THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

NO. 01-E-084

BIRCH STREET RECOVERY CORP.,
GER RECOVERY CORP., AND
JAAJ REALTY CORP.

V.

REGINALD L. GAUDETTE, LOUISE L. GAUDETTE, JEFFREY GAUDETTE, LISA ROBINSON, EDITH GAUDETTE, LIONEL GAUDETTE, THOMAS J. THOMAS, ESQ., MARC L. VAN DE WATER, ESQ., GLENN C. RAICHE, ESQ., AND MARK S. RING, CPA

OPINION AND ORDER

LYNN, C.J.

This action for civil conspiracy and violation of the Consumer Protection Act, RSA 358-A, was commenced in February 2001. The plaintiffs are three creditors of the defendants Reginald Gaudette, his wife Louise Gaudette (hereinafter the Gaudettes), and/or various corporations, partnerships or other entities which the Gaudettes controlled. The remaining defendants are Jeffrey Gaudette and Lisa Robinson, son and daughter of the Gaudettes; Edith and Lionel Gaudette, mother and father of Reginald; Thomas J. Thomas, Jr., Esq., Marc L. Van De Water, Esq. and Glenn C. Raiche, Esq. (hereinafter sometimes referred to as "the lawyer defendants"), attorneys who provided legal services to the Gaudettes or entities which they controlled; and Mark Ring, a certified public accountant (CPA) who provided accounting services for the Gaudettes or related entities.[1] Plaintiffs' amended bill in equity alleges that the defendants engaged in a scheme to defraud the plaintiffs, in their capacity as creditors of the Gaudettes or entities controlled by them, from collecting on their claims or judgments by sheltering or

[1] By orders dated June 4, 2001 (Doc. #28) and September 12, 2001 (Doc. #47-a), I dismissed the Consumer Protection Act claim against the lawyer defendants and Ring.

concealing assets of the debtors through a series of fraudulent transfers and the creation of various "shell" entities. Because most if not all of the allegedly fraudulent activities of the defendants occurred in connection with proceedings before the United States Bankruptcy Court involving, first, R & R Associates (a partnership in which Reginald Gaudette was a partner) and, later, Gaudette himself as debtors, the lawyer defendants now move to dismiss this case on the grounds that plaintiffs' claims are preempted by federal bankruptcy law. I conclude that the lawyer defendants' position is correct and that their motion must be granted.

At the outset, it is important to observe that plaintiffs do not dispute that they filed claims as creditors in both the R & R Associates and the Reginald Gaudette bankruptcies. It also is obvious from the face of the amended petition that the overwhelming majority of the alleged conduct on which the defendants liability is sought to be predicated occurred during or just prior to these bankruptcy proceedings and was designed to conceal assets of the Gaudettes which would have been reachable in those proceedings. Thus, if the allegations are true, there can no doubt that the conduct in question would amount to a fraud on the bankruptcy court. As if to emphasize this point, plaintiffs concede that they seek relief in this action only "[t]o the extent Plaintiffs' claims pending in the Bankruptcy Court (In Re: R & R Associates, Docket No. 91-10983 and In Re: Reginald Gaudette, Docket No. 96-12653) are less than fully satisfied by and through actions undertaken by the Trustee seeking to recover damages and assets on behalf of the estate[s]. . . ." Amended Petition, paragraph 6.

Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, state law is preempted by federal law in three circumstances. "First, Congress can define explicitly the extent to which its enactments pre-empt state law." English v. General Electric Co., 496 U.S. 72, 78 (1990). "Second, in the absence of explicit statutory

language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." Id. at 79. "Finally, state law is pre-empted to the extent that it actually conflicts with federal law." Id.

Acknowledging that Congress has not expressly preempted state law claims of the kind here at issue, the lawyer defendants rely primarily on Mason v. Smith, 140 N.H. 696 (1996) and Glannon v. Garrett & Assocs., Inc., 261 B.R. 259 (D.Kan. 2001) in support of their assertion that plaintiffs' claims are barred by the doctrine of implied preemption. In both of these cases the courts dismissed state tort claims filed by debtors against their creditors and related parties who were alleged to have wrongfully filed involuntary bankruptcy petitions against the debtors. The courts held that such claims were preempted by § 303(i) of the Bankruptcy Code, 11 U.S.C. § 303(i).

Plaintiffs seek to distinguish Mason and Glannon from the case sub judice on the grounds that § 303(i) provides specific remedies (including both compensatory and punitive damages) for a debtor who is the victim of an involuntary petition filed in bad faith, whereas the Bankruptcy Code contains no analogous remedies for "civil conspiracy among the debtor, his counsel and financial advisors." But while it may be true that the Code contains no damages remedy, as such, for the alleged misconduct of the defendants in this case, the Code does provide the bankruptcy court with an ample arsenal of weapons designed to rectify the harm plaintiffs claim to have suffered. For example, §§ 547, 548 and 550 of the Code grant the trustee substantial powers to avoid preferential or fraudulent transfers of assets of the bankruptcy estate and to hold transferees liable for the value of wrongfully transferred property that cannot be recovered in kind. 11 U.S. C. §§ 547, 548, 550. Section105(a) of the Code permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate . . . to prevent an abuse of process." 11 U.S.C. § 105(a). Rule 9011 of the Federal Rules of

Bankruptcy Procedure authorizes the imposition of sanctions for the signing and filing of documents not well grounded in fact or law or interposed for the purpose of harassment or delay. Bankruptcy Rule 9024 makes Federal Rule of Civil Procedure 60(b) generally applicable to bankruptcy cases, and thus provides a remedy for aggrieved parties to be relieved of judgments secured by fraud, misrepresentation or other misconduct of an adverse party. Section 329 of the Code and Bankruptcy Rule 2017 grant bankruptcy courts authority to oversee and, where appropriate, disallow attorney's fees charged by a lawyer representing a debtor in bankruptcy. And § 727 of the Code permits the bankruptcy court to deny a discharge to a debtor who has engaged in various kinds of misconduct, including particularly the fraudulent transfer or concealment of assets or the making or use of false statements or accounts.

Beyond the specific remedy provided by § 303(i), the Mason and Glannon courts relied on a number of policy considerations in support of their rulings that state law was preempted. First, "the fact that federal courts have exclusive jurisdiction over bankruptcy matters indicates Congressional intent to preempt state remedies." Glannon, 261 B.R. at 264. As the court explained in Mason, "it is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized." Mason, 140 N.H. at 700 (quoting Gonzales v. Parks, 830 F.2d 1033, 1036 (9th Cir. 1987)). Second, the comprehensiveness of the Bankruptcy Code "demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all the rights and duties of creditors and embarrassed debtors alike." Glannon, 261 B.R. at 264 (quoting MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 914 (9th Cir. 1996)). "Finally, the unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to

leave the regulation of the parties before the bankruptcy court in the hands of the federal courts alone." Id. at 265 (internal quotation omitted). These considerations are as applicable to the state claims at issue in this case as they were to the claims at issue in Mason, Glannon and the other cases cited above. Simply put, there can be no doubt that permitting a state court to decide what does and does not constitute fraudulent conduct in connection with a bankruptcy proceeding, and to impose damages if wrongful behavior is found, could discourage both debtors and creditors from seeking the benefits and protections of the federal bankruptcy laws.[2] See Cox v. Zale Delaware, Inc., 242 B.R. 444, 449-50 (N.D.Ill. 1999) ("The deliberately expansive reach of the Bankruptcy Code preempts virtually all claims which allege misconduct in Bankruptcy proceedings."). Moreover, the rationale requiring preemption applies notwithstanding the fact that the law firm defendants are not themselves parties to any proceedings before the bankruptcy court. See Gonzales, 830 F.2d at 1036-37 (state claims against debtor's attorney preempted although attorney not party to bankruptcy); Mason, 140 N.H. at 702 (preemption applies even if bankruptcy law provides no remedy against the agent of a creditor who filed an involuntary bankruptcy petition in bad faith).

Plaintiffs next assert that the law firm defendants' preemption argument is barred by the doctrine of judicial estoppel . Specifically, plaintiffs contend that by successfully moving the bankruptcy court to dismiss a claim for civil conspiracy which the bankruptcy trustee for Reginald Gaudette attempted to bring against the law firm defendants, these

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[2] I note that while many of the cases which have applied the preemption doctrine have involved attempts by debtors to bring state law claims against creditors for the creditors' alleged wrongful initiation of involuntary bankruptcy proceedings, the doctrine has also been invoked where, as here, it is the creditors who seek to pursue state law claims. In Gonzales, for example, a creditor brought a state law abuse of process suit based upon the debtor's filing of an allegedly baseless Chapter 11 bankruptcy petition as a means of avoiding or forestalling foreclosure against the debtor's real estate. The court held that the creditor's state claim was preempted by federal bankruptcy law.

defendants should not now be permitted to argue that the civil conspiracy claim cannot be maintained in state court. See In re: Reginald Gaudette, Adv, No. 98-1125-MWV (Bkrtcy., D.N.H.), Order of Nov. 2, 1999 (Vaughn, C.J.). I reject this argument because there is no inconsistency between the positions taken by the law firm defendants in this case and before the bankruptcy court. In the aforesaid adversary proceeding before the bankruptcy court, the issue was whether the trustee of the Gaudette bankruptcy estate had standing to assert a civil conspiracy claim against Gaudette himself as well as others (including the law firm defendants). The bankruptcy court held that the trustee stood in the shoes of the bankrupt debtor and had standing to assert only those claims that the debtor himself could have asserted. Because the debtor, Gaudette, was alleged to be a member of the conspiracy, the doctrine of "in pari delecto" precluded the trustee from asserting a claim against Gaudette or any other members of the alleged conspiracy. There is nothing inconsistent about the law firm defendants' argument in the bankruptcy case that the trustee lacked standing to sue them, and their argument in this case that plaintiffs' claims are preempted by federal bankruptcy law. Plaintiffs' contrary view appears to be predicated on the notion that they must be allowed to pursue their civil conspiracy claim in some forum. However, this is simply not correct. As explained above, the preemption doctrine has the effect of limiting plaintiffs to the remedies provided for them under the bankruptcy laws.

Plaintiffs also seek refuge under the supreme court's decision in Wenners v. Great State Beverages, Inc., 140 N.H. 100 (1995). In Wenners, the court held that a plaintiff's common law cause of action for wrongful termination was not preempted by § 525(b) of the Bankruptcy Code. Section 525(b) bars private employers from terminating or discriminating against an employee solely because the employee has filed for bankruptcy, failed to pay a debt that is dischargeable, or received a discharge in bankruptcy. 11

U.S.C. § 525(b). In concluding that the state claim was not preempted, the court relied heavily on two factors: first, that employment and employment discrimination were matters traditionally regulated by state law; and , second, that § 525(b) provided "no set of procedures or explicit means to enforce claims for wrongful termination." Id. at 104 (emphasis added). I acknowledge that Wenners offers a modicum of support for plaintiffs' position, but, on balance, I conclude that Mason and the other cases cited above provide the more persuasive authority. In Wenners, the wrongful conduct which plaintiff sought to vindicate through the mechanism of state law -- employment discrimination – was largely collateral to the main aims and purposes of the bankruptcy laws. Here, by contrast, the proposed state claims brought by the plaintiffs are intended to vindicate interests – the payment of debts legitimately owed and the prevention of fraudulent concealment of assets – which lie at the heart of federal bankruptcy law.

Lastly, although plaintiffs do not specifically press this point, I note that the mere fact that plaintiffs obtained leave from the bankruptcy court (via their motion for relief from the automatic stay) in order to pursue this action as against defendant Reginald Gaudette cannot be regarded as a ruling by the bankruptcy court that plaintiffs' state law claims are in fact legally viable. Plaintiff have produced no evidence indicating that the bankruptcy court considered or passed upon in any way the preemption argument advanced by the lawyer defendants before this court. That being the case, principles of issue preclusion have no bearing on the matter at hand.

For the reasons stated above, the lawyers defendants' motion to dismiss is hereby granted. Although only the law firm defendants have moved to dismiss on the grounds of federal preemption, the analysis set forth herein would seem to apply equally to all the other defendants. For this reason, I will dismiss this case against the remaining defendants unless plaintiffs file appropriate pleadings opposing such action within ten

(10) days after the clerk's notice of this order.

So ordered.

January 26, 2004

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ROBERT J. LYNN
Chief Justice