

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN THE MATTER OF ARTHUR COUNCIL	:	CIVIL ACTION
	:	NO. 06-1537
	:	
	:	BANKRUPTCY CASE
	:	NO. 05-32144 DWS
	:	
	:	ADVERSARY NO. 05-612

MEMORANDUM

Baylson, J.

August 23, 2006

I. Introduction

On or about September 9, 2005, Arthur Council (hereinafter “Appellant”) filed a petition under Chapter 13 of Title 11 of the United States Bankruptcy Code, docketed at 05-32144 in the Bankruptcy Court for this district. On or about September 30, 2005, Appellant filed an adversary proceeding in the Bankruptcy Court by filing a complaint naming the City of Philadelphia as the defendant. The complaint was styled as a “Complaint for Damages and Declaratory Relief for Illegal Realty Confiscation and for Fraud.” The City of Philadelphia filed a Motion for Dismissal for lack of subject matter jurisdiction, relying on the Rooker-Feldman doctrine. On January 5, 2006, the Bankruptcy Court granted the Motion to Dismiss.

On January 30, 2006, Appellant filed a Motion for Reconsideration of the Order of the Bankruptcy Court dated January 5, 2006, in which he sought to amend his complaint to include a cause of action under 11 U.S.C. § 548(a)(1)(B) – namely, a fraudulent conveyance action. On March 6, 2006, Judge Sigmund of the Bankruptcy Court signed an Order denying the Motion for Reconsideration. That Order was subsequently “entered” by the Clerk’s Office on March 7, 2006. Appellant thereafter filed the instant appeal on March 17, 2006.

On June 12, 2006, Appellant filed a Motion for Temporary Restraining Order (Docket No. 11), which the Court denied after a hearing on June 13, 2006, based on reasons stated on the record at the hearing. See June 13, 2006 Order.

Appellees filed a Motion to Quash the instant appeal on June 1, 2006 (Docket No. 9). The Court denied Appellee's Motion to Quash in an Order dated July 25, 2006.

Presently before the Court are (1) Appellant's Motion to Reconsider Denial of a Temporary Restraining Order (Doc. No. 14) and (2) Appellees' Motion to Reconsider the Court's Award of Attorney's Fees and Costs (Doc No. 30). For the reasons that follow, the Court will deny both motions.

II. Appellant's Motion to Reconsider Denial of a Temporary Restraining Order

On June 14, 2006, Appellant filed a Motion for Reconsideration of Denial of Temporary Restraining Order ("TRO") (Doc. No. 14). Appellees responded on June 19, 2006, and Appellant filed a reply brief on July 3, 2006.

Upon careful review of the pleadings, the Court finds no compelling reason to reconsider its denial of Appellant's request for a TRO. Appellant's limited pleadings do not establish any new facts or any error of law, or new issues apart from those discussed at the June 13, 2006 hearing. Although the Court is now more familiar with the issues presented on appeal from the Bankruptcy Court, and without prejudging the merits of that appeal, Appellant has simply not established either a likelihood of success on the merits or that granting relief will not result in greater harm to the other party. In addition, Appellant has not established that the asserted harm (i.e., displacement from his business) is so peculiar that it cannot be remedied by an action at law for money damages. Also, the record suggests that events may have made the relief requested moot, in that there is no showing that the property is still available to Appellant.

Therefore, for the same reasons that the Court stated on the record on June 13, and upon which the Court based its decision to deny the motion for a TRO, the Court finds that Appellant has not demonstrated either that this Court erred or the exceptional grounds required for a TRO.¹ Furthermore, Appellant has not shown that the Court has abused its discretion. The Court will therefore deny Appellant's Motion to Reconsider Denial of a TRO.

III. Appellees' Motion to Reconsider Award of Attorney's Fees and Costs

On July 25, 2006, the Court issued an Order denying Appellees' Motion to Quash (Docket No. 27). After finding that the Defendants adopted, argued, and maintained a consistently erroneous position in their briefing that was contrary to clear precedent, the Court ordered Appellees to compensate Plaintiff for the attorney's fees and costs incurred in defending against the motion. Appellees subsequently filed a Motion to Reconsider the Court's award of attorney's fees and costs.

In their brief, Appellees concede that the Court's legal ruling denying the motion to quash was correct, and that Appellant's appeal was timely. However, Appellees contend that their arguments were made in "good faith" and that Appellees' failure to identify either the controlling Third Circuit case was "unfortunate but understandable." The Court does not agree.

¹ To qualify for a temporary restraining order, the movant must demonstrate that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." Fed. R. Civ. P. 65(b). The requirements for a temporary restraining order are the same as those for a preliminary injunction. Bieros v. Nicola, 857 F. Supp. 445, 446-47 (E.D. Pa. 1994). Specifically, an applicant must demonstrate: (1) a likelihood of success on the merits; (2) the probability of irreparable harm if the relief is not granted; (3) that granting injunctive relief will not result in greater harm to the other party; and (4) that granting relief will be in the public interest. Frank's GMC Truck Center, Inc. v. G.M.C., 847 F.2d 100, 102 (3d Cir. 1988). A plaintiff must prove a "clear showing of immediate irreparable injury," not just a "risk of irreparable harm." Ecri v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) (citation omitted). The requisite feared injury or harm must be irreparable and "of a peculiar nature, so that compensation in money cannot atone for it." Id. (citation omitted).

As noted by Appellees, the Court has an inherent power to award fees where a party has, inter alia, acted “vexatiously.” In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 795 (3d Cir. 1999). The Third Circuit has noted that a court should “resist the temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not prevail, his action must have been unreasonable or without foundation.” Id. at 796. This is not a case, however, where the Court concluded, based on its own reasoning, that a particular argument was unreasonable or without foundation. Rather, this is a case where undisputed facts and caselaw establish without a doubt that Appellees sole premise for the motion was invalid.

Appellees’ Motion to Quash was based exclusively upon the premise that the appealed-from Bankruptcy Court Order was “entered on March 6, 2006.” Appellees apparently based this statement on the fact that when Judge Sigmund signed the order, she dated it March 6, 2006. The Bankruptcy Court’s docket, however, clearly stated that the order was “entered” by the Clerk’s Office on March 7, 2006. This fact, without any doubt, invalidated Appellees’ sole legal argument. See July 25, 2006 Order (setting forth, in detail, the clear caselaw, including the Third Circuit’s decision in United States v. Fiorelli, 337 F.3d 282 (3d Cir. 2003), that differentiates between the date an order is signed and the date and order is entered, and holds without ambiguity that for purposes of establishing the deadline for appeals, the date of entry by the Clerk’s Office controls).

Appellees were therefore wrong when they argued that Judge Sigmund’s Order was “entered on March 6, 2006” in their motion briefing filed on June 1, 2006 (Docket No. 9), and wrong again in their reply brief filed on June 26, 2006 (Doc. No. 20). It is true that the early briefing on this issue was somewhat confused, and the Court recognizes that counsel for Appellant did not clearly articulate the relevant issue in Appellant’s response brief filed on June

23, 2006 (Doc. No. 19). However, on July 3, 2006, counsel for Appellant submitted a letter brief in which he unequivocally made the correct factual statement that “[t]he Clerk’s Docket shows that the Bankruptcy Court’s Order of March 6, 2006, was not entered in the record until March 7, 2006.” Doc. No. 22(emphasis in original).

This letter clearly (1) noted the distinction between the date an order is signed and the date an order is entered by the clerk and (2) directed Appellees’ attention to the explicit notation of the date of entry of the relevant order on the clerk’s docket. Rather than correct this obvious error, however, Appellees made yet another filing with the Court (Doc. No. 24) in which they merely – in the face of Appellant’s letter brief to the contrary – repeated the erroneous factual assertion that the relevant order was “entered . . . on March 6, 2006.” See July 11 Letter Brief at 1. This perpetuation of an invalid argument forced Appellant’s counsel to file yet another letter brief to notify the Court that “Appellees mistakenly believe that the day of the ‘issuance of the Order,’ March 6, 2006, is the day Judge Sigmund ‘entered an order denying reconsideration,’” and to assert, once again, that “[t]he time for filing a notice of appeal is computed beginning with the date on which an entry is made on the Court Docket . . . [i]n this case, the Clerk entered the Order appealed on March 7, 2006 and this fact is borne by the record before the Court.”

The above cited record refutes Appellees’ argument that it was “not apparent to all litigants, at the time of the motion practice here, that the distinction between filing date and entry date . . . was even at [sic] issue in the current appeal.” Had Appellees merely (1) consulted the Docket of the Bankruptcy Court (available on line) and (2) conducted the most rudimentary legal research into the controlling date for the purposes of establishing an appeal deadline (which would surely have led to discovery of Fiorelli), they would have discovered that the basic premise of their motion was factually and legally untenable. Appellees fell short of that

minimum level of diligence in this case. To the contrary, Appellees briefing not only asserted incorrect facts but also did not even mention Fiorelli or the rule established in that case.²

It is true that the Third Circuit observed in Fiorelli that the law concerning this issue was “somewhat arcane.” However, that was the very reason the Fiorelli court engaged in a lengthy discussion of the issue. After the Court’s explicit discussion and holding in Fiorelli, the issue was no longer either arcane or subtle; it had been set forth in clear terms for the courts of this circuit.

The Court agrees with Appellees that it is not Appellant’s counsel’s “responsibility to educate [Appellees] with respect to [their] own motion.”³ The fact remains that Appellees maintained a plainly incorrect position as the sole premise for their Motion to Quash. Appellant was therefore obligated to engage in lengthy motion practice to defend against a motion that was without merit from its inception. Accordingly, the Court finds no compelling reason to reconsider its award. The Court will deny Appellees’ Motion to Reconsider the Award of Attorney’s Fees and Costs.

² Appellees citation to cases such as United States v. Scarfo, 263 F.3d 80, 88 (3d Cir. 2001) are unpersuasive because whether oral orders have “teeth” is unpersuasive because (1) here there was written order that had clear dates associated with it and (2) it is simply not relevant to the question at hand – namely, the specific trigger for a time limit concerning an appeal. Where specific time limits exists, and specific rules exist for triggering those limits, recourse to “common sense understanding” is not sufficient. Appellees actually admit that Scarfo is not controlling here; indeed, the Scarfo court specifically noted that it grappled with a completely different issue than appealability.

³ The Court notes that one of the Appellees in this case is the City of Philadelphia. Aside from the United States, the City of Philadelphia litigates more cases in the Eastern District of Pennsylvania than any other public or private party. This near-constant presence demands that the City be thorough and diligent in its legal research and in presentation of factual and legal arguments to this Court. Judges must be confident that the City is making an accurate presentation of the relevant facts and law. Generally, the City meets this standard. However, the City must take responsibility when, as here, its brief and representations are totally without a basis in fact and law.

IV. Appellant's Counsel Must File Additional Details About His Statement of Attorney's Fees and Expenses

Appellant's attorney has filed a conclusory statement listing the number of hours at a billing rate of \$200 per hour without any further details. This is insufficient for the award of attorneys fees under Third Circuit law. Appellant's counsel shall provide details, including the number of hours, a brief description of the work performed for each day, and justification for the requested hourly rate, for all hours for which compensation is sought. These materials shall be served on Appellee within seven (7) days. Counsel shall promptly discuss any issues, and, if there is still a dispute as to the amount of attorney's fees and costs which the Court should award, the parties shall file separate briefs addressing the dispute by September 5, 2006.

V. The Substantive Appeal

The Court will proceed to consider the merits of the appeal. The Court finds a need for further briefing. As set forth in the Court's Order, counsel shall file supplemental briefs on the issues identified by the Court by September 5, 2006. The Court urges the parties to be diligent and thorough during preparation of the supplemental briefs.

The Court will schedule oral argument for the week of September 5, 2006.

An appropriate Order follows.

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	:	NO. 06-1537
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	:	NO. 05-32144 DWS
	:	
	:	ADVERSARY NO. 05-612

ORDER

AND NOW, this 23rd day of August, 2006, it is hereby ORDERED as follows:

1. Plaintiff's Motion for Reconsideration of the Denial of a Temporary Restraining Order (Doc. No. 14) is DENIED.
2. Defendants' Motion to Reconsider Award of Attorney's Fees and Costs (Doc. No. 30) is DENIED.
3. Both parties shall file supplemental (letter) briefs on the merits of the appeal by August 30, 2006. There shall be no reply. The supplemental briefs shall each be limited to twenty (20) pages and shall address, with citation to caselaw, the following specific questions:
 - (a) Did Appellant ever file a Motion to Amend? If not, by Appellant filing the Motion for Reconsideration which requested that his pleadings be amended, did the Bankruptcy Judge have the power and/or discretion under the applicable rules to allow Appellant to amend his pleadings?
 - (b) Would Rule 15 (or any other Rule or principle) preclude Appellant from adding a "new" legal argument/theory (i.e., an argument concerning constructive fraud) to his adversarial complaint by way of amendment?
 - (c) If Appellant were allowed to amend his adversarial complaint, does In re Knapper, 407 F.3d 573 (3d Cir. 2005) and other persuasive authority establish that a claim for

constructive fraud under 11 U.S.C. § 548 falls under an exception to the general Rooker-Feldman doctrine, and is therefore a claim over which the Bankruptcy Court would indeed have jurisdiction despite the result of the prior state action?

(d) What would the actual prejudice to Appellees be if the parties were obligated to re-litigate the issue of constructive fraud in the Bankruptcy Court?

BY THE COURT:

/s/ MICHAEL M. BAYLSON
Michael M. Baylson, U.S.D.J.