United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Daniel Krupiak**
Case Number: **99-10304**
Chapter : **7**
Judge Code: **SA**
First Meeting Location: **Albuquerque**
Reference Number: **7 - 99-10304 - SA**

Document Information		
Number: 139		
Description: Findings of Fact and Conclusions of Law Re: [1-1] Involuntary Petition; In summary, Crt finds that there are not 3 petitioning crds whose clms are not subject to a bona fide dispute; THIS CASE SHOULD BE DISMISSED .		
Size: 30 pages (46k)		
Date Received: 10/14/1999 09:29:49 AM	**Date Filed:** 10/14/1999	**Date Entered On Docket:** 10/14/1999

Court Digital Signature View History

2a 26 db f8 2c e9 da 9b db 8e f7 38 d0 48 ea a1 80 0d 02 bf ab a8 a6 43 f8 92 4f 2c e2 ce b7 79 3b 22 59 fb 61 82 87 7b 20 ea a4 b7 13 b2 b6 84 a4 c5 32 f4 02 73 40 25 ea 3f b3 13 1b 03 f7 5e 28 c8 2b ac 47 ed 4c 5d 2d ac 99 23 11 85 b9 93 0a 25 8d 5e 8d 6f 23 44 d4 9e 49 17 3d 8b 6e 0d e0 77 8d 40 b8 b7 e1 7a 3b 5a 06 85 fb 93 5d 81 6a 65 6c 85 1b 0d 26 01 27 55 cf fe 5b c0 e7 a8

Filer Information

Submitted By:

Comments: Findings of Fact and Conclusions of Law on the Involuntary Petition

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
DANIEL KRUPIAK,
Alleged Debtor. No. 7-99-10304 SA

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE INVOLUNTARY PETITION

This matter came before the Court for trial of the Involuntary Petition filed by creditors Robert Munn, W.E. and Kitty Bemis[1], and David and Virginia Grosjean. Apodaca Earth Moving, Inc. joined as a petitioning creditor on March 26, 1999. Scot Graff Company d/b/a Pacific Mutual Door Company joined as a petitioning creditor on April 15, 1999. At the close of trial, the Court announced orally that the petition would be dismissed. These findings of fact and conclusions of law are entered pursuant to Bankruptcy Rule 7052.[2]

The Court finds as follows:

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[1]Bemis filed a motion to withdraw as petitioning creditor on March 26, 1999; notice was sent to all parties, and the Grosjeans objected. No hearing has been requested on the motion to withdraw.

[2] The Court announced its decision orally to the parties shortly after the conclusion of the trial. Petitioners then filed a motion and supporting memorandum to reconsider the decision. Krupiak filed a response thereto, and Petitioners filed a reply to that. Even though the motion to reconsider was filed prematurely, the Court has taken into consideration all those filings.

1. Daniel Krupiak (“Krupiak”) resides in New Mexico.
2. Krup Korp was incorporated as a New Mexico corporation in February of 1994.
3. Krupiak, with his wife, own 100% of the shares of Krup Korp.
4. Krupiak is the president of Krup Korp.
5. Krupiak testified that Krup Korp has no employees other than himself.
6. Krup Korp’s 1994 Biannual Profit Corporate Report was filed January 26, 1996 with a $100 late fee.
7. Krup Korp’s 1996 Biannual Profit Corporate Report was filed October 23, 1997 with a $100 late fee.
8. The October 23, 1997 check to the State Corporation Commission was returned for insufficient funds.
9. Krup Korp’s certificate of incorporation was revoked by the Commission on March 18, 1998, because Krup Korp did not refile its 1996 Biannual Profit Corporate Report and pay the October 23, 1997 insufficient funds check.
10. Krup Korp has not reinstated the certificate.
11. Krup Korp has never maintained a general ledger, accounts receivable ledger, accounts payable ledger, cash receipts journal, or a profit and loss statement. The tax returns filed contain a profit/loss statement, however.

12. The only inventory list kept by Krup Korp appears in the tax returns for 1994 through 1996. Krupiak testified, however, that at various times he would keep handwritten notes that served as an inventory list. Moreover, it appears to the Court that inventory for this corporation has been scant: twelve lots in San Miguel County, New Mexico, and five lots in an Albuquerque subdivision. There is no evidence that any more sophisticated type of inventory accounting would be required.
13. Krup Korp has not filed tax returns since 1996.
14. Krup Korp has no signed minutes from 1996 to date; there was testimony, however, that there were various corporate resolutions filed with lending institutions and creditors. None of these were produced in discovery or admitted into evidence.
15. Krup Korp has no payroll records or records of amounts paid to contract labor. Krupiak testified that there were no employees other than himself, and that his compensation was listed on the tax returns. He further testified that his normal business practice was to make use of contract labor, which would be hired on behalf of his customers who would then be responsible for paying the workers.

16. When Krup Korp was incorporated its initial board was comprised of Krupiak and Tom Krupiak, alleged debtor's father. The 1996 and 1997 corporate reports list only Krupiak as a director; he testified, however, that his father was in fact a director until his death in 1999.
17. Krup Korp opened a bank account on September 16, 1997. There was testimony that shortly after the corporation was formed it opened an account at First National Bank. The parties stipulated, however, that there were no accounts other than the one opened on September 16, 1997.
18. Krupiak was the only signatory on the Krup Korp account.
19. Krup Korp closed the bank account on July 31, 1998.
20. The only documentary evidence of this corporate bank account is a check register which lists 27 checks.
21. Before the Krup Korp bank account was opened, Krupiak deposited funds paid to Krup Korp into his personal account.
22. Krup Korp's accountant, Mr. Burwinkle, testified that he advised Krupiak to open a corporate account to make the records easier to review, which would save fees. He did not, however, testify that it was difficult or impossible to account accurately for Krup Korp's affairs because of the single account. Nor was there any testimony that

there were either a large number of transactions, or complicated transactions, such that the corporate affairs could not be sorted out. Indeed, for the approximately one year that the corporate account was in existence only twenty seven checks were written from that account.

23. The accountant also testified that before he commenced working for Krup Korp he reviewed the corporate documents and certificate of incorporation, and was satisfied that Krup Korp was a valid corporation.

24. Krupiak owned a mobile home on which Greentree had a lien. Krupiak issued checks from Krup Korp to Greentree.

25. The accountant testified that S-Corporations routinely pay personal expenses of an owner, and the accounting treatment is to apply that payment either to a withdrawal of profits or to a receivable account.

26. Krupiak also received the following funds from the Krup Korp account: $2,900 in September, 1997, $2,500 in October, 1997, and $7,500 in March, 1998. There was no showing that these payments were improper, or other than ordinary course of business. Krupiak testified that he had received salary from Krup Korp, and that it was reflected in the tax returns. Exhibit K-88 shows that Krupiak received an average annual income from Krup Korp

of $19,687 for the years 1994 through 1998; the income was all paid, however, during 1997 and 1998.

27. Krup Korp paid a furniture store for some dining room furniture. Petitioners claim this was a personal expense. Krupiak testified, however, that this furniture was intended for use in a model home and a proper business expense.

28. The accountant examined various documents when preparing the tax returns, including real estate contracts, and an assignment of a real estate contract.

29. The accountant did not work from ledgers to prepare the annual tax returns; rather, he worked from a “working trial balance” based on records kept for tax purposes and oral discussions with Krupiak.

30. After Krup Korp closed its bank account on July 31, 1998, funds paid to Krup Korp were deposited into Krupiak’s personal accounts.

31. Back in March, 1994, Krupiak personally purchased 13.48 acres of land in San Miguel County, New Mexico by executing a real estate contract to William H. Cunico.

32. On or about April 15, 1995, Krupiak deeded these 13.48 acres to Krup Korp.

33. Krupiak, as an employee or agent of Krup Korp, proceeded

to subdivide the 13.48 acres into twelve lots.

34. On or about November 20, 1995, Krup Korp entered into a real estate contract for the sale of Lot 2 to Rosendo and Mary Ann Cruz for the price of $29,000.

35. On or about July 14, 1998, Krup Korp deeded Lots 9 and 10 to Krupiak. Petitioners claim this transfer was without consideration. The undisputed testimony, however, was that Krupiak had both developed the entire 13.48 acres and paid a "release" price of $15,000 to Cunico for Lots 9 and 10. He testified that the transfer of the lot was compensation for his work in developing the 13.48 acres and developing the Albuquerque subdivision; compensation was paid with land because the corporation had no cash at the time. Krupiak also acknowledged that he may have to report some income on his personal tax return as a result of the transaction. There was no evidence of the value of Lots 9 or 10.[3]

36. On or about September 15, 1998, Krup Korp deeded Lot 1 to Krupiak. Petitioners again claim this transfer was without consideration. As discussed above, Krup Korp was compensating Krupiak for his work. Furthermore, Krupiak

[3] Krupiak subsequently mortgaged these lots in exchange for a personal loan in the amount of $42,449.36.

also paid a release price for this lot. There is no evidence of the value of Lot 1.[4]

37. On or about November 18, 1998, Krup Korp deeded Lot 11 to Krupiak. Petitioners claim this was without consideration. As discussed above, Krupiak had performed work, was being compensated, and in addition paid a release price of $15,000 for this lot. There is no evidence of the value of Lot 11.[5]

38. Krup Korp deeded Lot 8 to Tom Krupiak as compensation for work he did for Krup Korp.

39. As of the date of the petition, Krup Korp owned the remaining six lots in San Miguel County.

40. As of the date of the petition, Krup Korp also had a 50% interest in a partnership that owed ten (10) lots in an Albuquerque subdivision. Krupiak testified that the partnership debt on this land is approximately $300,000 and that each lot is worth approximately $90,000. Krup Korp's equity in the partnership is therefore approximately $300,000.

41. There were no allegations or testimony during the trial

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[4] Krupiak subsequently mortgaged this lot in exchange for a personal loan in the amount of $65,000.

[5] Krupiak subsequently mortgaged this lot in exchange for a personal loan in the amount of $25,000.

of this case that Krupiak was hiding assets, conveying assets out of his name, or preferring creditors. Krupiak did testify, however, that some of his funds were given to his wife and she purchased real estate in her own name as separate property.

42. No petitioner provided documentary evidence, or even alleged the existence, of any personal guarantees for their benefit, and the Court assumes there are none.

43. There was no testimony that the debts (discussed below) incurred by Krup Korp, i.e. the contracts for the houses, the purchase from Pacific Mutual Door, or the services of Apodaca Earth Moving, were incurred by fraud or false pretenses, or that the corporation (or that matter Krupiak) did not intend to pay those debts or perform the required services at the times the obligations were incurred.

44. There was no evidence presented that Krup Korp was initially incorporated for an improper purpose.

THE GROSSJEAN CLAIM

45. On or about April 11, 1997, David C. and Virginia L. Grosjean entered a new construction purchase agreement with seller Krup Korp Inc. The agreement was signed by "Dan Krupiak Krup Korp, Inc.". The addenda were signed

by “Krup Korp Inc., Dan Krupiak President”. (Exhibit G1)

46. A check, dated July 25, 1997 on the account of David C. Grosjean was paid to “Krup Korp Inc. & Dan Krupiak” in the amount of $22,675; another check, dated September 11, 1997 was payable to “Krup Korp, Inc.” in the amount of $10,070; a third check dated September 16, 1997 in the amount of $4,400 was made payable to “Krup Korp Inc. or Dan Krupiak”; another check dated November 21, 1997 in the amount of $5,500 was payable to “Dan Krupiak”; and a final check in the amount of $3,100 was made payable to “Brad L. Hays [attorney for Krupiak] & Krup Korp, Inc.” on December 5, 1997. Exhibits G2-G6.

47. Exhibits G7-12 are invoices from Krup Korp Inc. to David Grosjean for work done pursuant to the contract.

48. Krup Korp was a corporation in good standing at the time it entered the contract with Grosjean and received payments.

49. Mr. Grosjean testified that he had two claims against Krupiak personally: $3,295 for concrete work not done and $5,500 for heating work not done. He testified that the $3,295 represents an amount claimed by Albuquerque Rock Products for materials delivered to the house, and that Albuquerque Rock is now making a claim against him. He

also claimed that the house had no heating system. He admitted that there was no contract other than the one with Krup Korp. Grossjean's claims are based on the fact that Krupiak's name appears on the checks that he wrote. He had no reason to believe that Krup Korp was not a valid corporation at all times material to his claim. In his view, since Krupiak's name was on the checks, Krupiak is liable.

50. Krupiak admits that Krup Korp, Inc. owes $1,200 to Grosjean for materials and services paid to Krup Korp, Inc. for a boiler and its installation that were not provided pursuant to the contract. He denies that the balance of the $5,500 heating system claim is owed by Krup Korp; he testified that the heating system, consisting of piping and a manifold for a water heat system in the floor, was all installed and that only the $1,200 boiler remained uninstalled. Krupiak also testified that Krup Korp did not owe $3,295 for concrete work because only some product was delivered. Based on the testimony of the parties, the Court can only find that $1,200 is not in dispute as being owed by Krup Korp to Grosjean.

51. The Court finds that there is a material question of fact

whether Krupiak owes Grosjean for the debts of Krup Korp. The Court also finds that there are legal issues related to the disputed facts such that the Court cannot find as a matter of law that Krupiak owes Grosjean.[6]

THE APODACA EARTH MOVING CLAIM

52. Both Mr. and Mrs. Apodaca, the owners and officers of Apodaca Earth Moving, Inc., testified. In May, 1996, Krupiak met Mr. Apodaca at the Albuquerque subdivision that Krup Korp was developing to discuss earth work. They agreed on work to be done, and an hourly rate. Mr. Apodaca was otherwise unaware of the financial or legal aspects of the transaction. Mrs. Apodaca testified that at her first meeting with Krupiak, the following day, he gave her a business card that identified him as the president of Krup Korp, and instructed her that bills were to be sent to Krup Korp. Mrs. Apodaca understood the difference between an individual and a corporation, and she had no reason to believe she was not dealing with a corporation in good standing at the time of the transactions. Work did not commence until after this meeting.

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[6] Counsel admitted that three of the five petitioners' claims hinge on this Court piercing the corporate veil and holding Krupiak liable for Krup Korp debts.

53. Exhibit A-1 is an invoice to Krup Korp for amounts due as of August 5, 1997 in the amount of $18,231.67. Mrs. Apodaca testified that this amount included interest, and she would be happy with just receiving payment for the work and costs, which were about $15,000.

54. Mrs. Apodaca admitted that there was nothing that showed that Krupiak was personally liable for the debt to Apodaca Earth Moving, other than “his word” which he gave with his business card. The testimony did not develop what “his word” was, or whether it was an explicit representation or something Mrs. Apodaca assumed.

55. Apodaca Earth Moving Inc. filed a claim of lien on various lots in the Albuquerque subdivision on February 6, 1997. (Exhibit K-85). The claim of lien states that materials were furnished to “Krup Korp Inc.” On April 23, 1999, Apodaca Earth Moving Inc. released its lien claim. (Exhibit A-3). (A secured creditor can waive all or a portion of its lien to become an eligible petitioning creditor in an involuntary proceeding. See American Gypsum Company v. McDowell (In re American Gypsum), 31 B.R. 187, 189 (Bankr. D. N.M. 1983)).

56. The Court finds that there is a material question of fact whether Krupiak owes Apodaca Earth Moving for the debts

of Krup Korp. The Court also finds that there are legal issues related to the disputed facts such that the Court cannot find as a matter of law that Krupiak owes Apodaca Earth Moving.

THE BEMIS CLAIM

57. On or about February 9, 1998, W.E. Bemis and Kitty C. Bemis entered a new construction purchase agreement with seller Krup Korp Inc. The agreement was signed by “Krup Korp, Inc., Dan Krupiak”. An addendum was signed by “Krup Korp Inc., Dan Krupiak President”. (Exhibit B-1). The Bemises wrote three checks toward this contract: $13,000 on August 19, 1997 to “Krup Korp Inc. or Dan Krupiak”; $10,000 on September 4, 1997 to “Dan Krupiak or Krup Korp”; and $5,000 to “Krup Korp, Inc” on April 1, 1997.

58. Ms. Bemis testified that the claim against Krupiak is based on the fact that he was the contact person for Krup Korp. She also stated that other than the signed contract with Krup Korp she had no claim against Krupiak as an individual. She also testified that she did not have any basis to believe Krup Korp was not a corporation in good standing at all times material to her claim.

59. The Court finds that there is a material question of fact whether Krupiak owes Bemis for the debts of Krup Korp.

The Court also finds that there are legal issues related to the disputed facts such that the Court cannot find as a matter of law that Krupiak owes Bemis.

THE PACIFIC MUTUAL DOOR COMPANY CLAIM

60. The parties stipulated to the admission of designated portions of the deposition of Ted Lambert and the exhibits thereto. Lambert is a representative of Pacific Mutual Door Company. Eighteen invoices attached to the deposition say "Sold to Krupiak Homes", and list a job site of 8404 Oakland.[7] Krupiak testified that Krupiak Homes was his father's corporation; he also testified that Krup Korp used the services of Krupiak Homes for construction work.

61. Krupiak testified that he never purchased anything from Pacific Door for his personal use. All purchases were "corporate." Krupiak admitted that Krup Korp owed Pacific Mutual Door approximately $400 plus attorney fees.

62. Lambert testified that Pacific Mutual did not know Krup Korp was involved with Krupiak Homes; all dealings with Krupiak was for Krupiak Homes. When asked "If Krup Korp had purchased that stuff, or if Dan had been representing

[7] One invoice lists the address as "8400" Oakland.

Krup Korp and that information had been conveyed to the salesman, that would have appeared on the forms; is that right?", Lambert answered "Yes, ma'am."

63. Krup Korp wrote a check to Pacific Mutual which was returned for insufficient funds. Pacific Mutual filed lawsuit against "Dan Krupiak, individually and d/b/a Krup Korp, and Thomas Krupiak, individually and d/b/a Krupiak Homes, Inc." based on this check. The Court finds a real question as to which entity is liable for this debt.

64. Lambert filed a lien on behalf of Scott Graff Company against Krupiak Homes on or about January 26, 1998.

65. The Court finds that there is a material question of fact whether Krupiak owes Pacific Mutual Door. The Court also finds that there are legal issues related to the disputed facts such that the Court cannot find as a matter of law that Krupiak owes Pacific Mutual Door.

THE MUNN CLAIM

66. On or about February 10, 1997, Robert Munn and Jean Munn entered a new construction purchase agreement with seller Krup Korp Inc. The agreement was signed by "Dan Krupiak, President, Krup Korp, Inc.". Various addenda were signed by "Krup Korp Inc., Dan Krupiak President". (Exhibit M-1).

67. The Munns issued a check on February 10, 1997 to Merit Real Estate Company for $5,000 as a deposit on this contract. On March 7, 1998, they issued another check to Krup Korp Inc. in the amount of $9,600. (Exhibit M-3). Mr. Munn testified that the $5,000 check had cleared his bank, and he believed that the money had been released to Krup Korp. Therefore, the Court can find that Krup Korp owes $14,600 to the Munns.

68. Construction on the Munn house was to be complete by August, 1997. The Munns never received a certificate of occupancy on the house. The Munns had sold their prior house and needed to move, and in approximately November, 1997, they moved into the house without a certificate of occupancy. They lived there until May 11, 1999. During their occupancy they maintained the house, invested in fixtures such as fans and tile, and had to pay $2,500 to reconnect the water. The Munns had no rental agreement with Krupiak or Krup Korp, Inc. for the time period they lived in the house.

69. Mr. Munn testified that he did not know that the petition was filed against Krupiak individually. He stated he believed the petition was filed against Krup Korp Inc. He also testified that his total claim was $14,600 and it

was based solely on the contract. He also testified that he believed Krup Korp was a corporation in good standing when he and his wife entered the contract. Mr. Munn testified that he understood the distinction between a corporation and an individual. When questioned if he had any basis to make a claim against Krupiak individually on a contract executed by the corporation, he "guess[ed]" they were separate entities legally, and stated that he could not make such a claim.

70. The Court finds that there is a material question of fact whether Krupiak owes the Munns for the debts of Krup Korp. The Court also finds that there are legal issues related to the disputed facts such that the Court cannot find as a matter of law that Krupiak owes the Munns.

DISCUSSION

The parties agreed to bifurcate the trial, in order to determine first whether the petition should be granted, and then afterward, in a separate hearing with separate discovery, to determine any issues of costs, attorney fees or damages. This is the ruling on the first part of the trial.

In this case, the applicable elements of 11 U.S.C. §303 are:

1. 12 or more creditors

2. 3 or more petitioning creditors

3. the claim of each of which is not contingent

4. the claim of each of which is not subject to bona fide dispute

5. the total unsecured claims of the petitioning creditors are equal to $10,775 (pursuant to 11 U.S.C. §104)

6. the alleged debtor is generally not paying his debts as they become due unless such debts are the subject of a bona fide dispute.

The parties stipulated to evidence establishing that Krupiak had 12 or more creditors. There was a continuing dispute whether there were three petitioning creditors, but by the time of trial, the petitioners had utilized Section 303(c) to get at least three petitioning creditors whose noncontingent unsecured claims (against someone) taken together exceeded $10,775.

The petitioners presented sufficient evidence to have made out at least a prima facie case that Krupiak was not paying his debts as they became due although, given the disposition that the Court makes of this case, it is not necessary for the Court to decide that issue. Thus, the determinative issue is the bona fide dispute question, in both of its applications to this statute: (1) whether one or more

of the petitioning creditors' claims are subject to bona fide dispute (thereby raising the question of the "standing" of that claim to permit the creditor to serve as a petitioning creditor), and (2) whether the debts Krupiak is generally not paying are the subject of a bona fide dispute and therefore not counted in the "generally not paying" calculation. If the Court finds that there are not three petitioning creditors with standing, the Court need not address the second issue.

In this case, the petitioners have presented evidence and a vigorous argument that the Court should pierce the corporate veil and find that Krupiak is liable for Krup Korp's debts. However, the law of New Mexico on shareholder/ officer liability for corporate obligations is sufficiently strict in upholding the corporate shield that the Court cannot find that Krupiak's liability for the corporate debts is a "foregone conclusion", see Matter of Busick, 831 F.2d 745, 750 (7th Cir. 1987)(quoting from the district court opinion), and therefore must find that at this stage of the proceedings that the bulk of the petitioners' debts are subject to bona fide dispute. Indeed, the very need to argue the New Mexico case law on veil-piercing suggests, although it does not compel, compare B.D.W. Associates, Inc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65, 68 (3rd Cir. 1989), the conclusion that the

corporate debts will inevitably constitute debts subject to a bona fide dispute with respect to the individual shareholder or officer. And that is the case here.

A petitioning creditor cannot rely on a debt which is subject to a bona fide dispute as the basis for forcing Krupiak into bankruptcy. 11 U.S.C. § 303 (b)(1); Bartmann v. Maverick Tube Corporation, 853 F.2d 1540, 1543 (10th Cir. 1988) ("Bartmann"). In the Tenth Circuit, a bona fide dispute is one as to which "'there is an objective basis for either a factual or a legal dispute as to the validity of debt'". Id. at 1544 (quoting Busick, 831 F.2d at 750). "If there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed." In re Lough, 57 B.R. 993, 997 (Bankr. E.D. Mi. 1986). That is because "[t]he legislative history makes it clear that Congress intended to disqualify a creditor whenever there is any legitimate basis for the debtor not paying the debt, whether that basis is factual or legal." Id.

The Tenth Circuit's test for determining the existence of a bona fide dispute does not require the Court to "determine the probable outcome of the dispute, but merely whether one exists." Bartmann, 853 F.2d at 1544. At least two courts have

interpreted this standard to mean that the Court is not permitted to resolve any genuine issues of fact or law. Booher Enterprises v. Eastown Auto Co., 215 B.R. 960, 965 (6th Cir. B.A.P. 1998), citing Lough, 57 B.R. at 997. In other words, even if the Court wished to resolve the dispute (for the convenience of the parties or to move on to the merits of the claim), it would not be permitted to do so, which is essentially, as the Lough court's statement of the test suggests, a summary judgment standard. The Bartmann test does not explicitly require a summary judgment standard, and this Court declines to apply such a standard in this case, in large part because it is not necessary. That is, even assuming that the Court has some leeway to reach some conclusions about the facts of the disputed claims, the Court finds that there are sufficient factual questions about the petitioners' claims that they remain subject to bona fide dispute.[8]

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[8] The characterization of the Lough test as a summary judgment standard does not work well if the Court is prohibited from deciding legal questions as well; after all, the purpose of a summary judgment motion is precisely to determine whether, given a specific set of undisputed facts, the applicable law requires or allows a certain outcome. Thus it would appear that the Lough court and the Sixth Circuit B.A.P. would not have a court decide the legal issues based on some other reason or policy, such as allowing a decision to be issued more quickly. This Court has determined that there are substantial factual issues that must be determined as a condition to applying the law of New Mexico (primarily concerning shareholder/officer liability for contractual

"Once the petitioning creditor establishes a prima facie case that its claim in not subject to a bona fide dispute, the burden shifts to the debtor to present evidence of a bona fide dispute." Bartmann, 853 F.2d at 1544. In this case, it is not clear how much the burden shifted, and in any event, the evidence presented by Krupiak, in the course of cross examination during Petitioners' case and during Krupiak's portion of the case, was such to persuade the Court of the continuing existence of substantial factual disputes with respect to each petitioners' claim.

Petitioners cite Bartmann for the proposition that:

> for a . . . defense to bar a creditor's participation in an involuntary petition, it must be clear that the creditor's claim would be barred, without the resolution of substantial factual or legal questions.

Bartmann, 853 F.2d at 1544-45. That language certainly does appear in Bartmann, and certainly appears at odds with the language from Bartmann already cited in this opinion. But for

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corporate obligations), so that it cannot resolve the bona fide disputes. But were the facts not subject to dispute, the Court could presumably apply the law and determine the validity of the claim at this stage of the proceedings. That appears to be what the Third Circuit did in B.D.W. Associates, Inc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65, 68 (1989) ("The undisputed facts of this case satisfy all of these criteria [for piercing the corporate veil]."). And in any event, there is necessarily some decision making merely in the process of determining whether a given claim is subject to dispute.

the following reasons, this Court believes that language should be disregarded to the extent it is inconsistent with the test set out at pages 1543-44. First, the quoted language is directly at odds with the test adopted by the Tenth Circuit from the Busick and Lough cases. See above at pages 19-20. Second, the quoted language is the standard used in In re All Media Properties, Inc., 5 B.R. 126, 131-36 (Bankr. S.D. Tx. 1980), aff'd. 646 F.2d 193 (5th Cir. 1981). The All Media case was decided before the 1984 amendments to the Code added the "bona fide dispute" qualification to Section 303, and an examination of the case makes clear that the only disqualifying factor for the All Media case was if the claim were contingent. Indeed, the standard used by the Court in All Media is precisely the opposite of the Busick standard; to wit, "[o]nly holders of claims that are contingent as to liability are denied the right to be petitioning creditor. It is significant that holders of unmatured, disputed and unliquidated claims are not specifically barred from being petitioning creditors." Id. at 132. It therefore appears that this Court can better adhere to Bartmann by applying the test set out at pages 1543-44 rather than the latter one.[9]

[9] Indeed, In re All Media, Inc. could well be considered a "poster case" for the reasons that led Congress to amend Section 303 to add the bona fide dispute qualification.

The factual dispute arises from the fact that each Petitioner's case depends on a finding that Krupiak is liable for the debts of the corporation. There is no dispute that the corporation is liable for no less than $1,200 to the Grosjeans, $14,600 to the Munns, $28,000 to the Bemises, $15,000 to Apodaca Earthmoving, Inc., and $403 to Pacific Mutual Door. Petitioners' problem arises from the fact that

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Senator Max Baucus, the Senate sponsor of the amendment, stated in part as follows:

> "Some courts have interpreted section 303's language on a debtor's general failure to pay debts as allowing the filing of involuntary petitions and the granting of involuntary relief even when the debtor's reason for not paying is a legitimate and good-faith dispute over his or her liability. . . .
>
> "My amendment would correct this problem. Under my amendment, the original filing of an involuntary petition could not be based on debts that are the subject of a good-faith dispute between the debtor and his or her creditors. In the same vein, the granting of an order of relief could not be premised solely on the failure of a debtor to pay debts that were legitimately contested as to liability or amount."

30 Cong. Rec. S7618 (June 19, 1984), cited in In re Busick , 831 F.2d at 749-750, n. 2. The All Media court had held that merely because a claim was not provable (e.g., when the debtor can show the claim is barred by the statute of limitations) did not mean that it could not serve as the basis for a petitioning creditor to file an involuntary bankruptcy, even though that creditor would therefore unable to participate in the case or get paid. 5 B.R. at 135. (In fact, this was exactly the same reasoning used by the Tenth Circuit in Bartmann in addressing the claim of petitioner American Express whose claim was, according to the debtor in that case, time barred. Bartmann, 853 F.2d at 1544-45.)

in New Mexico it is relatively difficult to pierce the corporate veil and thereby attach those liabilities to Krupiak.

"A basic proposition of corporate law is that a corporation will ordinarily be treated as a legal entity separate from its shareholders." Scott v. AZL Resources, Inc., 107 N.M. 118, 121, 753 P.2d 897, 900 (1988) ("Scott").

> Only under special circumstances will the courts disregard the corporate entity to pierce the corporate veil holding individual shareholders or a parent corporation liable. . . . Three requirements must be satisfied to obtain this relief: a showing of instrumentality or domination, improper purpose and proximate causation. . . . But it also requires a showing that recognition of the separate corporate existence of the two corporations would sanction fraud or other improper purposes.

Id. (Citations omitted.); accord, Jemez Agency, Inc. v. Cigna Corp., 866 F.Supp. 1340, 1343-44 (D. N.M. 1994). Even assuming Petitioners successfully demonstrated Krupiak's instrumentality or domination of the corporation and that Krupiak had an improper purpose, the evidence failed to show that the Petitioners' losses were proximately caused by misuse of the corporation. In fact, the evidence could certainly be construed to show that there are sufficient assets in the corporation to pay the corporation's debts. See, e.g. Exhibit K-71 (Krup Korp balance sheet dated January 1, 1997 showing total assets of $1.069 million and liabilities of $432,000).

More important, the fact that the evidence can be construed against Petitioners demonstrates the existence of a bona fide dispute.[10]

Furthermore, under Scott, there needs to be a showing of improper purpose or fraud. Petitioners point only to the fact that Krupiak received funds and assets from Krup Korp to make this showing. The Court does not find that these transfers were clearly improper. Rather, the transfers are just one more example of a material unanswered question best tried in the state court case.

Petitioners argue that the opinion most applicable to the circumstances of this case is B.D.W. Associates v. Busy Beaver Building Centers, Inc., 865 F.2d 65 (3rd Cir. 1989). In that case, the trial court granted an involuntary petition against B.D.W. based on piercing the corporate veil. The Court of Appeals ruled that the petition should have been granted, on the grounds that the facts of the case were undisputed and that it "would be difficult indeed to imagine a clearer case for the invocation of alter ego liability." Id. at 68. The

[10] It is also the case that the Court has some questions about Krupiak's credibility, based on its observations of Krupiak as he testified concerning, for example, records that Petitioners had not requested. However, that skepticism does not rise to the level sufficient to eliminate the dispute about the claims.

Court stated that none of the parties had identified a single disputed issue of fact. Id. For that reason, the Court could confirm the correctness of the bankruptcy court's decision to grant the petition, despite the fact that ordinarily attempts to pierce a corporate veil or impose alter-ego liability will be subject to conflicting legal arguments of at least colorable merit, thus constituting a bona fide dispute. Id.

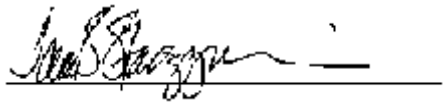
Petitioners assert that the facts in this case are as clear. The Court does not agree. For example, B.D.W. operated through Point View, which was "undeniably a mere shell" that never owned any assets and whose total capitalization was never greater than $700. Id. At 67. Krup Korp, on the other hand, has substantial assets in the form of its partnership interest in the Albuquerque subdivision and its fee interest of the San Miguel County lots; indeed, Krup Korp may have a greater net worth than Krupiak individually. Next, Point View was a mere pass-through from B.D.W. for bills; B.D.W. would transfer funds to Point View, which would in turn pay the bills without any funds accruing to the benefit of Point View. Id. Krup Korp, on the other hand, had its own contracts and generated its own revenues and did not operate as a mechanism solely for Krupiak to pay bills. Point View never incurred any expenses. Id. Krup Korp did. Point

View's owner and sole officer was a "figurehead" with no knowledge of the business, and whose sole function was to sign contracts and checks at the direction of B.D.W.'s officers. Id. Krup Korp's owner was its employee, and he has knowledge and experience in the field; Krupiak operated the business under the business name and for the benefit of the business.

Petitioners also argue that Garcia v. Coffman, 124 N.M. 12, 946 P.2d 216, cert. denied 123 N.M. 626, 944 P.2d 274 (1997) compels a finding that Krupiak is liable for Krup Korp's debts. The Court, however, finds striking differences between Coffman and this case. It is true that, like Krup Korp, the corporation is Coffman was closely held. In Coffman, however, the Court found that the corporation was set up as a scheme to provide unnecessary medical services. Id. at 17, 946 P.2d at 221. In the case before the Court there is no evidence that Krup Korp was established for an improper purpose. There is evidence that Krup Korp may have breached its contracts and owes debts; there is conflicting evidence, however, regarding any moral culpability attributable to Krupiak for those debts.

In summary, the Court finds that there are not three petitioning creditors whose claims are not subject to a bona fide dispute as is required under 11 U.S.C. § 303(b)(1).

Therefore, the case should be dismissed. A separate Order dismissing the case will be entered.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

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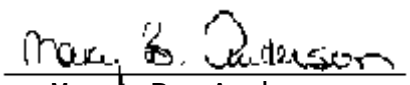

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