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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

JON C. VASILACOPULOS,

Appellant,

vs.

ALAN V. FUNK, et al.,

Appellees

82C-01031

MEMORANDUM DECISION AND ORDER

JON C. VASILACOPULOS,

Appellant,

vs.

ROBERT D. MERRILL, et al.,

Appellee.

Civil No. 87-C-0072G

This matter came before the court on appeal from the United States Bankruptcy Court. The appellant, Jon C. Vasilacopulos, acting pro se, appealed the United States Bankruptcy Court's February 18, 1987 order denying appellant's motions to remove VanCott, Bagley, Cornwall & McCarthy as counsel for the bankruptcy trustee, and to remove the trustee, Main Hurdman, from the estate of the debtor. Appellees Alan V. Funk, et al. and Robert D. Merrill, et al. were represented by the law firm of VanCott, Bagley, Cornwall & McCarthy. Legal memorandum were submitted on behalf of the parties. Oral argument was not

requested, and the matter was taken under advisement. The court now being fully advised, sets forth its Memorandum Decision and Order.

FACTUAL BACKGROUND

On April 29, 1982, five months after appellant Vasilacopulos was arrested by the State of Utah and charged with 20 counts of felony theft by deception, an involuntary petition in bankruptcy was filed against Jon C. Vasilacopulos dba Vasilacopulos & Assoc. pursuant to Chapter 7 of the Bankruptcy Code. The petitioning creditors determined that it was in the best interest of the estate to convert the case from Chapter 7 to Chapter 11. A copy of Motion to Convert was mailed to Vasilacopulos at his home address on October 7, 1982, and on October 8, 1982 a copy of an Affidavit in Support of the Motion to Convert was mailed to Vasilacopulos. Petitioning creditors were unable personally to serve Vasilacopulos with the Chapter 7 petition and other documents because of his attempts to flee the state and refusal to make his whereabouts known, so the Bankruptcy Court issued an order allowing service by publication. The Order for Relief was entered on October 13, 1982, a copy of which was mailed to Vasilacopulos at his home address. On October 15, 1982, the Bankruptcy Court entered an Order converting the case to Chapter 11 and appointed Main Hurdman as Trustee.

In April 1983, the law firm of VanCott, Bagley, Cornwall & McCarthy (hereinafter "VanCott") was employed by the Trustee, Main Hurdman, as its general counsel. A conflicts search by VanCott had shown no conflict of interest in representing the trustee of the Vasilacopulos estate.

On August 9, 1984, the Trustee initiated litigation in the Bankruptcy Court against Val Barton and Lynn Ferrin, two former employees of Vasilacopulos, to recover fraudulent transfers. The suit remained dormant until 1985 at which time VanCott attorneys working on the Vasilacopulos bankruptcy discovered that other members of the firm had previously represented Barton and Ferrin from October 27, 1981 through November 17, 1981 in connection with a proposed purchase of the Vasilacopulos diamond business.

Upon realizing that a conflict of interest might exist, VanCott bankruptcy counsel discussed the matter with Alan Funk, the responsible partner for the Trustee, and Barton and Ferrin. The present and former clients were informed that attorneys working on the Vasilacopulos bankruptcy were totally unaware of the prior representation and at no time had they seen any work product or discussed the matter with the attorneys who had worked with Barton and Ferrin. Barton and Ferrin were represented by independent counsel, and after full review VanCott was informed that they would waive any conflict of interest and had no

objection to VanCott continuing to represent the trustee. The trustee determined that the lawsuit against Barton and Ferrin would not be adversely affected by the prior representation and agreed to waive any conflict. The Bankruptcy Court entered a factual finding that at the time VanCott was employed by the Trustee to act as general counsel, the firm's bankruptcy counsel was unaware of the firm's prior representation of Barton and Ferrin. The Bankruptcy Court also found that immediately after the prior representation was discovered, it was fully disclosed to the Trustee and Barton and Ferrin and that both the present and former clients consented to the firm's continued representation of the Trustee and waived any potential conflict.

On September 18, 1986, Vasilacopulos, acting pro se, filed a motion with the Bankruptcy Court to remove VanCott as counsel for the trustee on conflict of interest grounds. On November 24, 1986, Vasilacopulos filed a Motion to Remove the Trustee, Main Hurdman, from the estate of the debtor on grounds that inadequate notice was given of the conversion from Chapter 7 to Chapter 11 bankruptcy. The Bankruptcy Court issued a written Order denying Vasilacopulos' Motions on February 18, 1987.

Vasilacopulos filed a notice of appeal of the Bankruptcy Court Order denying the appellant's motion to remove trustee's counsel from the estate of the debtor, and a separate notice of appeal of the Bankruptcy Court Order denying the

appellant's motion to remove the trustee from the estate of the debtor. This court consolidated the appeals so that both are here under consideration.

STANDARD OF REVIEW

The Bankruptcy Rules, adopted by the United States Supreme Court pursuant to 28 U.S.C. § 2075, govern bankruptcy appeals. Bankruptcy Rule 8013 sets forth the appropriate standard of review. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Accordingly, district courts accept the factual findings of the bankruptcy court unless they are clearly erroneous. In re Herd, 840 F.2d 757, 579 (10th Cir. 1988); In re Branding Iron Motel, Inc., 798 F.2d 396, 399 (10th Cir. 1986). The bankruptcy court's legal determinations, however, appropriately are reviewed de novo. In re Herd, 840 F.2d at 759.

MOTION TO REMOVE TRUSTEE'S COUNSEL FOR CONFLICT OF INTEREST

Vasilacopulos claims that his motion to remove VanCott as counsel for the Trustee on the basis of conflict of interest was improperly denied. He alleges that VanCott cannot zealously represent the trustee in an action against Barton and Ferrin because the two former Vasilacopulos employees had previously been represented by other attorneys in that firm.

Courts have generally applied a "substantial relationship" test in determining whether matters are comparatively similar for purposes of disqualification of counsel in cases involving subsequent representation against former clients.[1] Under the "substantial relationship" standard, the court examines the nature, similarities, relationship and other relevant aspects of the attorney's former and subsequent representation. Both the Tenth Circuit[2] and the Utah Supreme

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[1] See Bodily v. Intermountain Health Care Corp., 649 F.Supp. 468, 473 (D. Utah 1986).

[2] In Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985) (emphasis added) the Tenth Circuit observed:

> The merits of this disqualification motion depend on whether a substantial relationship exists between the pending suit and the matter in which the challenged attorney previously represented the client. "Substantiality is present if the factual contexts of the two representations are similar or related."
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> Once a substantial relationship has been found, a presumption arises that a client has indeed revealed facts to the attorney that require his disqualification. The majority of circuits that have considered the issue have held this presumption to be irrebuttable. We agree. The presumption is intended to protect client confidentiality as well as to avoid any appearance of impropriety.

See also, In re Corrugated Container Antitrust Litig., 659 F.2d 1341, 1346 (5th Cir. 1981).

Court[3] recognize the application of the "substantial relationship" test to cases of subsequent adverse representation of a former client. Also, Rule 1.9 of the Utah Rules of Professional Conduct, which this court has adopted,[4] prohibits a lawyer from representing a client in a matter substantially related and adverse to the interests of a former client unless

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[3] The Utah Supreme Court, in Margulies v. Upchurch, 696 P.2d 1195, 1202 (Utah 1985) (emphasis added) said:

> Canon 4's prohibitions against disclosure of client confidences and secrets have generally been interpreted to forbid an attorney from representing a client against a former client in a matter substantially related to the former client's representation.

[4] The United States District Court for the District of Utah has incorporated as a rule of court the Code of Professional Conduct or other ethical rules. Rule 1(g) of the Civil Rules of Practice of the United States District Court for the District of Utah states:

> The standards of conduct of the members of the bar of this court, . . . in a particular case shall be those prescribed by the Utah Code of Professional Responsibility and amendments thereto and revisions thereof and by the Code of Professional Responsibility approved by the Judicial Conference of the United States.

The Tenth Circuit Court of Appeals, in E.E.O.C. v. Orson H. Gygi Co., 749 F.2d 620, 621 n. 1. (10th Cir. 1984), recognized that the above quoted rule of practice incorporates both the state and national codes of professional responsibility and makes both binding on counsel before this court. Effective January 1, 1988, the Utah Supreme Court adopted the Model Rules of Professional Conduct in substitution of the Model Code. The Model Rules were approved by the House of Delegates of the American Bar Association in 1983.

the former client consents.[5] This prohibition is extended to the lawyer's firm by Rule 1.10(a).[6]

This court finds no violation of law governing lawyers or violation of ethical rules in this matter. In this regard, the court is satisfied that Barton and Ferrin were represented by VanCott in a matter not substantially related to the pending bankruptcy proceeding. Barton and Ferrin consulted that firm for a very short time (October 24-November 17) regarding their proposed purchase of the Vasilacopulos diamond business in 1981. That representation had nothing to do with the bankruptcy

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[5] Rule 1.9 provides: "A lawyer who has formerly represented a client in a matter shall not thereafter:

> (a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

The Model Code and Model Rules are substantially similar in addressing the conflict of interest problem here. Canon 4 of the Model Code states that "a lawyer should preserve the confidences and secrets of a client." The canon applies to situations in which an attorney represents an interest adverse to a client he has previously represented. In such a situation the applicable ethical rule provides that a lawyer shall not knowingly "use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after a full disclosure." DR 4-101(B)(3).

[6] "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2." Utah Rule of Professional Conduct 1.10(a).

proceeding which began in 1982. Also, when the facts were discovered full disclosure was made to both the present and former clients by the VanCott firm, and waivers of the conflict, if any, were obtained and informed consent given. Under these circumstances, the Bankruptcy Court properly denied the appellant's motion to remove the trustee's counsel.

MOTION TO REMOVE TRUSTEE

Vasilacopulos contends that the Chapter 11 trustee, Main Hurdman, should be removed because the notice and hearing requirements set out in the Bankruptcy Rules were violated when the bankruptcy case was converted from Chapter 7 to Chapter 11. The trustee contends that Vasilacopulos was given adequate and proper notice of the conversion, and that he was not improperly denied a hearing on the motion to convert.

Bankruptcy Rule 2002(a)(5) requires that the debtor, trustee, creditors and indenture trustees receive 20 days notice of a hearing on the conversion of a Chapter 7 case.[7] In this case a copy of the motion to convert was mailed to Vasilacopulos at his home address on October 7, 1982. On October 15, 1982, the Bankruptcy Court held a hearing and granted the motion to

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[7] "[T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . (5) in a Chapter 7 liquidation and a chapter 11 reorganization case the hearing on the dismissal or conversion of a case to another chapter. . . ." Bankr. Rule 2002(a)(5), 11 U.S.C. (1982).

convert. Bankruptcy Rule 9006(c)(1) permits for a reduction in the 20 day notice requirement if in the court's discretion, cause has been shown.[8] In this regard, the Bankruptcy Court found an eight day notice to be adequate and that the appellant's conduct was cause for reducing the twenty day notice period.[9] This court agrees that under the circumstances of this case an eight day notice was adequate prior to the hearing on the motion to convert and that the Bankruptcy Court proceeded properly under Bankruptcy Rule 9006(c)(1) for cause shown.[10]

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[8] "Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court for cause shown may in its discretion with or without motion or notice order the period reduced." Bankr. Rule 9006(c)(1), 11 U.S.C. (1982).

[9] After his arrest, and throughout the course of the bankruptcy proceeding, Vasilacopulos demonstrated an unwillingness to cooperate. In 1982 the petitioning creditors were unable personally to serve Vasilacopulos with the Chapter 7 petition because of his attempts to flee the state and refusal to make his whereabouts known. It was necessary to obtain an order from the Bankruptcy Court authorizing service of the Chapter 7 petition by publication. In light of Vasilacopulos' unknown whereabouts, his refusal to cooperate, and in order to cut off any attempt by Vasilacopulos to conceal assets, the petitioning creditors moved to have the Chapter 7 case converted to Chapter 11. Eventually, Vasilacopulos' refusal to cooperate and constant flight resulted in an order of civil and criminal contempt against him.

[10] The Bankruptcy Court found that: "[T]he petitioning creditors complied with all notice and hearing requirements of the Bankruptcy Code and Bankruptcy Rules in connection with the motion to convert the Debtor's involuntary Chapter 7 case to a case under Chapter 11 and the motion to appoint trustee." In re Vasilacopulos, No. 82C-01031, Order p.1 (Bankr., D. Utah February

Vasilacopulos also alleges that he was improperly denied a hearing on the motion to convert. He relies on the Chapter 7 provision which reads: "On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time."[11] The Bankruptcy Code, "authorizes an act without an actual hearing if such notice is given properly and if-

> (i) such a hearing is not requested timely by a party in interest; or
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act. . . .[12]

Vasilacopulos failed to request a hearing, but the court held a hearing anyway on the motion to convert. Many years have passed since the hearing and conversion but there has never been a motion to reconvert. This court rules that the notice and hearing requirements of the Bankruptcy Code and Bankruptcy Rules were met, so there is no ground for removing the trustee.

18, 1987).

[11] 11 U.S.C. § 706(b) (1982).

[12] 11 U.S.C. § 102 (1982).

The decision of the United States Bankruptcy Court is affirmed.

DATED: March 9, 1989.

J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO:

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