UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re: Chapter 7

EDMUND CUMMINGS, Case No. 08-13223

Debtor.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., Chief United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Before the court is the motion filed by Alfred Bemis, Jr., Glendine L. Bemis, and Dean Eric Bemis (collectively, the "Bemises") for an order holding Dominick Viscardi, Esq. ("Viscardi") and the firm of Viscardi, Howe & Rudgers, LLP ("VHR") in contempt and for injunctive relief pursuant to § 105[1] directing Viscardi and VHR to execute stipulations to change attorneys and to turn over certain files. For the reasons that follow, the court finds the Bemises' arguments unpersuasive and denies the motion.

[1] Unless otherwise noted, all statutory references are to Title 11, United States Code, and all rule references are to the Federal Rules of Bankruptcy Procedure.

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a). This is a core matter pursuant to 28 U.S.C. § 157(b)(A) and (M).

Facts

The following constitutes the court's findings of fact and conclusions of law pursuant to Rule 7052. The debtor Edmund Cummings ("Cummings") filed for relief under chapter 13 of the Bankruptcy Code on September 30, 2008. Prior to filing for bankruptcy protection, Cummings was a party to litigation pending in New York State Supreme Court, Essex County, arising out of a dispute over the existence of a road located in the Village of Crown Point, New York, and an alleged unlawful taking. Cummings' interest in the litigation was listed as an asset on Schedule B (Personal Property) of his petition. On April 28, 2010, Cummings' chapter 13 case was converted to chapter 7, and Douglas Wolinsky, Esq. was appointed chapter 7 trustee ("Trustee").

The Trustee sought abandonment of Cummings' affirmative claims for recovery in the litigation pending in Essex County, specifically, *Bemis v. Town of Crown Point, et al*., Index No. 143-99, RJI No. 15-1-1999-0070; *Bemis v. Cummings*, Index No. 0206-10, RJI No. 15-1-2010-0059, and *Town of Crown Point v. Cummings, et al*., Index No. 000172- 01, RJI No. 15-1-2001-0151 (collectively, the "Lawsuits"). The Bemises objected and made an offer to the Trustee to purchase Cummings' affirmative claims, including those against the Bemises, for $4,000. The Trustee filed a motion for an order approving the sale to the Bemises (the "Sale Motion," ECF No. 71.) The Sale Motion indicated that the affirmative claims were disputed and subject to pending motions to dismiss in the state court. The sale to the Bemises was approved by order entered January 14, 2011. (the "Sale Order," ECF No. 83.) The Sale Order states the assets sold to the Bemises consist of:

> The [a]ffirmative claims of Edmund Cummings and Sylvia Caldwell-Tromblee a/k/a Sylvia Caldwell Tromblee for recovery in three (3) lawsuits pending in the Supreme Court of the State of New York, Essex County, *Bemis v. Town of Crown Point, et al*., Index No. 143-99, RJI No. 15-1-1999-0070; *Bemis v. Cummings*, Index No. 0206-10, RJI No. 15-1-2010-0059, and; *Town of Crown Point v. Cummings*, et al., Index No. 000172- 01, RJI No. 15-1-2001-0151, together with any claims that could be asserted in any other court or tribunal, no matter whether denominated as claims, counterclaims, cross-claims, motions, cross-motions or otherwise, against the Town of Crown Point, Dale French, Tom Walters, Diane Barrows, Richard Malone, Teresa Miclette, William Potskowski, Alfred Bemis, Jr., Glendine L. Bemis and Dean Eric Bemis, their heirs, assigns and successors in interest, as well as any other claims or causes of action against any of the foregoing from the beginning of the earth to the date of the order approving the sale of the foregoing property. (The "Sale Assets")

(Sale Order 1-2.) The Sale Order also indicates that the Sale Assets were sold "'as-is, where-is' without any representations or warranties whatsoever by the Trustee or the bankruptcy estate, whether expressed, implied, or imposed by law, specifically without any warranty of merchantability, warranty of fitness for particular purpose." (Sale Order 3.)

The Bemises had also commenced a contempt proceeding against Cummings, *Bemis v. Cummings*, Index No. 469-96, RJI No. 15-1-96-0281 (the "Bemises' State Court Contempt Action"). The Bemises' State Court Contempt Action was not included in the Trustee's sale. Cummings was represented in the Lawsuits and in the Bemises' State Court Contempt Action by Viscardi and his firm, VHR. Neither Viscardi nor VHR were served with the Sale Motion or the Sale Order upon its entry.

After purchasing the Sale Assets, the Bemises allegedly discharged Viscardi and VHR, and requested that Viscardi and VHR execute stipulations to change attorneys. In addition, they demanded that Viscardi and VHR turn over their files, asserting rights to the files arising from the purchase of the Sale Assets under the Sale Order. When Viscardi and VHR did not sign the stipulations and turn over the files, the Bemises filed this motion. Subsequently, at the request of the Trustee, Viscardi executed stipulations substituting Corey E. Friedman, Esq. in his place as

counsel of record with respect to the affirmative claims against the Bemises in the Lawsuits, previously held by Cummings and, now, held by the Bemises under the Sale Order. Thus, that portion of the motion seeking a directive that Viscardi and VHR execute stipulations to change attorneys is moot. Additionally, after the motion was filed, the affirmative claims against the Bemises, which they purchased from the Trustee, were dismissed with prejudice by the state court.[2]

Argument

The Bemises purchased the affirmative claims asserted against them by Cummings in the Lawsuits so that they could seek to have the claims dismissed. Additionally, they admit that they also purchased the affirmative claims to gain access to the legal files maintained by Cummings' attorney, Viscardi, for use in the Bemises' State Court Contempt Action and a second contempt proceeding pending in state court. The Bemises argue that when they purchased the affirmative claims for recovery in the Lawsuits from the Trustee, they purchased all rights consequent to the claims, including, the representation of Viscardi and VHR as regards the affirmative claims. The Bemises contend that under New York law they have a right to an attorney of their choosing. Thus, they assert that they were within their rights when they discharged Viscardi and VHR and demanded turnover of the files related to the Sale Assets. The Bemises rely upon *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30 (1997), and *In re Touch America Holdings, Inc.*, 2009 WL 1393078 (Bankr. D.Del. May 14, 2009), to support their argument that the files belong to the owner of the claims. Because Viscardi and VHR have refused to turn over the files, the Bemises contend they are in contempt of the Sale Order.

[2] The court has not been made aware that the balance of the injunctive relief sought has been mooted by the events that have transpired in the Lawsuits and the Bemises' State Court Contempt Action over the course of many months of parallel litigation.

Viscardi points out that there is no order requiring him or his firm to turn over any files and, thus, they cannot be found in contempt. He also argues that neither he nor his firm was served with any pleading seeking to compel them to take action regarding the files at issue. With respect to the injunctive relief sought, Viscardi asserts that he was never retained as counsel by the Bemises and, as a result, cannot be a predecessor attorney to the Bemises' state court attorney. Viscardi argues that because he continues to represent Cummings as a defendant in the Lawsuits and in the Bemises' State Court Contempt Proceeding, turning over files to the Bemises so that their contents may be used against Cummings would be a violation of his professional responsibilities. In addition, Viscardi contends the Bemises' arguments for injunctive relief are conclusory and without substantiation and, therefore, no basis for injunctive relief has been shown. Furthermore, Viscardi notes that the Bemises' request for the files is partially moot as he has expressed a willingness to turn over the pleadings and correspondence from the files in question. Viscardi indicates he has refused to turn over the documents he secured in preparing the cases, memoranda, his client's documents, and legal research, because they will be used in defending the claims still pending against Cummings in the Lawsuits and the Bemises' State Court Contempt Action.

Discussion

Contempt

The bankruptcy courts' statutory contempt powers are contained within § 105, which authorizes the courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a); *In re Thompson,* 2007 WL 2406886, at *2 (Bankr. N.D.N.Y. Aug. 21, 2007). An essential function of an adjudication of civil contempt is to "compel compliance with a court order by imposing a sanction designed to

convince the contemnor to end his or her defiance of the court order." *NXIVM Corp. v. Bouchey*, 2011 WL 5080322, at *4 (N.D.N.Y. Oct. 24, 2011) (citing *In re Weiss,* 703 F.2d 653, 661 (2d Cir. 1983)). The Second Circuit has held that a finding of civil contempt is appropriate when (1) the order the party failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted to comply in a reasonable manner. *King v. Allied Vision, Ltd.,* 65 F.3d 1051, 1058 (2d Cir. 1995) (citation omitted). The movant has the burden of proof to show, by clear and convincing evidence, that the contemnor violated a specific and definite order of the court. *Levin v. Tiber Holding Corp.,* 277 F.3d 243, 250 (2d Cir. 2002). It must be proven that the alleged contemnor "had knowledge of and disobeyed a clear, explicit and lawful order of the court and that the offending conduct prejudiced the right of the [other] party." *Id.* at 251 (citation omitted).

The Sale Order does not mention with any specificity what was included in the sale of the affirmative claims. There is no mention of the underlying attorney files that were maintained in connection with the affirmative claims in the Sale Motion or the Sale Order. The Sale Order is also silent as to what, if any, actions were to be taken in conjunction with the sale by the Trustee or any third parties. The Sale Order does not command Viscardi or VHR to take any action, and neither entity is mentioned by name in the Sale Order. Thus, the court cannot conclude Viscardi and VHR have failed to abide by the Sale Order.

Even if the Bemises were able to establish Viscardi and his firm violated the Sale Order, they also have to demonstrate their rights were prejudiced. The Bemises have not provided clear and convincing evidence that not having the information in VHR's files prejudiced them with respect to the affirmative claims they purchased. The Trustee indicated in the Sale Motion that

the affirmative claims Cummings asserted against the Bemises and others in the Lawsuits were subject to a pending motion to dismiss and, ultimately, they were dismissed with prejudice.

As the Sale Order did not direct Viscardi or his firm to act or refrain from acting, the portion of the motion seeking to hold Attorney Viscardi and VHR in contempt is denied.

Injunction

The Bemises also seek an injunction under § 105. Essentially, the Bemises want the court to command Viscardi and VHR to turn over their files related to the affirmative claims in the Lawsuits on the basis that they were included in the Trustee's sale under the Sale Order. Before considering the merits of the Bemises' request, the court observes that this portion of the Bemises' motion is procedurally defective. A proceeding to obtain injunctive relief requires the commencement of an adversary proceeding. Fed. R. Bankr. P. 7001(7). Failure to comply with this requirement is a sufficient ground to deny the relief. *In re Conxus Commc'ns, Inc.*, 262 B.R. 893, 899 (D.Del. 2001) (citation omitted). Aside from this procedural defect, there are substantive grounds for denying the relief.

Ordinarily, a plaintiff seeking a permanent injunction must satisfy a four-part test. A plaintiff must show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Adelphia Commc'ns Corp. v. Am. Channel, LLC (In re Adelphia Commc'ns Corp.), 345 B.R. 69, 84 (Bankr. S.D.N.Y. 2006) (quoting *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391 (2006)). Section 105(a), however, may be invoked "'to enforce or implement' the Court's earlier orders, and to prevent abuses of process." *In re Flushing Hosp. & Med. Ctr.*, 395 B.R. 229, 241

(Bankr. E.D.N.Y. 2008) (quoting *NWL Holdings, Inc. v. Eden Ctr., Inc. (In re Ames Dep't Stores, Inc.),* 317 B.R. 260, 274 (Bankr. S.D.N.Y. 2004)). Thus, in the Second Circuit, it has been reiterated that the usual grounds for injunctive relief need not be shown in a proceeding for an injunction under § 105. *In re Britestarr Homes, Inc. v. City of New York (In re Britestarr Homes, Inc.)*, 368 B.R. 106, 108 (Bankr. D.Conn. 2007) (citing *Adelphia Commc'ns Corp.,*345 B.R. 69, 85 (Bankr. S.D.N.Y. 2006) (citing *In re Chateaugay Corp., Reomar, Inc.; LTV Steel Co., Inc. v. Bd. of Edu. of the Cleveland City Sch. Dist.,* 93 B.R. 26, 29 (S.D.N.Y. 1988), *appeal dismissed at* 924 F.2d 480 (2d Cir.1991), other citations omitted).

> 'Exercise of the Court's section 105(a) authority in this manner, and for this purpose, vindicates the interests of the *Court,* as much as (and perhaps more than) it vindicates the interest of an individual litigant. Particularly in such a situation, it is not surprising that the usual grounds for injunctive relief . . . need not be shown in a proceeding for an injunction under section 105(a).'

In re Flushing Hosp. & Med. Ctr., 395 B.R. at 241 (quoting *In re Ames Dep't Stores, Inc.*, 317 B.R. at 274).

The court is not convinced that the spirit and intent of its Sale Order have not been carried out. The court notes that the Trustee is not a party to this motion, nor have the Bemises asserted that the Trustee did not consummate the sale contemplated by the Sale Order. The Bemises have failed to set forth with particularity what terms of the Sale Order have not been met. Instead, they conclude that in purchasing the Sale Assets they also purchased representation by Viscardi and his firm and, hence, the files maintained by the firm in connection with the claims. The cases cited by the Bemises to support their theory, *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30 (1997), and *In re Touch America Holdings, Inc.*, 2009 WL 1393078 (Bankr. D.Del. May 14, 2009), are distinguishable. The New York Court of Appeals in *Sage Realty*, in adopting what it described as the majority view, held that at the

termination of the attorney-client relationship, a client presumptively has full right of access, with narrow exceptions, to all of the documents in the attorneys' file, including work-product documents, where no claim for unpaid legal fees exists. 91 N.Y.2d at 36. *Sage Realty* involved an attorney-client relationship in the classic sense. In *In re Touch America Holdings, Inc.*, the plan trustee under a confirmed chapter 11 liquidation plan sought documents relating to the debtors' property or financial affairs held by its former counsel. 2009 WL 1393078, at *1. The court held the attorneys were required to turn over documents in accordance with the standard set forth in the *Sage Realty* decision. *Id.* at *2.

Here we do not have an attorney-client relationship in the traditional sense, nor do we have the Trustee seeking documents relating to Cummings' financial affairs. Instead, we have third-parties who purchased from the Trustee affirmative claims asserted by a debtor in pending state court litigation seeking to use the information in the files maintained by the debtor's state court attorney against the debtor.

Relying upon *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1986), the Bemises discount Viscardi's contention that he cannot turn over the files without violating his ethical duties and professional responsibilities to Cummings, whom he continues to represent in the Lawsuits as a defendant and in the Bemises' State Court Contempt Action. In *Weintraub*, the Supreme Court held that the chapter 7 trustee of a corporation has the power to waive the corporate debtor's attorney-client privilege with regard to pre-bankruptcy communications. *Id*. at 358. In so holding, the Court stated:

> [A] corporation, as an inanimate entity, must act through agents. . . . When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors.

Id. at 356. (internal citation omitted).

Weintraub, however, is not on point with facts of this case, as the Supreme Court specifically noted that,

> [O]ur holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case. . . . An individual, in contrast, can act for himself; there is no 'management' that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, *it must be under some theory different from the one that we embrace in this case.*

Id. at 356-57 (emphasis added). The Bemises offer no other theory for the court to hold a chapter 7 trustee may waive an individual debtor's attorney-client privilege.[3]

As the Bemises have failed to convince the court that the terms of the Sale Order have not been implemented, the court declines to exercise its injunctive powers under § 105(a).

Conclusion

For the reasons stated above, the motion is denied in its entirety.

It is so ORDERED.

Dated: October 17, 2012

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
Chief United States Bankruptcy Judge

[3] The court leaves for another day the issue of whether the control an individual debtor's attorney-client privilege passes to a chapter 7 trustee.