

MAR 11 2004

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)	Chapter 11
)	
THE PHOENICIAN DYNASTY LLC,)	Case No. 2-04-00224-EWH
)	
Debtor.)	MEMORANDUM DECISION
_____)		

INTRODUCTION

The adult “cabaret” business in Phoenix Arizona, like many other small businesses, is made up of a relatively small number of operators. This case involves people who have known and fought with each other for years. Their battles have resulted in the filing of multiple bankruptcy petitions by or against the alleged Debtor commencing in 2000. This, the latest case, is an involuntary petition in which one of the petitioning creditors also claims an ownership interest in the alleged Debtor. This Petition will be dismissed because there are insufficient qualified petitioning creditors necessary to meet the statutory requirements for the entry of an order for relief. Even if the petitioning creditors had met the statutory minimums and even if the alleged Debtor was not generally paying its debts as they became due, I would exercise my discretionary abstention powers under 11 U.S.C. § 305(a)(1) and dismiss the case. The reasons for my ruling are explained in the balance of this decision.

1 **FACTUAL AND PROCEDURAL HISTORY**

2 Until late October 2003, The Phoenician Dynasty LLC (Phoenician) operated an adult
3 cabaret known as Amazons at 4125 North 7th Street, Phoenix, AZ (the 7th Street Location).
4 Phoenician's lease for the 7th Street Location expired at the end of May 2003. Thereafter, it
5 remained at the location on a month-to-month basis. In addition to a now expired tenancy right
6 at the 7th Street Location, Phoenician holds the rights to a liquor license, which due to certain
7 grandfathered provisions, makes it uniquely valuable at the 7th Street Location. Apparently,
8 only Phoenician's liquor license permits the serving of alcohol at that location.
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11 The 7th Street Location is owned by CalAz Oil Co. LLC (CalAz Oil), whose sole
12 member is Dr. John Taraska (CalAz Oil and Dr. John Taraska are collectively referred to as
13 Landlord). In the late 1990s, Dr. Taraska, and possibly some other members of the Taraska
14 family, acquired a membership interest in Phoenician. The acquisition was followed almost
15 immediately by litigation with the prior owners of Phoenician. The Taraskas engaged the law
16 firm of Bryan Cave and Associates (Bryan Cave) to represent Phoenician in that litigation.
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19 In 1999, the Taraskas were required to divest themselves of their interests in
20 Phoenician pursuant to a 1999 Consent Agreement and Order (Consent Order) entered by the
21 Arizona Liquor Department. The Consent Order also purportedly placed certain restrictions
22 on members of the Taraska family holding any interest in the Phoenician liquor license.
23

24 In April 2000, after the entry of the Consent Order, the Taraskas transferred some, but
25 possibly not all, of their membership interest in Phoenician to Salvatore Iadicicco, Jr.
26 (Iadicicco). In March 2001, Iadicicco transferred some, but possibly not all, of his ownership
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1 interest in Phoenician to Monte Brooks (Brooks) and Thomas O'Neill (O'Neill) (Exhibit F).

2 At the evidentiary hearing, the petitioning creditors claimed that Dr. John Taraska and/or Peter
3 Homenick, as his assignee, hold a membership interest in Phoenician. Indeed that is the focus
4 of the declaratory relief count of a multi-count complaint filed by petitioning creditors
5 Cheetah, John Taraska and CalAz Oil in Maricopa County Case No. CV-2003-019158 filed on
6 October 7, 2003 (Exhibit G) (the State Court Litigation).
7
8

9 When Brooks and O'Neill took over the operation of Phoenician in 2001, they
10 acknowledged that Phoenician had an obligation due to Cheetah under a Restated Promissory
11 Note (Exhibit Q) which was later amended on November 8, 2002 (Exhibit P). Under the
12 amendment, Phoenician owed Cheetah \$100,000.00 repayable over 71 months at 5% interest
13 per annum. Payments were due under paragraph 5 of the November 8, 2002 amendment as
14 follows:
15

16 11 equal monthly payments of \$8,560.75 beginning on November 15, 2002

17
18 60 equal monthly payments of \$161.55.

19 At the evidentiary hearing held on February 19, 2004, Cheetah acknowledged that the 11
20 payments of \$8,560.75 had been made, but claimed none of the 60 payments of \$161.55 had
21 been made and that as a result of the default, Cheetah had accelerated the entire amount due and
22 charged default interest of 18% on the accelerated balance.
23

24 Brooks and O'Neill accepted their membership interest in Phoenician "subject to all
25 of its debt" including the lease payments due for the lease of the 7th Street Location (Exhibit F,
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1 paragraph 5 – Lease Agreement Exhibit I). Brooks and O’Neill also accepted their Phoenician
2 membership interest subject to the “amount due” to Bryan Cave in the amount of \$40,000.00.
3

4 Phoenician has been the subject of three earlier bankruptcy petitions – all of which were
5 filed by Iadicicco. In October 2000, he filed a list of creditors which listed Bryan Cave as
6 holding a disputed claim in the amount of zero. That petition was dismissed at the request of
7 the Debtor on November 28, 2000.¹ On July 11, 2001, a second petition was filed and signed
8 by Iadicicco. Bryan Cave was again listed as a disputed contingent creditor with the amount
9 of the claim listed as zero. That petition was dismissed, at the request of the Debtor, on
10 March 24, 2001.
11

12 On July 15, 2002, over a year after Iadicicco had transferred his membership interest
13 in Phoenician to Brooks and O’Neill, he filed a third voluntary Chapter 11 petition claiming
14 to be the rightful managing member of Phoenician (Case No. 2-02-10836). Iadicicco did not
15 list Bryan Cave as a creditor in the third case, even though he and Bryan Cave entered into an
16 agreement dated August 29, 2002 (Bryan Cave Agreement) in which Bryan Cave assigned the
17 right to bring a collection action in Iadicicco’s name or Bryan Cave’s name to enforce
18 collection of the amount of any claim Bryan Cave had regarding Phoenician (Exhibit E).
19
20

21 Brooks and O’Neill moved to dismiss the third petition. Litigation continued until
22 November 2002 when the third bankruptcy case was dismissed by a stipulated order. The
23

24
25 ¹ Judicial notice may be taken of a bankruptcy file. RUSSELL, BANKR. EVID. MANUAL,
26 2004 Ed., § 201.6. Case #1, 2-00-10786-SSCP, was filed 10/3/00 and dismissed 11/22/00. Case
27 #2, 2-01-09036-RTB, was filed 7/11/01 and dismissed 8/27/01. Case #3, 2-02-10836-GBN, was
filed 7/15/02 and dismissed 11/7/02. Case #4, 2-04-00224-EWH, was filed 1/6/04.

1 dismissal order dated November 4, 2002 (Exhibit 39), provided that the case was dismissed
2 with prejudice “as to all claims which had been or could have been brought by any of the
3 parties.” As part of the dismissal of the third bankruptcy case, Iadicicco, Brooks and O’Neill
4 entered into a settlement agreement (Exhibit 40) which purportedly resolved all of the claims
5 among them regarding Phoenician.
6

7 On October 7, 2003, the Landlord gave Phoenician an eviction notice requiring
8 Phoenician to vacate the 7th Street Location by the end of the month. Thereafter, Phoenician
9 paid part of the October rent but did not pay \$8,500.00 for “additional parking.” Thereafter,
10 Michael Taraska apparently, as a result of Phoenician’s failure to pay the \$8,500.00, entered
11 the premises and removed all of the electrical switches. Phoenician tried to operate by using
12 generators, but was unable to do so. Phoenician vacated the 7th Street Location after the close
13 of business on Friday, October 24, 2003. Thereafter, the Landlord re-entered the premises and
14 has alleged that Phoenician deliberately or negligently caused damage which cost
15 approximately \$6,500.00 to repair.
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19 On October 7, 2003, CalAz Oil and John Taraska sued Phoenician in the State Court
20 Litigation. On November 5, 2003, CalAz Oil, John Taraska, Cheetah and Peter Homenick, as
21 John Taraska’s assignee, filed an Amended Complaint. After the State Court Litigation was
22 filed on October 7, 2003, litigation ensued on the Plaintiffs’ request for appointment of
23 receiver and for injunctive relief, which was denied.
24

25 On January 6, 2004, this involuntary petition was filed by Michael Taraska on behalf of
26 Cheetah, by Larry Williams on behalf of Williams Vending Inc. (Williams) and David Gell, on
27

1 behalf of Air Cleaning Specialists. On February 4, 2004, Phoenician filed a Motion to
2 Dismiss. Iadicicco, as Bryan Cave's "assignee," filed a joinder on February 9, 2004. John
3 Taraska, individually and as member of CalAz Oil, filed a joinder on February 17, 2004. James
4 Doffing, an independent contractor disc jockey, also filed a joinder on February 17, 2004. The
5 court conducted an evidentiary hearing on Phoenician's Motion to Dismiss on February 19,
6 2004.
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10 ISSUES TO BE DECIDED

- 11 1. Are there at least three petitioning creditors whose claims are not contingent or
12 subject to bona fide dispute and total \$11,625.00?
13
14 2. Even if the jurisdictional requirements of 11 U.S.C. § 303(b)(1) and (h) have been
15 met, should the case be dismissed?
16
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18 STATEMENT OF JURISDICTION

19 The court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1334(a) and
20 157(a) and (b).
21

22 DISCUSSION

- 23 A. There Are Not Three Petitioning Creditors Who Hold Non-Contingent Claims That Are
24 Not Subject to Bona Fide Dispute Totaling \$11,625.00

25 The parties agree that Phoenician has more than 12 creditors. Therefore, the petitioning
26 creditors must satisfy the requirements of 11 U.S.C. § 303(b)(1) by demonstrating they
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1 collectively hold claims of at least \$11,625.00 which are not contingent as to liability or
2 subject to bona fide dispute. A claim is contingent as to liability if a debtor's duty to pay
3 depends upon the occurrence of an extrinsic event. See *In re Ybarra*, 295 B.R. 609, 613
4 (9th Cir. BAP 2003). If a claim is non-contingent, in order to meet the requirements of 11
5 U.S.C. § 303(b)(1), it must also not be the subject of bona fide dispute. A claim is subject to
6 bona fide dispute if facts exist "which give rise to a legitimate disagreement over whether
7 money is owed, or in certain cases, how much." *In re Vortex Fishing Sys., Inc.*, 277 F.3d
8 1057, 1064 (9th Cir. 2001).

11 The existence of a counterclaim does not automatically make a claim subject to bona
12 fide dispute, however, if there is a dispute regarding the debtor's liability for a claim, then a
13 bona fide dispute exists. *Id.* at 1067. The existence of an affirmative defense suggests the
14 existence of a bona fide dispute because if the affirmative defense is successful, a debtor will
15 not be liable for the claim. See *id.*

18 For purposes of this decision, all of the claims, not just the claims of the original
19 petitioning creditors, have been reviewed and considered. The claims are summarized as
20 follows:

21 * * *

22 * * *

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Petitioning Creditors	Amount Claimed
Cheetah LLC	\$ 10,089.75
Williams Vending	\$ 4,000.00
Air Cleaning Specialists	\$ 130.00
Joining Creditors	
Salvatore Iadicicco	\$ 43,000.00
John Taraska or CalAz Oil Co LLC (Landlord)	\$ 8,500.00 rent \$ 6,500.00 damages
James Doffing	\$ 200.00
TOTAL	\$72,419.75

An analysis of each of the claims follows. In determining whether a claim is subject to a bona fide dispute, the outcome of the dispute has not been decided; rather, a determination is made as to whether “there are facts that give rise to a legitimate disagreement over whether money is owed.” *Id.* at 1064.

1. Williams Vending.

Williams Vending (Williams) filed a claim for conversion of a tabletop video game machine which allegedly disappeared after Phoenician Dynasty vacated the 7th Street Location. The evidence was disputed whether Phoenician Dynasty had removed any video machine when it left the 7th Street Location. Phoenician’s witnesses testified that the game machine was left on the bar. Doffing testified that he saw the machine loaded on a truck owned by “Gino” at about 10:00 a.m. Saturday morning. Phoenician’s witnesses testified that Phoenician had vacated the 7th Street Location well before 10:00 a.m. on Saturday and that Gino worked for Mike Taraska, not for Phoenician.

1 The evidence was also unclear as to which game machine Williams claimed was
2 missing. The invoice submitted into evidence to demonstrate Williams' acquisition of the
3 machine he asserted had been delivered to Phoenician was dated November 2001 (Exhibit B).
4 However, the agreement between Williams and Phoenician for placement of the machine was
5 dated months earlier – April 2000 (Exhibit A). Williams' testimony did not provide a clear
6 explanation for the disparity in the dates.
7

8
9 The terms of the agreement regarding who had responsibility for the safekeeping of the
10 video machine were also disputed. The written agreement was silent as to who bore the risk
11 of loss or damage. Brooks, one of Phoenician's principals, asserted that Phoenician did not
12 enter into video machine agreements unless the vendor assumed the risk of damage or loss.
13 The principal of Williams disputed that claim.
14

15 Assumption of the risk is an affirmative defense, which when combined with the murky
16 evidence regarding what machine was missing and the disputed testimony as to whether
17 Phoenician had removed any video game machine from the 7th Street Location indicate that
18 the claim is subject to bona fide dispute. The Williams' claim, therefore, does not meet the
19 requirements for a petitioning creditor's claim under 11 U.S.C. § 303(b)(1).
20

21
22 2. Salvatore Iadicicco.

23 Iadicicco's claim, based on the Bryan Cave Agreement, is also subject to a bona fide
24 dispute. Michael Taraska testified the Bryan Cave fees were incurred for legal services
25 performed between 1997 and 1998. No written fee agreement between Bryan Cave and
26 Phoenician was offered into evidence. Due to the passage of time since the legal services
27

1 were rendered, Phoenician has raised the affirmative defense that the Bryan Cave claim is time
2 barred either under A.R.S. § 12-543 (three years) or A.R.S. § 12-548 (six years). No evidence
3 was presented which demonstrated that Phoenician and Bryan Cave had entered into any
4 agreement to toll the statute of limitations. While there may have been agreements between
5 the current principals of Phoenician and Iadicicco that a liability was due from Phoenician to
6 Bryan Cave, such third party agreements are not always sufficient to toll the statute of
7 limitations. See A.R.S. § 12-508. There is, therefore, a bona fide dispute regarding whether,
8 as a matter of law, the statute of limitations has expired.
9

10
11 In addition, the nature of the Bryan Cave Agreement is itself subject to bona fide
12 dispute. Phoenician asserts that the document (Exhibit E) is a complete assignment of all of
13 Bryan Cave's rights to Iadicicco. If it is such an assignment, Phoenician argues that Iadicicco
14 waived all rights to be paid by (1) failing to list Bryan Cave as a creditor in the third bankruptcy
15 proceeding which he filed for Phoenician in July of 2002 and (2) by executing a settlement
16 agreement with Phoenician in October 2002, purportedly waiving all of his claims. Iadicicco
17 asserts his only right under the Bryan Cave Agreement is to act as a collection agent; and,
18 therefore, he did not waive any of Bryan Cave's rights by entering in the October 2002
19 settlement. I do not have to decide whose interpretation of the Bryan Cave Agreement is
20 correct, but the fact that there is a disagreement about the nature of the Bryan Cave Agreement
21 and the effect of Iadicicco's subsequent actions on the Bryan Cave claim demonstrates that
22 there is a bona fide dispute as to Iadicicco's claim. Thus, Iadicicco's claim does not qualify
23 under 11 U.S.C. § 303(b)(1).
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1 95 F.3d 1392 (9th Cir. 1996); *In re California Cannery & Growers*, 62 B.R. 18 (9th Cir. BAP
2 1986); Fed. R. Civ. P. 8(c). Accordingly, both of the Landlord's claims are subject to bona
3 fide dispute and the Landlord's claim cannot qualify as a petitioning creditor claim under 11
4 U.S.C. § 303(b)(1).

6 4. Air Cleaning Specialists.

7
8 Air Cleaning Specialists was a petitioning creditor. After the Petition was filed, Brooks
9 paid the amount in full. It is not necessarily prohibited for an alleged debtor to pay off a
10 petitioning creditor's claim after an involuntary petition is filed. *In re Vortex*, at 1065.
11 However, in the context of this case, where the payment of the claim may result in there being
12 insufficient petitioning creditors, I will consider the claim. The problem with allowing the
13 claim in full is that there was undisputed testimony that for a period of time after Phoenician
14 vacated the 7th Street Location, Mike Taraska was intercepting and holding its mail. A review
15 of the Air Cleaning Specialists' bill (Exhibit 43, page 3) indicates there was an invoice sent for
16 September in the amount of \$65.00. There was no evidence presented as to why the September
17 bill could not have been paid while Phoenician was still in control of the 7th Street Location.
18 However, the October invoice amount may have been improperly held by Mr. Taraska and will
19 not, therefore, be included in the amount of the claim. Air Cleaning Specialists has a
20 qualifying claim in the amount of \$65.00.

24 5. James Doffing

25 Mr. Doffing, who acted as an independent contractor disc jockey at the Location for
26 Phoenician, claimed to be owed four weeks' pay at \$63.00 per week. Phoenician denies owing
27

1 more than one week's pay to Mr. Doffing. Mr. Doffing admitted he was paid on a weekly basis.
2 Neither Doffing nor Phoenician produced any records to corroborate their claims as to how
3 many weeks pay was owed. As the petitioning creditor bears the burden of proof, I find that
4 three weeks' pay is subject to an affirmative defense of payment. I find, therefore, that
5 Mr. Doffing has a non-contingent, bona fide claim of \$63.00.
6

7
8 6. Cheetah Operations L.L.C.

9 The facts regarding the relationship between Phoenician and Cheetah are complex, but
10 largely irrelevant to the determination that must be made regarding the entry of an order for
11 relief. Regardless of whether Mike Taraska had authority to act on behalf of Cheetah when he
12 signed the Involuntary Petition, the total amount Cheetah claims it is owed is \$10,089.75. That
13 amount is insufficient by itself or in combination with the claims of Air Cleaning Specialists
14 and James Doffing to reach the jurisdictional limit of \$11,625.00. Even if the full amount of
15 Air Cleaning Specialists (\$130.00) and Doffing's (\$200.00) claims were allowed, the amount
16 would still fall short ($\$10,089.75 + \$130.00 + \$200.00 = \$10,449.75$). Because there are
17 insufficient petitioning creditors with non-contingent bona fide claims against the Debtor, an
18 order for relief will not be entered and I will not undertake an analysis of whether Phoenician
19 is generally paying its debts as they become due. See 11 U.S.C. § 303(h).
20
21

22
23 B. The Court May Abstain From Cases That Are Essentially Two-Party Disputes

24 This is not a case which can be disposed of by simply analyzing the claims, doing the
25 math and issuing an order dismissing the case. Phoenician has been the subject of three
26 previous bankruptcy petitions. More importantly, two of the three original petitioning
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1 creditors, Cheetah and the Landlord, have been engaged in the State Court Litigation with
2 Phoenician and its principals since October 2003. The claims for declaratory relief regarding
3 John Taraska's alleged ownership interests in Phoenician, as well as the Landlord's claims for
4 damages, remain pending before the state court. In the State Court Litigation, the plaintiffs
5 sought the appointment of a receiver and a temporary restraining order or other injunctive
6 relief. Both requests have been denied.
7
8

9 The principle that federal trial courts are not to be used as appellate courts for
10 unsuccessful litigants is the core of the Rooker-Feldman Doctrine. The doctrine seeks to
11 protect the integrity of state court judgments against collateral attack in lower federal courts.
12 *In re Audre, Inc.*, 216 B.R. 19, 26 (9th Cir. BAP 1997). The Rooker-Feldman Doctrine
13 precludes the bankruptcy court from having jurisdiction to make determinations on issues
14 intertwined with state court rulings that would render those rulings void. While the orders of
15 the state court denying requests for injunctive relief and appointment of a receiver are not final
16 judgments, the entry of an order for relief in this case would effectively void the State Court
17 Litigation orders. Such a result is exactly what the Rooker-Feldman Doctrine prohibits.
18
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20 Additionally, under 11 U.S.C. § 305(a), bankruptcy courts have the discretion to dismiss
21 a case when it is in the best interests of the parties to continue in a non-bankruptcy forum. The
22 discretion to abstain may be exercised *sua sponte*. *In re Harvey Propper*, 44 B.R. 667, 652
23 (Bankr. D. Mass 1984). In determining whether abstention is appropriate, courts consider
24 factors including: (1) the time and efficiency of administration; (2) whether there is already
25 another forum available to protect the parties' interests; (3) whether federal proceedings are
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1 necessary to reach a just and equitable solution; and, (4) the purpose for which the bankruptcy
2 jurisdiction is being invoked. *In re Spade*, 258 B.R. 221 (Bankr. D. Colo. 2001).

3
4 Abstention is appropriate where the involuntary petition is filed by a single creditor, the
5 proceeding is essentially a two party dispute, and the creditor would be able to obtain adequate
6 relief in a non-bankruptcy forum. *See In re Axl Indus. Inc.*, 127 B.R. 482, 484-485 (Bankr.
7 S.D. Fla. 1991) (“Courts consider the motivation of the petitioning creditor as a factor in
8 making [a 305(a)] determination. It is not appropriate to file an involuntary petition in an effort
9 to gain control of the debtor’s business.”).

10
11 This case is essentially a two party dispute, which is the subject of on-going state court
12 litigation. The relief sought in the bankruptcy court fundamentally seeks to overrule state
13 court rulings. Accordingly, if I were not dismissing this case for a failure to satisfy the
14 requirements of 11 U.S.C. § 303(b)(1), I would dismiss it under 11 U.S.C. § 305(a).

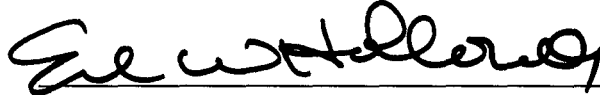
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18 **CONCLUSION**

19 There are insufficient petitioning creditors who hold non-contingent claims that are not
20 subject to bona fide dispute totaling \$11,625.00; therefore, an order for relief may not be
21 entered under 11 U.S.C. § 303(b)(1). Even if the jurisdictional requirements of 11 U.S.C.
22 § 303(b)(1) and (h) had been met, discretionary abstention is appropriate in this case.
23 Accordingly, the case will be dismissed.

24
25 The foregoing constitute this court’s Findings of Fact and Conclusions of Law pursuant
26 to Fed. R. Bank. P. 7052. A separate order dismissing the case will be issued this date. The
27

1 court will also issue a Notice of Status Hearing at which the parties should be prepared to
2 discuss a time and date to set a hearing to determine whether an award to Phoenician under
3 11 U.S.C. § 303(i) is appropriate.
4

5 Dated this 11th day of March, 2004.
6

7 
8 EILEEN W. HOLLOWELL
9 UNITED STATES BANKRUPTCY JUDGE

10
11 Copies of the foregoing mailed
12 this 11th day of March, 2004 to:

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