



SO ORDERED,

A handwritten signature in blue ink that reads "Katharine M. Samson".

Judge Katharine M. Samson  
United States Bankruptcy Judge  
Date Signed: May 15, 2015

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE: DUDLEY MASON**

**CASE NO. 15-50616-KMS**

**DEBTOR**

**INVOLUNTARY  
CHAPTER 7**

**ORDER DENYING MOTION TO APPOINT TRUSTEE**

THIS MATTER came on for hearing on April 29, 2015 (“Hearing”) on the Emergency Motion for the Appointment of Trustee (Dkt. No. 5) filed by Phillips Building Supplies of Gulfport, Inc., Coast Concrete Company, Inc., and Mobile Lumber Building Materials, Inc., the petitioning creditors in the above-styled Involuntary Chapter 7 case (“Petitioners”); and the Objection of Dudley Mason to Emergency Motion for the Appointment of Trustee (Dkt. No. 16) filed by Dudley Mason (“Mason” or “Debtor”), the alleged debtor in the above-styled case. Having considered the testimony of witnesses and documentary evidence submitted at the Hearing, as well as arguments of counsel and applicable law, the Court finds that the Petitioners have not met their burden to show that the appointment of a trustee is necessary at this time to preserve the property of the estate or to prevent loss to the estate pursuant to 11 U.S.C. § 303(g)

of the Bankruptcy Code.<sup>1</sup> Accordingly, the Emergency Motion for the Appointment of Trustee is denied for the following reasons.

### ***Jurisdiction***

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334.<sup>2</sup> This matter is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A) and (O).

### ***Factual Background***

On April 13, 2015, the Petitioners commenced the above-styled Chapter 7 Involuntary Petition against Dudley Mason (“Mason”)<sup>3</sup> (Dkt. No. 1) and a Summons to Debtor in Involuntary Case was issued (Dkt. No. 3).

Ten days after filing the Involuntary Petition, the Petitioners filed the Emergency Motion for the Appointment of Trustee (“Motion”) pursuant to 11 U.S.C. § 303(g). (Dkt. No. 5). The only basis for relief stated in the Motion, is the following: “Upon information and belief, proceedings are transpiring against the Debtor including, but not limited to, foreclosures as well as other actions which necessitate the preservation of property of the Estate and to prevent loss to the estate.” *Id.* The Motion was set for hearing on notice to the Debtor.<sup>4</sup>

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<sup>1</sup> “Bankruptcy Code” or “Code” refers to the United States Bankruptcy Code located at Title 11 of the United States Code. All Code sections hereinafter will refer to the Bankruptcy Code unless specifically noted otherwise.

<sup>2</sup> The Court’s finding of jurisdiction is not an adjudication as to proper venue and is not a determination on the Motion of Dudley Mason to Dismiss for Improper Venue, or, in the Alternative, to Transfer Venue. (Dkt. No. 14).

<sup>3</sup> On the same date, the Petitioners commenced a Chapter 7 Involuntary Petition in this Court against Mason Trendsetters Development Co., LLC., a company owned by Dudley Mason. *In re Mason Trendsetters, Dev. Co., LLC*, No. 15-50617-KMS (Bankr. S.D. Miss. filed Apr. 13, 2015).

<sup>4</sup> (Dkt. No. 6). *See* 11 U.S.C. § 303(g); Fed. R. Bankr. P. 2001. The Motion was set for hearing at the same time as the Emergency Motion for the Appointment of Trustee in the related Chapter 7 Involuntary Petition filed by the Petitioners against Mason Trendsetters Development Co., LLC (“Mason Trendsetters”). (*In re Mason Trendsetters Dev. Co., LLC*, No. 15-50617-KMS, Dkt. Nos. 6,7).

Mason filed an objection to the Motion alleging that the Petitioners have not plead sufficient facts to meet the standards required under § 303(g). (Dkt. No. 16). Specifically, Mason avers that the Petitioners allege no concealment, waste or loss of assets, and do not allege facts indicating that irreparable harm would likely result during the gap period *Id.* He further avers that no foreclosure proceedings are pending against him and that any such action would be stayed by the § 362 automatic stay. *Id.*

At the Hearing, counsel for the Petitioners argued that through the creation of multiple related entities, the involuntary debtors were engaged in a conspiracy to conceal assets and that there is an established pattern and practice of falsely swearing in contractors' affidavits or closing statements that subcontractors and materialmen were paid. Testimony was elicited from Melissa Williams, an attorney for Phillips Building Supply of Gulfport; from Derek Cusik, an attorney for Mobile Lumber and Supply; and from Austin Clark, an attorney representing a homeowner whose home was built by Dudley Mason and/or Mason Trendsetters. Testimony from the witnesses supported the Petitioners' position that affidavits or settlement statements were signed in 2014 by either Dudley Mason or another representative of Mason Trendsetters representing that materialmen and/or subcontractors had been paid in full when in fact they had not. As a result of these affidavits, Petitioners, who assert they had not been paid by Mason Trendsetters, argued that they were required, to their detriment, to remove liens in order to comply with Mississippi lien statutes. Petitioners assert that the existence of multiple related companies and Debtor's previous conduct with regard to the affidavits and closing statements require the appointment of an interim trustee to preserve the assets of the estate and to prevent further loss.

## *Analysis*

Section 303(g) specifically authorizes the appointment of an interim trustee in an involuntary bankruptcy where necessary for preservation of estate property or prevention of loss to the estate. 11 U.S.C. § 303(g).<sup>5</sup> Federal Rule of Bankruptcy Procedure 2001 provides that a motion requesting the appointment of an interim trustee under § 303(g) “shall set forth the necessity for the appointment and may be granted only after hearing on notice....” Fed. R. Bankr. P. 2001(a). The rule further provides that “[t]he order directing the appointment of an interim trustee shall state the reason the appointment is necessary and shall specify the trustee’s duties.” Fed. R. Bank. P. 2001(c). 11 U.S.C. § 303(g). The appointment of an interim trustee is within the discretion of the bankruptcy court. Collier on Bankruptcy ¶ 2001.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).<sup>6</sup>

As noted by Collier on Bankruptcy, the “contours of the law” under § 303(g) are not well defined:

The caselaw does not contain detailed discussion of what facts must be alleged and proven to establish that an interim trustee is "necessary to preserve the property of the estate or to prevent loss to the estate" under section 303(g).

...

One theme emphasized throughout the caselaw concerns the potentially devastating consequences flowing from the displacement of the debtor from his property prior to a finding that bankruptcy relief is appropriate. Although the courts generally have expressed reluctance to take this step absent a clear showing of necessity, the courts have not hesitated to do so where the evidence establishes that the debtor has made transfers with an intent to hinder, delay or defraud creditors by way of a bulk sale at fire sale prices, by transfers to relatives or insiders, or both. In support of the appointment, courts have cited evidence that

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<sup>5</sup> The Court notes that this standard for appointment of a Chapter 7 interim trustee in an involuntary bankruptcy differs from the § 1104 criteria for appointment of a Chapter 11 trustee “for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause....” 11 U.S.C. § 1104(a)(1).

<sup>6</sup> Courts have appointed interim trustees to prevent concealment, waste or loss of assets, or to prevent irreparable harm. *In re DiLorenzo*, 161 B.R. 752, 754 n. 8 (Bankr. S.D.N.Y. 1993)

assets are missing or are in danger of being dissipated by the debtor, that the debtor is nowhere to be found, that the debtor or insiders have resisted examination into the debtor's affairs, or that the debtor's operations consist of entities with commingled books and assets.

Collier on Bankruptcy ¶ 2001.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (footnotes omitted). Courts have denied requests to appoint interim trustees where proof has not been sufficient to warrant such appointment prior to an order for relief. *See In re Barkats*, No. 14-00053, 2014 WL 6461884, at \*1 (Bankr. D.C. Nov. 17, 2014) (“The petitioners have painted the debtor as an individual who has lied to them regarding his ability to pay them, and who has avoided paying his debts owed to them. That is not enough to warrant appointing a trustee prior to the entry of an order for relief.”).<sup>7</sup> Courts have also considered the nature of the debtor’s property or business in determining whether to appoint an interim trustee:

If the debtor has one or more businesses of considerable size and if the debtor is an individual personally involved in one or more of them, these are two factors indicating that the impact of the appointment of an interim trustee upon the debtor's future financial life would be considerable and that none should be appointed except upon a clear showing of the necessity for doing so.

*In re Rush*, 10 B.R. 518, 524 (Bankr. N.D. Ala. 1980).

The evidence at the Hearing showed that the Debtor has an interest in multiple related entities and that he signed affidavits that certified that subcontractors had been paid when they had not. Without more, the Court is unable, at this point in the proceeding, to conclude that the movants have met the burden required under § 303(g) to justify the appointment of an interim trustee prior to an order for relief. Therefore, the Court finds that the Motion should be denied

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<sup>7</sup> *See also In re Levin*, No. 10-27946-BKC-RBR, 2011 WL 1469004, at \*2 (Bankr. S.D. Fla. Apr. 15, 2011) (“The request for interim trustee should not be granted in absence of an exceptionally strong need for doing so.”); *In re Reed*, 11 B.R. 755, 757 (Bankr. S.D.W.V. 1981) (interim trustee will not be appointed unless irreparable harm to estate is likely between time of filing and hearing on contested petition); *see also In re Prof'l Accountants Referral Servs., Inc.*, 142 B.R. 424, 425-26 (Bankr. D. Colo. 1992) (request for interim trustee was initially denied without prejudice where there were allegations that assets had been dissipated or diverted but insufficient evidence was presented to support appointment of trustee on emergency basis).

without prejudice to renewal if additional facts establishing a need to preserve property of the estate or prevent loss to the estate are discovered.

IT IS THEREFORE ORDERED AND ADJUDGED that the Emergency Motion for Appointment of Trustee is DENIED.

*##END OF ORDER##*