

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
 :
DAVID C. ROSENBERGER, : Case No. 90-224-C
 : Chapter 7
Debtor. :
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ORDER--INVOLUNTARY PETITION

On May 1, 1990, a hearing was held on the involuntary petition. The following attorneys appeared on behalf of their respective clients: Ronald L. Hansel and Richard M. Lajuenesse for David C. Rosenberger; Mark D. Walz for Greyhound Financial Corporation ("Greyhound"); Peter S. Cannon for Signal Capital Corporation ("Signal"); LuAnn White for Chrysler Credit Corporation ("Chrysler"); Donald F. Neiman for Exchange National Bank of Chicago ("Exchange Bank"); David L. Davitt for Farm Credit Bank of Omaha ("FCB"); and Elizabeth A. Nelson for Sternco, Inc. ("Sternco"). At the conclusion of said hearing, the Court ordered the record left open for documentary evidence to be produced by David C. Rosenberger in compliance with a subpoena served upon him by Greyhound, and to be submitted by Greyhound. Greyhound did not submit additional documentary evidence and therefore, the evidentiary record was closed by order of the Court on May 17, 1990. The Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C.

§157(b)(2). The Court, upon review of the pleadings, arguments of counsel, evidence admitted and briefs submitted now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On January 26, 1990, Greyhound, FGL Commodity Services, Inc. ("FGL"), and Signal filed an involuntary petition in bankruptcy against David C. Rosenberger requesting that the Court enter an order of relief against David C. Rosenberger under Chapter 7 of the Bankruptcy Code.

2. On February 2, 1990, Chrysler joined Greyhound, Signal, and FGL in their prayer for the entry of an order of relief against David C. Rosenberger. Hereinafter Greyhound, Signal, FGL, and Chrysler shall be referred to collectively as "Petitioning Creditors".

3. David Rosenberger leased his farm ground to Mitchell Farms, Marvin R. Mitchell, for the 1988 and 1989 crop years period.

4. The farm leases for 1989, Exhibits V, W, and X, reveal that Mitchell Farms, Marvin R. Mitchell, was the tenant, and Double-D Farms, David C. Rosenberger, was the landlord. Double-D is a corporation in which David Rosenberger had an interest.

5. Mr. Rosenberger received \$20,000.00 in cash rent and approximately \$10,000.00 on a crop-share lease from these 1989 farm leases. Mr. Rosenberger did not provide the farming services to produce this income; Mitchell farms did.

6. David Rosenberger testified that he owned farm equipment (Exhibit 11). However, this farm equipment had been conveyed to a corporation in which David Rosenberger had an interest prior to 1989.

7. David Rosenberger had actively farmed for many years prior to 1988, but leased his farm ground commencing in 1988.

This was done because he was devoting his time to his non-farm business corporations and did not have the time to devote to farming.

8. David Rosenberger earned \$40,200.00 in 1989 from his employment as Chairman of the Board of Directors of Rose Way, Inc.

9. David Rosenberger was not generally paying his debts as they came due on the date the involuntary petition was filed.

10. Greyhound is a judgment creditor of David C. Rosenberger by virtue of a judgment entered September 13, 1989, in the amount of \$780,012.34 plus interest and costs, in the Iowa District Court for Polk County, Law No. CL 080-47368 (Exhibit G). On March 19, 1990, David C. Rosenberger and Doris Rosenberger filed a notice of appeal to the Supreme Court of Iowa from the Greyhound judgment entered September 13, 1989 (Exhibit G). The Greyhound judgment is not stayed pending appeal.

11. FGL is the holder of a judgment against David C. Rosenberger in the amount of \$3,865.78 plus attorneys' fees, interest, and costs entered on September 25, 1989, in the Iowa

District Court for Polk County, Law No. CL 78-46430. (Exhibit H).

12. Signal is a judgment creditor of David C. Rosenberger by virtue of a supplemental judgment entered in the Iowa District Court for Polk County, Law No. CL 79-46855 in the amount of \$1,352,431.63. (Exhibit O). On February 21, 1990, David C. Rosenberger and Doris M. Rosenberger filed a notice of appeal to the Supreme Court of Iowa from the Signal judgment entered January 23, 1990. (Exhibit 7). The Signal judgment is not stayed pending appeal.

13. Chrysler is a judgment creditor of David C. Rosenberger by virtue of a judgment entered October 3, 1989, in the Iowa District Court for Polk County, Law No. CL 79-46759 in the amount of \$718,166.70 plus interest and costs. (Exhibit O).

14. The above-described Petitioning Creditors' judgments are not secured by a lien on property of David C. Rosenberger.

DISCUSSION

11 U.S.C. §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 corporation that is not a monied, 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 the 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 \$5,000.00 more than the value of any lien on property of the debtor securing such claims held by the holder 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 became due unless such debts are the subject of a bona fide dispute...

There are three issues this Court must determine: (1) whether David C. Rosenberger is a farmer; (2) whether the claims of Greyhound and Signal are the subject of a bona fide dispute, and (3) whether the aggregate claims of the Petitioning Creditors equal \$5,000.00 more than the value of a secured interest of the Petitioning Creditors in David C. Rosenberger's property.

I. David C. Rosenberger's Status as a Farmer.

David C. Rosenberger asserts that he is a farmer and therefore an involuntary case may not be commenced against him under 11 U.S.C. §303(a).

11 U.S.C. §101 provides in pertinent part:

(19) "farmer" means ... 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...

The statute is clear that the court must consider the taxable year preceding the commencement of the case in determining whether David Rosenberger is a farmer for purposes of §303(a). There is no reason to look at the person's status at any time other than when the statute calls for. Potmesil v. Alexandria Production Credit Association, 42 B.R. 731, 733 (D.W.D. La. 1984).

In this case, Petitioning Creditors filed the involuntary petition on January 26, 1990. Therefore, the case against David C. Rosenberger was commenced in 1990, and the Court must look to the taxable year of 1989 to determine if David C. Rosenberger received more than 80 percent of his gross income from a farming operation owned or operated by him.

In 1989, David C. Rosenberger received \$40,200.00 for services on behalf of Rose Way, Inc. (non-farm income). In 1989, David C. Rosenberger's farm income consisted of \$20,000.00 received on a cash-rent lease of farm property and approximately \$10,000.00 received on a crop-share lease of farm property. The Petitioning Creditors assert that the \$20,000.00 received on the cash-rent lease of farm property is not farm income for purposes of 11 U.S.C. §101(19). However,

the Court does not have to make this determination. Even if the receipt of cash rent by David C. Rosenberger from the rental farmland is considered income from farming, David C. Rosenberger had \$30,000.00 in farm income and \$40,200.00 in non-farm income. Therefore, David C. Rosenberger did not receive 80 percent of his gross income in taxable year 1989 from a farming operation owned by him and does not meet the definition of a farmer under 11 U.S.C. §101(19). Accordingly, he is not a farmer for purposes of 11 U.S.C. §303(a). As further support for this conclusion, David C. Rosenberger testified that although he had not yet filed his 1989 income tax return, his estimated farm-related income for 1989 was approximately \$51,000.00. Therefore, by David C. Rosenberger's own admission, he received less than 80 percent of his gross income during 1989 from a farming operation and is not a farmer under 11 U.S.C. §101(19).

David Rosenberger essentially concedes that he is not a "farmer" within the definition of 11 U.S.C. §101(19). However, Mr. Rosenberger prays that this Court use its equitable powers under 11 U.S.C. §105 and determine that Mr. Rosenberger is such a farmer as a matter of equity and fairness.

11 U.S.C. §105(a) provides, in part:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title....

Mr. Rosenberger contends that he has farmed for many years; he has derived more than 80 percent of his income from his farming operation for many years; he has farm equipment; and he intends on continuing his farm operation. He concludes that it would be inequitable and unfair to conclude that he was not a farmer because he did not qualify in one critical year.

The basic purpose of §105(a) is to enable the court to do whatever is necessary to aid its jurisdiction. Johnson v. First Nat. Bank of Montevideo, Minn., 719 F.2d 270, 274 (8th Cir. 1983), cert. den. 465 U.S. 1012 (1984); In re Glenn, 760 F.2d 1428 (6th Cir. 1985), cert. den. 106 S.Ct. 144 (1985). However, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 108 S.Ct. 963, 968-69 (1988). "Section 105 does not empower a bankruptcy court to create new substantive rights." In re NWFx, Inc., 864 F.2d 593, 595 (8th Cir. 1989).

As stated, the statute is clear that the Court must consider the taxable year preceding the commencement of the case in determining whether Mr. Rosenberger was a farmer. 11 U.S.C. §109(19) does not give the Court the discretion to exercise its equitable powers and if the Court did so it would be creating a substantive right not provided in the Code. Accordingly, 11 U.S.C. §105 may not be employed to determine that Mr. Rosenberger was a farmer as defined in 11 U.S.C. §101(19).

II. Are the Claims of Greyhound and Signal the Subject of a Bona Fide Dispute.

David C. Rosenberger asserts that the claims of Greyhound and Signal are the subject of a bona fide dispute and therefore Greyhound and Signal are ineligible to join as petitioning creditors. David C. Rosenberger argues that the Greyhound and Signal claims are the subject of a bona fide dispute because David C. Rosenberger has filed a notice of appeal from these judgments to the Iowa Supreme Court. However, this assertion is contrary to case law. As stated by the Bankruptcy Court, District of South Carolina:

[A] claim based upon an unstayed judgment as to which an appeal has been taken by the debtor is not the subject of a bona fide dispute. Once entered, an unstayed final judgment may be enforced in accordance with its terms and with applicable law or rules, even though an appeal is pending [citations omitted]. The filing of an involuntary petition is but one of many means by which a judgment creditor may seek to attempt collection of something upon its judgment.

It would be contrary to the basic principles respecting, and would effect a radical alteration of, the longstanding enforceability of unstayed final judgments to hold that the pendency of the debtor's appeal created a 'bona fide' dispute within the meaning of Code §303.

In re Galaxy Boat Manufacturing Co., Inc., 72 B.R. 200, 202 (Bankr. D.S.C. 1986), citing In re Drexler, 56 B.R. 960, 967 (Bankr. S.D.N.Y. 1986); see also In re Caucus Distributions, Inc., 83 B.R. 921, 929 (Bankr. E.D. Va. 1988).

The judgments of Petitioning Creditors were entered in

Iowa District Court, Polk County, Iowa, from July 1989 through October 1989. Although David C. Rosenberger has filed a notice of appeal to the Iowa Supreme Court regarding the Greyhound and Signal judgments, none of these judgments have been stayed pending appeal. Therefore, none of these judgments are the subject of a bona fide dispute and all of the Petitioning Creditors are eligible to join as claimants petitioning for relief of involuntary bankruptcy against David C. Rosenberger.

III. Are the Aggregate Claims of the Petitioning Creditors \$5,000 More Than the Value of Their Secured Interest in Property of David C. Rosenberger.

David C. Rosenberger asserts that there has been no showing that the claims are \$5,000.00 more than the property securing the claims and therefore the involuntary petition fails to meet the requirements of 11 U.S.C. §303(b).

11 U.S.C. §303(b)(1) provides that the aggregate claims of petitioning claimants must be at least \$5,000.00 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims. The statute contains no provision for taking into account the property of third persons in determining whether a claimant is secured. Matter of Bowers, 16 B.R. 298, 302-303 (Bankr. D. Conn. 1981).

Petitioning Creditors have the following claims by virtue of their respective judgments: Greyhound - \$780,012.34; FGL - \$3,865.78; Signal - \$1,352,431.63; and Chrysler - \$718,166.70. The aggregate of these claims is well in excess

of the \$5,000.00 floor established by §303(b)(1). Each claim, although secured by Rose Way, Inc. property in some instances, is not secured by a lien on property of David C. Rosenberger.

Therefore, the Petitioning Creditors are eligible under §11 U.S.C. §303(b)(1).

ORDER

IT IS ACCORDINGLY ORDERED that the relief sought in the involuntary petition filed by the Petitioning Creditors is granted. An order for relief shall be entered against David C. Rosenberger by separate order of this Court, and David C. Rosenberger shall file all statements and schedules required by the Clerk of Court.

Dated this 17th day of August, 1990.

Russell J. Hill
U.S. Bankruptcy Judge