

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376  
Chapter 11  
Substantively Consolidated

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed on August 13, 1997, by Richard C. Breeden,  
as trustee ("Trustee") of The Bennett Funding Group, Inc. ("BFG"), Bennett Management &

Development Corporation (“BMDC”), Bennett Receivables Corporation (“BRC”), Bennett Receivables Corporation II (“BRCII”), Aloha Capital Corporation (“ACC”), American Marine International, Ltd. (“AMI”), Resort Service Company, Inc. (“RSC”), and The Processing Center, Inc. (“TPC”) (collectively the “Corporate Debtors”) seeking an order transferring the pending chapter 7 case of Michael A. Bennett (“M. Bennett”) from the Southern District of Florida to the Northern District of New York pursuant to 28 U.S.C. § 1412 and Rule 1014(b) of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”). Opposition to the Trustee’s motion was filed by M. Bennett on August 29, 1997.<sup>1</sup>

The motion was heard in Syracuse, New York, on September 2, 1997, and the Court reserved decision on the issue of whether the motion was properly before the Court pursuant to Fed.R.Bankr.P. 1014(b).

### **JURISDICTIONAL STATEMENT**

The Court has jurisdiction over the subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), and (b)(1).

### **FACTS**

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<sup>1</sup>The chapter 7 trustee for the estate of M. Bennett filed her response to the Trustee’s motion on August 27, 1997, indicating that she felt it appeared to be “well-founded” and that “judicial economy would appear to be better served by this matter being joint [sic] administered in New York.”

On March 29, 1996, BFG, BRC, BRC II and BMDC filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) (“Code”) with the Clerk of the United States Bankruptcy Court for the Northern District of New York. On April 19, 1996, AMI and RSC also filed chapter 11 petitions. On April 24, 1996, an involuntary case against ACC was commenced and the Court entered an order of relief against ACC on May 10, 1996. TPC filed a voluntary chapter 11 petition on April 26, 1996. The Corporate Debtors were consolidated on July 21, 1997, pursuant to an Order of this Court.

On August 4, 1997, M. Bennett filed a voluntary petition pursuant to chapter 7 of the Code with the Clerk of the United States Bankruptcy Court for the Southern District of Florida. M. Bennett’s counsel asserts that prior to filing his petition, M. Bennett had transferred his ownership interest in TPC to the Trustee on May 8, 1996, and his ownership interest in ACC to the Trustee on May 15, 1997. According to the Trustee, who does not dispute the transfers, at the time of each transfer M. Bennett held 100% of the stock of both corporations.

### **DISCUSSION**

According to its caption, Fed.R.Bankr.P. 1014(b) provides a “procedure when petitions involving the same debtor or related debtors are filed in different courts.” The Trustee asserts that M. Bennett, TPC and ACC are all related debtors by virtue of the fact that M. Bennett was an “affiliate” of both TPC and ACC, as defined in the Code.

Code § 101(2)(A) defines “affiliate” as an “entity that directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the

debtor . . . .” It is the Trustee’s position that the determination of affiliate status for purposes of Fed.R.Bankr.P. 1014(b) should be made as of the date of the commencement of the cases of ACC and TPC, not as of the date M. Bennett filed his petition, as M. Bennett argues. The Trustee asserts that if M. Bennett’s “reading of Bankruptcy Rule 1014(b) were correct, then any entity affiliated with an existing debtor could render Bankruptcy Rule 1014(b) moot by divesting itself of the stock creating the affiliate relationship prior to filing its petition.” *See* Trustee’s Reply, filed September 2, 1997, at 3. The Trustee also argues that M. Bennett’s interpretation of the Rule “would put its enforcement at the option of the affiliate.” *See id.*

Fed.R.Bankr.P. 1014(b) is procedural rather than substantive in nature and gives a court discretion to decide where related cases should proceed. There is nothing in the legislative history to assist the Court in its analysis of the Rule. The Rule is clearly inapplicable until an affiliate’s case is filed in a forum different from that of the initial case. In this instance, M. Bennett filed his petition on August 4, 1997, in the Southern District of Florida, more than a year after the cases of TPC and ACC had been commenced in the Northern District of New York.

There has been no evidence that M. Bennett deliberately transferred his stock ownership in ACC and TPC in order to eliminate his status as an affiliate prior to filing his petition. In fact, quite to the contrary, it appears that the stock was transferred pursuant to some agreement with the Trustee. There is no information in the papers before the Court concerning who initiated the transfer; however, there is a presumption that the Trustee, in accepting the shares of stock in TPC and ACC, must have made a business judgment that ownership of the stock would be of benefit to the estates of the Corporate Debtors. To now suggest that the transfer was a strategic move on M. Bennett’s part to avoid affiliate status is without support.

While the Trustee asserts that M. Bennett's interpretation of Fed.R.Bankr.P. 1014(b) is "illogical" and "unreasonable" and without support in case law, the Trustee also has not cited any cases in support of his position and, indeed, the Court has found none which have addressed this particular issue. It is just as easy to make the argument that the Trustee's position is "unreasonable." For example, assume the following scenario:

On January 1, 1992, Mr. Doe was an officer and holder of 20% of the voting securities in Corporation X, whose sole place of business was in New York. Mr. Doe also held 20% of the voting securities in Corporation Y, located in Texas, and 20% of the voting securities in Corporation Z, located in Michigan. On January 1, 1993, Mr. Doe decided to retire to California and resigned his position with Corporation X. On January 1, 1994, Corporation X filed a chapter 11 petition. As luck would have it, Corporations Y and Z also filed petitions sometime in 1994. On December 1, 1994, Mr. Doe decided to divest himself of his interest in all three corporations. On January 31, 1995, Mr. Doe found himself in financial difficulty and filed a chapter 7 petition in California.

Under the Trustee's theory, Mr. Doe would qualify as an affiliate of each of the three corporations at the time he filed his chapter 7 petition based on his prior ownership of 20% of the voting securities in each corporation and would be subject to having to respond to motions for change of venue in three different forums across the country. Following the Trustee's reasoning, it is conceivable that Mr. Doe would have to defend his choice of venue of his personal bankruptcy case in three different forums despite the fact that ultimately his case can be venued in only one. Pursuant to Fed.R.Bankr.P. 1014(a), however, any requests for a change in venue would have to be filed only in the district of California in which Mr. Doe filed his petition. This certainly would be the more reasonable approach allowing for the question of venue to be adjudicated in a single forum.

It is the opinion of this Court that whether M. Bennett is an affiliate of TPC and ACC must be determined at the time he filed his chapter 7 petition. Prior to filing his petition, M. Bennett had divested himself of any control he might have had over TPC and ACC by turning over his shares of stock in both companies to the Trustee. Therefore, the Court concludes that M. Bennett was not an affiliate of either TPC or ACC when his chapter 7 case was commenced, thereby making Fed.R.Bankr.P. 1014(b) inapplicable under those circumstances.

The fact that the Court has concluded that M. Bennett is not an affiliate and that Fed.R.Bankr.P. 1014(b) is inapplicable does not deprive the Trustee of his right to seek a change of venue of M. Bennett's case pursuant to Fed.R.Bankr.P. 1014(a) in the United States Bankruptcy Court for the Southern District of Florida. If the Trustee's reasons for seeking a transfer of venue have merit, which need not be addressed herein, there is no reason to think that his arguments will be any less effective before the Florida court than before this Court. The Court finds there is no prejudice to the Trustee in having to seek his requested relief in the Florida bankruptcy court, other than the expense of pursuing his motion in Florida rather than New York. Based on the foregoing, it is hereby

ORDERED that the Trustee's motion seeking the transfer of M. Bennett's chapter 7 case to the Northern District of New York is denied without prejudice based on a finding that M. Bennett was not an affiliate of TPC or ACC at the time M. Bennett filed his petition on August 4, 1997, and, therefore, Fed.R.Bankr.P. 1014(b) is an inappropriate procedural vehicle to support said motion.

Dated at Utica, New York

this 5th day of September 1997

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge