UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re:	:	
	:	Chapter 7
BARRY SISKIN,	:	Case no. 02-10373 (SMB)
	:	
Debtor.	:	

MEMORANDUM DECISION AND ORDER DENYING DEBTOR'S MOTION FOR REARGUMENT, OTHER, RELATED RELIEF, OR TO STAY THE ORDER FOR RELIEF

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STUART M. BERNSTEIN
Chief United States Bankruptcy Judge

By order dated January 26, 2006, the Court converted this case from chapter 11 to chapter 7. The debtor has now moved for reargument and reconsideration, to alter or amend the judgment, for a stay of the order for relief, and for relief from the conversion order. For the reasons that follow, his motion is denied.

BACKGROUND

The debtor is a New York attorney who filed a chapter 11 petition on January 28, 2002. According to the allegations in his current motion, the debtor handled a personal injury case, Woodson v. Mendon Leasing Corp., in the mid-1990s. He obtained an approximate $4 million default judgment against the driver of the motor vehicle involved in the underlying accident, and obtained a litigated judgment against the vehicle owner in excess of $2.9 million. The owner's insurer paid the latter judgment, and the debtor received a contingent fee of approximately $1 million, although half of the fee was paid to his trial counsel.

Thereafter, the owner's insurer successfully moved to vacate the $ 2.9 million judgment. By that time, the debtor had spent the attorneys' fees. The insurer then moved for an order of

disgorgement. The debtor filed his chapter 11 petition on the day before the disgorgement hearing, primarily to appeal the order vacating the judgment and to stay the disgorgement proceedings. The Appellate Division affirmed the order vacating the judgment.

On May 6, 2003, the New York Court of Appeals reversed the lower courts and reinstated the judgment. See Woodson v. Mendon Leasing Corp., 790 N.E.2d 1156 (N.Y. 2003). This ruling relieved the debtor of all of the reasons cited for filing the chapter 11 case. One would assume, therefore, that the debtor would immediately have moved to dismiss his case. This, the debtor did not do. Instead, he languished in chapter 11, ignoring the rules promulgated by the United States Trustee, the United States Congress, and this Court. For example just prior to the reversal by the Court of Appeals, Judge Blackshear imposed a monetary sanction against the debtor in the amount of $72,000, based upon his failure to abide by previous discovery orders. (ECF Doc. # 111.) The debtor is still paying off that award. According to the Government, the debtor regularly failed to file and/or pay his personal federal income, FICA and FUTA taxes prior to the petition, and post-petition, failed to pay his federal withholding, FICA and unemployment taxes (the debtor employs six people in his law office). The debtor also failed to file numerous federal tax returns post-petition. He similarly failed to file numerous New York tax returns, or filed returns without including the tax payment.[1] Many of the unpaid federal and state taxes are "trust fund" taxes which the debtor is required, by law, to collect from

[1] At the end of his moving affidavit, the debtor asked for the right to supplement the record to respond to the facts alleged in New York's joinder papers. (See Affidavit of Barry Siskin, sworn to Jan. 31, 2006, at ¶ 25) ("Siskin Affidavit") (ECF Doc. # 196.) The request is denied. New York filed its joinder one month before the January 26th hearing, and the debtor had plenty of time to respond. Moreover, the debtor does not contest the essential facts regarding non-payment of the post-petition withholding taxes asserted in New York's joinder.

his employees and turn over to the appropriate taxing authority. At oral argument, the debtor's lawyer attributed the non-payment of taxes to the need to pay the discovery sanction. (Transcript of hearing, held Jan. 26, 2006, at 7 ("Tr."); accord Siskin Affidavit ¶ 21).) In other words, the taxes are being used to fund the sanctions award. Finally, the debtor consistently failed to file his operating reports in a timely manner.

Despite these frequent failures, the debtor clings to chapter 11. He insists that the pot of gold at the end of this process is the unresolved claim against the insurer to collect the unsatisfied $4 million default judgment which, with accrued interest, currently totals $8 million. The trial has been scheduled frequently, and adjourned just as often. It is presently scheduled for April 2006. The debtor believes that if Woodson prevails, the fees generated by collection of the judgment, even after giving credit for the $2.9 million previously paid, will be sufficient to satisfy all of his creditors.

The Motion to Dismiss or Convert

The United States Trustee moved to convert or dismiss this case in February 2003. (ECF Doc. # 101.) The motion was apparently adjourned from time to time because it was still pending when I took over the matter after Judge Blackshear's retirement on March 31, 2005. At several adjourned hearings that I conducted, the debtor explained that the trial of the final Woodson matter was imminent, and that he needed some more time to file his missing federal tax returns.[2] I continued to adjourn the matter.

[2] In fact, the Government had filed a separate motion to dismiss or convert in December 2004, based primarily upon the debtor's failure to file his personal federal income tax

Prior to the adjourned hearing held on January 26, 2006, New York joined in the United States Trustee's motion. (ECF Doc. # 189.) New York argued that the debtor had not filed a plan or disclosure statement, the delay in doing so was unreasonable and prejudicial to the creditors, the debtor was unable to confirm or consummate a plan, and the debtor had failed to pay nearly $38,000 in post-petition withholding taxes. On the return date, the Court granted the motion, ruling:

> This case is about to enjoy its fourth birthday or anniversary.
>
> There has been no progress in the case. I know why the Debtor filed it, because he had problems with the IRS. But, whatever Chapter 11 is, it's not just some – simply a safe haven where people hang out hoping for things to improve.
>
> The Debtor has failed to pay administrative expenses, which will result in substantial prejudice to the Estate. He's a serial late filer of tax returns and operating reports. And under the circumstances, he has failed to adhere to the obligations imposed upon the Debtor and [sic] possession, which he willingly undertook when he was looking for protection from the IRS.

(Tr. at 11.)

The debtor has now moved for relief from the conversion order on a variety of procedural theories. The United States Trustee, the Government and the chapter 7 trustee oppose the debtor's motion.

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returns for the years 1998 through 2003. (See ECF Doc. ## 143-45.) The Government withdrew the motion after the debtor filed the missing returns. (See ECF Doc. # 190.) The debtor has still not filed his 2004 individual or fiduciary federal tax returns, or the FICA and withholding tax returns for the quarters ended September 30, 2002, December 31, 2003, March 31, 2004, September 30, 2004, December 31, 2004, March 31, 2005, June 30, 2005 and September 30, 2005. (Declaration of Paul de la Vega, dated Feb. 14, 2006)(ECF Doc. # 207.)

DISCUSSION

A. Motion for Reargument

Motions for reargument or reconsideration[3] are governed by Local Bankruptcy Rule 9023-1(a), BANKR. S.D.N.Y. R. 9023-1(a), which states:

> A motion for reargument of a court order determining a motion shall be served within 10 days after the entry of the Court's order determining the original motion, or in the case of a court order resulting in a judgment, within 10 days after the entry of the judgment, and, unless the Court orders otherwise, shall be made returnable within the same amount of time as required for the original motion. The motion shall set forth concisely the matters or controlling decisions which counsel believes the Court has not considered. No oral argument shall be heard unless the Court grants the motion and specifically orders that the matter be re-argued orally.

The movant must show that the court overlooked controlling decisions or factual matters "that might materially have influenced its earlier decision." Anglo-American Ins. Group, P.L.C. v. CalFed Inc., 940 F. Supp. 554, 557 (S.D.N.Y. 1996)(quoting Morser v. AT & T Information Sys., 715 F. Supp. 516, 517 (S.D.N.Y. 1989)); accord Banco de Seguros Del Estado v. Mutual Marine Offices, Inc., 230 F. Supp. 2d 427, 428 (S.D.N.Y. 2002), aff'd 344 F.3d 255 (2d Cir. 2003); Griffin Indus., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999); Farkas v. Ellis, 783 F. Supp. 830, 832-33 (S.D.N.Y.), aff'd, 979 F.2d 845 (2d Cir. 1992). "Alternatively, the movant must demonstrate the need to correct a clear error or prevent manifest injustice." Griffin Indus., 72 F. Supp. 2d at 368 (internal quotation marks and citations omitted); accord Banco de Seguros Del Estado, 230 F. Supp. 2d at 428.

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[3] The parties' motions refer to "reconsideration" while the Local Bankruptcy Rule 9023-1 refers only to "reargument." The terms are used interchangeably in this decision.

The rule permitting reargument is strictly construed to avoid repetitive arguments on issues that the court has already fully considered. Griffin Indus., 72 F. Supp. 2d at 368; Monaghan v. SZS 33 Assocs. L.P., 153 F.R.D. 60, 65 (S.D.N.Y. 1994); Farkas, 783 F. Supp. at 832. In addition, the parties cannot advance new facts or arguments; a motion for reargument is not a vehicle for "presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998)(discussing Rule 59); accord Griffin Indus., 72 F. Supp. 2d at 368 (discussing motions for reargument).

Although the parties have introduced a variety of new facts on this motion, the essential facts relied on in granting the motion were neither disputed nor overlooked – no plan or disclosure statement was filed in four years, the debtor repeatedly failed to file tax returns, pay taxes and file operating reports, and disregarded orders of this Court regarding discovery and the filing of operating reports. The debtor's failure to pay administrative taxes caused severe prejudice to the creditors. The Government has filed an administrative tax claim in the sum of $193,102.58, and as noted, New York is owed approximately $38,000 in post-petition taxes.[4]

The Court's ruling does contain one factual error, but the error is harmless and does not change the result. I was under the impression that the debtor filed this case to avoid an imminent seizure by the IRS. As it turns out, the debtor filed the case to avoid an imminent seizure by a creditor seeking disgorgement. It was the fact of the imminent seizure, not the identity of the

[4] The Government has also filed a pre-petition priority tax claim in the sum of $206,252.51.

seizing party, that was important.

The substance of the debtor's motion is that he should be permitted to complete the final Woodson matter. He believes that if Woodson prevails and recovers an approximate $5 million judgment ($8 million less the $2.9 million already paid), his one-sixth contingent fee will be enough to pay all of his creditors in full, or nearly in full.

The debtor made this same argument to me on several occasions at the various adjourned hearings, including the last one. I have lost confidence in the debtor's ability to bring this matter to a close, based primarily on the debtor's many previous unfulfilled promises that this matter was about to be brought to a close, and the manner in which he has performed his obligations as a debtor in possession. In addition, the debtor has retained trial counsel, and it is not even clear that his participation is necessary. Finally, the chapter 7 trustee can decide whether the estate needs the debtor to try the case or participate in the trial, and can distribute the estate's share of any recovery to the creditors.

B. The Motions for Reconsideration, to Alter or Amend the Conversion Order, or for Relief from the Conversion Order

The Federal Rules of Civil Procedure do not mention motions for reconsideration. Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999); 12 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 59.30[7], at 59-112 (3rd ed rev. 2005) ("MOORE"). Nevertheless, courts have generally held that regardless of the title, a motion filed within ten days of the entry of judgment is treated as a motion to alter or amend the judgment under FED. R. CIV. P. 59(e), while

one filed more than ten days after the entry of the judgment is treated as a motion for relief from the judgment under FED. R. CIV. P. 60(b). 12 MOORE § 59.30[7], at 59-112 to 59-114.

The debtor has not articulated a ground to alter or amend the conversion order, or to vacate it. The Court has already explained the reasons why the case was converted. The debtor has not shown that the Court was mistaken in its conclusion that the debtor failed to file a plan or disclosure statement after four years, failed to comply with the Court's discovery orders and orders directing the filing of operating reports, failed to file his various tax returns and/or pay his post-petition taxes, or that the substantial unpaid administrative taxes have caused prejudice to the estate and its creditors.

C. Motion for a Stay

Finally, the debtor seeks a brief stay of the conversion order to allow him to participate in the trial. According to his motion papers, the trial was scheduled for February 28, 2006. However, it has been rescheduled for April 25, 2006. The debtor's apparent theory for the stay request is that the final Woodson matter will bring in enough in fees to satisfy all or nearly all of his creditors.

Putting to one side the numerous conditions that must occur before the debtor sees any money from the litigation, there is no reason why the chapter 7 trustee cannot collect the money and make distribution in accordance with 11 U.S.C. § 726. In fact, given the debtor's many instances of non-compliance with the Court's orders and the federal and state tax codes, the

estate and its creditors are much better served by having the chapter 7 trustee, rather than the debtor, administer and distribute those funds.

Dated: New York, New York
February 22, 2006

/s/ *Stuart M. Bernstein*
STUART M. BERNSTEIN
Chief United States Bankruptcy Judge