

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
AMERICAN ARCHITECTUAL PRODUCTS * CASE NUMBER 00-43726
CORPORATION, *et al.*, *
* CHAPTER 11
*
Debtors. * HONORABLE KAY WOODS
*

M E M O R A N D U M O P I N I O N

AAPC Liquidation LLC, the successor in interest to Debtors under the joint plan confirmed in these cases ("AAPC"), filed a motion to hold CED Construction Partners, Ltd. ("CED") in contempt for violating the post-confirmation injunction and for sanctions thereon. CED responded with a brief and supplemental memorandum of law in opposition to AAPC's motion. AAPC replied with a supplemental response. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2).¹ The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTS

The following facts are undisputed. On December 22, 1998, CED entered into a subcontract with "Binnings Pan American." This contract required Binnings Pan American to install windows in an apartment complex in Orange County, Florida.

¹CED argues that the Florida Lawsuit, defined *infra*, is not a core proceeding. (CED's Supplement to Response ¶ 19.) This Court agrees, but that fact is irrelevant to the matter before the Court - a motion for contempt to enforce this Court's prior Confirmation Order, defined *infra* - which is, indeed, a core proceeding.

On December 18, 2000, Binnings Building Products, Inc. filed for protection under Chapter 11 of the Bankruptcy Code.² Prior to the bankruptcy filing, Binnings Pan American was a fictitious name or trade name owned by Binnings Building Products, Inc.

On January 31, 2002, this Court issued an order approving the sale to Binnings Acquisition Corp.³ of substantially all of the assets of Binnings Building Products, Inc., including the assets used in the business conducted through three trade names, including the "Binnings Pan Am" trade name. The approved sale also included the assumption of certain liabilities, specifically "all liabilities with respect to express or implied warranty claims for sales made by the Debtors, including claims for personal infury [sic] or damage to property other than products manufactured by the Debtors." (Debtors' Motion for Order Approving: (1) Asset Sale Agreement with Binnings Acquisition Corp.; (2) Sale of Property of the Estate Free and Clear of all Liens, Claims, and Interests; and (3) Assumption and Assignment of Certain Related Executory Contracts at 6, filed December 21, 2001.)

On July 22, 2003, this Court entered Findings of Fact, Conclusions of Law and Order Confirming Joint Plan⁴ (the "Confirmation

²This case was jointly administered with American Architectural Products Corporation as the lead case.

³Binnings Acquisition Corp. was created as a Florida corporation on or about December 3, 2001 for the sole purpose of purchasing substantially all of the assets of and to assume certain liabilities of Binnings Building Products, Inc.

⁴The Joint Plan was filed on April 30, 2003 by Debtors American Architectural Products Corporation, AAPC One Acquisition Corporation, AAPC Two Acquisition Corporation, AAPC Three Acquisition Corporation, AAPC Four Acquisition Corporation, AAPC Five Acquisition Corporation, AAPC Six Acquisition Corporation, American Glassmith, Inc., American Weather-Seal Company, Binnings Building Products, Inc., Danvid Window Company, Denver Window Company, Eagle & Taylor Company, Eagle Window and Door Center, Inc., Forte, Inc., Modern Window Corporation, Thermetic Glass, Inc., VinylSource, Inc., and WIG Liquidation Center (collectively, the "Debtors"). Debtors sought and obtained substantive consolidation. (See Confirmation Order ¶ 3.)

Order"). Pursuant to the Plan and Confirmation Order, the Court, among other things: (1) authorized the formation of AAPC; (2) ordered the substantive consolidation of the assets and liabilities of Debtors' estates; (3) authorized AAPC to take possession and title to the remaining assets of Debtors' estates; (4) provided that holders of class 4 claims that were or became allowed claims be made members of AAPC; (5) approved the appointment of Jonathon K. Schoenike ("Schoenike") as manager of AAPC; and (6) empowered AAPC to administer Debtors' assets and to pursue and defend claims for the benefit and on behalf of the members. In addition to the aforementioned, the Confirmation Order enjoins the pursuit of all claims and actions against Debtors outside the plan. The Confirmation Order specifically states:

Except as provided in the Plan or this Order, as of entry of this Order, all entities that have held, currently hold or may hold a Claim or other debt or liability that [is] unclassified by the Plan or that is classified by Article 4 of the Plan . . . are permanently enjoined from taking any of the following actions on account of any such Claims, debts, liabilities, Equity Related Claims, or terminated Equity Interests or rights: (a) commencing or continuing in any manner any action or other proceeding against the Debtors, the Realty LLCs, or the Liquidation LLC . . .; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree, or order against the Debtors, the Realty LLCs, the Liquidation LLC, or their respective property; . . . (e) commencing or continuing any action, in any manner, in any place, that does not comply with or is inconsistent with the provisions of the Plan or the Bankruptcy Code.

(Confirmation Order ¶ 5.)

On October 27, 2004 - two and half years after the sale to Binnings Acquisition Corp. and more than a year after entry of the Confirmation Order - CED filed a complaint in Florida state court

against five defendants, including Binnings Pan American, for alleged latent construction defects. (Case No. 20040653 CA03, Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida (the "Florida Lawsuit").)

On September 19, 2005, this Court conducted a telephonic status conference regarding AAPC's motion for contempt. Subsequent to that telephonic status conference, CED reluctantly dismissed Binnings Pan American from the Florida Lawsuit.⁵

II. AAPC'S POSITION

AAPC asserts that CED did not research the status of Binnings Pan American until after the complaint was filed. Upon conducting this research, CED discovered as early as December 1, 2004 that Binnings Pan American was no longer an operating company and might have filed for protection under the Bankruptcy Code. CED discovered this fact by investigating the history of Binnings Pan American and its former officers and directors. This investigation revealed a press release issued by Debtors' financial advisor, which stated that Debtors had filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code on December 18, 2000 and that they had completed the sale of substantially all of the assets of Binnings Pan American.

Furthermore, CED contacted Schoenike, AAPC's manager ("Manager"), in January 2005, who informed CED that Binnings Pan

⁵CED claims that it only dismissed "Binnings Pan American" from the Florida Lawsuit because of the "perceived ire of the Bankruptcy Judge at the telephonic hearing and a perceived inclination to award sanctions." (CED's Supplement to Response ¶ 13.) CED "perceived" ire where none existed and none was exhibited. The Court merely questioned CED about why no action had been taken to dismiss Binnings Pan American in the Florida Lawsuit. (AAPC's Reply ¶ 1.) Given CED counsel's mis-perception of the Court, the Court is inclined to believe counsel for AAPC that it was not "unprofessional, belligerent or threatening" to CED's counsel in the initial telephone call. (*Id.* ¶ 3.) Given the need of CED counsel to "quell his ire," (*see infra* n.7) perhaps he has a tendency to perceive ire too easily in others.

American filed for relief under the Bankruptcy Code. Despite this knowledge, CED served Manager with the complaint. After being served with the complaint, Manager informed CED's counsel that the assets of Binnings Pan American were sold during the bankruptcy, that CED was in violation of an injunction issued by this Court and that CED was proceeding against the wrong entity.

On April 11, 2005, CED served Manager with its motion for extension of time to serve process. Attached to the motion to extend was a voluminous set of documents that included Manager's social security number and other highly personal and confidential information about Manager.

On April 14, 2005, counsel for AAPC contacted CED, via telephone, to inform CED that it was acting in violation of the injunction and demanded that CED take the necessary steps to prevent any harm that might be caused by its disclosure of Manager's social security number and other confidential information.⁶ CED responded to this telephone call with a letter that, at best, can be characterized as arrogant and sarcastic.⁷ Subsequently, Manager requested the Florida court to redact the filings and the Florida court redacted such filings.⁸

⁶Counsel for AAPC reiterated its concerns with a letter to CED's counsel.

⁷The letter from counsel for CED states, "I am compelled to quell my ire," and then goes on to tell AAPC's counsel that he will not cooperate (despite knowing the request is to redact or seal confidential information) unless AAPC's counsel "find[s] the will to humble yourself." It is only then that counsel for AAPC "might find [CED's counsel] receptive" to the request. It is probably a good thing that CED's counsel "quelled his ire" since even in such a calmed state, he refers to counsel for AAPC as "dumb," "dumb like a fax [sic]," and makes other derogatory remarks. One can only wonder what invective the letter might have contained if counsel for CED had chosen to express his anger.

⁸By virtue of the Florida court's response to the request to redact the confidential information, it appears that such request was reasonable. CED's refusal to respond to the request is unfathomable.

III. CED'S POSITION

CED asserts that it erroneously filed an action against Binnings Pan American unaware it was a fictitious name owned by Binnings Building Products, Inc.⁹ CED commenced the suit unaware of Debtors' bankruptcy proceedings. At the time the lawsuit was commenced, Binnings Building Products, Inc. no longer did business as or owned Binnings Pan American. CED seeks only to pursue Binnings Pan American to the extent of its commercial liability insurance. Therefore, CED claims it has not sued a debtor in bankruptcy and no assets of a debtor are subject to CED's Florida Lawsuit.

On November 14, 2004, CED discovered that Binnings Pan American no longer conducted business at the address it had listed. As a result, CED conducted a search, through December 2004, as a result of which CED found David J. Wolfe and Schoenike, two former officers of Binnings Pan American. CED made numerous attempts to contact Schoenike to discuss effecting service on Binnings Pan American.¹⁰ On January 21, 2005, after failing to perfect service, CED submitted an alias summons to the Florida clerk of court for issuance on Binnings Pan American in care of Schoenike, as trustee. This summons was issued on January 28, 2005. In February 2005, service on Schoenike was effected and CED sent a letter to Schoenike requesting that he provide written notice of the claim to Binnings Pan American's commercial liability insurers.

⁹CED claims Binnings Pan American is a fictitious name that was not properly registered under Florida law.

¹⁰Interestingly, CED claims that Binnings Pan American, as a fictitious name and not a legal entity, "has no standing to bring an action." (CED's Supplement to Response ¶ 18.) CED admits that it sued a fictitious entity and needs to correct that error (*Id.*), but also alleges that the former officers of Binnings Pan American were "evading service" (*Id.* at 11 n.3), which allegedly accounted for CED's actions in maintaining the suit. This position is internally inconsistent since there would be no need for the former officers to evade service of a lawsuit to which Binnings Pan American could not be a proper defendant.

In March 2005, CED again contacted Schoenike. Schoenike informed CED's counsel that Binnings Pan American was implicated in the bankruptcy case of AAPC and that it had no intention of responding to the complaint. Schoenike informed CED's counsel that Binnings Pan American's assets and liabilities were purchased by Binnings Acquisition Corp. CED researched the bankruptcy records and confirmed these facts. CED further claims that Schoenike recommended that CED pursue its claim against Binnings Acquisition Corp. and to serve the complaint on Larry Powell, a former officer of Binnings Acquisition Corp. Schoenike did not inform CED that proceeding against Binnings Acquisition Corp. would violate a court order.

In April 2005, AAPC informed CED that if it attempted to prosecute claims against Binnings Building Products, Inc., the parent company of Binnings Pan American, it was acting in violation of a court order. CED states that the letter did not inform it that its pursuit of Binnings Acquisition Corp. would violate a court order.

CED claims that it has not taken any action against AAPC or Binnings Pan American but has only attempted to put Binnings Pan American's insurers on notice of CED's claim.

IV. RELIEF SOUGHT

AAPC seeks an order holding CED in contempt for filing the Florida Lawsuit against Binnings Pan American and pursuing service of process against Debtors despite having knowledge of the bankruptcy proceeding, for filing personal information about Schoenike, and for failing to take affirmative steps to dismiss Binnings Pan American as a party defendant in a case brought in violation of an injunction issued by this Court.

CED claims it has not sued a debtor in bankruptcy, has not violated an order of this Court, but if any violation occurred it was not done in bad faith.

V. DISCUSSION

A. **Statutory Authority to Exercise Civil Contempt Power**

Congress has granted this Court the right to exercise civil contempt power. This authority derives from 28 U.S.C. § 157 and 11 U.S.C. § 105. Section 157 of Title 28 sets forth procedures for bankruptcy judges to hear and determine cases under Title 11. Section 157 of Title 28 states:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

Section 105 of Title 11 allows the court to issue and enforce orders necessary or appropriate to carry out the provisions of Title 11.

This Section provides, in pertinent part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

. . .

(c) The ability of any district judge or other officer or employee of a district court to

exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

11 U.S.C. § 105.

The plain meaning of these provisions grant this Court the authority to issue any order necessary and appropriate to carry out the provisions in the Bankruptcy Code, which includes the power to issue civil contempt orders. The weight of authority supports this proposition. See, e.g., *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278 (9th Cir. 1996); *Mountain Am. Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444 (10th Cir. 1990); *Kellogg v. Chester*, 71 B.R. 36 (N.D. Tex. 1987); *Better Homes of Va., Inc. v. Budget Serv. Co., (In re Better Homes of Va., Inc.)*, 52 B.R. 426 (E.D. Va. 1985); *Dubin v. Jakobowski (In re Stephen W. Grosse, P.C.)*, 84 B.R. 377 (Bankr. E.D. Pa. 1988); *Miller v. Mayer (In re Miller)*, 81 B.R. 669 (Bankr. M.D. Fla. 1988).

B. Criteria for Civil Contempt

The purpose of a civil contempt order is to coerce compliance with a court order or to compensate another party for the contemnor's violation. *Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 612 (5th Cir. 1997). It is a well recognized principal that an award of monetary damages, in the form of attorneys' fees and costs, is an appropriate form of civil contempt sanction. *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627 (6th Cir. 2000).

A party should not be sanctioned for contempt where he has made a genuine good-faith effort to comply with the court order and any failure to do so is not his fault. *Balaber-Strauss v. Markowitz (In re Frankel)*, 192 B.R. 623, 627 (Bankr. S.D. N.Y. 1996). In other words, to award monetary damages, a court must find that the contemnor was on notice that his conduct violates a court order and that the contempt was willful. See *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074 (9th Cir. 2000); *In re San Angelo Pro Hockey Club, Inc.*, 292 B.R. 118 (Bankr. D. Tex. 2003).

"A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of non-compliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply." *In re Frankel*, 192 B.R. at 628 (citations omitted).

The Court will first examine whether the *Frankel* test for the imposition of sanctions is met in the instant circumstances. First, is the order that CED failed to comply with clear and unambiguous. The answer to this question is a definite "yes." CED admits that "[i]f CED had actually sued Binnings Building Products, Inc., CED agrees it might be in violation of this Court's Order." (CED's Supplement to Response at ¶ 24.) CED is somewhat disingenuous because such action would definitely be in violation of the Court's order, but the admission is there nonetheless. CED understood the order; there is no question that the Confirmation Order is clear and unambiguous.

Next, is the proof of noncompliance clear and convincing? Assuming that CED did not have knowledge of the AAPC bankruptcy

proceedings at the time it initiated the Florida Lawsuit in October 2004, the initiation of the lawsuit would not have been willful conduct that would warrant the imposition of sanctions. The initiation of the lawsuit, however, is not the only conduct of CED that constitutes noncompliance with the Court's Confirmation Order.

CED argues that it did not sue one of the Debtors and that by naming Binnings Pan American it did not violate the injunction in the Confirmation Order. CED's logic is that although Binnings Building Products, Inc. is a debtor and that it undisputedly did business under the trade name of Binnings Pan American, the Florida Lawsuit does not violate the Court's injunction because a fictitious entity cannot be sued. The Court finds CED's reasoning to be circular. Binnings Building Products, Inc. is unquestionably one of the consolidated Debtors to which the injunction in the Confirmation Order applies. Binnings Pan American was a trade name pursuant to which one of the Debtors operated its business. Thus, the Florida Lawsuit naming Binnings Pan American and served upon AAPC's Manager violated the express language of the Confirmation Order injunction. CED essentially admits this in contending that it refused to dismiss Binnings Pan American for months in the hope that AAPC's Manager would put Debtors' liability insurance carrier on notice.

After the sale of substantially all of the assets of Binnings Building Products, Inc. to Binnings Acquisition Corp., the trade name of Binnings Pan American no longer belonged to Debtors. If CED actually intended to sue Binnings Acquisition Corp., the current owner of Binnings Pan American, CED should have dismissed the "trade name" defendant and named the proper defendant. This CED failed to do. Accordingly, it appears that CED did, indeed, intend

to maintain the Florida Lawsuit against Debtors. CED did more than merely name Binnings Pan American as a defendant in the Florida Lawsuit; CED sought and obtained service of process on Schoenike, who is a representative of Debtors.

CED maintains that this entire dispute would not exist if the former officers of Binnings Pan American had not attempted to evade service of process. (CED's Supplement to Response at 11 n.3.) The injunction also applies to "any officer or director or other Person acting as a representative or otherwise on behalf of the Debtors." (Joint Plan at 27.) Here, CED violated the injunction by serving the summons and complaint on Binnings Pan American, care of Schoenike, as trustee. By such action, CED served Debtors with the summons and complaint. After learning that Binnings Pan American was owned by an unrelated third party, CED took no action to clarify the Florida Lawsuit and/or seek to name an appropriate defendant and effect proper service.

Indeed, CED even refused to seek to seal or redact the personal information about Schoenike that it had filed with the Florida court. Even if CED was merely republishing such information,¹¹ CED was aware that AAPC and Schoenike considered such information to be highly confidential, which would be true of any reasonable person given the possibility of identity theft. At that time CED knew that Schoenike was not related to and could not help it obtain the relief that it sought, yet it refused to consider the request to redact or seal such information unless counsel for AAPC

¹¹CED may be correct that it was merely republishing information that was publicly available on the Internet. The Court is not in a position to know if that is accurate.

"[found] the will to humble [him]self."¹² CED's actions in refusing to clarify the Florida Lawsuit after it became aware of the AAPC bankruptcy cases and the relationship of Binnings Pan American thereto demonstrates clear and convincing proof of noncompliance.

The third prong is whether the party has diligently attempted in a reasonable manner to comply. As set forth above, CED did not take any steps to comply with the Court's Confirmation Order until after the telephonic status conference on September 19, 2005 - approximately six months after it had full knowledge of the pertinent facts. Subsequent to that time, CED has dismissed Binnings Pan American from the Florida Lawsuit.

Assuming that CED had no knowledge of the AAPC bankruptcy proceedings when it filed the Florida Lawsuit in October 2004, there would not be the requisite willfulness to impose sanctions for the initiation of that lawsuit. After CED learned of the bankruptcy proceedings, however, it maintained the Florida Lawsuit and, for months, took no action to dismiss Binnings Pan American until it felt that it had to do so because this Court might impose sanctions. Thus, it appears that all three elements necessary for the imposition of sanctions exist.

VI. CONCLUSION

The imposition of sanctions is within the discretion of the Court. Based on the record, it appears that CED did not knowingly violate the Court's injunction when it initiated the Florida Lawsuit.

¹²CED seems to think that the "true motive" of the motion for contempt is the fact that "CED had attempted to serve Mr. Schoenike, erroneously it turned out, as an officer of Binnings Pan American." (CED Supplement to Response ¶ 28.) Even if this is true, it does not make the motion for contempt baseless. Indeed, it is the very fact that CED served Schoenike that a clear violation of the Court's Confirmation Order occurred.

It also appears that had counsel for CED not been so difficult, this matter could have been resolved short of AAPC filing the motion for contempt. Given that CED has now complied with the Court's injunction by dismissing Binnings Pan American, any order regarding civil contempt would not be for the purpose of coercing compliance with the order. The only damages at issue appear to be the attorneys' fees incurred by AAPC in bringing this motion for contempt; neither Debtors nor Schoenike allege other monetary damages. Based upon CED's conduct, this Court finds the imposition of civil contempt to be proper. This Court orders CED to refrain from taking any action in the Florida Lawsuit or elsewhere that would violate the Court's Confirmation Order or any other order of this Court. This Court further orders CED to reimburse AAPC the lesser of Three Thousand Dollars (\$3,000.00) or AAPC's actual attorneys' fees.

An appropriate order will enter.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 00-43726
AMERICAN ARCHITECTUAL PRODUCTS *
CORPORATION, *et al.*, * CHAPTER 11
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Debtors. * HONORABLE KAY WOODS
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O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, the motion of AAPC to hold CED in contempt for violating the post-confirmation injunction and for sanctions is granted. This Court orders CED to refrain from taking any action in the Florida Lawsuit or elsewhere that would violate the Court's Confirmation Order or any other order of this Court. This Court further orders CED to reimburse AAPC the lesser of Three Thousand Dollars (\$3,000.00) or AAPC's actual attorneys' fees.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE