Firm No. 37409 12629.A2A6 SRM/DEM/mrs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID GROCHOCINSKI, not individually, but solely in his capacity as the Chapter 7 Trustee for the bankruptcy estate of CMGT, INC.,	)	
Plaintiff,	)	
v	)	No. 06 C 5486
MAYER BROWN ROWE & MAW LLP and RONALD B. GIVEN,	)	Judge Virginia M. Kendall
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DAVID GROCHOCINSKI'S MOTION TO DISMISS DEFENDANTS' MOTION FOR SANCTIONS

Defendants have filed a petition for sanctions against David Grochocinski, for actions taken by him in his capacity as the Chapter 7 Trustee for the bankruptcy estate of CMGT, Inc. But in doing so, defendants have omitted an important step, a step whose omission deprives this court of subject matter jurisdiction to hear the sanctions claim: they have failed to obtain leave of the bankruptcy court to file their pleading against him.

It is widely recognized that bankruptcy court approval is required before a party may proceed against a trustee to recover a loss caused by actions undertaken in his role as trustee. In re Linton, 136 F.3d 544, 545 (7th Cir. 1998):

> An unbroken line of cases, including Judge Hand's Vass decision [Vass v. Conron Bros. Co., 59 F.2d 969 (2d Cir. 1932)], has imposed the requirement as a matter of federal common law....The trustee in bankruptcy is a statutory successor to the equity receiver, and it had long been established that a receiver could not be sued without leave of the court that appointed him. Barton v. Barbour, 104 U.S. 126,

> 128-29, 26 L.Ed. 672 (1881); Chicago Title & Trust Co. v. Fox Theatres Corp., 69 F.2d 60, 62 (2d Cir. 1934).
>
> 136 F.3d at 545.

This rule, known as the Barton doctrine, encompasses actions that seek to hold a trustee personally liable and liable for sanctions. In re Weitzman, 381 B.R. 874, 878 (N.D.Ill. 2008). Consequently, this court lacks subject matter jurisdiction over the motion for sanctions against Mr. Grochocinski and it should be dismissed.

The requirement of bankruptcy court approval is grounded in recognition of the fact that "a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code." Linton, 136 F.3d at 545. The rationale for the requirement is well stated in Linton:

> Without the requirement, trusteeship will become a more irksome duty, and so it will be harder for courts to find competent people to appoint as trustees. Trustees will have to pay higher malpractice premiums, and this will make the administration of the bankruptcy laws more expensive (and the expense of bankruptcy is already a source of considerable concern). Furthermore, requiring that leave to sue be sought enables bankruptcy judges to monitor the work of the trustees more effectively. It does this by compelling suits growing out of that work to be as it were prefiled before the bankruptcy judge that made the appointment; this helps the judge decide whether to approve this trustee in a subsequent case. Id.

In the present case, Mr. Grochoncinski has a lively interest in "seeking to enforce a requirement of bankruptcy law intended for his protection and for the protection of the integrity of the bankruptcy system." 136 F.3d at 546. Adherence to the Barton doctrine means that defendant's petition should be dismissed, as they have neither sought not received bankruptcy court approval to file it.

The litigation of Grochocinski v. Mayer Brown is imbued with bankruptcy considerations. Plaintiff Grochocinski was appointed as Chapter 7 Trustee by the bankruptcy court on September 21, 2004. ¶ 5 of complaint, which is exhibit C of defendants' notice of removal, document # 1 in the court file. Later, he was granted leave of court to retain special counsel to investigate and litigate claims that the bankruptcy estate might have. Id. When the lawsuit against Mayer Brown was filed, defendants removed the suit from state court to this court solely on the basis that the suit was related to a bankruptcy case under 28 U.S.C. § 1334. ¶ 7, notice of removal, document # 1. Spehar Capital, LLC, the bete noire of the story in the court's memorandum opinion and order of March 31, 2010, has long been fighting with Trustee Grochocinski before Judge Squires in the pending bankruptcy proceedings (In re CMGT, Inc., No. 04 B 31669) through the adversary proceeding he brought against Spehar, Grochocinski v. Spehar Capital, LLC, No. 07 A 00838. Mayer Brown is a creditor of the CMGT bankruptcy estate.

When a trustee's work is questioned and challenged by an attempt to obtain sanctions against him personally, the bankruptcy court should be the first to know. Otherwise, its function of monitoring the work of trustees will be impaired. The smooth functioning of the bankruptcy system depends on bankruptcy court oversight, and that includes the pre-approval of litigation that might be brought against a trustee.

Because of the trustee's unique and crucial role in the administration of the bankruptcy laws, he is entitled under the Barton doctrine to require a claimant to seek bankruptcy court approval of planned litigation against him. Particularly when personal liability is sought–the prospect of which can only make the role of trustee highly irksome–

bankruptcy court approval is essential. Since no approval was obtained in this case, the motion for sanctions against Mr. Grochocinski should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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