United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting Opinions

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Bankruptcy No.	22 BK 02485 (Involuntary)
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Judge:	Jacqueline P. Cox
Appearance of Counsel:	
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re: 318 Retail, LLC	)	Case No. 22-BK-02485 (Involuntary)
	)	
Alleged Debtor.	)	Chapter 11
	)	
	)	Honorable Jacqueline P. Cox

Amended Order on the Receiver's Amended Motion to Extend Time to File Responsive Pleadings (Dkt. No. 21)

This matter concerns a dispute between a state court-appointed receiver and a creditor who filed an Involuntary Petition against the Debtor, a non-individual, regarding whether the receiver has the right to contest the involuntary bankruptcy petition.

James E. Sullivan, in his capacity as court-appointed receiver for the Debtor ("Receiver" or "Movant"), filed a Motion for an Extension of Time to File Responsive Pleadings ("Motion") (Dkt. No. 21). The Receiver previously filed a Motion seeking the same relief at Docket No. 15. Republic Bank of Chicago ("Republic Bank" or "Creditor") filed an Objection thereto (Dkt. No. 16).

On April 12, 2022, the Court entered an Order permitting the Debtor to file a Response and the Movant to file a Reply. Dkt. No. 25. The court's order stated that the parties could address the following issues in their responsive pleadings: (1) if the receiver could not legally respond to the Involuntary Petition in this case, who can respond under Fed. R. Bankr. P. 1011; and (2) would any other person's or entity's participation in this matter, via responding to the Involuntary Petition, violate the receivership order?

Thereafter, a Contested Hearing on the matter was held on Tuesday, May 10, 2022 via Zoom.

Before considering the merits of the Motion, the court will examine the background of this

case.

I. Jurisdiction

This court has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter is a "core" proceeding under 28 U.S.C. § 157(b)(2)(A), a matter concerning the administration of the estate.

II. Background

On August 21, 2020, James E. Sullivan was appointed Receiver by court order in a domestic relations case in the Circuit Court of Cook County, IL. *See* Republic Bank's Response ("Response"), Dkt. No. 26, ¶ 3 (citing Motion, Dkt. No. 21, Ex. A (Agreed Order Appointing Receiver, *W. Kehlaulani Lum v. Louis D'Angelo*, No. 11 D 007463 (Ill. Cir. Ct. Aug. 21, 2020) ("Receivership Order")). The Receiver was appointed to take possession of, preserve, and arrange for the sale of certain real estate held by Louis D'Angelo ("D'Angelo") and "any business entity in which Louis had an interest," including the subject commercial condominium unit known as 318 S. Michigan Ave., Chicago, IL (the "Premises"). Specifically, the Receivership Order gives the Receiver power over (1) businesses and property of the husband, D'Angelo, including the Premises; (2) directs him to take possession of those properties; and (3) authorizes him "to take all actions necessary to take title . . . and to sell . . . ." those properties. Motion, Dkt. No. 21, Ex. A, pp. 2-4.

Republic Bank holds a duly recorded first priority mortgage encumbering the Premises. Response, Dkt. No. 26, ¶ 4. Before the appointment of the Receiver, the Alleged Debtor signed a promissory note in the principal amount of $2,700,000 secured by the first mortgage. *Id.* The Receiver does not dispute that Republic Bank has a mortgage on the Premises that secures the multi-

million dollar debt.

On October 25, 2019, before the appointment of the Receiver, the note secured by the mortgage matured. Response, Dkt. No. 26, ¶ 7. The current indebtedness due and owing to Republic Bank exceeds $2,500,000 and continues to increase. Response, Dkt. No. 26, ¶ 7.

The Receiver reports that on August 20, 2020, a quitclaim deed was executed by D'Angelo transferring the Premises to him. Motion, Dkt. No. 21, ¶ 4. The Bank counters that any transfer by D'Angelo to the Receiver would have been as a custodian and not to transfer ownership of the Premises to the Receiver personally. Response, Dkt. No. 26, ¶ 8. The Bank argues that, regardless, the transfer would be invalid, since D'Angelo has never been in title to the Premises and thus any quitclaim deed from D'Angelo to the Receiver would be outside the chain of title and would not convey an interest in the real estate. Response, Dkt. No. 26, ¶ 9.

III. Analysis

The parties dispute whether the Receiver has standing to contest the Involuntary Petition.

The Bank argues that the Receiver is a mere "custodian" and that he is not entitled to contest the Involuntary Petition. Reply, Dkt. No. 26, ¶ 16.

It is clear that "the debtor or a general partner . . . that did not join in the petition, may file an answer" to an involuntary petition. 11 U.S.C. § 303(d). Likewise, the "debtor named in an involuntary petition may contest the petition." *See* Fed. R. Bankr. P. 1011(a). However, here the alleged Debtor has neither filed an answer nor contested the petition.

Here, a state court-appointed receiver seeks to appear and contest the petition. Although there is some case law addressing the issue, the Bankruptcy Code and Federal Rules of Bankruptcy Procedure are less clear in defining which parties or entities other than the alleged Debtor, including

receivers, have standing to do so.

A. The Receiver is a "Custodian" under 11 U.S.C. § 101(11)(A)

A "custodian" includes a "receiver or trustee of any of the property of the debtor, appointed in a case or proceeding" not under the Bankruptcy Code. *See* 11 U.S.C. § 101(11)(A). The Receiver is a "custodian" under the Bankruptcy Code of the Premises, the property at 318 S. Michigan Ave.

The Receiver argues that even if he is a custodian, this does not mean he does not have standing to intervene because courts may allow receivers to appear on behalf of a debtor corporation in bankruptcy matters to oppose an involuntary petition. Reply, Dkt. No. 27, ¶ 8 (citing *In re Hewitt Grocery Co.*, 33 F.Supp. 493, 494-95 (D. Conn. 1940)). The Receiver also argues that bad faith is a basis to contest an Involuntary Petition and that he will establish in his responsive pleading that "this Involuntary Bankruptcy filing was a bad faith effort by Republic Bank to forum shop." Reply, Dkt. No. 27, ¶ 14. The court notes that the Receiver failed to make this bad faith argument in his motion (Docket No. 21) and declines to address the argument concerning bad faith at this time.

B. Jurisprudence on a Receiver's Ability to Respond in Involuntary Bankruptcies

Jurisprudence in this area suggests receivers may be able to intervene, file a motion to dismiss, or answer the petition. 2 COLLIER ON BANKRUPTCY ¶ 303.20[1][c] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (citations omitted).[1] Each of these actions will be examined in turn.

i. Intervention

Some authorities suggest a receiver may seek to intervene under Fed. R. Bankr. P. 1018. COLLIER ON BANKRUPTCY (citations omitted). Per Bankruptcy Rule 1018, Bankruptcy Rule 7024 applies to proceedings contesting an involuntary petition. *See* Fed. R. Bankr. P. 1018 (citing Fed.

[1] All references to "COLLIER ON BANKRUPTCY" refer to 2 COLLIER ON BANKRUPTCY ¶ 303.20[1][c] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

R. Bankr. P. 7024).

The court notes that before the Bankruptcy Code was enacted in 1978, the Seventh Circuit held that stockholders and state court receivers did not have an "absolute right" to contest an involuntary petition filed against a corporation, although the district court has "discretion" to allow them to intervene "upon a proper showing." *See In re Nat'l Republic Co.*, 109 F.2d 167, 170 (7th Cir. 1940), *cert. denied*, 309 U.S. 671, 60 S.Ct. 614, 84 L.Ed. 1017 (1940), *reh'g denied*, 309 U.S. 698, 60 S.Ct. 721, 84 L.Ed. 1037 (1940). In *Nat'l Republic Co.*, the Seventh Circuit reasoned that the District Court had permitted the state court receiver and stockholders to intervene because it assumed they were entitled to do so; however, the court stated that if the district court "felt their participation was unnecessary and served no good purpose, it was its duty to deny the intervention." *Id.* at 170. The Seventh Circuit suggests that where courts feel a receiver's intervention is necessary and would serve a good purpose, courts have discretion to permit a receiver to intervene. *See id.* However, the relevance of this case today is unclear, given that it predated enactment of the Bankruptcy Code in 1978.

Recent authorities have posited that "the custodian could seek to intervene in the proceeding under Bankruptcy Rule 1018(a) [sic], and such intervention should be granted." COLLIER ON BANKRUPTCY. A creditor and a custodian have different rationales for intervening. *Id.* A creditor may intervene "to protect preferences or fraudulent transfers received from the debtor or to quash investigations of suspect dealing with the debtor." *Id.* In contrast, a custodian may be "protecting assets for all creditors and may believe that this can be accomplished outside the bankruptcy system through the pending state procedure." *Id.*

ii. Motion to Dismiss

Some authorities also posit that "[a]n argument can be made that pursuant to section 707(a) or, more strongly, section 1112(b), any party in interest may bring a motion to dismiss an involuntary case." COLLIER ON BANKRUPTCY (citations omitted). Section 707(a) does not limit who may seek dismissal under it. Under 11 U.S.C. § 707(a), after notice and a hearing, a court may dismiss a bankruptcy case "for cause," including "unreasonable delay by the debtor that is prejudicial to creditors" and "nonpayment of any fees or charges required under chapter 123 of title 28." 11 U.S.C. § 707(a)(1)-(2). Under 11 U.S.C. § 1112(b), after notice and a hearing, upon the request of a "party in interest," the court "shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate . . . ."

Some courts have held that entities other than the alleged debtor in an involuntary case may file a motion to dismiss under 11 U.S.C. § 707(a). *See In re J.R. Food Mart of Ark.*, 234 B.R. 420, 421-22 (Bankr. E.D. Ark. 1999). In *In re J.R. Food Mart of Ark.*, entities related to the Debtor ("respondents") filed a Response and Motion to Dismiss or Abstain in response to the Involuntary Petition and a separate Motion to Dismiss under 11 U.S.C. §§ 305(a), 707(a). *Id.* at 421. The petitioning creditors moved to strike; the court granted the motion in part, finding that the respondents could not contest the involuntary petition under Fed. R. Bankr. P. 1011 and 11 U.S.C. § 303 but were permitted to file a motion to dismiss under 11 U.S.C. §§ 305(a), 707(a).[2]

The Receiver argues that "bad faith" is a basis to contest an Involuntary Petition and that he

[2] Section 305(a) of the Bankruptcy Code allows courts to abstain from hearing matters in favor of having them proceed in another forum by dismissing or suspending proceedings where "the interests of creditors and the debtor would be better served by such dismissal or suspension . . . ." 11 U.S.C. § 305(a)(1).

would develop his position that this involuntary bankruptcy case was filed in bad faith in his responsive pleading. Reply, Dkt. No. 27, ¶¶ 14, 17. The court notes that "bad faith" may constitute "cause" for dismissal under § 1112(b). *See In re Lee*, 467 B.R. 906, 913-14, 917 (6th Cir. B.A.P. 2012). However, the court declines to address that argument at this time.

iii. Answering the Petition

COLLIER ON BANKRUPTCY surmises that case law suggests a receiver can answer an involuntary petition, assuming that the Debtor has not done so, even though a receiver's ability to do so is not specifically mentioned in 11 U.S.C. § 303(d). When deciding whether a receiver may file an answer, courts have looked to various considerations, including whether the Debtor filed an answer, the language of the state receivership statute, and the receiver's powers under the receivership order. *See In re Starlite Houseboats, Inc.*, 426 B.R. 375, 381 (Bankr. D. Kan. 2010) (citing K.S.A. 17–6901); *see also In re A & B Liquidating, Inc*., 18 B.R. 922, 925 (Bankr. E.D. Va. 1982) (finding that an assignee for the benefit of creditors was a proper party to answer an involuntary petition).

For instance, in *In re A & B Liquidating, Inc.*, the court ruled that an assignee had standing to file an answer to an involuntary bankruptcy petition, focusing on the court's equitable powers and the fact that the debtor had not filed an answer. *In re A & B Liquidating, Inc.*, 18 B.R. at 925 (citations omitted). The court stated that "[a] receiver's right to be heard in a bankruptcy proceeding stems, ' . . . not from express statutory authorization but rather from the inherent equitable power of the bankruptcy court to grant intervention in a proper exercise of discretion."' 18 B.R. at 925 (citing *In re Hewitt Grocery Co.*, 33 F.Supp. at 495). The court also reasoned that the debtor's failure to file an answer to an involuntary petition provided a strong justification for permitting a

custodian to file an answer. *In re A & B Liquidating, Inc.*, 18 B.R. at 925 ("In light of an assignee's responsibilities and interests, . . . absent the filing of an answer by the Debtor, the assignee for the benefit of creditors has standing to file an answer.") (citations omitted).

Here, the alleged Debtor has failed to file an answer. *See* Response, ¶ 27. This supports allowing the Receiver to intervene and to seek dismissal.

The language of Illinois' receivership statute is similar to the language of other states' receivership statutes, which courts have interpreted to permit receivers to intervene. For instance, in *In re Starlite Houseboats, Inc.*, the court found the receiver was a proper party to answer an involuntary petition because "[t]he Kansas receivership statutes . . . vest a receiver "with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, ..." *See* 426 B.R. at 381 (citing K.S.A. 17–6901).

Unlike the Kansas statute, the Illinois receivership statute, 210 ILCS 47/3-508 (2020), does not specifically mention defending "all claims or suits. " It provides that the receiver "[s]hall exercise those powers and shall perform those duties set out by the court" and "[s]hall take such action as is reasonably necessary to protect or conserve the assets or property of which the receiver takes possession, or the proceeds from any transfer thereof, ..." 210 ILCS 47/3-508(a), (c).

The Receiver was appointed to take possession of, preserve, and arrange for the sale of certain real estate held by D'Angelo, including the Premises, 318 S. Michigan Ave., Chicago, IL. Motion, Dkt. No. 21, Ex. A, p. 3. Subject to the approval of D'Angelo's ex-wife, W. Kehaulani Lum, "the Receiver shall have all of the rights and powers necessary to fulfill his obligations under this order, specifically including, but not necessarily limited to, the power to . . . take any action reasonably necessary to protect and preserve the value of the real properties before the sale of the

properties is finalized." Motion, Dkt. No. 21, Ex. A, pp. 3-4. The Receiver was also "authorized to take all actions necessary to take title to the Loop Properties," including the Premises, as long as he discusses the sales price with Ms. Lum. Motion, Dkt. No. 21, Ex. A, pp. 1, 4.

IV. Conclusion

The broad language of both the Illinois Receivership Statute and the Receivership Order suggests the Receiver should have the right to file a responsive pleading, but not an answer.

The court rules as follows on the Receiver's Motion (Docket No. 21): the Receiver may file motions to intervene or to dismiss (or abstain) on or before June 15, 2022.

The Receiver will not be allowed to answer or contest the Involuntary Petition because Bankruptcy Code § 303(d) and Fed. R. Bankr. P. 1011(a) allow debtors and non-petitioning general partners only to do so.

Date: May 27, 2022

ENTER: _____
Judge Jacqueline P. Cox