IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

IN RE:	)	
	)	
ROBERT L. HUTCHINSON,	)	CV. 84-0-106
	)	
Debtor-Appellant	)	MEMORANDUM OPINION
	)	

This action is presently before the Court on appeal from findings and an order of the bankruptcy court entered on January 25, 1984. The appellant-debtor, Robert L. Hutchinson (hereinafter debtor) appeals the bankruptcy court's order granting the creditors' involuntary petition under Chapter VII of the Bankruptcy Code. The creditors had alleged against both debtors: that there were fewer than twelve creditors holding claims against the debtors; that the petitioning creditors held claims aggregating more than $5,000 in excess of the value of any lien on the debtors' property; that the debtors had resided within this district for the 180 days immediately preceding the filing of the petition; that the debtors had debts in excess of $5,000; and that they were generally not paying their debts as they became due. At the close of the trial, held on January 24-25, 1984, the bankruptcy court entered findings of fact and conclusions of law into the record, finding in favor of the petitioning creditors and against Robert L. Hutchinson only. This Court, after carefully reviewing the record submitted on appeal and the briefs filed by the respective parties, is of the view that the January 25, 1984, order of the bankruptcy court should be affirmed for the reasons hereinafter stated.

Briefly, the facts are these. On August 3, 1983, three creditors, Christensen Lumber, Inc., John Tober and Ramolee Engel filed an involuntary petition under Chapter VII of the bankruptcy code. Subsequently, a fourth creditor, Fremont Builders Supply, joined as a petitioning creditor. In its findings, the bankruptcy court found that Christensen Lumber, John Tober and Fremont Builders Supply were proper petitioning creditors. With respect to petitioning creditor Engel, the bankruptcy court held that the debt owed her was contingent and, accordingly, she was found not to be a proper petitioning creditor.

With respect to the debts owed to the petitioning creditors, the bankruptcy court found that the aggregate of such debts was at least $5,000 in excess of any security which those creditors may have held. Although debtor Robert L. Hutchinson claimed that such debts were disputed, the bankruptcy court further held that there was no "significant dispute" as to those debts and, thereupon, found that debtor Robert Hutchinson was generally not paying those debts as they had become due. Accordingly, the petitioning creditors' involuntary petition was sustained as to Robert Hutchinson only.

Thereafter a timely appeal was filed by the debtor and is now before this Court.

Before this Court addresses the merits of the appeal, it is prudent to state the general standard of review that guides the Court in matters such as this. Although on appeal, the bankruptcy judge's findings of fact are generally entitled to stand unless clearly erroneous, where there are presented for consideration mixed

questions of law and fact, the clearly erroneous rule is not applicable, In re American Beef Packers, Inc., 457 F.Supp. 313, 314 (D.Neb. 1978), and the bankruptcy judge's decision cannot be approved without this Court's independent determination of the law. In re Werth, 443 F.Supp. 738, 739 (D.Kansas 1977), citing Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir.), cert. denied, 414 U.S. 944 (1973).

With this standard in mind, this Court must now determine whether the bankruptcy court erred in its finding that Chapter VII relief should issue against debtor Robert Hutchinson. In this connection, debtor raises the following issues on appeal:

1) Whether the bankruptcy court erred in finding that the debtor was generally not paying his debts as they became due as of the filing of the involuntary petition;

2) Whether the bankruptcy court erred in finding that the claims of John Tober, Christensen Lumber and Fremont Builders Supply were not disputed or contingent;

3) Whether the bankruptcy court erred in failing to admit evidence of the value of certain real estate subject to a mortgage;

4) Whether the bankruptcy court erred in finding that a mortgage in favor of Equitable Federal Savings and Loan Association was valid and enforceable; and

5) Whether the bankruptcy court erred in finding that the petitioning creditors have a total debt of $5,000 in excess of any security which they may have.

Pursuant to 11 U.S.C. § 303(b)(1), an involuntary petition in bankruptcy may be brought under Chapter VII:

> By three or more entities, each of which is a holder of a claim against such a

> person that is not contingent as to liability, if such claims aggregate at least $5,000 more than the value of any lien on the property of the debtor securing such claims held by the holders of such claims.

Relief must be ordered against the debtor if the Court finds that "the debtor is generally not paying such debtor's debts as such debts become due." 11 U.S.C. § 303(h)(1). In response to debtor's allegation that the debts allegedly owed to the petitioning creditors were disputed debts, the bankruptcy court applied the test for inclusion of disputed debts as set forth in **Matter of Covey**, 650 F.2d 877 (7th Cir. 1981). In that case, the Seventh Circuit set forth a three-part analysis to be applied in making a determination as to whether disputed debts should be considered in the generally not paying debts finding. The Court held that disputed debts should be excluded only when:

> (1) the dispute is whether any claim exists, not merely regarding the amount of a claim; (2) the dispute can be examined without substantial litigation of legal or factual questions; and (3) the interests of the debtor in defeating an order of involuntary bankruptcy outweigh the creditors' interests in achieving a somewhat more rapid determination of the involuntary bankruptcy question.
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> 650 F.2d at 883-84.

In this regard, the bankruptcy court discounted debtor's claims that the debts were disputed and specifically found that the Covey decision "makes it clear that disputed claims are not excluded from the category of permitted petitioning creditors." (Tr. at 312).

While several courts have followed the Covey analysis, see, e.g., In re Bokum Resources Corp., 26 B.R. 615, 624-26 (D.N.M. 1982); In re Karber, 25 B.R. 9, 15 (Bkrptcy N.D.Texas 1982), that analysis has been subjected to criticism. In In re D. B. International Discount Corp., 701 F.2d 1071 (2d Cir.), cert. denied, 104 S.Ct. 108 (1983), Circuit Judge Friendly characterized the Covey test as:

> [A]n intricate balancing formula, designed to afford a rule of decision in all cases, with respect to the inclusion of disputed debts in the "generally not paying debts" termination. Apart from the question whether the treacherously simple statutory language will support so elaborate a gloss, we think it a bit early in the day to essay a guideline opinion on this subject.
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> 701 F.2d at 1077.

Furthermore, other courts have expressly rejected a strict application of Covey. In In re Dill, 731 F.2d 629 (9th Cir. 1984), the Ninth Circuit Court of Appeals rejected Covey entirely, noting that it "appears to lean too heavily toward favoring creditors', as opposed to debtors', interests." Id. at 632. Instead, the court adopted a standard for inclusion of disputed debts in the generally not paying debts calculation which requires a balancing of the interests of the creditors against those of the debtor. The same analysis was advocated by the Court in In re R. N. Salem Corporation, 29 B.R. 424, 429 (S.D.Ohio 1983), which stated:

> [A] rigid application of Covey may enable creditors to use the involuntary petition as a collective device where debts are disputed, a strategy which if widely employed, would paralyze bankruptcy courts. Congress intended the Bankruptcy Code as a shield for debtors, not a sword for creditors.

This Court has previously approved of the latter approach, see, In the Matter of Kovanda, CV. 83-0-555 (Memorandum Opinion Sept. 11, 1984), and herein reiterates its preference for a test which balances the interests of the petitioning creditors against those of the debtor. See, In re All Media Properties, Inc., 5 B.R. 126, 142-43 (Bkrtcy. S.D.Texas 1980). Nevertheless, the extensive findings of fact and conclusions of law read into the record on January 25, 1984, clearly indicate that the bankruptcy court's order for Chapter VII relief against debtor Robert Hutchinson was warranted under the circumstances. Therefore, this Court finds that debtor's assignments of error to be wholly without merit.

Accordingly, an order affirming the January 25, 1984, decision of the bankruptcy court will be entered contemporaneously with this memorandum opinion.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT