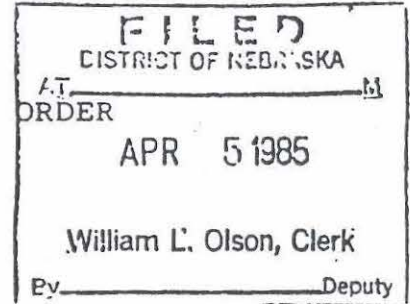


IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

IN RE: ) BK 82-1871  
)  
GERALD NORDBROCK, )  
)  
Debtor. )  
)  
BANKERS TRUST COMPANY, et al., ) CV 83-0-319  
)  
Plaintiffs, )  
)  
vs. )  
)  
GERALD L. NORDBROCK, )  
)  
Defendant. )



This matter is before the Court on appeal from a judgment entered by the United States Bankruptcy Court for the District of Nebraska awarding attorneys' fees and costs to appellee, Gerald L. Nordbrock, and against appellants Bankers Trust Company ("Bankers Trust") and BT Service Company ("BT"). The Bankruptcy Court awarded attorneys' fees in the amount of \$68,859.35 and costs totalling \$8,175.58 pursuant to 11 U.S.C. § 303(i) which authorizes such awards when an involuntary bankruptcy petition is dismissed.

This case arose from a debt allegedly owed by appellee Nordbrock to appellant Bankers Trust in the amount of approximately \$3,000,000.00. In August, 1982, Bankers Trust filed suit against Nordbrock in Iowa state court to recover this debt. On October 27, 1982, Bankers Trust filed an involuntary bankruptcy petition against Nordbrock.

Nordbrock answered the involuntary bankruptcy petition, denying that he was indebted to Bankers Trust, alleging that the petition was filed in bad faith, claiming that he was generally paying his debts as they became due, and claiming that he had more than 12 creditors, thus requiring that there be three petitioners in the involuntary proceeding. The case was then transferred to the United States District Court. This Court then referred certain threshold bankruptcy law issues to the Bankruptcy Court.

The Bankruptcy Court held trial of the referred issues on June 5 and 6, 1984. Following plaintiffs' (appellants') evidence the Bankruptcy Court sustained Nordbrock's motion to dismiss the case. The Bankruptcy Court found that appellants had failed to establish that Nordbrock was not generally paying his debts as they became due and had not proved that Nordbrock had fewer than 12 creditors. The Bankruptcy Court also ruled that Nordbrock should be awarded attorneys' fees and costs. The amount of these awards was determined on October 5, 1984.

Appellants appealed the Bankruptcy Court's dismissal of their involuntary bankruptcy petition. On September 18, 1984, this Court affirmed the Bankruptcy Court's decision. Appellants appealed to the United States Court of Appeals for the Eighth Circuit and that appeal is still pending.

Section 303(i) provides, in pertinent part:

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;

(B) a reasonable attorney's fee.

The decision as to whether to award attorney's fees and costs is committed to the sound discretion of the trial court. Therefore, unless there are errors of law or clear errors of fact, the only appropriate review for this Court to make is whether the Bankruptcy Court abused its discretion.

Appellants make several arguments in support of their contention that the Bankruptcy Court erred in awarding attorneys' fees and costs. First they contend that the involuntary bankruptcy petition was filed in good faith, being appellants' only way to avoid alleged preferential transfers by appellee to other creditors. Appellants argue that this was as a legitimate use of the bankruptcy laws and one that should not be penalized by the award of attorney's fees and costs.

Appellants further assert that the basis for the dismissal of their petition also mitigates against the award made by the Bankruptcy Court. A major reason the involuntary petition was dismissed was because the Bankruptcy Court concluded that appellants had not proved that appellee was not generally paying his debts as they became due. This conclusion was reached, according to appellants, in large part because appellee disputed appellants' claims in good faith. The various circuit courts of appeals are divided on whether to include a disputed claim in a determination of whether a debtor is generally paying his debts.



The Eighth Circuit has not addressed the point. According to appellants, the Bankruptcy Court's decision was, because of this split in authority, a "subjective" one. They contend that because the decision could have gone the other way, attorney's fees are not proper.

Appellants' arguments are not persuasive that the Bankruptcy Court abused its discretion. It is well established that bad faith in filing an involuntary petition is not a prerequisite to the award of attorney's fees and costs under Section 303(i). In Re Allen Rogers & Co., 34 B.R. 631 (Bankr. S.D. N.Y. 1983)'; Matter of Great Northwest Development Co., 28 B.R. 141 (Bankr. E.D. Mich. 1983). There are also factors present that support the Bankruptcy Court's decision. Appellants brought appellee into bankruptcy court while a state court action on the same debt was pending. Appellants then failed to prove either that appellee was not generally paying his debts as they came due or that appellee had fewer than 12 creditors.

Although appellants may have had perfectly legitimate motives for filing the involuntary petition, the fact is that they failed to prove several elements necessary to sustain the petition. Appellee was forced to defend against a wrongful petition. Under these circumstances the Court cannot say that the Bankruptcy Court abused its discretion in awarding attorneys' fees and costs.

Appellants also argue that the attorneys' fees awarded to appellee are excessive. Appellants argue that a significant portion of the work appellee's attorneys performed in the

bankruptcy case would have had to have been done in any event in the Iowa case. They offer no proof of this, however, and the Court is not persuaded that this would form a valid basis for a reduction of the award.

Accordingly,

IT IS ORDERED that the judgment of the Bankruptcy Court awarding appellee \$68,859.35 in attorneys' fees and \$8,175.58 in costs should be and hereby is affirmed.

DATED this 5<sup>th</sup> day of April, 1985.

BY THE COURT:

A handwritten signature in dark ink, appearing to read "C. Arlen Beam", is written over a horizontal line.

C. ARLEN BEAM  
UNITED STATES DISTRICT JUDGE