

FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

MAR 31 1986

CLERK, U.S.
BANKRUPTCY COURT

~~CASE NO~~

In re:

Case Number:

LEIGH-DAVID ENTERPRISES, INC.

EF7-85-02276

Debtor.

OPINION AND ORDER

Timepiece, Inc., Trocinski Trucking, Inc., and Kujak Transport, Inc., by Richard A. Westley, filed this involuntary petition against the debtor on November 13, 1985. The debtor appears by Galen W. Pittman and Jeffrey C. Mochalski. A hearing was held on this involuntary petition on December 30, 1985. At the hearing only two of the petitioning creditors appeared. The debtor moved to dismiss on the basis that three creditors needed to appear. The debtor alleged that it had more than twelve creditors and, therefore, three creditors must join to commence an involuntary petition. 11 U.S.C. § 303(b). This motion was submitted for determination by briefs. It is the conclusion of the court that the motion should be denied.

The debtor's brief notes that the petitioning creditors neither verified their petition nor entered upon it their unsworn declaration as required by Bankruptcy Rule 1008. The debtor did not point to this lack of verification either in its answer to the creditors' petition or at hearing. The creditors subse-

quently did amend the petition to include verification as soon as the deficiency was called to their attention. A petition that is not properly verified can be cured by amendment. In re All Media Properties, Inc., 5 B.R. 126, 139 (Bankr. S.D. Tex. 1980). It is the conclusion of this court that the verification requirement was satisfied by the timely amendment.

The next issue to be addressed is whether all three creditors needed to be at the hearing in order to satisfy the requirements of § 303(b). 11 U.S.C. § 303(b). The creditors' petition averred in paragraph one, that the three mentioned creditors all hold claims against the debtor, "not contingent as to liability, amounting in the aggregate, in excess of the value of any lien held by them on the debtor's property securing such claims, to at least \$5,000, [and] hereby petition the Court for relief." The debtor did not deny this averment in its answer. Rule 8 of the Federal Rules of Civil Procedure is made applicable to bankruptcy proceedings by Bankruptcy Rules 1018 and 7008. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed. R. Civ. P. 8(d). Since the debtor did not deny the averment of paragraph one of the creditor's petition in its answer, it is deemed to be admitted. The debtor cannot now move to dismiss when the averment has already been admitted. The debtor did not dispute the fact that the creditors were qualified to act nor did it allege that there were

twelve or more creditors in its answer. The answer was verified by the attorney for the debtor. Bankruptcy Rule 9011.

The debtor's argument that the petitioning creditors are all required to testify is totally absent foundation. "Nothing in the statute or rules requires that a petitioning creditor testify." In re North Country Chrysler Plymouth, Inc., 13 B.R. 393, 399 (Bankr. W.D. Mo. 1981). In fact, testimony to the effect that these claims were not contingent would be irrelevant since this issue is not one which is in dispute. The only real issue involved is the question whether the debtor was paying its bills when they became due. The evidence introduced on this issue indicated that the debtor was not in fact paying its bills when they became due.

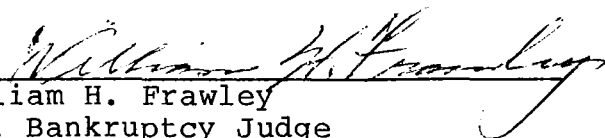
This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rules 7052 and 1018.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT the motion of the debtor seeking dismissal of this involuntary petition is hereby denied.

Dated: March 31, 1986.

BY THE COURT:


William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Richard A. Westley
Attorney Galen W. Pittman
Attorney Jeffrey C. Mochalski