UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re	)	
	)	
DARREN M. BREWER,	)	Case No. 6:11-bk-04174-KSJ
	)	Chapter 7
Debtor.	)	
	)	

ORDER DENYING CREDITOR'S MOTION FOR RECONSIDERATION

Insight Technology Inc. ("ITI"), petitioning creditor of an involuntary Chapter 7 bankruptcy against the alleged debtor, Darren Brewer, seeks reconsideration of the order awarding Mr. Brewer attorney's fees and costs in the amount of $65,871.40, arguing the amount of attorney's fees and costs that Mr. Brewer incurred after the Court dismissed the bankruptcy case are excessive.[1] ITI also requests reconsideration of the Court's denial of ITI's request for setoff against a judgment ITI has against Mr. Brewer.[2]

ITI filed its motion for reconsideration under Federal Rule of Civil Procedure 59(e), or alternatively 60(b).[3] A motion seeking reconsideration of a ruling on its merits, filed within 28 days of the original ruling, should be treated as a motion to alter or amend a judgment under Rule 59(e).[4] "The only grounds for granting [a 59(e)] motion are newly-discovered evidence or manifest errors of law or fact."[5] Rule 59(e) may not, however, "be used to relitigate old matters,

[1] Doc. No. 92.
[2] Doc. No. 90.
[3] Doc. No. 92. Federal Bankruptcy Rule 9023 incorporates by reference Federal Rule of Civil Procedure 59.
[4] *Finch v. City of Vernon*, 845 F.2d 256, 258–59 (11th Cir. 1998); *Mahone v. Ray*, 326 F.3d 1176, 1177 n.1 (11th Cir. 2003); *Travelers Casualty and Surety Company of America v. Thorington Electrical & Construction Company*, 2010 WL 743138 at *1 (M.D. Ala. March 1, 2010) (noting "[t]ypically, post-judgment motions brought within 28 days of the judgment, and that 'call into question the correctness of that judgment' are construed under Rule 59 (citing Finch, 845 F.2d at 258–59)). The time to file a motion under Rule 59 was extended from 10 days to 28 days in 2009. *See* Advisory Committee Notes to Rule 59 for 2009 Amendments.
[5] *Sherrod v. Palm Beach County School District*, 237 Fed. Appx. 423, 425 (11th Cir. 2007) (citing *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)); *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999).

raise argument or present evidence that could have been raised prior to the entry of judgment."[6] ITI does not raise new evidence or arguments, but argues the Court should reconsider its ruling as a matter of law.

ITI first seeks the Court's reconsideration of the amount of the award for attorney's fees and costs. Specifically, ITI argues the portion of fees and costs debtor incurred pursuing sanctions for bad faith and fraud are excessive because (1) they were incurred after the Court dismissed the case, and (2) because the Court ultimately found no bad faith. The Court disagrees.

Courts have made clear that filing an involuntary petition comes with certain risks, including high costs, if an involuntary petition is dismissed.[7] "The filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment."[8] As one court has stated:

> The danger of involuntary bankruptcy cannot be overlooked by the courts. An allegation of bankruptcy is a charge that ought not be made lightly. It usually chills the alleged debtor's credit and his source of supply. It can scare away customers. It leaves a permanent scar even if promptly dismissed. It is also obvious that the use of the bankruptcy court as a routine collection device would quickly paralyze this court.[9]

Due to the seriousness of the action, courts have broad discretion in awarding fees and costs when it finds that a creditor has improperly filed an involuntary petition against a debtor.[10]

In this case, ITI assumed the risk it would have to pay debtor's legal fees when it chose to place Mr. Brewer in bankruptcy. The Court dismissed the case, but kept it open until all pending matters were resolved.[11] One of these matters was the issue of ITI's bad faith in filing the

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[6] *Sherrod*, 237 Fed. Appx. at 245 (quoting *Michael Linet, Inc*. 408 F.3d at 763).
[7] *In re Tichy Elec. Co. Inc.*, 332 B.R. 364, 374 (N.D. Ia. 2005).
[8] *In re Reid*, 773 F.2d 945, 946 (7th Cir.1985).
[9] *In re Dino's, Inc.*, 183 B.R. 779, 783–84 (S.D. Ohio 1995).
[10] *In re Atwood*, 1993 WL 13005093, *5 (Bankr. S.D. Ga. 1993), *Tichy*, 332 BR at 374 (noting "the awarding of fees, costs and damages is not automatic, but is committed to the sound discretion of the court.").
[11] Doc. No. 53.

petition, which debtor raised prior to dismissal of the case.[12] This matter was core to the debtor's overall defense against the involuntary petition, and debtor is entitled to all attorney's fees and costs incurred in pursuing their bad faith allegations.[13] ITI's motion for reconsideration arguing the fees and costs in the amount of $65,871.40 were excessive is denied.

The Court also finds no basis to reconsider its previous denial of ITI's setoff request. Setoff is not appropriate in this case. At the time ITI commenced the involuntary petition against debtor, a bona fide dispute existed as to whether debtor continued to owe a debt to ITI.[14] This dispute remains unresolved. Unlike the cases ITI cites in support of setoff, no mutuality of debt exists here because there is a question as to how much debtor owes ITI, if at all.[15] Debtor need not wait to recover the costs he incurred in defending the petition until such time as the dispute is settled. ITI's motion for reconsideration as to setoff is denied.

Accordingly, it is

ORDERED:

1. ITI's Motion for Reconsideration (Doc. No. 92) as to the award for costs and fees is denied.
2. ITI is ordered to pay debtor's attorney fees and costs in the total amount of $65,871.40 within 30 days.
3. ITI's Motion for Reconsideration (Doc. No. 92) as to the issue of setoff is denied.

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[12] Debtor argued for dismissal of the bankruptcy because of ITI's improper purpose and bad faith in its Motion to Dismiss (Doc. No. 24). The Court did not rule on ITI's bad faith when it dismissed the case. This issue still was outstanding at the time debtor filed his Motion for Sanctions for fraud and bad faith (Doc. No. 56).

[13] Doc. No. 50.

[14] Debtor's stock certificates were levied and sold to satisfy the ITI judgment of $1,144,174.97 (Doc. No. 12 and 56). The stocks were sold to ITI, the only bidder at the sale, for $500. Debtor claims the value of the stocks was sufficient to satisfy the entire ITI judgment and has filed a motion to satisfy the judgment *in toto* in Seminole County.

[15] Doc. No. 92 (citing *In re Better Care*, 97 B.R. 405, 415 (Bankr. N.D. Ill. 1989); *In re Apache Trading Group, Inc.*, 229 B.R. 887, 890 (Bankr. S.D. Fla. 1999)).

4. If ITI fails to timely pay the fees and costs, the Court shall issue a final judgment upon which execution shall lie.

DONE AND ORDERED in Orlando, Florida, on June 8, 2012.

KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

Copies provided to:

Debtor: Darren M. Brewer, 4025 Bermuda Grove Place, Longwood, FL 32779

Counsel for Debtor: Jonathan B. Alper, 274 Kipling Court, Heathrow, FL 32746

Petitioning Creditor & Counsel: Insight Technology, Inc., c/o Roy S. Kobert, P.O. Box 4961, Orlando, FL 32802