

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

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In re

RAMA GROUP OF COMPANIES,  
INC.

Case No. 00-12654 K

Debtor

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Official Committee of Unsecured Creditors  
of Rama Group of Companies, Inc.

Plaintiff

-vs-

AP No. 02-1098 K

Richard A. Maussner, et al.

Defendants

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Attorneys for Metro Group, Inc.

The Committee's Motion for Summary Judgment is denied and Metro's Motion for Summary Judgment is granted in part and denied in part.

Whenever denying Summary Judgment, it is this writer's practice to recite only the bare necessities for the ruling in order that any thought processes that might otherwise be disclosed by the Court not "guide" one side or the other as to how to try the case.

The Committee's Motion is denied because the portions of the Committee's theory that seek to set aside pre-petition "transfers" are inapposite. No transfers occurred pre-petition. By the time the transfers occurred, Rama was a debtor in possession, and Maussner had a fiduciary duty to creditors. The portion of the Committee's motion that survives for trial is the accusation that collusion, confederation, or some other form of scheme as between Metro and Maussner amounted to Metro's aiding and abetting of a breach of fiduciary duty by Maussner as D-I-P. If they did, then this matter is similar to this Court's decision against Severson Environmental in the *Albion* case. The result would be that the § 363(m) finding of "good faith" would be infirm and subject to collateral attack, as would be any Orders in aid of the "good faith finding," such as the Order seemingly insulating Metro from any liability for the payment of the million dollars to Maussner.

Of course, all of the evidence of pre-petition "machinations" may be relevant to the accusation of a post-petition fraud upon the Court.

In light of the above, Metro's Motion for Summary Judgment is granted in so far as it seeks dismissal of theories seeking avoidance of pre-petition fraudulent transfers. The

motion is denied, however, in so far as it seeks dismissal of the Committee's claim of post-petition fraud upon the Court. The latter accusation has been properly pled and is not foreclosed by any statute of limitations.

Metro's restrictive view of what may constitute a "fraud upon the Court" is rejected for two reasons. Firstly, this Court believes that the case of *McMunn v. Memorial Sloan-Kettering Cancer Center*, 191 F.Supp.2d 440 (S.D.N.Y. 2002) properly interprets the Circuit's holding in *Gleason v. Jandrucko*, 860 F.2d 556. Secondly, *Gleason* and similar cases involve trials, adverse parties, opportunities to cross-examine and ferret-out perjury, etc. The § 363 process, on the other hand, is such that the question of whether there will be an adverse party, at all, depends entirely on the verity of what the parties in interest and the Court are being told.

Because of the concern expressed at the outset, the Court will not address each and every one of the allegations made by the Committee, which the Committee believes are indicia of an effort to work a fraud upon the Court. Rather, the Court will cite only two. The first is evidence that by contract between Gottesman and Strategic, Gottesman was prohibited from attempting to seek higher and better bids from others for the assets of Rama. If this is established at trial, then representations to creditors and the Court to the contrary were false, and the issue becomes whether the evidence clearly and convincingly establishes that the falsity was intentional.

Secondly, the representation that the APA was the highest and best offer for the assets of the Debtor was perhaps not legally false, but was misleading to the creditors and to the Court. The question for trial in this regard, consequently, is whether such representations were

deliberately misleading.

The fact that the Court has selected only two of the Committee's allegations of fact by no means forecloses the Committee from raising all other allegations it has raised, but only in so far as they are relevant to the question of whether the post-petition representations by the Debtor and/or Metro to the Court and creditors aided and abetted a breach of fiduciary duty by the Debtor and Maussner, rising to a fraud upon the Court. This Adversary Proceeding is placed back upon the **Calendar Call for October 15, 2008 at 11:30 a.m.** for further scheduling. Out of town counsel may appear by telephone.

SO ORDERED

Dated: Buffalo, New York  
October 8, 2008

/s/ Michael J. Kaplan

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U.S.B.J.