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UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF VERMONT

59-1

In re:	)	
HARRY ALEXANDER,	)	Case No. 98-11844
Debtor.	)	(Involuntary Chapter 7)
	)	
	)	**MEMORANDUM OF DECISION**
	)	**GRANTING MOTION TO**
	)	**TRANSFER VENUE**

APPEARANCES:
J. Anderson, Esq., of Ryan Smith & Carbine, Ltd. Rutland, VT, for Bank of Woodstock ("Bank").
J. Canney III, Esq., Rutland, VT, for Harry Alexander ("Debtor").
P. Flanagan, Esq., West Lebanon, NH, for Randal and Shelly Pitman.

Debtor asks that we transfer this involuntary case to New York, where Debtor presently lives and has filed a voluntary joint-petition with his spouse[1] We grant Debtor's motion.

FACTUAL HISTORY[2]

Debtor and his spouse purchased the Hartland General Store in Hartland, Vermont on

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[1]Our subject matter jurisdiction over this controversy arises under 28 U.S.C. §1334(b) and the General Reference to the Court by the District of Vermont. This is a core matter under 28 U.S.C. §157(b)(2). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bankr.P. 7052.

[2]At oral argument, the parties agreed that we could determine Debtor's domicile by reviewing the facts set forth in the transcript of Debtor's Fed.R.Bank.P. 2004 exam. Debtor later filed a supplemental affidavit, which was stricken from the record by our Order dated April 5, 1999.

November 12, 1997. *(2004 Transcript of Harry Alexander Feb. 12, 1999 at 247; hereafter "Tr.")* Debtor and his spouse operated the store and resided in Vermont. *(Tr. at 15).* In August, 1998, Debtor began searching for job opportunities in New York. *(Tr. at 22.)* When in New York, Debtor stayed at an apartment owned by his sister-in-law, which is located at 301 E. 69th Street, New York, New York. (hereafter "New York apartment") *(Tr. at 10).* Although there is no written lease agreement, Debtor's sister-in-law has charged Debtor $925 in monthly rent beginning September 1, 1998.[3] *(Tr. at 52).* According to Debtor's voluntary petition, he began occupying the New York apartment on September 17, 1998. (*Voluntary Chapter 7 Petition of Harry Alexander, Dec. 29, 1998 S.D.N.Y. Docket No. 98-49278).*[4]

Debtor obtained employment in New York on November 16, 1998. *(Tr. at 17-18).* On October 7, 1998, Debtor and his spouse obtained New York driver's licenses and voter registration cards. *(Interrogatory of Harry L. Alexander dated Feb. 8, 1999 Answer No. 5).* Though staying in New York during the week, Debtor made frequent weekend trips to Vermont to visit his spouse. *(Tr. at 25-29).* Debtor's spouse resided in Vermont while she wound up the affairs of the Hartland General Store, which closed permanently on October 31, 1998. *(Tr. at 25-26).* Debtor began having his Vermont mail forwarded to New York in December of 1998. *(Tr. at 48).* Debtor's spouse moved to New York on December 28, 1998. *(Tr. at 25-26).*

Bank and two other creditors filed an involuntary joint Chapter 7 petition[5] against Debtor

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[3]Debtor's spouse paid the rent for September and October (that rent was paid in either November or December). *(Tr. at 51-58).* November and December rent has not been paid. *Id.*

[4]Debtor brought clothing and certain other personal items with him to New York in mid-September. *(Tr. at 9;26).* He left his home furnishings, which were owned jointly with his wife, at the Vermont residence, because the New York apartment was fully-furnished. *(Tr. at 8-9).*

[5] The validity of an involuntary joint petition is discussed *infra.*

and his spouse here on December 8, 1998. On December 23, 1998, before an answer to the involuntary joint petition was filed, Bank made a motion to amend the petition. On January 11, 1999, we entered an Order, without hearing, granting Bank's Motion to Amend the involuntary joint petition to replead it as separate involuntary petitions against Debtor and Debtor's spouse.[6]

On December 29, 1998, Debtor and Debtor's spouse filed a voluntary joint Chapter 7 petition in the Bankruptcy Court for the Southern District of New York (the "New York Proceeding"). All activity in the New York Proceeding was stayed under Fed.R.Bankr.P. 1014(b) because of the involuntary petition pending here. On February 16, 1999, we dismissed the involuntary petition against Debtor's spouse as lacking the requisite number of creditors,[7] which permitted the New York Proceeding to continue as to Debtor's spouse only. At that same hearing, Debtor made a motion to transfer venue of the involuntary petition remaining against him to the Southern District of New York. Bank objected, claiming venue is proper in Vermont.

PROPER VENUE

"Venue" refers to the proper forum in which a case should be heard. 28 U.S.C. §1408 governs venue in a bankruptcy proceeding. The statute states:

Except as provided in Section 1410 of this title, a case under title 11 may be commenced

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[6]*See* Order Granting Motion to Amend Involuntary Petition, Jan. 11, 1999, which states:

IT IS ORDERED the joint Involuntary Petition filed against Harry L. Alexander [and] Stephanie E. Alexander on December 8, 1998 is amended under F.R.C.P. 15(a) and Bankruptcy Rule 7015(a) so as to be repled as a separate involuntary petition against Harry L. Alexander and a separate involuntary petition [against] Stephanie E. Alexander.
Id.

[7]Under 11 U.S.C. §303, three petitioning creditors are necessary to effectuate an involuntary Chapter 7 petition. One of the three creditors that filed against Debtor and Debtor's spouse held a judgment Order against Debtor only. Accordingly, the case against Debtor's wife was unconditionally dismissed.

> in the district court for the district (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty day [sic] period than the domicile, residence, or principal place of business in the United States, of such person were located in any other district....[8]

28 U.S.C. §1408.

It is not disputed by either party that during the 180 days prior to the filing of the involuntary petition, Debtor had two domiciles, Vermont and New York. If a person maintains two domiciles within 180 days prior to a bankruptcy filing, the proper venue lies in the domicile in which a debtor spends the majority of that period. **In re Frame**, 120 B.R. 718, 722 (Bankr. S.D.N.Y. 1990). The party asserting changed domicile for bankruptcy purposes has the burden of proof on the issue. **Id.** at 723. Accordingly, Debtor must show that he was domiciled in New York for at least 91 of the 180 days prior to the effective date of the involuntary petition.

We look to state law to determine Debtor's domicile under 28 U.S.C. §1408. **In re Gurley**, 215 B.R. 703, 707 (Bankr.W.D.Tenn. 1997) ("The terms 'residence' and 'domicile' are not defined for purposes of the Bankruptcy Code. Questions of domicile or residency are to be determined according to the law of the forum."). In Vermont, domicile is "a place where a person lives or has his [or her] home, to which, when absent, he [or she] intends to return and from which he [or she] has no present purpose to depart." **Duval v. Duval**, 149 Vt. 506, 509, 546 A.2d 1357, 1360 (1988) (overruled on other grounds by **Shute v. Shute,** 158 Vt. 242, 607 A.2d 890 (1992). To change domicile, one must show: (1) physical presence at the new domicile; and (2) an intent to remain there indefinitely. **Walker v. Walker**, 124 Vt. 172, 174,

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[8]We do not address the issues of residence, principal place of business, or principal assets in determining if Vermont is a proper venue to hear this case because we find that Debtor was domiciled in Vermont for the majority of the 180 pre-petition days.

200 A.2d 267, 269 (1964). Further, "[a]n essential ingredient of the intent to acquire a new domicile is the intent to give up the old domicile." **Id.** (citations omitted).

Accordingly, we must determine the date Debtor left Vermont with the intent to retain New York as his permanent domicile. We look to Debtor's actions as well as his words; mere after-the-fact and self-serving declarations are not enough to establish the requisite intent. "The troublesome aspect of domicile is that it deals not only with acts, but with states of mind." **Id.** (quoting **Duval v. Duval**, 149 Vt. At 509, 546 A.2d at 1360); *see also* **Bonneau v. Russell**, 117 Vt. 134, 137, 85 A.2d 569, 571 (1952) (holding that the intent necessary to establish domicile may be established by acts as well as words).

Debtor's actions show that he intended to establish New York as his domicile as of September 17, 1998, but no earlier. Although Debtor may have stayed in the New York apartment prior to that date, the evidence does not show that Debtor intended to remain there indefinitely prior to September 1998.[9] Up to that point, Debtor continued to work and live in Vermont. According to Debtor's 2004 testimony and his voluntary petition, Debtor did not 'move' to New York until mid-September. *(Tr. at 26; Voluntary Chapter 7 Petition of Harry Alexander, Dec. 29, 1998 S.D.N.Y. Docket No.98-49278).*

Looking at Debtor's actions as well as words, we find Debtor did not acquire an intent to remain in New York indefinitely until he moved there and began occupying the New York

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[9]While Debtor became liable under the oral lease on September 1, 1998, the lease is only month-to-month. Therefore, Debtor could leave on short notice. We further note that Debtor did not actually pay the rent until at least November, and possibly December. *(Tr. at 51-58).* We do not think that entry into an oral short-term lease is sufficient evidence for us to infer Debtor's intent to remain in New York indefinitely. Indeed, at the time the lease became effective, Debtor continued to reside in and keep the vast majority of his personal belongings in Vermont. *(Tr. at 8-9; 26).*

apartment on September 17, 1998.[10] **Walker**, 124 Vt. at 174, 200 A.2d at 269 (1964). Accordingly, we find that Debtor became domiciled in New York on September 17, 1998.

To determine if Debtor has met the 91-day requirement under 28 U.S.C. §1408, we must next determine the effective date of the involuntary joint petition. The December 8, 1998 involuntary joint petition was defective because it named Debtor and his spouse jointly. 11 U.S.C. §303 states that an involuntary petition may be filed only against a 'person'. Because involuntary joint petitions are against 'persons' rather than a 'person', such petitions are defective. *See* **In re Jones**, 112 B.R 770, 771 (Bankr.E.D.Va.1990) ("Courts considering the issue of whether an involuntary case may be maintained against more than one debtor have concluded that the bankruptcy code does not contemplate joint involuntary petitions.")[11] We have also ruled this way several times from the bench.

Debtor argues that because the December 8, 1998 involuntary joint petition was defective, we did not have jurisdiction to amend it, and should have dismissed it under Fed.R.Civ.P. 12(h)(3).[12] This argument does not lack merit. "The reasoning...entails a simple, two-step process: (1) the court does not have subject matter jurisdiction over a joint involuntary

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[10]The mere fact that Debtor continued to visit his family in Vermont after September 17, 1998 does not lead us to conclude that Debtor intended to give up New York as his domicile. Rather, we conclude that Debtor likely cared for and missed his spouse and family.

[11]At least one court has held that such a defect does not create a jurisdictional defect. **In re Gale**, 177 B.R. 531, 534 (Bankr. E.D.Mich. 1995) ("[Debtors] do not suggest that either of them could not individually be made the subject of an involuntary bankruptcy proceeding, and in substance that is all [creditor] did when it filed the joint petition....I therefore conclude that the Court possesses subject matter jurisdiction.") (citations omitted).

[12]"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed.R.Civ.P. 12(h)(3).

case; and (2) lacking such jurisdiction, a court has no choice but to dismiss the case." **In re Gale**, 177 B.R. 531, 533 (Bankr.E.D.Mich. 1995) (discussing **In re Jones**, 112 B.R. at 773). Bank argues that its amendment cured any defect in its petition, jurisdictional or otherwise, and that the amendment should relate back to the date of the original filing.

Choosing the better argument, we agree with Bank. While the single-debtor requirement of §303 may be considered a jurisdictional prerequisite,[13] we agree with the view that the situation is analogous to that of severing a misjoined party. *See* **In re Gale**, 177 B.R. at 532 ("[I]f the citizenship of one or more parties in a lawsuit deprives the court of diversity jurisdiction, Rule 12(h)(3) would suggest that the only appropriate response is to dismiss the case. Yet it is viewed as perfectly acceptable under such circumstances for the court to drop the nondiverse party pursuant to F.R.Civ.P. 21 (sic) if that party is dispensable." (citations omitted).[14] Our order granting Bank's motion to amend under Fed.R.Civ.P. 15(a), made applicable by Fed.R.Bankr.P. 7015(a), has the same substantive effect as a motion to sever under Fed.R.Civ.P. 21, made applicable by court order under Fed.R.Bankr.P. 1018.[15] The fact that our

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[13]*See* **In re Calloway**, 70 B.R. 175 (N.D.Ind. 1986); **Benny v. Chicago Title Insurance Co. (In re Benny)**, 842 F.2d 1147 (9th Cir. 1988); **In re Busick**, 719 F.2d 92, 926 note 7 (7th Cir. 1983); *but see* **In re Gale**, 177 B.R. 531, 534 (Bankr.E.D.Mich.1995).

[14]*But see* note 12 *supra.*

[15]Civil Procedure Rule 21 states:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any part or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed.R.Civ.P. 21

We note that under Bankruptcy Rule 1018, Civil Procedure Rule 21 will not apply unless

Order was entered under a different procedural rule in no way affects the substance of the ruling itself, which cured the defective petition.[16] Accordingly, we hold that we acted properly in granting Bank's motion to amend its original December 8, 1998 petition.

Because Debtor did not acquire his domicile in New York until at least September 17, 1998, his domicile remained in Vermont until at least that time. **Walker**, 124 Vt. at 174, 200 A.2d at 269 (1964). Debtor was therefore domiciled in Vermont for 98 of the 180 days preceding the involuntary petition date of December 8, 1998. Vermont therefore is a proper venue to hear this case. **In re Frame**, 120 B.R. 718, 722 (Bankr. S.D.N.Y. 1990); 28 U.S.C. §1408. But this holding does not end the proper search for proper venue.

TRANSFER OF VENUE

Debtor next argues that we should use our discretion to transfer venue of this proceeding

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the court so orders. The Advisory Committee Note to Bankruptcy Rule 1018 states:

> Because of the special need for dispatch and expedition in the determination of the issues in an involuntary petition, the objective of some of the...Rules...to facilitate the settlement of multiple controversies involving many persons in a single lawsuit is not compatible with the exigencies of bankruptcy administration. For that reason...[Rule 7021] will rarely be appropriate in a proceeding on a contested petition." (citations omitted).

Fed.R.Bankr.P. 1018 advisory committee's note (1983).

We believe that our Order, severing the two petitions and having them repled as two separate involuntary petitions would allay any concerns of the drafters. *See* note 16 *infra*.

[16]"The reluctance to honor form over substance should be particularly acute when dealing with a bankruptcy petition, as dismissal and the subsequent filing of a new petition could have a significant impact on the trustee's ability to challenge pre-petition property transactions." **In re Gale**, 177 B.R. at 535. *See also* **Western Land Bank**, 116 B.R. at 725 (dropping party rather than dismissing case "preserves time sensitive cases of action under the avoiding powers of the Bankruptcy Code that might otherwise be lost on dismissal of the petition.").

to New York. Under Fed.R.Bankr.P. 1014(a)(2) and 28 U.S.C. §1412, we may transfer venue of a case in the interests of justice or for the convenience of the parties.[17] Such a decision lies solely within our discretion.[18] **In re Pinehaven Assocs.,** 132 B.R. 982, 987 (Bankr.E.D.N.Y. 1991). "There is no litmus test or hard and fast rules offering precise guidance for transfer of venue and the bankruptcy courts are left to a case by case determination based upon all relevant factors." **Id.** at 987. Although New York does not appear to meet any of the venue prerequisites listed under 28 U.S.C. §1408,[19] that fact alone does not impinge on our discretionary power granted under 28 U.S.C. §1412 to transfer venue there if we deem it appropriate. *See* **In re McDonald,** 219 B.R. 804, 806-807 (Bankr.W.D.Tenn. 1998).

Bank argues that if we transfer venue to New York, Debtor plans to exempt his entire interest in over $1 million presently held in an Individual Retirement Account.[20] Under Vermont

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[17]"A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. §1412.

[18]Factors to consider in determining the convenience of the parties include the proximity of the creditors to the court, the proximity of the debtor to the court, the proximity of witnesses, the location of the debtor's assets, the economic administration of the estate, and the necessity for ancillary administration. **Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co.**, 596 F.2d 1239, 1247 (5th Cir.1979), *cert denied,* 444 U.S. 1045 (1980). If the convenience of the parties and witnesses is served by a venue transfer, justice will usually be served. **In re Pinehaven Assocs.**, 132 B.R. 982 (E.D.N.Y. 1988).

[19]The domicile predicate for proper venue is not available for Debtor to claim New York as a proper venue under 28 U.S.C. §1408, because Debtor was domiciled in Vermont until September 17. Under the facts as presented at Debtor's Fed.R.Bankr.P. 2004 examination, we do not find any other § 1408 predicate upon which this case could have originally been filed in New York.

[20]*See* N.Y. Debt. & Cred. Law § 282(2)(e); **Dubroff v. First National Bank of Glens Falls (In re Dubroff),** 119 F.3d 75 (2nd Cir. 1997).

law, all but $10,000 of his interest in that account is available for distribution to creditors.[21] Bank argues Debtor's alleged aggressive pre-bankruptcy planning to have this case brought in New York is tantamount to a fraud on the creditors of Debtor's estate. If such is the case, Bank is not without its remedies under federal or state law, a fact Bank has so informed us about.

Regardless of New York exemption law, using our discretion, we transfer venue of this case to New York. Debtor presently lives and works in New York. The vast majority of his assets are in New York, in fact it appears that none of Debtor's assets remain in Vermont. Debtor has filed a voluntary joint petition with his spouse in New York. Allowing this involuntary case to continue in Vermont would create problematic issues regarding distribution of marital assets and applying different state law exemptions to jointly-held property. Further, we think that it would be a waste of judicial resources. Any concerns of creditors regarding Debtor's alleged overreaching of the exemption statutes may be heard in the New York forum. Exercising our discretion as allowed under 28 U.S.C. §1412, we find that the convenience of the parties and the interests of justice are best served by transferring this case to New York.

CONCLUSION

Debtor's motion to transfer to the Southern District of New York is Granted. Debtor's counsel to submit an appropriate Order within five (5) days.

Dated at Rutland, Vermont this 14 Day of April, 1999

The Hon. Francis G. Conrad
U.S. Bankruptcy Judge

[21] *See* 12 V.S.A. §2740(16).