

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YOUNG JEWISH LEADERSHIP	:	CIVIL ACTION
CONCEPTS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
939 HKH CORP. (d/b/a AZTEC CLUB),	:	
DALE LALWANI, FARELL GREEN,	:	
(a/k/a LAWRENCE GREEN), and	:	
FREDRICK MILLER (a/k/a RICK MILLER),	:	
Defendants.	:	NO. 93-cv-2643

MEMORANDUM and ORDER

AUGUST 23, 2005

PRATTER, DISTRICT JUDGE

I. PROCEDURAL AND FACTUAL BACKGROUND

A glance at the Civil Action number for this matter will suggest the age of this dispute. It carries the dust of at least one party's venture into bankruptcy and benign inattention by the other parties. Now, prompted by the Court's inquiries, several of the parties propose to shake the dust off the case and proceed.

On October 25, 2004, Plaintiff Young Jewish Leadership Concepts ("YJLC") filed an Application and Motion to Remove this Action from Civil Suspense and to Proceed with the Case (Docket No. 63). Defendant Dale Lalwani filed, on November 1, 2004, a Cross-Motion to Dismiss for Failure to State a Claim (Docket No. 64). The remaining Defendants, 939 HKH Corporation (d/b/a the "Aztec Club") (hereinafter, "HKH"), Farell Green (a/ka Lawrence Green)

and Fredrick Miller (a/k/a Rick Miller) (collectively, the “Nonmoving Defendants”) have not otherwise responded to Plaintiff YJLC’s Motion or Defendant Lalwani’s Cross-Motion. On January 4, 2005, Plaintiff filed an Opposition to Defendant Lalwani’s Cross-Motion to Dismiss (Docket No. 65). Thereafter, on March 29, 2005, Defendant Lalwani filed a Reply in Support of the Cross-Motion to Dismiss and in Response to Plaintiff’s Opposition (Docket No. 67). The pertinent facts of the case, as gleaned from the parties’ submissions, are as follows.

Plaintiff alleges that it owns and/or registered the name “Young Jewish Leadership Concepts” and the acronym, “YJLC.” This case arises out of the alleged use by all Defendants of the initials “YJLC” in printed and published promotional materials in connection with a “Jewish Singles Hanukkah Party,” which Defendant Lalwani alleges the Nonmoving Defendants devised, planned, promoted and conducted. Defendants contend the initials “YJLC,” stands for “Young Jewish Leisure Club” and was used in connection with the promotion for a Hanukkah party, which took place on Christmas Eve, December 1992. The Nonmoving Defendants allegedly rented Defendant HKH’s Aztec Club to use as the location for their Hanukkah party.

On or about August 30, 1994, Defendant HKH filed for federal bankruptcy protection pursuant to 11 U.S.C. §§ 101, et seq. The bankruptcy proceeding is docketed in the United States Bankruptcy Court for the Eastern District of Pennsylvania (Philadelphia) as 94-bk-15643. As a result of Defendant HKH’s bankruptcy filing, by Order dated November 22, 1994, the Court placed this matter in its civil suspense file. Nearly nine years later, on October 27, 2003, the Court held a status conference at which defense counsel represented to the Court that the HKH bankruptcy had been discharged, that Defendant HKH is no longer in business and was, in fact, defunct. On January 8, 2004, defense counsel, Vito F. Canuso, Jr. and John Gregory, filed a

Motion to Withdraw as counsel for all Defendants. The Court granted the Motion to Withdraw on August 2, 2004. Plaintiff now desires to proceed with this matter only against the Defendant Lalwani and the Nonmoving Defendants, Farell Green (a/k/a Lawrence Green) and Fredrick Miller (a/k/a Rick Miller).

From December of 1990 until June 1994, Defendant Lalwani was a shareholder, officer and director of HKH, which owned and operated the Aztec Club, a nightclub which operated at 939 North Delaware Avenue, Philadelphia, Pennsylvania. Defendant Lalwani alleges that he was neither involved with nor a party to the acts which gave rise to the allegations contained in the Complaint. Mr. Lalwani contends he was merely an officer, director and shareholder of HKH which permitted the Nonmoving Defendants to rent HKH's nightclub to host a Hanukkah party. Defendant Lalwani contends that the Nonmoving Defendants arranged with him to rent the Aztec Club premises for between \$5000 and \$6000. In exchange, the Nonmoving Defendants retained all of the cover charges collected from patrons of the party. Lalwani Declaration at ¶7. Lalwani contends that the alleged use of Plaintiff's name, trade dress, unique identifiers or other allegedly protected and proprietary materials and marks were by Nonmoving Defendants, who did not consult with, nor clear advertising copy for their promotional event with Mr. Lalwani. Defendant Lalwani contends that at no time was he involved in generating promotional materials with the acronym "YJLC," or the promotion or advertising of the event. He states that such materials and promotional media were coordinated and conducted by the Nonmoving Defendants, who devised that acronym. Lalwani Declaration at ¶5. Finally, Mr. Lalwani alleges that he neither owned, operated, managed, directed, controlled, promoted or marketed any entity or group known as "Young Jewish Leadership Concepts," "Young Jewish Leisure Club," "YJLC" or any other

similar usage of the terminology. Lalwani Declaration at ¶4.

Plaintiff's cause of action was filed in 1993, approximately 12 years ago. Defendant Lalwani contends that Plaintiff has failed to timely and diligently prosecute its case, and, thus, Plaintiff has acted to otherwise deprive and prejudice Mr. Lalwani with regard to his ability to defend himself. There is no dispute that HKH was completely liquidated by the related bankruptcy action and/or by the bankruptcy Trustee. Although Defendant Lalwani contends that the bankruptcy proceeding terminated in 1995, according to the bankruptcy court's docket, the HKH case was closed on September 14, 1999. Plaintiff contends that it did not learn of the HKH bankruptcy conclusion until 2003.

No party has affirmatively represented to the Court that either Mr. Lalwani or the Nonmoving Defendants ever filed personally for protection pursuant to the Bankruptcy Code. The record in this case does not indicate that Plaintiff ever filed a motion with the Court to sever its causes of action against the individual Defendants (Defendant Lalwani and the Nonmoving Defendants), or, in the alternative, ever filed a motion for relief from the automatic stay in the related HKH bankruptcy matter in order to proceed against the individual Defendants. Nevertheless, Plaintiff attached a non-original, apparently re-typed letter, dated October 28, 1996, to its Memorandum in Opposition here that seems to request that the stay be lifted as to Defendant Lalwani and the Nonmoving Defendants here.¹

HKH operated the Aztec Club from 1990 until 1994, after which the corporation filed for protection under the bankruptcy code. Lalwani has represented to the Court, and Plaintiff has not challenged the representation, that HKH first sought protection under Chapter 11 of the

¹ By request, Plaintiff subsequently provided copies of the original letters to the Court.

Bankruptcy Code, but it was ultimately liquidated under Chapter 13 of the Code. Lalwani Declaration at ¶5.

At the time of the liquidation order of the bankruptcy court, Lalwani alleges HKH remained a corporation in good-standing in the Commonwealth of Pennsylvania. Lalwani Declaration at ¶9. Mr. Lalwani represents that he acted at all times within the scope of his duties to the corporation, and he never acted in bad faith, or in wilful or wanton disregard of his duties to the corporate entity known as 939 HKH. Lalwani Declaration at ¶9.

The Complaint was filed in May of 1993. In **June 1994**, Defendant HKH filed for protection under the Bankruptcy Code. At no time did Mr. Lalwani personally file for bankruptcy protection. As a result of HKH's bankruptcy filing, by Order dated **November 22, 1994**, the Court stayed the entire above-captioned matter. As mentioned above, Plaintiff never filed any petition for relief from the automatic stay. Lalwani Declaration at ¶¶10-11. Thus, prior to the Plaintiff's instant Application and Motion, **filed one month shy of 10 years after the stay was entered, on October 25, 2004**, Plaintiff never attempted to proceed against Mr. Lalwani or the Nonmoving Defendants.

As noted above, the Order of November 22, 1994, placed the entire instant case on the Court's suspense docket as a result of the HKH bankruptcy proceeding. The Order also provided that Plaintiff's counsel would be responsible for informing the Court of the status of the HKH bankruptcy proceeding "*at least once every six months.*" Order, Nov. 22, 1994 (Docket No. 54) (emphasis added). Plaintiff now concedes that,

[s]tarting in April of 1995 through October of 1996, plaintiff's counsel advised this Honorable Court of the status of the bankruptcy of the defendant, 939 HKH Corp. On October 28, 1996, plaintiff's counsel requested that this

matter be removed from civil suspense as to defendants, Dale Lalwani, Farell Green and Fredrick Miller.

See Plaintiff's Memorandum in Opposition at 6.² The letter, *dated October 28, 1996*, attached

by Plaintiff in support reads, in pertinent part,

Plaintiff is unaware of any change in the status of the bankruptcy of [HKH], since Plaintiff's counsel last status update of *October 26, 1995*.

Letter to the Honorable James McGirr Kelly from Alan B. Kane, Oct. 28, 1996 (emphasis added). Moreover, the other letter in support of Plaintiff's Opposition to Defendant Lalwani's

Cross Motion states, in pertinent part,

Plaintiff is unaware of any change in the status of the bankruptcy of 939 HKH Corporation d/b/a Aztec Club. Plaintiff's counsel requests that the defense counsel provide the Court and plaintiff's counsel with a status update regarding 939 HKH Corporation d/b/a Aztec Club.

In the event that 939 HKH Corporation d/b/a Aztec Club is still under bankruptcy protection or that the claim has been discharged in bankruptcy, then the plaintiff respectfully requests that Your Honor lift the stay as to the defendants, Dale Lalwani, Farell Green and Fredrick Miller. Otherwise, the plaintiff desires to proceed as to all defendants.

Letter to the Honorable James McGirr Kelly from Alan B. Kane, **July 14, 2003** (emphasis added). As stated above, it was unequivocally Plaintiff's responsibility to keep itself and the Court informed of the HKH bankruptcy proceedings. The HKH bankruptcy matter was closed in 1999, but no information in that regard was forthcoming from the Plaintiff.

On October 27, 2003, the Court re-activated its review of this case, by way of a case management conference. The case had not been removed from the suspense docket.

During the 2003 conference, Plaintiff contends that it learned for the first time that the

² The Court assigned page numbers to the Plaintiff's submission because Plaintiff failed to do so.

HKH bankruptcy proceeding had been concluded with the total liquidation and dissolution of HKH. See Lalwani Declaration at ¶¶11-12.

According to the record, following the Court's October 27, 2003 conference, another full year passed before Plaintiff attempted to reinstate this matter. See Plaintiff's Motion and Application, filed October 25, 2004 (Docket No. 63). On September 23, 2004, the Clerk of Court filed a Notice that the case would be dismissed, pursuant to Local Rule of Civil Procedure 41.1.

It is apparent to the Court that Plaintiff did nothing to prosecute this case from 1996 to 2003, a span of approximately seven years. The record is clear that during the years 1997 to 2003, Plaintiff neither notified the Court as required by the November 22, 1994 Order, nor attempted to continue this case. Only now, after receiving the Court's September 23, 2004 Notice of Automatic Dismissal under Local Civil Rule 41.1, has Plaintiff finally attempted to move the Court to reinstate its Complaint.

For the reasons stated more fully below, application of Rule 41.1 is appropriate at this time. Plaintiff violated the Court's Order of November 22, 1994, and certainly failed to diligently prosecute its claims. Thus, this matter is now subject to dismissal under Local Civil Rule 41.1, as authorized by Fed.R.Civ.P. 83. Therefore, Plaintiff's Motion and Application is denied, Defendant's Cross Motion is granted and Plaintiff's Complaint is dismissed in its entirety, with prejudice.

II. DISCUSSION

A. Standard of Review

Local Rule 41.1(a), provides, in pertinent part, that:

[w]henever in any civil action the Clerk shall ascertain that no proceeding has been docketed therein for a period of more than one year immediately preceding such ascertainment, the Clerk shall send notice to counsel of record, or, if none, to the parties that the action shall be dismissed, unless the court upon written application filed within thirty (30) days from the date of such notice *and upon good cause shown*, shall otherwise order. In the absence of such application to or Order by the court, the Clerk shall, without special order, enter upon the record “dismissed, with prejudice under Rule 41.1.”

The Court must balance the following factors in assessing Plaintiff’s failure to prosecute:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Emerson v. Thiel College, 296 F.3d 184, 190 (3d Cir. 2002) (citing Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir.1984)).

B. Plaintiff’s Failure to Prosecute

Plaintiff received a Notice regarding dismissal on or about September 24, 2004, that the Complaint would be dismissed. The Notice listed October 25, 2004, as the final deadline for the filing of a statement, pursuant to Local Rule 41.1, setting forth “good cause” as to why the Complaint should not otherwise be dismissed, pursuant to Local Rule 41.1(a). On October 25, 2004, Plaintiff filed its five-page Application and Motion to reinstate the above-captioned matter. Nowhere in the Application and Motion did Plaintiff set forth any persuasive and credible grounds, nor did Plaintiff submit a declaration in support, with regard to its belief that “good

cause” exists for the reactivation after a delay of seven years. In fact, in support of the Application and Motion, Plaintiff merely states the conclusion: “Good cause exists to remove this action from civil suspense.” Plaintiff’s Application and Motion, ¶ 8. No evidence or further argument in support of “good cause” is provided.

It is uncontested that, in fact, the HKH bankruptcy proceeding was resolved in 1999. Plaintiff merely contends that it did not know about the resolution. It is also uncontested that Plaintiff never filed a motion for relief from the Bankruptcy Court’s automatic stay. According to Plaintiff’s Opposition to the Cross-Motion, however, Plaintiff sent a letter to the Court on October 28, 1996, requesting that the Court lift the stay as to Defendants Lalwani, Green and Miller. There is no indication that the Court took any action with regard to this letter. Moreover, Plaintiff has not represented to the Court that Plaintiff took any follow-up or other action with regard to this matter for approximately seven years.

Plaintiff seems to try to ignore the Order, dated November 22, 1994, by which the Court required Plaintiff to semi-annually advise the Court of the status of the HKH bankruptcy proceeding. Plaintiff concedes that between 1996 and 2003 it failed to advise the Court pursuant to the Order of November 22, 1994, doing nothing until its July 14, 2003 letter requesting relief from the stay and the October 2004 filing of the instant Motion and Application with regard to its attempt to have this matter removed from the suspense docket.

Defendant Lalwani contends that it would be highly prejudicial to him to allow Plaintiff to now re-open and reinstate this case, so very long after (i) the related bankruptcy action was resolved and (ii) the alleged events transpired. Had Plaintiff made the instant Application and Motion immediately following the conclusion of the HKH bankruptcy proceeding in 1999, or

requested relief from the stay as early as 1994, the necessary and related records and witnesses might be located more easily to be used by Mr. Lalwani in his defense at trial. Here, however, as Defendant Lalwani contends, such records may not be available, and material witnesses may have relocated (including Mr. Lalwani, who has informed the Court that he now resides in Arizona).

Notwithstanding the Plaintiff's counsel's representations, Plaintiff has not made a showing of "good cause" that justifies or excuses its neglect and substantial delay in prosecuting this case.

On November 22, 1994, by Order, this entire case was placed on the Court's suspense docket as a result of the HKH bankruptcy proceeding. This Order further provided that Plaintiff's counsel would be responsible to inform the Court of the status of the HKH bankruptcy proceeding "*at least once every six months.*" Id. (emphasis added).

Thus, pursuant to this Order and a plain reading of the related letters, discussed supra, the Court is constrained to conclude the following: (i) the letters support Defendant Lalwani's allegation that Plaintiff continuously violated the Court's November 2004 Order requirement that the Court be provided with status updates *at least every six months*; (ii) the Plaintiff failed to keep itself apprised of the HKH bankruptcy proceeding, inasmuch as it is now uncontested that such proceeding terminated approximately six years ago, in 1999; and (iii) in the absence of any additional documentary support, Plaintiff is conceding that it took no other action to inform the Court as required by the November 1994 Order or to prosecute the instant case between 1996 and 2003 despite its informal letter request that the Court provide limited relief from the stay with regard to prosecuting the instant case against the individual defendants.

Local Rule 41.1(a) is clear -- unless a plaintiff diligently prosecutes its case or requests relief for good cause shown as a result of an otherwise inexcusable delay, the case shall be dismissed with prejudice. See Rule 41.1(a). Applying the Emerson factors, supra, here, it is the Court's conclusion that: (1) Plaintiff, through counsel, failed to keep itself apprised of the HKH bankruptcy action and failed to comply with the Court's 1994 Order for semi-annual updates; (2) Defendant Lalwani, as well as the Nonmoving Defendants would be unfairly prejudiced by the delay in prosecution, including the failure to create a factual record of the events which occurred over 12 years ago; (3) dilatoriness lasted for approximately seven years; (4) there is no evidence that Plaintiff's conduct or its attorney was willful or in bad faith; (5) the Court finds no alternative sanctions (such as monetary fines or attorneys fees and costs) to be appropriate other than dismissal of the case due to Plaintiff's failure to comply with the November 22, 1994 Order and the potential, severe prejudice to all Defendants as a result of Plaintiff's inattention; and (6) Plaintiff's claims in the Complaint appear at least facially meritorious; however, the meritoriousness factor is neutralized and not dispositive due to the fact that Plaintiff failed to pursue its claim with any true vigor. See Emerson, 296 F.3d at 190-91 (citing Poulis, 747 F.2d at 868).

III. CONCLUSION

For the reasons stated more fully above, the Court holds that Plaintiff failed to appropriately prosecute its claim. Plaintiff has failed to provide good cause for the inordinate delay in prosecution. Defendants would otherwise be severely prejudiced by having to now defend themselves against allegations that have been ignored by Plaintiff since 1996. Therefore,

(i) Plaintiff's Motion and Application is denied, (ii) Defendant Lalwani's Cross Motion to Dismiss for failure to prosecute is granted and (iii) because the Defendants would be unfairly prejudiced by Plaintiff's inexcusable delay, Plaintiff's Complaint is dismissed with prejudice.

An appropriate Order follows.

By the Court:

/S/ _____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YOUNG JEWISH LEADERSHIP	:	CIVIL ACTION
CONCEPTS,	:	
Plaintiff,	:	
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v.	:	
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939 HKH CORP. (d/b/a AZTEC CLUB),	:	
DALE LALWANI, FARELL GREEN,	:	
(a/k/a LAWRENCE GREEN), and	:	
FREDRICK MILLER (a/k/a RICK MILLER),	:	
Defendants.	:	NO. 93-cv-2643

ORDER

AUGUST 23, 2005

PRATTER, DISTRICT JUDGE

AND NOW, this __th day of August, 2005, upon consideration of this Court's Order dated November 22, 1994 (Docket No. 54), Plaintiff Young Jewish Leadership Concepts' ("YJLC") Application and Motion to Remove this Action from Civil Suspense and to Proceed with the Case (Docket No. 63), Defendant Dale Lalwani's Cross-Motion to Dismiss for Failure to State a Claim (Docket No. 64), Plaintiff's Opposition to Defendant Lalwani's Cross-Motion to Dismiss (Docket No. 65), and Defendant Lalwani's Reply in Support of the Cross-Motion to Dismiss and in Response to Plaintiff's Opposition (Docket No. 67), IT IS HEREBY ORDERED THAT because the Court finds that Plaintiff was in violation of this Court's November 22, 1994 for seven (7) years and because the Court further finds that no good cause exists for Plaintiff's failure to prosecute the instant case, pursuant to Local Rule of Civil Procedure 41.1, as authorized by Fed.R.Civ.P. 83:

(i) Plaintiff's Motion and Application is DENIED:

(ii) Defendant Lalwani's Cross Motion to Dismiss for failure to prosecute is GRANTED;

and

(iii) because the Defendants would be unfairly prejudiced by Plaintiff's inexcusable delay, Plaintiff's Complaint is DISMISSED with prejudice.

IT IS SO ORDERED.

By the Court:

/S/

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE