

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JAMES WESLEY OWNBY, JR.,)	CIVIL ACTION NO. 3:02CV00034
)	
Appellant,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
JAMES GUY COHEN, <i>et al.</i> ,)	
)	
Appellees.)	
)	JUDGE JAMES H. MICHAEL, JR.

In the above-captioned matter, the appellant, James Wesley Ownby, Jr., appeals the decision of Judge William E. Anderson of the United States Bankruptcy Court for the Western District of Virginia to grant judgement to appellees James Guy Cohen and Jim Beck, Inc. The appellant is currently incarcerated. The court has thoroughly reviewed the parties' submissions to this court, the applicable law, and the entire documented record. On that review, the court finds that oral argument would not aid in the decisional process. For the reasons articulated in this memorandum opinion, the court affirms the judgment of the bankruptcy court and finds that appellant Ownby's assignments of error are meritless.

I.

In 1993, appellant Ownby and appellee Cohen purchased a mechanical contracting business, Jim Beck, Inc., in Charlottesville, Virginia. At the time of the purchase, Ownby and Cohen executed a Stockholders Agreement (the Agreement). In 1995, Ownby was arrested, and subsequently convicted, for his commission of various state and federal felonies, for which he is currently serving a prison sentence in the custody of the Virginia Department of Corrections. After Ownby's

conviction, Cohen invoked a mandatory buy-out provision in the Agreement.

On March 16, 1996, Jim Beck, Inc., filed for protection of Chapter Eleven of the United States Bankruptcy Code. On June 17, 1997, the company's Amended Plan of Reorganization was confirmed by the U.S. Bankruptcy Court for the Western District of Virginia. To that end, Jim Beck, Inc. was discharged of its obligations, including any claims regarding Ownby's equity interest in the company.

In January, 1998, appellant Ownby filed a civil action against defendants Cohen and Jim Beck, Inc. claiming breach of contract, fraud, and defamation. In September, 1998, this court granted the defendants' motion to dismiss the civil action. In October, 2000, Ownby initiated a similar civil action in the Circuit Court for the City of Charlottesville. This latter suit alleged various violations of the Agreement and other breach of contract claims. In particular, the suit contained a claim involving Ownby's equity interest in Jim Beck, Inc.

In November, 2000, the appellees timely removed the state court complaint to the U.S. Bankruptcy Court for the Western District of Virginia on the basis that Jim Beck, Inc. had been discharged of Ownby's claim and it desired to enforce the discharge injunction of 11 U.S.C. § 524(a). The bankruptcy court then reopened the company's bankruptcy proceeding. Shortly thereafter, Ownby filed a motion to dismiss defendant Jim Beck, Inc. and a request to transfer the case back to state court. The bankruptcy court denied the motion and retained the case in its entirety.

On September 7, 2001, the bankruptcy court entered a scheduling order that provided, in pertinent part, that "motions, if any, are to be filed so that they may be noticed for hearing and heard on November 19, 2001." The scheduling order also set a trial date of December 17, 2001. Appellant Ownby petitioned the court to allow him to attend the trial, but the bankruptcy court denied his

petition.

Appellant Ownby subsequently filed an untimely summary judgment motion. After the December 17, 2001 trial date, the bankruptcy court issued a written order denying Ownby's untimely motion for summary judgment and entering judgment in favor of Cohen and Jim Beck, Inc. The appellant then filed the instant appeal on January 22, 2002.

The court has jurisdiction of this case under 28 U.S.C. § 158 (West 2000 & Supp. 2001), which grants United States district courts jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court.

II.

The appellant first argues that the bankruptcy court improperly “allowed the defendants to transfer this case to the bankruptcy court from the state court.” Appellant's Brief, page 7. The appellant fails to cite any legal authority in support of his position.

28 U.S.C. § 1452 provides a mechanism for litigants to remove state claims to the bankruptcy court for the district where such civil action is pending if the latter court has jurisdiction over such claim. There is no dispute that the bankruptcy court in this matter has jurisdiction. The appellant's suit implicates the discharge injunction afforded Jim Beck, Inc. As the appellee argues, “[e]nforcement of that injunction is a core proceeding over which the bankruptcy court has original jurisdiction.” Appellee's Brief, page 3.

Once it had been established that the bankruptcy court has jurisdiction over Ownby's claims, either party had the right to remove the state court cause of action without the consent of the other party. *See, e.g., Creasy v. Coleman Furniture Corp.*, C.A.4 (Va) 1995, 763 F.2d 656. Put differently, the bankruptcy court did not “allow” the appellees to do anything. Rather, the removal

statute creates the right in any party to a state court proceeding to commence removal proceedings. *See, e.g., Fraidin v. Sturtz*, 68 Md.App. 693 (1986), A.2d 775. The appellees simply took advantage of their statutory right of removal.

The appellant also notes that this court, by order dated September 8, 1998, dismissed the same state claims that he now seeks to have removed back to state court. The appellant argues, therefore, that if the court thought that the state judiciary was the proper forum to litigate the claims in 1998, then it follows that the court should also remove the matter to state court now. Appellant Ownby, however, fails to consider that there are two distinct set of rules governing jurisdiction and removal.

Appellant Ownby's 1998 civil suit against the appellees alleged various RICO counts and other breach of contract claims. After this court dismissed Ownby's RICO counts, the plaintiff was left with a "fairly straightforward claim for breach of contract." September 8, 1998 Memorandum Opinion, page 16. 28 U.S.C. § 1367(c) provides that the district court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." To that end, the court explained that

[b]ecause the remaining counts involve questions of state law and there is no diversity, this court will dismiss the remaining counts for lack of jurisdiction. Nothing about this case directs this court to exercise jurisdiction to retain the state law claims when the case has not proceeded past the motion to dismiss stage.

September 8, 1998 Memorandum Opinion, at 16-17. Put differently, after the dismissal of the federal RICO counts, this court declined to exercise its discretionary jurisdiction to entertain the remaining state law claims.

Once the appellees removed the case back to federal court in 2000, however, a different set of rules applied. Neither the bankruptcy court nor the district court have authority under 28 U.S.C. § 1367 to send the case back to state court after the defendants properly removed the case to federal court. Rather, the decision of where to litigate was vested solely in the parties to the action. As noted earlier, once it was established that the bankruptcy court had jurisdiction of the appellant's claims, 28 U.S.C. § 1452 vested both parties with the right to remove the action to federal court. The appellees exercised their statutory right and properly removed the action to the federal court system. In that regard, unlike in 1998, this court has jurisdiction of the appellant's cause of action and cannot remand to state court a claim over which the bankruptcy court has original jurisdiction.

The appellant next contends that the bankruptcy court erred in dismissing his "Motion to Dismiss and Request Transfer," filed December 8, 2000. Again, the appellant fails to provide any legal support for his position. Ownby, instead, offers only his recitation of the facts of the case.

Federal Rule of Civil Procedure 41(a) provides, in pertinent part, that

an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

FED. R. CIV. P. 41(a) (West 2002).¹ If an answer, as here, or a motion for summary judgment has

¹ Because both branches of Rule 41(a) refer to the voluntary dismissal of "an action," the Second Circuit held that "the word 'action' as used in the Rules denotes the entire controversy, whereas 'claim' refers to what has traditionally been termed 'cause of action.'" *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953), *cert. denied* 73 S.Ct. 949, 345 U.S. 964. The court held, therefore, that a plaintiff may not dismiss one of several defendants under Rule 41(a), but instead must proceed under Rule 21. Although some other courts have followed the Second Circuit, the "sounder view" and the greater weight of judicial authority are to the contrary. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2362 (2d 1995). "It seems undesirable and unnecessary to invoke inherent power to avoid a limit on Rule 41(a) that is reached only by an overly literal reading of that rule." *Id.* To that end, the court is treating the appellant's motion to dismiss as a Rule 41(a) motion.

been served, the plaintiff no longer has the absolute right to dismiss and, unless all of the parties stipulate to dismissal, a plaintiff who wishes to dismiss must obtain an order of the court. In this case, defendant Jim Beck, Inc. did not stipulate to dismissal. The company, conversely, expressly argued against being dismissed by Ownby. The only way Jim Beck, Inc. could have been dismissed, therefore, is by order of the trial court pursuant to Rule 41(a)(2). The grant or denial of a dismissal motion under Rule 41(a)(2) is within the discretion of the trial court. To that end, the bankruptcy court did not error in denying the appellant's motion to dismiss defendant Jim Beck, Inc.

The appellant's third contention is that the bankruptcy court erred in denying his request for appointment of counsel. Specifically, the appellant argues that the bankruptcy judge "abused his discretion by refusing to offer any assistance" and violated the appellant's "constitutional right to access the court system." Appellant's Brief, page 9. Appellant Ownby's contention is unavailing.

The district courts have authority to appoint counsel to represent indigents under 28 U.S.C. § 1915(d). The statute provides, in pertinent part, that after the indigent files an affidavit stating his or her inability to pay for counsel, "[t]he court *may* request an attorney to represent any such person..." 28 U.S.C. § 1915(d) (West 2000) (emphasis added).

While § 1915(a) gives authority to "[a]ny court of the United States" to make such appointment, it is at least unsettled as to whether a bankruptcy court is a "court of the United States." A survey of the cases and relevant statutes supports the conclusion that a bankruptcy court is not a "court of the United States" as defined in 28 U.S.C. § 451. It follows, then, that § 1915 does not authorize bankruptcy courts to appoint counsel to represent indigent parties. *See, e.g., United States v. Kras*, 409 U.S. 434 (1973) (§ 1915 is not available in proceedings before the bankruptcy court).

Despite the Supreme Court's admonition in *Kras*, some bankruptcy courts have held that they

have authority to appoint counsel for indigent parties if the requisite affidavit showing grounds is filed by such litigants. *DuPage Boiler Works, Inc. v. CFC Capital Corp.*, 97 B.R. 437 (1989). Even assuming, *arguendo*, that the bankruptcy court had authority under 28 U.S.C. § 1915(d) to appoint counsel to represent the appellant in this matter, Ownby failed to submit an affidavit detailing his inability to pay for counsel.

Additionally, it is well settled that the appointment of counsel in a civil matter is a privilege and not a right. *Bowman v. White*, 388 F.2d 756, 761 (4th Cir. 1968), *cert denied*, 89 S.Ct. 214, 393 U.S. 891. The statute allowing for appointment of counsel is merely descriptive of the court's innate power, and makes such request discretionary on the part of the court but does not grant a statutory right to an individual to have counsel appointed in a civil action. *Bowman*, 388 F.2d at 761. Having reviewed the entire record, the court cannot find that the bankruptcy court erred in choosing not to appoint counsel to represent appellant Ownby.

The appellant's next contention is that the bankruptcy court erred in dismissing his motion for partial summary judgment without consideration. After a survey of the law involving summary judgment, the appellant summarily argues that "there are no issues of material fact and, as such, Plaintiff should be awarded Summary Judgment as to Count one as a matter of law." Appellant's Brief, page 14. The appellant, however, never explains why there are no issues of material fact. Additionally, the appellant's summary judgment motion was untimely as it failed to comply with the bankruptcy court's scheduling order.² In that regard, the bankruptcy court properly denied the

² By order dated September 7, 2001, the bankruptcy court prescribed that "if any motions are filed in this Adversary Proceeding, they may be noticed for hearing and heard on November 19, 2001." The appellant did not file his motion for summary judgment until November 21, 2001. Federal Rule of Civil Procedure 56(c), which pertains to summary judgment, provides that "[t]he motion shall be served at least 10 days before the time fixed for the hearing." The appellant's

appellant's motion for summary judgment.

Appellant Ownby next argues that the bankruptcy court erred “by refusing to order Ownby’s appearance at the pre-trial hearings and at the trial.” Appellant’s Brief, page 15. While the appellant’s assertion that federal courts have the discretion to order a prisoner produced in a civil case is accurate, it is also true that prisoners who bring civil actions have no absolute right to be present at any stage of the proceedings. *Price v. Johnston*, 334 U.S. 266 (1948). Nevertheless, federal courts have the authority to issue writs “necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). In conjunction with 28 U.S.C. § 2241, this authority extends to the issuance of a writ compelling the presence of a prisoner in court. Section 2241, in pertinent part, provides that a writ may be issued by “the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” 28 U.S.C. § 2241 (West 2000).

As a threshold matter, it is unsettled whether a bankruptcy court as an adjunct of the district court has independent authority to issue such a writ. *In re David C. Larson*, 232 B.R. 396 (Bankr. W.D.Wisc. 1999) (citing *In re Cornelious*, 214 B.R. 588 (Bankr. E.D.Ark. 1997) (finding no authority in bankruptcy court to issue writ of habeas corpus); *In re Bona*, 124 B.R. 11 (S.D.N.Y. 1991) (discussing the doubtful authority of bankruptcy courts to issue writs of habeas corpus)). Because of the questionable statutory authority of bankruptcy courts to issue writs of habeas corpus, the court cannot say that the bankruptcy court erred in refusing the appellant’s request to be present at the various hearings.

Even assuming, *arguendo*, the bankruptcy court had the power to issue a writ compelling

summary judgment motion, therefore, was untimely.

Ownby's presence, the court did not error in refusing to issue such a writ. The issuance of a writ of habeas corpus ad testificandum is committed to the discretion of the court. *In re David C. Larson*, 232 B.R. at 398 (internal citations omitted). The Seventh Circuit, in *Stone v. Morris*, 546 F.2d 730, 735 (7th Cir. 1976), articulated an eight-prong test that the court should consider when determining whether to compel a prisoner's presence at a court proceeding through a writ of habeas corpus ad testificandum:

- (1) The costs and inconvenience of transporting the prisoner from his place of incarceration to the courtroom;
- (2) Any potential danger or security risks which the presence of the prisoner would pose to the court;
- (3) Whether the matter at issue is substantial;
- (4) The need for an early determination;
- (5) The possibility of delaying trial until the prisoner is released;
- (6) The probability of success on the merits;
- (7) The integrity of the correctional system;
- (8) The interests of the inmate in presenting his testimony in person rather than by deposition.

Stone v. Morris, 546 F.2d at 735-36. "Because the issuance of the writ is discretionary, no one factor is dispositive of the analysis." *In re David C. Larson*, 232 B.R. at 399.

In the present matter, a careful consideration of the factors enumerated by the Seventh Circuit mitigates against the issuance of a writ directing the Virginia Department of Corrections to transport the appellant to hearings before the bankruptcy court. Several of the factors indicate that the

presence of appellant Ownby was unnecessary. Perhaps most importantly, the matter at issue is not substantial. In the cases in which the reviewing court decided to remand the case back to the trial court after a consideration of the eight factors, the matter at issue involved the civil rights of the plaintiff inmate. *See, e.g., Stone*, 546 F.2d 730 (the plaintiff inmate initiated a civil rights action against prison officials). Even the case relied upon by the appellant, *Muhammad v. Warden*, 849 F.2d 107 (4th Cir. 1988), involved a civil rights claim by the plaintiff inmate. In this matter, however, appellant Ownby filed a private cause of action against a former business partner. In his cause of action, the appellant failed to allege any violation of his civil rights. In that regard, the matter before the court is not “substantial.” As the appellees argue, Ownby “is simply trying to use government funds to facilitate prosecution of a private breach of contract claim.” Appellee’s Brief, page 5.

Second, there is little likelihood that the appellant’s action would have succeeded. After obtaining the protection of Chapter 11 of the U.S. Bankruptcy Code, Jim Beck, Inc. was discharged of its obligations, including any claims regarding the appellant’s equity interest in the company. Ownby provides no indication that he has any relevant evidence that would militate against the enforcement of the discharge injunction of 11 U.S.C. § 524(a). Third, although the appellant is proceeding pro se, his interests in appearing in person were slight. If Ownby had any documents relevant to the case, there seems no reason that he could not submit the documents without making an appearance in court.

Appellant Ownby’s final contention is that the bankruptcy court erred when it awarded costs to the defendants. The appellant again fails to offer any legal support for his argument. Federal Rule of Civil Procedure 54(d)(1) provides that “costs other than attorneys’ fees shall be allowed as of course to the prevailing party unless the court otherwise directs.” Rule 54(d)(1) expressly vests the

court with sound discretion, which extends to all civil actions. To that end, the bankruptcy court acted well within its discretion in awarding costs to the prevailing defendants.³

III.

For the foregoing reasons, the judgment of the bankruptcy court hereby is affirmed. An appropriate order shall this day enter.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

³ In fact, some courts have held that Rule 54(d)(1) dictates that costs may be denied to the prevailing party only when there would be an element of injustice in a cost award. *See, e.g., Cherry v. Champion International Corporation*, 186 F.3d 442 (4th Cir. 1999).

CHARLOTTESVILLE DIVISION

JAMES WESLEY OWNBY, JR.,) CIVIL ACTION NO. 3:02CV00034
Appellant,)
v.) ORDER
JAMES GUY COHEN, *et al.*,)
Appellees.)
) JUDGE JAMES H. MICHAEL, JR.

The bankruptcy appeal is before the court pursuant to 28 U.S.C. § 158(a). The appellant appeals the decision of the bankruptcy court entering judgment in favor of the defendants-appellees. For the reasons stated in the accompanying memorandum, it is accordingly

ADJUDGED, ORDERED AND DECREED

(1) that the decision of the bankruptcy court shall be, and it hereby is, AFFIRMED;

(2) that the Clerk of the Court hereby is directed to strike the present case from the docket of this court.

The Clerk of the Court is further directed to send a certified copy of this Order to United States Bankruptcy Judge, the Honorable William E. Anderson, and to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date