

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:06-bk-02044-ABB
Chapter 13

RICHARD J. DEMPSEY,

Debtor.

RICHARD J. DEMPSEY,

Plaintiff,

vs.

Adv. Pro. No. 6:07-ap-00061-ABB

RUDOLPH HARDICK, *et al.*

Defendants.

ORDER

This matter came before the Court on the Motion to Dismiss and Memorandum of Law (Doc. No. 4) ("Motion to Dismiss") and the Motion for Rule 11 Sanctions (Doc. No. 9) ("Sanctions Motion") filed by Rudolph Hardick, Michael Hardick, Sr., Michael Hardick, Jr., Theresa Hardick, Mark S. Peters, R.D.M.H., Inc., Surf and Sun Apartments, Inc., C.F.M. & I., Florida Mortgage & Investment Co., Magma Trading Corporation, Banana River Finance, Inc., and Delano on the River, LLC, the Defendants herein (collectively, the "Defendants"). Richard Dempsey, the Plaintiff and Debtor herein ("Plaintiff"), filed a Response (Doc. No. 7) to the Motion to Dismiss. An evidentiary hearing was held on August 13, 2007 at which the Plaintiff and counsel for the Defendants appeared. The Court makes the Following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

Background

The Plaintiff initiated the above-captioned adversary proceeding by filing a Complaint (Doc. No. 1) against the Defendants on May 24, 2007.¹

¹ Doc. No. 1.

The Complaint contains a menagerie of convoluted allegations against the Defendants including fraud, conspiracy to commit fraud, negligence, bankruptcy fraud, and conspiracy to commit bankruptcy fraud. The majority of these allegations stem from the Plaintiff's dissatisfaction with the Defendants' alleged noncompliance with a judgment entered by this Court in an unrelated bankruptcy case. The Plaintiff, through the remaining allegations, appears to also seek recovery of damages against the Defendants for alleged fraudulent actions.

The Plaintiff has made appearances in this Court since 1990 through a number of bankruptcy cases and adversary proceedings. He filed this most recent Chapter 13 bankruptcy case, which is his fourth case, on August 17, 2006.² He filed two adversary proceedings in connection with the above-captioned case against essentially the same defendants: (i) Dempsey v. Peters, et al., Adv. Pro. No. 6:06-ap-00148-ABB; and (ii) Dempsey v. Hardick, et al., Adv. Pro. No. 6:07-ap-00061-ABB. The Court determined the Complaint in Adversary Proceeding No. 6:06-ap-00148 did not include any claim upon which relief could be granted and was dismissed by Order entered on July 6, 2007. The Plaintiff filed a 1995 Chapter 7 involuntary bankruptcy petition against Surf 'n Sun Apartments, Inc., a Defendant herein.³ The case was designated a no asset case and closed on July 23, 2001.

The R.D.M.H. Judgment

The Plaintiff references throughout the Complaint the Judgment entered by this Court on July 8, 1998 ("R.D.M.H. Judgment") in favor of Jerald I. Rosen ("Trustee Rosen") in the adversary proceeding Dempsey, et al. v. Hardick, et al., Adv. Pro. No. 6:95-ap-00023-ABB.⁴ Trustee Rosen was the duly-appointed Chapter 7 Trustee of the related main bankruptcy case In re R.D.M.H., Inc., Case No.

² The Plaintiff's previous bankruptcy cases include: (i) In re Richard Jay Dempsey, Case No. 6:95-bk-02826-ABB, Chapter 7 (case was closed on September 19, 1995); (ii) In re Richard J. Dempsey, Case No. 6:98-bk-06942-ABB, Chapter 13 (case was closed on December 30, 1993); (iii) In re Richard J. Dempsey, Case No. 6:99-bk-05564-ABB, Chapter 13 (case was closed on November 2, 1999, Debtor's Motion to Reopen was denied by Order entered on December 14, 1999).

³ In re Surf N Sun Apts., Inc., Case No. 6:95-bk-02342-ABB, Chapter 7.

⁴ The Plaintiff initiated Adversary Proceeding No. 6:95-ap-00023-ABB. An Order was entered on September 12, 1995 granting Trustee Rosen's motion to intervene as a party plaintiff.

6:94-bk-04497-ABB (“R.D.M.H. Case”), and the Plaintiff was a creditor of R.D.M.H. by virtue of a state court judgment (“State Court Judgment”).⁵ This Court determined, as set forth in the R.D.M.H. Judgment, various parcels of real properties constituted property of the R.D.M.H. estate and ordered the properties be transferred to Trustee Rosen for the benefit the estate.

The R.D.M.H. Judgment was affirmed by the United States District Court for the Middle District of Florida, Orlando Division on June 25, 1999.⁶ No further appeal was taken. The R.D.M.H. Judgment constitutes a final, non-appealable order.

The Plaintiff asserts the properties were not turned over to Trustee Rosen pursuant to the R.D.M.H. Judgment. Trustee Rosen resigned from the R.D.M.H. Case on September 1, 1999. The Office of the United States Trustee subsequently designated the R.D.M.H. Case a no asset case and it was closed on March 27, 2001.⁷ The properties delineated in the R.D.M.H. Judgment were abandoned by operation of the Bankruptcy Code when the case was closed.

The Plaintiff’s motion to reopen the R.D.M.H. Case was denied. The Plaintiff is barred by the doctrines of collateral estoppel, res judicata, and the law of the case from challenging the abandonment of the properties. All counts of the Plaintiff’s Complaint relating to the R.D.M.H. Judgment are due to be dismissed.

State Court Judgment

The Plaintiff references in the Complaint the State Court Judgment entered by the Circuit Court of the 18th Judicial Circuit in and for Brevard County in Dempsey v. R.D.M.H., Inc., et al., Case No. 89-9103-CA-J on October 4, 1993 “nunc pro tunc to May 4, 1992.” The State Court Judgment awarded judgment in favor of the Plaintiff and against R.D.M.H., Inc. for \$88,997.70, plus interest at the rate of twelve percent per annum, for damages

relating to a breach of contract.⁸ The Plaintiff is apparently seeking to enforce the State Court Judgment through the pending adversary proceeding.

The State Court Judgment is listed in the Plaintiff’s Schedule B and constitutes an asset of the bankruptcy estate. His Chapter 13 plan has been confirmed and the assets of the Chapter 13 estate are vested in the Plaintiff. The Plaintiff is entitled to seek enforcement of the State Court Judgment, but he has not articulated a legitimate legal claim upon which the Bankruptcy Court can enforce the State Court Judgment. The Plaintiff’s claims seeking enforcement of the State Court Judgment are due to be dismissed for failure to state a claim upon which relief can be granted.

The Plaintiff is seeking recovery of the State Court Judgment through claims for damages against the Defendants based on allegations of fraud and conspiracy to commit fraud through transfers of assets and concealment. The claims have been raised and litigated in the State Courts or are significantly related to State Court matters. The State Court is the appropriate forum for litigation or relitigation of these claims.

This Court previously reviewed many of the allegations relating to the State Court Judgment in connection with the “Motion to Reopen Chapter 13 Case & Motion to Reduce Injunction and File Chapter 7 and Put Judgment in the Hands of the Trustee” (“Motion to Reopen”) filed by the Plaintiff in his previous Chapter 13 bankruptcy case, Case No. 6:99-bk-05564-ABB. The Plaintiff’s request to reopen Case No. 6:99-bk-05564-ABB was denied by Order entered on December 14, 1999. The December 14, 1999 Order constitutes a final, non-appealable order.

The doctrines of collateral estoppel, res judicata, and the law of the case bar the Plaintiff from relitigating the issues relating to the State Court Judgment considered and resolved in the December 14, 1999 Order. All claims contained in the Complaint relating to the State Court Judgment are due to be dismissed.

⁵ Note: Adversary Proceeding No. 6:95-ap-00023-ABB was consolidated with Adversary Proceeding No. 6:96-ap-00270-ABB (Rosen v. Magma Trading Corp.) and the R.D.M.H. Case was jointly administered with In re Surf ‘n Sun Apts., Inc., Case No. 6:95-bk-02342-ABB.

⁶ District Court Case No. 6:98-cv-01354-ACC (Doc. No. 15).

⁷ The Plaintiff’s objection to the no asset designation was overruled by the Order approving the No Distribution Report entered on July 23, 2001.

⁸ The State Court Judgment provides it was issued “[p]ursuant to the verdict rendered in this action, and Mandate issued by the Fifth District Court of Appeal on June 16, 1993, in R.D.M.H. Inc. and Rudolph Hardick v. Richard Dempsey, Fifth DCA Case #92-1146.”

Motion to Dismiss

The Plaintiff has failed to set forth any claim in his Complaint upon which relief can be granted. The Complaint is replete with convoluted claims and causes of actions relating to issues litigated previously in this Court and the State Courts. The State Courts are a more appropriate forum for litigating the claims contained in the Complaint. The Complaint is due to be dismissed.

Sanctions Motion

The Defendants filed the Sanctions Motion seeking attorney's fees and costs in addition to an order requiring the Plaintiff to obtain the signature of a licensed attorney on any future pleadings. The Court is empowered to impose sanctions for pleading violations and may impose an injunction pursuant to its inherent powers to prevent abuse of the bankruptcy system. Prohibiting the Plaintiff, or any agents or entities acting on his behalf, from filing any petitions or pleadings in the United States Bankruptcy Court for the Middle District of Florida without leave of court is an appropriate sanction.

The Plaintiff is receiving the benefits provided to Chapter 13 debtors and should cease using the Bankruptcy Court to relitigate issues previously resolved by the various state and federal courts or which are best addressed by the State Courts.

This Court retains the authority to consider damages incurred by the Plaintiff's filing of this adversary proceeding and Adversary Proceeding No. 6:06-ap-00148-ABB.

CONCLUSIONS OF LAW

Motion to Dismiss

The Plaintiff is barred from recovering upon the R.D.M.H. Judgment by the doctrines of res judicata, collateral estoppel, and the law of the case. Res judicata bars re-litigation of matters decided in a prior proceeding if: (i) the prior decision was rendered by a court of competent jurisdiction; (ii) there was a final judgment on the merits; (iii) the parties were identical in both suits; and (iv) the prior and present causes of action are the same. Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1501 (11th Cir. 1990). "A final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979). Collateral estoppel

precludes the re-litigation of an issue that has already been litigated and resolved in a prior proceeding. Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998).

The doctrine of the law of the case provides "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case . . . This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (*citations omitted*).

The closing of the R.D.M.H. Case rendered the property listed in the R.D.M.H. Judgment abandoned. 11 U.S.C. § 554(c) (2007). The Office of the United States Trustee determined the properties would not generate sufficient funds to warrant their administration and the case was closed. The properties are no longer available for the benefit of creditors through bankruptcy proceedings. The Plaintiff is barred from challenging the abandonment by the doctrines of collateral estoppel, res judicata and the law of the case. The Plaintiff cannot make allegations relating to these properties without reopening the R.D.M.H. Inc. bankruptcy case, a motion for which has already been denied. All allegations relating to the Defendants' alleged non-compliance with the R.D.M.H. Judgment are due to be dismissed.

The State Court Judgment constitutes property of the Plaintiff's bankruptcy estate pursuant to Section 541(a) of the Bankruptcy Code, which provides: "The commencement of a [bankruptcy] case . . . creates an estate. Such an estate is comprised of . . . all legal or equitable interests in property as of the commencement of the case." 11 U.S.C. § 541(a) (2007). The Plaintiff's Chapter 13 plan was confirmed and the assets of the estate are vested in the Plaintiff. 11 U.S.C. § 1327(b). The Plaintiff, although entitled to seek enforcement of the State Court Judgment through the legal remedies available to him, has failed to state a legally cognizable basis upon which the Bankruptcy Court may enforce the State Court Judgment. The Plaintiff's claims seeking enforcement of the State Court Judgment are due to be dismissed.

The Plaintiff asserts claims for damages related to the Defendants' non-payment of the State Court Judgment. There is no basis for such claims in Bankruptcy Court. The Plaintiff should litigate any claims for damages in the State Court. The

Bankruptcy Court is not the appropriate forum to litigate or re-litigate issues which are more appropriately brought in State Court. The Rooker-Feldman doctrine, as articulated by the Eleventh Circuit Court of Appeals in Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983), prevents this Court from acting in an appellate manner with regards to the State Court decisions. All claims contained in the Complaint relating to the State Court Judgment are due to be dismissed.

The Plaintiff presented several claims relating to the State Court Judgment in his Motion to Reopen filed in Bankruptcy Case No. 6:99-bk-05564-ABB. Those issues were considered and resolved through the December 14, 1999 Order. The Plaintiff is barred by the doctrines of collateral estoppel, res judicata, and the law of the case from relitigating, through this Complaint, issues previously resolved by this Court through the December 14, 1999 Order.

Dismissal is required where a claimant has failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to bankruptcy proceedings through Federal Rule of Bankruptcy Procedure 7012. Dismissal is appropriate where “it is clear the plaintiff can prove no set of facts in support of the claims in the complaint.” South Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996). Stated another way, dismissal is appropriate when “on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.” Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993). A complaint in which the claimant fails to state a claim upon which relief can be granted will result in dismissal pursuant to Rule 12(b)(6). Daewoo Motor Am., Inc. v. General Motors Corp., 459 F.3d 1249, 1271 (11th Cir. 2006); Snow v. DirecTV, Inc., 450 F.3d 1314 (11th Cir. 2006); Davila v. Delta Air Lines, 326 F.3d 1183, 1185 (11th Cir. 2003).

The R.D.M.H. Judgment does not constitute a basis for any of the claims contained in the Complaint. The properties subject to transfer pursuant to the R.D.M.H. Judgment were abandoned, pursuant to 11 U.S.C. Section 554(c), when the R.D.M.H. Case was closed. The claims contained in the Complaint relating to the R.D.M.H. Judgment or the closed R.D.M.H. Case are barred by the doctrines of res judicata, collateral estoppel and law of the case. Any claims for damages arising out of alleged non-compliance with the State Court Judgment should be litigated in State Court.

The Plaintiff has failed in his Complaint to state a claim upon which relief can be granted. The Complaint is due to be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

Sanctions Motion

The Plaintiff has filed four bankruptcy cases in this Court since 1990. The pending adversary proceeding is the second initiated by the Plaintiff in connection with his most recent Chapter 13 case. The Plaintiff named essentially the same defendants in both adversary proceedings. The Court dismissed Adversary Proceeding 6:06-ap-00148-ABB on July 6, 2007 due to the Plaintiff’s failure to state a claim upon which relief could be granted. The Plaintiff’s continued attempts to relitigate issues that have been resolved by the courts are abusive of the bankruptcy process.

The Defendants seek an imposition of sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011(b)(2), which provides pleadings must contain claims “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”⁹ Subsection (c) of Rule 9011 allows for the imposition of sanctions if the court determines subsection (b) has been violated. Monetary sanctions are not appropriate at this juncture, but this Court retains jurisdiction to consider any potential damages to the Defendants caused by this adversary proceeding and Adversary Proceeding 6:06-ap-00148-ABB.

The imposition of an injunction is proper pursuant to Section 105(a) of the Bankruptcy Code to prevent further abuse of the bankruptcy process. Section 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision . . . shall be construed to preclude the court from, sua sponte, taking any action . . . necessary or appropriate . . . to prevent an abuse of process.

11 U.S.C. § 105(a) (2007). The Plaintiff is accordingly prohibited from filing any petition, action, complaint, claim, pleading, or paper in the

⁹ The Defendants’ Sanctions Motion cites Federal Rule of Civil Procedure 11, which is similar, but not identical to Federal Rule of Bankruptcy Procedure 9011.

United States Bankruptcy Court for the Middle District of Florida without leave of Court.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Defendants' Motion to Dismiss (Doc. No. 4) is hereby **GRANTED** and the above-captioned adversary proceeding is hereby **DISMISSED**; and it is further

ORDERED, ADJUDGED and DECREED that the Defendants' Motion for Sanctions (Doc. No. 9) is hereby **GRANTED** and, pursuant to 11 U.S.C. Section 105(a), Richard J. Dempsey and his agents, entities, legal representatives, administrators, successors and assigns, are hereby enjoined from filing in the United States Bankruptcy Court for the Middle District of Florida, without leave of Court, any petition, action, complaint, claim, pleading, or paper related to the relief requested in Adversary Proceeding Nos. 6:07-ap-00061-ABB and 6:06-ap-00148-ABB.

Dated this 13th day of September, 2007.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge