

583 B.R. 787
 United States Bankruptcy Court,
 S.D. Alabama, Southern Division.

IN RE: Charles K. BRELAND, Jr., Debtor.

Case No.: 16-2272-JCO

|
 Signed 03/15/2018

Synopsis

Background: Unsecured creditors filed joint motion for appointment of unsecured creditors' committee.

Holdings: The Bankruptcy Court, [Jerry C. Oldshue, Jr., J.](#), held that:

[1] as matter of apparent first impression, order entered by bankruptcy court, directing that no unsecured creditors' committee would be appointed, did not relieve Bankruptcy Administrator of his ongoing duty to ensure that interests of unsecured creditors were adequately represented;

[2] Bankruptcy Administrator could not appoint committee without permission of bankruptcy court; and

[3] court would exercise authority granted to it under Code provision empowering it to issue “necessary or appropriate” orders in order to deny request by unsecured creditors for appointment of unsecured creditors' committee.

Motion denied.

West Headnotes (17)

[1] **Bankruptcy**
 🔑 [Creditors' and equity security holders' committees and meetings](#)

Appointment of a creditors' committee is administrative function performed by the United States Trustee, or in the Southern District of Alabama by Bankruptcy

Administrator, and is not a judicial one. 11 U.S.C.A. § 1102(a).

[Cases that cite this headnote](#)

[2] **Bankruptcy**
 🔑 [Carrying out provisions of Code](#)

Bankruptcy
 🔑 [Creditors' and equity security holders' committees and meetings](#)

While appointment of a creditors' committee is administrative function performed by the United States Trustee (UST), or in the Southern District of Alabama, by Bankruptcy Administrator, bankruptcy court, in exercise of authority granted to it to issue “necessary or appropriate” orders, process or judgments, may review the UST's or Bankruptcy Administrator's actions with respect to appointment of committee under “arbitrary and capricious” standard. 11 U.S.C.A. §§ 105(a), 1102(a).

[Cases that cite this headnote](#)

[3] **Federal Courts**
 🔑 [Abuse of discretion in general](#)

Decision is not “arbitrary and capricious” unless it is based on erroneous conclusion of law, a record devoid of evidence on which the decision maker could rationally have based its decision, or is otherwise patently unreasonable, arbitrary or fanciful.

[Cases that cite this headnote](#)

[4] **Bankruptcy**
 🔑 [Creditors' and equity security holders' committees and meetings](#)

As long as there are creditors who hold unsecured claims and are willing to serve on committee of unsecured claimants, United States Trustee or Bankruptcy Administrator is required to appoint committee to represent such claimants. 11 U.S.C.A. § 1102(a)(1).

[Cases that cite this headnote](#)

[5] Statutes**Language**

Cardinal canon of statutory interpretation is that courts must presume that legislature says in statute what it means and means in statute what it says there.

[Cases that cite this headnote](#)

[6] Statutes**Language**

Starting point of statutory interpretation must always be language of statute itself.

[Cases that cite this headnote](#)

[7] Statutes**Clarity and Ambiguity; Multiple Meanings**

When examining language of statute in effort to interpret it, court's task is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute.

[Cases that cite this headnote](#)

[8] Statutes**Plain language; plain, ordinary, common, or literal meaning**

If language is plain and unambiguous, sole function of courts is to enforce it according to its terms.

[Cases that cite this headnote](#)

[9] Statutes**Purpose and intent; determination thereof****Statutes****Plain, literal, or clear meaning; ambiguity**

If statutory language is ambiguous, court may look to legislative history and documented purpose of statute for assistance in interpreting it.

[Cases that cite this headnote](#)

[10] Statutes**Purpose; policy behind or supporting statute****Statutes****Unintended or unreasonable results; absurdity**

Legislature is presumed to act with a sensible and reasonable purpose, and statute should, if at all possible, be read so as to avoid unjust or absurd conclusion.

[Cases that cite this headnote](#)

[11] Bankruptcy**Representation of debtor, estate, or creditors**

Until Chapter 11 plan is confirmed, Bankruptcy Administrator has ongoing duty to ensure that unsecured creditor body is adequately represented.

[Cases that cite this headnote](#)

[12] Bankruptcy**Representation of debtor, estate, or creditors**

Order entered by bankruptcy court, after being informed by Bankruptcy Administrator that he had solicited unsecured creditors to ascertain which creditors, if any, were willing to serve on unsecured creditors' committee and been unable to find any creditor that was willing to do so, in directing that no unsecured creditors' committee would be appointed, did not relieve Bankruptcy Administrator of his ongoing duty to ensure that interests of unsecured creditors were adequately represented, but merely suspended that ongoing duty until party in interest requested that committee be appointed. 11 U.S.C.A. § 1102(a)(1).

[Cases that cite this headnote](#)

[13] Bankruptcy

🔑 [Creditors' and equity security holders' committees and meetings](#)

In order to appoint unsecured creditors' committee after bankruptcy court, based on absence of unsecured creditors that were at that time willing to serve on committee, had directed that no such committee would be appointed, Bankruptcy Administrator had to seek permission from bankruptcy court; however, there was nothing to prevent unsecured creditor wishing to have such a committee appointed from petitioning court for such relief directly. 11 U.S.C.A. § 1102(a).

[Cases that cite this headnote](#)

[14] **Bankruptcy**

🔑 [Carrying out provisions of Code](#)

Bankruptcy

🔑 [Creditors' and equity security holders' committees and meetings](#)

On request by unsecured creditors for appointment of unsecured creditors' committee, in Chapter 11 case in which bankruptcy court had previously directed that no such committee would be appointed because there were no creditors that were at that time willing to serve thereon, bankruptcy court had authority, pursuant to statute authorizing it to issue “necessary or appropriate” orders, to deny creditors' later request to appoint committee based on lack of necessity of such a committee. 11 U.S.C.A. § 105(a).

[Cases that cite this headnote](#)

[15] **Bankruptcy**

🔑 [Creditors' and equity security holders' committees and meetings](#)

Unsecured creditors' committee operates as representative voice for unsecured creditors in Chapter 11 case, and committee's role is always one of convenience and efficiency.

[Cases that cite this headnote](#)

[16] **Bankruptcy**

🔑 [Representation of debtor, estate, or creditors](#)

Bankruptcy

🔑 [Creditors' and equity security holders' committees and meetings](#)

When Chapter 11 trustee is appointed, need for unsecured creditors' committee as voice for unsecured creditors generally no longer exists.

[Cases that cite this headnote](#)

[17] **Bankruptcy**

🔑 [Carrying out provisions of Code](#)

Bankruptcy

🔑 [Creditors' and equity security holders' committees and meetings](#)

Bankruptcy court would exercise authority granted to it under Code provision empowering it to issue “necessary or appropriate” orders in order to deny request by unsecured creditors for appointment of unsecured creditors' committee, where bankruptcy court had previously directed that no such committee would be appointed because there were no creditors that were at that time willing to serve thereon, where Chapter 11 trustee had been appointed in interim, and where there had been no showing that trustee was not adequately representing interests of unsecured creditors. 11 U.S.C.A. § 105(a).

[Cases that cite this headnote](#)

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

JERRY C. OLDSHUE, JR., U.S. BANKRUPTCY JUDGE

This matter came before the Court for a hearing on January 30, 2018, on creditor Crimson Portfolio, LLC's (hereinafter "Crimson") and Adams and Reese, LLP's (hereinafter "A & R") (altogether, "Movants") Joint Motion for Amendment of Order and Appointment of Unsecured Creditors' Committee. (Docs. 601, 603, 604, 886, 887). The Internal Revenue Service (hereinafter "I.R.S.") filed an objection to the Motion, in which the appointed Chapter 11 Trustee joined. (Docs. 610, 889). This is a contested matter pursuant to [Fed. R. Bankr. P. 9014](#). Notice was given and a hearing was held on the Motion and Objections. The Court has considered the Motions and Objections thereto, the arguments of the parties and the record in sum and concludes that the request is due to be and hereby is DENIED at this time.

JURISDICTION

This Court has jurisdiction to hear this matter pursuant to [28 U.S.C. §§ 1334](#) and [*790](#) 157, and the order of reference of the District Court dated August 25, 2015. This is a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(A\)](#), and the Court has authority to enter a final order.

FINDINGS OF FACT

The Debtor filed his voluntary Chapter 11 petition on July 8, 2016. In accordance with his statutory duties under [section 1102 of the Bankruptcy Code](#), the Bankruptcy Administrator¹ (hereinafter "the B.A."), sent written notice to the unsecured creditors listed on the Debtor's schedules regarding the appointment of a creditor's committee. The notice solicited responses regarding whether those noticed were interested in serving on such a committee. Having received no accepting responses, the B.A. did not appoint a committee, and notified the Court of such. On August 9, 2016, this Court entered an Order declining to appoint an unsecured creditors' committee. (Doc. 38). That Order included the directive: "It is ORDERED that no Creditors' Committee be appointed in the above captioned Chapter 11 case."

Over the course of three days in late 2016, this Court held hearings on various motions to dismiss and/or to appoint a Chapter 11 trustee during which many exhibits were admitted into evidence and testimony was taken from multiple witnesses on whether cause existed to appoint a Chapter 11 trustee. On April 28, 2017, having considered the evidence, testimony and record before it, this Court entered a Memorandum Opinion and Order granting the Motion to Appoint a Trustee finding that, under [11 U.S.C. § 1104\(a\)](#), cause existed to appoint a Chapter 11 trustee, and that it was in the interests of the creditors to do so. (See Doc. 378 Memorandum Opinion and Order). On May 3, 2017, this Court approved the appointment of A. Richard Maples as Chapter 11 Trustee.

Also in May of 2017, Crimson acquired an unsecured pre-petition claim against the Debtor from the law firm of Hutto & Bodiford, thereby becoming an unsecured creditor in this Chapter 11 case. On August 14, 2017, Crimson filed its proof of claim in the amount of \$7,103.44. (Claim 14-1). To date, there are 16 claims filed in this case. Two creditors, A & R and the Baldwin County Revenue Commissioner filed multiple proofs of claim, leaving only eight creditors who filed unsecured claims, including the I.R.S. Of those eight creditors, five are law firms who have performed legal services for the Debtor and filed claims on that basis. Crimson's claim is included in this group of five because the basis of the claim it purchased are the legal services provided by Hutto & Bodiford.

On August 16, 2017, Crimson contacted the B.A. to request the appointment of an unsecured creditors' committee. The B.A. declined the request on the basis that he did not have authority, due to the Court's prior order, to appoint a committee. Until this point, none of this group of five unsecured creditors had participated in this case.

Crimson filed this Motion on the basis that "multiple developments and changes in circumstances" have occurred in this case, (Doc. 601 at 3), including a "myriad of motions to dismiss or appoint a trustee, fraud allegations, revolving debtor's counsel, and multiple amended disclosures ... [which have] effectively eliminated any reasonable prospect for the Debtor's timely exit from bankruptcy." (Doc. 887 at 2-3). [*791](#) Based on these allegations, Movants assert that the appointment of an unsecured creditors' committee would be in

the best interest of the unsecured creditors and that appointment of a committee is necessary to ensure adequate representation of the unsecured creditors. (Doc. 601 at 3). Movants also contend that such a committee would assist the Trustee in moving the case forward and could help facilitate resolution of the case in general. (*Id.*).

The I.R.S. filed its objection in opposition to the Joint Motion on the grounds that a committee is not necessary due to this Court's appointment of a Chapter 11 Trustee. The I.R.S. highlighted the impracticality of appointing such a committee as it would serve a duplicate purpose and incur additional fees and expenses which the Estate would be forced to pay.

The Chapter 11 Trustee, in joining the I.R.S.'s objection, orally argued that his [section 1104](#) duties encompass a fiduciary duty to the Estate and to the creditors, including the unsecured creditors. The Trustee also argued that this request is merely a tactic by the Movants to receive payment for their claims from the Estate instead of through the plan under the statutory priority scheme.

Having considered the Motion and responses, the arguments of the parties and the record before it, this Court agrees with the I.R.S. and the Trustee, and finds their objections are due to be SUSTAINED for the following reasons.

CONCLUSIONS OF LAW

Standard of Review

[1] [2] [3] Under [section 1102\(a\)\(1\) of the Bankruptcy Code](#), the United States trustee is required to appoint a committee to represent the unsecured creditors in chapter 11 cases. The appointment of a creditors' committee under [section 1102\(a\)](#) is an administrative function performed by the United States trustee, not a judicial one; however, a bankruptcy court may review a trustee's actions with respect to appointment of a committee under [section 105 of the Bankruptcy Code](#) under an arbitrary and capricious standard. *In re JNL Funding Funding Corp.*, 438 B.R. 356, 360 (Bankr. E.D.N.Y. 2010). “A decision is not ‘arbitrary and capricious’ unless it is based on an erroneous conclusion of law, a record devoid of evidence on which the decision maker could rationally have based its decision, or is otherwise patently unreasonable,

arbitrary or fanciful.” *In re Barney's, Inc.*, 197 B.R. 431, 439 (Bankr. S.D.N.Y. 1996) (citing *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1022 (D.C. Cir. 1986)); see also *State of N.Y. Dep't of Soc. Servs. v. Shalala*, 21 F.3d 485, 491 (2d Cir. 1994) (in determining whether agency has acted arbitrarily and capriciously, court may not substitute its judgment for that of agency but must determine whether agency's decision was based on consideration of relevant factors and whether there has been clear error of judgment). Movants must present “substantial evidence” that the B.A. acted “arbitrarily and capriciously” in not appointing a committee at Movants' request. *In re Barney's, Inc.*, at 439. Furthermore, even though prior amendments to [section 1102](#) removed the power of committee-appointment from the courts and bestowed that power upon the U.S. trustee, “one should not conclude that Congress had any intention to exclude the court from [changing the] committee membership for appropriate reasons.” *Id.* (citing *In re Plabell Rubber Prods.*, 140 B.R. 179, 180 (Bankr. N.D. Ohio 1992) (citation omitted).

Here, this Court has been asked to review the B.A.'s refusal of Crimson's request to appoint a committee. Because there must be an ability to resort to the *792 court where an objection has been unsuccessfully raised regarding the B.A.'s action or inaction related to a committee or composition, this Court will utilize its [section 105](#) powers to review the B.A.'s actions and will apply the arbitrary and capricious standard as set out above. *Id.*; see also, *In re Lykes Bros. S.S. Co., Inc.*, 200 B.R. 933 (M.D. Fla. 1996); *In re Mercury Fin. Co.*, 240 B.R. 270 (N.D. Ill. 1999).

Section 1102 and The B.A.'s Duty to Appoint

[4] [Section 1102\(a\)\(1\) of the Bankruptcy Code](#) states that “as soon as practicable after the order for relief,” the United States trustee “shall appoint a committee of creditors holding unsecured claims...” 11 U.S.C. § 1102(a) (1). Applying the plain language of the statute, the Court agrees with Movants that there is little room for doubt that the B.A. “shall” appoint a committee. As long as there are creditors who hold unsecured claims and are willing to serve on a committee of unsecured claimants, the B.A. is required to appoint a committee to represent such claimants. See 5 Collier on Bankruptcy 1102.01 at 1102-4.

There is no dispute that the B.A. indeed performed his duties in soliciting participation of a committee. At that time, there were no creditors interested in serving, thus, no committee was appointed, and this Court entered an order that no committee would be appointed. Now, approximately one year later, Movants request that the B.A. once again perform this statutory duty and appoint a committee of unsecured creditors. This late request requires the Court to address the questions of whether the B.A.'s duty to appoint still exists. If the duty does not exist, when did it expire? If it does exist, may the B.A., given this Court's prior order, appoint a committee without Court permission?

To answer this question, this Court turned first to the statute itself, only to find these questions unanswered. Therefore, it appears these are matters of first impression. Other than stating that the B.A. must appoint "as soon as practicable," the statute itself does not set an express deadline within which the duty to appoint expires, nor does it indicate that any action or inaction by the B.A. or otherwise would cause the duty to necessarily lapse. There is likewise no case law on point addressing the status of the B.A.'s duty at this juncture. Thus, the Court must resort to general rules of statutory interpretation to determine this question of law.

[5] [6] [7] [8] [9] [10] "The cardinal canon of statutory interpretation is that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *In re Hock*, 571 B.R. 891, 894 (Bankr. S.D. Fla. 2017) (citing *U.S. v. Aldrich*, 566 F.3d 976, 978 (11th Cir. 2009) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quotation marks omitted))). "The starting point of statutory interpretation must always be the language of the statute itself." *Hock*, at 894 (citing *Randall v. Loftsgaarden*, 478 U.S. 647, 656, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986)). "When examining the language of the statute itself, the Court's task is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Hock*, at 894 (citing *Med. Transp. Mgmt. Corp. v. Comm'r of I.R.S.*, 506 F.3d 1364, 1368 (11th Cir. 2007) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (quotation marks omitted))). If the language is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct.

1026, 103 L.Ed.2d 290 (1989) (citations omitted). "If the statutory language is ambiguous, the *793 Court may look to the legislative history and documented purpose of the statute." *Hock*, at 895 (citing *In re Kaplan*, 331 B.R. 483, 486 (Bankr. S.D. Fla. 2005)). "Because the legislature is presumed to act with sensible and reasonable purpose, a statute should, if at all possible, be read so as to avoid an unjust or absurd conclusion." *In re Robinson*, 535 B.R. 437, 445 (Bankr. N.D. Ga. 2015) (citing *In re Graupner*, 537 F.3d 1295, 1302 (11th Cir. 2008) (internal quotation marks omitted)).

[11] [12] Beginning with the question of whether the B.A.'s duty to appoint still exists, the Court finds that it does. Until a plan is confirmed, the B.A.'s duty to ensure that the unsecured creditor body is adequately represented is ongoing. See *In re New Century TRS Holding, Inc.*, 2013 WL 5377962 at *4 (Bankr. D. Del. Sept. 26, 2013) (collecting cases). However, to interpret the statute to require the B.A., after no response to his initial inquiry, to continually attempt to form a committee in every chapter 11 case until a plan is confirmed would be an exercise in futility and outside the spirit of section 1102. Such an interpretation would in fact be the very definition of an absurd result. Thus, this Court believes that the most reasonable approach is a finding that its order stating that no committee would be appointed merely suspends the ongoing duty until a party in interest requests that a committee be appointed.

[13] Even though the B.A.'s duty is now suspended by court order, Movants assert the position that the B.A. does not need court permission to appoint a committee once there becomes an interest in participating. This Court disagrees with Movants, and finds that the B.A. must seek Court permission to appoint a committee, since, in addition to this Court's directive ordering that no committee would be appointed, Congress never intended to insulate B.A.'s administrative actions from review by a bankruptcy court. See *In re Mercury Finance, Inc.*, 240 B.R. 270, 277. Therefore, this Court finds that the B.A.'s refusal to appoint a committee absent court permission was not arbitrary and capricious. However, where the B.A. has performed his duties but no committee has been appointed, a creditor who wishes to form a creditors' committee is not foreclosed from petitioning the court simply because the B.A.'s duties are suspended. Such a foreclosure imposes a reading of section 1102 that does comport with the spirit of the Code, and creates an

absurd result. See *In re Barney's, Inc.*, 197 B.R. 431, 439 (S.D.N.Y. 1996) (citing *In re Plabell Rubber Prods.*, 140 B.R. 179, 180) (where a request to the U.S. trustee to change the membership of a committee fails, or if there is an objection to the act of the U.S. trustee, there must be an ability to resort to the court; absent very specific and direct language, one should not conclude that Congress had any intention to exclude the court from those able to change committee membership for appropriate reasons); see also 11 U.S.C. § 1109(b).

Based on this Court's finding, that, under these facts, Court permission to appoint a committee must be sought, and that this Court has jurisdiction to hear such a request, the Court now considers the merits of Movants' request.

Necessity

[14] Section 105 of the Bankruptcy Code provides bankruptcy courts with the power to issue any “order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Code. 11 U.S.C. § 105(a). This Court believes that where a court order has been entered that no committee shall be appointed, section 105 gives this Court the authority to deny a creditor's later request to appoint a committee *794 based on the lack of necessity of such a committee.

[15] [16] [17] An unsecured creditors' committee operates as a representative voice for the unsecured creditors in a chapter 11 case. The committee's role is always one of convenience and efficiency. *In re Pacific Ave., LLC*, 467 B.R. 868, 870 (W.D. N.C. 2012). However, where a chapter 11 trustee is appointed, the necessity for such a representative committee generally no longer exists. *Id.* Because the “[t]rustee has a statutory fiduciary duty to the same unsecured creditors” that a committee would have, allowing a committee to be appointed after

a trustee has been appointed would be duplicative and unnecessary. *Id.* “It is worth noting that an unsecured committee is not provided for in Chapter 7 liquidation cases—because of the presence of the Trustee in such cases.” *Id.* The appointment of a chapter 11 trustee renders the appointment of a committee unnecessary to the fair and orderly administration of the estate. The cost of another team of professionals to represent the committee is impractical and is not cost effective.

At the hearing of these matters, no evidence was presented that the rights and interests of the unsecured creditors were being inadequately represented by the Trustee. Unless and until Movants present the Court with sufficient evidence that Mr. Maples has not or is not upholding his statutory fiduciary duty to the unsecured creditors, no committee shall be appointed. To ensure that Movants are not denied future due process on this issue, this Memorandum Opinion and Order is entered without prejudice. Movants are hereby entitled to renew their request for relief if sufficient evidence can be presented that their interests are not being fairly and adequately represented by the Trustee.

CONCLUSION

Having considered the Motions and Objections thereto, the arguments of the parties, and the record in sum, this Court finds that the Objections by the I.R.S. and the Chapter 11 Trustee, A. Richard Maples, are due to be SUSTAINED and the Movant's Motion is hereby DENIED without prejudice, with no unsecured creditors' committee being appointed at this time.

All Citations

583 B.R. 787, 121 A.F.T.R.2d 2018-1099

Footnotes

¹ In Alabama, the Bankruptcy Administrator is the functional equivalent of the United States trustee, and the B.A. assumes the duties of the trustee as required by the Code. See *In re JNL Funding Corp.*, 438 B.R. 356, n. 6 (Bankr. E.D.N.Y. 2010).