

In re Bilzerian

United States Bankruptcy Court, M.D. Florida
258 B.R. 850 · February 16, 2001

Memorandum Opinion on Motion to Dismiss Pursuant to Bankruptcy Code § 707(a)

MICHAEL G. WILLIAMSON, Bankruptcy Judge.

This case came on for hearing on February 8, 2001, (“Hearing”) upon the motion (“Motion to Dismiss”) of the Securities and Exchange Commission (“SEC”) and Deborah R. Meshulam, as receiver (“Receiver”) (collectively, the SEC and Receiver, the “Movants”), seeking the following relief: dismissal of the case for cause under Bankruptcy Code § 707(a), dismissal of the case under the abstention provisions of Bankruptcy Code § 305, a finding that certain actions are within the “police power” exception of Bankruptcy Code § 362(b)(4), relief from the automatic stay for cause under Bankruptcy Code § 362(d)(1), or alternatively, an order excusing the Receiver from compliance with the turnover provisions of Bankruptcy Code § 543.

The court has considered the entire record including the testimony of the debtor, Paul A. Bilzerian (“Debtor” or “Bilzerian”), the exhibits received in evidence, the declarations of the parties, as well as the numerous memoranda and other filings with the court.

***852** For the reasons set forth below, the court will grant the Motion to Dismiss and dismiss this Chapter 7 case for cause pursuant to Bankruptcy Code § 707(a).

Findings of Fact 1

Bilzerian commenced this case by the filing of a petition under Chapter 7 on January 2, 2001. At the time of the filing of his Chapter 7 case, Bilzerian was a defendant in an action, SEC v. Bilzerian, Civil Action No. 89-1854 SSH (“Enforcement Action”), pending in the United States District Court for the District of Columbia (“D.C. District Court”) which currently seeks enforcement of a judgment of disgorgement (“SEC Judgment”) obtained by the SEC in an original amount (exclusive of interest) in excess of \$60 million.

The Enforcement Action was commenced on June 29, 1989. Soon after, on September 27, 1989, Bilzerian was convicted of securities laws violations and sentenced to four years in prison and fined \$1.5 million. The Second Circuit affirmed his criminal conviction on January 3, 1991. *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir.1991).

On April 8, 1991, Judge Harris from the D.C. District Court found Bilzerian hable for securities fraud. *SEC v. Bilzerian*, 1991 WL 83964 (D.D.C.1991). The Court of Appeals affirmed the D.C. District Court’s decision. *SEC v. Bilzerian*, 29 F.3d 689 (D.C.Cir.1994).

On August 6, 1991, Bilzerian filed his first personal bankruptcy case in the United States Bankruptcy Court for the Middle District of Florida (“First Bankruptcy”). The case was assigned to Bankruptcy Judge Alexander L. Paskay. See *in re Bilzerian*, 146 B.R. 871 (Bankr.M.D.Fla.1992).

On January 28, 1993, the D.C. District Court entered the SEC Judgment against Bilzerian in the amount of \$33,140,787.07. *SEC v. Bilzerian*, 814 F.Supp. 116 (D.D.C.1993). On June 25, 1993, the D.C. District

Court entered an order adding an additional \$29,196,812.46 in prejudgment interest to the SEC Judgment. SEC v. Bilzerian, 1993 WL 542584 (D.D.C.). The Court of Appeals affirmed these decisions. SEC v. Bilzerian, 29 F.3d at 696.

The SEC was ultimately successful in the First Bankruptcy in obtaining a determination that the SEC Judgment was non-dischargeable under Bankruptcy Code § 523. In re Bilzerian, 153 F.3d 1278 (11th Cir.1998). In addition, another creditor, HSSM # 7 L.P. (“HSSM”), which was scheduled by Bilzerian in this case as being owed \$30,650,328.17, was similarly successful in obtaining a judgment of nondis-chargeability in the First Bankruptcy. In re Bilzerian, 100 F.3d 886 (11th Cir.1996).

Between 1994 and 1999, Bilzerian transferred his substantial assets into a complex ownership structure of off-shore trusts and family-owned companies and partnerships. It is clear that he did this purposefully to insulate his assets from the reach of his creditors.

For example, in 1994, Bilzerian established “The Paul A. Bilzerian and Terri L. Steffan 1994 Irrevocable Trust” for the benefit of his children (“Children’s Trust”). In June of 1994 Bicoastal Holding Company (“Bicoastal”), then jointly owned by Bil-zerian and his wife as tenants by the en-tireties, acquired an option to purchase 6 *853 million shares of Cimetrix Incorporated 2 at 16 cents per share. Bieoastal then paid a dividend of an option to acquire 5.4 million shares of Cimetrix to Bilzerian and his wife.

In June of 1994, Bilzerian and his wife transferred an option for 2.4 million Cime-trix shares to the Children’s Trust. In that same month, Bilzerian’s wife transferred the home in which they reside to Bilzerian and his wife as tenants by the entirety (“Home”). The Home is over 30,-000 square feet and is valued at approximately \$3.5 million. Until Bilzerian’s recent incarceration, he resided in the Home with this wife.

In 1995, Bilzerian and his wife established a Cook Islands trust entitled “The Paul A. Bilzerian and Terri L. Steffen 1995 Revokable Trust” (“Family Trust”). Bilze-rian is one of the trust’s settlors and is a trustee and beneficiary of it. In December of 1995, Bilzerian and his wife transferred all of their shares of Bicoastal to the Family Trust.

In December of 1995, Overseas Holding Limited Partnership, a Nevada limited partnership (“OHLP”) was established. Bicoastal is OHLP’s sole general partner, owning 1 percent of its equity, and the Family Trust is OHLP’s sole limited partner, owning 99 percent of its equity.

Bilzerian and his wife transferred a second Florida property, a Minnesota vacation home, and an option to purchase three million share of Cimetrix stock to OHLP in December of 1995. In March of 1997, Bilzerian and his wife executed a deed of the Home to OHLP. The deed was recorded in January 1999.

In April of 1997, Bicoastal, the Children’s Trust, and the Family Trust through OHLP, exercised the Cimetrix options and acquired 6 million shares of Cim-etrix’s stock worth more than \$31 million. Bicoastal holds 180,000 shares. OHLP holds 2.9 million shares. The Children’s Trust holds 2.315 million shares. About 600,000 shares were sold for an unknown amount at an unknown time.

On November 20, 1998, in response to the SEC’s motion for civil contempt, the D.C. District Court issued a show cause order that required Bilzerian to file a sworn accounting identifying all assets in which he had any direct or indirect beneficial interest (“Show Cause Order”). Immediately after the entry of the Show Cause Order, in late November or early December of 1998, Bilzerian was removed as trustee of the

Family Trust and on December 21, 1998, he was removed as co-beneficiary of the Family Trust. 3

On August 21, 2000, Bilzerian was found to be in contempt by the D.C. District Court which held that Bilzerian has the ability to repay the disgorgement judgments, at least in part. Rather than comply with the disgorgement, “his diligent efforts have been focused on how to avoid compliance with the Court’s orders.” SEC v. Bilzerian, 112 F.Supp.2d at 23-28 and n. 23.

Bilzerian has been the beneficial owner of substantial assets in the years since the judgment was entered, but he has made no attempt whatsoever to pay the SEC Judgment. Instead of complying, he has transferred the assets to entities controlled by his wife and other family members. 4

***854** The D.C. District Court set a number of conditions that Bilzerian had to meet in order to purge the contempt. One of these was a requirement that he submit an additional accounting of his assets so that the D.C. District Court could ascertain the precise portion of the \$62 million judgment Bilzerian was capable of paying.

On December 22, 2000, the D.C. District Court entered an order appointing the Receiver. On December 22, 2000, the Receiver was ordered to marshal assets of Bilzerian and various related entities — the Family Trust, the Children’s Trust, Bi-coastal, and OHLP (“Bilzerian Related Entities”). Bilzerian and the Bilzerian Related Entities were also ordered to provide access to assets and documents to the Receiver and to take no action to hinder, delay, or obstruct or otherwise interfere with the Receiver.

Immediately after her appointment, the Receiver sent letters to a variety of individuals and entities connected to Bilzerian requesting that they immediately surrender assets, provide the Receiver with access to assets and information, and take no action to interfere with the Receiver.

On January 2, 2001, less than two weeks after appointment of the Receiver, Bilzerian filed this Chapter 7 case. The same day, Bilzerian sent a letter to the SEC and the Receiver notifying them of the bankruptcy filing and that the filing “stays certain collection and other actions against me and my property. Any attempt to collect a debt or take other action in violation of the Bankruptcy Code may subject you and your employers to penalties.”

On January 12, 2001, the D.C. District Court found that Bilzerian had not purged his contempt and ordered him incarcerated (“Incarceration Order”). The Incarceration Order also sets forth the findings of the D.C. District Court that the civil contempt proceeding resulting in the Incarceration Order was excepted from the automatic stay as an exercise of the “police powers” under Bankruptcy Code § 862(b)(4) and as necessary “to uphold the dignity of the Court and to vindicate the authority of the Court to enforce its orders.” Incarceration Order at 5.

On January 15, 2001, Bilzerian wrote counsel for the SEC and the Receiver stating that they had violated the automatic stay and demanding that they support his efforts to cause the D.C. District Court to vacate the Incarceration Order. In his letter, Bilzerian threatened sanctions against counsel, the Receiver, and their employers for their “willful and malicious violations of the Automatic Stay.”

On January 17, 2001, Bilzerian filed an appeal from the Incarceration Order as well as the related Order Appointing Receiver and the Contempt Order.

On January 17, 2001, the D.C. District Court granted Bilzerian an 11-day delay of the effectiveness of the Incarceration Order. A request for stay pending appeal was denied by the D.C. District Court on January

26, 2001, and was denied by the D.C. Circuit on January 29, 2001.

On January 30, 2001, Bilzerian was incarcerated.

Conclusions of Law

On January 25, 2001, this court considered a motion by the SEC for a protective order with respect to a deposition notice that Bilzerian had served on the SEC which noticed a deposition under Fed. R.Civ.Proc. 30(b)(6) of a representative of the SEC for Monday, January 28, 2001. One of the contentions advanced by the SEC in support of its motion was that the factual findings needed for the relief the SEC requests in the Motion to Dismiss are found in various prior decisions of the courts before which Bilzerian has appeared 5 that the SEC contends are binding on this court under the doctrine of collateral estoppel. 6

At the Hearing, Bilzerian objected to the court's making the findings set out above arguing that collateral estoppel does not apply as to the issues before the court on the Motion to Dismiss. Accordingly, the court will first consider the applicability of collateral estoppel to the numerous findings made by the D.C. District Court in the Contempt Order.

A. Collateral Estoppel Effect of the Contempt Order.

Collateral Estoppel "requires that (1) the issue be identical in both the prior and current action; (2) the issue was actually litigated; (3) the determination of the issue was critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the subsequent action not be significantly heavier." *Securities and Exchange Commission v. Bilzerian (In re Bilzerian)*, 153 F.3d 1278, 1281 (11th Cir.1998).

The court finds that as a matter of law, collateral estoppel does apply to the findings of the D.C. District Court made by Judge Harris in the Contempt Order, for the following reasons.

First, as discussed below, the issue with respect to whether this case should be dismissed depends on whether "cause" exists under Bankruptcy Code § 707(a). "Cause" is not a defined term. Rather, it requires the court to look at all of the facts and circumstances leading up to the filing of the case. The types of factual findings made by Judge Harris are exactly the sort of issues on which this court would have otherwise required evidentiary support. Second, it is clear that the facts upon which Judge Harris based the Contempt Order were actually and vigorously litigated by the SEC and Bilzerian. Third, the determination of the factual issues resolved by Judge Harris was critical and necessary to his findings that Bilzerian was in contempt of his prior orders.

Finally, the burden of persuasion in this action is not significantly heavier than the burden that the SEC had to carry in order to prevail on their motion to have Bilzerian declared in contempt of court. "In a contempt proceeding, the moving party has the burden of showing by clear and convincing evidence that (1) a court order was in effect, (2) the order required certain conduct by the respondent, and (3) the respondent failed to comply with the court's order." *Securities and Exchange Commission v. Bankers Alliance Corp.*, 881 F.Supp. 673 (D.D.C.1995). See also *Commodity Futures Trading Commission v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir.1992) The burden of the SEC in this case is a preponderance of the evidence. This is a lesser burden than that faced by the SEC in the D.C. District Court.

Accordingly, the court will next consider whether these factual findings support a finding of cause under Bankruptcy Code § 707(a).

B. Dismissal for Cause— § 707(a).

Movants rely on Bankruptcy Code § 707(a) in support of their argument that this case should be dismissed. That section provides that, “The court may dismiss a case ... for cause.... ” The primary contention of Movants is that this case was filed in “bad faith” and that “evidence that ***856** a Chapter 7 case was filed in bad faith constitutes cause for dismissal under Section 707(a).” In support of this contention, they cite the proposition that “good faith is an implicit jurisdictional prerequisite to filing a Chapter 7 petition.” Citing *In re Creazzo*, 172 B.R. 657 (Bankr.M.D.Fla.1994).

While a good faith requirement is explicitly imposed in chapter 11,12 and 13 cases, 11 U.S.C. §§ 1129(a)(3), 1225(a)(3) and 1325(a)(3), that explicit reference is omitted in a chapter 7 case. However, even absent this explicit reference, courts have dismissed chapter 7 cases under § 707(a) for “lack of good faith.” The seminal case holding that the lack of good faith is a valid basis for dismissal of a case under section 707(a) is *Industrial Insurance Services, Inc. v. Zick* (*In re Zick*), 931 F.2d 1124 (6th Cir.1991) (“*Zick*”).

In accepting this rationale, however, the Sixth Circuit in *Zick* cautioned that dismissal based on bad faith is only appropriate in “those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.” *Id.* at 1129. After review of the lower court’s findings, the Sixth Circuit held that these findings supported a finding of a lack of good faith.

Not all courts have agreed with the *Zick* court’s holding. For example, the Eighth Circuit in *Huckfeldt v. Huckfeldt* (*In re Huckfeldt*), 39 F.3d 829 (8th Cir.1994) (“*Huckfeldt*”) declined to frame the inquiry of dismissal under section 707(a) as one of “bad faith” but ruled that “the § 707(a) analysis is better conducted under the statutory standard ‘for cause.’ ”

In reaching its decision, it agreed with the “narrow cautious approach” of *In re Khan*, 112, B.R. 613 (Bankr.D.Minn.1994). The *Huckfeldt* court acknowledged the criticism of the *Zick* approach and legitimate concerns of certain courts. *Id.* at 832 (citations omitted). That is, chapter 7 is a liquidation proceeding and a different standard is appropriate when a debtor is willing to surrender all non-exempt assets. *Id.* While some conduct constituting cause to dismiss may be readily characterized as “bad faith,” framing the issue in such terms “may tend to misdirect the inquiry away from the fundamental principles and purposes of Chapter 7.” *Id.* Under the facts of the *Huckfeldt* case, the court ultimately held that “cause” existed to dismiss a chapter 7 case where the debtor filed the petition to frustrate the divorce court decree, attempted to push his ex-spouse into bankruptcy, and manipulated his earnings to achieve these non-economic motives. *Id.*

Recently, the Ninth Circuit has agreed with the Eighth Circuit that the inquiry under section 707(a) dismissals should be under the statutory standard “for cause.” *Neary v. Padilla* (*In re Padilla*), 222 F.3d 1184 (9th Cir.2000).

Absent Eleventh Circuit precedent on this issue, this court is persuaded that the views expressed in *Huckfeldt* are more consistent with the plain meaning and intent of chapter 7. That is, a court should look

at all of the facts and circumstances and determine whether or not “cause” exists for dismissal.

While bad faith is clearly a requirement of chapters 11 and 13, — *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir.1988) (“Phoenix”) (dismissal of chapter 11 case on bad faith grounds); *In re Waldron*, 785 F.2d 936 (11th Cir.1986) (“Waldron”) (dismissal of chapter 13 case for bad faith filing) — it is not a requirement, explicit or otherwise, for the filing of a chapter 7 case. That is, a case of an individual seeking to “reorganize” a debt to a single creditor who files a chapter 11 or chapter 13 on the eve of an adverse ruling in state court or a pending foreclosure sale may well be subject to dismissal for bad faith. See *Phoenix* and *Waldron*.

***857** However, the same debtor who files a chapter 7 should not be denied a discharge by denial of the recourse to bankruptcy without a showing that the debt is nondischargeable under Bankruptcy Code § 523 or that the debtor would not qualify for a discharge under Bankruptcy Code § 727. “Bad faith” taken alone is not a ground for dismissal in a chapter 7 case.

Rather, following the approach of *Huckfeldt*, this court will focus on whether this case should be dismissed for “cause” as that term is used in Section 707(a). This requires an analysis of all of the facts and circumstances leading up to the filing of this case to include the debtor’s motive in filing the case, the purposes which will be achieved in this case, and whether the debtor’s motive and purposes are consistent with the purpose of chapter 7, that is, to provide an honest debtor with a fresh start in exchange for the debtor’s handing over to a trustee all of the debtor’s nonexempt assets for liquidation for the benefit of the debtor’s creditors. *Huckfeldt*, 39 F.3d at 831.

This analysis starts with the fact that of the approximately \$139,762,828.17 of debt listed in Bilzerian’s schedules, \$130,650,328.17 is owed on account of the nondischargeable debts owed to the SEC and HSSM. Another \$9 million is owed to the Internal Revenue Service which, subject to certain narrow exceptions, would be nondischargeable under Bankruptcy Code § 523(a)(1). It can reasonably be inferred from these facts that Bilzerian did not file this case to get a “fresh start.”

It can also be inferred that Bilzerian has no intention of handing any assets over to the trustee for the benefit of his creditors. In his schedules filed in this case, Bilzerian has listed no assets available for creditors. That is, this is a “no asset” case. As stated by his wife in a declaration filed in the Enforcement Action, “To the best of my knowledge, my husband has no means or ability to pay any portion of the Disgorgement Judgment obtained by the SEC in January 1993.” *SEC v. Bilzerian*, 112 F.Supp.2d at 23.

Bilzerian’s own words also reflect his perspective and motives for filing this case. For example, in a March 1999 show cause hearing in the D.C. District Court, Bilzerian states, “[I]t shouldn’t be a shock to anybody that I ... have no reason, I mean, to dedicate my life to trying to earn money all of which would go to basically pay a judgment that I don’t believe, with all due respect to the Court, should have been entered in the first place.” *SEC v. Bilzerian*, 112 F.Supp.2d at 28. More recently, in a filing with the same court,

So that there will never be a misunderstanding on this point, I wish to make it crystal clear, for so long as I draw a breath, no matter how long it takes, no matter whether I reside in a prison cell or a rat-infested apartment or the largest mansion in the world, I will never, ever rest until the truth of my case is published for all the world to see.

Bilzerian’s Exhibit Number 3.

Bilzerian's resolve to never pay the SEC debt is beyond dispute. The journey into this court by the recent filing of this chapter 7 is yet another step on a path started years ago in a desire to protect his assets and the assets that he shares with his family in order to frustrate his creditors. It is clear that there will not be an end to these efforts until either he is successful, the SEC is successful, or somebody simply gives up — a result this court considers unlikely.

The only real question is in what court these issues will be litigated. This court certainly has jurisdiction to deal with the same assets being pursued by the SEC and Receiver in the D.C. District Court. Certainly, Bilzerian would prefer that this court be the court that determines the *858 outcome of any such litigation. That is why he filed here.

On the other hand, things have not gone well for Bilzerian in the D.C. District Court. He has been held in contempt. He has been incarcerated. Obviously, he desires to change the venue in which the issues raised by the SEC and Receiver will be decided. The question then is — should the door to this court be open to Bilzerian as the next step in his litigation strategy? 7

The court believes that based on these circumstances, ample cause exists to dismiss this case. In addition to Bilzerian's motives in filing the case, his inability to discharge virtually any significant debt and the fact that he has filed the case as one of "no assets," persuades this court that "cause" exists. The court has also considered the following additional factors as supporting a finding that cause exists under Section 707(a).

A Federal court receivership is already in place for the purposes of marshaling and liquidating Bilzerian's assets. Functionally, the Receiver will be acting as a Chapter 7 trustee and has been granted broad powers to accomplish her objectives under the control of a federal district court judge — the same judge that has vast familiarity with the background of this case— having presided over the case for approximately ten years.

Significantly, there is no creditor opposition to dismissal of the case so that the receivership can continue to conclusion. All parties that appeared and took a position at the Hearing, other than Bilzerian, supported dismissal of the case.

Clearly, the only reason this case was filed was because of the SEC's collection efforts. While Bilzerian attempted to convince the court that this case was filed because of litigation with another creditor, this argument was simply not credible. This is clear from all of the facts and circumstances. For example, the only creditor that received immediate notice of his filing was the SEC through a letter sent to them on the day he filed.

It is also no coincidence that at the time of this filing, Bilzerian's impending incarceration was looming. The obvious inference was that he hoped the bankruptcy stay would prevent that incarceration, as he argued unsuccessfully to the D.C. District Court. 8

Conclusion

For all of the foregoing reasons, ample grounds exist to dismiss this case for cause under Section 707(a). 9

The court by separate order has dismissed this case.

. Cimetrix Incorporated (“Cimetrix”) employed Bilzerian as its president until his incarceration. From 1996 until August of 2000, Bilzerian had his salary from Cimetrix paid to Bicoastal.

. The D.C. District Court found the Family Trust to be the “apex of the complex ownership structure into which Bilzerian has transferred his assets.” SEC v. Bilzerian, 112 F.Supp.2d at 18, 27 n. 30.

.The District Court, in the Contempt Order, further found that it was “inconceivable that Bilzerian does not have the ability to provide the Court with a copy of the Family Trust instrument; he and his wife were the Trust’s settlors, until recently he was both its trustee and a beneficiary. Its current trustees and Trust protector are members of the family, and the sole current beneficiary is his wife.” Id.

. Those decisions are:

1.

United States of America v. Bilzerian,

926 F.2d 1285

(2d Cir.1991) (affirming Bil-zerian’s criminal conviction).

***855**

2.

SEC v. Bilzerian,

29 F.3d 689

(D.C.Cir.1994) (affirming SEC Judgment).

3.

SEC v. Bilzerian,

153 F.3d 1278

(11th Cir.1998) (finding SEC Judgment nondis-chargeable).

4.

SEC v. Bilzerian,

112 F.Supp.2d 12

(D.D.C.2000) (Contempt Order).

5. Order Appointing Receiver of December 22, 2000 in the Enforcement Action.

6.SEC v. Bilzerian,

131 F.Supp.2d 10

(D.D.C.2001)(ordering Bilzerian incarcerated for failing to satisfy purgation requirements).

. See In re Bilzerian, 258 B.R. 846 (M.D.Fla.2001) (this court granted the SEC's motion for a protective order).

. Bilzerian is no stranger to the legal system. A Westlaw search indicates that he has been a named party either as plaintiff, defendant or debtor in 140 actions in the state and Federal courts over the last 15 years. In many of these he has appeared pro se and based on this court's observation has done a very competent job of representing his own interests.

. The D.C. District Court correctly rejected this argument since the exercise of that court's contempt powers under the circumstances of this case clearly fell within the "police power" exception to the automatic stay. Bankruptcy Code § 362(b)(4); SEC v. Bilzerian, 131 F.Supp.2d 10 (D.D.C.2001).

.In addition, while this ruling moots the other relief requested, the court finds that this record would also support a finding in favor of Movants with respect to the other relief requested in the Motion to Dismiss.

Footnotes

- 1 The findings of fact which form the basis for the relief requested by Movants were established by judicial notice of pertinent events as set forth in various reported decisions, the collateral estoppel effect of findings made by the D.C. District Court principally in its order reported at SEC v. Bilzerian, 112 F.Supp.2d 12 (D.D.C.2000) in which the D.C. District Court found Bilzerian in contempt ("Contempt Order"), prior final determinations in proceedings to which the SEC and Bilzerian were parties that are res judicata between the SEC and Bilzerian, admissions of Bilzerian made in his testimony at the Hearing and as contained in filings with this court, and the uncontroverted statements made in the declaration filed by the Receiver in support of the Motion to Dismiss.