

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

Gomery & Associates, PLLC
_____ /

Debtor
_____ /

Case # 14-2289

Chapter 7

Honorable James W. Boyd

**CREDITOR FRED A. TOPOUS' COMBINED RESPONSE IN OPPOSITION TO
DEBTOR'S MOTION FOR RELIEF FROM STAY PERMITTING DEBTOR TO
PURSUE APPELLATE CASES**

Now comes creditor Fred A. Topous, by and through his attorneys of record, **Cooke Law, PLLC**, and for his Response in Opposition to Motion for Relief from Stay Permitting Debtor to and Pursue Appellate Cases, states as follows.

Overview

a. The State Action

The relationship and ultimate State lawsuit between Mr. Gomery and his law firm, Gomery and Associates, PLLC, and creditor Fred A. Topous, Jr., that lead to the judgment relevant to this bankruptcy action, is a complicated and arduous one. Probably, the easiest way to get a grasp on the relevant underlying facts and holding of the State court is to read the succinctly written opinion of the

presiding judge, Thomas G. Power, from his August 26, 2013 ruling on Plaintiff's Motion for Sanctions for Spoliation of Evidence and Frivolous Defenses (**Exhibit 4**).

b. The Bankruptcy Context

On April 2, 2014, Debtors Clarence K. Gomery and Gomery and Associates, PLLC filed for bankruptcy protection under Chapter 13 and Chapter 7 respectively seeking to discharge a debt owed to Fred A. Topous, Jr. arising from a judgment he obtained against them in Grand Traverse County Circuit Court in the amount of \$314, 629.27 on November 22, 2013. They have also listed an ownership interest in the Old Mitchell Creek Golf Course on Three Mile Road in Grand Traverse County on their schedules.

The judgment arose from an attorney-client relationship between Gomery and Topous, during which time attorney Gomery approached Mr. Topous about two separate issues that involved **fraud** on the part of Gomery and Gomery and Associates. The first was a proposal brought by Gomery to Topous concerning the purchase of the Old Mitchell Creek Golf Course through a tax sale for the amount of \$500,000. This, on its surface, seemed like a valuable investment as the property was valued, during the lawsuit, from between \$1.1 and \$1.7 million. When Topous appeared at Gomery's law office with the purchase money, Gomery proposed setting up a limited liability company, T&G Real

Estate Development Company, which would purchase and hold the property so that Mr. Topous could remain anonymous. Gomery presented a document to Topous and advised him to sign it. Gomery claimed that he would be a member of the company for the sole purpose of acting as the attorney and spokesperson for the purchase. Mr. Topous advanced the entire \$500,000 purchase price for the property.

This "Operating Agreement" was later manipulated by Gomery (as found by the jury and Court) to give Gomery a one-half interest in the property although Gomery paid nothing towards the purchase. The computer used to create the "Operating Agreement" was demanded during discovery and, despite several specific orders of the Court, was never produced.

The second incident was a demand by attorney Gomery for a \$25,000 cash payment. Gomery told Mr. Topous that this was compensation used to make a threatened lawsuit against Mr. Topous' brother Jeff and/or the Southside Hideout bar "go away". Gomery later changed his story to claim that the payment was for overdue legal bills owed by Mr. Topous. Neither of these stories was true.

Status

a. The Circuit Court Trial and Sanctions Judgment

The relationship between debtors Clarence K. Gomery and Gomery &

Associates, PLLC and debtor Fred A. Topous began 11 years ago in October of 2008 when licensed Michigan attorney Clarence K. Gomery represented Mr. Topous in a one car rollover accident in Kalkaska, MI. It culminated on May 15, 2013, after a six day jury trial before Grand Traverse County Circuit Court Judge Thomas G. Power, when the jury found, that attorney Gomery:

1. had knowingly violated the Michigan Rules of Professional Responsibility, MRPC 1.8 when he entered into a business relationship with Mr. Topous over the purchase of the Mitchell Creek Golf Course;
2. had committed legal malpractice by obtaining the signature of Mr. Topous on an "Operating Agreement" that gave him a one-half interest in the property despite having not invested one dollar towards the purchase;
3. had committed legal malpractice by obtaining a \$25,000 cash payment from Mr. Topous under the guise of settling a lawsuit that did not exist;
4. had committed **fraud** in obtaining Mr. Topous' signature on an "Operating Agreement" that gave Gomery a one-half interest in the Mitchell Creek property;
5. had committed **fraud** in obtaining a \$25,000 cash payment from Mr. Topous to settle a lawsuit that did not exist;
6. and had committed **silent fraud** as to both the Operating Agreement and the obtainment of a \$25,000 cash payment from Mr. Topous for a lawsuit that

did not exist.

The jury also awarded the Mitchell Creek property to Mr. Topous, cutting off any claim of ownership by debtor Gomery (even though he has listed an ownership interest in the golf course property in his schedule) and ordered the return of the \$25,000 cash payment fraudulently obtained by Gomery.

Attorney Gomery also filed a counter-claim against Mr. Topous alleging that Topous had interfered with Gomery's "business expectancy" of developing the Mitchell Creek property into a wedding banquet venue. The jury found No Cause for Action on the claim. The jury did award Gomery \$13,377.38 for personal property and other improvements he left at the property prior to the lawsuit. **(Exhibit 1, Judgment).**

After the jury verdict was rendered, debtor Topous filed his Motion for Sanctions Pursuant to MCR 2.625 and MCL 600.2591 and for Intentional Spoliation of Evidence against Gomery and Gomery and Associates.

MCR 2.625 states:

(A) Right to Costs.

(1) *In General.* **Costs** will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

(2) *Frivolous Claims and Defenses.* In an action filed on or after October 1, 1986, if the court finds on motion of a party that **an action or defense was frivolous, costs** shall be awarded as provided by [MCL 600.2591](#).

MCL 600.2591 allows the Court to assess costs in frivolous actions as follows:

(1) Upon motion of any party, if a court finds that a civil action or *defense to a civil action was frivolous*, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) **"Frivolous"** means that at least 1 of the following conditions is met:

(i) The **party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.**

(ii) The party had **no reasonable basis to believe that the facts underlying that party's legal position were in fact true.**

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

Judge Power granted the plaintiff's motion on August 26, 2013 and entered and order on September 9, 2013, ordering the assessment of all attorney fees and costs expended by plaintiff Topous to refute frivolous defenses launched by Gomery and

Gomery and Associates and for the intentional spoliation of evidence by the defendants in the following regard:

1. that Gomery's request for a \$25,000 cash payment from Topous was to settle an outstanding claim or was for attorney fees owed;
2. for Plaintiff Topous' efforts to obtain "the actual computer used to create, access, store or modify" the original digital file (containing the supposed "Operating Agreement");
3. for Plaintiff Topous' efforts to refute the claim by Gomery that an "Operating Agreement" produced by Gomery, containing the signature of Mr. Topous, was a legitimate document that properly gave him a one-half interest in the Mitchell Creek property. **(Exhibit 2).**

Judge Power ordered the submission of proofs for the amounts of attorney fees and costs that fell in to each of these categories pursuant to the mandates of *Smith v 481 Mich 519 (2008)*. On November 22, 2013, Judge Power issued a sanctions award against debtors Gomery and Gomery and Associates in the amount of \$314,629.27 plus statutory interest from January 12, 2012 until satisfied pursuant to MCL 600.6013(8). **(Exhibit 3)**

The transcript from Judge Power's ruling on August 26, 2013 is most illustrative for this Court's purposes both for ruling on this motion and for, ultimately, determining the true reason why debtors have sought this path and whether their debt to Mr. Topous is dischargeable in a bankruptcy action. **(Exhibit 4)**

Among other things the presiding Judge at the trial found:

"...that turned out to be and Mr. Gomery admitted that it was not true, a lie. And there was no truth to that at all [the \$25,000 cash payment demanded to settle a lawsuit]. He then claimed the \$25,000 was for legal work...[B]ut these invoices were manufactured way after the fact..." **(Exhibit 4 at pps 5,6)**

"...so it seems to me the Defendant knew there was no justification for the \$25,000, that **he had committed fraud**. This is not a matter where there is fraud claimed and he had a defense. **He basically knew he defrauded Topous on that point.**" **(Exhibit 4 at pps. 7, 8).**

"...Subsequently there were efforts to explore what the computer history of this document had been [the Operating Agreement]. However, the computer was not only not produced, misrepresentations were made to the Plaintiff's computer expert about which computers were the ones that might have produced this agreement.

That they specifically assured him one of these two. One of which apparently did not exist at the time... And so they knew they did not have it at that time and misrepresented it . Or more likely, they had it and it never got produced or was deep-sixed at some point after that. **But it was intentionally withheld. It was intentionally covered up..." (Exhibit 4, pps 9, 10)**

The Court continued:

"The Plaintiff's document examiner gave powerful testimony of evidence as to why he was confident that there had been key middle pages in the agreement, several pages in the guts of the agreement substituted, including the pages that provided for the interest of the parties, 50/50... and the defense document examiner...detailed examination confirmed pretty much what the Plaintiff's document examiner said. So there is strong evidence of page substitution.

So that, coupled with the—the withholding of the computer appears, therefore to establish the spoliation or withholding of evidence..." **(Exhibit 4 at pps. 9-11).**

"And he--- Defendant (Gomery) knew Plaintiff did not have a copy. And so that made it possible to make these changes. And, whatever they were, because there was an agreement signed, but we don't know what the original agreement said, because **it was fraudulently changed, to be honest with you. "** **(Exhibit 4 at p. 12)**

"We have to show that **Defendant knew that he was – engaged in a fraud** and was –was attempting to avoid being held responsible for it...However, in this case, we have some other evidence that indicates **Mr. Gomery knew he had defrauded Mr. Topous...** And here is this **Operating Agreement, which we now have strong evidence to show was actually fabricated** after the dispute occurred. And so that's an added fact over and above normal fraud claim." **(Exhibit 4 at pps 13,14)**

"In addition, we have Mr. Gomery's testimony, which I made notes of. Which reflected very poorly, I thought. **He was evasive. He played dumb**, claiming that he didn't know anything about anything. He didn't have much to do with drafting of the agreement... Had no idea what Dr. Gogolin's report had in it. Well, Dr. Gogolin was his computer expert. A very key person. I mean, **I did not find his testimony credible. He was not being truthful.** " **(Exhibit 4 at pps. 13, 14)**

"So I find that there was no reasonable basis in Mr. Gomery's mind to believe that his position that there was no fraud was true. He knew it wasn't true. **He knew he had misrepresented when he said the operating agreement gave half to him when he put up no money at all.**

And that he **knew that the agreement had been fraudulently manufactured** to support that version." **(Exhibit 4, pps 14, 15)**

b. Post trial Proceedings and Appeal

On July 29, 2013, Defendants Gomery and Gomery and Associates filed their appeal of the Judgment entered by the Court. As the Court had retained jurisdiction in the Judgment, the hearings on the sanctions order progressed as reviewed above. The defendants Gomery and Gomery and Associates, PLLC, filed a Motion to Stay Execution of the Judgment and for Appellate Bond on August 16, 2013. Defendant's requested a bond of \$12,000 be set by the Court representing the difference between the \$25,000 jury verdict awarded to Mr. Topous for the "cash payment" issue and the \$13,377.38 award to defendants on their counter-claim. Defendant's motion, however, completely ignored the \$314,629.27 sanctions award and the value of the Mitchell Creek property that the jury had awarded to Mr. Topous (\$1.1 million to \$1.4 million). Plaintiff Topous filed a written response requesting that the bond be set in the amount of \$1.8 million.

Thereafter, a series of adjournments of the motion hearing took place, principally, at the request of attorneys for Mr. Gomery, (8-26-2013, 1-6-14, 2-3-14, 3-3-14) while the issue of his appellate representation was resolved. Ultimately, Ms. Liisa Speaker, filed an appearance as Mr. Gomery's appellate attorney and requested another adjournment of the hearing then set for April 7, 2014. During email communication with Ms. Speaker, counsel raised the need for having the hearing as appellate briefs were nearly due and the matter had been pending since August of 2013. Counsel suggested obtaining a One

Million dollar bond and, if so, agreed to a stipulated stay. Ms. Speaker represented that if the motion hearing was adjourned to May 19th, Gomery would look into obtaining the \$1 million bond (**Exhibit 5**). Instead, on March 27th, counsel received a call from Mr. Deszi, also representing Mr. Gomery, indicating that if Mr. Topous did not release Mr. Gomery from the sanctions judgment and accept a quit claim deed from Mr. Gomery for the Mitchell Creek property, Gomery would file bankruptcy. On April 2nd, Mr. Gomery and his law firm filed for bankruptcy protection in this Court.

Eight days after filing for bankruptcy protection Clarence K. Gomery and Gomery and Associates, LLC petitioned this Court for relief from the automatic stay so they could pursue their appeal.

Law and Argument

The automatic stay implemented in bankruptcy proceedings is intended as a safe harbor for the debtor while he proceeds through the bankruptcy system. Once a bankruptcy action is filed, all actions by creditors must cease by operation of law (11 USC 362(a)). 11 USC 362(c) allows for the lifting of the automatic stay under specific conditions. The section is clearly geared to situations where creditors petition the Court to lift the stay. These motions must typically be for cause such as situations where a creditor's interest in subject property is not adequately protected due to, among other things, lack of adequate insurance or the debtor does not have an equity interest in the

property or the property is not necessary for effective reorganization. There is nothing in the rule that speaks to the debtor's ability to seek a lifting of the automatic stay.

Thus, on its face, the debtors' request is an anomaly. The "cause" given this Court is that the appellate action may be "dismissed" if the stay is not lifted and the debtors allowed to proceed with the appeal. A review of the docket at the Michigan Court of Appeals level reflects that both cases are being "held in abeyance" pending the outcome of the bankruptcy action. No substantiation has been provided by the debtor that this would in fact occur. "Cause", especially cause required to lift an automatic stay in a bankruptcy proceeding, would seem to require more than a mere assertion that the Michigan Court of Appeals "might" take action that would jeopardize an appeal that has already been perfected. Certainly, this Court would not grant a creditor's request under 11 USC 362(c) to lift the stay and allow execution on the debtor's estate because a pending appeal "might" be jeopardized. This would circumvent the very purpose of the stay.

The Court, in analyzing the request, must be mindful of what has occurred to this point and whether or not there needs to be further exploration of the reason for the bankruptcy filing. The filing must be a "good faith" filing. As the Court is aware the bankruptcy action can be dismissed for "bad faith" under 11 USC 707 (b)(3). This would include situations where the granting of relief would be an abuse of the Code, where the

petition has been filed in bad faith and, where, under the totality of the circumstances the debtor's financial situation demonstrates abuse.

It must be noted that the sanctions judgment was entered on November 22, 2013. No action was taken to proceed through bankruptcy until, some five months later, counsel refused to adjourn the Motion for Stay and to Set Appellate Bond for a fourth time. This bankruptcy action was filed 5 days before the hearing was to be held. The Motion to Lift the Stay was filed, before this Court, 3 days after the state court would have set a bond. Of course, were the Court to allow the stay to be lifted to allow the debtors to pursue the appeal, no bond would be necessary as creditor Topous is barred from executing on the judgment pursuant to 11 USC 362(c).

Thus, under the current strategy, Gomery and his law firm can continue to challenge the judgment of the state Circuit Court without posting bond. He can also attempt to discharge the very judgment he is appealing through this bankruptcy filing. This is a manipulation of the bankruptcy system by a licensed attorney.

Further, to allow Gomery to pursue his appeal while the bankruptcy action proceeds, puts the cart in front of the horse. There is a serious question as to whether or not the Sanctions Judgment, obtained as a result of the fraudulent defenses raised by Gomery to the lawsuit and as a result of the intentional actions of spoliation of evidence

even qualify as a dischargeable debt. Exceptions from discharge include civil judgments based on fraud and intentional acts, 11 USC sec 523 (a)(2)(A), (a)(4), (a)(6).

Finally, as the underlying state court action is res judicata, Gomery does not hold an ownership interest in the Mitchell Creek property he has listed on his schedules. Further, as a matter of law, the state Court found that he was deceptive, not credible and not worthy of belief, ie: he lied under oath on the central issues related to his attempt to claim a one-half ownership interest in the subject property and created fraudulent documents.

This Court should be cautious not to facilitate the debtors desire to avoid the consequence of their fraudulent and intentional acts. What is the true reason for filing this bankruptcy? The debtor believes that this awaits a full 2004 examination and supplementation to this Court. This process has begun but the 2004 examination was adjourned so that the debtor can provide a full response to the requested financial document disclosure.

In closing, it should be noted that debtors Gomery have already shown to this Court that their filings should be viewed skeptically. In the Chapter 13 case, Trustee Rodgers has filed an objection to the plan because Clarence K. Gomery did not disclose a 50% ownership interest in JAAC, inc., a long standing family cooperation that holds

title to his law firm and another building, among others. This results in nearly double the monthly income that Gomery originally claimed.

This is no fault of attorney Bare who has been completely compliant with discovery requests, however, it is the position of the creditor, that Gomery is not forthright with anyone, including his own attorney. Just as he was not forthright with his own computer expert and that of the Plaintiff, in the underlying state action, when he provided a computer to be searched by the experts for the "Operating Agreement" file, pursuant to an order of the Court. The computer provided by Gomery did not even exist at the time the "Operating Agreement" was signed (as referenced by Judge Power above).

Conclusion

As there appears to be no statutory basis for a debtor to request the lifting of an automatic stay under these circumstances and the request by debtors Gomery comes suspiciously after Gomery realized he would need to post a One Million dollar appellate bond in the state court action, the request should be viewed skeptically by this Court. In so doing the Court should note that the underlying judgment is based on the assertion of fraudulent defenses by Gomery in the state court action and the intentional withholding or spoliation of critical computer evidence. Further, there is evidence in the

state court record as well as a ruling by a state court judge, that Gomery's credibility is suspect, ie: he lied under oath and created fraudulent documents to cover his tracks.

A central piece of Plaintiff's evidence below is a recording of Gomery requesting Mr. Topous to take back a \$25,000 check Topous had brought to the law firm to pay the "settlement" and get cash so Gomery could avoid paying Federal taxes. Gomery, on the witness stand, testified that he had lied to his client to obtain the cash and that no such "settlement" had occurred. At trial Gomery attempted to claim that the payment was for overdue legal fees but, when invoices were demanded during the suit, Gomery produced invoices bearing computer creation dates long after the recorded conversation. This point will not be elaborated here but awaits further elaboration during creditor Topous upcoming motion to dismiss this filing. In any event, this was also touched on by Judge Power in Exhibit 4 and should heighten this Court's suspicion of Gomery's position.

Creditor Fred A. Topous respectfully requests this Honorable Court to deny debtor Gomery's Motion to Lift the Automatic Stay to Pursue Appeal and allow this

matter to proceed to a full development through the 2004 examination.

June 25, 2014

Respectfully,

A handwritten signature in black ink, appearing to read "C. K. Cooke", is positioned above a horizontal line.

Christopher K. Cooke (P35034)

Cooke Law, PLLC

12935 South West Bayshore Drive, Suite 350

Traverse City, MI 49684

chris@cookemail.com