NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 07-053

Bankruptcy Case No. 06-04675-GAC

EDGAR ABNER REYES COLON,
Alleged Debtor.

BANCO POPULAR DE PUERTO RICO,
Appellant,

v.

EDGAR ABNER REYES COLON,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Gerardo A. Carlo, U.S. Bankruptcy Judge)

Before
Boroff, Deasy, and Rosenthal, United States Bankruptcy Appellate Panel Judges.

Eldia M. Diaz Olmo, Esq., on brief for Appellant.
Charles Cuprill-Hernandez, Esq., on brief for Appellee.

November 21, 2008

Rosenthal, U.S. Bankruptcy Appellate Panel Judge.

Banco Popular de Puerto Rico ("BP" or "Appellant") appeals from the bankruptcy court's March 27, 2007 order dismissing the involuntary chapter 11 petition filed by BP for failure to have three petitioning creditors as required by § 303(b)(1),[1] and the July 9, 2007 order denying BP's motion for reconsideration for raising arguments not previously presented to the court. BP claims that the dismissal was erroneous because the twenty (20) day notice to all parties in interest, as required by Bankruptcy Rules 1017 and 2002, was not provided and because it was denied the opportunity to conduct discovery. Moreover, it alleges the lack of notice and opportunity to conduct discovery and be heard is a violation of its due process rights. BP also argues that the bankruptcy court abused its discretion in denying reconsideration. Finally, BP argues that the bankruptcy court abused its discretion in granting Appellee attorney's fees. We agree, and for the reasons set forth below, we **REVERSE** and **REMAND** for the entry of an order consistent with this opinion.

BACKGROUND

On November 22, 2006, BP, as the sole petitioning creditor, filed an involuntary chapter 11 petition under § 303(b) against Edgar Abner Reyes Colon ("Colon" or "Appellee"). Colon responded with a motion to dismiss under § 303(j) on the grounds that BP's petition failed to comply with § 303(b)(1) because he had more than 12 creditors. The bankruptcy court ordered

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. § 101, et seq. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

Colon to file a list of all creditors as required by Bankruptcy Rule 1003(b). Before the creditor list was filed, Popular Auto joined BP's involuntary petition.

On December 28, 2006, Colon filed a list of 58 creditors as well as a second motion to dismiss alleging that the petition was filed in bad faith as BP knew or should have known that the debtor had more than 12 creditors at the time of filing. On the same day the court noted that it "appear[ed] that there are twelve or more creditors" and issued an order stating that "all creditors … are granted fifteen (15) days to join in the petition. Notice of this order shall be given to the creditors by Banco Popular de Puerto Rico."[2] BP subsequently filed a response to Colon's motion to dismiss and, although noting that it filed the petition as a single creditor based on an assertion in Colon's July 31, 2005 financial statement that he had only five creditors, it requested an additional 15 days during which creditors could join the petition. BP also requested that Colon file a list of creditors for which he serves as guarantor. On January 17, 2007, the court ordered Colon to reply to BP's response. Colon filed a timely response asserting that BP had requested Equifax credit reports on January 27 and July 24, 2006, which reports "reveal[ed] that Respondent [Colon] had and has more than three [sic] creditors." Alleging that his "condensed and *pro* forma financial report," which appears to be a reference to the July 31, 2005 financial statement, "does not contradict" his assertion that he had more than 12 creditors, Colon requested that he be deemed in compliance with the court's January 17, 2007 order.

On February 2 and March 1, 2007, BP filed motions for compliance, again asking the court to order Colon to file a list of creditors for debts for which he was a guarantor. Colon

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[2] Whether BP served the order is unclear. The parties have not included a docket report or certificate of service in the record.

answered these motions by asserting that he had already complied, that the court did not require him to do anything further, and that he only served as guarantor on one debt, which he listed. Colon again requested that the court dismiss the case because the petition was defective and filed in bad faith.

On March 27, 2007, the court issued a decision and order concluding that Colon had more than 12 creditors and that such creditors were given a reasonable opportunity to join in the petition in compliance with Bankruptcy Rule 1003(b). The court dismissed the case, but indicated that it could not conclude from the information before it that the petition was filed in bad faith. The court also awarded attorney's fees under § 303(i)(1)(B)[3] and ordered Colon to file a fee application within 20 days. BP was given 10 days in which to respond to Colon's application for attorney's fees or the application for fees would be granted. On March 30, 2007, Colon filed his application for attorney's fees and also requested that the court retain jurisdiction to determine whether the petition was filed in bad faith and whether Colon was entitled to damages, including punitive damages. The court granted Colon's request to retain jurisdiction.

On April 9, 2007, new counsel entered an appearance for BP[4] and filed a motion for reconsideration asserting that a "special circumstances" exception exists by which the court could allow the petition to proceed with less than three creditors. The motion for reconsideration also requested that the court allow BP to conduct discovery and asserted that BP was entitled to a

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[3] The March 27, 2007 decision and order refers to "11 U.S.C. § 303(i) (B)," which the Panel understands to be an error as the reference should be to § 303(i)(1)(B), which permits an award of reasonable attorney fees if the case is dismissed except in circumstances not relevant to the instant case.

[4] On March 15, 2007, BP's prior counsel filed a motion to resign from his representation of BP. The motion was denied in the March 27, 2007 decision and order.

trial on the merits. On April 10, 2007, BP filed a supplement to its motion for reconsideration and on the same day the court gave Colon 20 days to respond to the motion for reconsideration. On April 30, 2007, Colon filed his answer to the motion for reconsideration and asserted that the motion for reconsideration was not timely. Moreover, even if the motion were timely, Colon argued that BP failed to establish any grounds for altering or amending the court's March 27, 2007 order. BP replied that dismissal of the case without affording BP the right to discovery and a trial on the merits, as required by § 303(h) and the applicable Rules of Bankruptcy Procedure, was a manifest error of law. In its July 9, 2007 decision and order denying the motion for reconsideration, the court rejected the argument that the motion to reconsider was untimely but restated its prior conclusion that the involuntary petition was insufficient on its face. The court further noted that BP was aware that the number of petitioning creditors was in issue yet during the period between the filing of the petition and the case's dismissal, BP failed to raise a theory as to how the petition could be maintained without the presence of three creditors. The bankruptcy court agreed that if BP had raised the argument earlier and not received a hearing, that scenario would have constituted a manifest error of law.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). An interlocutory order "'only decides some intervening matter

pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998).

Courts within this circuit have repeatedly held that dismissal of a case under chapter 11 is a final order. See, e.g., In re Abijoe Realty Corp., 943 F.2d 121, 124 (1st Cir. 1991); In re Gilroy, 2008 WL 4531982, at *4 (B.A.P. 1st Cir. 2008). The finality of the order of dismissal is not undermined by the bankruptcy court's retention of jurisdiction to determine whether the petition was filed in bad faith. In re DSC Ltd., 2005 WL 2671314, *2 (E.D. Mich. Oct. 19, 2005).

STANDARD OF REVIEW

Appellate courts reviewing an appeal from the bankruptcy court generally apply the "clearly erroneous" standard to findings of fact and *de novo* review to conclusions of law. See T I Fed. Credit Union v. Delbonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20 n.8 (1st Cir. 1994); In re SPM Mfg. Corp., 984 F.2d 1305, 1311 (1st Cir. 1993).

The abuse of discretion standard applies to matters within the judge's discretion. "A decision committed to the discretion of the bankruptcy court will only be reversed if the record demonstrates 'that the trial judge indulged a serious lapse of judgment.'" Efron v. Gutierrez, 226 B.R. 305, 312 (D.P.R. 1998) (quoting Texas Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 875 (1st Cir. 1995)). "It is well settled that the trial judge has broad discretion in

ruling on pre-trial management matters," and that a trial court's denial of discovery should be reviewed for abuse of its considerable discretion. Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 91 (1st Cir. 1996) (citations omitted). An appeals court should intervene only upon a clear showing of manifest injustice, that is, "where the lower court's discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party." Mack v. Great Atl. & Pac. Tea Co., Inc., 871 F.2d 179, 186 (1st Cir. 1989).

In the case at hand, the appropriateness of dismissal without notice and a hearing and denial of the motion for reconsideration will receive *de novo* review, while the decisions regarding discovery and attorney's fees will be reviewed for abuse of discretion.

DISCUSSION

A. Whether the bankruptcy court erred in dismissing the involuntary petition filed without allowing Appellant adequate opportunity to conduct discovery.

Generally, if a debtor has 12 or more creditors holding claims that are not contingent and are not the subject of a *bona fide* dispute as to liability or amount, three such creditors must join in filing the involuntary petition; if there are fewer than twelve creditors, one creditor alone may file the petition. 11 U.S.C. § 303(b). BP and Colon disagree as to how many creditors holding non-contingent, undisputed claims BP had as of November 22, 2006, when BP filed the involuntary petition. On appeal, the parties disagree as to the appropriate standard of review of the court's dismissal. BP urges that a *de novo* standard is the correct one because the dismissal was based upon an erroneous interpretation of the law and rules while Colon urges that the Panel apply an abuse of discretion standard. BP argues that an abuse of discretion standard is inappropriate because this is not a case where discovery was sought and denied.

The burden of proof with respect to establishing that the Appellee had less than 12 creditors rested with the petitioning creditor. Once the debtor answers that there are more than 12 creditors and files a list in compliance with Bankruptcy Rule 1003(b), the petitioning creditors bear the burden to put the debtor to the test. In re Braten, 99 B.R. 579, 583 (Bankr. S.D.N.Y. 1989) (citing Pleas Doyle & Assocs. v. James Plaza Joint Venture (In re James Plaza Joint Venture), 67 B.R. 445, 448 (Bankr. S.D. Tex. 1986)). BP argues that pursuant to Bankruptcy Rule 1018, which, among other things, makes Bankruptcy Rules 7028-7037 applicable to contested involuntary petitions, it was entitled to discovery. Focusing on the facts that Colon had initiated discovery, that the court was aware of this discovery, and that the court never imposed a time limit or notified BP that discovery would be limited, BP deduces that the court's dismissal, which resulted in discovery being denied, was a clear error of law.

Although BP would undoubtedly have been entitled to discovery had it timely requested it, BP never requested discovery until the motion for reconsideration, even though Colon propounded interrogatories and scheduled a deposition of a BP representative. Dismissing the case without affirmatively affording an opportunity for discovery where no discovery was requested is distinct from denying BP the right to discovery and, therefore, is not a manifest error of law. Moreover, even if the dismissal is construed as a denial of discovery, discovery orders are reviewed under an abuse of discretion standard. Efron, 226 B.R. at 316.

In Hydromechaniki, S.A. v. MacDonald Constr. Co., 511 F.2d 475 (8th Cir. 1975), a bankruptcy court refused to allow interrogatories designed to determine whether any listed creditors should be excluded and dismissed the case for having an insufficient number of creditors at a hearing on the issue. The Court of Appeals affirmed based on the petitioner's lack

of diligence in either seeking to join creditors or conducting discovery during the month and a half that elapsed between the filing of the answer alleging more than 12 creditors and the hearing regarding the number of creditors. Id. at 476. Hydromechaniki was cited with approval by Braten, in which the court dismissed an involuntary petition where creditors had failed to find a third petitioning creditor or refute the debtor's verified list of creditors for nearly 2 years. Braten, 99 B.R. at 583.

In Efron, the district court affirmed the bankruptcy court's denial of an extension of time to conduct discovery under similar circumstances. The bankruptcy court had given the petitioning creditors 15 days from the debtor's filing of its creditor list to join additional creditors. Efron, 226 B.R at 316. In affirming the denial of the requested extension, the district court stated that the petitioning creditors were well aware that they would have to conduct discovery on a tight time frame. Id. Moreover, the district court found that the petitioners had ample time to investigate the debtor's creditors because they had filed the petition and had been notified by the court five months before the court-imposed deadline for joining creditors that they lacked the three creditors required to proceed with an involuntary petition. Id.

Jefferson Trust & Sav. Bank of Peoria v. Rassi (In re Rassi), 701 F.2d 627 (7th Cir. 1983), cited by the Appellant, recognizes that cases are sometimes dismissed where the petitioner is not diligent in seeking discovery. "The Rassis, the courts below, and our research reveal no cases in which a petition was dismissed on the basis of the alleged debtor's list alone, except where the petitioner was not diligent in seeking discovery." Id. at 630.

Bankruptcy Rule 1013 mandates the expeditious determination of the issues of contested involuntary petitions.

> The purpose of Bankruptcy Rule 1013(a) is the avoidance, to the extent possible, of the consequences of the involuntary petition in the absence of the entry of an order for relief. These consequences often include loss of credit standing, a chilling effect on the willingness of creditors and third parties to transact business in the ordinary course, and possible public embarrassment. See In re Zadock Reid, 773 F.2d 945 (7th Cir. 1985).

In re Immudyne, Inc., 218 B.R. 860, 862 (Bankr. S.D. Tex.1998). BP delayed over three months in requesting discovery even though it was aware that the number of petitioning creditors required was at issue, and only then requested discovery in its motion for reconsideration. A petitioning creditor must be diligent in preserving his rights to be entitled to discovery, especially given the expedited nature of involuntary proceedings. Therefore it was not an abuse of discretion to deny BP the opportunity to conduct discovery.

B. Whether the bankruptcy court erred in dismissing the involuntary petition filed without having provided Appellant and all parties in interest with a twenty (20) day notice as required by the applicable Bankruptcy Rules.

BP argues that the case should not have been dismissed without at least 20 days notice to all parties in interest pursuant to Bankruptcy Rules 1017 and 2002. BP acknowledges that § 102(1) provides that "after notice and a hearing" does not always require a hearing, but asserts that, at a minimum, notice of the court's intention to decide the controversy without a hearing is required. Colon counters that when a petition is fatally defective on its face, it may be dismissed without notice to creditors of the pendency of a motion to dismiss and cites Wynne v. Rochelle, 385 F.2d 789 (5th Cir. 1967), as support.

In Wynne, the Fifth Circuit Court of Appeals indicated that not all dismissals require notice. Id. at 794. "[I]t is well established that notice is not required where the matter has been submitted to the court for consideration and is dismissed on the merits either after a hearing . . .

or because the petition is fatally defective on its face." Id. at 794-95. As argued by BP, however, the cases cited by Wynne for the proposition that a petition can be dismissed if fatally defective on its face are distinguishable from the situation at hand. In Zlot v. San Jose Fashions, Inc., 284 F.2d 469 (9th Cir. 1960), a petition was dismissed because on its face it did not show that the petitioners were creditors of the debtor at the time of alleged preferential transfers that were the basis of the petition. In In re Lande, 20 F. Supp. 26 (S.D.N.Y. 1937), the court granted a motion to dismiss where an allegation was "so indefinite and deficient in particularity that . . . it [did] not enable the Court to find from the petition the essential jurisdictional facts." Id. at 26. Therefore, a motion to dismiss was the proper remedy. Id. The court did not reach the issue of whether a motion to dismiss would, without notice, be the proper remedy when a petition has been filed by less than three creditors and the alleged debtor asserts that he has more than 12 creditors. Id.

The petition is not fatally defective on its face because, until challenged by the alleged debtor, it was sufficient under § 303(b). Once challenged by Colon, the petitioning creditor had to either join additional petitioning creditors after being given a reasonable opportunity to do so or contest the veracity of Colon's creditor list. If BP failed to do either, the Bankruptcy Code and Rules set forth the procedures to be followed prior to dismissal. As the petition was not fatally defective on its face, the question remains whether notice and a hearing were required. As those issues are intertwined, they are discussed together.

Section 303(j), which governs the dismissal of an involuntary petition, provides that:

> Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section–
> (1) on the motion of a petitioner;
> (2) on consent of all petitioners and the debtor; or
> (3) for want of prosecution.

11 U.S.C. § 303(j). It is unclear whether the dismissal in this case on the motion of the debtor for failure to comply with the statutory requirements of § 303(b) is governed by § 303(j).[5] Arguably, the dismissal was for want of prosecution in that BP failed to either get two additional creditors to join the petition or challenge the veracity of Colon's creditor list. In any event, Bankruptcy Rule 1017, which pertains to the dismissal of involuntary petitions, applies and provides in relevant part:

> a case shall not be dismissed on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties, before a hearing on notice as provided in Rule 2002. For the purpose of the notice, the debtor shall file a list of creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it.

Fed. R. Bankr. P. 1017. Bankruptcy Rule 2002 , in turn, requires a twenty-day notice of the "hearing on the dismissal of the case ...." Further, Bankruptcy Rule 1003(b), which deals with the joinder procedure relevant to the situation at hand provides that "if it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon." Fed. R. Bankr. P. 1003(b).

According to § 102(1):

"after notice and a hearing", or a similar phrase-

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

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[5] See In re Earl's Tire Serv., Inc., 6 B.R. 1019, 1023 (D. Del. 1980) (likening the three petitioning creditor requirement to an affirmative defense that must be timely raised or else is waived rather than a "jurisdictional" requirement).

(B) authorizes an act without an actual hearing if such notice is given properly and if--

(i) such a hearing is not requested timely by a party in interest; or
(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.

11 U.S.C. § 102(1).

Bankruptcy Rule 1017 applies in the context of a motion to dismiss an involuntary petition for failure to obtain the requisite number of petitioning creditors. Efron, 226 B.R. at 318. In that case, the court held that dismissal was premature as the bankruptcy court never held a hearing regarding the dismissal nor did it provide notice to creditors of the impending dismissal. Id. The court also noted that notice through the existence of a public record was "not sufficient to put the creditor on notice that it might have to abide by a court-imposed deadline that runs contrary to the explicit language of the relevant statute," which allows creditors to join at any time until dismissal. Id.

The court in Wynne discussed the importance of notice prior to dismissing an involuntary petition due to a concern for the preservation of the estate in the interest of creditors not a party to the petition. Wynne, 385 F.2d at 795. The court emphasized that "were the petitioning creditors the only persons affected by the dismissal, we would not be so concerned to protect them from their own errors of judgment. However, a bankruptcy proceeding involves more than the interests of the immediate creditors who commenced the proceeding, and it is the rights of those creditors not a party to the original proceeding that the section was intended to protect and in whose interest it should be construed." Id. at 795 n.6.

Regardless of whether BP requested a hearing on the matter, which it arguably did by virtue of its January 10, 2007 reply to Colon's motion to dismiss, the court was at least required

to assure that **all** creditors have notice and the opportunity for a hearing prior to dismissal. Colon's assertion that BP was on notice that its petition could be dismissed if additional creditors failed to join misapprehends the purpose of § 303(j) and Bankruptcy Rules 1003 and 1017, namely to give all creditors (i.e. those listed in Colon's motion to dismiss) the opportunity to join the petition. Although the court ordered BP to provide notice, there is nothing in the record indicating that it did so and although BP had the burden of disproving Colon's assertion that it had more than 12 creditors, it is unfair for the interests of those creditors who were not parties to the original proceeding to be prejudiced by BP's errors. Although BP is an unsympathetic appellant, particularly if it failed to serve the creditors as ordered so to do by the bankruptcy judge[6] and now seeks to rely on lack of notice and a hearing as the grounds for its appeal, the rules governing dismissal are in place to protect all creditors and to give them an opportunity to join the petition prior to its dismissal. The creditors should not be prejudiced by the failure of others to provide it the notice required for dismissal. Without a hearing, we find no basis for the bankruptcy judge's findings. We determine, therefore, that the court erred in dismissing the case without at least giving all creditors notice and the opportunity for a hearing.

C. Whether the bankruptcy court violated Appellant's due process rights in denying the Appellant the right to discovery and the opportunity to present its case in a trial or hearing.

As this Panel has determined that the court erred in dismissing the case without notice and a hearing, there is no need to reach the Constitutional question. It is preferable to dispose of the issue on narrower, less contentious grounds and avoid making a constitutional judgment unless necessary to the decision of the case. Burton v. United States, 196 U.S. 283, 295 (1905);

[6] The record, including the docket in this case, does not show such service.

Hudson Savings Bank v. Austin, 479 F.3d 102, 106 (1st Cir. 2007) (discussing concept of constitutional avoidance).

D. Whether the bankruptcy court erred in denying the motion for reconsideration filed by Appellant based upon the conclusion that Appellant had failed to raise the issues discussed on the motion for reconsideration on a "timely basis."

An appellate court should apply an abuse of discretion standard in determining whether a bankruptcy court erred in denying BP's motion for reconsideration. Venegas Hernandez v. Sonolux Records, 370 F.3d 183, 190 (1st Cir. 2004).

> Rule 59(e) motions are "aimed at *re*consideration, not initial consideration." Harley-Davidson Motor Co., Inc. v. Bank of New England, 897 F.2d 611, 616 (1st Cir.1990) (citing White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451, 102 S. Ct. 1162, 1166, 71 L.Ed.2d 325 (1982)) (emphasis in original). Thus, parties should not use them to "raise arguments which could, and should, have been made before judgment issued." Id. (quoting Fed. Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)). Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence. Meyer, 781 F.2d at 1268. They may not be used to argue a new legal theory. Id.

F.D.I.C. v. World Univ., Inc., 978 F.2d 10, 16 (1st Cir. 1992)

As this Panel has reversed the decision dismissing the case without notice to creditors and opportunity for a hearing, it is unnecessary to reach the issue of reconsideration.

E. Whether in the circumstances presented, the bankruptcy court erred in granting Appellee costs and attorney's fees.

Section 303(i) provides in relevant 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; or

(B) a reasonable attorney's fee . . . .

11 U.S.C. § 303(i).

The award of costs and fees is permissive and properly within the discretion of the court. In re K.P. Enterprise, 135 B.R. 174, 177 (Bankr. D. Me. 1992) (citing In re Reid, 854 F.2d 156, 159 (7th Cir. 1988); In re Nordbrock, 772 F.2d 397, 400 (8th Cir. 1985); In re Better Care, Ltd., 97 B.R. 405, 410 (Bankr. N.D. Ill.1989)).[7] Bad faith is not a prerequisite to the award of costs and fees under § 303(i)(1) although it can be a factor in deciding to award fees and costs.[8] In re Mountain Dairies, Inc., 372 B.R. 623, 637 (Bankr. S.D.N.Y. 2007). "Courts generally hold that the exercise of the court's discretion is based on the totality of the circumstances; that there is a presumption that costs and attorney's fees will be awarded to the alleged debtor following dismissal of an involuntary petition; and that the burden of proof is on the petitioner to justify a denial of costs and fees." In re Squillante, 259 B.R. 548, 553-54 (Bankr. D. Conn. 2001). As this Panel has determined that the bankruptcy court erred in dismissing the petition without notice and a hearing, the award will be reversed.

CONCLUSION

For the reasons set forth above, the Panel **REVERSES** and **REMANDS** for orders consistent with this opinion.

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[7] Use of the word "or" in § 303(i) was not intended to limit the court's award to only one of the listed alternatives. 11 U.S.C. § 102(5)." K.P. Enterprise, 135 B.R. at 177.

[8] Bad faith is, however, a prerequisite to awarding damages under § 303(i)(2).