

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)
 In re)
)
 GAILON ARTHUR JOY)
)
 Debtor)
 _____)
)
 GAILON ARTHUR JOY)
)
 Plaintiff)
)
 v.)
)
 THREE ANGELS BROADCASTING)
 NETWORK, INC.,)
 DANNY LEE SHELTON,)
 JOHN P. PUCCI, ESQ.,)
 JERRIE M.HAYES, ESQ.,)
 GERALD S. DUFFY, ESQ.,)
 FIERST, PUCCI & KANE LLP,)
 and)
 SIEGEL BRILL GRUEPNER)
 DUFFY & FOSTER, P.A.)
)
 Defendants)
 _____)

Case No: 4:08-CV-40090-FDS

DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. On April 6, 2007, Three Angels Broadcasting Network (“3ABN”) and Danny Lee Shelton (“Shelton”) commenced an action in the U.S. District Court for the District of Massachusetts against Gailon Arthur Joy (“Joy”) and one other Defendant, Robert Pickle (“Pickle”), entitled Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation

and Danny Lee Shelton v. Gailon Arthur Joy and Robert Pickle, docketed as Case No. 4:07-cv-40098-FDS (“Civil Action”).¹ See Civil Action Docket.

2. The Complaint in the Civil Action alleged *inter alia* that Joy and Pickle were infringing on 3ABN’s trademarks and publishing defamatory statements about 3ABN and Shelton on the Internet. The Complaint sought damages for Joy and Pickle’s conduct, as well as injunctive relief requiring that Joy and Pickle stop infringing on 3ABN’s trademarks. See Civil Action Complaint (Civil Action Docket, ECF Doc. No. 1).

3. 3ABN and Shelton are represented in the Civil Action by the law firm of Siegel Brill Greupner Duffy & Foster, P.A. (“Siegel Brill”), including Attorneys Gerald S. Duffy (“Duffy”) and Jerrie M. Hayes (“Hayes”), as well as by the law firm of Fierst, Pucci & Kane LLP (“Fierst Pucci”), including Attorney John P. Pucci (“Pucci”), as local counsel. See Civil Action Docket.

4. Joy proceeded *pro se* in the Civil Action. Pickle initially was represented by Attorney Laird Heal (“Heal”), although on November 10, 2007, he also filed his appearance *pro se*. See Civil Action Docket and Pickle Notice of Appearance (Civil Action Docket, ECF Doc. No. 31).

5. On August 9, 2007, this Court held an evidentiary hearing in the Civil Action in consideration of a dispute between the parties concerning the form for production of electronic and electronically-stored information. See Electronic Clerk’s Notes (Civil Action Docket).

¹ On November 3, 2008, Judge Saylor entered an Order dismissing the Civil Action without prejudice based on a Motion for Voluntary Dismissal filed by 3ABN and Shelton. See November 3, 2008 Order (Civil Action Docket, ECF No. 129). While Joy and Pickle did not assert any counterclaims in the Civil Action, they have nevertheless appealed the Order of dismissal and the appeal is pending before the First Circuit Court of Appeals. See Notice of Appeal (Civil Action Docket, ECF No. 133). Moreover, on April 27, 2009, Joy and Pickle filed a Motion to Reconsider and to Amend Findings with respect to Judge Saylor’s Orders of April 13 and 15, 2009 concerning Joy and Pickle’s Motion for Costs and Motion for Leave to File Under Seal, respectively. See Motion for Reconsideration and Memorandum in Support (Civil Action Docket, ECF Nos. 169 and 170).

6. Following that hearing, on August 13, 2007, this Court issued an Order in the Civil Action that the parties submit proposed orders with respect to the format that any electronically-stored information should be provided to the opposing party within 14 days. See August 13, 2007 Electronic Order (Civil Action Docket).

7. On August 14, 2007, Joy filed a Voluntary Petition under the provisions of Chapter 7 of the United States Bankruptcy Code (“Bankruptcy Case”). See Ex. 1 submitted herewith (Bankruptcy Case Docket). The Bankruptcy Case is pending before the United States Bankruptcy Court for the District of Massachusetts, docketed as Case No. 07-43128-JBR. See id.

8. Joy is represented in the Bankruptcy Case by Attorney Heal. See Bankruptcy Case Docket.

9. Joy did not list either 3ABN or Shelton as creditors in his Bankruptcy Schedules, despite the fact that 3ABN and Shelton had pending claims against him for monetary damages in the Civil Action; accordingly, neither 3ABN nor Shelton received notice from the Bankruptcy Court that Joy had filed his Bankruptcy Case. See Bankruptcy Petition (Adversarial Case Docket No. 4:08-cv-40090-FDS, ECF Doc. No. 2-10).

10. Nor did 3ABN, Shelton, or any of their attorneys receive notice from Heal or Joy that Joy had filed his Bankruptcy Case. See Ex. 2 submitted herewith (Affidavit of Gerald S. Duffy, hereinafter “Duffy Aff.”), at ¶5

11. Pursuant to this Court’s August 13, 2007 Order in the Civil Action, which issued one day before his filing of the Voluntary Petition, Joy submitted his proposed order regarding the production of electronically-stored information, along with an accompanying memorandum of law, on August 27, 2007. See Proposed Order and Memorandum of Law (Civil Action

Docket, ECF Doc. Nos. 26 and 27). Joy did not make any reference in either of these two pleadings to the fact that he had filed his Bankruptcy Case two weeks earlier. See id. As a *pro se* litigant in the Civil Action, Joy electronically signed these two documents himself, but they were filed through his bankruptcy attorney's (Laird Heal's) ECF account. See Notices of Electronic Filing (Civil Action Docket, ECF Doc Nos. 26 and 27).

12. On or around August 29, 2007, counsel for 3ABN and Shelton learned of Joy's Bankruptcy Case by undertaking a "party search" on PACER in the ordinary course of preparing the Civil Action. See Duffy Aff., at ¶6.

13. On September 13, 2007, Attorney Hayes sent a letter to Attorney Heal. See Amended Adversarial Complaint, at Ex. 6 (Sept. 13, 2007 letter) (Adversarial Case Docket, ECF Doc. No. 2-14). In that letter, Hayes advised Heal that 3ABN and Shelton had learned of Joy's Bankruptcy Petition and that:

Under our reading of all applicable bankruptcy statutes and rules, the automatic stay suspends all pending activity involving Gailon Joy in the matter of 3ABN v. Joy and Pickle, thus prohibiting any additional pleadings by Mr. Joy and precluding Mr. Joy's involvement in discovery and pretrial practice in this case. We also believe the automatic stay applies until such time as relief from the automatic stay is ordered by the Bankruptcy Court upon Plaintiffs' motion for such.

See id. Hayes further expressed that Heal's continued representation of Pickle in the Civil Action, while he was also representing Joy in the Bankruptcy Case, represented an irreconcilable conflict of interest. See id.

14. On October 24, 2007, 3ABN and Shelton, through their attorneys, filed a Motion for Status Conference in the Civil Action. See Motion for Status Conference (Civil Action Docket, ECF Doc. No. 29). In this document, 3ABN and Shelton advised this Court that Joy had filed his Bankruptcy Petition and requested a status conference to address the issue of

preservation of electronic evidence stored on the Debtor's computer equipment given that Joy had listed "electronic office equipment" as a personal property asset, and 3ABN and Shelton were concerned that the equipment might be seized and/or liquidated by Joy's Chapter 7 Trustee. See id. In the Motion, 3ABN and Shelton also advised the Court of the perceived conflict of interest in Heal's continued representation of Pickle in the Civil Action, while he was simultaneously representing Joy in his Bankruptcy Case. See id. Joy did not file an opposition to Plaintiffs' Motion for Status Conference (see Civil Action Docket), nor provide any prior notification that he considered the status conference or his attendance to be violative of the stay.

15. In response to the Motion for Status Conference, this Court issued an Order on November 2, 2007 granting the Motion, scheduling the requested status conference for November 13, 2007, and ordering Joy to provide the Court, 3ABN, and Shelton with a listing of all of his electronic equipment and to make that equipment available for mirror imaging at 3ABN and Shelton's expense, with the mirror images to be placed under seal and not made available to 3ABN and Shelton absent further order of the Court. See November 2, 2007 Order (Civil Action Docket, ECF Doc. No. 30-2).

16. On November 5, 2007, Attorney Hayes faxed and mailed a letter to Attorney Heal, in his capacity as counsel for Pickle in the Civil Action, enclosing and serving upon him the Court's November 2, 2007 Order. See Amended Adversarial Complaint, at Ex. 4 (Nov. 5, 2007 letter) (Adversarial Case Docket, ECF Doc. No. 2-12). In the letter, Hayes indicated that she would be contacting Joy "separately to arrange for the date and time for the data imaging." See id.

17. On November 6 and November 9, 2007, Hayes faxed and mailed two letters to Joy in connection with setting up the mirror imaging ordered by this Court on November 2. See

Amended Adversarial Complaint, at Ex. 3 (Nov. 6, 2007 letter) and Ex. 5 (Nov. 9, 2007 letter) (Adversarial Case Docket, ECF Doc. Nos. 2-11 and 2-13).

18. On November 13, 2007, 3ABN and Shelton filed a Motion for Relief from the Automatic Stay in the Bankruptcy Case, along with a Motion for Expedited Determination. See Ex. 3 submitted herewith (Motion for Relief from the Automatic Stay) and Ex. 4 submitted herewith (Motion for Expedited Determination). In the Motion for Relief from the Automatic Stay, 3ABN and Shelton advised the Bankruptcy Court of the status conference that was scheduled to occur that day in the Civil Action. See Ex. 3, at ¶19.

19. Later that same day, this Court held the scheduled status conference at the U.S. District Court for the District of Massachusetts sitting in Boston. See November 13, 2007 Electronic Clerk's Notes (Civil Action Docket).

20. Attorneys Duffy and Pucci appeared at that conference on behalf of 3ABN and Shelton. See Duffy Aff., at ¶7. Joy also attended the status conference. See November 13, 2007 Electronic Clerk's Notes (Civil Action Docket). The conference addressed the issues raised by 3ABN and Shelton in the Motion for Status Conference, namely the preservation of electronic evidence and the potential conflict of interest in Heal's continued representation of Pickle in the Civil Action. See id. During the conference, Attorneys Duffy and Pucci advised the Court that 3ABN and Shelton had filed their Motion for Relief from the Automatic Stay in the Bankruptcy Case earlier that day. See id.

21. On November 14, 2007, Joy filed his initial Complaint in this adversarial proceeding. See Ex. 1 submitted herewith (Bankruptcy Case Docket, ECF Doc. No. 20).

22. Thereafter, on November 16, 2007, 3ABN and Shelton, through their attorneys, filed an Emergency Motion for Status Conference in the Civil Action. See November 16, 2007

Emergency Motion (Civil Action Docket, ECF Doc. No. 32). In the Emergency Motion, 3ABN, Shelton, and their attorneys advised this Court that Joy had initiated an adversarial proceeding and asked this Honorable Court to address the stay issue rather than proceed with the mirror-imaging protocol as ordered by the Court on November 2. See id.

23. In response, this Court issued an Order reserving ruling on the Emergency Motion for a Status Conference and staying its November 2 Order regarding mirror-imaging Joy's electronic equipment pending further Order of the Court. See November 16, 2007 Electronic Order (Civil Action Docket). The copying of Joy's hard drive, therefore, did not take place. On November 19, 2007, this Court issued a further Order denying the Emergency Motion for a Status Conference without prejudice to 3ABN's and Shelton's right to renew the motion after obtaining relief from the automatic stay. See November 19, 2007 Electronic Order (Civil Action Docket).

24. On November 20, 2007, Joy filed an Opposition to 3ABN's and Shelton's Motion for Relief from the Automatic Stay. See Ex. 5 submitted herewith (Opposition to Motion for Relief from the Automatic Stay).

25. On November 21, 2007, the Bankruptcy Court issued an Order lifting the Automatic Stay so as to allow 3ABN and Shelton to continue to prosecute the Civil Action against Joy as to injunctive relief, provided that neither 3ABN nor Shelton sought damages on account of any prepetition claim against Joy. See Ex. 6 submitted herewith (November 21, 2007 Order).

26. On February 11, 2008, Joy filed his Amended Adversarial Complaint, which is currently pending before this Court. See Amended Adversarial Complaint (Adversarial Case Docket, ECF Doc. No. 2-8). (Joy filed his Amended Complaint after his original Complaint was

dismissed by the Bankruptcy Court because he had failed to allege any damages he supposedly suffered as a result of any alleged violations of the automatic stay. See Ex. 7 submitted herewith (February 1, 2008 Order)).

27. In his Amended Adversarial Complaint, Joy alleges that he spent “at least” 10 hours “answering the messages of the Defendants in violation of the Automatic Stay, preparing to meet the orders of the district court during the pendency of the Automatic Stay, and attending the status conference hearing . . .” See Amended Adversarial Complaint, at ¶28. Joy further alleges that he “cannot quantify his lost profits [in connection with the at least 10 hours of time, but that] he has in the past done paralegal work and been compensated at twenty-five dollars per hour, making a calculation of his personal loss of earnings some \$250.00.” See id. Joy also alleges that the Court’s November 2 Order made “it impossible for [him] to conduct his normal business operations.” See id., at ¶¶34, 42.

28. Joy further alleges that he “incurred legal costs and fees in the sum of one thousand five hundred ninety-three dollars and sixty cents (\$1,593.60) at 7.85 hours plus costs, prior to the filing of this Adversary Proceeding . . .” See Amended Adversarial Complaint, at ¶29.

29. Joy thereafter requests a Judgment in his favor for damages in the amount of \$250, plus attorneys’ fees and costs of \$1,593.60, as well as punitive damages in the amount of \$35,000. See Amended Adversarial Complaint, at last two (unnumbered) pages (“Wherefore” section).

30. On February 21, 2008, defendants 3ABN and Shelton filed a Motion to Dismiss Amended Complaint, or in the Alternative, to Treat Adversary Proceeding as a Contested Matter Under Federal Rule of Bankruptcy Procedure 9014. See February 21, 2008 Motion to Dismiss

(Adversarial Case Docket, ECF Doc. No. 3). On February 22, 2008, Defendants Pucci and Fierst Pucci filed their own Motion to Dismiss Amended Complaint, adopting 3ABN and Shelton's motion in its entirety. See February 22, 2008 Motion to Dismiss (Adversarial Case Docket, ECF Doc. No. 4). Also on February 22, 2008, Defendants Siegel, Brill, Greupner, Duffy & Foster, P.A., Duffy and Hayes filed an answer incorporating by reference the Motion to Dismiss. (Adversarial Case Docket, ECF Doc. No. 2-15). Joy filed his opposition to these motions on April 25, 2008. See April 25, 2008 Opposition (Adversarial Case Docket, ECF Doc. No. 5).

31. On September 9, 2008, 3ABN and Shelton took Joy's examination under oath pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. See Ex. 8 submitted herewith (Portions of Transcript of Examination, hereinafter "Transcript"), at p. 1.

32. In the examination, Joy was asked about specific employment or income opportunities he lost in connection with attending the status conference that allegedly took place in violation of the stay. He testified as follows:

Q: How many conferences did you attend in the District Court or hearings did you attend in the District Court personally in connection with ---

A: I've attended all hearings, so whatever was during that period of time, I attended them.

Q: I believe that the only hearing that took place prior to the lifting of the stay that is at question was the November 13, 2007 status conference.

A: That's not true. We had a whole hearing on the production of the—we had a—let me think. We had a---I'm trying to remember the date on that. We had a full hearing before the judge magistrate.

Q: In connection with your attendance at those hearings, did you have to reschedule any appointments or anything that would have otherwise led to income opportunities.

...

A: I don't recall the dates of the hearings or what the circumstances were. If it's a question of whether or not there was a huge income opportunity, I seriously doubt it given the fact that we were in bankruptcy. I can't imagine anybody in bankruptcy—but I guess there's some people that don't really have bankruptcies that file for bankruptcy—but mine was a real bankruptcy.

Q: So it's your testimony then that you were not deprived of any real income producing opportunities as a result of your having to attend the hearings?

A: How would I know? I wouldn't know. If I was attending hearings, how would I know if I missed something?

Q: Were there any messages?

A: Let's put it this way. If I would have earned it, I probably wouldn't have gotten paid anyway, so what difference does it make?

See Transcript, at pp. 70-72.

33. Joy also testified about his valuation in his Amended Adversarial Complaint of \$250 for his time in responding to the alleged violations of the automatic stay based on prior work as a paralegal:

Q: And you say that you had in the past done paralegal work in attempting to affix a dollar value to the time that you say you spent. Have you ever worked as a paralegal?

A: Yes.

Q: When?

A: Oh, I have worked—I worked for—I worked three days a week working with a firm in Vermont from probably around '84 through—I think the last case I did up there was '93, '94 somewhere in there. . . .

. . . It was a part-time thing.

Q: Part-time thing, at the same time as you were working other jobs?

A: Oh, sure, yeah. Since then I have on occasion worked with attorneys on other cases.

See Transcript, at pp. 81-82.

34. As to other supposed sources of income or “normal business operations” during the time period in which Joy allegedly spent 10 hours in dealing with the alleged stay violations in October and November 2007, Joy testified as follows:

Q: So your testimony just now is that you were the branch manager for New England Merchants Corporation. When did it close? When did it go out of business, as you say?

A: Let’s see. I guess it was probably in July. I don’t remember the date. Sometime in July.

Q: Of last year?

A: Yeah.

Q: 2007?

A: Something like that, yeah. But it actually—we ended up—it took us a while to finish up, cleaning out the records, and we didn’t finish that until sometime in probably September, October, because we had several years’ worth of records there.

See Transcript, at p. 21.

Q: What, sir, have you done for gainful employment, for income, since the closing of NEMCO, which you said took place in roughly July or August 2007?

A: Well, actually we didn’t finish up until probably September or October, something like that. I can’t remember when it was.

Q: When you say you didn’t finish up, are you saying that you continued to be paid for a little while longer?

A: We didn’t get paid. As you can see, we didn’t get paid. We were supposed to get paid. We didn’t get paid. As a matter of fact, we didn’t get credit for any of our work that was done in July or August.

Q: Okay. So your last income then was when?

A: You mean with NEMCO?

Q: From NEMCO, yes.

A: Apparently July. I didn't get paid beyond that.

Q: What have you done—what do you do now for income?

A: Well, if the question is a post-petition question, when I left NEMCO, I went to work with First American Mortgage Trust again.

See Transcript, at pp. 63-64.

Q: When did you go back to work for First American Mortgage Trust?

A: In November maybe, late November.

Q: Late November?

A: Sometime in November. I don't remember when. You know what? I may have been putting in accounts in October. I don't recall. I'd have to look and see. I have no clue, to be honest with you.

...

Q: Were you an employee from November to January of First American Mortgage Trust?

A: Well, I was an account exec for them, but didn't get paid during that period.

Q: You never got paid anything from them.

A: No. The company collapsed. They took the money with them.

Q: So you worked for two months or so and never received any compensation.

A: Well, I received about \$3,000 in December, I think, if I recall.

Q: Subsequent to First American Mortgage Trust's failure, have you worked for somebody else or something else?

A: I tried several things. Nothing seems to have gained traction yet significantly.

Q: My specific question is have you worked for somebody else? Have you been an employee with another firm or another company since January of 2008?

A: I haven't—not really, no. I have talked to several, but we've never consummated a deal.

See Transcript, at pp. 65-66.

35. Joy also testified at his deposition as to his expectation of what would happen with the Civil Action based upon his filing his Bankruptcy Case:

Q: What I want to understand is whether you had an expectation that the District Court litigation would stop as a result of the bankruptcy filing?

A: No. I did not.

Q: You did not have an expectation that the District Court litigation would stop?

A: Why would I? I had produced documentation --

Q: Did you expect it to continue in fact --

A: I did not consider 3ABN to be a creditor.

Q: So therefore did you expect the District Court litigation to continue notwithstanding your bankruptcy filing?

A: Once they put a notice of bankruptcy on the record, they put themselves in a position where they should have stopped, and they didn't do it. I didn't put it on the record; they did. And they utilized that petition maliciously.

Q: If 3ABN and Danny Shelton had not put on the record that you were in bankruptcy, and they proceeded with the litigation in the normal course, would you have done anything to stop it?

A: Can't imagine. There was --

Q: The question is would you have done anything to stop the litigation?

A: I can't imagine that I would have done anything to stop the litigation at that point other than exactly what--the thing that precipitated the entire issue was they put it on record, and then they abused it and used it maliciously to do something that they should never have done.

See Transcript, at pp. 161-63.

Q: So would you have been all right if they simply proceeded with what they were --

A: I would have been, except what they did was they used it as the basis to try to come after hard drives. That's what they did. They were malicious.

Q: But you have no problem with the fact that they proceeded against you in the District Court litigation, notwithstanding your bankruptcy filing? You had a problem because they were going after the hard drive?

A: You know what? I wouldn't have had a problem with that if they had come to us in the right circumstances. But to do it in a malicious way that they did made it absolutely unacceptable, and that's been classic for them, malicious activity.

See Transcript, at pp. 158-59.

Q: So you didn't consider that the automatic stay was in place because you didn't consider 3ABN and Shelton creditors?

A: You were not creditors and you're not to this date.

Q: Who's not? You're saying "you," but for clarity on the record, who's "you"?

A: The plaintiffs, Shelton and 3ABN, were not creditors at the time I filed [for bankruptcy] and they are still not creditors to this date.

Q: So to be clear, you do not consider that evidentiary hearing to have taken place in violation of the automatic stay?

A: As I said, we did not consider you creditors.

Q: So is your answer no, it wasn't in violation of the automatic stay because 3ABN and Shelton were not creditors?

A: We had not invoked the automatic stay, and proceeded to defend the case.

Q: Is it your belief that you did invoke the automatic stay at some point?

A: We did not. You did.

...

A: Absolutely. They invoked the automatic stay. We did not invoke the automatic stay. We did not consider you creditors. You made yourselves creditors artificially.

See Transcript, at pp. 178-181.

Q: Is it your position that the bankruptcy filing did not affect or shouldn't affect the District Court action?

A: Didn't think about it one way or the other.

Q: Didn't think about it one way or the other?

A: Nope. 3ABN was not on my mind when I filed bankruptcy believe me. It is the last thing on my mind when I filed bankruptcy.

See Transcript, at p. 125.

36. According to Joy, once this Court learned of the Bankruptcy Case, “[s]omething happened, and suddenly the judge magistrate realized that he had a little problem; that there was a bankruptcy hearing and he had to deal with that issue first, so he reversed his order.” See Transcript, at p. 80.

Respectfully Submitted,

SIEGEL, BRILL, GREUPNER,
DUFFY & FOSTER, P.A.

Dated: May 15, 2009

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system, along with any affidavits and/or attachments filed herewith, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

Dated: May 15, 2009

/s/ M. Gregory Simpson