

2015 WL 4624156

United States Bankruptcy Court, S.D. New York.

IN RE: David Francis Charles REYES, Debtor.

Case No.: 14-13233 (SMB)

Signed August 4, 2015

Attorneys and Law Firms

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MEMORANDUM DECISION GRANTING MOTION TO DISMISS THE CASE AND DENYING SANCTIONS

[STUART M. BERNSTEIN](#), United States Bankruptcy Judge:

*1 Jo Anne Simon, as trustee (the “Trustee”) of the Gerald Arthur Living Trust (the “Trust”) has moved to dismiss this chapter 11 case and seeks sanctions under [Federal Rule of Bankruptcy Procedure 9011](#) (“Rule 9011”), [28 U.S.C. § 1927](#) and [11 U.S.C. § 105](#) against the debtor and his counsel, Brian DeLaurentis, Esq., on the ground that the case was filed in bad faith. (*Motion to Dismiss the Debtor's Chapter 11 Case and for Sanctions for a Bad Faith Filing*, dated Feb. 4, 2015 (the “Motion”) (ECF Doc. # 22).)¹ In addition, the Court reserved decision on an earlier request for sanctions made in connection with Simon's successful motion to remand certain proceedings removed from the New York Surrogate's Court by the debtor. For the reasons that follow, the Court grants the motion to dismiss but denies the requests for sanctions.

BACKGROUND

A. The Dispute Regarding the Property

The impetus for this bankruptcy case was certain real property located at 149 East 29th Street in Manhattan (the “Property”) formerly owned by Gerald Arthur. In 2002, Arthur executed a will that apparently left the Property to Abraham Pelotin. Subsequent to the execution of the will, the debtor became Arthur's domestic partner and they lived together at the Property.

According to the debtor, Arthur decided to execute a new will in 2007, and leave the Property plus other assets to the debtor. He retained Jo Anne Simon, Esq. to prepare the will, but contrary to Arthur's wishes, Simon created the Trust and named herself as the Trustee.² In broad terms, the Trust would acquire title to the Property as well as Arthur's other assets and pay his expenses during his lifetime. Arthur could revoke or amend the Trust through an executed writing, dated and delivered to the Trustee. If the Trust was revoked, the Property reverted to Arthur. Upon his death, the Trust became irrevocable, and Trustee would distribute his residuary estate, including the Property, to one or more charities in accordance with the wishes that Arthur had expressed to Simon.

According to the debtor, Arthur executed the Trust on October 6, 2008, at a time when he was hospitalized, in pain and taking medication. At the same time, he also executed a Power of Attorney appointing Simon as his attorney-in-fact. The next day, Simon executed and delivered a deed from Arthur, as his attorney-in-fact, to herself as Trustee of the Trust. Simon recorded the deed on November 21, 2008 and the Trust became the record owner of the Property. Citing Simon's billing records, the debtor contends that the Trust, Power of Attorney and deed were back-dated.

According to the debtor, Arthur attempted to revoke the Trust in writing in August 2009, but Simon ignored him. Arthur died in February 2011, and his death spawned the numerous disputes regarding ownership of the Property. Simon claimed that the Trust owned the Property. The debtor claimed that the Trust was invalid or had been revoked, and he had an equitable interest in the Property by virtue of Simon's failure to prepare a will under which Arthur would have conveyed the Property to the debtor.

*2 In addition, the 2002 will surfaced, and the executor, David Carraway, filed a probate proceeding and was

appointed the temporary administrator of Arthur's estate. Pamela Green, an alleged relative of Arthur's, claimed, as did the debtor, that the 2002 will had been revoked, and she was entitled to Arthur's property under the laws of intestacy.

These various claims were the subject of several proceedings pending in Surrogate's Court. In addition, Green and the Debtor had commenced an action in Supreme Court and joined all of the claimants. They sought a judgment determining that Green owned the Property in fee simple, or alternatively, the debtor was the beneficiary of a constructive trust over the Property. In addition, the debtor demanded money damages against Simon, and requested an injunction delaying New York City's tax sale of the Property. The Supreme Court action was subsequently transferred to the Surrogate's Court.

B. The Bankruptcy Case

By order dated November 17, 2014, the Surrogate's Court directed the parties to show cause on November 25, 2014 why the *lis pendens* filed by the debtor should not be lifted and the Trustee should not be allowed to sell the Property pursuant to a signed contract of sale. The debtor filed this chapter 11 case on November 24, 2014, staying the hearing on the order to show cause. The debtor's schedules and statement of financial affairs disclosed the following: the debtor's sole material assets were his asserted equitable interest in the Property and his disputed interest as a Trust beneficiary. His liabilities included approximately \$224,000 in real estate tax and Medicaid liens and \$5,666 in liquidated unsecured debt. His monthly income was \$800, exactly the same as his monthly expenses.

The Surrogate's Court had scheduled a hearing in connection with the action transferred from the Supreme Court for January 9, 2015. One day before the scheduled hearing, the debtor removed several of the proceedings pending before the Surrogate's Court pursuant to 28 U.S.C. § 1452, including the causes of action transferred from the Supreme Court to the Surrogate's Court, Simon's application to eject the debtor from the Property, Carraway's application to compel the turnover of the Property and Simon's application to sell the Property. One of the motivating factors prompting the filing of the chapter 11 case and the removal of the Surrogates Court proceedings was the debtors belief that the Surrogates Court was biased in favor of Simon because she was a member of the New York State Assembly, sat on the Judiciary Committee and Simon and/or the Judiciary Committee and/or the New York State Assembly presided over the Surrogates Courts

budget as well as any proposed modifications to state law that affected the Surrogates Court.

In response, Simon moved to remand and for sanctions pursuant to 28 U.S.C. § 1447(c). The Court rendered a bench decision on March 17, 2015 concluding that mandatory abstention was required, and thereafter signed an order that remanded the removed proceedings to the Surrogate's Court while reserving decision on Simon's request for fees, costs and expenses pursuant to 28 U.S.C. § 1447(c). (*Order of Remand*, dated Mar. 18, 2015 (ECF/Adv P. No. 15–01008 Doc. # 13).) Following remand, the Court granted Simon's motion for relief from the automatic stay to allow her to continue the state court litigation. (*Order Vacating Stay*, dated June 3, 2015 (ECF Doc. # 43).)³

C. The Motion to Dismiss

*3 While the remand motion was pending, Simon filed the *Motion* arguing that the debtor had filed this case in bad faith as a litigation tactic for the sole purpose of transferring the state court litigations to this Court. The debtor had few debts, was not being pressed for payment by the few creditors he did have and had no ability to reorganize. Simon also argued that although she was not a creditor, she was nonetheless a party-in-interest because her rights individually and as Trustee were affected by the filing of the bankruptcy case and the removal of the Surrogate's Court proceedings to which she was a party.

In response, the debtor contested Simon's standing, and argued that he filed this case for the legitimate purpose of liquidating the Property and paying his debts, including his debt to Medicaid that was increasing daily at an alarming rate. The debtor (and his counsel) also opposed sanctions, arguing that Simon failed to serve a safe harbor motion as required by Rule 9011 or demonstrate subjective bad faith required under 28 U.S.C. § 1927.

DISCUSSION

A. Standing

“[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues*. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis added). Constitutional, or Article III standing, “imports justiciability: whether the plaintiff has

made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III.” *Id.* To establish Article III standing, a party must show (1) an injury in fact that is actual or imminent rather than conjectural or hypothetical, (2) the injury is “fairly traceable” to the conduct complained of, and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). Prudential standing refers to the requirement that even “[w]hen the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, ... the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth*, 422 U.S. at 499.

In addition, section 1109(b) of the Bankruptcy Code, which only applies in chapter 11 cases, provides that “[a] party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.” The Bankruptcy Code does not define “party in interest,” *Krys v. Official Comm. of Unsecured Creditors of Refco Inc. (In re Refco Inc.)*, 505 F.3d 109, 117 (2d Cir.2007); *Roslyn Sav. Bank v. Comcoach Corp. (In re Comcoach Corp.)*, 698 F.2d 571, 573 (2d Cir.1983), and the list in § 1109(b) is not exhaustive. *Savage & Assocs., P.C. v. K & L Gates LLP (In re Teligent, Inc.)*, 640 F.3d 53, 60 (2d Cir.2011). Instead, the phrase must be interpreted on an *ad hoc* basis, *id.*, to ensure “that anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains....” *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir.1992)(Posner, J.). Thus, an entity may be a party-in-interest with standing for one purpose but lack standing for other purposes. *Peachtree Lane Assocs., Ltd. v. Granader (In re Peachtree Lane Assocs., Ltd.)*, 188 B.R. 815, 824 (N.D.Ill.1995); *In re Ofty Corp.*, 44 B.R. 479, 481 (Bankr.D.Del.1984).

*4 Although a party-in-interest typically has a financial stake in the outcome of the bankruptcy case, courts have recognized in limited circumstances that someone with a legal rather than a financial interest in the case may appear. *Teligent*, 640 F.3d at 60. Where a financial stake is absent, the movant can still establish standing to seek dismissal by demonstrating that the filing or pendency of the bankruptcy case impaired the movant’s legal rights or the ability to perform his duties. *E.g.*, *El Torero Licores v. Raile (In*

re El Torero Licores), No. SAVC 13–00875(VAP), 2013 WL 6834609, at *3 (C.D.Cal. Dec. 20, 2013) (state court receiver granted sole authority to file bankruptcy petition had standing to move to dismiss petition filed by debtor because receiver had “legally protected interest in being the sole party with the authority to file bankruptcy”); *In re Overview Equities, Inc.*, 240 B.R. 683, 687 (Bankr.E.D.N.Y.1999) (party with legal interest in property, rather than claim, was a party in interest); *Ofty*, 44 B.R. at 481–82 (court-appointed receiver had standing to seek dismissal, transfer of venue and conversion of case filed by debtor’s principal because the filing prevented him from carrying out his duties).

The Trust was the record owner of the Property, and Simon was tasked with distributing the property of the Trust upon Arthur’s death. Simon sought to perform her duties as Trustee by selling the Property although there are concededly competing claims to ownership. The filing of the bankruptcy case triggered an automatic stay that stopped her efforts to sell the Trust’s Property in the Surrogate’s Court, and more generally, to take any actions that interfere with any property in which the debtor asserted an interest. It would be an odd rule that prohibited the Trustee from seeking to dismiss a petition that was filed for the purpose of derailing her efforts to perform her duties as Trustee. Although the automatic stay has since been lifted, it was extant when she made the *Motion*, and the debtor has not argued that the stay relief stripped her of the standing she had when she made her motion. Moreover, the debtor filed an appeal from the order lifting the automatic stay, (*Notice of Appeal*, dated June 16, 2015 (ECF/Adv. P. No. 15–01008 Doc. # 14)), and the reinstatement of the stay is a possibility. Accordingly, Simon, as Trustee, is a party-in-interest for the purpose of moving to dismiss the chapter 11 even though the Trust is not a creditor and does not have a financial stake in the case.

Simon has also demonstrated Constitutional and prudential standing in her capacity as Trustee. Generally, a “party in interest” with respect to a particular issue will also meet the requirement for Article III standing with respect to that issue. *See* 7 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1109.04[4][a], at 1109–36 (16th ed. 2015) (“COLLIER”). Here, the Trustee was aggrieved by the filing of the chapter 11 for the reasons stated, and the dismissal of the case will relieve her of the harm caused by the filing of the chapter 11 case. In addition, Simon is asserting her own rights as Trustee and satisfies the requirement for prudential standing.

B. The Motion to Dismiss

[Bankruptcy Code § 1112\(b\)](#) authorizes the Court to convert or dismiss a case for cause. The section contains a non-exclusive list of “causes” for conversion or dismissal, and although not listed, the Court may convert or dismiss a case that was filed in bad faith. A petition is filed in bad faith “if it is clear that on the filing date there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings.” *Baker v. Latham Sparrowbush Assocs.* (*In re Cohoes Indus. Terminal, Inc.*), 931 F.2d 222, 227 (2d Cir.1991); accord *In re Kingston Square Assocs.*, 214 B.R. 713, 725 (Bankr.S.D.N.Y.1997) (“The standard in this Circuit is that a bankruptcy petition will be dismissed if both objective futility of the reorganization process and subjective bad faith in filing the petition are found.”) (emphasis omitted).

*5 Debtors rarely admit to their own bad faith. In *C–TC 9th Ave. Pship v. Norton Co.* (*In re C–TC 9th Ave. P’ship*, 113 F.3d 1304 (2d Cir.1997)), the Second Circuit identified several badges that supported a finding that a chapter 11 case was filed in bad faith:

- (1) the debtor has only one asset;
- (2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;
- (3) the debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;
- (4) the debtor's financial condition is, in essence, a two party dispute between the debtor and secured creditors which can be resolved in the pending state foreclosure action;
- (5) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights;
- (6) the debtor has little or no cash flow;
- (7) the debtor can't meet current expenses including the payment of personal property and real estate taxes; and
- (8) the debtor has no employees.

C–TC, 113 F.3d at 1311 (quoting *Pleasant Pointe Apartments, Ltd. v. Kentucky Hous. Corp.*, 139 B.R. 828, 832 (W.D. Ky. 1992)). Although these factors are generally applied in single asset real estate cases, they are appropriate to apply in this

case because it, too, is essentially a single asset real estate case concerning the Property.

The application of the *C–TC* factors supports the conclusion that the debtor filed this chapter 11 case in bad faith. First, the debtor has only one asset; he claims that Simon holds the Property in constructive trust for his benefit.⁴ Second, the debtor filed the chapter 11 one day before the return date of the hearing to sell the Property, and the filing stayed the hearing. Third, the debtor has few unsecured creditors; his principal creditor is Medicaid which he scheduled as secured. The debtor also scheduled a secured claim for real estate taxes, but his debt is contingent on his ownership of the Property. Fourth, although the Surrogate's Court proceedings concern a multi-party dispute regarding ownership of the Property, that dispute can be resolved in state court. In fact, this Court remanded the removed proceedings because it concluded, *inter alia*, that the state court was better able to resolve the factual and legal issues presented by the dispute. Fifth, the debtor has no cash flow or operations or employees, and is unable to meet his personal expenses as evidenced by the growing Medicaid lien. This is not to suggest that chapter 11 would never be appropriate, but it is plainly premature until the debtor is determined to be the owner of the Property; absent ownership of the Property, there is nothing to reorganize.

This brings me to the last and most significant badge of bad faith in this case. The debtor concedes that he filed the chapter 11 case in order to litigate his rights in this Court instead of the Surrogate's Court. “As a general rule where, as here, the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith. *In re HBA East, Inc.*, 87 B.R. 248, 259–60 (Bankr. E.D.N.Y. 1988) (citations omitted); accord *In re Wally Findlay Galleries (New York), Inc.*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984) (dismissing chapter 11 case because “[t]he debtor is unable to propose a meaningful plan of reorganization until its litigation ... is resolved [and] [t]hus, it is evident that the debtor seeks to use this court not to reorganize, but to relitigate. This is an impermissible use of Chapter 11 of the Bankruptcy Code.”). Here, the debtor filed the bankruptcy case solely as a litigation tactic to try the dispute in a forum he deemed more favorable.

*6 Accordingly, the Court concludes that the debtor filed this case in bad faith, and it is dismissed pursuant to [11 U.S.C. § 1112\(b\)](#).

C. Sanctions

1. Sanctions for Filing the Case

Simon seeks sanctions under [Rule 9011](#), [28 U.S.C. § 1927](#) and the Court's inherent authority through [11 U.S.C. § 105\(a\)](#) based on the bad faith filing of the chapter 11 case.

a. Bankruptcy Rule 9011

With certain exceptions, every petition, pleading, written motion or other paper presented to the court must be signed by the party's attorney, and if the party is *pro se*, by the party himself. [FED. R. BANKR.P. 9011\(a\)](#). Here, the debtor verified the petition and DeLaurentis signed it on behalf of his firm as the debtor's attorney.

By signing the petition, the debtor and DeLaurentis certified that to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

- (1) [the petition] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

[FED. R. BANKR. P. 9011\(b\)](#).

[Rule 9011](#) parallels [Rule 11 of the Federal Rules of Civil Procedure](#), and the jurisprudence under [Rule 11](#) informs the interpretation and application of Bankruptcy [Rule 9011](#).⁵ *Klein v. Wilson, Elser, Moskowitz, Edelman & Dicker (In re Highgate Equities, Ltd.)*, 279 F.3d 148, 151 (2d Cir.2002). [Rule 11](#) “establishes an objective standard, intended to eliminate any ‘empty-head pure-heart’ justification for

patently frivolous arguments.” [FED. R. CIV. P. 11](#) advisory committee's note (1993).

The decision whether to impose sanctions for a violation of [Rule 9011](#) is discretionary. 10 COLLIER ¶ 9011.06[1], at 9011–16. Furthermore, the sanction is designed to deter rather than compensate, and should be no more than is necessary to effect this goal:

(c) *Sanctions*. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

*7

(2) *Nature of sanction; limitations*. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

[FED. R. BANKR. P.9011\(c\)\(2\)](#). In deciding the appropriate sanctions, courts may consider whether the improper conduct was willful or negligent, whether it was part of a pattern of activity or an isolated event, whether it infected the entire pleading or only one particular count or defense, whether the violator engaged in similar conduct in other litigation, whether it was intended to injure, the effect that the improper conduct had on the judicial process in time and expense, and whether the responsible person is trained in the law. When contemplating the amount of a monetary sanction, the court may also consider what is necessary to deter the violator from repeating the improper conduct in the same case in light of his financial resources and to deter similar activity by other litigants. [FED. R. CIV. P. 11](#) advisory committee's note (1993).

I assume without deciding that the standard of objective bad faith needed to support dismissal of the petition is

the same as the standard to impose sanctions under [Rule 9011](#). Nevertheless, several of the cited factors weigh against imposing sanctions. Although the debtor and DeLaurentis filed the petition for an improper purpose, they were not seeking to delay or harass Simon or anyone else. To the contrary, they were trying to expedite the determination of the debtor's rights. The debtor is on public assistance and desperately needs a place to live.⁶ The debtor, though more probably DeLaurentis, clung to the sincere if misguided belief that Simon's position as a member of the New York State Assembly and the Assembly's Judiciary Committee would so affect the Surrogate as to preclude an impartial decision. The fault was not raising the issue with the Surrogate's Court, and instead, filing the bankruptcy case and removing the litigation to this Court as a means of avoiding the perceived bias. Furthermore, the improper conduct was not intended to injure anyone, and is not likely to recur.

*8 It is true that certain considerations also weigh in favor of sanctions, including a monetary award. DeLaurentis is a lawyer who should have known better. The filing of the case followed by the removal of the Surrogate's Court proceedings resulted in the time and expense necessary to undo what was done. Finally, other litigants must be deterred from engaging in the same improper conduct. Nevertheless, in light of all of the circumstances, including the honest though mistaken motivations behind the filing of the bankruptcy case and the limited effect it ultimately had on the Surrogate's Court proceedings, I decline in the exercise of my discretion to award any sanctions under [Rule 9011](#).

b. 28 U.S.C. § 1927 and 11 U.S.C. § 105(a)

[Section 1927](#) authorizes a “court of the United States” to award attorney's fees and other excess costs and expenses against an attorney or other party authorized to practice before the courts who “multiplies the proceedings in any case unreasonably and vexatiously.” [28 U.S.C. § 1927](#).⁷ It imposes an obligation on attorneys to avoid dilatory tactics throughout the entire litigation, and “[b]ad faith is the touchstone of an award under this statute.” [United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO](#), 948 F.2d 1338, 1345 (2d Cir. 1991).

A court may also impose sanctions under [11 U.S.C. § 105\(a\)](#) pursuant to its inherent power, which “derives from the fact that courts are ‘vested, by their very creation, with power to

impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.’ ”⁸ [Schlaifer Nance & Co., Inc. v. Estate of Andy Warhol](#), 194 F.3d 323, 336 (2d Cir.1999) (quoting [Chambers v. Nasco, Inc.](#), 501 U.S. 32, 43 (1991)). “One component of a court's inherent power is the power to assess costs and attorneys' fees against either the client or his attorney where a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’ ” [Int'l Bhd. of Teamsters](#), 948 F.2d at 1345 (quoting [Alyeska Pipeline Serv. Co. v. Wilderness Soc'y](#), 421 U.S. 240, 258–59 (1975)). “[I]n practice, ‘the only meaningful difference between an award made under § 1927 and one made pursuant to the court's inherent power is that awards under § 1927 are made only against attorneys or other persons authorized to practice before the courts while an award made under the court's inherent power may be made against an attorney, a party, or both.’ ” [Schlaifer](#), 194 F.3d at 336 (quoting [Oliveri v. Thompson](#), 803 F.2d 1265, 1273 (2d Cir.1986)).

Courts in this Circuit construe [§ 1927](#) “narrowly and with great caution, so as not to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.” [Mone v. Comm'r of Internal Revenue](#), 774 F.2d 570, 574 (2d Cir. 1985) (internal quotation marks omitted); accord [Romeo v. Sherry](#), 308 F.Supp.2d 128, 148 (E.D.N.Y. 2004). Likewise, the Supreme Court has admonished that “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion,” [Chambers](#), 501 U.S. at 44, and “great caution.” [Id.](#) at 43 (internal quotation marks omitted). “To impose sanctions under either authority, a court must find clear evidence that (1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith—that is, ‘motivated by improper purposes such as harassment or delay.’ ” [Eisemann v. Greene](#), 204 F.3d 393, 396 (2d Cir.2000) (quoting [Schlaifer](#), 194 F.3d at 336); accord [Pac. Elec. Wire & Cable Co., Ltd. v. Set Top Int'l Inc.](#), No. 03 Civ. 9623(JFK), 2005 WL 2036033, at * 5 (S.D.N.Y. Aug. 23, 2005). Notably, the “ ‘[t]he test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice.’ ” [Pac. Elec. Wire & Cable Co.](#), 2005 WL 2036033, at *5 (quoting [Sierra Club v. U.S. Army Corps of Eng'rs](#), 776 F.2d 383, 390 (2d Cir.1985)).

*9 Simon is not entitled to sanctions under [28 U.S.C. § 1927](#) or the Court's inherent authority because the filing of the chapter 11 case was not done in bad faith within the meaning of the sanctions authorities. As already stated, the debtor and DeLaurentis were not seeking to delay or harass Simon or any of the other litigants involved in the Surrogate's Court

proceedings. Instead, the case was filed and the proceedings were removed based on their honest belief that the debtor could get a quicker and fairer resolution of the debtor's claim to the Property in this Court. Furthermore, the debtor's claim to the Property is not frivolous, and if proved, may entitle him to a constructive trust in the Property superior to the Trust's interest. See *Latham v. Father Divine*, 85 N.E.2d 168, 171 (N.Y.1949) (constructive trust will arise in favor of intended legatee where defendants by force and fraud prevented the testator from making a will in favor of the intended legatee), *reargument motion denied*, 86 N.E.2d 114 (N.Y.1949).

2. Sanctions for Removing the Surrogates Court Proceedings

When the Court remanded the removed proceedings, it reserved decision on Simons request for costs and fees under 28 U.S.C. 1447(c).⁹ An award of costs and fees under 1447(c) is discretionary. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005); *Morgan Guar. Trust Co. of New York v. Republic of Palau*, 971 F.2d 917, 923–24 (2d Cir.1992); *Dacey v. Morgan Stanley Dean Witter Co.*, 263 F.Supp.2d 706, 712 (S.D.N.Y.2003). There is no presumption in favor of awarding fees and costs when granting a motion to remand. *Martin*, 546 U.S. at 137. In considering whether to award attorneys fees, a court should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants

a right to remove as a general matter, when the statutory criteria are satisfied. *Id.* at 140.[T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied. *Id.* at 141.

The Court declines to award fees and costs under 1447(c). Although the Court has concluded that the filing of the chapter 11 case was primarily a litigation tactic, the removal itself was not objectively unreasonable or impermissible under the law. Title 28, 1452(a) allows a party to remove a claim or cause of action if the district court has jurisdiction of the claim or cause of action under 28 U.S.C. 1334. The District Court and this Court through the standing order of reference had jurisdiction over the claims and causes of action asserted in the Surrogates Court proceedings because they affected the debtors interest in the Property.

Submit separate orders (1) in the case, dismissing the chapter 11 case and denying sanctions and (2) in the adversary proceeding, denying sanctions and closing the adversary proceeding.

All Citations

Not Reported in B.R. Rptr., 2015 WL 4624156, 74 Collier Bankr.Cas.2d 107, 61 Bankr.Ct.Dec. 106

Footnotes

- 1 "ECF" refers to the docket in this case. "ECF" followed by a case or adversary proceeding number refers to the docket in that case or adversary proceeding.
- 2 A copy of the Trust Agreement is annexed as Exhibit 15 to the *Declaration of David Reyes in Opposition to Motion to Dismiss, Abstain & for Sanctions*, dated Feb. 19, 2015 (ECF Doc. # 25).
- 3 After the Court remanded the state court proceedings, the debtor asked the District Court to withdraw the reference and hear the proceedings that had been remanded. On July 24, 2015, the District Court denied the debtor's motion as moot. (*Order*, dated July 24, 2015 (ECF/Case No. 15–CV–4624 Doc. # 5).)
- 4 The debtor's schedules also listed a disputed beneficial interest in Trust property which may refer to other Trust property. This other property has not been identified but the debtor's rights in any such property rise or fall with his rights to the Property.
- 5 The debtor and DeLaurentis contend that the motion for sanctions under Rule 9011 should be denied because Simon failed to send a "safe harbor motion" and afford them the opportunity to withdraw the petition. The "safe harbor" provision in Bankruptcy Rule 9011(c)(1)(A) does not apply if the bad faith relates to the filing of the petition because the filing has immediate, serious consequences and there is no absolute right to withdraw a chapter 7 or chapter 11 petition. 10 COLLIER ¶ 9011.05[1][b], at 9011-14.

- 6 It may be unrealistic to believe that if the debtor prevails he will be able to afford to live at the Property given the carrying costs, including accrued and accruing real estate taxes, and his insufficient income. Nevertheless, there may be substantial equity in the Property that, if sold, will provide the debtor with the money needed to find another place to live.
- 7 There is some controversy regarding whether a bankruptcy court is a “court of the United States” under § 1927. See *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 102–04 (3d Cir.2008) (citing cases). However, in *Cohoes Indus. Terminal*, the Second Circuit ruled that a bankruptcy court may impose sanctions under 28 U.S.C. § 1927. 931 F.2d at 230.
- 8 “Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct.” *In re Green*, 422 B.R. 469, 473–74 (Bankr. S.D.N.Y. 2010) (quoting *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir.1996)).
- 8 Section 1447(c) provides in pertinent part that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.