UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

D.A. ELIA CONSTRUCTION CORP. Case No. 94-10866 K

Debtor

ORDER GRANTING WITHDRAWAL OF MOTION
FOR RECONSIDERATION, TOGETHER WITH ADMONITION
AGAINST FUTURE CONTEMPTS

By letter dated March 15, 1999, L. Andrew Bernheim seeks to withdraw his Motion for Reconsideration of this Court's February 25, 1999 Order finding him in Contempt of this Court's September 17, 1998 Order. He was sanctioned $5.00 in court costs and $100 payable to the Debtor's estate for the legal costs of having to read the contemptuous submissions.

The Motion will be deemed withdrawn and will not be heard on March 24, 1999, as had been previously ordered. But it is important that Bernheim be advised of how future contempts may be punished, and be advised of how to avoid further contempts.

Firstly, Bernheim is advised that his disagreement with my Order of September 17, 1998, and his seeming lack of understanding of its basis are not excuses to disobey it. The Sanctions Order of February 25, 1999 was issued for his flagrant disregard of the earlier order, and future such abuses will be punished with increasing severity, as detailed below.

Secondly, Bernheim misstates and misinterprets the September 17, 1998 Order. It does not deny him appropriate access to the court, but rather it puts an end to his gross abuse of

this forum.

DISCUSSION

No other litigant has ever been permitted by this writer to seek relief from this Court (not just seek information) by telephone call on a repeated, ongoing basis. No other litigant has been permitted to make such calls to the Court every day, sometimes several times a day, for extended periods of time leading up to scheduled Court dates in which such litigant had an interest. And no other litigant has repeatedly taken up the time of so many court employees with such calls. The calls sought such form of relief as:

Seeking leave (many times) to "participate" by telephone,

Seek rescheduling of matters that involved numerous other parties

whose agreement to rescheduling he had not obtained

Seek to have the Court locate and treat old written submissions

as a new opposition to a new matter so that he wouldn't have to

appear or prepare new opposition.

And many other requests. And because there was no written record of these matters, they generated more miscommunication, more confusion in the minds of others, and countless meetings among staff sorting out what who said to whom.

Bankruptcy Rule 9013 states that "A request for an order . . . shall be by written motion . . . ." To be sure, the Court entertains an occasional telephonic request from almost

everyone who regularly appears here. But no one has ever been permitted the latitude that Bernheim enjoyed. And no one has ever been permitted even just a now-and-then telephonic request in any matter as highly contentious as is every matter that Bernheim has been involved in this case. None of this writer's tolerance of such abuses was deliberate. The tolerance benignly accumulated like a cyst.

Whatever obligation this Court felt it had to be tolerant of a pro se non-lawyer party-in-interest, was increasingly tested for a long time until Bernheim's abuse of these telephone privileges combined with his abuse of the lawful limits upon written submissions, as follows:

Bernheim's written submissions are so grossly in excess of propriety as to defy efforts to describe them. As a former environmentalist, this writer grew increasingly appalled at the number of trees that had to die to support the steady stream of paper that Bernheim filed here as "exhibits."

He filed reams, mountains of paper, very, very little of which was necessary, useful, or illuminating, to the issues before this Court – rather, they were usually massive reprints of matters in other courts, with a cover letter from Bernheim saying that I must read it all to understand the matter that was before me.

The issues that have been before me have been very simple insofar as they involve Bernheim specifically, and I transferred those issues to the Bankruptcy Court handling Bernheim's own Chapter 11 case sometime before the September 17, 1998 Order. All other issues before me involved all of the D.A. Elia Company creditors, and once Bernheim voluntarily

subordinated his purported claim as a creditor, and acknowledged that his is essentially an ownership dispute with the Elia family, this Court had no need to concern itself with any claim of Bernheim as a creditor. As to matters affecting creditors generally, the Court has never needed Bernheim's input. This Court knows how to do its job without his advice. With his ownership dispute transferred to New Jersey and his purported creditor claims subordinated, there was no need for any submissions from Bernheim.

If he wanted to place his position on the record, so that the Court would have to address it, he could always do so with a single sheet of paper. But he continued to file reams and reams of paper. Mostly copies of submissions in New Jersey. Irrelevant, uninvited, not cognizable under any Rule, and superfluous. And almost all unsigned. Yet the federal taxpayers must pay to docket it and store it, and trees had to die for it.

No other litigant has ever been permitted by this writer to so abuse the forum that all taxpayers provide.

On September 17, 1998, when yet another meeting had to be held in a seemingly endless stream of meetings over many months to figure out who took Bernheim's phone calls and to what effect, and who else called regarding what Bernheim had told them, and in the midst of that meeting, yet another 10-14" of paper was placed in this writer's in-box (yet another set of "exhibits," in duplicate or triplicate, with a demand to the Clerk to acknowledge filing and a request or demand that this writer read it all in connection with some upcoming matter as to which Bernheim's input was unnecessary), the Order of that date was entered.

Bernheim is now on the same footing as any other litigant, lawyer or non-lawyer

alike, as to written submissions. They must be cognizable under the law. They must be signed under penalty of sanctions under Rule 9011. And they must comport with local custom and practice. (This writer does not even let lawyers submit uninvited briefs. This is because: (1) this writer might well know the law and need no brief, and (2) the opponent would feel obliged to file a Reply Brief, and (3) this writer does not want any client billed for any brief that the Court did not need, even if counsel for both sides wants to brief the matter.)

As to phone calls, Bernheim is now indeed on a lesser footing than those others who have not abused the phone call privilege. There is ample precedent in this Court and its "Mother Court" (the United States District Court for the Western District of New York) for denying certain privileges that others enjoy, once it is established that the privilege is being abused. For example, lawyers who establish a record of "calling around" to different court staff looking for either an answer they like or someone to blame something on, have been placed on a communicate-in-writing-only basis. Pro so litigants who conducted themselves inappropriately on the phone or in person, placing staff in fear or in inexcusable discomfort, have been placed on a communicate-in-writing-only basis and even have been instructed never to personally appear in the courthouse without an attorney, or have been the subject of a court-appointed security detail to accompany them whenever they are in the courthouse, so as to insure a civil demeanor.

None of this is to say that Bernheim is uncivil. Rather, it is that he abusively exploited telephone contact with the Court, and he ignored the governing Rules as to his other submissions, and substituted vast and unenlightening "quantity," for the "quality" of a well-focused, single-page Motion, Application, Objection or other cognizable form of appearance.

CONCLUSION

Bernheim's flagrant violation of the September 17, 1998 Contempt Order (to wit, his submissions received on February 23, 1999) required the attention of a deputy clerk to receive them, another deputy clerk to determine how to docket them, the Clerk of the Court (and possibly a supervising Deputy or two in-between), my own attention, the administrative cost of preparing the contemptuous documents for return, the postage (which the court does, in fact, pay to the carrier) and the cost of recording the result, by docket or otherwise. Yet the Court assessed only $5.00 in court costs for the contempt. Actual costs may have been many multiples of $5.00.

Something similar presumably occurred in the office of the Debtor's counsel in figuring-out what the submission was about and what to do about it. The Court deemed $100 to be fair compensation to the estate for the contempt, although the actual costs may have been some multiples of $100.

Since Bernheim filed the reconsideration Motion that he now withdraws, he has filed another ream of "exhibits," in duplicate, almost all of which relate to the New Jersey litigation, rather than to his contempt.

Further contempts by Bernheim will be punished by amounts more closely reflective of the actual damages. And if his contempts rise to the level of vexatious litigation tactics, punitive awards will be made in favor of the D.A. Elia estate under the doctrine of *Chambers v. Nasco, Inc.* See 501 U.S. 32, 44 (1991).

Bernheim is further advised that he will be given no prior advice as to what is or is not an appropriate submission under the Rules or customs or practices. The court is not obliged to re-write them all for a pro se litigant, or to act as his counsel or advisor. Indeed, in such highly-contested matters, the Court would do injury to an opponent to waive appropriate procedures in favor of a pro se litigant.

Bernheim is further advised that this writer does not assent to Bernheim's request that I recuse from any matter involving him. I have no knowledge or impression of any class of individuals against which I might ever remotely have any bias or prejudice, whether or not Bernheim may be a member. Nor has Bernheim allegedly any class bias or prejudice on my part. I also have no interest in the matter nor any knowledge of Bernheim or his opponents other than in the performance of my judicial duties. In sum, there is no basis whatsoever for recusal, however much Bernheim might prefer a judge who will continue to put up with his abuses of the tolerance he was previously afforded. Indeed, with the ownership dispute in front of a different court, it is hard to see why Bernheim is even in front of this Court at all, other than by a single sheet of paper here or there to insure that nothing happening here will prejudice what is happening there.

Finally, Bernheim suggests that he might file judicial misconduct charges, but states that his withdrawal of the reconsideration Motion is being filed "if that's where this treatment and seemingly prejudicial conduct would stop." Bernheim is advised that there was, is and will be no "bargaining" with this writer for any decision, by anyone, ever. Nor will this writer be intimidated by threats of review by his superiors. This writer always welcomes review

and such threats are of no consequence here, one way or the other.

SO ORDERED.

Dated: Buffalo, New York
March 19, 1999

/s/ Michael J. Kaplan

U.S.B.J.