UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

Case No. 6:01-bk-00533-ABB
Chapter 11

EVERGREEN SECURITY, LTD.,

Debtor.
_____/

PROPOSED FINDINGS AND CONCLUSIONS PURSUANT TO 28 U.S.C. SECTIONS 1927 AND 157(c)(1)

This matter came before the Court on the Motion for Fees and Costs Pursuant to 28 U.S.C. Section 1927 (Doc. No. 1624) ("Section 1927 Motion") filed by the Debtor Evergreen Security, Ltd. ("Evergreen") through its President R.W. Cuthill, Jr. ("Cuthill") seeking sanctions against the attorneys Scott W. Spradley ("Spradley"), Maureen A. Vitucci ("Vitucci"), and Peter R. Ginsberg ("Ginsberg"), and the law firms of GrayRobinson, P.A. ("GrayRobinson") and Peter R. Ginsberg, P.C.[1] (collectively, the "Respondents") relating to the Respondents' Motion for Recusal, Motion to Disqualify, Disclosure of All Ex Parte Communications and Revocation of All Prior Orders (Doc. No. 1508) ("Recusal Motion").[2] The Respondents filed various responses to the Section 1927 Motion.[3]

A final evidentiary hearing on the Section 1927 Motion, Evergreen's Motion for Sanctions Pursuant to Federal Rule of Bankruptcy Procedure 9011 (Doc. 1542) ("Rule 9011 Motion"), and the Court's August 17, 2007 Show Cause Order (Doc. No. 1700) was held on August 28, 2007 at which the Respondents, their respective counsel, counsel for Evergreen, counsel for Cuthill, and Byrd F. Marshall, Jr., a representative of GrayRobinson, appeared. The parties, pursuant to being granted leave to file and serve closing statements, filed post-hearing briefs.[4]

Evergreen seeks an award of sanctions against the Respondents pursuant to 28 U.S.C. Section 1927 of all fees and costs it expended in connection with the Recusal Motion. This Court, as determined in its July 17, 2007 Order (Doc. No. 1685), does not have authority to impose sanctions against the Respondents pursuant to 28 U.S.C. Section 1927, but it does have authority to hear the Section 1927 Motion and submit proposed findings of fact and conclusions of law to the United States District Court for the Middle District of Florida, Orlando Division ("District Court") pursuant to 28 U.S.C. Section 157(c)(1).

The Court entered an Order on January 2, 2008 (Doc. No. 1739) addressing the Section 1927 Motion:

> The Court, in the interests of judicial economy and to not burden the District Court, incorporates herein the findings and conclusions of the January 2, 2008 Order [Doc. No. 1738]. The Court will not transmit a separate proposed findings of fact and conclusions of law to the District Court relating to the Section 1927 Motion unless the January 2, 2008 Order [Doc. No. 1738] is appealed or a party, by written motion, requests the Court make such transmission.

[1] Ginsberg and his firm Peter R. Ginsberg, P.C. shall be referred to collectively herein from time to time as "Ginsberg."

[2] Evergreen is not pursuing sanctions against any individual or entity other than the Respondents. The Respondents' clients (*see infra* p. 3 for definition of "Clients") are culpable for any wrongful conduct in connection with the signing, filing, and advocating of the Recusal Motion pursuant to Federal Rule of Civil Procedure 9011(c), 11 U.S.C. Section 105(a), and the Court's inherent powers (*see*, *also*, Byrne v. Nezhat, 261 F.3d 1075, 1117-18 (11th Cir. 2001) (explaining the imposition of sanctions against a represented party is "proper if she knew or should have known that the allegations in the complaint were frivolous."). The Clients' culpability was not addressed by the Court due to the Clients' entry into a global settlement (Section VII of Doc. No. 1738).

[3] *See* Doc. Nos. 1656, 1657, 1659, 1676, and 1678.

[4] *See* Doc. Nos. 1717, 1722, and 1723.

Doc. No. 1739 at p. 3.

Ginsberg appealed Doc. No. 1739. This submission to the District Court constitutes proposed findings of fact and conclusions of law for the entry of a final order or judgment pursuant to 28 U.S.C. Sections 1927 and 157(c)(1). The Court makes the following proposed Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

Background

The Respondents and their joint clients Jon M. Knight, J. Anthony Huggins, Mataeka, Ltd., Atlantic Portfolio Analytics & Management, Inc. a/k/a APAM, and International Portfolio Analytics, Inc. (collectively, the "Clients") filed the Recusal Motion on July 27, 2006. They sought recusal of the undersigned Judge from further involvement in the above-captioned case and all other cases involving the Clients. They sought disqualification of Evergreen's counsel and the revocation of *all* orders entered in Evergreen's case and in *all* other proceedings involving the Clients.

The Recusal Motion allegations include:

(i) the Judicial Council of the Eleventh Circuit Court of Appeals was conducting an "investigation" of the undersigned Judge relating to an alleged complaint filed by attorney Phillip M. Hudson in connection with a case unrelated to Evergreen;

(ii) the undersigned "directed" and engaged in *ex parte* communications with Evergreen's counsel;

(iii) the existence of an improper relationship between Evergreen's counsel and the undersigned; and

(iv) Evergreen's counsel violated the Florida Rules of Professional Conduct.

The Recusal Motion was denied by the Order entered on February 27, 2007 (Doc. No. 1643). It is a final, non-appealable Order. The findings and conclusions of the February 27, 2007 Order are fully adopted and incorporated herein.

Evergreen sought sanctions against the Respondents through its Rule 9011 and Section 1927 Motions. Evergreen, the law firm of Latham Shuker Eden & Beaudine L.L.P., Shuker, GrayRobinson, Vitucci, and Spradley executed a global settlement agreement on August 8, 2007 resolving the Rule 9011 and Section 1927 Motions pursuant to which GrayRobinson was to pay $300,000.00 to Evergreen on or before October 1, 2007 and Evergreen would withdraw the sanctions motions as to GrayRobinson, Vitucci, and Spradley.

The Court entered Orders on November 16, 2007 (Doc. No. 1726) and January 2, 2008 (Doc. No. 1738) awarding sanctions in favor of Evergreen and against the Respondents pursuant to Federal Rule of Bankruptcy Procedure 9011, 11 U.S.C. Section 105(a), and the Court's inherent powers. The findings and conclusions of Doc. Nos. 1726 and 1738 are fully adopted and incorporated herein.

The Court, pursuant to Doc. Nos. 1726 and 1738, awarded sanctions of $300,000.00 in favor of Evergreen and against Spradley, Vitucci, and GrayRobinson, jointly and severally.[5] The Court, pursuant to Doc. No.

[5] Ginsberg appealed both Orders and the four related Orders entered on January 2, 2008. The appeals are pending in the District Court.

1738, imposed monetary sanctions of $371,517.69 against Ginsberg and his firm, jointly and severally, and enjoined them from practicing before the United States Bankruptcy Court for the Middle District of Florida for a period of five years from January 2, 2008.

Sanctionable Conduct

Evergreen carries the burden of establishing the elements of 28 U.S.C. Section 1927. Evergreen established the Respondents signed, filed, and presented the Recusal Motion in bad faith. The Recusal Motion was filed in retaliation to rulings that were unfavorable to the Respondents' clients and for delay purposes. The pleading is a conglomeration of gossip, intentional misrepresentations, and untruths. It had no evidentiary or legal support at the time it was filed, or at any time. Not a single claim had factual basis or legal merit.

The Respondents continued to act in bad faith post-filing of the Recusal Motion. Evergreen established the Respondents advocated the Recusal Motion in bad faith. The Respondents, despite numerous opportunities, did not correct, withdraw, or attempt to withdraw the Recusal Motion. They litigated the Recusal Motion through trial.[6]

The Respondents, from the filing of the Recusal Motion on July 27, 2006 to the entry of the February 27, 2007 Order:

> (i) filed nineteen substantive pleadings and made eleven appearances in the Evergreen case relating to the Recusal Motion;
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> (ii) instituted and litigated an appeal of the Order excluding the undersigned Judge as a witness;[7] and
>
> (iii) filed and litigated in the District Court three petitions seeking writs of mandamus against the undersigned Judge.[8]

The Respondents continued to prosecute the Recusal Motion despite the adverse rulings issued by the District Court on September 20, 2006 and December 26, 2006 finding, respectively, there was:

> no evidence before this court that such an investigation has been undertaken [against the undersigned], let alone that there has been a finding of wrongdoing on the part of the judge[9]

and that the Respondents' petition "was wholly lacking in merit."[10]

Spradley admitted the Respondents continued to prosecute the Recusal Motion even after it became evident the Recusal Motion "was not supportable."[11] Spradley wanted to withdraw the Recusal Motion, but Ginsberg and the clients refused.

The Respondents prosecuted the Recusal Motion knowing the allegations were unsupported by fact or law and engaged in litigation tactics that needlessly obstructed the resolution of pending matters in the Evergreen cases. They filed the Recusal Motion to delay the conclusion of the trials on their clients'

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[6] See Doc. No. 1738 at pages 53 through 60 for more specific findings of fact regarding the Respondents' actions post-filing of the Recusal Motion.

[7] Doc. No. 1550. District Court Case No. 6:06-cv-01867-JA. The Respondents were also litigating their appeal (District Court Case No. 6:06-cv-00837-JA) of the Judgment entered against their clients on March 22, 2006 in Cuthill v. Knight, *et al.*, AP No. 6:01-ap-00232-ABB.

[8] District Court Case No. 6:06-cv-01210-JA-KRS (filed August 14, 2006); District Court Case No. 6:06-cv-01807-JA-JGG (filed November 27, 2006).

[9] District Court Case No. 6:06-cv-01210-JA-KRS Doc. No. 23 at pp. 2-3.

[10] District Court Case No. 6:06-cv-01807-JA-JGG Doc. No. 3 at p. 3.

[11] Aug. 28, 2007 Hr'g Tr. vol. 2, p. 128, ll.21-24.

involuntary petitions and prevent the undersigned from presiding over those matters. Their prosecution of the Recusal Motion caused the pending matters in the Evergreen cases to be held in abeyance for several months. The Respondents knowingly pursued meritless claims and engaged in litigation tactics that needlessly obstructed the litigation of non-frivolous claims, specifically, the involuntary cases and the adversary proceeding *R.W. Cuthill, Jr. v. Knight, et al.*, Adversary Proceeding No. 6:03-ap-00035-ABB.[12]

The Respondents attempted to use the Recusal Motion to delay appellate proceedings in the District Court. They filed the Recusal Motion in the midst of the briefing period in the appeal of the Judgment entered against the Clients in *J.W. Cuthill, Jr. v. Mataeka, Ltd., et al.*, Adversary Proceeding No. 6:01-ap-00232-ABB.[13] They filed petitions in the District Court requesting writs of mandamus be issued against the undersigned. The petitions were filed to delay proceedings in this Court and for harassment. The pleadings were filed in bad faith.

The Respondents pursued frivolous, unjustifiable claims, greatly delayed the Evergreen cases, and unnecessarily, unreasonably, and vexatiously multiplied proceedings. Their conduct was intentional and egregious. Their filing of the Recusal Motion and all subsequent actions relating to the Recusal Motion were made in bad faith. The Respondents caused substantial judicial resources to be expended and Evergreen to incur excess attorneys' fees and costs of $671,517.69.[14]

Evergreen established it reasonably incurred excess attorneys' fees and costs of $671,517.69 as a direct result of the Respondents' bad faith conduct. It established its total fees of $631,266.00 and costs of $40,251.69 are reasonable after consideration of the First Colonial and Johnson factors (discussed *infra* pp. 10-11) and all of the facts and circumstances of this case. It established the Respondents should be required to satisfy personally those excess fees and costs pursuant to Federal Rule of Bankruptcy Procedure 9011, 11 U.S.C. Section 105(a), the Court's inherent powers, and 28 U.S.C. Section 1927.

Federal Rule of Bankruptcy Procedure 9011, 11 U.S.C. Section 105(a), and the Court's inherent powers each provided authority for the imposition of sanctions of $671,517.69 against the Respondents in the Court's November 16, 2007 and January 2, 2008 Orders. Evergreen established each of the elements of 28 U.S.C. Section 1927 to provide additional authority for the award of sanctions of $671,517.69 against the Respondents.

The Court respectfully recommends the District Court find 28 U.S.C. Section 1927 constitutes additional authority for the imposition of sanctions in the amount of $671,517.69 against the Respondents, grant Evergreen's Section 1927 Motion, and apportion the sanctions award as follows: (i) $300,000.00 against Spradley, Vitucci, and Gray Robinson, jointly and severally, with such amount to be satisfied through the August 8, 2007 settlement agreement; and (ii) $371,517.69 against Ginsberg and his firm, jointly and severally.

CONCLUSIONS OF LAW

[12] Cuthill instituted this adversary proceeding against Knight, Huggins, APAM, and International Portfolio Analytics, Inc. seeking recovery of an alleged fraudulent transfer of approximately $213,000.00.

[13] The District Court affirmed the Mataeka Judgment on March 30, 2007 and the Clients appealed the decision to the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). The Clients, pursuant to the global settlement, dismissed the Eleventh Circuit appeals with prejudice.

[14] Evergreen's Exh. B from August 28, 2007 hearing. The figure $671,517.69 is comprised of total fees of $631,266.00 and total costs of $40,251.69 incurred as follows: $365,746.49 by Latham Shuker Eden & Beaudine L.L.P. (consisting of fees of $345,124.50 and costs of $20,621.99); $221,212.85 by Smith Hulsey & Busey (consisting of fees of $203,126.00 and costs of $18,086.85); $45,149.87 by Saxon, Gilmore, Carraway, Gibbons, Lash & Wilcox, P.A., counsel for Evergreen's Steering Committee (consisting of fees of $44,515.50 and costs of $634.37); fees $11,000.00 by Cuthill; and $28,408.48 by Professor Lubet, Evergreen's expert witness (consisting of fees of $27,500.00 and costs of $908.48).

Section 1927 of Title 28, entitled *Counsel's liability for excessive costs*, provides for the imposition of sanctions for unreasonable and vexatious conduct:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (2006).[15] The statute sets out a three-prong, conjunctive test: (1) an attorney must engage in unreasonable *and* vexatious conduct; (2) this conduct must multiply the proceedings; and (3) the sanction amount cannot exceed the costs occasioned by the objectionable conduct. Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225 (11th 2003). The party seeking Section 1927 sanctions carries the burden of establishing each of the three prongs. Macort v. Prem, Inc., 208 Fed. Appx. 781, 785-86 (11th Cir. 2006).

Section 1927, due to its penal nature, "is to be strictly construed." Id. at 786. "'Bad faith' is the touchstone" of a Section 1927 determination. Schwartz, 341 F.3d at 1225. There must be bad faith; mere negligence is not enough. Id. The Eleventh Circuit Court of Appeals has "consistently held that an attorney multiplies proceedings 'unreasonably and vexatiously' within the meaning of the statute only when the attorney's conduct is so egregious that it is 'tantamount to bad faith.'" Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180, 1190 (11th Cir. 2006), *as amended* 500 F.3d 1230, 2006 WL 4758983 (11th Cir. Sept. 17, 2007) (*quoting* Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991)).

Bad faith, for Section 1927 purposes, "turns not on the attorney's subjective intent, but on the attorney's objective conduct." Amlong, 457 F.3d at 1190. "In short, a district court may impose sanctions for egregious conduct by an attorney even if the attorney acted without the specific purpose or intent to multiply the proceedings." Id. at 1192. "A determination of bad faith is warranted where an attorney knowingly or recklessly pursues a frivolous claim or engages in litigation tactics that needlessly obstruct the litigation of non-frivolous claims." Schwartz, 341 F.3d at 1225.

The Respondents signed, filed, and prosecuted the Recusal Motion for improper purposes. They prosecuted the Recusal Motion to trial knowing the allegations had no basis in fact or law. The Recusal Motion trial revealed the pleading had no evidentiary or legal support whatsoever. Their actions were egregious and constitute bad faith, from both a subjective and an objective standard. Their prosecution of the Recusal Motion unreasonably and vexatiously multiplied proceedings.

A sanction award made pursuant to 28 U.S.C. Section 1927 "must bear a financial nexus to the excess proceedings, *i.e.*, the sanction may not exceed the 'costs, expenses, and attorneys' fees reasonably incurred because of such conduct.'" Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11th Cir. 1997). Evergreen incurred excess attorneys' fees and costs of $671,517.69 as a direct result of the Respondents' unreasonable and vexatious conduct that multiplied the Evergreen proceedings. The fees and costs were reasonably incurred as a result of the Respondents' conduct.

The reasonableness of attorney fees and costs is determined through an examination of the criteria enunciated by the Fifth Circuit Court of Appeals in In the Matter of First Colonial Corp. of America, 544 F.2d 1291, 1298-99 (5th Cir. 1977) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).[16] The criteria are applied universally in

[15] Section 451 of Title 28 defines "court of the United States" to include: ". . . the Supreme Court of the United States, courts of appeals, district courts . . . and any court created by Act of Congress the judges of which are entitled hold office during good behavior." 28 U.S.C. § 451 (2006).

[16] The twelve factors are:

bankruptcy attorney compensation matters. The fees and costs are reasonable pursuant to the First Colonial and Johnson factors.[17]

Evergreen established, pursuant to 28 U.S.C. Section 1927, the Respondents' actions post-filing of the Recusal Motion were unreasonable and vexatious, improperly multiplied proceedings, and caused Evergreen to incur fees and costs of $671,517.69.

The Court respectfully recommends the District Court grant Evergreen's Section 1927 Motion and award sanctions of $671,517.69 in favor of Evergreen and against the Respondents pursuant to 28 U.S.C. Section 1927, with such amount to be apportioned as follows: (i) $300,000.00 against Spradley, Vitucci, and Gray Robinson, jointly and severally, with such amount to be satisfied through the August 8, 2007 settlement agreement; and (ii) $371,517.69 against Ginsberg and his firm, jointly and severally.

Dated this 8th day of February, 2008.

/s/Aruthur B. Briskan
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

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(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and the length of the professional relationship with the client; (12) awards in similar cases.

[17] See Doc. No. 1738 at pages 63-64, 83 for a detailed analysis of Evergreen's fees and costs.