UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re: DUNCAN J. McNEIL, Debtor(s).	No. 01-06073-W11 Adv. No. A02-00011-W11
MARK T. YOUNG LAW CORP. d/b/a LAW OFFICES OF MARK T. YOUNG, Plaintiff(s), vs. DUNCAN J. McNEIL, Defendant(s).	MEMORANDUM DECISION RE: PLAINTIFF'S MOTION TO DISMISS "COUNTER-CLAIMS"
DUNCAN J. McNEIL, "Counter Claimant." BROADWAY BUILDINGS II L.P., et al., "Involuntary Counter Claimants," vs. MARK T. YOUNG, et al. "Counter Defendants."	

FILED

MAY 7 2002

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

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on April 15, 2002 on Plaintiff Mark T. Young

and Mark T. Young Law Corporation's Motion to Dismiss (Docket No. 11). The following parties appeared:

Attorney	Representing
Mark Young Jay Jump	Mark T. Young Law Corp. & Self Interested Party

The debtor-defendant was not present.

The Plaintiff filed this dischargeability action during the pendency of the since dismissed underlying bankruptcy proceeding. The debtor answered the Complaint, asserting various affirmative defenses, "counterclaims" and listing various parties as "involuntary counterclaimants[1]." The plaintiff has brought this motion seeking dismissal of the so called "counterclaims"[2] on various bases. The motion was served on the debtor and other interested parties. The only response received from the debtor was an "Amended Answer" filed the Friday prior to the Monday hearing. The Court reviewed the motion, supporting affidavit,

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[1]This appears to be an unwarranted attempt to apply F.R.B.P. 7019 in order to make certain entities parties without having served them. The Involuntary Plaintiff Doctrine is a very limited and seldom used tool whereby a plaintiff names parties, whose rights are then adjudicated without service having occurred. Utilization of this procedural tool requires several elements to be present, most of which do not appear to exist in this case. See *Followay Productions, Inc. v. Maurer*, 603 F.2d 72 (9th Cir. 1979); *Caprio v. Wilson*, 513 F.2d 837 (9th Cir. 1975); *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U.S. 459 (1926); 7 Charles Allen Wright & Arthur R. Miller, Federal Practice & Procedure § 1606 (3rd ed. 2001). As such, the attempted joinder of these parties as claimants is ineffective.

[2]Some of the claims the defendant has labeled as "counterclaims" appear to be in fact cross-claims, but in the interest of consistency, the court will utilize the term the debtor has chosen.

files and records herein, including the "Amended Answer", has been fully advised in the premises and now enters its Memorandum Decision.

The debtor has amended his counterclaims, which he can as a matter of right once before a responsive pleading is served. F.R.B.P. 7015. A counterclaim requires a response and as no answer has been filed, the debtor's counterclaims may be amended once. A motion to dismiss for failure to state a claim does not terminate a party's right to amend. *Mayes v. Leipziger*, 729 F.2d 605 (9th Cir. 1984). Consequently, the court will recognize the Amended Answer filed by the debtor on April 12, 2002 to the extent it amends the asserted counterclaims.

SUBJECT MATTER JURISDICTION

The plaintiff argues that the debtor's failure to make any statement as to the court's jurisdiction is grounds for dismissal. A court must always be mindful of its subject matter jurisdiction and should dismiss or transfer the claims if it is lacking.

A. Does this Court Have Subject Matter Jurisdiction Over the Counterclaims?

A Bankruptcy Court has jurisdiction over matters which are core under 28 U.S.C. § 157 and over those which are related to bankruptcy proceedings under 28 U.S.C. § 1334. A matter is related to a bankruptcy proceeding if it could conceivably have any effect upon the administration of the bankruptcy estate. *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984); *Feitz v. Great Western (In re Feitz)*, 852 F.2d 455 (9th Cir. 1988). Subject

matter jurisdiction over a claim is determined at the time that the claim is made. *Feitz; Sizzler v. Belair & Evans (In re Sizzler Restaurants)*, 262 B.R. 811 (Bankr. C.D. Cal. 2001). In the instant case, the defendant's answer/counterclaim was initially filed on February 26, 2002 and later amended on April 11, 2002. The underlying bankruptcy proceeding (01-06073-W11) was dismissed on February 21, 2002. The pleadings list purely state law causes of action, not arising out of nor contained in the Bankruptcy Code. The captions also list various Bankruptcy Code sections in an apparent attempt to seek relief under Title 11. Although claims under Title 11 would normally be core proceedings, and in fact 28 U.S.C. § 157 specifically includes an estate's counterclaims within the category of core proceedings, several courts have held, and this court agrees, that the automatic designation of counterclaims as core proceedings applies only to compulsory counterclaims. Noncompulsory counterclaims must have some independent federal jurisdictional basis. *In re Yagow*, 53 B.R. 737 (Bankr. N.D. 1985); *Aerni v. Columbus (In re Aerni)*, 86 B.R. 203 (Bankr. Neb. 1988). In the instant case, at least some of the counterclaims appear to arise out of the same nucleus of fact, i.e. the representation by Mark Young of Broadway Buildings. They may therefore be compulsory. To that extent, the debtor's claims are compulsory counterclaims, and this court would have subject matter jurisdiction to hear them. It appears, however, that the defendant's counterclaims, as explained below, are dismissible on other grounds asserted by the plaintiff.

B. Mootness

The dismissal of the underlying bankruptcy proceeding has mooted many of the "counterclaims." Most, if not all, issues that would involve the debtor's reorganization are mooted by the dismissal of the petition as the court is without the ability to grant effective relief in the absence of a pending bankruptcy. *Spacec v. Thomen (In re Universal Farming)*, 873 F.2d 1334 (9th Cir. 1989), *Aheong v. Mellon Mortgage Co. (In re Aheong)*, 2002 WL 642711 (B.A.P. 9th Cir. (Haw.) March 29, 2002). See also *First State Bank v. Grell (In re Grell)*, 83 B.R. 652 (D. Minn. 1988). Specifically, because there is no estate being administered, there is none to be effected by any outcome of some, if not all, of the counterclaims asserted. Many of the Code sections which Mr. McNeil cites have no relevancy outside of a bankruptcy. For example, an order allowing a claim in bankruptcy is without effect when there will be no distribution of estate assets. As such, the court is unable to fashion any effective remedy on such a cause of action. Because of the less than adequately pled nature of most of the claims, however, it is difficult to ascertain with any certainty which facts relate to which alleged Bankruptcy Code causes of action. Assuming for argument's sake that they were adequately pled, as to some of the Title 11 Code sections listed,

502[3], 523[4], 542[5] and 510[6], no justiciable controversy exist outside the context of a pending bankruptcy. The court is therefore without jurisdiction to hear them and they are **DISMISSED.**

RES JUDICATA EFFECT OF PRIOR FEE APPLICATION ORDER ENTERED BY CALIFORNIA BANKRUPTCY COURT

The plaintiff has argued that, at least as to himself and his professional corporate entity, the California Bankruptcy Court's order approving professional fees entered in Case No. LA 98-18082-SB on July 20, 2000 precludes the claims now asserted by the debtor against them. In support thereof, the plaintiff has cited several unpublished California Bankruptcy Court cases which have held that a prior hearing resulting in approval of fee applications precludes subsequent suits brought by former clients for alleged malpractice or negligence in performance of professional duties. These cases have no precedential effect, but even in their absence, application of the elements of collateral estoppel requires the same result. In order for collateral estoppel to apply, the following elements must be present: a prior final judgment on the merits, the same parties or their privies and the causes of action or grounds for recovery were, or could have been, litigated in the prior case. *FDIC v. Jenson (In re*

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[3]Allowance of claims or interests.

[4]Dischargeability of debts; See *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896 (9th Cir. B.A.P. 1999).

[5]Turnover of property of the estate.

[6]Subordination for purposes of distribution.

Jenson), 980 F.2d 1254 (9th Cir. 1992); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The original answer/counterclaim recites 126 factual contentions which, if the court has interpreted them correctly, attempt to allege malpractice, breach of various duties owed from counsel to client and other vague wrongful conduct on the part of the "counter-defendants" arising out of their representation of Broadway Buildings in its bankruptcy proceeding. The Amended Counterclaim contains these same allegations. Without deciding whether they are properly pled, such allegations could have been raised at the hearing on objection to professional fees in the Bankruptcy Court and are therefore barred by collateral estoppel. Therefore, the "counterclaims" against Mark T. Young and Mark T. Young Law Corporation are **DISMISSED** as being barred by collateral estoppel.

FAILURE TO STATE A CLAIM

The plaintiff also seeks dismissal of the debtor's "counterclaims" under F.R.B.P. 12, asserting three grounds: violation of F.R.B.P. 8's requirement of a short and plain statement, lack of jurisdictional allegation and pleadings alleging conclusory allegations are insufficient to state a claim.

A. Conclusory Allegations

Although the Court is to take all facts asserted by plaintiff as true, conclusory allegations will not defeat a motion to dismiss for failure to state a claim. *Nat'l Assn. for Advancement...v. California Board of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000); *Assoc. of General Contractors of America v. Metropolitan Water District...*, 159 F.3d 1178, 1187 (9th Cir.

1998); *Pareto v. F.D.I.C.*, 139 F.3d 696 (9th Cir. 1998). Most of the allegations contained within the counterclaims are simply broad statements of alleged fact without specificity as to time, place or alleged wrongdoing party. In addition to the requirement to put a party on notice as to the claims against which it must defend, claims of conspiracy, fraud & malpractice have to be pled with specificity. There are no specific facts alleged in support of any of these claims.

B. F.R.B.P. 8

The debtor's original answer/counterclaim was 31 pages, which although one of the shorter pleadings filed by the defendant, is certainly not a short or plain statement. At first blush, the debtor's amended answer/counterclaim appears to be shorter in length, containing only 17 pages, however, the debtor incorporates by reference approximately 100 "factual statements" from his prior Complaint, totaling 19 pages. Neither Complaint resembles a short and plain statement. The standard set out in Rule 8 is a straightforward one, requiring simple, concise & direct averments. Most, if not all, of the "factual statements" in the counterclaim portion of the debtor's answer contain conclusory allegations, providing little specific information about what the debtor complains and little basis on which a party defendant may appropriately respond or defend. The amended answer/counterclaim provides little more information except that it refers to a failure by an unspecified party to give unspecified notices during the pendency of the Broadway Buildings bankruptcy proceeding. Any of these claims as they might refer to Mark T. Young or Mark T.

Young Law Corporation would be barred by the collateral estoppel effect of the California Bankruptcy Court order approving professional fees (See above). As to the remaining "Counter-Defendants", the debtor's complaints do not provide a short & plain statement of his causes of action and are therefore **DISMISSED** for failure to state a claim. *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996).

WITH PREJUDICE

Ordinarily dismissal of a complaint for failure to state a claim would be with leave to amend. Under proper circumstances, i.e., when allowing leave to amend would be futile, the court has the discretion to dismiss the complaint with prejudice. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293 (9th Cir. 1998). An examination of the debtor's history in this District alone reveals an inability or unwillingness by the debtor to state any claim or request clearly and succinctly. The debtor's Amended Complaints have more often than not been longer & more convoluted than the originals[7]. When leave to amend has been denied, the debtor has even amended his Complaint without regard for proper procedure or court order[8]. The *McHenry* case describes perfectly the phenomenon that exists here: the court spends hours delving through the

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[7]See "Order Dismissing Plaintiff's Claims in Part by Judge Robert H. Whaley," entered July 13, 2000 by the U.S. District Court for the Eastern District of Washington in case No. 97-CD-435, *McNeil, et al. v. Baker, et al.*

[8]See "Order by Judge Robert H. Whaley striking Second Amended Complaint," entered August 31, 2000 by the U.S. District Court for the Eastern District of Washington in case No. 97-CS-435, *McNeil, et al. v. Baker, et al.*

debtor's rendition of the same tired old facts, struggling to understand what argument he is inartfully asserting. After granting leave to amend, an even more lengthy, less articulate pleading is filed with the court and the parties again spend hours struggling to understand the agreement. Accepting the debtor's amended answer/counterclaim as being filed as a matter of right and finding no greater clarity in it, the court finds that dismissing with leave to amend would be futile and therefore **DISMISSES** all of the debtor's "counterclaims" **WITH PREJUDICE.**

A separate Order of Dismissal will be entered commensurate herewith. This Memorandum Decision shall constitute the court's findings of fact and conclusions of law.

DATED this 14 day of May, 2002.

Patricia C. Williams

PATRICIA C. WILLIAMS
Chief Bankruptcy Court Judge