U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-04207

ORDER OF DISMISSAL

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby ORDERED.

FILED BY THE COURT
09/21/2009

US Bankruptcy Court Judge
District of South Carolina

Entered: 09/21/2009

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 09-04207-HB
	Chapter 11
Clifton Power Corporation,	
Debtor(s).	

ORDER DISMISSING CASE

This case came before the Court on September 10, 2009, for hearing on the Chapter 11 involuntary petition and a request to dismiss. From the record, evidence and proffer of evidence at the hearing, the Court finds as follows:

Facts

On June 4, 2009, Charles B. Mierek ("Mierek") filed an involuntary petition for Chapter 11 relief pursuant to 11 U.S.C. § 330(b) against Clifton Power Corporation ("alleged debtor"). Mierek was the only petitioning creditor listed on the involuntary petition. The Court issued a summons to Mierek for service. On July 13, 2009, Mierek sent the Court a letter that explained he was unable to serve the summons within the required time, and he therefore requested issuance of a new summons. On July 21, 2009, Mierek filed correspondence with the Court stating that "the summons and the clocked copy of the involuntary petition were served on the Clifton Power Corporation President on July 20, 2009." That correspondence did not include the usual details such as the service address, method of service or the name of any appropriate person served. However, Mierek stated at that hearing that he served the summons and involuntary petition on himself because he was not only the petitioning creditor, but also the registered agent and President of the alleged debtor.

On August 4, 2009, Spartanburg Water filed a request to dismiss this matter, claiming that the involuntary petition was filed as a delay tactic. Spartanburg Water was the highest bidder at a Master's Sale of the alleged debtor's real property on June 3, 2009; however, before the Master's Deed could be signed, the involuntary petition was filed. The United States Trustee ("Trustee") filed a document supporting the dismissal of the case on the following grounds:

> 1. Charles B. Mierek, the debtor's principal, sole shareholder, president, and a creditor filed the involuntary petition against the debtor. This case appears to be an involuntary case filed by Mr. Mierek, a friendly creditor, for the purpose of stalling a foreclosure sale of the alleged debtor's property - not for the benefit of the alleged debtor's creditors. Mr. Mierek has invoked the jurisdiction of this Court in bad faith.
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> 2. Charles B. Mierek represented to the Court that he was unable to effect timely service upon the alleged debtor of the involuntary petition and summons. There is no reasonable justification for the failure to complete service other than for the purpose of delaying the administration of this case.
>
> 3. Charles B. Mierek appears to be attempting to represent the debtor, a corporation, without the benefit of counsel. Mr. Mierek is not a licensed attorney.
>
> 4. Charles B. Mierek, the sole petitioning creditor, has not shown that he meets the requirements of 11 U.S.C. § 303(b) for the filing of an involuntary petition.

The alleged debtor filed an Answer to the involuntary petition on August 12, 2009. The answer was executed "by and through its President, Charles B. Mierek." The answer stated that Mierek is the 100% owner of the alleged debtor. In the answer Mierek further stated, on behalf of that alleged debtor, that the corporation does not oppose the

involuntary petition that he filed as petitioning creditor. The Answer asked that the involuntary petition "be converted into a Chapter 11 voluntary bankruptcy." However, as of the hearing date no progress had been made to further that request, such as filing schedules and statements or formulating any business plan or significant reorganization strategy. Although the involuntary petition was filed more than three months earlier, at the hearing on these matters Mierek stated that he has attempted to but has been unable to find an attorney to represent the alleged debtor corporation. [1]

At the hearing Mierek presented affidavits from two additional creditors, The Clifton Corp. and Nancy Mierek, supporting his involuntary petition. He is married to Nancy Mierek and he and/or his wife own a controlling interest in The Clifton Corp. After the hearing on September 15, 2009, Mierek filed the following list of creditors per the Court's request:

	A	B	C	D	E	F
1		CLIFTON POWER CORPORATION				
2						
3						
4		SCHEDULE OF LIABILITIES				
5		September 2009				
6						
7		NAME OF CREDITOR			CURRENT	
8					BALANCE	
9					$	
10						
11	1	DUKE POWER CO.			>20,000	
12	2	THE CLIFTON CORP.			167,250	
13	3	FORT WOLFE ASSOC.			42,200	
14	4	SC DEPT OF REVENUE			650	
15	5	ELEFANT LAW FIRM			13,500	
16	6	SWIDERSKI ENGINEERING			8,000	
17	7	NANCY MIEREK			>150,000	
18	8	CHARLES MIEREK			>150,000	
19						
20						
21						

[1] South Carolina Local Rule of Bankruptcy Procedure 9011-2(c) provides that "[a]ll partnerships, corporations and other business entities must be represented by an attorney duly admitted to practice as specified in SC LBR 2090-1, except with respect to the filing of proofs of claim or interests and reaffirmation agreements."

Discussion and Conclusions of Law

Section 303(b) of the Bankruptcy Code provides the following:

> (b) 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 $13,475[2] 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 $13,475 of such claims.

Mierek asserted that the involuntary petition was correctly commenced by him alone because the alleged debtor has less than ten creditors. Alternatively, he argued that the two affidavits in support of the involuntary petition are sufficient to bring it in compliance with § 330(b)(1).[2] As there are no schedules and statements filed in this case, verified under penalty of perjury, it is difficult for the Court to determine the applicable number of creditors. Further, the two added creditors did not take any further steps to join in the petition beyond the signing of an affidavit. It is therefore unclear from the evidence whether the involuntary petition was properly initiated pursuant to § 330(b)(1) or (2). Regardless, the involuntary petition was not controverted by the alleged debtor and therefore § 330(h) provides that the Court shall order relief against the debtor. The unusual facts concerning how this case was commenced, however, are evidence to be considered when addressing the dismissal request.

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[2] 11 U.S.C. § 303(c) provides that "a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section."

11 U.S.C. § 1112(b)(1) states:

> [O]n request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, 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, if the movant establishes cause.

Several examples of "cause" are listed in § 1112(b)(4). "Bad faith is not an enumerated ground under § 1112(b)(4), but courts have found that bad faith is cause that justifies dismissal of a Chapter 11 case." In re Harmony Holdings, LLC, C/A No. 08-00599-dd, slip op. at 8 (Bankr. D.S.C. Sep 11, 2008) (citing Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989). "In the Fourth Circuit a party moving for dismissal on the ground of bad faith must prove, by a preponderance of the evidence, both the objective futility of reorganization and subjective bad faith." Id.

Further, "if it appears there was collusion between the Debtor and the petitioning creditors, and they fraudulently invoked the jurisdiction of the Court, the Court will not tolerate the maintenance of an involuntary petition." In re Winn, 49 B.R. 237, 239 (Bankr. M.D. Fla. 1985). A court is "duty bound to conduct an inquiry at the outset of the case if requested to determine the legitimate purpose of the parties who sought to invoke the jurisdiction of this Court and take appropriate steps to prevent the abuse of the bankruptcy process." Id.

Mierek is the petitioning creditor and the President of the alleged debtor. He filed the involuntary petition *against the alleged debtor*, he eventually served himself with the summons accepting it *for the alleged debtor*, and then he filed an Answer on behalf of the alleged debtor corporation. Despite his attempts to answer the Court's question about his

advocacy, it was unclear to the Court which interest(s) he was representing at the hearing on these matters. There can be no stronger evidence of collusion in the filing of an involuntary petition than when the same party appears on all sides of the petition. If the alleged debtor, its ownership and primary creditors all agreed that a Chapter 11 reorganization was necessary, they could easily have sought the protection of bankruptcy through a voluntary petition and the case would have advanced significantly by this point in time. The failure to proceed with a voluntary petition, and instead initiating the case in this convoluted manner, is evidence of bad faith on the part of both the petitioning creditor and the alleged debtor. Even though the involuntary petition was filed more than three months before this hearing, the case has not accomplished anything other than unnecessary delay. Due to the collusion, delay, lack of evidence of any reasonable prospects for reorganization or progress towards that goal, and due to the bad faith of the petitioning creditor and alleged debtor, the Court finds that cause exists to dismiss this case pursuant to § 1112(b).

THEREFORE, IT IS ORDERED that Spartanburg Water's Motion to Dismiss is GRANTED, and this Chapter 11 case is hereby DISMISSED.

AND IT IS SO ORDERED.