

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In re:	:	Case No. 02-04410-CH
PUBLIC SAFETY GROUP, INC.,	:	
	:	
Debtor.	:	
	:	Chapter 7
	:	
	:	

ORDER –INVOUNTARY PETITION

Trial on the Involuntary Petition seeking to place Public Safety Group, Inc. into chapter 7 bankruptcy was held on October 16, 2002. Matthew T. Cronin represented petitioning creditor Tom Conley. Van M. Plumb represented debtor Public Safety Group. Petitioning creditors Agans Brothers, Inc., Lee’s Standard, Inc., and Lubrications of Des Moines, Inc., were not represented by counsel. At the conclusion of the trial, the court took the matters under advisement. The court considers the matters fully submitted.

The court has jurisdiction of these matters pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Upon review of the pleadings, evidence, memorandums, and arguments of counsel, the court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 1018 & 7052.

FINDINGS OF FACT

1. The following creditors filed an involuntary chapter 7 bankruptcy petition against Public Safety Group, Inc. (hereinafter PSG): Agans Brothers Inc., claiming

\$13,114.30 for a judgment for past due rent; Lee's Standard claiming \$48.10 for gasoline, goods, and services; Lubrications of Des Moines, LTD. claiming \$155.30 for services performed on vehicles; and Tom Conley claiming \$13,436.64 for wages.

2. Agans Brothers Inc. is a corporation. John W. Agans signed the petition in his representative capacity of vice president for Agans Brothers Inc. Attorney Jason G. Parmer signed the petition indicating that he represented Agans Brothers.

3. Lee's Standard is a corporation. Tom Metcalf signed the petition in his representative capacity of manager for Lee's Standard. The petition does not identify an attorney representing Lee's Standard. No attorney subsequently entered an appearance for Lee's Standard.

4. Lubrications of Des Moines is a corporation. James M. Ord signed the petition in his representative capacity of operations director. The petition does not identify an attorney representing Lubrications of Des Moines. No attorney subsequently entered an appearance for Lubrications of Des Moines.

5. Tom Conley (hereinafter Conley) signed the petition in his individual capacity. Matthew T. Cronin signed the petition indicating that he represented Conley.

6. PSG is an Iowa corporation with its principal place of business located in Des Moines, Polk County, Iowa.

7. Rhonda Shirley (hereinafter Shirley) is the registered representative of PSG. She is the sole shareholder and holds all of the offices of the corporation.

8. Shirley is Conley's foster mother.

9. Sometime around 1978, Conley formed Conley Security Agency to provide security services to individuals and businesses. Early in its existence, Shirley provided funding to Conley and Conley Security Agency. The business was not a financial success. Due to mounting debt and unpaid tax obligations, Conley Security Agency filed for chapter 11 bankruptcy protection on November 6, 1986. The case converted to chapter 7 on April 14, 1989, and closed as a no asset, no discharge / business case on March 22, 1990.

10. Sometime around 1989, Shirley formed PSG for the purpose of saving Conley Security Agency for Conley. PSG ultimately acquired the secured debt and all of the assets of Conley Security Agency. Conley continued to operate the business under the name of Conley Security Agency/ PSG. However, the business failed to become profitable.

11. In October of 1999, Shirley and Conley ended their business relationship. At that time, the business was failing financially. Shirley attempted to enlist Conley's assistance in selling the business.

12. In June of 2001, Lee's Security Agency, Inc., acquired PSG's assets and secured debt.

13. Sometime after February 2002, PSG received \$50,000.00 from an insurance company as compensation for a claim that alleged that Conley stole assets from PSG. The amount of the payment was the policy limit. PSG did not use the funds to pay unsecured creditors. PSG turned the funds over to Lee's Security Agency.

14. Conley filed a lawsuit in the Iowa District Court for Polk County, Case No. CL. 81891, alleging defamation, slander for false statements, recovery of wages, and other injury. PSG has filed a counterclaim against Conley alleging theft of corporate assets.

15. After the filing of the involuntary petition, Shirley paid Lee's Standard the amount claimed on the petition.

16. PSG does not dispute that it owed Agans Brothers, Lee's Standard, and Lubrications of Des Moines the alleged amounts on the date of the bankruptcy filing. PSG disputes Conley's stated claim.

17. PSG does not dispute that it is not currently paying its unsecured debt, or that it has unsecured debts that are due.

18. On August 12, 2002, petitioning creditors commenced this case by filing a chapter 7 petition, and summons issued the same day.

19. On September 3, 2002, PSG filed its answer to the petition asking that the case be dismissed.

20. On September 23, 2002, the clerk of bankruptcy court sent notice that the trial on the involuntary petition was scheduled in Courtroom 1, 4th Floor, U.S. Courthouse Annex, 110 East Court Avenue, Des Moines, IA, on October 16, 2002 at 1:30 p.m. Notice was given to Agans Brothers, Inc., Lee's Standard, Lubrications of Des Moines, Tom M. Conley, Matthew T. Cronin, Jason C. Palmer, Van M. Plumb, PSG, and the United States Trustee at the addresses supplied to the court. Service of notice was adequate and proper.

DISCUSSION

Under certain circumstances the Bankruptcy Code allows creditors to commence an involuntary bankruptcy for a debtor. 11 U.S.C. § 303. Section 303 provides in pertinent part:

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least \$11,625 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

* * *

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

* * *

(h)...Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if--

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

* * *

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section--

(1) on the motion of a petitioner;
(2) on consent of all petitioners and the debtor; or
(3) for want of prosecution.

11 U.S.C. § 303(a), (b), (d), (h), & (j). The Bankruptcy Code defines “person” to include a corporation. 11 U.S. C § 101(41).

Section 303 requires that 1) appropriate number of creditors commence the case; 2) the claims of the creditors are not contingent and are not subject to a bona fide dispute (regardless of whether the creditors are petitioning or merely used in the calculation to determine the required number of petitioning creditors); 3) the petitioning creditors hold unsecured claims in excess of \$11,625.00; and 4) the debtor is not generally paying debts as they come due unless they are subject to a bona fide dispute or a custodian was appointed as outlined in § 303(h)(2). 11 U.S.C. § 303(b) & (h). Additionally, courts require that the petition be filed in good faith. Basin Elec. Power Coop. v. Midwest Processing Co., 769 F.2d 483, 485-86 (8th Cir. 1985). The burden rests with the petitioning creditors to prove the necessary requirements to commence the case by a preponderance of the evidence. Booher Enterprises v. Eastown Auto Co. (In re Eastown Auto Co.), 215 B.R. 960, 968 (B.A.P. 6th Cir. 1998); In re Everett, 178 B.R. 132, 139 (Bankr. N.D. Ohio 1994) (citing Grogan v. Garner, 498 U.S. 279, 286 (1991), for the proposition that the preponderance of the evidence is generally the standard that applies in civil actions).

In this case, Debtor does not dispute that it has more than twelve creditors that hold claims that are not contingent and not subject to bona fide dispute. Further, Debtor does not dispute the contention that it is not paying bills as they come due. Debtor admits that it is currently unable to pay any bills. Therefore, the court finds that Debtor has more

than twelve such creditors. The court also finds that Debtor is not paying its bills as they come due. See 11 U.S.C. § 303(h).

Four creditors caused the involuntary chapter 7 petition to be filed. Debtor does not dispute the claims of Agans Brothers, Inc., Lee's Standard, and Lubrications of Des Moines. However, it disputes Tom Conley's claim.

"Bona fide dispute" is not defined in the Bankruptcy Code. In addressing the matter, the Eighth Circuit has held that the bankruptcy court must determine "whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt." Rimell v. Mark Twain Bank (In re Rimell), 946 F.2d 1363, 1365 (8th Cir. 1991) quoting Matter of Busick, 831 F.2d 745, 750 (7th Cir. 1987). It is up to the petitioning creditor to establish prima facially that no bona fide dispute surrounds the claim. Once done, the burden shifts to the debtor to present evidence showing a bona fide dispute exists. Id.

In this case, Conley has not carried his burden to show the absence of a bona fide dispute surrounding his claim. His evidence as to the existence of his claim consists of his testimony that Debtor owes him wages. However, he also testified that amount of the claim stated on the petition includes wages owed to his spouse, who is not a petitioning creditor. Conley did not identify for what time period the wages were incurred, nor offer any corroborating evidence of the amount of his wages earned or PSG's failure to pay. He offered Exhibit F, a letter by PSG's attorney stating that PSG accepted Conley's resignation and that he would remain on the payroll until Monday, October 25, 1999. The

letter is dated October 22, 1999. However, Conley did not state how this exhibit relates to his claim.

Although Conley testified that he has commenced an action against Debtor in state court alleging a claim for lost wages, he did not offer the petition into evidence. Further, Shirley testified that PSG is defending the action and is counterclaiming for damages based on Conley's alleged theft of corporate assets.

Based on the record before it, the court determines that even if Conley has shown that he has a claim against PSG for unpaid wages, the claim and amount is subject to a bona fide dispute. Accordingly, Conley is not properly qualified to bring the petition against Debtor.

Turning to the remaining petitioners, the court notes that each entity is a corporation. It is the well settled that a corporation must have counsel to appear in federal court. Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 201-02 (1993); Steel v. City of Bemidji, 257 F.3d 902, 905 (8th Cir. 2001); United States v. Van Stelton, 988 F.2d 70 (8th Cir. 1993). This has been the law for the "better part of two centuries." Rowland, 506 U.S. at 202. Courts routinely rule adversely against corporations that fail to acquire representation in federal court. See e.g. Steel, 257 F.3d at 902; Van Stelton, 988 F.2d at 70; United States v. High Country Broadcasting Co. Inc., 3 F.3d 1244, 1245 (9th Cir. 1993); Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, (7th Cir. 2003); Jones v. Niagra Frontier Transp. Authority, 722 F.2d 20, 22 (2d Cir. 1983).

The court notes that certain courts have made exceptions to the rule where the corporation arguably could not afford to hire counsel. See e.g. Matter of Holliday's Tax Services, Inc., 417 F. Supp. 182 (E.D.N.Y. 1976), aff'd sub nom Holliday's Tax Services, Inc. v. Hauptman, 614 F.2d 1287 (Table)(2d Cir. 1991). However, the United States Supreme Court dismisses such cases as aberrations. Rowland, 506 U.S. at 202. Accordingly, this court follows the rule that corporations must be represented by licensed, legal counsel in proceedings before federal courts.

The involuntary petition identifies counsel for Agans Brothers, Inc. Said counsel has appeared before the court for Agans Brothers, Inc., in other matters concerning this case. However, counsel did not appear at the trial at the corporation's request. No appearances by counsel have been filed for Lee's Standard or Lubrications of Des Moines. No counsel appeared at trial on the involuntary petition for Lee's Standard, and Lubrications of Des Moines. The court questioned representatives of each of these creditors to verify their business form and their representation at the trial. Each representative identified the creditor as a corporation and stated that no counsel was present for the creditor. Accordingly, the court announced that each creditor was in default for not appearing at the trial.

Section 303(j)(3) provides that the court may dismiss an involuntary petition for want of prosecution. A leading treatise on bankruptcy practice explains the application of § 303(j)(3) thusly:

Dismissal under section 303(j)(3) occurs when the petitioning creditors fail to pursue the action. For example, if the debtor or non-joining general partner files an answer or a motion to dismiss pursuant to section 303(d) and the petitioning creditors fail to show up at the scheduled hearing, dismissal is a possible solution.

2 Lawrence P. King, *Colliers on Bankruptcy* ¶ 303.16 at 303-16 (15th Ed. 2003).

Since no counsel appeared for the petitioning corporate creditors, the court concludes that the corporate creditors did not “show up” at the trial. The court notes, that after it explained that the corporations needed to be represented by counsel, none of the representatives requested the opportunity to acquire counsel and have counsel present at the trial. Of primary concern to each representative was the cost. Accordingly, the court will dismiss the complaint for want of prosecution.

Debtor requests costs, attorney's fees, compensatory, and punitive damages pursuant to 11 U.S.C. § 303(i)(1) and (2). This section provides:

- (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment-
 - (1) against the petitioners and in favor of the debtor for-
 - (A) costs; or
 - (B) a reasonable attorney's fee; or
 - (2) against any petitioner that filed the petition in bad faith, for-
 - (A) any damages proximately caused by such filing; or
 - (B) punitive damages. 11 U.S.C. § 303(i)(1), (2) (1997).

The section uses the permissive term "may." Accordingly, the assessment of costs or damages against the petitioners is entirely within the court's discretion, In re Nordbrock, 772 F.2d 397,400 (8th Cir. 1985). The court is not inclined to make such an assessment in this instance.

Debtor readily conceded that it had more than twelve creditors; three of the petitioning creditors had valid claims against it; the three held unsecured claims in excess of \$11,625; it was not paying debts as they came due; it had no intention of paying the

unsecured creditors; it was receiving a stream of income from Lee's Security; and it had a potential claim against Conley that could provide at least partial payment of the claims.

The court acknowledges that Tom Conley is the motivating force behind the involuntary petition. He enlisted other creditors to file the involuntary petition. This is not unusual in the context of involuntary bankruptcies. Section 303 clearly envisions some cooperation between petitioning creditors. The court further acknowledges the acrimonious relationship that developed between Conley and Debtor's principal. However, such acrimony between debtors and creditors is not unique in bankruptcy. Consequently, the court chooses not to award costs, fees, or punitive damages to Debtor.

ORDER

IT IS ACCORDINGLY ORDERED that the involuntary chapter 7 bankruptcy petition filed against Public Safety Group, Inc. is hereby DISMISSED.

RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT