UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

DANIEL F. DWYER, **CASE NO. 93-20620**

Debtor.

DECISION & ORDER

BACKGROUND

On March 22, 1993 at 1:53 p.m. a voluntary petition commencing a Chapter 11 case was filed on behalf of Daniel F. Dwyer (the "Debtor"). The petition, which indicated that the Debtor intended to file a plan within the time allowed by statute, rule or order of the Court, was signed by both the Debtor and his attorney, Mark M. Greisberger ("Attorney Greisberger") on March 22, 1993. Along with the petition, the Debtor filed a list of creditors holding the twenty largest unsecured claims, which listed only S.D. Office Equipment Co., Inc. ("S.D. Office") with a disputed claim of $320,000.00, and a local attorney, David DeLuca, with a disputed claim of $10,000.00.

Two days later on March 24, 1993, a notice of motion (the "Withdrawal Motion"), a supporting affidavit by the Debtor and a proposed order shortening time for a hearing to be held on April 7, 1993 to permit the Debtor to withdraw his Chapter 11 petition was filed on behalf of the Debtor. The March 24, 1993 supporting affidavit by the Debtor alleged that: (1) the Debtor "caused" the Chapter 11 petition to be filed on March 22, 1993; (2) the Debtor was a defendant in an action pending in New York State Supreme Court; (3) a trial in the action had been scheduled to commence on March 22, 1993; (4) the Debtor had been advised by his trial counsel that he had not had sufficient time to prepare to defend the case on behalf of the Debtor, and therefore, there was a substantial risk that the Debtor might be found to be liable even though the trial counsel believed that the Debtor had meritorious defenses; (5) at the time that he filed his petition, the Debtor believed that if he were to have been found personally liable in the action his legitimate creditors and existing

business would have been extremely prejudiced; (6) the Debtor, on advice of counsel, caused the Chapter 11 petition to be filed "to obtain a stay of the pending State Court action and to enable my trial counsel to fully examine the merits of my defenses to the pending action" (Debtor Aff. at ¶4); (7) the Debtor believed that because he and his trial counsel had worked diligently since the filing of the petition they could now proceed in the S.D. Action on the merits; and (8) the Debtor believed that none of his creditors would be prejudiced by the withdrawal of the Chapter 11 petition.

The Court entered the order shortening time so that a hearing on the Withdrawal Motion could be held on April 7, 1993.

On April 5, 1993, a response to the Withdrawal Motion was filed on behalf of S.D. Office. The response alleged that: (1) the pending state court action (the "S.D. Office Action") which had been scheduled for trial on March 22, 1993 was an action which S.D. Office had commenced against the Debtor and Restaurant Empire Group, Inc. ("REG")[1]; (2) a note of issue had been filed in the

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[1] REG is a corporation wholly owned by the Debtor, which had previously filed a Chapter 11 case in this Court and had a Chapter 11 plan confirmed. The S.D. Office Action involved summary proceedings to remove REG and the Debtor from 1389 Empire Boulevard, where REG and/or the Debtor had previously operated the Bounty Harbor Restaurant, and for alleged damages when REG and the Debtor vacated the premises. 1389 Empire Boulevard was acquired by S.D. Office as part of a confirmed court appointed Chapter 11 Trustee proposed plan in the Chapter 11 case of Bounty Bay Associates, also pending in this Court. Bounty Bay Associates is a New York general partnership whose general partners include the Debtor and Stuart Dunphrey ("Dunphrey"), the sole shareholder of S.D. Office. The Bounty Bay Associates Chapter 11 case was initiated by an involuntary petition filed by the Debtor in 1989. Attorney Greisberger has been the principal attorney representing the Debtor in the Bounty Bay Associates Chapter 11 proceeding. In the afternoon of March 22, 1993 the Court held a scheduled conference in the Bounty Bay Associates Chapter 11 case which dealt with a contested matter before the Court concerning the distribution of excess monies being held by the Trustee from the proceeds of the sale of the assets of Bounty Bay Associates, specifically whether any excess proceeds should be distributed to the Debtor in that there was a pending state court action commenced by Dunphrey concerning the various rights and liabilities of the partners in which the Debtor was a defendant. Annexed to the response of S.D. Office to the Withdrawal Motion was a March 29, 1993 affirmation of Irwin R. Gilbert ("Attorney Gilbert"), an attorney for S.D. Office, which sets forth in greater detail the nature of the S.D. Office Action and its procedural history.

S.D. Office Action on December 17, 1992, and thereafter a day certain for a jury trial was set by the Court for March 22, 1993; (3) on March 19, 1993 and the morning of March 22, 1993, New York Supreme Court Justice Arthur B. Curran refused the Debtor's requests for a stay of the trial;[2] and (4) Justice Curran had advised counsel that if the trial did not go forward during the week of March 22, 1993, it was unlikely that he would be available to try the case until the fall of 1993. The S.D. Office response further alleged that no discovery of S.D. Office had been conducted since the filing of the Debtor's petition on March 22, 1993 and that the Debtor, by the filing of his Chapter 11 petition, sought to use the Bankruptcy Court as a super appeals court to obtain a stay of the jury trial in the S.D. Office Action when the state court had twice denied the Debtor's requests for a stay.

S.D. Office requested that the Court impose sanctions on the Debtor and his attorney for filing the Chapter 11 petition for improper purposes, including obtaining improper and unwarranted delay, which unnecessarily increased the costs and expenses of S.D. Office in the S.D. Office Action and caused it to incur costs and expenses in the bankruptcy proceeding.

In his April 6, 1993 Affidavit, Attorney Enos alleged that it was not until January, 1993 that the Debtor was served with a pleading in the S.D. Office Action which purported to place him in the position of personal liability for the damages to 1389 Empire Boulevard alleged in the S.D. Action. The Affidavit alleged, without explanation, that this required the Debtor to obtain individual counsel (Attorney Enos), who was not retained until February 18, 1993. The affidavit further alleged that in the opinion of Attorney Enos the Debtor had a meritorious defense to the S.D. Office Action and that had the Debtor been forced to go to trial on March 22, 1993, "there would have been inadequate

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[2] The Court has reviewed the transcripts of the hearings before Justice Curran in Ontario County on March 19, 1993 and in Monroe County on March 22, 1993. The transcripts were filed with the Court as part of an August 6, 1993 affidavit in opposition to the request for sanctions filed by Christopher J. Enos ("Attorney Enos"), the Debtor's trial counsel in the S.D. Office Action.

time to present a full and adequate defense that would have prevented a personal judgment being rendered against Dwyer." (Enos Aff. at ¶10).

On the April 7, 1993 return date, the Court denied the Withdrawal Motion as not being in the best interests of creditors and adjourned the issue of whether sanctions should be imposed against the Debtor and Attorney Greisberger to an Evidentiary Hearing Calendar on April 14, 1993 at which time the matter was set down for an evidentiary hearing on May 26, 1993.

On May 5, 1993, the Court granted the motions of S.D. Office, which were not opposed, and terminated the automatic stay provided by Section 362 to permit the S.D. Office Action to proceed against the Debtor and REG, which had also filed a Chapter 11 petition on March 22, 1993.[3]

After being adjourned several times, the hearing on sanctions was held on July 8, 1993 and July 27, 1993. The Court heard the testimony of Attorney Gilbert and his paralegal, Douglas Nash, Dunphrey and Daniel Walter, employees of S. D. Office, the Debtor, Attorney Greisberger and Anthony J. Adams, the attorney for REG in the S.D. Office Action.

DISCUSSION

Based upon all of the facts and circumstances and the pleadings and proceedings in this case, and particularly the testimony of the witnesses before the Court on July 8, 1993 and July 27, 1993

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[3] At the conclusion of the Bounty Bay Associates conference conducted by the Court on March 22, 1993, at which Attorney Greisberger and David D. MacKnight ("Attorney MacKnight"), one of the attorneys for S.D. Office, were present, Attorney MacKnight indicated to the Court that he wished the Court to entertain an immediate motion to lift the stay to allow the S.D. Action to proceed to trial in the state court that week. Attorney Greisberger indicated that he did not wish to even discuss the matter with the Court at that time and would not consent on behalf of the Debtor to an immediate lifting of the stay or even an expedited hearing. Based upon Attorney Greisberger's clear opposition and after reviewing its schedule for the week of March 22, 1993, the Court indicated to Attorney MacKnight that it did not have the ability to shorten time and schedule and conduct an expedited hearing on a motion to lift the stay during the week of March 22, 1993.

and their credibility and the Debtor's March 24, 1993 affidavit, the Court finds that the Debtor filed his Chapter 11 petition on March 22, 1993 to stay the trial and related proceedings in the S.D. Office Action knowing that the likely result would be that the matter would not be resolved in the State Court or the Bankruptcy Court for a number of months and without an intention to reorganize under Chapter 11. This course of conduct by the Debtor is particularly egregious since Justice Curran had twice denied the Debtor's motions for a stay of the trial. It is clear to this Court from a review of the transcripts of the proceedings before him on March 19, 1993 and March 22, 1993 that Justice Curran, as the trial court judge, was fully familiar with the relevant facts and circumstances of the S.D. Office Action and its long and difficult procedural history, and that he had twice made a determination, in his sound discretion, that proceeding with the trial, even in the absence of REG which he had been advised on March 22, 1993 would be filing a petition in Chapter 11 and obtaining an automatic stay, would not prejudice the Debtor.

Filing a Chapter 11 petition without an intent to reorganize and for the purpose of obtaining a stay of the proceedings of a pending state court action constitutes a bad faith filing and an abuse of the Bankruptcy Code and requires the imposition of appropriate sanctions in accordance with Rule 9011. *Matter of King*, 83 B.R. 843, 847 (Bankr. M.D.Georgia 1988).

Based upon all of the facts and circumstances of the S.D. Office Action and the pending Chapter 11 case, the Court finds that none of the reasons testified to by the Debtor or Attorney Greisberger for the filing of the petition constitute a legitimate purpose for filing the Debtor's Chapter 11 bankruptcy petition. At a minimum to file a voluntary Chapter 11 petition a debtor must have a desire and intention to reorganize and a reasonable expectation of reorganization. Here the Debtor filed his petition solely to obtain the automatic stay provided by 11 U.S.C. Section 362. The Debtor had no intention of reorganizing but wished only to improperly stay a trial in a pending state court action where applications to the trial judge to stay the trial had been denied. This clearly

constitutes an abuse of the Bankruptcy Code. *See Id.*

It is well settled law that the awarding of sanctions meets two goals of Bankruptcy Rule 9011[4] and by incorporation Federal Rule of Civil Procedure 11, deterrence and compensation. Deterrence is the principal goal and "courts should impose the least severe sanction that is likely to deter." *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989).

As to the amount of sanctions to be imposed, the Court has considered the following additional factors: (1) the reasonable and necessary expenses incurred by S.D. Office as a result of the improper Chapter 11 filing, including amounts necessary to prosecute the request for sanctions

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[4] Rule 9011(a) provides:

> *Signature.* Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

through the procedures required by the Court, including hearings; (2) the Debtor's and his attorney's degree of familiarity with the bankruptcy process; (3) the severity of the violation; and (4) the ability of the parties to pay any sanction imposed upon them. *See Doering v. Union Board of Chosen Freeholders*, 857 F.2d 191, 197 n.6 (3rd Cir. 1988) (for various factors courts consider).

Rule 9011 authorizes the trial court to impose sanctions upon the attorney, his client, or both, but provides no standards to guide how the allocation should be made. Both courts and commentators have suggested that sanctions should be directed to whoever is responsible for the filing of the frivolous paper and the court has a great deal of discretion in allocating sanctions. *Eastway Construction Corp. v. City of New York*, 637 F.Supp. 558, 569 (E.D.N.Y. 1986), *modified and remanded*, 821 F.2d 121 (2d Cir. 1987), *cert. denied* 484 U.S. 918 (1987).

Attorney Greisberger has practiced in this Bankruptcy Court for a number of years and has and continues to hold himself out as an attorney with expertise in both commercial and consumer bankruptcy cases and in the filing of Chapter 11 cases. The Debtor is a sophisticated businessman who, from his experience in this Court in the REG Chapter 11 case and the Bounty Bay Associates Chapter 11 case, is in this Court's opinion sufficiently knowledgeable about bankruptcy, the proper purposes of Chapter 11 cases and matters relating to the automatic stay so as to warrant the imposition of sanctions against him individually under Rule 9011 on the facts and circumstances of this case. Although the Debtor contends that he relied on the advice of counsel in causing the Chapter 11 petition to be filed for the purpose of obtaining a stay of the trial in the S.D. Office Action, the Court believes that, given all of the facts and circumstances including the Debtor's sophistication and knowledge of bankruptcy matters, sanctions against the Debtor individually are warranted.

On the facts and circumstances of this case, the Court finds that sanctions in the amount of $10,225.00 are appropriate, and that the Debtor and Attorney Greisberger, who each signed the

Chapter 11 petition, should be held jointly and severally liable to pay this amount, which shall be paid to S.D. Office in addition to any amounts otherwise owed to it by reason of its claims against the Debtor other than for his improper filing of a Chapter 11 petition.

In making its determination as to an appropriate sanction, the Court has reviewed the detailed time records and requests of (a): Attorney Gilbert, including the services of Mr. Nash; (b) Lacy, Katzen, Ryen & Mittleman; and (c) Dunphrey and Daniel Walker, employees of S.D. Office. The sanction imposed, which is less than the amounts requested, represents what the Court finds to be the reasonable value of the services and disbursements of Attorney Gilbert, including the services of Mr. Nash, which the Court believes will have been incurred and billed to S.D. Office unnecessarily because of the improper Chapter 11 filing. They are for the services and disbursements which the Court believes will, in fact, have to be duplicated in preparing a second time for the trial of the S.D. Office Action, as well as for his services and disbursements in connection with the Chapter 11 case and the request for sanctions. The sanction imposed also includes what the Court finds to be the reasonable value of the services and disbursements of Lacy, Katzen incurred in connection with the Chapter 11 case and the request for sanctions. The sanction imposed does not include any amounts requested by S.D. Office for the time of its employees, which the Court believes is a cost of doing business. The Court also believes that both the Debtor and Attorney Greisberger can afford to pay the sanction imposed.

CONCLUSION

Daniel D. Dwyer and Mark M. Greisberger, Esq. are hereby held to be jointly and severally liable to S.D. Office Equipment Co., Inc. in the amount of $10,225.00, representing a sanction imposed under Rule 9011 of the Rules of Bankruptcy Procedure.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: December 31, 1993