UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-07-1122-BaKPa
CAPITAL FINANCE, INC.,	Bk. No. RS 02-19544-MG
Alleged Debtor.	
N. DANIEL KLEIN,	
Appellant,	
v.	**M E M O R A N D U M**[1]
CAPITAL FINANCE, INC.,	
Appellee.	

Argued and Submitted on October 24, 2007
at Los Angeles, California

Filed - November 14, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Mitchel R. Goldberg, Bankruptcy Judge, Presiding

Before: BARDWIL,[2] KLEIN and PAPPAS, Bankruptcy Judges.

1. This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

2. Hon. Robert S. Bardwil, U.S. Bankruptcy Judge for the Eastern District of California, sitting by designation.

Appellant N. Daniel Klein ("Klein") appeals the bankruptcy court's award of attorney's fees and costs to Capital Finance, Inc. ("Capital Finance"), under 11 U.S.C. § 303(i)(1),[3] following the dismissal of Klein's involuntary chapter 7 petition against Capital Finance. We hold that the bankruptcy court did not err in determining that Capital Finance had standing to seek an award under that section, and did not err in determining that Capital Finance's motion was timely. We also conclude that the bankruptcy court did not abuse its discretion in awarding attorney's fees and costs to Capital Finance, based on the totality of the circumstances. Therefore, we AFFIRM.

FACTS

On May 4, 2000, Klein obtained a default judgment in the amount of $2,400,000 in Riverside County Superior Court against one D. Robert Johnson ("Johnson") and others. After unsuccessfully attempting to collect on the judgment, Klein filed an involuntary petition against Johnson in the bankruptcy court for the Central District of California, as Case No. RS 01-28022 MG, and an order for relief was entered. Klein apparently learned that entities related to Johnson had made a number of transfers of real property to Capital Finance. Klein attempted

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3. Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "L.B.R." references are to the Local Bankruptcy Rules for the Central District of California.

to persuade the bankruptcy trustee in the Johnson case to act to recover those transfers, but was unsuccessful.

On June 7, 2002, Klein, as the sole petitioning creditor, filed an involuntary chapter 7 petition (the "involuntary petition") against Capital Finance. Capital Finance responded with a motion to dismiss the involuntary petition on the ground that Klein was not a creditor of Capital Finance eligible to file such a petition under § 303(b), and thus, did not have standing to be a petitioning party. Capital Finance also alleged that the petition had been filed in bad faith and that Capital Finance was entitled to attorney's fees, costs, and actual and punitive damages, pursuant to § 303(i)(1) and (2).

Klein's opposition to the motion to dismiss was comprised primarily of a variety of attacks on Johnson and Jamal Dawood ("Dawood"), the principal of Capital Finance. Klein accused Dawood of forgery, mail and wire fraud, credit card fraud, and identity theft, and alleged that Dawood and Johnson had arranged a number of real property transfers in order to defraud Klein and others. Klein also challenged the validity of Dawood's incorporation of Capital Finance and its authority to do business in California. Klein's objective, apparently, was to establish that Capital Finance had no standing to defend against the involuntary petition.

On the subject of his own standing as a creditor of Capital Finance, Klein submitted copies of a number of deeds in lieu of foreclosure from Johnson entities, as grantors, to Capital Finance, as grantee, and concluded from these that, "[p]ursuant to California Civil Code § 3439.08(b), [Klein] is entitled to a

judgment of $2,800,000 [sic][4] against Capital Finance, Inc., and that the claim is not subject to any bona fide dispute." Klein testified in a declaration that the transfers were made without consideration and solely to defraud him and other creditors, who were, however, not named.

Capital Finance asserted, on the other hand, by way of a declaration by Dawood, that the transfers had been made in satisfaction of pre-existing debts owed by Johnson to Capital Finance. Dawood also testified that Capital Finance was a Nevada corporation in good standing and qualified to do business in California as Nevada Capital Finance, that it had no long-term obligations and was paying its operating expenses as they came due, that it was not past due on any obligation to anyone, that it owed no money or other obligation to Klein, and that it had never done business with Klein.

At a hearing on September 9, 2002, on Capital Finance's motion to dismiss the involuntary petition, the court stated its findings and conclusions on the record, finding that the more appropriate forum for Klein's claim against Capital Finance was the state court, where he could "get a judgment, get a temporary restraining order, get a restraint on selling the assets, do whatever you need to do. And then maybe you can initiate the involuntary." Tr. Hr'g 2:7-10 (September 9, 2002).

The bankruptcy court granted Capital Finance's motion to dismiss the involuntary petition by order entered September 24, 2002 (the "dismissal order"). In the dismissal order, the court

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4. The amount of the judgment was actually $2,400,000.

also "reserve[d] jurisdiction to award attorney's fees, costs, actual damages and punitive damages on any motion brought by Capital Finance, Inc." Klein timely appealed the dismissal order.

Klein's appeal was pending before this Panel from October 3, 2002 until August 19, 2003, when it was dismissed for failure to prosecute. The bankruptcy case was closed on October 17, 2003. In connection with Capital Finance's attempt to file a motion under § 303(i), the case was reopened by the court sua sponte on November 24, 2003. For reasons that are not fully explained, the case was closed again on December 15, 2003. Capital Finance filed a § 303(i) motion on March 8, 2004, and in response, the court required that it also file a motion to reopen the case, which was set for hearing on April 1, 2004.

In opposition to the motion to reopen, filed March 24, 2004, Klein contended that, pursuant to Fed. R. Civ. P. 54, Capital Finance was required to file its § 303(i) motion within 30 days after entry of the order dismissing the case, and that having waited 18 months instead, Capital Finance was time-barred. Klein asserted he would "suffer extreme prejudice" if Capital Finance were permitted to go forward, because he had allowed his appeal to lapse "in reliance upon the passage of time and the statutory bar to any request for fees or damages." He alleged that:

> I would not have permitted the appeal in this case to be dismissed if there were any pending request or award for fees or damages. My perspective was that Jamal Dawood was in jail, there were additional criminal complaints against him, and the Honorable Mitchel R. Goldberg did not want this case. It did not make sense to me to try to further prosecute this case at the appellate level if there was no claim by Capital Finance, and if the bankruptcy court did not want this case.

The § 303(i) motion was taken off calendar by agreement of the parties, and the hearing on the motion to reopen was continued twice, apparently also on the parties' stipulation. The motion to reopen was heard on July 22, 2004, and granted by order entered August 6, 2004, at which time the court imposed a September 1, 2004 deadline for Capital Finance to refile its § 303(i) motion. Capital Finance refiled its § 303(i) motion on September 1, 2004 ("the § 303(i) motion" or "Capital Finance's § 303(i) motion"), and Klein filed opposition to the motion on October 1, 2004.

For reasons that are only vaguely alluded to, apparently having to do with discovery disputes and Dawood's incarceration, two more years passed. On December 15, 2006, Klein filed a motion to dismiss Capital Finance's § 303(i) motion. The court heard argument and denied Klein's motion to dismiss. The court then heard testimony on Capital Finance's § 303(i) motion over the course of several days, and issued its findings and conclusions orally on the record.

By order entered March 12, 2007, the bankruptcy court awarded Capital Finance $79,221 in attorney's fees and $5,475.63 in costs, a total of $84,696.63, under § 303(i)(1).[5] Klein filed a timely notice of appeal.

ISSUES

1. Whether the bankruptcy court erred in determining that Capital Finance's § 303(i) motion was timely.

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5. Following the court's announcement of its ruling on attorney's fees and costs, Capital Finance withdrew its claims for damages under § 303(i)(2).

2. Whether the court abused its discretion in awarding fees and costs to Capital Finance.

3. Whether the court erred in determining that Capital Finance had standing to file and prosecute its § 303(i) motion.

STANDARDS OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law de novo. Padilla v. U.S. Trustee (In re Padilla), 214 B.R. 496, 498 (9th Cir. 1997). Thus, we review the court's interpretation of the law governing its award of attorney's fees de novo. Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.), 370 B.R. 236, 245 (9th Cir. BAP 2007), citing Law Offices of David A. Boone v. Derham-Burk (In re Eliapo), 468 F.3d 592, 596 (9th Cir. 2006).

We review the court's decision to award fees for an abuse of discretion or an erroneous application of the law. Eliapo, 468 F.3d at 596. Thus, "we will not reverse an award of fees unless we have a definite and firm conviction that the bankruptcy court committed clear error in the conclusion it reached after weighing all of the relevant factors." Id.; Higgins v. Vortex Fishing Sys. (In re Vortex Fishing Sys.), 379 F.3d 701, 705 (9th Cir. 2004).

Standing is a legal issue reviewed de novo. Franklin v. Four Media Co. (In re Mike Hammer Prods., Inc.), 294 B.R. 752, 753 (9th Cir. BAP 2003); Aheong v. Mellon Mortg. Co. (in Re Aheong), 276 B.R. 233, 238 (9th Cir. BAP 2002), citing Loyd v. Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000).

The bankruptcy court's interpretation and application of its local rules is reviewed for abuse of discretion. Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 411 (9th Cir. BAP 2005).

DISCUSSION

Klein's opening brief identifies two issues on appeal in addition to those listed above--whether he had standing to file the involuntary petition and whether the bankruptcy court properly granted Capital Finance's motion to dismiss. These issues were actually and necessarily decided by the bankruptcy court when it dismissed the petition. Klein had the opportunity to revisit these issues when he appealed from the dismissal order; he chose instead to abandon the appeal. Thus, these issues are not before us in this appeal. See Kelley v. South Bay Bank (In re Kelley), 199 B.R. 698, 702 (9th Cir. BAP 1996).[6]

Klein does not challenge the amount of the attorney's fees and costs awarded on Capital Finance's § 303(i) motion or the allowance of any particular portion of the award.

This appeal centers on the remedies afforded an alleged debtor against an unsuccessful petitioning creditor pursuant to § 303(i), which provides:

> (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment--
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> (1) against the petitioners and in favor of the debtor for–

6. In his reply brief, Klein appears to acknowledge that these issues have been finally determined.

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for--

(A) any damages proximately caused by such filing; or

(B) punitive damages.

§ 303(i).

A. Capital Finance's Standing

We begin with the issue of Capital Finance's standing to seek fees and costs under § 303(i)(1). Klein's argument is that Capital Finance is not entitled to do business in the State of California. The record is to the contrary. Klein submitted to the bankruptcy court a copy of a January 15, 2002 order in which the Orange County Superior Court ruled that "[d]ue to lack of proof of standing, the third party claim by Capital Finance, Inc., is dismissed without prejudice." Capital Finance argues, but we cannot determine from the record, that this document was not admitted into evidence at the trial.

The significant points are that the state court found only that Capital Finance had not proven its standing to pursue the particular claim, and that the order predates Klein's filing of the involuntary petition, on June 7, 2002, by almost five months. Klein's own evidence reveals that in the interim, on January 18, 2002, Capital Finance, Inc., was incorporated in Nevada, and on April 2, 2002, registered with the California Secretary of State as an active Nevada corporation "which will do business in California as Nevada Capital Finance, Inc." Dawood testified

that Capital Finance "is currently a Nevada corporation, in good standing and duly qualified to do business in California as Nevada Capital Finance."[7] Thus, we conclude that Capital Finance had the requisite authority under state corporate law to defend against the involuntary petition and to file the § 303(i) motion.

B. Timeliness of the § 303(i) Motion

We turn next to Klein's argument that the § 303(i)(1) motion was not timely filed. Klein relies on L.B.R. 7054-1, and in the bankruptcy court, Klein also cited Fed. R. Civ. P. 54(d). Klein argues that L.B.R. 7054-1 required Capital Finance to file its § 303(i) motion within 30 days from entry of the dismissal order, and that because it did not, the motion should have been denied. We reject this proposition.

The pertinent subsections of the rule are as follows:

> **(a) WHO MAY BE AWARDED COSTS**
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> When costs are allowed by the F.R.B.P. or other applicable law, the court may award costs to the prevailing party. . . .
>
> **(b) BILL OF COSTS**
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> The prevailing party who is awarded costs shall have 30 days after entry of judgment to file and serve a Bill of Costs. Each item claimed shall be set forth separately in the Bill of Costs. The prevailing party, or the party's attorney or agent having knowledge of the facts shall file a declaration with the Bill of Costs. The declaration shall verify that:
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> (1) The items claimed as costs are correct;
> (2) The costs have been necessarily incurred in the case;

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7. Klein admitted that he was aware of the fact of Capital Finance's incorporation in Nevada on January 18, 2002, and its registration with the California Secretary of State on April 2, 2002, before he filed the involuntary petition.

(3) The services for which fees have been charged were actually and necessarily performed; and
(4) The costs have been paid or the obligation for payment has been incurred.

(f) MOTION FOR ATTORNEYS' FEES

If not previously determined at trial or other hearing, any motion for attorneys' fees where such fees may be awarded shall be served and filed within 30 days after the entry of judgment or other final order, unless otherwise ordered by the court. Such motions and their disposition shall be governed by Local Bankruptcy Rule 9013-1.

L.B.R. 7054-1(a), (b), (f).

The bankruptcy court issued its oral ruling on this issue on December 28, 2006. The crux of the ruling was a distinction between a contract cause of action, for example, in which the prevailing party is entitled to attorney's fees and costs, ancillary to the trial on the merits, and on the other hand, an involuntary bankruptcy petition, where the right to attorney's fees is not absolute, but only presumed, and where the court, as a separate matter, considers the totality of the circumstances of the petitioning creditor's conduct in determining whether the alleged debtor will be awarded fees and costs. The bankruptcy court concluded that the former would be subject to the filing deadline imposed by Fed. R. Civ. P. 54(d); the latter would not.[8] The court clarified later at the hearing that its findings pertained to both Fed. R. Civ. P. 54(d) and L.B.R. 7054-1.

We agree with the bankruptcy court that Fed. R. Civ. P. 54(d) and L.B.R. 7054-1 regarding "prevailing parties" do not

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8. The court noted that the alleged debtor "[has] no right by law to attorneys fees as the prevailing party." Tr. Hr'g 15:2-6 (December 28, 2006).

apply. The key distinction is that § 303(i) is substantive law providing an independent claim to an alleged debtor whenever an involuntary petition is dismissed without the alleged debtor having waived that claim.[9]

Moreover, Fed. R. Civ. P. 54(d) does not apply in bankruptcy proceedings at all. Rule 7054 incorporates in bankruptcy adversary proceedings subsections (a) through (c) of Fed. R. Civ. P. 54, but not subsection (d). Rule 1018, in turn, makes Rule 7054 applicable in proceedings relating to a contested involuntary petition.

While the inapplicability of Fed. R. Civ. P. 54(d) is dispositive as to that aspect of the argument, we note that, even if the rule were applicable in bankruptcy matters generally, an attorney's fee award under § 303(i)(1) is not of the sort that would be governed by that rule.[10] We also conclude that a § 303(i)(1) fee award is not of the type governed by L.B.R. 7054-1.[11]

Section 303(i) is inherently different from a prevailing party statute. First, § 303(i) is "intended to be the exclusive

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9. We find Klein's reliance on White v. N. H. Dep't of Employment Sec., 455 U.S. 445 (1982), and Bender v. Freed, 436 F.3d 747 (7th Cir. 2006), to be misplaced. Neither case pertains to the filing of involuntary bankruptcy petitions or to an alleged debtor's remedies when such a petition is dismissed.

10. Fed. R. Civ. P. 54(d)(2)(A) provides that "[c]laims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial."

11. Under Rule 9029(a)(1), a local bankruptcy rule may not be inconsistent with the Federal Rules of Bankruptcy Procedure. We conclude that L.B.R. 7054-1 would be invalid as applied to a § 303(i)(1) award, although it may be perfectly valid as applied in other contexts.

remedy for regulating abuse of the involuntary bankruptcy process." Wechsler, 370 B.R. at 249 (emphasis in original), citing Miles v. Okun (In re Miles), 430 F.3d 1083, 1089-91 (9th Cir. 2005).

Further, we must view § 303(i) as an integrated whole, reading subdivisions (i)(1) and (i)(2) together.

> [T]he doctrine of "whole statute" interpretation requires that "a subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter."

Wechsler, 370 B.R. at 252, quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:5 (5th ed. 1992).

In accordance with this principle of statutory construction, the Panel has previously held, with regard to § 303(i) in particular, that "[t]he § 303 (i) scheme [. . .] is construed as an integrated whole in which each of its facets is assessed in the context of the remaining facets." Michael N. Sofris, APC v. Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.), 2007 Bankr. LEXIS 3174 * 7-8 (9th Cir. BAP 2007), citing United States v. Atl. Research Corp., 127 S. Ct. 2331, 2336, 168 L. Ed. 2d 28 (2007), Wechsler, 370 B.R. at 252.

The bankruptcy court applied this principle in this case, recognizing that the two subsections of § 303(i) go hand-in-hand, and observing the illogical result of applying a 30-day deadline to a motion under § 303(i)(1) but no deadline to a motion under § 303(i)(2). The alleged debtor would be required to file his motion for attorney's fees and costs within 30 days from entry of the order dismissing the case, but might file his motion for damages at a later time, thus requiring the court to examine the

same set of facts twice, at different times.

The bankruptcy court also alluded to the inequity that would result from requiring a debtor who has just gone through an involuntary filing, "something he never entered into," to make his decision whether to apply for fees and costs within 30 days.

Further, if the outcome in this case had been different, and if the bankruptcy court had entered an order for relief, Klein would have been under no such time constraint in deciding whether and when to seek an allowance of his attorney's fees and costs under § 503(b)(3)(A) and (b)(4). It would be incongruous at best to impose a strict deadline on Capital Finance, whose involvement in the involuntary proceeding was truly involuntary, when Klein, whose participation was the result of his own choice, would have been under no such deadline.[12]

We conclude that attorney's fees and costs are under the umbrella of § 303(i), which encompasses all the potential remedies that may be available to an alleged debtor who defeats an involuntary petition. As such, attorney's fee and cost claims

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12. As the Panel previously observed,

> [our] analysis is further supported by the recognition that, in the instance of involuntary petitions, the availability of awards to successful petitioning creditors and their counsel under §§ 503(b)(3)(A) and (b)(4) are essentially symmetric with the rights of alleged debtors to recover fees and costs under § 303(i) when they successfully fend off an involuntary petition. The language of § 303(i) does not admit of the construction that the alleged debtor must actually have a separately-reimbursable expense before fees and costs could be awarded. An asymmetric construction of §§ 503(b)(3)(A) and (b)(4) would be unfair and absurd.

Salomon N. Am. v. Knupfer (In re Wind N' Wave), 328 B.R. 176, 183 (9th Cir. BAP 2005), rev'd on other grounds, 2007 U.S. App. LEXIS 25507 (9th Cir. 2007).

are not the type of claims required to be asserted within the time frame of L.B.R. 7054-1(f).

Having concluded that neither L.B.R. 7054-1 nor Fed. R. Civ. P. 54(d) applied, the bankruptcy court went on to examine whether the delay in filing the § 303(i) motion had been reasonable and whether Klein had been prejudiced by the delay. The bankruptcy court carefully considered and ruled on these issues, addressing the reasons for the various delays, with specific reference to each time period between relevant events. The court also considered and rejected Klein's argument that he had been prejudiced because he had allowed his appeal to lapse in reliance on Capital Finance's failure to file a § 303(i) motion within 30 days from entry of the dismissal order.

Given the bankruptcy court's careful consideration of Klein's arguments, and the broad discretion it enjoyed in construing its own local rules, we conclude that the court did not abuse that discretion when it determined that L.B.R. 7054-1 did not apply to Capital Finance's § 303(i) motion.[13]

However, even if we assume that L.B.R. 7054-1 applied to Capital Finance's § 303(i) motion, we find that the motion complied with the rule. Rule 7054-1(f) imposes a 30-day limit specifically conditioned on "unless otherwise ordered by the court." Capital Finance included a request for an award of attorney's fees and costs, as well as damages, under § 303(i)(1) and (2), in its motion to dismiss the involuntary petition. Not only did Capital Finance expressly request such relief in the

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13. District courts "'have broad discretion in interpreting and applying their local rules.'" Delange v. Dutra Constr., Co., 183 F.3d 916, 919 n. 2 (9th Cir. 1999), citing Miranda v. Southern Pac. Transp., 710 F.2d 516, 521 (9th Cir. 1983).

motion, it included argument and case authority for its entitlement to such relief, and indicated it would present evidence of its fees and costs, and actual damages, at a subsequent evidentiary hearing if the dismissal motion was granted.

After issuing its ruling on Capital Finance's motion to dismiss, at the September 9, 2002 hearing, the court indicated it would handle the fees and damages request at a later date. The court engaged in a discussion with counsel for Capital Finance in an attempt to select an acceptable date for the evidentiary hearing and a corresponding date for additional papers to be filed. Dates more than 30 days out were discussed, but because of counsel's expressed wish to conduct discovery, the court finally stated, "I'll reserve, you set it. . . . I reserve re fees and sanctions, no hearing dates." Tr. Hr'g 10:6-14 (September 9, 2002). Klein's counsel was present during this colloquy, and raised no objection.

The Panel concludes that this discussion, together with the court's express reservation of jurisdiction, in the dismissal order, "to award attorney's fees, costs, actual damages and punitive damages on any motion brought by Capital Finance, Inc." was an implicit extension of time, for purposes of L.B.R. 7054-1(f). Thus, the motion was timely in the first instance.

C. Award of Fees and Costs

Finally, Klein contends the bankruptcy court erred in awarding fees and costs under the totality of the circumstances. We observe first that, while the totality of the circumstances is

the correct standard for an award under § 303(i)(1), the inquiry properly begins with "a rebuttable presumption that reasonable fees and costs are authorized." Wechsler, 370 B.R. at 249, citing Higgins, 379 F.3d at 707.

> [A]lthough the Code has liberalized standards for instituting involuntary cases, because of the potential adverse impact on the debtor and the need to encourage discretion in filing such cases, unsuccessful involuntary petitioners should routinely expect to pay the debtor's legal expenses arising from the involuntary filing.

Wechsler, 370 B.R. at 249, citing Higgins, 379 F.3d at 706; In re Kidwell, 158 B.R. 203, 217 (Bankr. E.D. Cal. 1993). (Emphasis added.)

In short, "[f]iling an involuntary petition 'should be a measure of last resort because even if the petition is filed in good-faith, it can 'chill[] the alleged debtor's credit and sources of supply,' and 'scare away his customers.'" Higgins, 379 F.3d at 707, quoting In re Advance Press & Litho, Inc., 46 B.R. 700, 702 (Bankr. D. Colo. 1984).

The petitioning creditor must be given an opportunity to rebut the presumption, but is not entitled to conduct additional discovery and present additional evidence. Higgins, 379 F.3d at 707. "The rebuttable presumption framework allows the court, which by this point in the process has heard all the evidence surrounding dismissal, to make 'an informed examination of the entire situation' without the burden of conducting another mini-trial." Id., citing In re Scrap Metal Buyers of Tampa, Inc., 233 B.R. 162, 166 (Bankr. M.D. Fla. 1999).

In assessing the totality of the circumstances, the bankruptcy court should consider, but is not limited to, these

factors: (1) the merits of the involuntary petition, (2) the role of any improper conduct on the part of the alleged debtor, (3) the reasonableness of the actions taken by the petitioning creditors, and (4) the motivation and objectives behind filing the petition. Higgins, 379 F.3d at 707, citing In re Scrap Metal, 233 B.R. at 166.

Although it was not required to do so, the court conducted a trial on the issue over a period of two days, on December 28, 2006 and January 18, 2007. The trial followed extensive briefing from both sides of the issue, and Klein had conducted discovery, both before he appealed the dismissal order and after that appeal was dismissed. In short, all the issues Klein raised were thoroughly explored, with virtually no limitation by the bankruptcy court, at least none of which he now complains.

On January 18, 2007, the bankruptcy court made a detailed oral ruling on Capital Finance's entitlement to fees and costs under § 303(i)(1). The court relied on In re K.P. Enter., 135 B.R. 174 (Bankr. D. Me. 1992), which in turn, describes the relevant factors as including "the reasonableness of the petitioners' actions, their motivation and objectives, and the merits of their view that the petition was proper and sustainable." K.P. Enter., 135 B.R. at 177.

The bankruptcy court rejected Klein's argument, also raised in this appeal, that he had relied on the advice of counsel in filing the involuntary petition. "Involuntary is an extremely harsh remedy and mere reliance on counsel is not an excuse. . . . There is an independent duty to investigate." Tr. Hr'g 3:25 - 4:4 (January 18, 2007). The court focused on whether Klein had a

justifiable reason for filing the involuntary petition. The court's findings included the following:

> It is clear beyond any doubt that Mr. Klein was not a creditor of the fictitious name Capital Finance, Capital Finance, Inc., or Nevada Capital Finance, Inc. doing business in California as Capital Finance. It is clear that he was not a creditor of any of them.
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> What he was was a disputed claimant of the parties because he had a triable issue of fact as to whether the Johnsons and Dawood, on behalf of Capital Finance, conspired to hide properties in the wake of the onslaught between Mr. Hasso and Mr. Klein of putting pressure to collect on a number of default judgments against Johnson. . . .
>
> Involuntaries are supposed to be a rare and extreme circumstance to assure protection for the benefit of all creditors. The testimony is clear. Mr. Klein had no idea if there were any other creditors of Capital Finance. That didn't matter to him. He was out to protect what he perceived was a fraudulent transfer and he was as frustrated as frustrated can be. He had judgments against Johnson, Johnson had done everything to hide properties. They [Klein and another] finally put him [Johnson] in an involuntary and it even looked like that wasn't going to work. And out of that frustration and success of getting relief in the Johnson bankruptcy, somehow came the belief that involuntary was a tool to gain control. And it is. But it has to be used extremely carefully.
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> In this case the tool was improperly used.

Tr. Hr'g 145:21 - 147:7.

The bankruptcy court addressed in some detail the impediment that the Johnson bankruptcy posed to Klein's recovery of the alleged fraudulent transfers, in terms of the Johnson bankruptcy trustee's apparently exclusive standing to pursue the transfers.[14] The court noted that before Klein commenced the involuntary against Capital Finance, Klein's attorney approached the Johnson bankruptcy trustee, but Klein was unwilling or unable to put up the deposit the trustee would require to prosecute the transfers.

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14. Any such impediment was created by Klein himself, as it was his involuntary petition that had put Johnson into bankruptcy.

The bankruptcy court concluded, therefore, that prior to commencing the involuntary, Klein was aware of appropriate remedies against Capital Finance, including convincing the Johnson trustee to pursue the transfers or offering to purchase the causes of action. In other words, Klein's use of the involuntary petition was not as "a measure of last resort." See Higgins, 379 F.3d at 707. Rather, filing the involuntary petition was a matter of convenience for Klein.

The court supplemented its findings on January 19, 2007, clarifying that it was not holding that Klein acted in bad faith when he filed the petition, but that he acted without making a reasonable inquiry and for an invalid purpose.[15]

Klein argues that he held a non-contingent undisputed claim against Capital Finance, and therefore, that he filed the petition in good faith.[16] He also contends that the allegedly undisputed facts would have supported substantive consolidation

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15. We observe, as did the bankruptcy court, that "in the Ninth Circuit, the presumption is that, upon dismissal of an involuntary petition, attorney's fees and costs are to be awarded to the alleged debtor whether or not the filing was in bad faith." Wechsler, 370 B.R. at 255.

16. On this particular point, we reject Klein's argument that the bankruptcy court dismissed the involuntary petition solely because Klein had not reduced his claim to judgment. The court merely suggested that the proper venue for Klein's claim against Capital Finance was the state court, where the disputed factual issues could be decided, including whether the real property transfers were arms-length transactions or fraudulent transfers. We agree. Klein's reliance on Chicago Title Ins. Co. v. Seko Invs., Inc. (In re Seko Invs., Inc.), 156 F.3d 1005 (9th Cir. 1998), is similarly flawed. The case stands not for the proposition that a petitioning creditor need not have a state court judgment, but that "the existence of a counterclaim against a creditor does not automatically render the creditor's claim the subject of a 'bona fide dispute.'" 156 F.3d at 1008. Unlike the claim of the petitioning creditor in Chicago Title, Klein's claim against Capital Finance was unequivocally the subject of a bona fide dispute.

with Johnson's pending chapter 7 case, and that involuntary bankruptcy constitutes "lesser relief."

Klein argues in his reply brief that his objective here is not to collaterally attack the order dismissing the involuntary petition, which is now final, but to show "the merits of the petition," which is one of the factors a court should consider in ruling on a § 303(i)(1) request for fees and costs. Higgins, 379 F.3d at 707. The substantive consolidation argument also concerns alleged improper conduct on the part of the alleged debtor, which is another pertinent factor.

Klein's arguments depend on the underlying proposition that "in a hearing on a motion to dismiss, all facts must be construed in the light most favorable to the opposing party, and the allegations of a petition or complaint must be accepted as being true." (Klein Opening Br. at 18.) Klein does not cite a rule or other authority; we presume, therefore, that he refers to Fed. R. Civ. P. 12(b)(6). See Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996).

We reject this proposition because Capital Finance met Klein's involuntary petition with a Fed. R. Civ. P. 12(b)(6) motion to dismiss, to which Klein responded with a declaration and extensive exhibits, thereby taking steps to convert the motion to dismiss to a motion for summary judgment.[17] "A federal court must convert a 12(b)(6) motion to one for summary judgment when the parties submit, and the court does not reject, material

17. A Fed. R. Civ. P. 12(b)(6) motion is an appropriate procedure for presenting defenses and objections to an involuntary petition. Rule 1011(b). Rules governing summary judgment are also applicable in proceedings relating to a contested involuntary petition. Rule 1018, incorporating Rule 7056, in turn incorporating Fed. R. Civ. P. 56.

beyond the pleadings." Fernandez v. GE Capital Mortg. Servs. (In re Fernandez), 227 B.R. 174, 179 (9th BAP 1998), citing Parrino v. FHP, Inc., 146 F.3d 699, 706 n.4 (9th Cir. 1998), Cunningham v. Rothery (In re Rothery), 143 F.3d 546 (9th Cir. 1998). Formal notice of the conversion of the motion is not required; the important point is that the parties have "'a full and fair opportunity to ventilate the issues involved in the motion.'" Fernandez, 227 B.R. at 180, quoting Cunningham, 143 F.3d at 549. "A party is 'fairly appraised' [sic] that the court will in fact be deciding a summary judgement motion if that party submits matters outside the pleadings to the judge and invites consideration of them." Cunningham, 143 F.3d at 549, citing Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir. 1985).

Although the bankruptcy court did not refer to the matter as a summary judgment motion, it did take and consider the evidence presented by both parties. Klein invited consideration of evidence outside the pleadings when he submitted his declaration and exhibits. He had no reason to expect the court to accept them as "undisputed" simply because he presented them in the context of an opposition to a motion nominally brought under Fed. R. Civ. P. 12(b)(6).

Further, Klein's attempt to apply the Fed. R. Civ. P. 12(b)(6) standards to render his alleged facts "undisputed" would turn the applicable burden of proof on its head. "The filing of an involuntary case requires the petitioning creditor to meet the burden of proof on the main elements of § 303." Cunningham, 143 F.3d at 548.

Additionally, in terms of his good faith in filing the petition, the record supports no other conclusion than that Klein's claims were hotly disputed, and that Klein knew it or, by any standard of reasonableness, must have known it, given the serious nature of his charges.[18]

Finally, to the extent, if any, that alleged grounds for substantive consolidation should be considered in assessing the totality of the circumstances, for purposes of a § 303(i)(1) award, we observe that Klein addressed this issue in his opposition to Capital Finance's motion to dismiss the involuntary petition, and the issue was, therefore, presumably considered by the bankruptcy court.

In summary, given the thoroughness with which the bankruptcy court handled this matter, taking evidence over the course of two days, and reviewing extensive and detailed briefing, given the detail with which it rendered its ruling, and given the broad discretion afforded the bankruptcy court under § 303(i)(1), we cannot say that the court abused its discretion in finding that Klein failed to conduct a reasonable inquiry into the relevant facts and pertinent law before commencing this case, or in

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18. See, e.g., Adell v. John Richards Homes Bldg. Co., L.L.C. (In re John Richard Homes Bldg. Co., L.L.C.), 439 F.3d 248, 257 (6th Cir. 2006):

> [T]he nature of Adell's claims was such that he would certainly not require legal advice to understand that he and JRH would have real and substantial legal and factual disputes, and further that the litigation to resolve these disputes would be lengthy and costly. Even before JRH filed responsive pleadings, Adell could not have reasonably concluded that JRH would simply admit that it had committed the frauds and the other intentional wrongs that he had alleged.

finding that he had no valid purpose for filing the involuntary petition. Nor did the court abuse its discretion in awarding Capital Finance its attorney's fees and costs.

CONCLUSION

We conclude that the bankruptcy court did not err in determining that Capital Finance had standing to seek an award of attorney's fees and costs, pursuant to § 303(i), and did not err in determining that Capital Finance's motion for such an award was timely filed. We also conclude that the court did not abuse its discretion in awarding attorney's fees and costs to Capital Finance. Therefore, we AFFIRM.