

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Involuntary
) Proceedings
HOEFFKEN BROS., INC.,) Under Chapter 7
)
Debtor.) No. BK 87-30712

MEMORANDUM AND ORDER

This matter is before the Court on debtor's Motion to Dismiss. On July 31, 1987 Fidelity and Deposit Company of Maryland ("Fidelity and Deposit"), Rednour Steel Erectors, Inc. ("Rednour") and Lester Germann filed an Involuntary under Chapter 7 of the Bankruptcy Code. Petitioners alleged that the debtor, Hoeffken Bros., Inc. ("Hoeffken Bros.") owed debts exceeding \$5,000.00 and that debtor was generally not paying its debts as such debts became due. The relevant facts are as follows:

On June 20, 1983 and August 22, 1983 the State of Illinois Department of Transportation ("IDOT") entered into contracts with H.H. Hall Construction Co. ("H.H. Hall") for the construction and completion of certain improvements in St. Clair County, Illinois. Fidelity and Deposit, as surety, and H.H. Hall, as principal, executed a contract bond on each of these contracts. The original contracts between H.H. Hall and IDOT were subsequently terminated and declared in default by IDOT. Fidelity and Deposit then took over the work on the H.H. Hall contracts. On March 27, 1985 Fidelity and Deposit and Hoeffken Bros. executed two separate Completion Contracts, pursuant to which Hoeffken Bros. was to complete the work remaining to be done under the original H.H. Hall

contracts. Hoeffken Bros. has since completed all of the work required by the Completion Contracts, but has not yet been paid by Fidelity and Deposit.

During July 1987, Fidelity and Deposit made payments excess of \$5,000.00 to various suppliers and subcontractors of Hoeffken Bros. Payments were made by issuing two-party checks made payable to Hoeffken Bros. and the particular supplier or subcontractor. Hoeffken Bros. endorsed all checks over to its subcontractors and suppliers in payment for work performed on the two Completion Contracts. These same suppliers and subcontractors then assigned their claims against Hoeffken Bros. to Fidelity and Deposit. Fidelity and Deposit contends that, pursuant to these assignments, Hoeffken Bros. owes it approximately \$32,000.00. Rednour, another petitioning creditor, alleges that Hoeffken Bros. owes it more than \$34,000.00 for work performed on four subcontracts for IDOT construction projects. (These projects are separate and different from the H.H. Hall construction projects.) Finally, Lester Germann, the third petitioning creditor, claims that Hoeffken Bros. owes it \$31,174.75 for work performed as a subcontractor of debtor on two other IDOT construction projects.

In response to the claim of Fidelity and Deposit, Hoeffken Bros. contends that as of the date the Involuntary Petition was filed, Fidelity and Deposit owed Hoeffken Bros. \$271,730.95 under the Completion Contracts. Additionally, debtor contends that Rednour has a lien on a retainage fund held by IDOT in the amount of \$16,712.85. Likewise, debtor contends that Lester Germann holds a lien on the funds due from IDOT to Hoeffken Bros., and that Germann is therefore fully

secured.

The statutory provision governing involuntary petitions is 11 U.S.C. §303. That statute provides, in part, as follows:

(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, or an indenture trustee representing such a holder, if such claims aggregate at least \$5,000 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 \$5,000 of such claims....

11 U.S.C. §303(b)(1) and (2). Under this statutory provision, "the claim of each creditor must be one that is not subject to a 'bona fide dispute.'" Matter of Busick, 831 F.2d 745, 746 (7th Cir. 1987). In Busick, the court held that "'if there is a bona fide dispute as to either the law or the facts, then the creditor does not qualify and the petition must be dismissed.'" Id. at 750 (citations omitted). "Under this standard, 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." Id.

In determining whether a bona fide dispute exists as to the "debt" allegedly owed Fidelity and Deposit, the Court has considered two

factors: 1) Did Fidelity and Deposit owe Hoeffken Bros. \$271,730.95 on the date the Petition was filed, and 2) What effect do the assignments, which were executed by various subcontractors and suppliers, have on Fidelity and Deposit's claim against Hoeffken Bros.?

With regard to the first question, the Court notes with interest two provisions in the Completion Contracts. In each contract, Article V provides that "Fidelity shall make payment to Hoeffken on the date that Fidelity receives payment from IDOT...." The same article, however, also provides:

If for reasons not related to Hoeffken performance of the completion, payments by IDOT to Fidelity are delayed, in whole or in part, for more than seven days beyond the usual time for receipt of such payment, Fidelity will not withhold or delay payment to Hoeffken.

Fidelity and Deposit contends that debtor failed to establish the existence of a bona fide dispute since under the terms of the contract, Fidelity was not required to pay debtor until IDOT paid Fidelity. The contract clearly provides otherwise. Furthermore, Maurice Hoeffken, President of Hoeffken Bros., testified that although he was uncertain whether IDOT had paid Fidelity and Deposit as of July 31, 1987, the date the Petition was filed, he at least thought that Fidelity and Deposit owed Hoeffken Bros. approximately \$270,000.00 as of that date. In light of the provisions in the Completion Contracts, and in view of Hoeffken's testimony, there clearly exists an "objective basis" for a factual dispute as to the validity of the debt allegedly owed Fidelity and Deposit. See Busick, 831 F. 2d at, 750.

The assignments likewise fail to create a claim that is not

subject to a bona fide dispute. When Fidelity and Deposit took over the H.H. Hall contracts, it effectively assumed the capacity of general contractor. As such, it was obligated to pay Hoeffken Bros., who in turn, was required to pay its subcontractors. The evidence established that Fidelity and Deposit had not paid Hoeffken Bros. as of July 31, 1987. It makes little sense then, for Fidelity, who still owes Hoeffken Bros., to pay the subcontractors and to then claim that Hoeffken Bros. owes it for those amounts. Under these facts, the Court finds that a bona fide dispute exists with regard to Fidelity and Deposit's claim.

Fidelity and Deposit raises an additional argument in response to debtor's claim that Fidelity actually owes money to Hoeffken Bros. Apparently, sometime after the bankruptcy Petition was filed, Fidelity and Deposit paid \$1,500,000.00 to MacClair Asphalt, a subcontractor of Hoeffken Bros., on yet another project bonded by Fidelity and Deposit. (No allegations regarding MacClair Asphalt were set forth in the Involuntary Petition.) Fidelity and Deposit contends, therefore, that even assuming it owes debtor \$271,730.95, the net difference between that amount and Hoeffken Bros.' liability to MacClair Asphalt greatly exceeds \$5,000.00. However, Maurice Hoeffken testified, and there was no evidence to the contrary, that the promissory note from Hoeffken Bros. to MacClair Asphalt was not due and payable until after July 31, 1987. Therefore, according to the evidence, Hoeffken Bros. did not owe Fidelity and Deposit the \$1,500,000.00 as of the date the Petition was filed. Thus, Fidelity and Deposit does not qualify as a petitioning creditor within the meaning of section 303.

As previously stated, debtor contends that Lester Germann holds a lien on the funds due from IDOT to Hoeffken Bros., and that Germann is therefore fully secured. At the hearing on the Motion to Dismiss and in its Findings of Fact, Fidelity and Deposit contends that Germann does not possess a lien on property of the debtor, but only a lien on property of another. According to Fidelity and Deposit, Germann is therefore a proper claimant under 11 U.S.C. §303(b). The cases cited by Fidelity in support of its position are factually distinguishable, and the Court has found no other cases on point. The Court finds that the money owed by the State to Hoeffken Bros. is property of the debtor, particularly in view of the fact that no evidence was presented suggesting that the State was not going to pay debtor. Therefore, Lester Germann, as a fully secured creditor, does not qualify as a claimant under section 303.

Rednour, the only remaining creditor, has moved to withdraw. In light of the Court's holding with respect to Fidelity and Deposit and Lester Germann, IT IS ORDERED that Rednour's Petition to Withdraw is GRANTED.

IT IS FURTHER ORDERED that Hoeffken Bros.' Motion to Dismiss is GRANTED. The Involuntary Petition is hereby DISMISSED.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: January 5, 1988