UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

KEITH PILLICH — Case No. 94-10400 K

Debtor

Stanley Nowak
Richard Kwiatowski
Cynthia Kwiatowski
Chester Arczymowicz
Estate of Mary P. Spychalska
Estate of Zeona Spychalska
Clifford Alf

Plaintiffs

v. — AP 96-1150 K

Keith Pillich

Defendant

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Details of this litigation are set forth in the Court's earlier decision of November 6, 1996, which decision has been appealed by the Plaintiffs. Neither this Court nor the District Court have been asked under Fed. R. Bankr. P. 8005 to stay the present litigation pending appeal. In a status conference held in chambers on April 21, 1997, counsel advised that briefing of the appeal is nearly complete.

Presently before this Court is the Debtor-Defendant's ("Debtor") motion to compel discovery from the Plaintiff, and the Plaintiff's cross-motion seeking a protective order that would either: (1) declare that no further discovery is necessary in light of the discovery had in prior, similar state court civil litigation among most of the same parties; or (2) schedule pre-trial matters in this Adversary Proceeding under Fed. R. Civ. P. 16 in a fashion that would, in essence, constitute a "stay pending appeal."

This writer extensively examined the proper uses of Rule 16 in the case of *In re Chadwick Bay Hotel Assocs.,* 178 B.R. 618 (Bankr. W.D.N.Y. 1995), wherein it was stated that "It is a Rule 16 duty of the Court, in light of Rule 1, to insure that unambiguous steps that may simplify the litigation be undertaken before the Court and the parties face complex issues with expensive results." *Id*. at 623.

Here, the Debtor seeks expedition in the preparation of this case for trial, while the Plaintiffs seek economy, both of which goals are exalted by Fed. R. Civ. P. 1. The Court finds here that the balance weighs in favor of the Plaintiffs.

That the Debtor would like to have a resolution of these issues and move on with

his life one way or the other is understandable. However, we are not talking here about the question of whether there are any non-dischargeable debts. This Debtor knows that more than a half million dollars in restitution payments ordered in his criminal proceedings are non-dischargeable under the teaching of the Supreme Court in the case of *Kelly v. Robinson*, 479 U.S. 36 (1986). The present litigation, if the Plaintiffs are successful, would increase the non-dischargeable debts arising out of the Debtor's various admitted or asserted frauds by another $200,000 to $300,000. According to his counsel, the Debtor has been unable to make significant restitution payments, in any event. Therefore, we are not at the point at which the Debtor needs to know how much he needs to pay to which of his pre-petition creditors, and consequently there would seem to be no need to expedite this dischargeability litigation, other than for the Debtor's peace of mind.

The Plaintiffs' situation, on the other hand, is more compelling. All but one or two of them were identified as the "victims" of the Debtor's felonious conduct in the restitution order. They provided extensive and complete discovery in pre-bankruptcy civil litigation against the Debtor, in regards to the same issues, when the Debtor was represented by a different attorney. They now offer fourteen boxes of discovery materials, and the cooperation of their counsel to assist the Debtor's new counsel in understanding the allegations and the issues. But the Debtor's new counsel insists that he has no duty to wade through fourteen boxes of materials to find the answers to the questions he is asking. He insists that the Debtor has a right to start over again in this regard. To a certain extent, the present Court has upheld the Debtor's

argument; the November 6, 1996 decision of this Court denied the Plaintiffs' effort to avoid having to prove the Debtor's fraud, the Plaintiffs having argued that various earlier state court civil and criminal proceedings should be given *res judicata* effect warranting summary judgment in their favor under 11 U.S.C. § 523(a)(2) and (4). It is that decision, the effect of which is to permit the Debtor another day in court, that the Plaintiffs seek to have reversed on appeal. (And Plaintiffs candidly acknowledge that if that effort is unsuccessful, there could be some question as to whether they have the resources to continue the present litigation.)

The present Court is, of course, confident in its prior interpretation of the substantive law of issue preclusion, but the Court is also confident that the substantive tests that govern stays pending appeal under Rule 8005 need not be addressed in making common sense scheduling decisions under Rule 16.[1]

Totally apart from the question of whether the Debtor committed frauds or wilful and malicious injuries towards these Plaintiffs, and totally apart from the fact that he is a

[1]We are here only talking about discovery, not enforcement of a judgment. The fact that a Rule 16 scheduling order might have the same effect as a Rule 8005 stay does not mean that no such order should be entered unless the *Hirschfeld* tests for "stay" have been met. *See Hirschfeld v. Spanakos*, 104 F.3d 16 (2d Cir. 1997). Rather, one is always permitted to argue the least difficult theory to achieve a particular result. Here, the *Hirschfeld* requirement of a "substantial possibility of success" in the appeal cannot be satisfied, in my view, but all the other *Hirschfeld* factors are met, and militate in favor of a sensible scheduling order that essentially is a stay pending appeal. This is not a situation in which the Plaintiffs are a commercial entity for whom making discovery should be an ordinary cost of business, nor is it a situation in which the discovery will have to be provided in any event. In the remote event that Plaintiffs prevail on appeal, they will not have to make further discovery at all.

convicted felon, the primary reason that the Debtor still does not have answers to the questions presented in this litigation stems from his own vexatious conduct as a voluntary debtor in this case. Until recently obtaining the advice of his present counsel, this Debtor engaged in a long series of misfeasances and malfeasances of his duties as a debtor. This is the subject of numerous prior decisions and orders of the Court aimed at getting the Debtor to file complete schedules, statements of affairs, lists of creditors, etc. That he should now insist on a right to a prompt resolution of the dischargeability litigation at added expense to these Plaintiffs who, if they are successful in their appeal, will be able to proceed to trial without any further expense at all, rings hollow.

Pursuant to Rule 16, this Court orders that there will be voluntary discovery only until there is a final resolution of the appeal. For tracking purposes only, this Adversary Proceeding is set for a Calendar Call on October 15, 1997 at 11:00 a.m.

SO ORDERED.

Dated: Buffalo, New York
April , 1997

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U.S.B.J.