

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 98-13185
Chapter 7 (Involuntary)

ACORN GENERAL PARTNERSHIP

Debtor

MEMORANDUM OPINION

Appearances: Hugh J. Moore, Jr., Witt, Gaither & Whitaker, P.C., Chattanooga, Tennessee,
Attorney for Shumacker & Thompson and Jeffery Van Curry

Thomas E. Ray, Ray & Associates, P.C., Chattanooga, Tennessee, Attorney
for Petitioner

Hoyt Samples, Samples, Jennings & Pineda, Chattanooga, Tennessee,
Attorney for Petitioner

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

Now before the court are two related motions, a motion to amend the involuntary bankruptcy petition filed against Acorn General Partnership and a motion to continue the trial to a later date if the amendment is allowed.

The involuntary petition alleged that the petitioner is a partner and Acorn General Partnership is a partnership. An answer was filed by Jeffery Curry, among others. It asserts that Acorn is not a partnership. The proposed amendment alleges that Acorn is an unincorporated association if it is not a partnership. The Bankruptcy Code makes corporations subject to involuntary bankruptcy. 11 U.S.C. § 303(a) & § 101(41). The definition of corporation includes unincorporated associations. 11 U.S.C. § 101(9). Thus, an unincorporated association is subject to involuntary bankruptcy.

The court can allow an amendment to an involuntary petition. *In re Crabtree*, 39 B.R. 718 (Bankr. E. D. Tenn. 1984). Rule 1011 says that the only pleadings allowed are a petition, an answer and a reply to the answer. *Fed. R. Bankr. P.* 1011(e). Of course, an amendment is just that, an amendment, not a new kind of pleading. It does not violate this rule.

The question of the legal status of Acorn has already been raised in this proceeding. The parties have conducted discovery and prepared for trial on the issue of whether Acorn is a partnership. The proof with regard to whether Acorn is a partnership may tend to show that it is not a partnership but an unincorporated association. Much of the evidence will be the same with regard to whether Acorn is a partnership or an unincorporated association. If the court denies the

amendment, it may simply provoke the filing of another involuntary petition alleging Acorn is an unincorporated association, and the court may be required to try the issues again.

The main obstacle to allowing the amendment is the early trial set for less than a week away. This problem, however, can be dealt with by postponing the trial. One of the parties who answered the petition, Mr. Curry, has filed a motion for continuance. The question, then, is whether the court should grant the continuance.

The court has already said that much of the evidence is likely to be the same with regard to whether Acorn is a partnership or an unincorporated association. That does not mean there is no need for a continuance. The change of theory is significant. First, the allegation that Acorn is an unincorporated association may draw in other persons. Second, the allegation raises directly the question of whether the petitioners are creditors. A general partner can file an involuntary petition against the partnership without being a creditor (the holder of a claim), but only a creditor can file an involuntary petition against another person, such as an unincorporated association. 11 U.S.C. § 303(b) & § 101(10). Mr. Curry has already asserted that Acorn has no creditors, but the amendment raises directly the issue of whether the petitioners are creditors.

Moreover, it seems obvious to the court that different facts will be relevant to determining whether an unincorporated association exists to the extent that it can be treated as an entity in bankruptcy.

Finally, pleading in the alternative that Acorn is a partnership or an unincorporated association requires the opposing parties to re-think their strategy and look at the facts they already

know from a different point of view. In this regard, consider the question of who, if anyone, is a creditor of Acorn and its relevance to the two questions of eligibility. Is Acorn eligible for bankruptcy and who is eligible to file an involuntary petition against Acorn?

The petitioners have filed a response that opposes the motion for a continuance. The response takes the position that Mr. Curry does not need a continuance because he can not oppose the petition against Acorn as an unincorporated association. The response states that only the debtor, Acorn, can oppose the petition against it as an unincorporated association, and it has in effect already consented to an order for relief by failing to respond to the petition against it as a partnership.

This argument puts the cart before the horse. The court can not say that Mr. Curry's failure to answer allegations that were not in the original petition should be held against Acorn because Mr. Curry would not have had the authority to answer the allegations if they had been made.

There is no issue before the court at the moment as to whether Mr. Curry can oppose a petition against Acorn as an unincorporated association. That issue will arise if the court allows the amendment, Mr. Curry files an answer to the amendment, and the petitioners assert that Mr. Curry lacks standing to oppose the petition. The petitioners' argument also overlooks the possibility that other persons may want to oppose a petition alleging Acorn is an unincorporated association.

To add another cliché, the court might say that the petitioners want to eat their cake and have it too; they want the amendment allowed and Acorn denied time to prepare a defense.

The need for a quick decision on an involuntary petition is for the benefit all parties concerned, including the alleged debtor, its creditors, and the petitioners. *Fed R. Bankr. P.* 1013(a); 9 Lawrence P. King, et al. *Collier on Bankruptcy* ¶ 1013.02 (15th ed. 1998). Mr. Curry, who has answered the petition, has requested a continuance. As to the petitioners and creditors (if there are any), the court must note that it has appointed a bankruptcy trustee. A slight delay to decide all the issues at once may result in a quicker final decision. The court does not intend to be led into error or into a long-lasting piecemeal process of dealing with this case because the petitioners want to rush to a decision on the original petition. *See American Standard, Inc. v. Nass (In re Jack Kardow Plumbing Co.)*, 451 F.2d 123 (5th Cir. 1971); *Associated Cemetery Management, Inc. v. Barnes*, 268 F.2d 97 (8th Cir. 1959).

The court concludes the amendment should be allowed and the trial postponed. The court will allow Acorn a short time to respond to the amendment. Since the factual issues may not be refined until closer to the trial date, the court will also set a pre-trial conference.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

BY THE COURT

entered August 27, 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 Opinion entered this date,

It is ORDERED that the motion to amend the involuntary petition is GRANTED;

It is further ORDERED that any party who has filed an answer to the original petition is allowed ten (10) days after the date of this order to file an answer to the amendment. A copy is attached to this order and shall be served on them by the clerk's office along with the memorandum.;

It is further ORDERED that the rules may require service on other parties. *Fed. R. Bankr. P. 1010 & 7004; Fed. R. Civ. P. 4.* With regard to them, the petitioners are responsible for obtaining and serving a summons to answer the amendment. The time for answering is hereby shortened to fifteen (15) days after service of the summons. *Fed. R. Bankr. P. 1011(b) & 9006(b).* The summons shall be issued accordingly;

It is further ORDERED that the trial of the involuntary petition set for September 1, 1998, is re-scheduled to October 13, 1998 at 9:30 a.m., in Courtroom A, Historic U. S. Courthouse, 31 E. 11th Street, Chattanooga, Tennessee; and

It is further ORDERED that the court will hold a pre-trial conference on October 6, 1998, at 10:00 a.m., in Courtroom A, Historic U. S. Courthouse, 31 E. 11th Street, Chattanooga, Tennessee. The court will give notice of the pre-trial conference to any other parties who answer the amendment.

ENTER:

BY THE COURT

entered August 27, 1998

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE