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T.S. McGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re: DUNCAN J. MCNEIL, Debtor.	No. 01-06073-W11 MEMORANDUM DECISION RE: U.S. TRUSTEE'S MOTION TO CONVERT (DOCKET No. 44)

This bankruptcy proceeding was commenced on July 27, 2001 by Duncan McNeil personally. On August 9, 1999, Duncan McNeil, as representative of the Grace Miller Family Trust (hereinafter "GMFT"), commenced a bankruptcy proceeding on its behalf in the Central District of California, Cause No. 99-39555. That entity and various affiliated entities commenced an adversary proceeding in the Central District of California, Cause No. LA00-02379[1], which had 15 causes of action among which were slander of title, civil conspiracy, defamation, RICO violations (18 U.S.C. § 1962, etc.) and fraud. Those causes of action arose from a Joint Venture Agreement and certain real estate transactions between and among entities affiliated with the debtor. There were 38 named defendants, including several law firms or attorneys who had acted as closing agents in the real estate transactions. On November 2,

[1]Several appeals from this adversary have been dismissed for failure to prosecute (See Bankruptcy Appellate Orders filed January 16, 2002).

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2000, in the adversary No. LA00-02379, the court entered an order determining that each plaintiff and this debtor were "vexatious litigants." Although Mr. McNeil, the debtor in this proceeding, has argued that the order did not apply to him personally, it specifically refers to Mr. McNeil as a vexatious litigant and specifically precludes him as well as the other plaintiffs from taking certain actions. Debtor in that order was prohibited from making "future filings in any court of the United States in any way related to any of the factual allegations" in that adversary proceeding. Such future filings could occur after posting a bond of $100,000 and after leave had been granted by the Central District of California Bankruptcy Court. Although the California court retained jurisdiction to enforce the order, it also stated that "any court is authorized to enforce the order" and instructed its Clerk not to accept future filings from Mr. McNeil until bond had been posted and leave had been given.

A review of the pleadings filed in this bankruptcy makes it very apparent that the filing of this petition involves the same nucleus of facts alleged in the California adversary proceeding and was therefore filed in violation of that court's order. GMFT is listed on Mr. McNeil's current petition as an affiliate. Thirteen of the parcels of real estate listed on his Schedule "A" are listed on the Schedule "A" of the GMFT. Most of the 38 defendants in adversary No. LA00-02379 are listed and have been involved in this proceeding. Mr. McNeil's pleadings are replete with references to the Joint Venture Agreement and the various

real estate transactions and alleged "fraudulent deed" referenced in adversary No. LA 00-02379. "Debtor's Small Business Disclosure Statement Describing Debtor's Plan of Reorganization of Broadway . . ." filed September 28, 2001 (Docket No. 184) reiterates the same Joint Venture Agreement, real estate transactions, "fraudulent deed" and alleged unlawful conduct of the defendants in adversary No. LA00-02379. The plan provides that the debtor will continue litigation against the defendants for that alleged misconduct. This proceeding clearly involves many of the factual allegations, parties and transactions referenced in adversary No. LA00-02379.

The commencement of this proceeding and the filing of many of the pleadings in it was in violation of the terms of the vexatious litigant order. For that reason, this proceeding should be dismissed and debtor precluded from commencing another bankruptcy proceeding on his own behalf which relates to the transactions referenced in adversary No. LA00-02379 until the conditions of the vexatious litigant order have been fulfilled. Although the violation of the vexatious litigant order justifies dismissal of this proceeding, alternative grounds for dismissal exist.

I. LACK OF GOOD FAITH REORGANIZATION PURPOSE AND INABILITY TO EFFECTUATE A PLAN

A. Enforcement of Broadway Plan

The purpose of this bankruptcy proceeding is not to reorganize the financial affairs of Mr. Duncan McNeil, the debtor. The purpose is to enforce the terms of the confirmed Chapter 11

reorganization plan of Broadway Buildings LLP, a separate legal entity affiliated with the debtor.[2] Broadway Buildings LLP filed a Chapter 11 proceeding in the Central District of California, Cause No. LA98-18082, and confirmed a plan in June of 1999. The debtor continually maintains both in pleadings and at hearings that the purpose of this proceeding is to enforce Broadway's reorganization plan. The court has repeatedly indicated that this proceeding relates only to the financial affairs of the debtor and that Broadway Buildings or other entities affiliated with the debtor are not entitled to bankruptcy relief in this proceeding. The debtor invariably replies that the court is incorrect and proceeds in his attempts to invoke the Broadway Buildings plan.

Broadway Buildings has registered with this court under 28 U.S.C. § 1963 its confirmed plan and several other orders and pleadings entered by the Central District of California court in that proceeding. In this proceeding, the debtor has filed a purported small business plan of reorganization which states that its purpose is to enforce the Broadway Buildings plan. The debtor believes that since he is the "manager" appointed under the Broadway Buildings plan he can utilize this proceeding to continue to litigate claims or issues regarding Broadway Buildings, GMFT

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[2]At page 13 of "Debtor's Small Business Disclosure Statement Describing Debtor's Plan of Reorganization of Broadway . . .," the debtor states: "This voluntary chapter 11 petition was filed in order to (1) reorganize the Debtor's financial affairs; (2) to enforce Broadway's confirmed plan and all orders, claims or matters dealt with thereby; (3) to enforce the absolute immunity as court ordered Fiduciary . . . to shield GGM, Valero and Debtor and parties related to them from liability . . ."

and other entities. Nearly every request for relief filed by the debtor relates to matters involving Broadway Buildings or the GMFT or some other affiliated entity. This conflicts with the only proper purpose of a Chapter 11, which is to reorganize the financial affairs of the debtor. The debtor's reliance on the Broadway plan as some sort of a shield to all objections and motions by other parties ignores the fact that the Broadway plan does not cure deficiencies in the debtor's petition. Broadway's plan does not address, nor would it control the existence of a good faith purpose in the filing of this petition, nor would it control or create an ability on the part of the debtor to effectuate a plan. It is apparent that the debtor is simply unable or unwilling to understand the distinction between himself personally, Broadway Buildings and other affiliated legal entities.

B. Business Is Litigation

Some years ago various legal entities with which the debtor was affiliated entered into various Joint Venture Agreements and real estate transactions. Mr. McNeil has devoted the past several years to litigation regarding those transactions. This debtor's only business is litigation. He lists approximately 120 lawsuits to which he or the related entities are parties. That list includes the five prior bankruptcy proceedings which Mr. McNeil commenced in this District on behalf of affiliates.[3] Those

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[3] *In Re 13th and Maple*, No. 96-04178; *In re General Management Corp.*, No. 96-04079; *In re 10th and Maple*, No. 96-04175; *In re Fontana Properties*, No. 96-02980; and *In re Southern*

bankruptcy proceedings generated four adversaries. Mr. Baker was appointed the Trustee in three of the cases and since then Mr. McNeil has brought several suits against Mr. Baker. A review of three of the other listed suits brought by debtor (Eastern District of Washington District Court proceedings Nos. CS-00-0065-RHW and CS-00-435-RHW and Idaho District Court No. CV-96-217-NEJL) reveals that those concern the same affiliated entities and Joint Venture Agreements and some of the same real estate transactions and some of the same defendants as in adversary No. LA00-02379. The causes of action in the Eastern District of Washington actions and adversary No. LA00-02379 are numerous but include civil conspiracy, defamation, RICO violations (18 U.S.C. § 1962) and fraud. The Idaho action seeks injunctive relief and damages. The same Joint Venture Agreement, real estate transactions and "fraudulent deed" are also referenced in the Broadway Buildings plan, the debtor's small business Plan and Disclosure Statement in this proceeding and in two adversaries debtor has commenced in this court. They are also referenced in most of the requests for relief filed by the debtor. Whenever an action is dismissed or an adverse order is entered, an appeal occurs. The list of 120 lawsuits refers to 49 pending appeals. This bankruptcy proceeding is only one more legal action in years of protracted litigation arising out of failed real estate transactions.

It is an understatement to say that Mr. McNeil is a prolific pro-se litigator. Prolific litigation, especially that which

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California LP, No. 96-03301.

finds little foundation in the Bankruptcy Code, cannot form the proper basis for a Chapter 11 bankruptcy proceeding and has been found to support a finding of cause to dismiss or convert. See *In re Edwards*, 1996 WL 407253 at 5 (Bankr. E.D. Pa. 1996); citing *In re Roma Group, Inc.*, 165 B.R. 779, 780 (Bankr. S.D. N.Y. 1994), et al. The possession of causes of action alone without other assets have also formed the basis for dismissal of Chapter 11 proceedings. *In re Minnesota Alpha Foundation*, 122 B.R. 89 (Bankr. D. Minn. 1990); *In the Matter of Imperial Heights Apartments, Ltd.*, 18 B.R. 858 (Bankr. S.D. Ohio 1982).

C. Frivolous Nature of Litigation

Mr. McNeil's only business activity is not just litigation, but frivolous litigation. The subject matter and causes of action in adversary No. LA00-02379 were determined to be frivolous. As stated above, this bankruptcy proceeding, as well as some of the other litigation reviewed by the court, concerns the same subject matter and causes of action. This proceeding is yet another example of frivolous litigation as it lacks any recognized bankruptcy purpose.

D. Failure of Debtor to Comply with Bankruptcy Code and Rules

Despite Mr. McNeil having been provided with multiple opportunities to comply with the duties imposed by the Code and court rules, he has failed to do so. The § 341 meeting was only finally concluded on November 30, 2001, after two continuances. The court determined that the meeting had been properly adjourned by the U.S. Trustee and that no authority had been provided in

support of the debtor's argument that he had the right to operate a video camera during the meeting. Complete schedules have not yet been filed, in violation of F.R.B.P. 1007, even though on November 1, 2001, the court reminded the debtor complete schedules needed to be filed. Not a single monthly operating statement has been filed as required by F.R.B.P. 2015.

E. Burdensome Nature

Every request for relief in this proceeding (although rarely captioned as such), consists of numerous pages and contains many paragraphs which are identical to numerous paragraphs in every other pleading and which relate to the same joint venture and real estate transactions. The debtor has filed literally thousands of pages of pleadings in this proceeding. Most of the debtor's pleadings are unnecessarily and excessively lengthy and contain frivolous and repetitive arguments. Many of the authorities cited are simply not relevant to the issue, although that is often difficult to determine as the issue is itself obscure. The captions are verbose with most pleadings containing several forms of requested relief. Some pleadings raise issues previously determined by a prior court and ask this court to take action contrary to the relief granted by the other court. Such reprehensible conduct of the debtor is indicative of his attempt to proceed without good faith and of his continuous effort to abuse the bankruptcy process. For example, in pleading No. 115, the debtor requested this court to disqualify the law firm of Lukins & Annis based on actions it took in other litigation. The

same request had been made on the same basis to the Ninth Circuit Court of Appeals in cause No. 00-03544 and the Circuit Court had determined that the firm's actions should not result in disqualification. There were 19 documents, affidavits and pleadings filed in support of that motion, having all together more than 455 pages.

On October 10, 2001, the debtor filed pleading No. 207 (which with attachments is 64 pages in length) entitled "Notice of Lodging (proposed) Order; Notification of Request for Relief and Judicial Action re (1) Order Awarding Monetary Damages; and (2) Order for the Disqualification or Recusal of the Hon. Judge Williams." Only after time consuming careful reading of the pleading could it be determined that the debtor requested that the Clerk register a copy of the final confirmed Broadway Plan and sought $19,701,379 in damages against the Clerk of the Court and "any others" if they failed to register it. The pleading also asked for a determination that the confirmed plan be declared entitled to "full faith and credit." This is an example of the type of needlessly complex pleadings consistently filed by the debtor.

This proceeding has caused and would continue to cause a great burden on the parties and the court. Until personal or first class mail service was required by the court, the debtor sent by facsimile unwieldy voluminous pleadings on a regular basis to the parties. Counsel for other parties would receive on a Friday afternoon, an 87-page fax requiring law office staff to

work overtime to receive and collate the same and prevent the use of the fax machine by the law firm for several hours. The numerous lengthy pleadings regularly served by the debtor interfered with the operation of the law firm and the office of the U.S. Trustee. (See Declaration No. 289 and 293.) After personal or first class mail service was required by the court, counsel experienced difficulty serving the debtor. Certificates of Service would be filed evidencing first class mail service upon the debtor at his address of record (an office suite), but the debtor would deny having received the same and state he was having difficulty with regular mail delivery. (Hearings October 29, 2001 and November 19, 2001; See Esposito Certificate of Personal Service, Docket No. 305). This continued after the court on more than one occasion told the debtor he must ensure that he receive regular mail delivery or provide a different address for mail service.

Early in this proceeding, the debtor would file his typically lengthy and confusing pleadings and demand a response in one to three days, often over a weekend. The court reviewed the local rules regarding notice with the debtor who then initially complied with them. Then again, on Friday, November 14, 2001, he served voluminous discovery requests on counsel for a party and the local U.S. Attorney and demanded responses be received by Monday, November 16, 2001.

Also, early in the proceeding, the debtor would send notices of hearing without first obtaining a hearing date from the court.

The process to schedule hearings was explained to the debtor and he was instructed that only chambers staff could schedule hearings. The debtor complied with that process, but inexplicably on November 13, 2001 again sent a notice of hearing to parties for November 19, 2001 without obtaining a hearing time from chambers staff. No such hearing appeared on the court's docket. Counsel were confused and called the court attempting to determine if a hearing had in fact been set.

Mr. McNeil has repeatedly been told that requests for relief must be captioned as such and that is it improper to caption all pleadings as "notice" as a notice under the local rules is a different type of pleading. The debtor has consistently ignored the court's instruction and continues to caption most of the pleadings as "notices." As an example of the difficulties with the debtor's pleadings, Docket No. 361 contains 33 pages at the end of which is a request for judicial action. Counsel must read the repetitive pleading carefully and throughly to determine if they need file a response. With 424 pleadings filed in four and half months, this becomes burdensome. (See Declaration, Docket No. 289). At the hearing on December 5, 2001, the debtor did not have copies of two exhibits. The court allowed him additional time to provide copies. In response, the debtor filed numerous additional proposed exhibits as well as all exhibits that were used at the hearing, totaling more than 1700 pages.

At hearings, the debtor periodically reargues issues that the court has already resolved. For example, at the hearing of

October 29, 2001, the debtor argued the timeliness of an objection which was the same issue the court had resolved at the hearing on October 19, 2001. Frequently, a request for relief from another party results in a response by the debtor that the other party is "making false statements" or is "committing bankruptcy fraud." For example, at the hearing on November 1, 2001, attorney Mr. Jump stated that a Notice of Appeal had been filed in one of the many other suits and the debtor immediately responded that Mr. Jump was making a false statement. The pleadings themselves contained a conformed copy of the Notice of Appeal.

It has taken approximately one-half of a law clerk's time to deal with this proceeding and the related adversaries. Innumerable hours have been spent reviewing repetitive, voluminous, frivolous pleadings in order to ascertain if a substantive issue exists. Proceedings which are consistent with the goals and policies of the Bankruptcy Code and debtors who need bankruptcy relief and assistance in reorganizing their financial affairs have been neglected while the court has processed this proceeding. Court resources have been stretched to ensure Mr. McNeil the opportunity to present relevant significant legal issues which are not the subject of some other suit. This has never occurred.

II. CONVERSION IS NOT APPROPRIATE

The U.S. Trustee requested conversion of this proceeding to a Chapter 7 on essentially two bases, the assertion that the debtor did not have a good faith reorganization purpose in filing

this Chapter 11 petition and the debtor's inability to effectuate a plan. These bases are set out under 11 U.S.C. § 1112 and thoroughly elaborated on in Ninth Circuit case law. See *In re Marsch,* 36 F.3d 825 (9th Cir. 1994) and *In re Thirtieth Place,* Inc., 30 B.R. 503 (B.A.P. 9th Cir. 1983).

The presence of these factors is readily apparent from the above cursory review of the case and is very well explained in the U.S. Trustee's Memorandum in support of his motion. Having found that the facts do support a conclusion that the debtor is not properly in a Chapter 11 proceeding however, the court disagrees with the U.S. Trustee's contention that the proceeding should be converted. Once a court finds cause to dismiss or convert it must balance a number of factors when deciding which remedy is appropriate based on the facts and circumstances present. Some of those factors relate to the potential duties of and burden on a trustee. See *In re Robino,* 243 B.R. 472 (Bankr. N.D. Ala. 1999). If this case were converted to a Chapter 7, even Mr. McNeil recognizes that this would be a no-asset Chapter 7. (Hearing, November 14, 2001). There are simply no assets for a Trustee to manage.[4] Conversion to a Chapter 7 would simply result in the appointment of a Chapter 7 Trustee who would be required to deal with a vexatious litigant. Mr. Baker, the Trustee in the previous

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[4]After the hearing on December 5, 2001, the debtor submitted exhibits and argued in his memorandum that he owns a 25% interest in the causes of action of Broadway Buildings and GMFT. This only further supports the court's finding that the debtor's only business is litigation and does not support any contention of an ability to effect reorganization.

bankruptcy proceedings in this District, has been named as a defendant by debtor in several actions including adversary No. 00-02379 in the Central District of California and in the Idaho District Court action No. CV-96-217-NEJL. Some of the suits reviewed by this court contain sweeping allegations of civil conspiracy, slander, defamation and fraud. There is no reason to expose a Chapter 7 Trustee to such a situation.

III. DISMISSAL WITH LIMITS ON REFILING IS APPROPRIATE

Mr. McNeil has already been determined to be a vexatious litigant by the Bankruptcy Court in the Central District of California, and this bankruptcy proceeding concerns many of the same factual allegations made in that adversary proceeding, No. LA00-02379. This proceeding was commenced in violation of the order entered in that adversary proceeding. This bankruptcy proceeding is frivolous and improper as it requests no appropriate bankruptcy relief and attempts to relitigate matters determined in other courts. The manner in which Mr. McNeil has conducted this proceeding has been vexatious and burdensome to the parties and the court and is an abuse of the bankruptcy system. There is no indication that Mr. McNeil will ever be willing or able to competently seek appropriate relief from this court. In fact, every indication is to the contrary. For those reasons, this proceeding is **DISMISSED**.

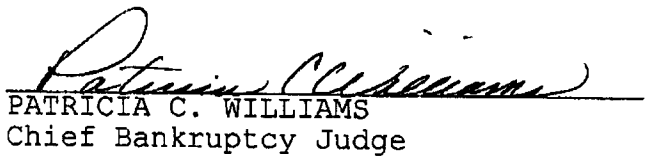
Flagrant abuse of the judicial process and the repeated filing of improper frivolous proceedings may justify not only sanctions, but limiting the access of a litigant to the court

system. *De Long v. Hennessey*, 912 F.2d 1144 (9th Cir. 1990). Courts have inherent power to restrict a litigant's ability to repeatedly commence frivolous, repetitive litigation. *Demos v. U.S. Dist. Court for Eastern Dist. Of Washington*, 925 F.2d 1160 (9th Cir. 1991). The filing of 87 actions in the state and federal courts by a pro se litigant in *Cello-Whitney v. Hoover*, 769 F. Supp. 1155 (W.D. Wash. 1991) was found to be abusive and enjoined. The limitation of access to the court imposed on a vexatious litigant must be tailored to the particular litigant. *Delong, supra*. This particular litigant has already violated an order limiting access previously entered by the Bankruptcy Court of the Central District of California. Giving all benefit of the doubt to Mr. McNeil and assuming he did not believe the commencement of the proceeding would violate that order, a similar order should be entered in this proceeding.

Mr. McNeil is precluded from commencing either on his own behalf or on behalf of any affiliated entity any bankruptcy proceeding in this court without leave of the Central District California court in adversary No. LA00-02379 or, alternatively, without first obtaining leave of this court. In order to obtain leave of this court, the debtor must (a) pay the appropriate filing fee in full; (b) file with the petition a Request For Leave to Commence a Bankruptcy Proceeding; (c) file with the petition complete Schedules and a Statement of Affairs which evidence that the proposed filing would have an appropriate bankruptcy purpose; and (d) file with the petition a declaration or sworn statement

certifying that it is not the purpose of the bankruptcy proceeding to relitigate or pursue the claims referenced in Central District of California adversary No. LA00-02379. Leave of this court will be granted or denied without a hearing based upon the pleadings filed with the petition. Should the debtor on his own behalf or on behalf of any affiliated entity desire to commence a bankruptcy proceeding in any other district, he must, at the time of filing any such petitions, notify the Clerk of that court in writing that he has been determined to be a vexatious litigant by the Central District of California and by this court.

DATED this 21st day of February, 2002.



PATRICIA C. WILLIAMS
Chief Bankruptcy Judge