UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:17-bk-07843-FMD
Chapter 7

Gabriel C. Murphy,

Alleged Debtor.
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ORDER DENYING MOTION TO STRIKE AND GRANTING LEAVE TO AMEND INVOLUNTARY PETITION

THIS CASE came on for hearing on March 29, March 30, May 8, 9, and 11, 2018, of the *Motion to Strike Amended Involuntary Petition* filed by the alleged debtor, Gabriel Murphy, (Doc. No. 124) and *Petitioning Creditors' (i) Response to Debtor's Motion to Strike Amended Involuntary Petition, and (ii) Alternative Motion for Leave to File Amended Involuntary Petition, Nunc Pro Tunc* (Doc. No. 151). For the reasons set forth below, the Court finds that the *Motion to Strike Amended Involuntary Petition* should be denied and the *Alternative Motion for Leave to File Amended Involuntary Petition, Nunc Pro Tunc* should be granted.

On September 5, 2017, Digital Technology, LLC ("Digital Technology"), Investment Theory, LLC ("Investment Theory"), and Guaranty Solutions Recovery Fund I, LLC ("Guaranty Solutions"), (together, "Petitioning Creditors") filed an involuntary Chapter 7 petition (the "Original Petition")[1] against Gabriel Murphy ("Murphy").

Murphy promptly filed a motion to dismiss on the grounds of improper service, that Digital Technology's claim is in bona fide dispute such that Digital Technology is not a qualified petitioning creditor, and that the Original Petition was filed in bad faith (the "Motion to Dismiss").[2] Murphy later dropped his claim for improper service.[3]

During the course of the case, Murphy expanded upon the grounds for the Motion to Dismiss, including the Original Petition's failure to disclose that Investment Theory and Guaranty Solutions had acquired their claims by transfer and not for the purpose of filing the involuntary petition, that Investment Theory is the alleged alter ego of Digital Technology, and that Guaranty Solutions' claim is in bona fide dispute.[4]

On February 28, 2018, after months of discovery and related discovery disputes—and just a month before the scheduled trial on the Motion to Dismiss—Petitioning Creditors filed an amended involuntary petition (the "Amended Petition").[5] The Amended Petition recalculated Digital Technology's claim and, in compliance with Federal Rule of Bankruptcy Procedure 1003, disclosed that Investment Theory and Guaranty Solutions had obtained their claims by transfer and not for the purpose of filing an involuntary case.

In response, Murphy moved to strike the Amended Petition (the "Motion to Strike").[6] Petitioning Creditors filed a response to the Motion to Strike, and, in the alternative, requested leave of Court to file the Amended Petition, *nunc pro tunc* to the date of the Amended Petition.[7] Murphy contends that the Original Petition's "fatal flaws" cannot be corrected by an amended petition filed without leave of Court.

For the following reasons, the Court will deny the Motion to Strike and will grant Petitioning Creditors' request for leave to file the Amended Petition. The Court will address the Motion to Dismiss by separate order.

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[1] Doc. No. 1.
[2] Doc. No. 7.
[3] See Transcript, Doc. No. 41, pp. 8-9.
[4] Doc. No. 150.
[5] Doc. No. 120.
[6] Doc. No. 124.
[7] Doc. No. 151.

I. Investment Theory and Guaranty Solutions Disclosed Acquisition of Claims by Transfer.

Under Federal Rule of Bankruptcy Procedure 1003(a), a petitioning creditor who has acquired its claim by transfer must disclose the transfer and sign a statement that the claim was not transferred for the purpose of commencing the case. And an entity who transferred or acquired a claim for the purpose of commencing an involuntary case may not be a qualified petitioner.

Although the Original Petition did not include a statement that Investment Theory and Guaranty Solutions had acquired their claims by transfer and that the claims were not acquired for the purpose of filing the Original Petition, the evidence before the Court establishes that Murphy had actual notice of the transfers prior to the Original Petition's filing.

Investment Theory had acquired a Kansas judgment from Union Bank, recorded a copy of the assignment of the claim in Kansas, and took steps in Lee County, Florida, to domesticate and collect on the judgment.[8] Murphy was served with a Notice to Judgment Debtor on March 23, 2017, giving Murphy notice of the foreign judgment and the procedures to contest it.[9]

And Murphy also had actual knowledge that Guaranty Solutions had acquired its claim from BMO Harris Bank, the holder of a judgment originally obtained by M&I Marshall & Ilsley Bank. Guaranty Solutions' corporate representative, Robert Contreras, corresponded with Murphy as early as February 15, 2016,[10] and testified at his deposition that he had spoken with Murphy five or so times after Guaranty Solutions acquired its judgment claim in an effort to come to a resolution.[11]

Murphy relies on *In re Clignett*[12] to support the Motion to Strike. In *In re Clignett*, the petitioning creditor failed to state on the petition that it had acquired his claim by transfer. Although the creditor later filed an addendum to cure this deficiency, the court found that the addendum was more properly characterized as an amendment, done without leave of court. The court then dismissed the involuntary petition for lack of standing due to creditor's failure to comply with Rule 1003(a).

Although the *In re Clignett* ruling facially supports Murphy's position, the Court finds that it is distinguishable on the facts. In *In re Clignett*, "Creditor A" had a judgment against the debtor. Creditor A allegedly sold the judgment to his son-in-law, "Creditor B." Creditor A then filed his own bankruptcy case and did not list the judgment on his bankruptcy schedules. He later reacquired the judgment and tried to sell it to debt collectors. When Creditor A was unable to sell the judgment, he sued the debtor in state court for breach of a settlement agreement on the judgment. Prior to trial of Creditor A's lawsuit against the debtor, Creditor B filed the involuntary petition.[13] The court stated:

> [T]he fact that [Creditor A] was prosecuting a state court civil action against Debtor up until the filing of the involuntary proceeding indicates that it appears it was [Creditor A], not [Creditor B], who was the holder of the claim arising from the state court judgment. In any event, it would appear that either [Creditor B] does not have standing to bring the petition or [Creditor B] failed to comply with Fed. R. Bankr. P. Rule 1003(a).[14]

The facts in *In re Clignett* demonstrate the existence of conflicting evidence regarding the ownership of the claim asserted by the petitioning

[8] Transcript, Doc. No. 204, p. 16; Petitioning Creditors' Ex. 90.
[9] Transcript, Doc. No. 204, pp. 16-18; Petitioning Creditors' Ex. 91.
[10] Petitioning Creditors' Ex. 99 (Ex. 4 to Robert Contreras Deposition Transcript).
[11] Petitioning Creditors Ex. 99, p. 47.
[12] 567 B.R. 583 (Bankr. C.D. Cal. 2017).
[13] The court's opinion states that Creditor A filed the involuntary petition, but it is clear from a reading of the opinion and confirmed by a review of the court docket in Case No. 6:16-bk-18842-MH (Bankr. C.D. Cal.), that the involuntary petition was filed by Creditor B.
[14] 567 B.R. at 586.

creditor. But that is not the case here; Murphy does not dispute the ownership of Investment Theory's and Guaranty Solutions' claims and he had actual notice that both claims had been acquired.

The purpose of Rule 1003(a) is to exclude the holders of claims that were transferred or acquired for the purpose of filing an involuntary bankruptcy from serving as petitioning creditors.[15] This issue will be addressed on the merits in the Court's ruling on the Motion to Dismiss.

II. Recalculation of Digital Technology's Claim

Digital Technology is the payee of two promissory notes, only one of which was subject to offset for indemnification claims. Murphy guaranteed both notes. The Original Petition stated Digital Technology's claim for $325,664.45.[16] In order to eliminate Murphy's argument that Digital Technology's claim is subject to a bona fide dispute arising from his asserted alleged indemnification claims, the Amended Petition restates Digital Technology's claim for $55,547.00,[17] the balance that Digital Technology asserts is due on the second promissory note, which was not subject to indemnification claims, after credit for all payments received.

Murphy contends that Digital Technology's claim, even in this reduced amount, remains the subject of a bona fide dispute.

III. Courts Freely Grant Leave to Amend Pleadings.

Under Federal Rule of Civil Procedure 15, incorporated by Federal Rule of Bankruptcy Procedure 7015, amendments under Rule 15 are freely given by the court when justice so requires. The notion that leave of court should be "freely given" is intended to advance the important principle that matters be tried on their merits, not on the basis of procedural defect.[18] To successfully challenge a motion for leave to amend a pleading, the party opposing an amendment must show improper motive on the movant's part or actual prejudice, not just the mere possibility of prejudice.[19]

While the better practice would have been for Petitioning Creditors to seek leave of Court to file the Amended Petition, the Court finds no showing of improper motive and no prejudice to Murphy in allowing its relation back. The Court will consider Murphy's contention that Digital Technology's re-stated claim is in bona fide dispute in the context of the Motion to Dismiss.

Therefore, the Court concludes that the Motion to Strike should be denied, and leave of court to file the Amended Petition, *nunc pro tunc*, will be granted.

Accordingly, it is

ORDERED:

1. The *Motion to Strike Amended Involuntary Petition* filed by the alleged debtor, Gabriel Murphy, (Doc. No. 124) is hereby **DENIED**.

2. The *Alternative Motion for Leave to File Amended Involuntary Petition, Nunc Pro Tunc* filed by Petitioning Creditors (Doc. No. 151) is hereby **GRANTED**.

3. The Amended Petition is deemed filed *nunc pro tunc* to February 28, 2018.

DATED: March 19, 2019.

/s/ Caryl E. Delano
Caryl E. Delano
United States Bankruptcy Judge

[15] *In re Kidwell*, 158 B.R. 203 (Bankr. E.D. Cal. 1993).
[16] Doc. No. 1, p. 2.
[17] Doc. No. 120, p. 2.
[18] *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 612-14 (4th Cir. 1980).
[19] *In re Bernard L. Madoff Inv. Securities, LLC*, 560 B.R. 208, 224 (Bankr. S.D.N.Y. 2016).