

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE:

DONALD E. KRAFT,
Debtor.

BK. NO. 91-22937

Chapter 7

DECISION AND ORDER

BACKGROUND

On October 21, 1991 Villager Construction, Inc. ("Villager Construction"), Insulation Concepts, Inc. ("Insulation Concepts") and Gino A. Affronti, Jr. d/b/a Hilltop Construction ("Affronti") filed an involuntary petition (the "Petition") against Donald E. Kraft ("Kraft") requesting the entry of an order for relief under Chapter 7 of the Bankruptcy Code. (Villager Construction, Insulation Concepts and Affronti are sometimes hereinafter referred to as the "Petitioning Creditors.") The Petition indicated that Kraft was an individual whose debts were primarily business debts, his alleged business being the construction of a home. The Petition further alleged that Kraft was generally not paying his debts as they became due, unless such debts were the subject of a *bona fide* dispute. The Petition listed Villager Construction as having a claim against Kraft for goods provided and services rendered in the amount of \$10,061.86, Insulation Concepts as having a claim against Kraft for goods provided and services rendered of \$5,392.62 and Affronti as having a claim against Kraft for goods provided and services rendered in the amount of \$7,210.06.

On November 8, 1991 an answer (the "Answer") was interposed on behalf of Kraft which included a separate counterclaim for \$500,000 against each of the Petitioning Creditors as a result of the filing of the Petition. The Answer alleged that Kraft was generally paying his debts as such debts became due, excluding debts in *bona fide* dispute, and that the claims of each of the Petitioning Creditors were the subject of *bona fide* disputes. The Answer indicated that Kraft was the owner of 1930 Harris Road, Penfield, New York ("Harris Road") and that each of the Petitioning Creditors had entered into an

agreement with him to perform certain work at the property. With respect to the work performed by each of the Petitioning Creditors, Kraft alleged that the agreed upon work was not performed in a good and workmanlike manner and as a result Kraft had or would have to employ additional contractors to properly complete the work resulting in as yet undetermined damages.

Each of the Petitioning Creditors filed a Reply to the Answer and a pretrial conference was scheduled for February 27, 1992.

When the Court became aware at the February 27, 1992 pretrial conference that both Villager Construction and Insulation Concepts had actions on their claims against Kraft pending in Rochester City Court at the time of the filing of the Petition, the pretrial conference was adjourned until March 16, 1992. During the adjournment, the parties were afforded an opportunity to make whatever submissions they desired on the issue of whether, pursuant to Section 305(a), the Court should abstain in this matter as being in the best interests of the Creditors and the Debtor. Because Kraft was concerned that a dismissal pursuant to Section 305(a) would leave him with no remedy in connection with the damages he allegedly incurred by reason of the Petitioning Creditors filing the Petition and the Petitioning Creditors did not wish the Court to abstain in this matter, the matter was assigned to the Court's trial calendar for April 20, 1992 with the understanding that limited discovery regarding Kraft's creditors would take place by the trial calendar call. On April 20, 1992 the matter was set down for trial on May 26, 1992, but thereafter, with the consent of all parties, the trial was moved to June 2, 1992.

DISCUSSION

Section 303(b)(1) and Section 303(h)(1) provide that,

§ 303. Involuntary cases.

....

(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;

....

(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; . . .

Each of these subsections requires the Court to make findings as to whether the claims of certain creditors are in *bona fide* dispute. Unfortunately, the Bankruptcy Code does not define a *bona fide* dispute. Matter of Busick, 831 F.2d 745, 749 (7th Cir. 1987); Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). The majority of the circuits which have addressed this issue have held that the proper standard requires that the Bankruptcy Court determine whether there is an objective basis for either a factual or legal dispute as to the validity of the claim in question. Busick, 831 F.2d at 750; Bartmann, 853 F.2d at 1544; B.D.W. Assoc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65, 66-67 (3d Cir. 1989); In re Rimell, 946 F.2d 1363, 1365 (8th Cir. 1991) cert. denied, ___ U.S. ___, 112 S.Ct. 2275, 119 L.Ed.2d 202 (1992). Although the Bankruptcy Court need not actually resolve the underlying dispute in connection with its determinations under Section 303, it must conduct a limited analysis to determine whether there is a *bona fide* factual or legal dispute. Rimell, 946 F.2d at 1365.

Prior to trial, the Petitioning Creditors filed affidavits by or on behalf of various individuals and entities, including the Petitioning Creditors, hired by Kraft to perform work at Harris Road. A number of the deponents also testified at trial that they still claimed to be owed varying amounts of money from Kraft in connection with Harris Road. However, each of the deponents acknowledged at trial that at some

point in time, in most instances it was alleged after payment was demanded, Kraft raised questions about the quality of the work.

From the pleadings in this case and the testimony of the various witnesses at trial, including the Petitioning Creditors or their representatives, Mr. and Mrs. Kraft, and various other alleged creditors of Mr. Kraft in connection with work done at Harris Road, the Court concludes that Kraft has a *bona fide* dispute with respect to the claims of each of the Petitioning Creditors and that Kraft is generally paying his debts as such debts become due, except for debts which are the subject of a *bona fide* dispute.

With respect to the claims of the Petitioning Creditors, Villager Construction and Insulation Concepts had actions which they had commenced against Kraft pending in State Court at the time of the filing of the Petition. Answers and counterclaims had been interposed by Kraft in those State Court actions, and discovery and negotiations had taken place. In the Villager Construction State Court action, a motion by Villager Construction for summary judgment had been denied. Further, the claim of Insulation Concepts was scheduled for trial on October 23, 1991, two days after the filing of the Petition.

As to the claims of each of the Petitioning Creditors, testimony at trial indicated that there are numerous factual and legal disputes with respect to those claims. In each case the scope of the work to be performed was not clearly provided for by written documents, and in each case there were ongoing negotiations and discussions regarding the scope of the work, quality of the work and terms of compensation to be paid for the work.

The evidence produced at trial also indicated that Kraft is generally paying his debts as they become due. There is no clear definition or test for "generally not paying such debtor's debts as such debts become due." Matter of B.D. International Discount Corp., 15 B.R. 755, 762 (Bankr. S.D.N.Y. 1981), aff'd, 24 B.R. 876 (S.D.N.Y. 1982), aff'd, 701 F.2d 1071 (2d Cir. 1983), cert. denied, 464 U.S. 830 (1983). In viewing the case law in this area, the Bankruptcy Court in B.D. International found that it was not possible to have a definitive rule and lay down guidelines that would fit in all cases but instead looked at the "totality of the record before the Court." Id. at 762, 764. The Second Circuit Court of Appeals

agreed with this approach. 701 F.2d at 1076. Looking at the totality of the record before the Court, it is clear that the Debtor is not in the business of building homes. The Debtor is an engineer who perhaps ill-advisably decided to act as his own general contractor to build his personal residence. Testimony and evidence presented at trial indicates that the Debtor is current on all of his regular consumer obligations, including his mortgage, but has a number of outstanding disputes with some of the contractors and subcontractors who he had engaged in connection with the construction of his home. The evidence at trial also indicated that the Krafts' financial condition is such that any amounts found to be due to the Petitioning Creditors and other creditors in connection with the construction of Harris Road could ultimately be paid by them. Further, there was no evidence presented at trial which indicated that the interests of creditors were being affected by a worsening financial condition, dissipation of assets or other actions or transactions which traditionally precede and precipitate the filing of an involuntary petition. It appears that the Petitioning Creditors and all of the creditors who performed work in connection with the construction of Krafts' home have appropriate legal rights and remedies without the need for a bankruptcy case. This raises a serious question as to whether there is any need whatsoever for the administration of Kraft's financial affairs to be accomplished in a bankruptcy case.

In a Letter Memorandum of Law dated June 15, 1992 the attorneys for Villager advised the Court that there is at least one additional creditor available and willing to join as a Petitioning Creditor pursuant to Section 303(c) should the Court determine that the involuntary petition should be dismissed solely because under Section 303(b)(1) there are not the three required petitioning creditors with claims not in **bona fide** dispute. In that Memorandum, a request was made that before an order of dismissal is entered a reasonable time be afforded the Petitioning Creditors to obtain additional petitioning creditors. Since the Court has found from the evidence at trial that Kraft is generally paying his debts as they become due, except for debts in **bona fide** dispute, it does not appear that it is necessary at this time to give notice to allow additional creditors to join in the petition pursuant to Section 303(c). Also, such notice and procedures may cause unnecessary damage to Kraft within the meaning of Section 303(i).

It was stipulated by the parties at the pretrial conference that any rights Kraft may have to obtain a judgment against the Petitioning Creditors pursuant to Section 303(i) would be deferred until the Court determined whether the Petition should be dismissed, after which a separate hearing under Section 303(i) would be scheduled if appropriate.

CONCLUSION

Since the Court finds that the claims of each of the Petitioning Creditors are in *bona fide* dispute and that Kraft is generally paying his debts as they become due, except for debts which are the subject of a *bona fide* dispute, the Petitioning Creditors' October 21, 1991 involuntary petition is dismissed, except for any proceedings pursuant to Section 303(i).

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: September 29, 1992