

amount of \$10,775, 11 U.S.C. § 303(b)(1) (referring to 11 U.S.C. § 104 for adjusted dollar amount to commence an involuntary petition). In re Enviro-Hort, Inc., Bankr. No. 98-22923 (Bankr. E.D. Pa. Dec. 8, 1999)(Twardowski, B.J.). The Bankruptcy Court found that “[d]ebtor has raised genuine issues of material fact which bear upon the Debtor’s liability to [creditors] Vanderwende, Thiel, and Inman.” Id. at n.2.²

In its original order, the Bankruptcy Court allowed the involuntary petition to go forward after debtor failed to file proposed findings of fact in support

¹(...continued)

(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

11 U.S.C. § 303(b)(1). The “bona fide dispute” provision also appears in 11 U.S.C. § 303(h)(1):

[T]he court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if

(1) 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.

² The dispute involves whether three creditors — Vanderwende, Thiel, and Inman — were employees of debtor Enviro-Hort, Inc. and what expenses were incurred by them on the debtor’s behalf. In re Enviro-Hort, Inc., Bankr. No. 98-22923 (E.D. Pa. Dec. 8, 1999)(order, Dec. 8, 1999 at n.2). Debtor submitted “Proposed Findings of Fact, Conclusions of Law and Discussion on Behalf of Enviro-Hort, Inc.” to the Bankruptcy Court, upon which it relied. See record at document no. 16. According to debtor, Vanderwende, Thiel, and Inman were sales representatives for Enviro-Hort, Inc. and were to be paid commission only, with an initial draw against future commissions. Id. These creditors maintain that each was to be paid a salary. Appellant’s brief at 20–24.

of dismissal of the petition, as required by prior court order. In re Enviro-Hort, Inc., Bankr. No. 98-22923 (Bankr. E.D. Pa.)(order, Mar. 12, 1999). Debtor moved the Bankruptcy Court to reconsider because of counsel's "excusable neglect" in not filing its submission on time. Fed. R. Civ. P. 60(b)(1); Fed. R. Bankr. P. 9024.

Creditor Vanderwende appeals the Bankruptcy Court's order on four grounds — a notice of appeal filed by debtor on March 30, 1999 deprives this court of jurisdiction to review the motion for reconsideration; debtor's motion to convert the case from Chapter 7 to Chapter 11 proceedings mooted the motion for reconsideration; debtor's failure to respond to the Bankruptcy Court's briefing schedule was not excusable neglect; and the Bankruptcy Court erred in dismissing the petition because debts owed to creditors are not bona fide disputes. Appellant's brief at 9–11, 16.

In regard to the jurisdictional argument, debtor's notice of appeal of the Bankruptcy Court's order granting the involuntary bankruptcy was untimely.³ An untimely notice of appeal does not affect the jurisdiction of the Bankruptcy Court. "The failure to file a timely notice of appeal creates a jurisdictional defect barring appellate review." Robeson Indus. Corp. v. Hartford Accident & Indemnity Co., 178 F.3d 160, 169 (3d Cir. 1999)(quoting Shareholders v. Sound Radio, Inc., 109 F.3d 873, 879 (3d Cir. 1997)). Since the Bankruptcy Court had jurisdiction

³ On March 30, 1999, debtor filed a notice of appeal of the Bankruptcy Court's March 12, 1999 order. See record, document no. 1 (certified docket). Under Fed. R. Bankr. P. 8002(a), a notice of appeal must be filed "within ten days of the date of the entry of the judgment, order, or decree appealed from."

to reconsider its original order, this court, likewise, has jurisdiction to review its subsequent order.

Appellant also asserts that because debtor moved to convert the Chapter 7 petition to a proceeding under Chapter 11, the motion for reconsideration of the order granting the Chapter 7 petition is moot. However, the Bankruptcy Court explicitly stated that it had not ruled on debtor's motion to convert, In re Enviro-Hort, Inc., Bankr. No. 98-22923 (Bankr. E.D. Pa.)(order, Dec. 8, 1999 at n.4)(“[A]n order has not been entered converting this case to chapter 11.”), and there is no evidence of record that demonstrates otherwise.⁴ The mootness argument is, therefore, rejected on this appeal. See record, document no. 1 (certified docket).

As to the substance of the motion for reconsideration, the Bankruptcy Court did not err in finding excusable neglect. In In re O'Brien Environmental Energy, Inc., 188 F.3d 116 (3d Cir. 1999), our Court of Appeals applied the test for excusable neglect outlined by the Court in Pioneer Investment Servs. Co. v. Brunswick Assocs. Limited Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed.2d 74 (1993) (four factors in excusable neglect analysis). These factors are

⁴ Chapter 7 debtors have a right of conversion to Chapters 11, 12, or 13 “at any time.” 11 U.S.C. § 706(a). However, the petition is not converted automatically, but must be ruled on by the Bankruptcy Court. See Cofield v. Desmond, 97 F.3d 1445 (1st Cir. 1996) (“A notice of conversion, filed pursuant to § 11 U.S.C. S 706(a), is not effective on filing. Bankruptcy Rule 1017(d) provides that conversion under § 706(a) ‘shall be on motion filed and served as required by Rule 9013.’”)(quoting Fed. R. Bankr. P. 1017(d)); In re Washington, 235 B.R. 126, 129 (Bankr. S.D. Fla. 1998)(same).

“the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” In re O’Brien Environmental Energy, Inc., 188 F.3d at 125 (quoting Pioneer Investment Servs. Co., 507 U.S. at 395, 113 S. Ct. at 1498).

The Bankruptcy Court observed that the creditors will not be prejudiced because, once the petition is dismissed, creditors will be free to file their claims against debtor in state court without the interference of the automatic stay. In re Enviro-Hort, Inc., Bankr. No. 98-22923 (Bankr. E.D. Pa.)(order, Dec. 8, 1999 at 2 n.1). Given that debtor’s submission was belated by six weeks, the Bankruptcy Court noted that “Petitioning Creditors’ Proposed Findings of Fact and Conclusions of Law were also tardily filed.” There was also “considerable delay” between the hearing on the merits and when the last transcript was filed. Id. Therefore, “the impact on the proceedings occasioned by the delay caused by Debtor was, in light of these circumstances, relatively minimal.” Id. The Bankruptcy Court also found debtor’s counsel’s failure to note the briefing deadline on his calendar to be excusable under the circumstances and that the debtor was acting in good faith, citing In re O’Brien Environmental Energy, Inc., 188 F.3d at 128. Id. Appellant has not produced evidence to overcome the Bankruptcy Court’s finding of excusable neglect.

As to dismissal of the involuntary petition based on bona fide disputes, appellant urges that the claims of both the salesperson creditors and the

trade creditors of Enviro-Hort, Inc. are sufficient to overcome dismissal.⁵ Our Court of Appeals adopted the following standard for ascertaining the existence of a bona fide dispute under 11 U.S.C. § 303(b)(1), (h): where there is a “substantial” dispute of fact that “bears upon the debtor’s liability” or a “substantial” legal question raised by the debtor that “preclude[s] finding of involuntary bankruptcy.” B.D.W. Assocs., Inc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65, 66-67 (3d Cir. 1989) (citing In re Busick, 831 F.2d 745 (7th Cir. 1987)). A debtor requesting dismissal of the petition has the burden of showing a bona fide dispute. IBM Credit Corp. v. Compuhouse Systems, Inc., 179 B.R. 474, 478 (W.D. Pa. 1995) (citing Matter of Sims, 994 F.2d 210, 221 (5th Cir. 1993)).

There appears to be a genuine issue of material fact as to Enviro-Hort’s liability to Vanderwende, Inman, and Thiel — whether they were to be paid a percentage of commissions based on sales or a monthly salary.⁶ Upon extensive hearings, the Bankruptcy Court concluded that the debtor had raised “substantial

⁵ The Bankruptcy Court determined that the claims other than salespersons’ claims did not meet the jurisdictional threshold; it did not decide whether the remaining claims were also in dispute. In re Enviro-Hort, Inc., Bankr. No. 98-22923 (Bankr. E.D. Pa.)(order, Dec. 8, 1999 at n.3)(citing Collier on Bankruptcy ¶ 303.03[2][b] (15th ed. rev’d).

⁶ Appellant supports his position by stating — “As to the salary issues of both Vanderwende and Thiel, circumstances surrounding the hiring of both individuals indicated that it is reasonable to interpret that both were hired on a salary basis.” Given the factual dispute as to what those “circumstances” were, it would have been inappropriate for the Bankruptcy Court to have decided the liability issues. “If a bona fide dispute existed, the Bankruptcy Court was obliged to dismiss the petition, rather than resolve the dispute.” B.D.W. Assocs., Inc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65, 66 (3d Cir. 1989).

factual and legal questions regarding its liability to Vanderwende, Thiel, and Inman.” In re Enviro-Hort, Inc., Bankr. No. 98-22923 (Bankr. E.D. Pa.)(order, Dec. 8, 1999 at n.2). In light of the record, the Bankruptcy Court correctly applied the law to the facts presented.

An appropriate order accompanies this memorandum.

Edmund V. Ludwig, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| IN RE ENVIRO-HORT, INC. | : | CIVIL ACTION |
| | : | No. 00-407 |
| | : | |
| | : | CHAPTER 7 |
| | : | BANKRUPTCY |
| | : | No. 98-22923 |

ORDER

AND NOW, this day of May, 2000, the appeal of creditor Robert W. Vanderwende of the Bankruptcy Court's order of December 8, 1999 is denied, and the dismissal of the involuntary petition is affirmed.

Edmund V. Ludwig, J.