

**IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION**

IN RE:)	
)	CHAPTER 7
Cedar Rock Holdings, LLC,)	
)	C.A. No.: 16-11519-SDB
Debtor.)	
)	
_____)	

**CEDAR ROCK HOLDINGS, LLC'S MOTION TO DISMISS
INVOLUNTARY BANKRUPTCY PETITION**

Cedar Rock Holdings, LLC (“Cedar Rock”) hereby moves to dismiss Petitioners’ involuntary bankruptcy petition and requests that it be awarded attorney’s fees and costs, pursuant to Rule 1011 of the Federal Rules of Bankruptcy Procedure, Rule 12(b) of the Federal Rules of Civil Procedure, and 11 U.S.C. § 303.

INTRODUCTION

Upset by a refusal to pay a disputed claim, Andrew Thompson and his company T-Factor, LLC, orchestrated the filing of a petition to place Cedar Rock in involuntary bankruptcy. In doing so, Thompson lists seven alleged creditors of Cedar Rock. He filed the petition unbeknownst to many of the very individuals and entities listed in his petition as petitioners. Had they been consulted, Thompson would have learned that numerous of the alleged creditors listed in the petition are not owed any debt by Cedar Rock. Furthermore, other entities and individuals listed as creditors have claims that are either contingent or are subject to a bona fide dispute and, therefore, such claims do not constitute a proper basis for involuntary bankruptcy. As explained further below, the petition for involuntary bankruptcy against Cedar Rock is procedurally deficient and made in bad faith. Accordingly, it must be dismissed, and fees, costs, and damages should be awarded to

Cedar Rock.

FACTUAL BACKGROUND

I. Cedar Rock

Cedar Rock is a Georgia limited liability company managed by Matthew Sterner. It has numerous owners, including several individuals and corporate entities. The business of Cedar Rock is owning investment property and operating Lights of the South, a seasonal holiday amusement park located in Grovetown, Georgia. The owners of Cedar Rock contributed capital of \$1.8 million to the company after being induced to do so by Andrew Thomson, Robert Lowe, Jr., and Benjamin Bell. While much of that capital has been lost as a result of the failed water park venture, Cedar Rock has an available line of credit with Georgia Bank & Trust sufficient to pay all justified claims against it, and it pays such claims as they come due. *See* Affidavit of Matthew B. Sterner, attached hereto as **Exhibit A**.

II. Petitioners

There are seven “Petitioners” in the involuntary petition. None of the seven purported creditors have claims that would permit entry of an involuntary bankruptcy. *See* Sterner Affidavit.

a. T-Factor, LLC

T-Factor, LLC (“T-Factor”) is a company run by Andrew Thompson. Thompson previously sold securities for ownership interests in Cedar Rock to various members (which, unbeknownst to the members, was done without an appropriate license). Thompson does not have an interest in Cedar Rock himself, though he has made representations to the contrary. *See* Sterner Affidavit.

Thompson recently demanded \$192,682.36 from Cedar Rock, but he had nothing to support that demand and would not cooperate with the company in providing documentation to support his claim. He had previously been paid over \$192,000 from Cedar Rock, again unbeknownst to its

members, and Cedar Rock asserts he was not entitled to such payments. Thompson claims that some portion of those funds (up to \$50,000) was paid by T-Factor to Robert Lowe, a founding member of Cedar Rock and fellow fundraiser for “future legal services.” If these were not sufficient red flags, Thompson refused to produce documentation to Cedar Rock when requested to support his demand. When Cedar Rock disagreed that Thompson was entitled to any further payments from Cedar Rock, he filed the petition for involuntary bankruptcy. The amounts claimed by Thompson and T-Factor are entirely disputed and not proper claims for an involuntary bankruptcy. *See* Sterner Affidavit.

Thompson has orchestrated some of the other claims against the company, which are also unjustified. Thompson has filed the instant petition against Cedar Rock, including providing information regarding certain creditors that have not agreed to be participants in this matter and/or do not have actual claims against Cedar Rock (as discussed in detail below).

b. Stewart Construction, LLC

Stewart Construction, LLC (“Stewart Construction”) is a company that performed certain construction work for Cedar Rock. Although included in the petition for involuntary bankruptcy, Stewart Construction did not authorize anyone to file a petition on its behalf or include it as a Petitioner in this matter. That is because it does not have a valid claim. Indeed, Stewart Construction has a contingent claim based on a payment plan with Cedar Rock developed at Stewart Construction’s request. No amounts are currently due and owing to Stewart Construction by Cedar Rock. An affidavit of Stewart Construction’s principal, Todd Stewart, confirming these facts is attached hereto as **Exhibit B** and incorporated herein by reference. On information and belief, Andrew Thompson reported to his counsel that Stewart Construction should be listed as a Petitioner consenting to his representation, which is simply not true.

c. Johnette Bell

Johnette Bell is a member of Cedar Rock. Ms. Bell reports to the undersigned that she did not authorize the involuntary bankruptcy petition naming her as a Petitioner and is not representing by Petitioning counsel. Despite this, the petition asserts she is claiming \$721 in an unpaid debt. Any such claim by Ms. Bell was not previously provided to Cedar Rock. At the request of the undersigned, Ms. Bell submitted evidence of such payments made on behalf of Cedar Rock, the company paid her. She has no remaining claim against the company. *See* Sterner Affidavit.

d. W.R. Toole Engineers, LLC

W.R. Toole Engineers, LLC (“W.R. Toole”) was engaged on a project by Cedar Rock. It has been paid in full for its work. It is unclear what the basis is for claiming a \$5,310 debt in the petition, when that alleged debt was previously paid. W.R. Toole did not authorize its inclusion in the petition. An affidavit of Rick Toole confirming these facts is attached hereto as **Exhibit C** and incorporated herein by reference.

e. Parker Poe Adams & Bernstein PC

Parker Poe Adams & Bernstein PC (“Parker Poe”) is a law firm that performed work for Andrew Thompson as his personal attorney. Cedar Rock did not authorize Parker Poe to perform work for it, and it is unaware at this time what services Parker Poe allegedly provided. Cedar Rock disputes that any money is owed to Parker Poe. *See* Sterner Affidavit.

f. Ocozzio, Inc.

Ocozzio, Inc. (“Ocozzio”) is a marketing firm for whom Andrew Thompson purportedly performed services, including the creation of an employee stock ownership plan (ESOP). Ocozzio claims to have performed marketing services for Cedar Rock at the request of Andrew Thompson to the tune of \$8,000 per month. However, Ocozzio has no contract with Cedar Rock. Moreover,

Ocozzio has never even attempted to demonstrate what it could possibly have done to justify a payment of \$8,000 per month for multiple months. Ocozzio never produced any actual advertising or marketing content for Cedar Rock. Nonetheless, it is purportedly making a claim for \$56,613.43 in the petition without any supporting documentation or proof of work performed. Such a claim is entirely disputed as there have been no services provided to Cedar Rock by Ocozzio and no agreement by Cedar Rock to pay Ocozzio any money. *See Sterner Affidavit*. Importantly, it appears that the billing by Ocozzio was at the behest of Andrew Thompson. *See Sterner Affidavit*.

g. I-AM, LLC

I-AM, LLC entered into a contract with Cedar Rock to have an individual manage the waterpark that never became a reality. This contract provided for a manager to live and work near the waterpark and for payment of certain living and operating expenses for the manager. After it was decided that the waterpark was not moving forward, however, the manager allegedly continued attempting to collect living and operating expenses. This was without Cedar Rock's authority or consent, but purportedly based upon conversations with Andrew Thomson. Most importantly, the manager did nothing to earn any compensation he claims to be owed. Despite this, the manager submitted charges to Cedar Rock that it never agreed to pay for under the contract, such as bills for two sets of cable television services, personal cell phone bills, and various other unwarranted and unproven living expenses. A copy of these bills and expenses are attached to the Sterner Affidavit and incorporated herein by reference. Because of the above, the amounts claimed by I-AM, LLC are disputed based on fact and contract. Cedar Rock has been investigating the I-AM claim and has been in negotiations with its Florida counsel, who was completely unaware of the instant bankruptcy filing. He has agreed to provide additional information to Cedar Rock in an effort to substantiate its claims, and the two parties are working to arrive at an agreeable compromise of its

claim. *See* Sterner Affidavit.

LEGAL STANDARD

An involuntary bankruptcy is an extraordinary remedy that must be closely scrutinized. *In re Reid*, 773 F.2d 945, 946 (7th Cir.1985) (“[T]he filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment.”); *In re Dino’s*, 183 B.R. 779, 783-84 (S.D. Ohio 1995) (“the danger of involuntary bankruptcy cannot be overlooked by the courts;” an involuntary petition is a charge that “ought not be made lightly”). The goal or purpose of an involuntary filing should be the equal distribution of assets among creditors and to give a debtor a fresh start. *See In re Smith*, 243 B.R. 169, 174 (Bankr. N.D. Ga. 1999). It is not designed for or properly used to shut down a properly functioning business that is paying its debts in a timely and orderly manner.

Section 303 of the bankruptcy code provides who and when an involuntary bankruptcy can be filed. Specifically, 11 U.S.C. §303(b) provides:

(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 \$ 10,775 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 \$ 10,775 of such claims.

A petitioning creditor under section 303(b) bears the burden to demonstrate a prima facie case that its claim is not contingent or subject to a bona fide dispute. *See Farmers & Merchs. State*

Bank v. Turner, 518 B.R. 642, 649 (N.D. Fla. 2014) (dismissing involuntary bankruptcy petition); *see also FMB Bancshares, Inc. v. Trapeza CDO XII, Ltd. (In re FMB Bancshares, Inc.)*, 517 B.R. 361, 369 (Bankr. M.D. Ga. 2014) (stating that “[t]he petitioning creditor bears the burden of establishing that it is a qualified creditor under § 303(b)” and that “[a] qualified creditor is one whose claim is not contingent as to liability or subject of a bona fide dispute”). Once the petitioning creditor makes the necessary showing, “the burden shifts to the debtor to present evidence demonstrating that a bona fide dispute does exist” or that a claim is not contingent. *See In re Rimell*, 946 F.2d 1363, 1365 (8th Cir. 1991); *In re Biogenetic Techs., Inc.*, 248 B.R. 852, 856 (Bankr. M.D. Fla. 1999).

A bona fide dispute exists if “there is 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.” *In re Atwood*, 124 B.R. 402, 407-08 (S.D. Ga. 1991); *see also In re Biogenetic Techs.*, 248 B.R. at 856 (providing that a bona fide dispute exists where “there is an objective basis for either a factual or a legal dispute as to the validity of the debt.”) (quoting *In re Rimell*, 946 F.2d at 1365). As to contingent claims,

A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created. On the other hand, if a legal obligation to pay arose at the time of the original relationship, but that obligation is subject to being avoided by some future event or occurrence, the claim is not contingent as to liability, although it may be disputed as to liability for various reasons.

In re Smith, 243 B.R. 169, 179 (Bankr. N.D. Ga. 1999).

“If there are substantial legal or factual questions raised by the debtor, the debtor can preclude the creditor from being an eligible petitioning creditor.” 2 Collier on Bankruptcy ¶ 303.11[1]. “Congress has made clear that it intended to disqualify a creditor whenever there is any

legitimate basis for the debtor not paying the debt, whether that basis is factual or legal.” *In re Taub*, 439 B.R. 261, 273 (E.D.N.Y. 2010) (quoting *In re DSC, Ltd.*, 486 F.3d 940, 945 (6th Cir. 2007)). The Court may determine whether a claim is contingent or if a bona fide dispute exists for purposes of a motion to dismiss, although it does not attempt to resolve the merits of a bona fide dispute. *See Farmers & Merchs. State Bank v. Turner*, 518 B.R. 642, 649 (N.D. Fla. 2014).

Furthermore, dismissal of an involuntary petition is also proper where a party acts in bad faith. *In re Smith*, 243 B.R. at 195 (dismissing involuntary petition because it was filed in bad faith); *In re Spade*, 258 B.R. 221, 231 (Bankr. D. Colo. 2001) (“In considering dismissal under § 305, it is appropriate to consider the motivation of the parties in seeking jurisdiction of the bankruptcy court.”).

Finally, bankruptcy petitions that are dismissed generally warrant payment of fees, costs, actual damages, and punitive damages to the debtor. Section 303(i) provides:

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) damages proximately caused by such filing; or (B) punitive damages.

11 U.S.C. §303(i).

The involuntary petition in this case should be dismissed because it fails to meet the requirements of Rule 303(b) and was filed in bad faith. Further, all fees, costs, actual damages, and punitive damages should be awarded to Cedar Rock.

I. The Petition should be dismissed under Section 303(b) because it does not assert a prima facie case that the claims are not contingent or subject to a bona fide dispute.

Petitioners have failed to meet the basic requirements for a valid involuntary bankruptcy. As

an initial matter, Cedar Rock has more than 12 creditors in the ordinary course of its business operations, so Petitioners need three creditors who are not insiders to establish that they have claims that are not contingent or subject to a bona fide dispute. That cannot be shown here.

A “petitioning creditor must establish a prima facie case that no bona fide dispute exists. Once this is done, the burden shifts to the debtor to present evidence demonstrating that a bona fide dispute does exist.” *In re Rimell*, 946 F.2d 1363, 1365 (8th Cir. 1991); *see also In re Manhattan Indus., Inc.*, 224 B.R. 195, 200 (Bankr. M.D. Fla. 1997) (“Once a creditor has established that its claim is not subject to a bona fide dispute, ‘the burden shifts to the Debtor to present evidence of a bona fide dispute.’”). A bona fide dispute exists where “there is an objective basis for either a factual or a legal dispute as to the validity of the debt.” *In re Biogenetic Techs., Inc.*, 248 B.R. 852, 856 (Bankr. M.D. Fla. 1999) (quoting *In re Rimell*, 946 F.2d at 1365). If there is “a genuine issue of material fact that bears upon the debtor's liability to the petitioning creditor, or a meritorious contention as to the application of law to undisputed facts, the claim is subject to a bona fide dispute.”

The same must be shown in establishing that the creditors’ claims are not contingent.

A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created. On the other hand, if a legal obligation to pay arose at the time of the original relationship, but that obligation is subject to being avoided by some future event or occurrence, the claim is not contingent as to liability, although it may be disputed as to liability for various reasons.

In re Smith, 243 B.R. 169, 179 (Bankr. N.D. Ga. 1999).

In this case, Petitioners have failed to establish that their claims are not subject to a bona fide dispute or contingent. In fact, the Petitioners have failed to make any showing at all regarding their claims. They attach no proof of their claims, basis for valuations, or even the

alleged underlying contracts or services rendered for said claims. For that reason alone, the petition should be dismissed.

II. The Petition should be dismissed because Cedar Rock affirmatively demonstrates herein that all unpaid claims are contingent or subject to a bona fide dispute.

The evidence provided by Cedar Rock through affidavits and other documents attached hereto demonstrates that each of the Petitioners' "claims" either do not exist, are contingent, or are subject to a bona fide dispute. Starting with Stewart Construction, the attached affidavits establish that the claim is contingent, *i.e.*, not yet due. The parties have worked out a payment plan at Stewart Construction's behest, and that amount is not required to be paid at this time. Accordingly, this claim is not a proper basis for an involuntary bankruptcy petition.¹

Similarly, Johnette Bell's claim is not proper. Fundamentally, she is an insider, as she owns a portion of Cedar Rock, and is disqualified from being the single creditor presenting the claim under Rule 303. Further still, she never actually presented a claim for payment prior to the filing, and it was therefore contingent. Upon submission to Cedar Rock, it was paid. *See* Sterner Affidavit.

W.R. Toole has been paid in full for any work performed. The amounts listed on the petition are not an actual debt, and therefore cannot be a basis for filing the involuntary bankruptcy petition. The claim of Parker Poe is disputed as being an unauthorized expenditure of Andrew Thompson. *See* Sterner Affidavit.

The claim of I-AM, LLC is also not valid, as it is subject to a bona fide dispute. While claiming entitlement for all living expenses for a manager per a contract, the expenses demanded are not covered by the supposed contract nor are they appropriate under the circumstances. Specifically, I-AM seeks to charge for months of living expenses of a manager who never

¹ It is important to note that Stewart Construction had no knowledge regarding the filing of the petition and disagrees with its contents entirely, most especially because it was allegedly filed on Stewart Construction's behalf.

actually managed a waterpark. Despite the waterpark never opening and nothing being managed, I-AM seeks payment for work never performed and expenses that are not covered by contract. These claims are subject to a bona fide dispute based on contract and the facts, and therefore are not proper for an involuntary bankruptcy petition. *See Sterner Affidavit.*

Ocozzio presents a similar situation to I-AM, except even less legitimate. Ocozzio failed to provide any proof that it did anything for Cedar Rock's benefit or had authorization to perform services. The services billed do not have supporting documentation or proof. There is no contract between the parties, and the claims appear to be based upon collusion between Andrew Thompson and Ocozzio. These claims are likewise subject to a bona fide dispute. *See Sterner Affidavit.*

Finally, Andrew Thompson's claim through T-Factor is not supported in fact or law. There is no contract to support his claim. It therefore cannot be a basis for an involuntary bankruptcy petition.² *See Sterner Affidavit.*

None of the claims of the Petitioners are bases for an involuntary bankruptcy petition under Rule 303(b). Cedar Rock has and continues to pay its legitimate debts as they become due. *See Sterner Affidavit.* The petition for involuntary bankruptcy should therefore be dismissed.

III. Petitioners are acting in bad faith.

The Petition filed in this matter was made in bad faith by Andrew Thompson and T-Factor. As an initial matter, a determination of bad faith rests on a number of factors, including (1) whether the petition was presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal

² The attempt to force involuntary bankruptcy in this forum, as opposed to properly filing a claim in a superior court to prosecute any claim Thompson/T-Factor, is strategic. In this forum, Cedar Rock is unable to litigate and hold Thompson accountable for securities violations, fraud, and mismanagement. Attempts to avoid such claims by pursuing involuntary bankruptcy are fundamentally unfair and cannot be permitted.

contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. *In re Smith*, 243 B.R. 169, 195 (Bankr. N.D. Ga. 1999) (applying the standards set by the 11th Circuit to involuntary bankruptcy petition bad faith analysis).

The evidence in this matter readily demonstrates that the petition in this case was filed in bad faith. Indeed, one of the purposes of the bankruptcy court is to preserve assets for creditors where there are threats of dissipation. It is not designed to be a collection agency to assist a creditor seeking to avoid going to civil court. Instead of properly filing suit for any debts alleged to be owed, Petitioners are asking this court to be its collection agency. That is wholly improper and constitutes use of the bankruptcy court for an improper purpose. *See id.* at 199 (dismissing claim made in bad faith and stating that “[a]s the Eleventh Circuit has noted, bad faith has been found to exist when a creditor's actions amount to an improper use of the Bankruptcy Code as a substitute for customary collection procedures.”) (internal quotations omitted); *see also In re Mountain Dairies, Inc.*, 372 B.R. 623, 635 (Bankr. S.D.N.Y. 2007) (stating that “the bankruptcy court is not a collection agency.”); *In re Century Tile and Marble, Inc.*, 152 B.R. 688, 689-90 (Bankr. S.D. Fla. 1993) (sanctioning creditors’ attorney and dismissing involuntary petition “utilizing bankruptcy court as a collection agency instead of going to state court where collection claims are properly filed”).

Furthermore, the evidence of bad faith is strong here given the conduct of Andrew

Thompson. Thompson appears to be attempting to evade claims by the company and its members for negligence and/or fraud in selling securities in Cedar Rock, and for misrepresentations and mismanagement in dealing with other claimed creditors of Cedar Rock without its authorization. Thompson recently demanded \$192,682.36 from Cedar Rock, but he had nothing to support that demand. He had previously been paid over \$192,000 from Cedar Rock, again unbeknownst to its members, and Cedar Rock asserts he was not entitled to such payments. Thompson claims that some portion of those funds (up to \$50,000) was paid by T-Factor to Robert Lowe, a founding member of Cedar Rock and fellow fundraiser purportedly for “future legal services.” Thompson then refused to produce documentation to Cedar Rock when requested to support his demand. Thompson appears to have orchestrated the filing of the instant petition against Cedar Rock, including naming co-petitioners who have no knowledge of the filing whatsoever. The filing of this action for Cedar Rock’s refusal to pay a contested claim is the epitome of bad faith.

Finally, bad faith is further evidenced by the fact that several of the alleged Petitioners had no idea that claims were being filed on their behalf. If these alleged creditors had known what was being filed, they surely would have informed the other Petitioners that nothing is owed, that the claims have not been presented, and/or that the claims are contingent. As illustrated above, said claims do not qualify for the extraordinary relief of an involuntary bankruptcy. The Petitioners’ claims are not based in fact or law and, as such, the filing of them constitutes bad faith.

The timing of the filing of the petition is further evidence of bad faith. The Petitioners are well aware that the operating season for Lights of the South is from mid-November through December to coincide with the holiday season. The filing of the petition during this time appears purposely intended to harass Cedar Rock during its most busy period. The filing and the resulting negative press arising therefrom also appears to have been aimed at harming Cedar Rock’s business

by creating negative publicity and questions surrounding the opening of Lights of the South.

IV. Attorney's fees, costs should be awarded to Cedar Rock.

There is a presumption that costs and attorney's fees will be awarded to a putative debtor where an involuntary petition is dismissed. *In re Express Car Truck & Rental, Inc.*, 440 B.R. 422, 431-32 (Bankr. E.D. Pa. 2010). Because of the acts of Petitioners, the business of Cedar Rock has been disrupted and it has incurred considerable expenses in responding to and rebutting the frivolous filing. Cedar Rock thus respectfully requests that the Court dismiss the petition and enter judgment against Petitioners and in favor of Cedar Rock for costs and reasonable attorney's fees.

Respectfully submitted this 7th day of December, 2016.

/s/ Christopher A. Cospers
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(to be admitted *pro hac vice*)

ATTORNEYS FOR CEDAR ROCK

CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the directives from the Court Notice of Electronic Filing (“NEF”) which was generated as a result of electronic filing.

This 7th day of December, 2016.

/s/ Christopher A. Cospers
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