

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-15152

D. C. Docket Nos.
06-60047-CV-CMA & 05-23206 BKC-RB

<p>FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT October 10, 2007 THOMAS K. KAHN CLERK</p>

In Re: E.S. PROFESSIONAL SERVICES, INC.,

Debtor.

DHL AERO EXPRESSO, S.A.,

Plaintiff-Appellant,

versus

E.S. PROFESSIONAL SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 10, 2007)

Before ANDERSON and PRYOR, Circuit Judges, and ALBRITTON,* District
Judge.

*Honorable W. Harold Albritton, III, United States District Judge for the Middle District
of Alabama, sitting by designation.

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We conclude that the bankruptcy court did not abuse its discretion in denying the continuance. We discern no error in the conclusion of the courts below that DHL failed to prove that the debtor had fewer than 12 creditors. See 11 U.S.C. §303(b) (although a single qualified creditor may file an involuntary bankruptcy petition if there are fewer than 12 creditors, the statute requires three or more qualified creditors to file an involuntary bankruptcy petition if there are 12 or more such creditors).¹ We decline to address DHL's argument concerning payments to creditors post-petition, because it was not raised in the bankruptcy court.

AFFIRMED.

¹ We also conclude that the appeal is not moot. The parties dispute whether the bankruptcy court made a ruling pursuant to 11 U.S.C. §305 (permitting a bankruptcy court to dismiss a case where "the interests of creditors and the debtor would be better served by such dismissal."). The parties also dispute whether the district court's ruling based on §305 was dicta. Assuming arguendo, but not deciding, that the courts below did dismiss the case relying alternatively upon §305 as well as upon 11 U.S.C. §303, we nevertheless conclude that this appeal is not moot. The §303 issue is a live issue because the pending claims for damages and attorney's fees depend upon the validity of the §303 ruling.