



SO ORDERED.

SIGNED this 2nd day of March, 2017.

Lena Mansori James
LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re)
Matthew James Black,)
Alleged Debtor.)

Case No. 17-50064
Chapter 7

ORDER DISMISSING INVOLUNTARY PETITION

This case came on for hearing on February 23, 2017 on the Motion by Matthew James Black to dismiss the involuntary bankruptcy case filed against him. Due and proper notice having been given, William P. Janvier appeared as attorney for Virginia Ann Palmer (the "Petitioning Creditor"), and Daniel C. Bruton and Harold C. Spears appeared as attorneys for Matthew James Black. Mr. Black was present at the hearing and testified. Jon R. Moore, counsel for the Petitioning Creditor in her state court case against Mr. Black, was also present at the hearing and testified. The Petitioning Creditor was not present.

Having considered the Motion, the record in this case, the evidence presented including the credibility of the witnesses, and the arguments from counsel, the court makes the following findings of fact and conclusions of law:

1. Around midnight on December 2, 2015, Mr. Black was driving a vehicle owned by the Petitioning Creditor's mother. The Petitioning Creditor was seated in the

back seat, behind Mr. Black. The vehicle crossed the center line and collided with another oncoming vehicle. The Petitioning Creditor was seriously injured in the accident. Mr. Black maintains that the December 2, 2015 accident was the result of mechanical failure associated with the vehicle's steering mechanism.

2. At the time of the accident, the Petitioning Creditor was covered under an insurance policy with North Carolina Farm Credit Bureau. Mr. Black did not believe that he held vehicle insurance because he did not own a vehicle. Mr. Black was, however, living with his mother. As a result, he was, in fact, covered by his mother's MetLife Auto & Home Insurance ("MetLife") policy.
3. In February of 2016, the Petitioning Creditor retained Jon R. Moore of Brown Moore & Associates, PLLC to represent her in connection with the December 2, 2015 accident.
4. Subsequent to his retention, Mr. Moore made several attempts to reach Mr. Black to discuss his insurance information. Unable to reach Mr. Black by telephone, Mr. Moore sent a letter to Mr. Black on March 14, 2016 stating that he had been retained in the case and that he needed information about Mr. Black's automobile liability insurance company. In the letter, Mr. Moore wrote, "Absent a response within twenty-one (21) days we will have no choice but to initiate litigation against you in order to utilize the subpoena and contempt powers of the Stanly County Superior Court in order to gain the necessary information concerning your automobile insurance." (Exhibit A).
5. Sometime thereafter Mr. Moore and Mr. Black spoke by telephone. Mr. Black stated that he was not covered under an insurance policy. Mr. Black also expressed his willingness to aid the Petitioning Creditor in any way possible as she undertook efforts to recover from her insurance company. Mr. Black

believed that Mr. Moore was contacting him to prepare a lawsuit against the Petitioning Creditor's insurance company.

6. On June 8, 2016, Mr. Moore commenced an action for the Petitioning Creditor by filing a complaint in Stanly County Superior Court seeking damages incurred in an amount in excess of \$25,000 as a result of Mr. Black's alleged negligence in operating a vehicle on a highway (the "State Court Action").
7. Mr. Black did not file an answer or otherwise respond to the State Court Action complaint.
8. On July 12, 2016, Mr. Moore contacted North Carolina Farm Credit Bureau. He attached a copy of the State Court Action complaint and a discovery request.
9. Around this time, Mr. Black tendered a copy of his mother's insurance card with MetLife to the Petitioning Creditor's nephew, who then passed the information along to Mr. Moore.
10. On July 26, 2016, Mr. Moore reached out to North Carolina Farm Credit Bureau and MetLife jointly, offering to settle the case for \$130,000, the sum of the policy limits for both policies.
11. On August 24, 2016, Mr. Moore filed a Motion for Entry of Default in the State Court Action on behalf of the Petitioning Creditor. The Iredell¹ County Clerk of Court entered default that same day.
12. The Petitioning Creditor filed a Motion for Entry of Default Judgment in the State Court Action. This motion and its corresponding certificate of service are dated September 9, 2016, and the motion is stamped as filed by Stanly County Clerk's Office on September 14, 2016 at 10:50 am. In this motion, the Petitioning Creditor requested a hearing for a determination of the amount of damages. A

¹ Though the State Court Action was filed in Stanly County, as was the Motion for Entry of Default Judgment, paragraph 6 reads, in part, "The Iredell County Clerk of Court entered default as to the Defendants on August 24, 2016." (Exhibit 2, ¶ 6).

Notice of Hearing on damages dated September 9, 2016 is also stamped as filed by Stanley County Clerk's Office on September 14, 2016 at 10:50am. The notice indicated that a hearing would be held at the Stanly County Courthouse, Albemarle, North Carolina, in Courtroom 402 on September 15, 2016 at 9:30 am.

13. Mr. Moore testified on direct examination that he obtained the September 15, 2016 date, time, and place by simply calling the clerk's office in the Superior Court of Stanly County and asking for a hearing date. On cross examination, Mr. Moore admitted that he was aware that September 15, 2016 was a criminal session, and to have a hearing in a civil matter heard during a criminal session, special leave from the state court judge must be sought.
14. On September 15, 2016 at 9:30 am, Mr. Black appeared at the Stanly County courthouse, went to Courtroom 402, and discovered that criminal court was in session. He inquired and was told that his case was not on that calendar, so Mr. Black then proceeded to the clerk's office, where they too were unable to locate the State Court Action. Mr. Black then went home. Mr. Black did not see the Petitioning Creditor, or any attorney not related to the criminal proceedings, during his time at the courthouse.
15. Mr. Moore was late in arriving for the 9:30 am hearing time, and was not present in the courtroom for the entirety of the morning.
16. The State Court Action was called at 11:30 am, but was continued until after lunch, since Mr. Moore had failed to file a Servicemembers Civil Relief Act affidavit with his pleadings. Over the lunch break, Mr. Moore filed the affidavit with the clerk's office.
17. After the lunch break on September 15, 2016, a hearing was held on the Petitioning Creditor's motion, at which time the Petitioning Creditor testified as to her injuries and additional evidence was provided as to the amount of

damages in the case. The Honorable Kevin M. Bridges entered a judgment for \$5,000,000 against Mr. Black at 2:53 pm that same day.

18. In early December 2016, Mr. Moore contacted J. David Stradley, an attorney with White & Stradley, PLLC with experience in dealing with insurance coverage-related claims. Mr. Moore became aware of a strategy whereby an involuntary petition is filed against a judgment debtor such that a bankruptcy trustee can pursue otherwise-non-assignable first-party claims against the debtor's insurance company to satisfy the judgment debt. Mr. Moore believes that Mr. Black holds potential breach of contract and tortious bad faith claims against both MetLife and North Carolina Farm Credit Bureau arising from their failure to defend Mr. Black in the State Court Action, claims which if pursued could satisfy the default judgment.
19. Mr. Moore called Mr. Black on December 16, 2016 to arrange an in-person meeting. Mr. Black and Mr. Moore settled on December 20, 2016 for a meeting time. Mr. Moore represented to Mr. Black that the meeting was to talk about the "procedures" going forward. Mr. Black believed the meeting had been requested to discuss issues that had arisen in the case, and he hoped to assist the Petitioning Creditor.
20. On December 20, 2016, Mr. Black met with Mr. Moore, who was accompanied by Mr. Stradley, at a local café. Mr. Black was informed that Mr. Stradley was an attorney who had been retained by the Petitioning Creditor.
21. At the meeting, Mr. Moore explained to Mr. Black that the Petitioning Creditor had a judgment from the State Court Action on which Mr. Black was liable and thus had an outstanding claim against him, and that they intended to file Mr. Black into an involuntary bankruptcy proceeding to collect on the judgment. Mr. Moore and Mr. Stradley asked Mr. Black a series of questions about his debts,

and Mr. Black informed them that he did not have any loans or credit cards; he was not past due on any utilities or insurance; his Verizon bill was paid in full monthly; and he was current on his payment plan with CMC Northeast for the EMS bill from the ambulance after the accident for which the final payment was due in January.

22. Mr. Moore and Mr. Stradley asked Mr. Black to fill out and sign an affidavit listing his other creditors, advising him to list Verizon and CMC Northeast. Mr. Black stated he had no other creditors to whom he owed money, and signed the affidavit. The last line of the affidavit signed by Mr. Black on December 20, 2016 reads, "I understand that the purpose of this affidavit is to ascertain the number of creditors I have in order to facilitate the filing of an involuntary bankruptcy proceeding against me." (Exhibit C-1).
23. At the December 20, 2016 meeting, Mr. Black was also provided with a copy of a Notice of Right to Have Exemptions Designated, and was told that a sheriff would be serving Mr. Black with those papers.
24. Mr. Stradley recorded the full December 20, 2016 meeting, and later made the record of the meeting available to Mr. Moore.
25. On December 22, 2016, John T. Jeffries of McAngus Goudelock & Courie sent a letter to Mr. Moore, stating that he had been retained by MetLife, and that once he obtained consent from Mr. Black to represent him in the State Court Action, he would be filing a Motion to Set Aside the Default Judgment. His letter also indicated that he had authorization to tender the limits of the applicable insurance policy as payment toward the existing judgment. (Exhibit K).
26. On December 28, 2016, MetLife tendered \$30,000 to Mr. Moore in partial payment of the judgment entered September 15, 2016. (Exhibit N).

27. On December 30, 2016, Harold Spears of Caudle & Spears, P.A. sent a letter to Mr. Moore stating that he represented Mr. Black, asking for copies of any statements Mr. Black made on December 20, 2016, seeking any recordings or videos from the meeting, requesting any documents or information provided, and asking for any documents Mr. Black may have signed. The letter also sought consent for an Order Setting Aside the Default Judgment while leaving the Entry of Default in place. (Exhibit M).
28. On January 5, 2017, North Carolina Farm Credit Bureau tendered \$222,738.72 to Mr. Moore in partial payment of the judgment and post-judgment interest entered September 15, 2016. (Exhibit O).
29. In early January of 2017, Mr. Black filled out and returned a Motion to Claim Exempt Property. (Exhibit P).
30. On January 13, 2017, the Petitioning Creditor obtained a writ of execution on her judgment against Mr. Black. The writ was delivered to the Stanly County Sheriff's Office the same day. (Exhibit Q). On January 20, 2017, the writ of execution was returned unserved because the sheriff did not locate property upon which to levy. (Exhibit Q).
31. On January 23, 2017 at 4:17 pm, Mr. Spears filed a Motion to Set Aside Entry of Default and Default Judgment in the Superior Court of Stanly County on Mr. Black's behalf, accompanied by an Answer denying liability in the accident and alleging six affirmative defenses, as well as by an affidavit executed by Mr. Black. (Motion to Dismiss, Exhibit E).
32. Subsequently on January 23, 2017 at 4:33 pm, the Petitioning Creditor filed an involuntary Chapter 7 bankruptcy petition (the "Involuntary Petition") pursuant to 11 U.S.C. § 303(b)(1) against Matthew James Black, placing the Debtor into bankruptcy. The Petitioning Creditor is the only petitioning creditor on the

Involuntary Petition. The Petitioning Creditor's involuntary case against Mr. Black was filed by William P. Janvier of Janvier Law Firm, PLLC.

33. Prior to filing an Involuntary Petition against Mr. Black, Mr. Janvier spoke with the Petitioning Creditor by phone, but at the hearing admitted he had never met with her in person.
34. Mr. Black timely responded to the Involuntary Petition by filing the present Motion on February 13, 2017. Mr. Black argues that: (a) since he has moved to set aside the state court judgment, there is a bona fide dispute as to the Petitioning Creditor's claim, and since she is the only creditor on the petition the case must be dismissed for lack of subject matter jurisdiction; (b) the petition was filed in bad faith; and (c) pursuant to 11 U.S.C. § 105, the petition is an abuse of process.
35. On February 21, 2017, the Petitioning Creditor filed a response in opposition to the instant Motion.
36. The Petitioning Creditor has filed the present case relying on 11 U.S.C. § 303(b) which provides as follows:

An involuntary case against a person 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 as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least \$15,775 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 ... by one or more of such holders that hold in the aggregate at least \$15,775 of such claims.

37. Section 303(h) provides that if an involuntary petition is controverted, the court shall order relief against the debtor only if “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 as to liability or amount.”
38. Involuntary petitions filed pursuant to § 303 may also be dismissed for bad faith, due to the inherent equitable nature of the bankruptcy court. *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328, 335 (3d Cir. 2015).
39. A petitioning creditor is presumed to be acting in good faith in filing an involuntary petition. *Forever Green Athletic Fields*, 804 F.3d at 335. To determine whether an involuntary petition is filed in bad faith, a court must examine whether a reasonable person would have filed the petition, an objective test, as well as the motivations of the petitioning creditor, a subjective test. *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 716 (4th Cir. 1993). If a petition is challenged as having been filed in bad faith, a court must evaluate the totality of the circumstances in adjudicating whether an alleged debtor overcomes the presumption of good faith. *U.S. Optical, Inc. v. Corning (In re U.S. Optical, Inc.)*, 991 F.2d 792, *4 (4th Cir. 1993).
40. Here, after consideration of the totality of the circumstances, whether a reasonable person would have filed the petition as well as the motivations of the Petitioning Creditor, the court finds that Mr. Black has overcome the presumption that the case was filed in good faith and has established that the Involuntary Petition was filed in bad faith and must be dismissed.
41. In finding bad faith, the court considers that the Petitioning Creditor is seeking a bankruptcy trustee to pursue potential breach of contract and tortious bad faith claims that she could not directly pursue in state court, which raises grave

concerns about whether the bankruptcy system is being used for an improper purpose.²

42. Here, there is only one petitioning creditor, and other than the Petitioning Creditor's default judgment, Mr. Black is generally paying his debts as they become due. In fact, aside from one final payment on his EMS bill, Mr. Black had no debt as of the filing other than the claim held by the Petitioning Creditor. The Petitioning Creditor was aware of this information prior to filing the Involuntary Petition. The Petitioning Creditor acted with the full knowledge that the involuntary proceeding would be purely self-serving and of no benefit to other creditors.
43. Further, the bankruptcy code should not be used as a debt collection mechanism. *Atlas*, 986 F.2d at 716 n. 11 ("Debt collection is not a proper purpose of bankruptcy."); see *Forever Green Athletic Fields*, 804 F.3d at 335 n. 6 (citing David S. Kennedy et al., *The Involuntary Bankruptcy Process: A Study of the Relevant Statutory and Procedural Provisions and Related Matters*, 31 U. MEM. L. REV. 1, 58 (Fall 2000) (explaining that creditors should not "invoke the involuntary bankruptcy process ... based on personal whim or vindictiveness seeking to collect an unpaid debt"))).
44. Some of the communications that counsel for the Petitioning Creditor had with Mr. Black prior to obtaining the default judgment were not forthright, and were at times misleading. This is particularly worrisome, given that the claim giving rise to the default judgment serves as the basis for filing this Involuntary Petition. For example, Mr. Moore's letter dated March 14, 2016 clearly states that a lawsuit might be filed against Mr. Black specifically to gain necessary

² Under North Carolina law, such claims are not assignable. *Horton v. New S. Ins. Co.*, 468 S.E.2d 856, 858 (N.C. Ct. App. 1996).

information regarding automobile insurance coverage, a letter that is misleading as to Mr. Moore's intent to file a suit against Mr. Black alleging liability for the Petitioning Creditor's injuries. Mr. Moore represented that his telephonic communications were consistent with his written letter. Also, Mr. Moore testified that he sought special permission to have the hearing on the Motion for Default Judgment heard during a criminal session. And, Mr. Moore arrived late for the September 15, 2016 hearing.

45. Additionally, the December 20, 2016 meeting seems duplicitous in nature. The purported reason of the meeting on December 20 was to discuss next "procedural" steps after obtaining a default judgment. It was well beyond the realm of normal procedural steps to: (1) file the State Court Action; (2) obtain a default judgment; (3) meet with Mr. Black, an unrepresented defendant, to obtain information for the purpose of filing an involuntary bankruptcy; and only after that, (4) request an execution on the judgment.
46. The December 20, 2016 meeting was really about preparing to file an involuntary bankruptcy. Otherwise there would have been no need to discuss the number and identity of Mr. Black's other creditors. Mr. Moore admitted as much, stating in his testimony that he and Mr. Stradley were meeting Mr. Black for the purposes of explaining that they intended to file an involuntary petition.
47. While Mr. Moore does not believe that he offered legal advice to Mr. Black at any point, his conduct and Mr. Stradley's conduct on December 20, 2016 raises concerns regarding Rule 4.3 of the Rules of Professional Conduct.³ Mr. Moore also stated that he was aware under the Rules of Ethics that he has an ethical

³ "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not: (a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client" N.C. RULES OF PROF'L CONDUCT r. 4.3 (2003).

obligation regarding his communications to Mr. Black (a) as an adverse party, and even more so (b) as an unsophisticated lay person. His conduct indicates otherwise.

48. Other conduct of the Petitioning Creditor's attorneys in filing this case is also questionable. First, counsel for the Petitioning Creditor was aware as early as December that Mr. Black was going to seek, through counsel, to have the state court judgment set aside, and yet they proceeded with executing on the petitioning creditor's judgment, and they filed the instant case only 16 minutes after Mr. Black filed his motion in the State Court Action. Further, Mr. Janvier did not offer any explanation as to why the filing of this involuntary petition was so urgent that it could not wait until his schedule permitted him to meet with his client. This involuntary case appears to have been filed in haste to cut off Mr. Black's ability to file the motion to set aside the default judgment in the State Court Action. Courts have a strong preference in favor of deciding cases on the merits, and this court has a low tolerance for tactics that seek to undermine that principal.
49. Lastly, there appears to be no reason why Mr. Black should be cut off from pursuing his own claims, if any, against the insurance companies. There is no allegation of a wasting asset, and it is clear that Mr. Black only became aware of the possible existence of such claims very recently.
50. Section 303(i) provides that if the court dismisses an involuntary petition, the court may grant judgment against the petitioner and in favor of the debtor for damages. 11 U.S.C. § 303(i). At the hearing on this matter, counsel for Mr. Black indicated that they would waive any request for attorneys' fees. The court did not reach the issue of any other possible damages.

Therefore, for the reasons set forth above, as well those stated on the record, it is hereby **ORDERED** that

1. The Motion to Dismiss is GRANTED and the Involuntary Petition is DISMISSED;
2. Consumer reporting agencies (as defined in § 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))) are hereby prohibited from making any consumer report (as defined in § 603(d) of that Act) that contains any information relating to the Involuntary Petition or to the above-captioned case; and
3. Mr. Black shall have 14 days from the date of this order to file a request, if any, pursuant to 11 U.S.C. § 303(i)(1)(A) or § 303(i)(2), along with any necessary supporting documents or affidavits. The Petitioning Creditor shall have 7 days from the filing of any such request to file a response.

[END OF DOCUMENT]

PARTIES TO BE SERVED

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17-50064 C-7

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