

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
JAN 15 2012  
CLERK OF COURT  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re: ) Case No. 01-13290  
)  
)  
COIN COMMUNICATIONS, INC., ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
\_\_\_\_\_)  
)  
STEVEN DAVIS, TRUSTEE, ) Adversary Proceeding No. 01-1298  
)  
Plaintiff, )  
)  
v. ) **MEMORANDUM OF OPINION**  
)  
D.G.M. INVESTMENT, INC., et al., )  
)  
Defendants. )

**FACTS**

Defendant Derek Brown was the president of the Debtor, Coin Communications, Inc. Derek Brown's brother, Greg<sup>1</sup> Brown, operated a company called D.G.M. Investment, Inc. On August 7, 2001, the Chapter 7 Trustee filed this adversary proceeding against Derek Brown, Greg Brown, D.G.M. Investment, Inc., and Wireless Accessories alleging that the Debtor fraudulently transferred assets to the Defendants prepetition. (Docket 1, 4). Specifically, the Trustee averred that the transfers violated 11 U.S.C. § 548 and Ohio Revised Code § 1226, et seq. (fraudulent transfers) and that he may recover the assets for the estate under 11 U.S.C. § 550 (liability of transferee of avoided transfer). The last time any Defendant actually participated in the case,

---

<sup>1</sup> His name also appears in the record as "Graig."

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

through counsel or otherwise, was at the initial case management conference on November 1, 2001.

The Trustee has now filed a Motion for Sanctions under Bankruptcy Rule 7037 asking the Court to grant a default judgment in his favor based on the Defendants' complete failure to comply with the Trustee's discovery requests. FED. R. BANKR. P. 7037. (Docket 22). No Defendant responded to the Motion or requested a hearing.

The Trustee contends that dismissal is the appropriate sanction because several events show a willful intent by the Defendants to ignore this civil proceeding, including these:

1. The Trustee noticed the deposition of Greg Brown, the owner of D.G.M. Investment, and served him with a request for production of documents. Greg Brown failed to appear at the deposition and did not produce the requested materials. The Trustee filed a Motion to Compel him to attend the deposition and produce the documents. (Docket 14). To date, the deposition has not been taken and the documents requested have not been produced.

2. The Trustee also propounded document requests to D.G.M. Investment and Wireless Accessories, who did not comply with them. (Docket 14).

3. The Court granted the Trustee's motion to conduct a Rule 2004 examination of Derek Brown, the Debtor's president. (Docket 8, 9). Derek Brown failed to appear at the examination. The Trustee moved for an order finding Derek Brown in contempt for failing to comply with the 2004 Order.<sup>2</sup> (Docket 13). The Court held a hearing on the motion, but Derek Brown did not appear. The Court then issued an Order directing Derek Brown to appear and show cause why he should not be held in civil contempt for failing to appear. (Docket 21).

---

<sup>2</sup> The Trustee also filed a motion to hold Derek Brown in contempt for failing to appear at a records deposition, but he withdrew that motion. (Docket 10, 13, 16).

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

Derek Brown did not appear at the show cause hearing and the Court found him to be in civil contempt. (Docket 24).

4. Attorney Virgil Brown was retained to represent Greg Brown, D.G.M. Investment, and Wireless Accessories. (Docket 5). However, Attorney Brown filed a motion to withdraw from the case which the Trustee opposed. (Docket 11, 12). At the hearing on the motion to withdraw, Attorney Brown stated that Greg Brown told him that he did not need counsel because he would no longer participate in the litigation. For good cause shown, the Court granted Attorney Brown's motion. (Docket 20).

5. Similarly, Derek Brown had retained M. Taylor Warren to represent him in this matter but Mr. Warren also filed a motion to withdraw. The Court granted this motion after Mr. Warren explained that Derek Brown no longer wanted his representation. (Case No. 01-13290, Docket 25).

6. To date, no other attorney has appeared on behalf of any one of the Defendants and no individual Defendant has stated an intention to proceed *pro se*.

**DISCUSSION**

Federal Rule of Civil Procedure 37(b)(2) lists sanctions which a court may impose on a party who fails to obey an order to provide or permit discovery.<sup>3</sup> The Rule, which is applicable

---

<sup>3</sup> Rule 37 provides in pertinent part:

(b) Failure to Comply With Order.

\* \* \* \* \*

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

to adversary proceedings under Bankruptcy Rule 7037, authorizes a court to enter a default judgment where the sanctioned party fails to obey an order to provide or permit discovery.

*Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 366-67 (6th Cir. 1997). The Sixth Circuit considers four factors in assessing the appropriateness of dismissing a complaint on these grounds: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2)

---

Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
- (E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery; (3) whether the sanctioned party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered. *Id.* If the record reflects overall dilatory and contumacious conduct, dismissal is warranted. *Id.* at 368.

This case presents a clear record of neglect and disregard for judicial proceedings. The Defendants have unequivocally refused to cooperate in the discovery process. No Defendant has produced documents or appeared for deposition or examination when noticed. Greg Brown, the Debtor's president, has refused to comply with the Trustee's notice of deposition. Derek Brown has also refused to cooperate by failing to attend a 2004 examination on several occasions. Further, Greg Brown and Derek Brown have ignored orders from the Court instructing them to comply with the Trustee's discovery requests and to appear at depositions. Derek Brown has disregarded the Court's authority by failing to appear at hearings as ordered, to the extent that he has been found in civil contempt. In addition, Greg Brown informed his former attorney Virgil Brown that he would not participate any further in the litigation. D.G.M. Investment and Wireless Accessories have not complied with discovery requests or explained their failure to do so. This conduct rises to the level of willful failure to participate in discovery and in the general civil process.

The Trustee is clearly prejudiced by the conduct of the Defendants who simply refuse to engage in the discovery process. The Defendants' overall conduct inspires faint hope that this situation will improve. The Trustee has shown a prima facie case that he cannot prepare his case without discovery. Allowing the case to continue in this manner would unfairly impede the Trustee in preparing and presenting his case.

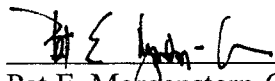
THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

The Court has given the Defendants multiple opportunities to show that they are serious about participating and defending themselves in this matter. However, the Defendants have not responded that they will comply with the rules for discovery or court orders. To the contrary, the Defendants have stated to their then-counsel that they will not proceed at all, they are no longer represented by counsel, and they have failed to appear before the Court on several occasions.

While the Court is cognizant that a default judgment is a severe remedy, the facts in this case warrant such a result. The Defendants have repeatedly been asked to honor their obligations and they have totally ignored these requests. The Court has already held one of the Defendants in contempt with no appreciable change in that individual's approach to his responsibilities here. The Defendants did not even appear in opposition to this Motion to enter default judgment against them. In sum, the Defendants' willful indifference to the discovery process, the prejudicial effect on the Trustee, and the strong likelihood that such conduct will continue makes it reasonable and just to grant the Trustee's Motion for Sanctions and enter Default Judgment against each of the Defendants under Rule 37.

For the reasons stated, the Trustee's Motion for Sanctions is granted. A separate Judgment will be entered reflecting this decision.

Date: 19 April 2002

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Mr. Greg Brown  
Mr. Derek Brown  
Kenneth Baker, Esq.  
D.G.M. Investment, Inc.  
Wireless Accessories

By: Joyce L. Gordon, Secretary  
Date: 4/19/02

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
- APR 19 2002  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 01-13290
	)	
COIN COMMUNICATIONS, INC.,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
STEVEN DAVIS, TRUSTEE,	)	Adversary Proceeding No. 01-1298
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>JUDGMENT</u></b>
	)	
D.G.M. INVESTMENT, INC., et al.,	)	
	)	
Defendants.	)	

For the reasons stated in the Memorandum of Opinion entered this same date, Default Judgment is entered on the Complaint in favor of Plaintiff Steven Davis, Trustee, and against Defendants D.G.M. Investment, Inc., Greg Brown, Derek Brown, and Wireless Accessories, individually and collectively.

IT IS SO ORDERED.

Date: 19 April 2002

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Mr. Greg Brown  
Mr. Derek Brown  
Kenneth Baker, Esq.  
D.G.M. Investment, Inc.  
Wireless Accessories

By: Joyce L. Gordon, Secretary  
Date: 4/19/02