UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:17-bk-07843-FMD
Chapter 7

Gabriel C. Murphy,

Debtor.
_____/

ORDER DENYING PETITIONING CREDITORS' MOTION FOR RECONSIDERATION (Doc. No. 227)

THIS CASE came on for consideration without a hearing of Petitioning Creditors' *Motion for Reconsideration* (the "Motion for Reconsideration")[1] and Debtor's *Opposition to Petitioning Creditors' Motion for Reconsideration*.[2] The Motion for Reconsideration requests the Court reconsider its *Order Denying Motion to Dismiss Involuntary Bankruptcy Petition and Granting Alleged Debtor's Request for Abstention* (the "Abstention Order").[3] For the reasons set forth below, the Court will deny the Motion for Reconsideration.

I. BACKGROUND

This case's lengthy history started with a business transaction—through corporate entities—between the putative debtor, Gabriel Murphy ("Murphy") and Michael Connolly ("Connolly"), as described in detail in the Abstention Order. The business transaction spawned litigation, involving numerous parties, including Murphy, Connolly, their related entities, and third parties, in the Isle of Man, the State of Kansas, and the State of Florida.

To summarize the procedural background of this involuntary bankruptcy case, on September 5, 2017, Digital Technology, LLC ("Digital Technology"), Investment Theory, LLC ("Investment Theory"), and Guaranty Solutions Recovery Fund I, LLC ("Guaranty Solutions") (together, "Petitioning Creditors") filed an involuntary Chapter 7 petition against Murphy.[4] Murphy promptly filed a motion to dismiss (the "Motion to Dismiss").[5] In his memorandum in support of the Motion to Dismiss, Murphy requested, alternatively, that the Court abstain from the case.[6]

On February 28, 2018, Petitioning Creditors filed an amended involuntary petition (the "Amended Petition") to disclose, as required by Federal Rule of Bankruptcy Procedure 1003(a), that Investment Theory and Guaranty Solutions obtained their claims by transfer and not for the purpose of filing the involuntary case.[7]

Trial of the Motion to Dismiss was scheduled to begin on March 29, 2018. On March 27, 2018, Petitioning Creditors filed a joinder to the involuntary petition on behalf of William M. Scheer and Lawrence G. Scheer (the "Scheers" and the "Scheer Joinder").[8] The Court addressed the Scheer Joinder at the start of the trial. Murphy's counsel argued that because the Scheer Joinder was filed on the eve of trial, he didn't have a chance to determine if it had been filed in bad faith and that there was a bona fide dispute as to the Scheers'

[1] Doc. No. 227.
[2] Doc. No. 234.
[3] Doc. No. 224.
[4] Doc. No. 1.
[5] Doc. No. 7.
[6] Doc. No. 150.
[7] Doc. No. 120. Murphy moved to strike the Amended Petition (the "Motion to Strike") (Doc. No. 124). Petitioning Creditors filed a response to the Motion to Strike, and, in the alternative, requested leave of Court to file the Amended Petition, *nunc pro tunc* to the date of the Amended Petition (Doc. No. 151). The Court considered the Motion to Strike and Petitioning Creditors' request for leave to file the Amended Petition at the commencement of the trial on the Motion to Dismiss. On March 19, 2019, the Court entered its Order denying the Motion to Strike and granting Petitioning Creditors' motion for leave to file the Amended Petition (Doc. No. 223).
[8] Doc. No. 153.

claim as it arose from a "dormant" unenforceable judgment.[9]

Petitioning Creditors' counsel argued that the Scheers' claim is not dormant. He then stated:

> My suggestion on resolving this is -- this is a motion to dismiss. And if we get past this, we still have the second trial on whether or not the Debtor is paying his debts -- generally paying his debts as they become due. So when you get to that point, one of the allegations of an involuntary petition is that they're eligible petitioners.
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> So the issue -- he still has his opportunity down the road if, for some reason, he thinks that this -- that entity is not eligible, it's not -- he still has his opportunity. And I don't think we're trying -- you know, we're not -- that trial hasn't even been set yet. So there's plenty of time for them to address that claim.[10]

The Court responded:

> All right. Well, my preference would be to defer the issue. It may be that the Scheers' eligibility as a petitioning creditor is a moot point, depending on what happens at this trial, and we won't have to get to it.
>
> If it turns out to be a critical issue, then [Murphy's counsel] is correct, he ought to have the opportunity to conduct some discovery and to look into it. But we'll have to just see where we are at the end of the day and whether it's a critical issue with respect to the motion to dismiss. . . . [11]

The Court conducted trial on the Motion to Dismiss over five days in March and May 2018 (the "Trial"). At the conclusion of the Trial, the Court directed the parties to file post-trial briefs and objections to each other's briefs. The briefing was concluded on August 8, 2018.[12]

On March 19, 2019, the Court entered the Abstention Order, denying the Motion to Dismiss and abstaining from the involuntary case under 11 U.S.C. § 305(a).[13] In the Abstention Order, the Court found that Petitioning Creditors each held a claim that is not contingent as to liability or subject to a bona fide dispute that aggregated at least $15,775.00, satisfying the requirements of 11 U.S.C. § 303(b)(1).[14]

However, the Court found that Connolly's formation of Investment Theory and Investment Theory's acquisition of a judgment claim so that Connolly (who indirectly owns 80% of Digital Technology) and Digital Technology could "make themselves whole,"[15] and Guaranty Solutions' and the Scheers' peripheral role in the involuntary case supported the Court's finding that the case is a two-party dispute.

The Court also found that other forums are available to protect the interests of Murphy and Connolly, and there was no evidence of assets available for distribution to creditors. Finally, the Court concluded that Petitioning Creditors' claims did not hinge upon federal bankruptcy law, and that a bankruptcy case was not necessary to reach a just and equitable solution.[16]

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[9] The Sheer Joinder refers to a June 30, 2011 judgment against Murphy and others. Under Kansas law, a judgment that is not renewed after five years becomes dormant. When a judgment has been dormant for two years, it shall be released upon request. K.S.A. 60-2403(a)(1). A judgment that has become dormant may be revived if a motion for revivor is made within two years. K.S.A 60-2404.

[10] Doc. No. 165, Trial Transcript, March 29, 2018, pp. 17:23-18:9.

[11] *Id.* at p. 18:10-20.

[12] Doc. Nos. 194, 195, 199, and 200.

[13] Doc. No. 224.

[14] Unless otherwise stated, statutory citations are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

[15] The Court determined that Digital Technology is the holder of a claim against Murphy that is not in bona fide dispute. But rather than Digital Technology's pursuing collection remedies on its own behalf, Connolly arranged for the formation of Investment Theory (owned 90% by Connolly) and Investment Theory's acquisition of judgment against Murphy for $1,555,592.36 from the holder of the judgment. Investment Theory then domesticated the judgment and pursued collection remedies in the Circuit Court of the State of Florida in and for Lee County, Florida. (Doc. No. 224, pp. 22-23.)

[16] Doc. No. 224, pp. 39-40.

The last issue before the Court was Murphy's request for attorney's fees and punitive damages under § 303(i). Based upon the totality of the circumstances, because the Court did not dismiss the case on the grounds advanced by Murphy—but instead abstained from the case under § 305(a)—and did not find that the petition was filed in bad faith, the Court exercised its discretion and denied Murphy's request for fees and punitive damages.[17]

Petitioning Creditors timely filed the Motion for Reconsideration.[18] Petitioning Creditors ask the Court to reconsider its ruling because, they assert: (1) the Scheers did not participate in the trial because (a) they were not a party and (b) the Court had specifically tabled consideration of all issues pertaining to the Scheers' claim; (2) the extent of Murphy's assets has limited relevance to the Motion to Dismiss; (3) Petitioning Creditors' interests are not adequately protected outside the bankruptcy forum; and (4) the decision to abstain based on the Court's conclusion that this is a two-party dispute is premature because other creditors were not given notice of the bankruptcy as contemplated by Federal Rule of Bankruptcy Procedure 1003(b).

II. DISCUSSION

A. Standard for Motion for Reconsideration

Motions for reconsideration may be filed under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, made applicable in bankruptcy cases by Federal Rules of Bankruptcy Procedure 9023 and 9024. Petitioning Creditors do not specify whether they seek relief under Rule 59 or Rule 60.

Under Federal Rule of Civil Procedure 59, a court may reconsider an order on limited grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; (3) to correct a clear error of law; or (4) prevent manifest injustice."[19] Motions under Rule 59 are "an extraordinary remedy and should not be used 'as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant.'"[20] Under Rule 60, a party may be relieved from a final judgment or order for reasons such as newly discovered evidence, mistake, or fraud.[21]

B. The Scheers' Participation at Trial

Petitioning Creditors contend there was no reason for the Scheers to actively participate in the case because the Motion to Dismiss did not challenge the Scheers' claim (the "Scheer Claim"), and the Scheers were willing to travel from Arizona to testify at the Trial, but did not do so based on the Court's decision to table issues pertaining to the Scheer Claim. Murphy argues that nothing precluded the Scheers from testifying at the Trial.

As demonstrated by the statements of Petitioning Creditors' counsel and the Court at the Trial, the Scheer Claim was relevant to whether Petitioning Creditors could satisfy the three-creditor requirement of § 303(b)(1). If the Court found that one of the three Petitioning Creditors was not a qualified petitioning creditor (because it is contingent or in bona fide dispute), the Court would have considered whether the Scheers qualify as a petitioning creditor. On the other hand, if the Court were to find—as it did—that all three Petitioning Creditors were qualified or that two or more of Petitioning Creditors were not qualified as petitioning creditors, then there was no need to address the Scheer Claim.

In any event, the Court did not prevent the Scheers from participating at the Trial. If the Scheers wanted to appear as witnesses—or to take any other action—in this case, they could have done so. Further, the Court notes that the Motion for Reconsideration is not supported by an affidavit or declaration of the Scheers or any indication—other than their having signed the Scheer Joinder—that they have any interest in this case.

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[17] Doc. No. 224, pp. 40-41.
[18] Doc. No. 227.
[19] *Lindros v. Brewer (In re Brewer)*, 500 B.R. 130, 136 (Bankr. M.D. Fla. 2013).
[20] *Id.* (quoting *In re CHC Indus., Inc.*, 381 B.R. 385, 389-90 (Bankr. M.D. Fla. 2007)).
[21] Fed. R. Civ. P. 60.

C. The Scheers and Guaranty Solutions Are Peripheral to this Case.

The Court found that the Scheers are "peripheral" to this case. This finding is supported by the record: other than the Scheer Joinder—filed by Petitioning Creditors' counsel on the eve of the Trial, over eighteen months ago—the Scheers have taken no other action in this case.

Likewise, the record supports the Court's finding that Guaranty Solutions is peripheral to this case. Guaranty Solutions' corporate representative testified at deposition that filing involuntary bankruptcy cases was not one of Guaranty Solutions' collection practices or business model and that Guaranty Solution's participation as a Petitioning Creditor arose because counsel for Digital Technology contacted Guaranty Solutions in July 2017 to discuss the possibility of Guaranty Solutions joining in the filing of the involuntary petition.[22] And while Guaranty Solutions was to share pro rata in any distribution in the bankruptcy case, it did not pay any of the attorney's fees or costs involved in filing the involuntary petition, and if no funds were recovered it was not obligated to pay any of the fees or costs.[23]

D. Murphy's Assets

Petitioning Creditors contend that the Court prematurely concluded that Murphy has no assets and that the extent of his assets is not relevant to the Motion to Dismiss. Petitioning Creditors also complain that the Court overlooked Murphy's most significant asset, his litigation claims pending in the state of Kansas (the "Kansas Litigation").

The extent of Murphy's assets was relevant to the Court's consideration of Murphy's request that the Court abstain.[24] Although the evidence at the Trial included Murphy's having posted Instagram photographs of luxury cars, travels to Europe, and fine dining, Murphy testified that the posts were "satire," that his trips to Europe were in connection with litigation in the Isle of Man, and that he does not own a luxury car. Murphy testified that "really my only asset" was the Kansas Litigation.[25] The record evidence is that Murphy suffered losses in the Kansas City real estate market that resulted in judgments against him in the millions of dollars and that he was distraught at the loss of income from the failed business transaction with Connolly and the abrupt cancellation of his family's health insurance. He also testified that his house was in foreclosure and, at the time of the Trial, he was living with his mother.[26]

Petitioning Creditors express concern that, if Murphy prevails in the Kansas Litigation, his potential recovery would not be available to creditors. But Murphy's litigation claims are "choses in action," to which judgment creditors may look for recovery.[27] Petitioning Creditors' other concern is that Murphy, contrary to his testimony at the Trial, may be hiding assets—possibly out of the country—that a Chapter 7 trustee would be in the best position to recover for the benefit of all creditors.

The record in this case is that both Murphy and Connolly, for reasons unknown to the Court, have operated their businesses through various offshore entities, including in the Republic of Malta and the Isle of Man. If Petitioning Creditors' suspicions regarding Murphy's ability to secrete assets offshore are correct, perhaps a trustee, at great expense, would succeed in recovering assets. But would Murphy cooperate with this process? And if not, what might be the result—the barring of Murphy's discharge? Leaving creditors in exactly the same position they are in today.

E. The Existence of Alternative Adequate Forums

Petitioning Creditors argue that "[t]he Abstention Order does not provide any insight into why the Court believes other forums are available

[22] Petitioning Creditors' Ex. 99 (Robert Contreras Deposition Transcript, pp. 57-60, Exs. 5 and 6).
[23] Petitioning Creditors' Ex. 99 (Robert Contreras Deposition Transcript, pp. 64-65).
[24] *See In re Axl Industries*, 127 B.R. 482 (S.D. Fla. 1991); *In re Bos*, 561 B.R. 868 (Bankr. N.D. Fla. 2016).
[25] Doc. No. 206, Trial Transcript, May 11, 2018, p. 39:14-18.
[26] Doc. No. 166, Trial Transcript, March 30, 2018, pp. 15-16, 44, and 73-74; Doc. No. 204, Trial Transcript, May 9, 2018, pp. 40 and 147; Doc. No. 205, Trial Transcript, May 9, 2018, p. 58; and Doc. No. 206, Trial Transcript, May 11, 2018, p. 92.
[27] *See MYD Marine Distrib., Inc. v. Int'l Paint Ltd.*, 201 So. 3d 843, 845 (Fla. 4th DCA 2016).

to protect *all of the Petitioning Creditors'* interests (particularly the Scheers), or how abstention and dismissal might possibly benefit them."[28] Petitioning Creditors express concern that Murphy might transfer proceeds from the Kansas Litigation beyond the reach of Murphy's creditors. But as set forth above, Murphy's litigation claims are choses in action, to which judgment creditors may look for recovery; there is no evidence before the Court that there would be any recoveries by a trustee in a bankruptcy case.

Petitioning Creditors are each the holders of judgments against Murphy, and they are each free to pursue their collection remedies in the appropriate judicial forum.

F. Notice to Other Creditors

In their final argument, Petitioning Creditors argue that "[b]ut for a few creditors who were informally asked to join in the petition prior to its initiation, the majority of claimants were never provided with notice of the pendency of the involuntary petition or of their right to participate in the process as contemplated by Rule 1003(b)."[29] Petitioning Creditors further contend that because such notice was never provided, it is premature to conclude that the involuntary petition is merely a two-party dispute.

Under Federal Rule of Bankruptcy Procedure 1003(b), if an involuntary petition is filed by fewer than three creditors and the debtor in his answer avers the existence of 12 or more creditors, § 303(b)(1)'s requirement of three or more petitioning creditors is triggered and the debtor must file a list of creditors. The purpose of Rule 1003(b) is to permit a single petitioning creditor to contact other creditors to try to meet the three-creditor threshold of § 303(b)(1).[30] Here, the Court has found the existence of three petitioning creditors and Rule 1003(b) does not apply.

Petitioning Creditors' real point is that Murphy has other creditors who might benefit from a bankruptcy case such that this case is not a true two-party dispute. But, as the Court has already found, absent evidence of assets available for distribution by a trustee, there is no perceivable benefit to a bankruptcy case.

III. CONCLUSION

As the foregoing analysis demonstrates, the Motion for Reconsideration merely repeats the arguments made by Petitioning Creditors in their closing brief.

Petitioning Creditors have met none of the requirements for reconsideration under Rule 59. They have not argued an intervening change in controlling law; they have not provided new evidence that was not available at the Trial; they have not demonstrated a clear error of law; and they have not shown manifest injustice. Likewise, Petitioning Creditors have demonstrated no basis for relief under Rule 60, as they have not shown newly discovered evidence, mistake, or fraud.[31]

As the Court stated in the Abstention Order, "[c]ourts have broad discretion in deciding whether to abstain from a matter."[32] After carefully considering the Motion for Reconsideration, the Court finds no basis on which to reconsider its decision to abstain from this case.

Accordingly, it is

ORDERED that the Motion for Reconsideration is DENIED.

DATED: August 15, 2019.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge

[28] Doc. No. 227, p. 6.
[29] Doc. No. 227, p. 9.
[30] *See In re Taub*, 439 B.R. 261, 271 (Bankr. E.D.N.Y. 2010) ("By its terms, Bankruptcy Rule 1003(b) is operative only where the involuntary petition was commenced by fewer than three petitioners in reliance on Bankruptcy Code § 303(b)(2), and, in its answer, the alleged debtor asserts the existence of 12 or more creditors in accordance with Bankruptcy Rule 1003(b)." (citation omitted)).
[31] Fed. R. Civ. P. 60.
[32] *In re Bos*, 561 B.R. 868, 900 (Bankr. N.D. Fla. 2016).