

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 98-13185
Chapter 7-Involuntary

ACORN GENERAL PARTNERSHIP

Debtor

MEMORANDUM

Appearances: Thomas E. Ray, Ray & Associates, Chattanooga, Tennessee, Attorney for
Petitioning General Partner

Hoyt Samples, Samples, Jennings & Pineda, Chattanooga, Tennessee,
Attorney for Petitioning General Partner

Rosemarie L. Bryan, Witt, Gaither & Whitaker, Chattanooga, Tennessee,
Attorney for Jeffery V. Curry

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

I. Introduction

The question before the court is whether to grant a motion to dismiss an involuntary bankruptcy petition filed against Acorn General Partnership (“Acorn”). The involuntary petition was filed against Acorn by Vivian Brooks, who is identified in the petition as a general partner in Acorn.

The motion to dismiss was filed by Jeffery Curry. Mr. Curry does not identify himself as a general partner, only as an investor in Acorn. Indeed, his motion asserts that Acorn can not be forced into bankruptcy because it is not a partnership. In this regard, the Bankruptcy Code allows an involuntary bankruptcy petition to be filed against a person, which is defined to include a partnership. 11 U.S.C. § 303(b) & § 101(41).

The motion to dismiss also asserts that Ms. Brooks has not shown that she is eligible to file the involuntary petition because she has not shown that she is a general partner in or has a claim against Acorn. 11 U.S.C. § 303(b)(1) & (3).

Finally, the brief in support of the motion asserts that Acorn can not be subjected to involuntary bankruptcy because it does not owe any debts.

Mr. Curry filed an affidavit to the effect that the facts stated in the motion and the brief are true and accurate to the best of his knowledge and upon information and belief. The following section of this memorandum is a verbatim copy of the “Factual Background” portion of the brief.

II. Facts as stated in the brief

Billy J. Fulton (hereinafter “Fulton”) was the owner of a sole proprietorship named Airway Vacuum (hereinafter “Airway”) which operated a store in East Ridge, Tennessee. Airway operated the store as a warranty center for the sale and repair of vacuum cleaners and sales of related accessories. The primary source of business, however, for Airway (according to Fulton) was its status as a commercial distributor for certain vacuum manufacturers to bid on large commercial contracts for the bulk sale of commercial-grade vacuum cleaners. Fulton maintained that when a particular manufacturer would negotiate certain large potential commercial sales, Airway was given the opportunity to participate as a distributor in the actual fulfillment of the sale to the commercial customer. To participate, Airway would have to provide to the manufacturer, within a relatively short period of time after receiving notice of the opportunity, an amount of cash equal to fifty percent (50%) of the manufacturing cost of the units to be sold. In turn, Airway would receive the profit that would follow when the particular contract was fulfilled and the customer paid the contract price to the manufacturer which would hold the funds in an “escrow” for Fulton.

Fulton needed capital to fund Airway’s participation in these large commercial sales. He approached several individuals, many of whom were members at the church where Fulton served as a deacon, regarding the opportunity to fund Airway’s participation in individual commercial sale contracts and Fulton promised them a return on their investment. Many individuals provided funds to Fulton which were allegedly used by Fulton to participate in specific commercial sales contracts as described above. In 1995, a small group of these individuals (by no means all of the individuals who provided funds to Fulton) considered putting this relationship with Fulton on a more business-

like basis. Approximately twenty to twenty-five individuals (many of whom were fellow church members with Fulton) and members of their families attempted to form an investment vehicle or alliance. This alliance led to the group calling itself Acorn.

The purpose of the alliance was only to better facilitate the funding going to Fulton. Acorn called itself a general partnership. A copy of the “Structure Memorandum and Partnership Agreement of Acorn General Partnership” is attached to Curry’s Motion as Exhibit “1” and incorporated herein by reference (hereinafter “Agreement”). The Agreement attempted to outline the purpose of Acorn and explain how it would function as an investment vehicle. As part of the Agreement, each participant was to execute a “Subscription Agreement”. See Attachment “3” to the Agreement (hereinafter “Subscription Agreement”).

The Agreement stated that Fulton would request funds from Acorn as needed. According to the Agreement, each participant would “invest to support [Fulton] in fulfilling the terms of a contract between [Fulton] and the [manufacturing company]”. See Agreement. Each participant would receive a Confirmation of Investment acknowledging the investment in a particular contract and the payment of the return and principal was guaranteed by Fulton. Fulton promised Acorn members a minimum return of fifteen percent (15%) for the use of the funds over a period of no more than 120 days.

The Agreement clearly stated that Acorn was not a “pooling of money or funds”. See Agreement at p.2. Acorn was not allowed to pool the funds of two or more partners and could only invest the money “on a per deal basis as to each individual partner.” Id.

From the inception of Acorn and before its inception, no person ever contributed any money or capital to it. On information and belief, Acorn had no bank account. In fact, all of the individuals paid their funds directly to Fulton. If monies (principal or profit) were paid out to individuals, they were paid directly by Fulton. No money passed through Acorn. From the inception of Acorn and even before its inception, there was no sharing of profits among the individuals that may have made up Acorn, as each individual placed funds into the hands of Fulton to fund a particular contract and profits were not shared or commingled or otherwise joined together. Acorn had no assets and, in actuality, did not act as even a conduit for the funding of Fulton or the payment of Fulton/Airway's alleged profits. If anything, Acorn was merely a bookkeeping arrangement.

Because of reported returns on Airway's sales contracts, many more individuals began providing funds to Fulton and many more individuals provided funding to Fulton under the heading of Acorn. Upon information and belief, not all persons investing with Fulton executed a "Subscription Agreement" or even saw the Agreement. In addition, some of the initial participants in Acorn withdrew or died and new participants entered and withdrew, all over the course of time from 1995 to date. Several other individuals provided funds to Fulton in exactly the same fashion as did those under the loose umbrella of Acorn, yet these individuals are not being subjected to the involuntary petition filed by the Petitioner in the instant case.

On May 5, 1998, Fulton was found dead in his home of an apparent heart attack. Shortly thereafter, it was discovered that the funds given to him by the many individuals referenced above were not being applied toward commercial sales contracts. Instead, rumors are that the funds have allegedly been used as part of an elaborate Ponzi type scheme by Fulton.

III. Discussion of grounds for dismissal

- A. Assuming Acorn is a partnership, the petition must be dismissed because it fails to show that Ms. Brooks is a partner or has a claim against Acorn.

The motion to dismiss and the brief do not attempt to introduce facts to show that Ms. Brooks is not a general partner of Acorn, other than the facts supposedly showing that Acorn was not a partnership. The court is unconcerned with those facts as they affect this part of Mr. Curry's motion because it assumes Acorn is a partnership. Thus, the motion is essentially the same as a motion to dismiss for failure to state a claim upon which relief can be granted. *Fed. R. Bankr. P.* 1011(b); *Fed. R. Civ. P.* 12(b)(6). The motion simply raises the question of whether the petition sufficiently alleges that Ms. Brooks is a general partner or has a claim against Acorn. For the purpose of deciding this kind of motion, the court assumes the truth of the allegations. *See generally* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (2d ed. 1990).

An involuntary bankruptcy petition is treated to some extent as a complaint. *Fed. R. Bankr. P.* 1010 & 1011, *but see Fed. R. Bankr. P.* 7001 & 9014. The petition form, however, allows the required allegations to be made with little detail. The petition form has check boxes for the main allegations required by Bankruptcy Code § 303. 11 U.S.C. § 303. The check boxes include one stating that the petitioner is eligible to file the petition under § 303(b). It does not ask for the grounds on which the petitioner is eligible. Of course, the box is checked in Ms. Brooks' petition against Acorn. The last page of the petition asks for the nature of the petitioner's claim. In this space is typed "General Partner."

The petition form does not require or request the attachment of documents to prove any of the allegations. The committee note to the official form says that the petitioners “may wish to supplement the allegations set forth in the form with a further statement of facts.” *Fed. R. Bankr. P. Official Form 5, Committee Note; Fed. R. Bankr. P. 9009.*

The allegation that a person is a partner will often be conclusory. This is especially true when there is, as in this case, a written contract that appears to create a partnership. The person alleging she is a partner can be expected to allege that the contract created the partnership and she was a party to the contract or became a partner as provided in the contract. She is not likely to allege other facts a court will consider when the opposing party alleges she is not a partner.

The petition is sufficient to establish Ms. Brooks’ standing as a general partner until someone introduces evidence she is not.

The motion to dismiss also challenges the petition on the ground that it does not allege Ms. Brooks has a claim against Acorn. A general partner is eligible to file an involuntary petition against the partnership without having a claim against the partnership. 11 U.S.C. § 303(b). The court has held that the petition sufficiently alleges Ms. Brooks status as a general partner. Whether Ms. Brooks has a claim against Acorn will be relevant only if Acorn is a partnership, but Ms. Brooks is not a general partner. Therefore, this challenge to the petition is irrelevant at the moment.

B. Acorn does not owe any debts.

To the extent a motion to dismiss relies on matters outside the pleading (the petition), the motion must be treated as a motion for summary judgment. *Fed. R. Bankr. P.* 1011(b); *Fed. R. Civ. P.* 12(b); *In re Kidwell*, 158 B.R. 203 (Bankr. E. D. Cal. 1993); *In re Watauga Steam Laundry*, 7 F.R.D. 659 (E. D. Tenn. 1947); *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (6th Cir. 1995).

This portion of the motion to dismiss relies on outside matters, the facts set forth in the brief, and must be dealt with as a motion for summary judgment. The court can grant summary judgment if (1) the moving party demonstrates that there is no genuine issue of material fact, and (2) based on the undisputed facts, the law entitles the moving party to judgment in its favor. *Fed. R. Bankr. P.* 7056; *Fed. R. Civ. P.* 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

This portion of the motion to dismiss apparently is based on Bankruptcy Code § 303(h)(1). It allows the court to enter an order that the bankruptcy proceed (an order for relief) if the debtor is generally not paying its debts as they become due. 11 U.S.C. § 303(h)(1). The motion to dismiss asserts this requirement can not be met because Acorn does not owe any debts. This assertion is based on Mr. Curry's statement in the brief that no one ever paid any money to Acorn for it to invest with Airway.

Mr. Curry makes this statement as if he has actual knowledge that no one invested any money through Acorn. The next sentence goes on to say that Acorn did not have a bank account, but this statement is based on Mr. Curry's "information and belief" instead of actual knowledge. This suggests that Mr. Curry does not have actual knowledge that Acorn never received any investments.

The brief also does not explain how Mr. Curry would have personal knowledge that no one invested any money with Acorn. He could have been involved enough with Acorn that he would know this, but the brief does not say that. He might have discovered it through investigation, but the brief does not mention any investigation or its results.

In summary, the court has doubts as to whether this statement of fact is based on Mr. Curry's personal knowledge or upon information and belief. An affidavit in support of a motion for summary judgment must be based on personal knowledge and must affirmatively show that the person making the statement is competent to testify to the matters stated in the affidavit. *Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(e)*. In light of the court's doubt, it declines to grant summary judgment on this ground.

C. Acorn is not a partnership.

Since this contention is also based on outside matters, the court must deal with it as a motion for summary judgment. Mr. Curry is in effect asking for summary judgment holding that Acorn is not a partnership. Again, the court can grant summary judgment on this issue only if there is no genuine issue of material fact, and based on the undisputed facts, the law entitles the Mr. Curry to judgment in his favor. *Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c)*.

The brief relies primarily on the argument that the relationship between the investors, as set out in the Acorn agreement, did not involve their joining together to conduct any business;

each investor continued to deal with Airway in essentially the same manner as he or she had dealt with Airway before the creation of Acorn.

The brief also asserts that the free movement of investors in and out of the alleged partnership indicates that it was not intended to be a partnership; it would be difficult to say who the partners were at any one moment.

The court has already mentioned the statement in the brief that no investor paid any money to Acorn. Of course, this is relevant to whether Acorn was a partnership. In the argument part of the brief, it adds the assertion that Acorn did not pay any money to any investor. Again there follows the statement that Acorn did not have a bank account.

To decide whether a partnership exists, the court must consider all the relevant facts, actions, and conduct of the parties. *Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991). The intention of the parties determines whether a partnership exists. But the intent to create a partnership does not depend on the terminology used by the parties or their legal understanding or their hidden intent. The intention of the parties is determined primarily from their actions; the question is whether they intended to do the things that constitute a partnership. In other words, “the existence of a partnership can be implied from the circumstances where it appears that the individuals involved have entered into a business relationship for profit, combining their property, labor, skill, or money.” *Bass*, 814 S.W.2d 38, 41 (Tenn. 1991).

Mr. Curry’s contention that Acorn was not a partnership relies, ironically, on the terms of the Structure Memorandum and Partnership Agreement for Acorn General Partnership. Mr.

Curry wants the court to hold that the agreement clearly does not establish a partnership. The argument seems to have two main points. First, Acorn was not really a business because, according to the agreement, it was not supposed to do anything itself that would have produced a profit or loss for it or the potential investors. The profit or loss would come from investing in contracts of Airway. Though Acorn had the duty to move money to and between an investor and Airway, this was simply a ministerial act. The investor, not Acorn, decided what contract to invest in. Second, Acorn's duties did not involve any combining of the investors' property, labor, skill or money to produce a profit *from Acorn's activities*.

The court is not certain this reasoning is correct. The agreement is titled a partnership agreement and identifies Acorn as a general partnership. Furthermore, a court might view Acorn as a business engaged in producing a profit simply because an investor who paid money to Acorn could make a profit on the investment only if Acorn in fact moved the money to Airway.

The court's major problem with Mr. Curry's motion is the lack of evidence to show Acorn was not a partnership. The court is expected to decide primarily on the basis of the agreement. This makes the issue somewhat theoretical. The parties' actions are more important in deciding whether a partnership exists. The parties' actions may create a partnership even though the written contract fails to do so. There are practically no undisputed facts in the record concerning the parties' actions with regard to Acorn after execution of the agreement. Though Mr. Curry stated that Acorn never received any investments, the court has already explained its doubt that this statement is based on Mr. Curry's personal knowledge. The court has the same doubt as to the statement that Acorn never paid any money to an investor. Neither of these statements is an undisputed fact.

The same general problem occurs with the argument that Acorn was not a partnership because “partners” were allowed in and out easily without affecting Acorn’s existence. It calls for a decision based on the structure set up by the agreement, instead of all the relevant facts including the actions of the parties.

The existence of a partnership depends on intent, and intent is generally determined from a broad range of facts. This makes it difficult to grant summary judgment on the issue. *Beckman v. Farmer*, 579 A.2d 618, 630 (D. C. Ct. App. 1990). When there are only a few undisputed facts in the record, they must show that some fact critical to the creation of a partnership did not exist. Furthermore, the party moving for summary judgment has the burden of showing there is no genuine issue of material fact. *Johnson v. Turner*, 125 F.2d 324 (6th Cir. 1997). The basic undisputed fact now before the court is the Acorn partnership agreement. It does not lead to the conclusion that there is no genuine issue of material fact as to whether Acorn was a partnership. Facts other than the agreement may show there is a partnership. The court will therefore deny summary judgment on the issue of whether Acorn is a partnership.

IV. Denying the motion because a trial will be more efficient

The court has another reason for not granting summary judgment. The motion raises serious doubts as to whether Acorn is a partnership. The facts as stated by Mr. Curry also suggest that a bankruptcy may not be appropriate even if Acorn is a partnership. However, the record now before the court is not overflowing with undisputed facts.

The involuntary petition is set for trial in about two weeks. It will provide the parties an opportunity to present more evidence. The court should have a better grasp of the facts. In this regard, the court notes that it has appointed a trustee who will be investigating the creation and affairs of Acorn.

The court has the discretion to withhold a decision on a motion for summary judgment in favor of holding a trial. *Niagara Mohawk Power Corp. v. Megan Racine Associates, Inc. (In re Megan-Racine Associates, Inc.)*, 180 B.R. 375 (Bankr. N. D. N. Y. 1995).

A trial will be more efficient in the long run for both the court and the parties. It should lead to a quicker final decision on the question of whether Acorn can be or should be forced into bankruptcy. This is an appropriate case for withholding a decision on the motion and proceeding to trial. *In re Kidwell*, 158 B.R. 203 (Bankr. E. D. Cal. 1993); *Lisle Mills, Inc. v. Arkay Infants Wear*, 90 F.Supp. 676, 678 (E. D. N. Y. 1950).

V. Conclusion

The court will enter an order denying the motion and requiring an answer to be filed shortly before the trial.

This memorandum constitutes the court's findings of fact and conclusions of law.

Fed. R. Bankr. P. 7052.

BY THE COURT

entered August 21, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 98-13185
Chapter 7-Involuntary

ACORN GENERAL PARTNERSHIP

Debtor

ORDER

In accordance with the Memorandum entered this date,

It is ORDERED that the Motion to Dismiss Involuntary Petition filed by Jeffery V. Curry is DENIED;

It is further ORDERED that Jeffery V. Curry shall have to and including August 28, 1998, within which to file an Answer in this case.

ENTER:

BY THE COURT

entered August 21, 1998

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE