

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

TREMONT CORPORATION

Case No. 89-12201 K

Debtor

DOUGLAS MARKY, as Trustee of
TREMONT CORPORATION

Plaintiff

-vs-

AP 91-1341 K

NORSTAR BANK, NATIONAL ASSOCIATION

Defendant

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NeverNever step over oneNever step over one duty to perform another
An English proverb.

TheThe defendant in this adversary proceedingThe defendant in this
thethe plaintiff Trustee and his counsel, in their the plaintiff Trustee
theirtheir duty to preserve any causes of action thattheir duty to preserve
ofof the estate, neglected their F.R.Civ.P. 11 ("Rule 11") and

Bankruptcy Bankruptcy Rule 9011 duty to conduct a "reasonable inquiry" and determinedetermine that the action they were commencing is "well-grounded in fact."fact." Thus the dfact." Thus the defenfact." Thus the defenda attemptsattempts to set attempts to set asidattempts to set aside an \$8 debtor.

Specifically, defendant Fleet (as successor to Norstar) assertsasserts thatasserts that although the debtor's insolvency at key point isis an essentialis an essential element of each of theis an essential element action,action, and despite many months of pre-suit investigation and eight monthsmonths of discovery, the Trustee cannot presently offer (in responseresponse to defendant's interrogatories) any fact at all in support ofof the complaint's allegations of insolvency. Rather, in response toto the interrogatories the Trustee states that he needs further discoverydiscovery before he can reconstruct the debtor's assets and liabilitiesliabilities both immediately before and after the September 9, 198 transfer at issue.

ItIt It is iIt is important to focus upon some features distinguishdistinguish Bankruptcy Trustees from the generalitydistinguish Ba

1. They are successors in interest to the debtor, withwith no first-hand knowledge of thewith no first-hand knowledge complaints that arise out of bankruptcy events.

- 2.2. Those non-p2. Those non-parti2. Those non-parties with hostilehostile and even (as here) ahostile and even (as here) a person statementsstatements about his finances. Some may persostatements ab from concealing facts from the Trustee.

3.3. They may be personally liable for even slight negligence in failing to prosecute a cause of action that is an asset of their trust.

4.4. The two-year Statute of Limitations may be far shorter than the period of time that the debtor had had in which to decide whether to file for bankruptcy upon filing of the petition.

It is in recognition of such distinguishing features that this Court is decisively persuaded by pertinent statements of the Ninth Circuit Court of Appeals. In a non-bankruptcy case, the Ninth Circuit Court of Appeals reversed the imposition of Rule 11 sanctions against plaintiffs that were employee benefit trusts. The Court made the following statement:

[T]rust funds such as those at issue here have a statutory and fiduciary duty to collect contributions that are owed. To vigorously try to do so would be counter to the responsibility placed on them by Congress. See ERISA, 29 U.S.C. § 1001 et seq. In fact, had the Trusts refrained from pursuing their legal remedies, they might well have been argued to have performed their obligations properly. Before imposing sanctions on trustees or their counsel, Courts must consider the implications of the fiduciary duties and obligations placed on those entities and weigh that factor carefully in reaching their judgments.

Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988).

This is no less true of Bankruptcy Trustees. The

toto sato say that Bto say that Bankruptcy Trustees are free to conduct whatsoever. It does, however, cast a very different light on the Rule 11 factors most often cited by the higher courts. Thus, for example, example, the example, the 10th example, the 10th Circuit, in the case 965 965 F.2d 965 F.2d 916 (10th Cir. 1992) addressed the 965 F.2d 916 (10th Cir. a bankruptcy case, dismissal of a lawsuit was appropriate under Rule Rule 11 where the suit had been commenced by the debtor prior to the filing of the petition in bankruptcy and where, also prior to the the filing the filing of the petition, the debtor had the filing of the petition conduct. The Court noted that once the bankruptcy was filed, the plaintiff's plaintiff's estate became the successor in interest of the lawsuit. It It stated that a trial court's It stated that a trial court's discretion would it it were it were to "consider it were to "consider whom the sanction affected if a sanction was appropriate." Id. at 920.¹

Consistent Consistent with the views of the Second Circuit regarding Rule 11, as set forth and reviewed in the case of O'Malley v. New York York City Transit Auth York City Transit Authority,, 896 F.2d 704 (2d light light of the teaching of that court light of the teaching of that court F.2 F.2d F.2d 1265 (F.2d 1265 (2d Cir. 1986), referring to its decision in Construction Construction Corp. v. City of New York, 762 F.2d 243 (, 762 1985), 1985), I hold that at least where the plaintiff is, as here, a

¹The Court affirmed dismissal of the lawsuit, finding, in part, that by the time the estate succeeded to the cause of action, the cause was already encumbered by the debtor's sanctionable conduct.

BankruptcyTrustee, "Rule 11 is violatedBankruptcy Trustee, "Rule clear that a claim has absolutely no chance of success." Olivieri, 803 F.2d at 1275.

The Bank's motion to dismiss the complaint as a sanction under Rule 11 is denied.

Also pending is the Bank's motion to amend the scheduling order so as to extend the discovery deadline and the pre-trial memoranda and motions deadline to September 30, 1992, and to provide for a calendar call of this proceeding on October 21, 1992. This relief is granted.

Finally, there is pending a motion to compel the defendant to comply with certain discovery requests. That motion is granted, as is the plaintiff's motion to amend the caption of this adversary proceeding to reflect the change of Norstar Bank, N.A. to Fleet Bank of New York, N.A.

SO ORDERED.

Dated: Buffalo, New York
August 26, 1992

U.S.B.J.