

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

ERNEST L. WAGNER,

Case No. 87-1916-D

Debtor.

ORDER ON MOTION TO DISMISS INVOLUNTARY PETITION

On November 12, 1987 a hearing on debtor's motion to dismiss the involuntary Chapter 7 petition filed by Peoples National Bank of Columbus Junction (Peoples Bank) was held before this court in Davenport, Iowa. Randy E. Trca appeared on behalf of the debtor and Timothy K. Wink appeared on behalf of Peoples Bank. At the close of the hearing the court ordered the parties to submit briefs by December 12, 1987. Peoples Bank submitted a brief on December 11, 1987 but to date no brief has been filed on behalf of the debtor.

Background

Peoples Bank filed an involuntary petition for relief under Chapter 7 on July 27, 1987. The petition states that Peoples Bank is a creditor of Ernest L. Wagner and holds a claim against him that is at least \$5,000.00 more than the value of any lien on the property of the debtor. The petition asserts that there are less than 12 creditors, that the debtor is not generally paying his debts as they become

due and that the debtor is not a farmer. The petition further asserts that the debtor transferred an interest in real estate to three relatives and that the transfer was fraudulent under 11 U.S.C. section 548.

On August 20, 1987 the debtor filed a motion to dismiss the involuntary petition asserting three grounds for dismissal. First, the debtor asserts that the petition fails to allege that the claim of Peoples Bank is not the subject of a bona fide dispute. Second, the debtor asserts that he is a farmer against whom an involuntary case may not be commenced. Third, the debtor asserts that the nonpayment of one creditor does not merit relief through an involuntary proceeding. The debtor states that he has not engaged a trick, sham, artifice or fraud upon the creditor and that sufficient and adequate remedies exist under state law for the creditor to pursue its debt.

Peoples Bank asks the court to take judicial notice of the debtor's former Chapter 12 case filed on April 6, 1987. That case was dismissed on July 7, 1987 because the debtor failed to meet one of the eligibility requirements under 11 U.S.C. section 101(17)--that 50 percent of his gross income arise from a farming operation.

Discussion

11 U.S.C. section 303 which governs involuntary petitions states in 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 \$5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$5,000 of such claims;

....

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. 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;

....

A. Bona Fide Dispute

The debtor asserts that the involuntary petition is defective because of the failure to allege that the claim of Peoples Bank is not the subject of a bona fide dispute. Peoples Bank contends that 11 U.S.C. section 303(b)(2) does not require the creditor to plead that the claim is "not the subject of a bona fide dispute."

Alternatively, Peoples Bank asks the court to permit its amendment to the involuntary petition filed on December 11, 1987 which adds the allegation that the claim is not the subject of a bona fide dispute.

The provisions of 11 U.S.C. section 303(b)(1) and (h)(1) were amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984. The effect of the amendments is to condition the granting of an involuntary petition on the absence of a bona fide dispute regarding the debts which form the basis of the petition, in connection with either the creditors' standing to bring an involuntary petition or the question as to whether the debtor is generally paying debts as they come due. Matter of Busick, 65 B.R. 630, 634 (N.D. Ind. 1986). A bona fide dispute refers to either a genuine issue of material fact that bears upon the debtor's liability or a meritorious contention as to the application of law to undisputed facts. Id. at 637.

The argument of Peoples Bank that section 303(b)(2)

does not require the pleading of the absence of a bona fide dispute is not persuasive. The "such claims" identified in section 303(b)(2) refer to the claims described in section 303(b)(1)--claims that are "not contingent as to liability or the subject of a bona fide dispute." The Bank's failure to plead this allegation, however, is not fatal. "Errors in a petition are a common occurrence" and courts have generally been very liberal in allowing amendments. 2 Collier on Bankruptcy, § 303.15[14] at 303-75 (15th ed. 1987). In this case the allowance of the amendment would not prejudice the debtor. The debtor does not assert the existence of a bona fide dispute, rather he merely challenges the formal allegations contained in the petition. Moreover, the debtor's schedules filed with his Chapter 12 petition indicated that the claim of Peoples Bank was not disputed. Therefore, the involuntary petition will not be dismissed on this ground.

B. Farmer

The debtor next asserts that he is a farmer and that an involuntary case cannot be commenced against him. Peoples Bank asserts that the debtor failed to satisfy the 50 percent income from farming test in the context of the Chapter 12 case and therefore cannot satisfy the 80 percent income from farming test for purposes of this involuntary Chapter 7 case.

In an involuntary case, whether a debtor is a farmer is a factual question to be pled and proven under 11 U.S.C.

section 101(19), which defines a farmer as a "person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person." If the debtor fails to plead and prove that he is a farmer, he has in effect consented to the entry of the order for relief. Potmesil v. Alexandria Production Credit Ass'n, 42 B.R. 731, 732 (W.D. La. 1984).

In this case the debtor has merely asserted that he has been a farmer all of his life. No evidence was presented to indicate that the debtor received more than 80 percent of his income in 1986 from a farming operation. Nor was any authority presented to establish that a different analysis should be utilized to interpret income in the context of this involuntary case as opposed to the former Chapter 12 case. Accordingly, the involuntary petition will not be dismissed on this ground.

C. One Creditor Petition.

Finally, the debtor asserts that the nonpayment of one creditor does not establish that the debtor is generally not paying his debts as they become due pursuant to 11 U.S.C. section 303(h)(1). He further asserts that there are adequate remedies available to the creditor under state law and that he committed no trick, sham or fraud upon the

creditor. Peoples Bank argues that the debtor engaged in fraud by transferring real estate to relatives prior to filing a voluntary Chapter 12 petition and that there are no adequate remedies in a state court to compensate for that fraud.

The cases relied upon by both parties involve involuntary petitions brought by one creditor where that creditor's debt is the only debt not being paid. See In re Nordbrock, 772 F.2d 397, 400 (8th Cir. 1985); Matter of Goldsmith, 30 B.R. 956, 963 (Bankr. E.D. N.Y. 1983); In re R.V. Seating, Inc., 8 B.R. 663, 665 (Bankr. S.D. Fla. 1981); In re Arker, 6 B.R. 632, 636 (Bankr. E.D. N.Y. 1980); Matter of 7H Land & Cattle Co., 6 B.R. 29, 34 (Bankr. D. Nev. 1980). However, the debtor has more creditors than Peoples Bank. Indeed, Peoples Bank attached to its brief an affidavit of the Louisa County Treasurer which states that real estate taxes have not been paid by the debtor. Accordingly, the exceptions to the one creditor rule--fraud and inadequate nonbankruptcy remedies--are relevant but not controlling in this case.

At the time of the hearing, the court questioned whether abstention would be appropriate. The doctrine of abstention is codified at 11 U.S.C. section 305 which states in pertinent part:

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if--

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension;

The concept of abstention is a recognition that there are instances where it appears to be proper for the court to decline jurisdiction. In re R.V. Seating, Inc., 8 B.R. 663, 665 (Bankr. S.D. Fla. 1981) citing In re WPAS, Inc., 6 B.R. 44, 47 (Bankr. M.D. Fla. 1980). In determining whether the interests of creditors and the debtor would be better served by dismissal, the court considers the efficiency and economy of bankruptcy administration and whether there are adequate state laws to deal with the relationships between the parties. In re Deacon Plastics Mach., Inc., 49 B.R. 982, 983 (Bankr. D. Mass. 1985); In re Beacon Reef Ltd. Partnership, 43 B.R. 644, 646 (Bankr. S.D. Fla. 1984); In re R.V. Seating, Inc., 8 B.R. 663, 665 (Bankr. S.D. Fla. 1981).

In the petition Peoples Bank asserts that the debtor transferred real estate to three relatives for less than adequate consideration. Peoples Bank argues that the transfer was a fraudulent transfer under 11 U.S.C. section 548 and that state law remedies would not adequately compensate Peoples Bank. Consideration of the factors relevant for abstention lead the court to conclude that a non-bankruptcy forum would better serve the interests of creditors and the debtor.

In the bankruptcy forum only a trustee may avoid fraudulent transfers pursuant to section 548. Even if

Peoples Bank could convince the trustee that a fraudulent transfer had occurred and that the allegations merited the filing and prosecution of a complaint, any potential recovery would necessarily be reduced by the expenses of the bankruptcy administration. On the other hand, it appears to this court that adequate state law remedies do exist. A creditor certainly may seek to set aside a fraudulent conveyance under Iowa law. See generally Muehlenthaler v. DeBartolo, 347 N.W.2d 688 (Iowa App. 1984); Hall Roberts' Son, Inc. v. Plaht, 253 Iowa 862, 114 N.W.2d 548 (1962); Monona County v. Schoenherr, 251 Iowa 301, 105 N.W.2d 91 (1960). Moreover, the court questions whether a transfer of title has occurred. The challenged transaction was a sale pursuant to a real estate contract. Under Iowa law a real estate contract does not transfer legal title. Rather the vendee becomes the equitable owner and the vendor retains legal title as security for the balance of the purchase price. See Fellmer v. Gruber, 261 N.W.2d 173, 174 (Iowa 1978); H.L. Munn Lumber Co. v. City of Ames, 176 N.W.2d 813, 816-817 (Iowa 1970). From the documentation on file it appears that under state law Peoples Bank could foreclose its mortgage liens and seek to enforce any deficiency against property titled in the debtor.

WHEREFORE, based on the foregoing analysis, the court hereby finds that dismissal of this involuntary case would better serve the interests of creditors and the debtor.

THEREFORE, the debtor's motion to dismiss is granted.

Signed and filed this 25th day of April, 1988.

LEE M. JACKWIG

CHIEF U.S. BANKRUPTCY JUDGE