UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
LAWRENCE KASSOVER,	:	Case No. 98-43124 (BRL)
Debtor.	:	
R. PEYTON GIBSON, Liquidating Trustee of the Estate of Lawrence Kassover, Plaintiff,	:	Adv. Pro. No. 01-3569
- against -	:	
PHILIP KASSOVER	:	
Defendant.	:	

MEMORANDUM DECISION DISMISSING ADVERSARY PROCEEDING

R. Peyton Gibson, in her capacity as the liquidating trustee (the "Trustee") of the chapter 11 estate of Lawrence Kassover (the "Debtor") moves for an order (I) pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure (the "Federal Rules"), made applicable herein by Rule 7041(a)(2) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") dismissing this adversary proceeding without prejudice. Rosalie K. Erickson, in her capacity as Personal Representative of the Estate of Max Kassover ("MK Estate") and intervenor-plaintiff, objects to the dismissal. Philip Kassover, the defendant, seeks dismissal with prejudice or alternatively, if dismissal is without prejudice, reimbursement of costs and expenses.

Background

Familiarity with the background of this matter, which is set forth in this Court's previous decision, is presumed. *See In re Kassover*, 336 B.R. 74 (Bankr. S.D.N.Y. 2006). In that decision this Court, *inter alia*, granted the Trustee's motion to amend the complaint in this adversary proceeding to omit certain claims for injunctive and declaratory relief that had since become moot and to re-state and re-assert the claims for tortious interference and contempt that were contained in the original complaint and to set forth additional relevant events that are material to those claims that occurred after the filing of the original complaint. The Court also denied a motion by The Garden City Company, Inc. ("Garden City") to intervene but granted a motion to intervene by the MK Estate. Since then, a state court action brought by Philip Kassover against Ms. Gibson, not as Trustee of the chapter 11 estate but as Disbursing Agent under a post-confirmation merger agreement, and Garden City, among others, resulted in a judgment in favor of Philip. Because of that judgment, Garden City will no longer fund this litigation for the Trustee as it had previously agreed to do. Moreover, the Liquidating Trust is apparently administratively insolvent with insufficient funds to pay the Trustee's cumulative deferred fees and the ongoing mandatory expenses such as the United States Trustee fees and the bond premium.

The MK Estate contends that the adversary proceeding should not be dismissed as long as the MK Estate is willing to proceed against Philip and allow the Trustee to continue as a passive plaintiff. Alternatively, the MK Estate submits that the Trustee should be allowed to withdraw as a party to the AP and allow the MK Estate to continue to pursue its claims against Philip.

Discussion

Federal Rule 41(a)(2) provides, in pertinent part, that "an action shall not be dismissed at the plaintiff's instance, save upon order of the court, and upon such terms and conditions as the court deems proper." Fed.R.Civ.P. 41(a)(2). Although voluntary dismissal without prejudice is not a matter of right, the presumption in this circuit is that a court should grant a dismissal absent a showing that defendants will suffer substantial prejudice as a result. *Viada v. Osaka Health Spa, Inc.*, 458 F. Supp. 2d 100, 103 (S.D.N.Y. 2005). Starting a litigation all over again does not constitute legal prejudice. *D'Alto v. Dahon California, Inc*., 100 F.3d 281, 283 (2d Cir. 1996); *see Jones v. Securities & Exchange Commission*, 298 U.S. 1, 19 (1936) ("The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint ... unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter."). Legal prejudice is shown when actual rights are threatened or when monetary or other burdens appear to be extreme or unreasonable. 8 Moore's Federal Practice, § 41-40[6] at 41-147 (Matthew Bender 3d ed. 2008).

Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss. *See Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir.1990).

Although this adversary proceeding has been pending for several years, it was originally commenced to enjoin Philip from continuing to interfere with the sale of Garden City and in that

respect was successful. After this Court entered an injunction against such interference, the Trustee was able to consummate the Garden City transaction. Thus the commencement of the action was necessary and reasonable and did not constitute undue vexatiousness on the Trustee's part. The adversary proceeding remained open for several years in part due to an attempt at mediation which failed and the litigation pending in the state court where the judgment in favor of Philip was entered and affirmed in July 2008. Within the same month, the Trustee filed this motion to dismiss due to the inability to continue funding the litigation. Thus, the Trustee has been diligent and her explanation for having to abandon the action is reasonable.

With respect to relitigation, the Trustee has stated that she has no intention of pursuing the claims in this action against Philip but only seeks dismissal without prejudice so as not to have any impact on other litigation such as the litigation pending in State Court or claims, actions or defenses by any other person or entity particularly in light of Philip's propensity for litigation.[1] *See Nemaizer v. Baker*, 793 F.2d 58, 60 -61 (2d Cir. 1986) ("A dismissal with

[1] Indeed, as has been noted previously and repeatedly, Philip has instigated many frivolous and repetitive motions and unsuccessful appeals all calculated to prevent the judicially sanctioned liquidation of assets. *See Kassover v. Gibson (In re Kassover)*, 2006 WL 2390264, * 1 (S.D.N.Y. 2006) ("[t]his appeal is one of many taken by Mr. [Philip] Kassover from orders and decisions of the Bankruptcy Court, other judges of the District Court, and the Court of Appeals in the Lawrence Kassover Chapter 11 case.") (denying appeal as moot) *aff'd.*, 257 Fed.Appx. 339 (2d Cir. 2007); *see also Kassover v. Gibson*, 2003 WL 21222341 (S.D.N.Y. May 27, 2003), aff'd. 98 Fed.Appx. 30, 32 (2d Cir. 2004) (holding that appeal was equitably moot and finding "Phillip's remaining claims ...to be without merit."); *Gibson v. Kassover* (*In re Kassover)*, 2002 WL 100640 (S.D.N.Y. Jan 24, 2002)(denying leave to appeal injunction) *appeal dismissed*, 343 F.3d 91 (2d Cir. 2003); *In re Kassover*, 28 Fed.Appx. 100 (2d Cir. 2002) (affirming district court's dismissal of appeal as equitably moot and noting that "[we] have considered all of Phillip's contentions on this appeal and have found in them no basis for reversal.").

prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action."); *Smoot v. Fox,* 340 F.2d 301, 303 (6th Cir. 1964) (a dismissal with prejudice is a complete adjudication of the issues presented by the pleadings)*; Wainwright Securities Inc. v. Wall St. Transcript Corp*., 80 F.R.D. 103, 108 (S.D.N.Y. 1978)("a dismissal with prejudice has the effect of a final adjudication on the merits favorable to the defendant.") The Trustee has made clear, and the facts do not demonstrate otherwise, that her dismissal without prejudice request is made of necessity rather than choice. At no point is it conceded that her claims against Philip are without merit.

Concerned that a dismissal with prejudice would poison pursuit of claims in any other proceeding, the MK Estate argues that the adversary proceeding should not be dismissed so that it can continue to pursue its claim against Philip. The MK Estate claims that the Trustee can simply "ride its coattails" and that any recovery by the MK Estate - which would benefit only the MK Estate - would result necessarily in an equivalent recovery to the Debtor's estate. The MK Estate offers no basis for this proposition and no recognition of the possible liabilities or responsibilities that the Trustee and the Debtor's estate may have to bear in order for the MK Estate to continue the litigation in this court. The case cited by the MK Estate is inapposite. In *County of Santa Fe, N.M. v. Public Service Co. of New Mexico,* 311 F.3d 1031 (10th Cir. 2002) the Court reversed the dismissal with prejudice because any subsequent action by the intervenors in that case would be precluded by the dismissal. *Id.* at 1049; *see also ITV Direct, Inc. v. Healthy Solutions, LLC,* 445 F.3d 66, 70 (1st Cir. 2006) (plaintiff's motion to dismiss with prejudice refused where it would prejudice intervenor's claims against third party). If this adversary proceeding is dismissed without prejudice, the MK Estate is free to pursue any and all claims it

has against Philip in another forum.

The MK Estate also argues that this Court has independent jurisdiction over the MK Estate's claims even if the underlying adversary proceeding is dismissed. I disagree. The MK Estate's claim is a state law claim brought by a nondebtor shareholder and board member against another. The MK Estate's claim has no conceivable effect on the Debtor's estate. The MK Estate's argument that the Plan and Confirmation Order provide for the retention of jurisdiction of the MK Estate's claim is unavailing. This Court's continuing jurisdiction over implementation of the Plan and Confirmation Order encompasses only claims that affect the Debtor's estate not third party claims against a nondebtor that have no effect on the estate. *See Publicker Industries Inc. V. United States (In re Cuyahoga Equipment Corp.)*, 980 F.2d 110, 114 (2d Cir.1992) ("[T]he test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome would have any "conceivable effect" on the bankrupt estate."); *see also In re Johns-Manville Corp.*, 517 F.3d 52, 65 (2d Cir. 2008) ("a third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy...."); *Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir.1983) (Friendly, J.) (Action was not within the jurisdiction of the bankruptcy court since it lacked any "significant connection" to the bankruptcy case)*; Kassover v. Prism Venture Partners, LLC, (In re Kassover)*, 336 B.R. 74, (Bankr. S.D.N.Y. 2006)(action that was related only tangentially to events occurring in bankruptcy case could be adjudicated in state court without effecting estate).

Fees and Costs

Although a court may impose attorneys' fees and costs under Federal Rule 41(a)(2), it should do so only when justice so demands. *Gap, Inc. v. Stone Intern. Trading, Inc*., 169 F.R.D. 584, 588 -589 (S.D.N.Y. 1997), *aff'd.*, 125 F3d 845 (2d Cir. 1997). Courts within this circuit have refused to award fees and costs following a Rule 41(a)(2) dismissal absent circumstances evincing bad faith or vexatiousness on the part of the plaintiff. *See BD ex rel. Jean Doe v. DeBuono* 193 F.R.D. 117, 125 (S.D.N.Y. 2000) (citing cases); *In re Shavit*, 197 B.R. 763, 771 (Bankr.S.D.N.Y.1996) (refusing to award fees and costs after a Rule 41(a)(2) dismissal absent evidence plaintiff commenced or conducted action in "bad faith, vexatiously, wantonly, or for oppressive reasons"). There has been no such showing in the present case. Here, the request for fees and costs by Philip is somewhat ironic as his previously recounted propensity for aggressive, successive and repetitive motions and appeals has burdened all his counter parties with substantial fees and expenses of their own.

Moreover, the purpose of such an award is generally to reimburse the defendant for the litigation costs incurred in view of the risk faced by the defendant that the same suit will be refiled and will result in the imposition of duplicative expenses. *Gap, Inc. v. Stone Intern. Trading, Inc*. 169 F.R.D. at 589 *citing Colombrito v. Kelly*, 764 F.2d 122, 134 (2d Cir.1985). Here the Trustee has represented that she has no intention of pursuing the claims in this action against Philip. Should the MK Estate continue to pursue its claims against Philip, Philip can use the same preparation and expense undertaken in this case in any subsequent action.

Conclusion

For the reasons set forth, consideration of the *Zagano* factors support the Trustee's

request for dismissal of this adversary proceeding in its entirety. Accordingly, the adversary proceeding is dismissed without prejudice and Philip's request for costs and fees are denied.

SUBMIT AN ORDER CONSISTENT WITH THIS DECISION.

Dated: New York, New York
October 30, 2008

/s/ Burton R. Lifland
United States Bankruptcy Judge