2000 BNH 023 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

In re: BK No. 99-11189-MWV
Chapter 7

Global Environmental Solutions, Ltd.,
Debtor

Seaton Gras,
Plaintiff Adv. No. 99-1075-MWV

v.

Global Environmental Solutions, Ltd.
Global Environmental Services, L.L.C.,
Refrigerant Separation Technology, L.L.C.,
Polar Refrigerant Technology, L.L.C., and
Exeter Refrigerents,
Defendants

Seaton Gras,
Pro Se plaintiff

Mark F. Sullivan, Esq.
Attorney for Global Environmental Solutions, Ltd., et. al.

MEMORANDUM OPINION

BACKGROUND

Before the Court are the counterclaims of the above named Defendants alleging that this adversary proceeding, since voluntarily dismissed, was filed in bad faith and is frivolous. For the reasons set forth below the Court denies the Defendants' counterclaim.

This adversary proceeding arises out of an involuntary Chapter 7 bankruptcy petition filed by Seaton Gras (hereinafter "Plaintiff"), Graham Bunce, and Palmer & Sicard, Inc. on behalf of Global Environmental Solutions, Ltd. ("Solutions"). The involuntary petition was filed days before a scheduled

trial in Rockingham Superior Court involving Solutions and the Plaintiff. A motion to dismiss the involuntary bankruptcy case as being brought in bad faith was denied on June 21, 1999.

The Plaintiff and Graham Bunce, who were former directors and officers of Solutions, brought the complaint alleging that the other directors of Solutions, Stephen Barnes and Theodore Atwood, conspired to create the other named Defendants and fraudulently transferred assets away from Solutions to the other entities in order to avoid the reach of creditors, including the Plaintiff and Bunce. According to the complaint, Barnes and Atwood conspired to strip the Plaintiff and Bunce of their interests in Solutions and transferred a thirty percent ownership interest to an offshore entity known as Danube International, Ltd. ("Danube"), which was controlled by Barnes. Barnes and Atwood then proceeded to dissolve Solutions and with the assistance of Danube created the above named Defendants using the assets of Solutions. The Defendants filed counterclaims alleging that the complaint is frivolous and brought in bad faith.

On January 18, 2000, the Court granted Graham Bunce's motion to withdraw as a party plaintiff after he reached a settlement agreement with the other principals of Solutions. As part of the settlement, Mr. Bunce agreed not to assist the Plaintiff in any claims against Solutions and the other Defendants. On the same day, the Court granted Attorney William Richmond's motion to withdraw as attorney of record for the Plaintiff due to conflicts of interest. On May 15, 2000, after the Plaintiff was unable to obtain counsel, the Court granted his motion to dismiss his complaint without prejudice. However, the Defendants' counterclaims were not dismissed.

On May 23, 2000, a trial was held on the counterclaims only. Mr. Atwood, who has been involved as a principal with each of the named Defendants, testified before the Court. Mr. Atwood testified that each of the entities held separate tax identification numbers and although they performed functions within the same industry and there was some overlap in the services and time periods in which they operated, each was a separate business unrelated to Solutions. Specifically, unlike Solutions, which was involved in the separation of gasses, Exeter Refrigerants, which was run by Mr. Atwood and one employee simultaneously with Solutions, involved only performing analysis of refrigerants; Global Environmental Services, L.L.C.

("Services") was involved in the sale of gas rather than the separation of gasses and began operating shortly after Solutions became defunct; Refrigerant Separation Technology, L.L.C., like Solutions, was involved in the separation of gasses, but operated after Solutions ceased doing business and was unrelated to Solutions or any of the other defendant entities; and finally, Polar Refrigerant Technology, L.L.C. ("Polar"), the only of these businesses operating at the time the complaint was brought, is involved in the cleaning and selling of gas cylinders and has no relationship with Solutions. According to Mr. Atwood, any overlap in timing of operation or services is attributable merely to the entrepreneurial successes and failures of the principals who were seeking to carve out a nitch in a very specialized industry.

At trial, several exhibits were entered into evidence by the Plaintiff showing the relationship between the various defendant entities and Mr. Atwood, Mr. Barnes and Danube. Among the exhibits were brochures which appear to advertise services under the name of both "Global Environmental Solutions, L.L.C." and "Global Environmental Services, L.L.C.," using the two names interchangeably within the brochure. (See Plaintiff's Exhibits 1 and 2). In addition, a separate brochure advertising Polar Refrigerants Technologies, L.L.C. was introduced. (See Plaintiff's Exhibit 3). The Polar advertising brochure, which is nearly identical in appearance, advertises many of the same services advertised in the advertising brochure for Global Environmental Services, L.L.C. and Global Environmental Solutions, L.L.C., including a "buyback program" for purchasing refrigerants in cylinders, analytical services for testing and analyzing refrigerant products, and reclamation services for reclaiming refrigerants. In fact, much of the same language is duplicated in the in Polar advertising brochure and several pictures are identical. Also admitted were several pieces of correspondence between Mr. Atwood and creditors and potential customers. The correspondence, which occurred during the second half of 1997 might indicate that Mr. Atwood was representing to creditors and customers that Solutions and Services were the same entity, merely reorganized and moved to new facilities. Furthermore, Mr. Atwood testified that he was primarily responsible for the business operations of each of the entities and that he represented each of the entities in all relationships with customers and creditors. There was also testimony that a battery operated fork-lift,

which was purchased and used by Solutions, was ultimately moved to the Polar location. However, Mr. Atwood testified that the fork-lift was not in working condition and was only stored at the Polar facility for lack of adequate space elsewhere. Finally, the evidence showed that the Plaintiff was awarded a wage claim against Solutions in the amount of $16,000 which has not been satisfied due to Solutions' insolvency.

DISCUSSION

The amended complaint filed by the Plaintiff and Mr. Bunce accuses the Defendants of engaging in a sham liquidation of Solutions and accuses Mr. Atwood, Mr. Barnes and Danube of merely creating the other named defendants as "shells" in order to keep assets away from creditors of Solutions. Specifically, the complaint alleges that assets were ultimately transferred to Polar in violation of 11 U.S.C. § 548. Section 548 requires the Plaintiffs to prove that within one year of filing for bankruptcy property of the debtor was transferred with actual intent to hinder, delay or defraud creditors or the debtor received less than reasonably equivalent value for such transfer. The language of § 548 is broad and may encompass almost any act that has the effect of diminishing the value of a debtor's estate to the detriment of creditors. See L. King, Collier on Bankruptcy, ¶ 548.01 (15th Ed.). Generally, a § 548 action is brought by the trustee in a Chapter 7 case rather than creditors. However, where there are insufficient funds in the estate, a creditor who is prepared to fund and prosecute the case may be permitted to bring the action. Id.

This adversary proceeding does not come before the court on its merits as the Plaintiff voluntarily dismissed the complaint prior to trial. Therefore, the Court will not, under these circumstances, attempt to speculate as to its outcome had there been a trial. Gokey v. McIntosh (In re McIntosh), 89 B.R. 144, 146 (Bankr.D.Colo.1988) . The Court will, however, review the record before it, including the pleadings, testimony, exhibits, and arguments of counsel, to determine whether the Defendants are entitled to any relief based on the counterclaim for bad faith filing of the complaint.

Sanctions against attorneys or parties for filing frivolous claims are generally imposed pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure. However, the counterclaims included in the

Defendants' answers do not satisfy the notice requirements of Rule 9011, which requires that a request for sanctions be made separately from other motions or requests and describe the specific conduct alleged to have violated the rule. Fed. R. Banrk. P. 9011(c)(1)(A). See also, Tate v. Lau, 865 F.Supp. 681, 691 (D.Nev.1994). Although the Court will not treat the counterclaims as a motion for sanctions pursuant to Rule 9011, it will look to the Rule and those cases applying it in considering the allegation of bad faith made by the Defendants here.[1]

Rule 9011 provides:

> (b) *Representations to the Court.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances –
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> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
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> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
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> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) *Sanctions*. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible.

Fed. R. Bankr. P. 9011. In construing Rule 9011, courts look to cases involving Rule 11 of the Federal Rules of Civil Procedure, which is substantively similar to Rule 9011. Sylver v. Security Pacific Financial Services, Inc. (In re Sylver), 214 B.R. 422, 428 (1st Cir. BAP 1997). When applying Rule 9011 or Rule 11

[1] Although the Defendants did not make a motion for sanctions pursuant to Rule 9011, it is within the Court's inherent power to impose sanctions where a complaint is frivolous or filed in bad faith. See Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998).

the "appropriate standard for measuring whether a party and his or her attorney has responsibly initiated and/or litigated a cause of action . . . is an objective standard of reasonableness under the circumstances." Id. (quoting Cruz v. Savage, 896 F.2d 626, 631 (1st Cir. 1990)). Although the subjective belief of the Plaintiff at the time of filing is a factor in determining whether the complaint was reasonable under the circumstances, Rule 9011 will also look to whether the violation was caused by inexperience, incompetence, willfulness, or deliberate choice. Id.

Rule 9011 places an affirmative duty on the party or attorney to make a reasonable investigation of the facts and law before filing a claim. As part of that duty, the responsible party must make an evaluation of the legal basis of the claim and the obvious defenses. However, the party need not make a detailed analysis of every possible defense. See L. King, Collier on Bankrupty, ¶ 9011.04[3] (15th Ed.). Viewing the evidence and arguments presented at trial and the pleadings filed in connection with this adversary proceeding, the Court finds that the complaint was not frivolous or filed in bad faith. The Plaintiff, who is a creditor of Solutions, produced evidence that at least two separate entities operated by the same principals engaged in business operations substantially similar to that of Solutions after Solutions supposedly became defunct. In addition, the Plaintiff showed that at least some assets of Solutions ultimately ended up with Polar, which performs many of the same services that Solutions provided. It is the Plaintiff's contention that the Defendants created separate entities and transferred the assets of Solutions to these entities in order to avoid the reach of creditors. The Court expresses no opinion as to the likelihood of success on the merits of this claim. However, it finds that the claim displays at least the minimum analysis of the facts and law required to provide a reasonable basis for bringing a complaint pursuant to 11 U.S.C. § 548.

The Court also finds that the voluntary dismissal of the complaint is not evidence of bad faith. The Court acknowledges that this case was removed to the Bankruptcy Court by the actions of the Plaintiff shortly before these claims were to be heard in Rockingham Superior Court and that the Plaintiff voluntarily dismissed the complaint before this Court. Thus, a hearing on the merits of this claim has now been twice postponed by the actions of the Plaintiff himself. However, the circumstances surrounding the voluntary

dismissal of the claims before this Court may have been beyond the control of the Plaintiff as his counsel withdrew with permission of the Court shortly before the trial was scheduled. The Plaintiff objected to that withdrawal and professed to be ready and willing to proceed with the litigation, but he was unable to obtain replacement counsel on short notice. Therefore, the Court does not find that the voluntary dismissal of the complaint before this Court is indicative of bad faith.

CONCLUSION

Based on objective criteria, the Court finds that the complaint filed by the Plaintiff is not frivolous and finds no evidence of bad faith. Accordingly, the Defendant's counterclaim is denied. A separate judgment will be entered.

DONE and ORDERED this 12th day of June, 2000, at Manchester, New Hampshire.

BY THE COURT:

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Mark W. Vaughn, Chief Judge