

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
ASSOCIATED GROCERS OF)
NEBRASKA COOPERATIVE, INC.,) CASE NO. BK82-1518
)
DEBTOR)

MEMORANDUM OPINION

Hearing was held in Omaha, Nebraska, on an Application for Order of Conversion Nunc Pro Tunc. Trustee for debtor was represented by Robert Ginn and Julia Gold of Omaha, Nebraska. The Official Creditors' Committee was represented by Robert Craig of Omaha, Nebraska. Trade Creditor was represented by Harry Dixon and Terry Fredricks of Omaha, Nebraska. Ecolab, Inc., was represented by C. G. Wallace of Omaha, Nebraska.

Facts

On August 30, 1982, an involuntary petition was filed against the debtor, Associated Grocers. Debtor contested the petition, claiming that the entities initiating the petition were not creditors and were, thus, ineligible to initiate the involuntary petition. The Bankruptcy Court did not adjudicate the petition nor did the Court issue an order of relief. On April 1, 1983, debtor filed a Chapter 11 petition. Debtor claims that the filing of the Chapter 11 petition effected a conversion of the involuntary Chapter 7 case to a Chapter 11 case. Debtor argues that because the present bankruptcy rules which require a motion to convert had not been adopted when debtor's Chapter 11 petition was filed, the interim bankruptcy rules and the bankruptcy rules promulgated under the 1898 Bankruptcy Act governed conversion procedures. The interim rules were silent on the subject of conversion, and the rules under the former Act permitted conversion from an existing bankruptcy case to another chapter by the filing of the petition. Debtor contends that the Bankruptcy Judge intended a conversion to occur and treated the Chapter 11 case as if it had occurred. Therefore, debtor asserts that the motion for a nunc pro tunc order of conversion should be granted.

Creditors argue that neither the facts nor the applicable Code and rules support an order nunc pro tunc. Creditors point out that conversion by motion was utilized in other bankruptcy cases during this same time frame and that no order, motion or other pleading suggests an intent by the debtor or Court to effect

a conversion from the involuntary Chapter 7 case to the Chapter 11 case. Additionally, creditors state that because the involuntary petition was not litigated and no order for relief was granted, no case was commenced. Thus, no conversion was possible. Creditors further argue that nunc pro tunc orders are available only to supply evidence of an existing fact. Because the facts are disputed, a nunc pro tunc order is inappropriate.

Issue

Whether the Court should enter a nunc pro tunc order converting an involuntary Chapter 7 petition filed against debtor August 30, 1982, to a proceeding under Chapter 11, which petition debtor filed April 11, 1983, even though the Court issued no conversion order nor did debtor move to convert?

Analysis

The Court finds no basis in either creditor's or debtor's brief for ruling that an order to convert was authorized by the Court and inadvertently not issued. Orders nunc pro tunc are available when, inter alia, inadvertence of a party caused its omission. See Anderson v. Coopers & Lybrand, No. A85-362 (Bankr. D. Neb. Oct. 6, 1986).

Moreover, although the present bankruptcy rules were not in effect when the instant petitions were filed, the Suggested Interim Bankruptcy Rules issued August 1979 by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States had been adopted by the Nebraska Bankruptcy Court in January 1983. Debtor's Reply Brief at 3. These rules were in effect prior to the filing of debtor's Chapter 11 petition. Debtor is correct that the interim rules are silent on the proper procedure for converting a case from Chapter 7 to Chapter 11. But Interim Rule 1009 entitled, "Hearing and Disposition of Petition in Involuntary Cases" requires that in a contested petition "[t]he court shall determine the issues of a contested petition at the earliest practical time and order relief, dismiss the case, or enter other appropriate orders."

Notwithstanding the applicability, as debtor contends, of debtor's options under Rule 10-104 of the old Act,¹ Interim Rule 1009 required the Court to affirmatively act on the involuntary petition, i.e., order relief, dismiss or enter an appropriate order.

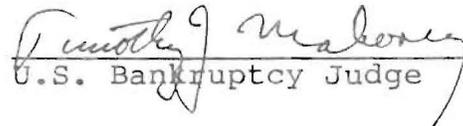
¹Rule 10-104. Voluntary Petition and Stay: "If a bankruptcy case is pending by or against the debtor, any petition under this rule shall be filed therein and may be filed before or after adjudication." R. Bankr. P. 10-104 (1976).

The record indicates no order was issued. Even if filing of a new petition by debtor could be an acceptable method of conversion, the Court must dispose, by order, of the involuntary petition as required by Interim Rule 1009 for a conversion to occur. Clearly no order was issued, and neither an intent to issue an order nor inadvertent failure to issue an order has been demonstrated.

Debtor's application for an order of conversion nunc pro tunc is overruled. This order is not a finding concerning any issue in any adversary proceeding now pending. The Court simply finds it inappropriate to enter a nunc pro tunc order based upon arguments presented. The same issue is apparently to be litigated in several adversary proceedings and a final decision will be rendered at that time.

DATED: November 2, 1987.

BY THE COURT:



U.S. Bankruptcy Judge

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