ORDERED in the Southern District of Florida on July 14, 2022.

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

BERNSTEIN FAMILY REALTY, LLC,

Debtor.
_____/

Case No. 22-13009-EPK
Chapter 7

ORDER DENYING
"CREDITOR AND INTERESTED PARTY ELIOT BERNSTEIN CREDITOR AND ACTING BFR MANAGER MOTION FOR RECONSIDERATION"
AND DENYING IN PART
"CREDITOR AND INTERESTED PARTY ELIOT BERNSTEIN CREDITOR AND ACTING BFR MANAGER SUPPLEMENTAL MOTION FOR RECONSIDERATION AND RESPONSE TO TRUSTEE MOTION FOR DELAY AND PARTIAL RESPONSE TO LAST MINUTE MOTION BY IMPROPER PARTIES JOANNA SAHM AS ALLEGED REPRESENTATIVE OF WALTER SAHM"

Eliot I. Bernstein filed a motion seeking an order disqualifying the judge currently presiding over this chapter 7 case, vacating the order converting this case from chapter 11 to chapter 7, and reinstating the chapter 11 case before a new judge. ECF No. 44. Mr. Bernstein's three adult sons, who were the petitioners in this involuntary case, and his spouse, joined in the motion. ECF Nos. 36, 37, 38, and 39.

Mr. Bernstein also filed a document, docketed by the clerk three times, supplementing his motion for reconsideration of the order converting this case and asking that the entire case be abated or suspended, responding to a motion by the chapter 7 trustee to delay dismissal of this case, and opposing a motion to dismiss this case with prejudice. ECF Nos. 54, 55, and 56 (3 identical documents). To the extent these filings are in response to the *Trustee's Request to Delay Entry of Order of Dismissal* [ECF No. 40], they were considered at a hearing on July 13, 2022, and the Court determined to grant the trustee's motion, which will be addressed in a separate order. To the extent ECF Nos. 54, 55, and 56 are in response to the *Motion to Dismiss with Prejudice* [ECF No. 52], the Court will treat them as an objection to be considered at the hearing on that motion to dismiss, which will be set by separate order. To the extent ECF Nos. 54, 55, and 56 are intended to supplement Mr. Bernstein's motion filed at ECF No. 44, and also seek abatement or suspension of this entire case, those requests for relief are addressed in this order.

The Court held a hearing on Mr. Bernstein's requests to disqualify the presiding judge, to reconsider the order converting this case, and to abate or suspend this entire case, on July 13, 2022. For the reasons detailed below, the Court will deny all relief requested in Mr. Bernstein's motion at ECF No. 44 as supplemented by ECF Nos. 54, 55, and 56 (including the request for abatement or suspension of this entire case).

On April 19, 2022, Joshua Bernstein, Jacob Bernstein, and Daniel Bernstein filed an involuntary bankruptcy petition under chapter 11 against Bernstein Family Realty, LLC, the debtor in this case. ECF No. 1. In an attachment to the petition, they stated: "We are filing this Individual Petition against a company, BFR, LLC and are the sole Owners and Members of this Company owning the LLC through our Individual Irrevocable Trusts where we individually are the sole and only beneficiary of each such Trust." From the same attachment, it is apparent that the primary purpose of the involuntary petition was to stay

a pending foreclosure against the debtor's principal asset, a home in Boca Raton, Florida where the petitioners reside.

In the involuntary petition, the petitioners each stated a claim against the debtor in the amount of $77,411.00. However, from the attachment to the petition it appears that these sums represent "Capital Contributions" rather than "claims" within the meaning of 11 U.S.C. § 303(b). It is likely that none of the three petitioners was a proper petitioning creditor under that section. However, noting that the summons was issued and apparently served, and there being no response to the involuntary petition, the clerk entered an order for relief under chapter 11 on May 23, 2022. ECF Nos. 2, 6, 10.

The Court held a status hearing in this case on May 25, 2022. The hearing was attended by: all three petitioners and counsel making a limited appearance on their behalf; Mr. Bernstein; counsel for the United States Trustee; counsel for creditors Patricia Sahm and the personal representative of the estate of Walter Sahm, holders of a foreclosure judgment on the debtor's principal asset; counsel for Ted Bernstein as trustee of a trust that is the holder of a second mortgage; and Candice Bernstein, Mr. Bernstein's spouse and the mother of the petitioners. The Court expressed concerns about the filing and status of this case. Among other things, the Court noted that there was no matrix of creditors or schedules on file, meaning that no creditors had received official notice of the case and the United States Trustee was unable to convene a meeting of creditors. The Court also stated that the debtor, an entity, could not act without counsel and no counsel had appeared on its behalf. The Court continued the status hearing to the following week, June 1, 2022, and directed the debtor "to retain counsel to appear on its behalf at the continued hearing." ECF No. 19.

The same parties attended the continued status hearing on June 1, 2022. In addition, David Brown, Esq. appeared but stated that he had not been formally retained by

the debtor. Inger Garcia, Esq., who represented the petitioners, also addressed the Court. Following the continued status hearing, the Court entered an order setting a deadline of June 3, 2022 for the debtor to file its matrix of creditors, a deadline of June 13, 2022 for the debtor to file other documents required in the order for relief, and a deadline of June 3, 2022 for the debtor to file an application for employment of counsel and for such counsel to file a disclosure of compensation. ECF No. 22. In that order, the Court stated: "Failure to comply with the terms of this order may result in the conversion or dismissal of this case without further notice or hearing."

The debtor failed to file a matrix of creditors by the June 3, 2022 deadline. More than six weeks after imposition of the automatic stay on April 19, 2022, no creditor had official notice of the debtor's pending bankruptcy case. The United States Trustee was unable to convene a meeting of creditors as required by 11 U.S.C. § 341(a). This was a secret bankruptcy, putting creditors in the position of potentially taking actions in violation of the automatic stay that would be void under precedent in this circuit.

The debtor also failed to file an application to retain counsel by the June 3, 2022 deadline. The debtor was at that time proceeding in chapter 11, a component of the Bankruptcy Code under which the debtor, as debtor-in-possession, retains control over its own management and reorganization effort. As the Court had repeatedly stated, both in open court and in a written order, an entity such as the debtor cannot act other than through counsel, and counsel for a debtor-in-possession must be approved by the Court after the filing of an appropriate application and a disclosure of compensation. More than six weeks after the filing and service of the petition, and in spite of two orders specifically directing it to do so, the debtor still had not retained counsel.

On June 4, 2022, the United States Trustee filed an emergency motion to dismiss or convert this case. ECF No. 23. Citing the debtor's failure to comply with the Court's

deadlines, failure to provide information reasonably requested by the United States Trustee, failure to maintain adequate insurance, and gross mismanagement of the estate, the United States Trustee sought dismissal or conversion under 11 U.S.C. § 1112. Patricia Sahm and the personal representative of the estate of Walter Sahm, through counsel, joined in the motion and requested conversion rather than dismissal. ECF No. 27.

The Court held a hearing on the United States Trustee's motion to dismiss or convert on June 8, 2022. ECF No. 25. At the hearing, counsel for the United States Trustee noted that the debtor had yet to file a matrix of creditors and that the United States Trustee still did not have proof of insurance for the debtor and its property, nor had the debtor filed an application to retain counsel. Mr. Brown attended the hearing but, again, had not been formally retained by the debtor. After hearing argument from those present, the Court determined that there was cause to dismiss or convert this case for three independent reasons: (1) under section 1112(b)(4)(E) because the debtor had failed to comply with orders of the Court setting important deadlines; (2) under section 1112(b)(4)(H) because the debtor had failed to provide the United States Trustee with information she reasonably requested; and (3) under section 1112(b)(4)(C) because the debtor had failed to provide proof of insurance, of particular concern as the hearing took place at the start of hurricane season and the debtor's principal asset is a single family home in South Florida. The Court declined to rule based on the United States Trustee's argument of gross mismanagement on the grounds that such a ruling likely would require additional evidence. However, the Court clearly stated that there was cause for dismissal or conversion for the three independent reasons stated, each of which alone would be sufficient. Finally, consistent with section 1112(b), the Court determined that conversion rather than dismissal was in the best interests of creditors and the estate, noting that only the debtor's indirect equity owners, who had orchestrated the filing of the involuntary petition to avoid

continued state court foreclosure litigation, sought dismissal over conversion. On June 10, 2022, the Court entered its order converting this case to chapter 7. ECF No. 29. Michael Bakst was appointed as chapter 7 trustee that same day. ECF No. 30.

In the present motion, as supplemented, Mr. Bernstein seeks three forms of relief.[1] First, Mr. Bernstein asks the presiding judge to disqualify from this case. Second, Mr. Bernstein asks that the order converting this case be vacated and that the case be reinstated as a chapter 11. Third, through his supplements, Mr. Bernstein asks "for an Order that abates and suspends the case until the fraud is sorted out and a new Judge assigned setting a reasonable time to file Voluntary Chapter 11 or otherwise not dismiss out of Chapter 7 and afford reasonable time to cure any defects in Schedules."

Mr. Bernstein argues that the presiding judge must disqualify from this case because the Court once employed Ms. Berkley Sweetapple as a summer intern and Ms. Sweetapple's father, Robert Sweetapple, Esq., represents a party adverse to the debtor and Mr. Bernstein. At the hearing on July 13, 2022, Mr. Bernstein also argued that, in his view, certain counsel and parties in interest have lied to the Court or failed to disclose material concerns to the Court, those lies and failures constitute fraud on the Court, the presiding judge is thus a "material witness" to fraud on the Court, and so the presiding judge is required to disqualify from this case.

Mr. Bernstein's request for the presiding judge to disqualify from this case is governed by 28 U.S.C. § 455 and Fed. R. Bankr. P. 5004(a). Section 455(b) provides a list of specific instances requiring disqualification, none of which apply in this case. More

[1] Although Mr. Bernstein alleges that he is "a named likely Creditor in the original Chapter 11 Petition and now as a Creditor on the Creditor Matrix," it was unclear how Mr. Bernstein was a party in interest in this case at the time the Court converted this case to chapter 7. In the meantime, Mr. Bernstein claims to have been appointed manager for the debtor. However, because the debtor is now in chapter 7, the debtor's manager has no authority over the operation or management of the debtor.

broadly, section 455(a) requires a judge to recuse himself or herself "in any proceeding in which his impartiality might reasonably be questioned." In this context, the Eleventh Circuit Court of Appeals has explained: "The inquiry of whether a judge's 'impartiality might reasonably be questioned' under § 455(a) is an objective standard 'designed to promote the public's confidence in the impartiality and integrity of the judicial process.'" *Davis v. Jones*, 506 F.3d 1325, 1332 n.12 (11th Cir. 2007) (quoting *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980)). The Court considers "the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Cheney v. United States Dist. Court*, 541 U.S. 913, 924 (2004) (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (statement of Rehnquist, C.J.)). "Under § 455, the standard is whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality." *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1329 (11th Cir. 2002) (quoting *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000)); *see also*, *Byrne v. Nezhat*, 261 F.3d 1075, 1101 (11th Cir. 2001) (the lay observer must also be disinterested). Adverse rulings alone almost never provide a party with a sufficient basis for claiming that the court's impartiality is in doubt. *Ginsberg v. Evergreen Sec., Ltd. (In re Evergreen Sec., Ltd.)*, 570 F.3d 1257, 1274 (11th Cir 2009).

Ms. Sweetapple was an intern in the chambers of the presiding judge in the summer of 2013. The presiding judge does not remember having contact with Ms. Sweetapple since that time. Other than the fact that Mr. Sweetapple and other members of his firm have occasionally appeared in cases before this Court, the presiding judge has no "relationship with the Sweetapple family" as suggested by Mr. Bernstein in the present motion. The fact that the Court nine years ago employed as a summer intern the daughter of counsel to a party currently adverse to the debtor and Mr. Bernstein is not cause for the

presiding judge to disqualify in this case. Indeed, it is common, and acceptable, for former law clerks and interns to themselves appear in cases before the judge for whom they worked so long as such matters were not pending in chambers during the time of their employment and so long as no other rule of ethics governs.[2]

Nor do Mr. Bernstein's allegations that certain parties made fraudulent statements to the Court or failed to disclose material facts present cause for the presiding judge to disqualify. Such a requirement would mean that a judge could never award sanctions or otherwise remedy such a concern, but would need to first transfer the case to another judge. If the Court becomes convinced that any attorney or party has committed fraud before this Court, the Court will consider appropriate action including sanctions and/or reporting such persons or entities to relevant authorities. However, even if an attorney or party has committed fraud before the Court, that would not by itself require the presiding judge to disqualify himself.

In this case, the Court is confident that a reasonable observer informed of all the surrounding facts and circumstances would not doubt the presiding judge's impartiality. To the extent Candice Bernstein in her joinder complains that the Court, during the hearing on the United States Trustee's motion to dismiss or convert, refused to permit Mr. Bernstein to repeatedly raise concerns unrelated to that motion, this also does not rise to a level requiring disqualification. *See Liteky v. United States*, 510 U.S. 540, 555 (1994). Mr. Bernstein's motion for the presiding judge to disqualify from this case, as joined in by

[2] Although the Court is under no duty to comment on this fact, the Court notes that two of the presiding judge's former term law clerks work for the law firm representing the interests of Patricia Sahm and the personal representative of the estate of Walter Sahm in this case. Even if those former law clerks are involved in this particular case, that would not be cause for the presiding judge to disqualify himself.

Joshua Bernstein, Jacob Bernstein, Daniel Bernstein, and Candice Bernstein, will be denied.

Mr. Bernstein also seeks an order vacating the order converting this case from chapter 11 to chapter 7. To the extent Mr. Bernstein seeks this relief because he believes the presiding judge should be disqualified, such relief will be denied as there is no reason for this case to be transferred to another judge.

The remainder of Mr. Bernstein's argument takes issue with the Court's substantive ruling in converting this case from chapter 11 to chapter 7. Mr. Bernstein addresses a number of issues that, while discussed during the hearing on the United States Trustee's motion to dismiss or convert this case, were not relevant to or relied on in the Court's ruling. The Court determined to convert this case based solely on the reasons stated on the record as outlined above. In short, the Court converted this case because of the continued failure of the debtor itself to comply with orders of this Court and to fulfill its basic duties as a debtor-in-possession. In particular, the Court would have granted the United States Trustee's motion, and determined that conversion was the appropriate remedy, even if Patricia Sahm and the personal representative of the estate of Walter Sahm had not joined in the motion or presented argument at the hearing. Mr. Bernstein's allegations of fraud here and in state court litigation are not relevant to the Court's determination to convert this case.

There is no reason for the Court to reconsider its order converting this case. That portion of Mr. Bernstein's motion, as joined in by Joshua Bernstein, Jacob Bernstein, Daniel Bernstein, and Candice Bernstein, will also be denied.

Finally, Mr. Bernstein asks the Court to abate or suspend this entire case under 11 U.S.C. § 305(a)(1), apparently so that a different judge can provide rulings more to his

liking. As is obvious from the analysis above, the interests of creditors and the debtor would not be better served by suspension of this case. This request will also be denied.

For the foregoing reasons, it is hereby ORDERED and ADJUDGED as follows:

1. The *Creditor and Interested Party Eliot Bernstein Creditor and Acting BFR Manager Motion for Reconsideration* [ECF No. 44], as joined in by documents filed at ECF Nos. 36, 37, 38, and 39, and as supplemented by ECF Nos. 54, 55, and 56, is DENIED.

2. To the extent ECF Nos. 54, 55, and 56 are filed in response to the *Motion to Dismiss with Prejudice* [ECF No. 52], the Court will treat them as an objection to that motion.

3. If Mr. Eliot Bernstein files any further documents with this Court: (a) he is directed to reduce the length of the titles of such documents so that they do not extend to more than two lines of text; and (b) if he wishes to make or respond to multiple requests for relief, he must file a separate document seeking each type of relief or responding to each particular request filed by another party.

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Copies furnished to:
All creditors by the Clerk.