

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
OMEGA BUILDERS, INC.,
Alleged Debtor.

No. 7-97-15561 SA

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND MEMORANDUM OPINION
ON INVOLUNTARY PETITION**

This matter came before the Court for a preliminary hearing on the involuntary petition on February 24, 1999.¹ Petitioning Creditor the New Mexico Taxation and Revenue Department appeared through its attorney Donald Harris. The alleged debtor ("Omega") appeared through its attorney James Jacobsen. At the hearing, the parties agreed to resolution of the matter through submission of stipulated facts and simultaneous briefing. Having considered the entire record in the case, and having examined the facts and considered the arguments of the parties, the Court finds that the relief requested should be granted. The Court will enter the Order for Relief under Chapter 7.

FACTS

The parties stipulated to the following facts:

- 1) Omega is the sponsor of a Defined Benefit Plan ("Plan") dated April 1, 1989. The only current beneficiaries of the

¹ This involuntary petition was filed on September 5, 1997, but the Court never heard the petition due to a stipulated continuation after which the matter was not rescheduled until 1999. The prior judge assigned to the case orally denied a motion to appoint an interim trustee, but no order was ever entered.

Plan are two individuals, the sole shareholder of Omega and the son of the sole shareholder who was an employee of Omega. A copy of the Plan appears as Exhibit D to the stipulation of facts.

- 2) Omega went out of business on March 11, 1991.
- 3) On April 20, 1992, the Resolution Trust Corporation ("RTC") filed a transcript of judgment in Bernalillo County, New Mexico against Omega in the amount of \$241,451.81. The judgment was not appealed and has not been satisfied, and collection of that judgment is not barred by any statute of limitations. The RTC is not actively attempting to collect on the judgment.
- 4) On June 19, 1994, the New Mexico Taxation and Revenue Department ("Department") assessed Omega \$602,237.39 in gross receipts taxes, penalties, and interest. The principal amount of the tax assessed is \$316,458.80. The tax debt was for the periods 1988 to 1991. Exhibit A details the amounts of the tax debt, interest, and penalties.
- 5) On July 19, 1994, Omega protested the assessment pursuant to § 7-1-24B NMSA, which stayed collection action. Exhibit B is the protest letter. The letter seeks "the abatement of all tax, penalty and interest assessed against the corporation in excess of that which would be due on a tax deficiency of \$235,435.97".

- 6) On August 14, 1997, Omega withdrew the protest. Exhibit C is the cover letter and a completed "Protest Withdrawal" form.
- 7) Omega has not paid the tax debt.
- 8) The Department is the only creditor pursuing collection activity against Omega.
- 9) Omega has not claimed that there are twelve or more creditors with enforceable claims.
- 10) There appear to be no assets of Omega other than whatever right the alleged debtor has to assets of the Plan.²
- 11) The Department claims that Omega has a reversionary interest in the Plan; Omega claims it has no reversionary or other interest in the Plan.
- 12) The parties disagree on the legal question of whether the Plan, or any part thereof, may be liquidated to pay creditors. The parties also disagree on the tax consequences of that hypothetical liquidation.

CONCLUSIONS OF LAW

1. This is a core proceeding under 28 U.S.C. §157(b)(2)(A). These Findings of Fact and Conclusions of Law are made pursuant to Bankruptcy Rule 7052.

2. Involuntary bankruptcy proceedings are governed by 11 U.S.C.

²The Court will take this assumption as true for the purposes of the petition. Of course, any trustee would have a duty to verify this fact.

§303, which provides in relevant part:

(b) An involuntary case ... 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 ... if such claims aggregate at least \$10,000³ 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 \$10,000 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.

3. The Department holds a claim in excess of \$10,000 that is not contingent. A contingent claim is one on which a debtor's obligation to pay does not come into being until the happening of some future event. See generally 2 Collier on Bankruptcy ¶303.03[2][a]. Omega's tax liability arose before it closed its business in 1991.
4. The Court of Appeals for the Tenth Circuit has addressed the

³In 1998 the amount changed to \$10,775. See 11 U.S.C. §104(b)(2).

meaning of "bona fide dispute":

We choose to adopt the standard propounded by the Seventh Circuit as to what constitutes a bona fide dispute: "the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt. ... Once the petitioning creditor establishes a prima facie case 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. ... Under this objective approach, the debtor's subjective intent does not control whether a claim is considered to be subject to a bona fide dispute.

Bartmann v Maverick Tube Corporation, 853 F.2d 1540, 1543-44 (10th Cir. 1988)(citations omitted).

5. Section 7-1-17(C) NMSA 1978 (1998 Repl.) provides that any assessment of taxes or demand for payment made by the department is presumed to be correct. Therefore, Department has established a prima facie case for its tax claim.
6. The Court concludes that the Department's claim is not subject to a bona fide dispute. Under the law established by the Court of Appeals for the Tenth Circuit, a debt is subject to a bona fide dispute if there is an objective basis for either a factual or a legal dispute as to the validity of the debt. Bartmann v. Maverick Tube Corporation, 853 F.2d 1540, 1544 (10th Cir. 1988). Under this test, the debtor's subjective intent does not control whether a claim is considered to be subject to a bona fide dispute. Id. First, Omega's withdrawal of the tax protest

removes any documented dispute regarding the assessment.

Under the bona fide dispute test, it does not matter that Omega disagrees with the assessment, or that it found it not cost effective to pursue the protest. Second, the protest letter actually acknowledges a debt of at least \$235,435.97. This \$235,435.97 debt alone gives the Department standing to file this petition.

7. Omega is generally not paying its debts as such debts become due. First, Omega went out of business in 1991 and there are no assets other than any possible reversionary interests under the Plan. If the corporation has no assets it cannot be paying its debts. Specifically, Omega is not paying RTC, and is not paying the Department. It appears that Omega is generally not paying 100% of its creditors.
8. In its opening brief, Omega claims that the Department has not submitted evidence regarding the existence or lack of existence of creditors. The Court assumes that this means that Omega essentially argues that the burden is on the petitioning creditor to first demonstrate the number of creditors, in order that the Court can determine whether one or three petitioners is required under Section 303(b)(1) and (2). The parties stipulated, however, that Omega "has not claimed that there are twelve or more creditors", nor has Omega filed a list of other creditors or averred in its answer that there were twelve or more creditors. See

Bankruptcy Rule 1003(b). Also, in its November 7, 1997, motion to dismiss Omega stated "The case should be dismissed as a single creditor bankruptcy." From this combination of facts, the Court finds that there are fewer than twelve creditors, and that a single petitioner is sufficient under Section 303(b)(2).

9. Omega also argues that the Department has submitted no evidence regarding the RTC judgment, or why the RTC is not pursuing collection. The parties did stipulate that RTC filed a transcript of judgment in Bernalillo County, New Mexico against Omega in the amount of \$241,451.81, and that the judgment was not appealed and has not been satisfied. The parties also stipulated that Omega has no assets. From these two facts the Court can logically conclude that RTC is still owed and not being paid by Omega.
10. Omega also argues that the Department's assertion that Omega did not pay taxes for the period 1988 to 1991 cannot be used to show that Omega is not paying its debts ten years later. The flaw in this argument is that the taxes are still due and are not being paid ten years later. The Department does not base its claim on the fact that the taxes were not paid in 1988 to 1991.
11. Omega finally argues that this is a one creditor case that should be dismissed under two theories: 1) this is a single creditor case and the Court should adopt the "generally

recognized exception" to one creditor cases, and 2) there are no assets to be administered in the bankruptcy. The Court will address these in turn.

A. Single Creditor Case

First, the Court finds that this is not a one creditor case. The stipulated facts demonstrate that RTC is owed money on a judgment. Furthermore, even if this were a one creditor case, the Court notes that there is a split of authority as to the "general" applicability of the one creditor exception to involuntary cases. Compare e.g. Concrete Pumping Service, Inc. v. King Construction Company, Inc. (In re Concrete Pumping Service, Inc.), 943 F.2d 627, 630 (6th Cir. 1991)(stating that the Code specifically contemplates the possibility of a single creditor case) with e.g. H.I.J.R. Properties Denver v. Schideler (In re H.I.J.R. Properties Denver), 115 B.R. 275, 278 (D. Co. 1990)(discussing the one creditor "exception" to involuntary petitions). The Court does not need to rule on this issue today.

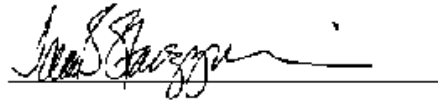
B. No assets.

Both sides presented argument on whether a trustee could realize anything from the Plan. The Court does not need to address the merits of these arguments because Code section 303 does not have as a requirement that the petitioning creditor(s) demonstrate that there would actually be any assets to administer. Furthermore, any advance ruling on

the merits of a possible action against the Plan would be purely advisory at this point. However, the Court also notes that a trustee would have a duty not only to review the Plan, but to examine the financial affairs of the debtor to determine if there were any preferences, fraudulent transfers, or other causes of action. In the Court's view, there are sufficient allegations that the situation warrants a trustee to investigate further.

12. Having found that the Department holds a claim in excess of \$10,000 that is not contingent as to liability nor the subject of a bona fide dispute, and having found that Omega is generally not paying its debts as such debts become due, the Court "shall order relief." 11 U.S.C. §303(h).

An Order for Relief shall be entered by separate order.



Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following: Donald Harris (for the Department), James Jacobsen (for Omega), and the United States Trustee.

