Docket #0119 Date Filed: 8/21/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: TEHUM CARE SERVICES, INC., Debtor.	Case No. 23-90086 (CML) Chapter 11
ANANT KUMAR TRIPATI, Plaintiff, v. SARAH TIRSCHWELL, *et al.*, Defendants.	Adv. Pro. No. 23-03072 (CML)

LEXINGTON INSURANCE COMPANY AND ZEICHNER ELLMAN & KRAUSE LLP'S OPPOSITION TO TRIPATI'S MOTION FOR SANCTIONS

ZEICHNER ELLMAN & KRAUSE LLP
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 223-0400

23900862308210000000000007

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

RELEVANT PROCEDURAL HISTORY 2

THE PURPORTED "SANCTIONABLE" CONDUCT 3

ARGUMENT 4

I. PLAINTIFF'S MOTION FOR RULE 11 SANCTIONS SHOULD BE DENIED 4

II. PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO THE COURT'S INHERENT POWER SHOULD BE DENIED 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page(s)**

Brewer v. Lennox Hearth Prods., LLC,
601 S.W.3d 704 (Tex. Sup. Ct. 2020) 6

Butowsky v. Folkenflik,
2020 U.S. Dist. LEXIS 256374 (E.D. Tex. 2020) 4

Chaves v. M/V Medina Star,
47 F.3d 153 (5th Cir. 1995) 5, 6

In re Phillips,
291 B.R. 72 (S.D. Tex. 2003) 6

Luna v. Am. Nat'l Ins. Co.,
2021 U.S. Dist. LEXIS 90464 (W.D. Tex. 2021) 4

Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.,
2 F.3d 1397 (5th Cir. 1993) 4

Sarco Creek Ranch v. Greeson,
167 F. Supp. 3d 835 (S.D. Tex. 2016) 6

Rules

Federal Rule of Civil Procedure ("FRCP") 8(a) 1, 3, 5

FRCP 9(b) 1, 3, 5

FRCP 11 ..... *passim*

FRCP 12(b)(6) 1, 3, 5

FRCP 26 5

Federal Rule of Bankruptcy Procedure 7012 1

PRELIMINARY STATEMENT

The Court should deny Plaintiff Anant Kumar Tripati's ("Plaintiff") Motion for Inherent Power and Rule 11 Sanctions Against Counsel and Defendants [ECF Docket No. 93] (the "Motion").

Plaintiff contends Lexington Insurance Company and its counsel, Zeichner Ellman and Krause LLP (jointly "Lexington"), should be sanctioned because (i) Lexington violated Federal Rule of Civil Procedure ("FRCP" or "Rule") 11 when it failed to produce documents unilaterally requested by Plaintiff; (ii) Lexington's motion to dismiss the complaint is frivolous and was merely filed to delay the adversary proceeding; and (iii) the bankruptcy petition is a fraud filed in bad faith. *See* generally Motion [ECF Docket No. 93] at 1-22. Plaintiff is wrong.

Rule 11 sanctions are not appropriate here because, as a matter of law, Rule 11 sanctions cannot be imposed for conduct related to discovery. Even if it could be, that Plaintiff prematurely seeks documents now, before discovery has commenced, does not mean Lexington should be sanctioned for refusing Plaintiff's demand at this time. Discovery follows the pleading stage, and Lexington has every right to move to dismiss Plaintiff's materially flawed complaint before being forced to undertake the time and expense of discovery. *See, e.g.*, FRCP 8(a), 9(b), 12(b)(6); Federal Rule of Bankruptcy Procedure 7012. In this regard, the arguments made in Lexington's Motion to Dismiss the Complaint with Prejudice [ECF Docket No. 47] (the "Motion to Dismiss") have merit. As explained therein, the complaint (i) is untimely and violates the applicable statutes of limitation; (ii) is incomprehensible and confusing, in violation of Rule 8(a); (ii) does not pled any actionable facts as to Lexington, in violation of Rule 9(b); and (iii) fails to state plausible RICO claims, in violation of Rule 12(b)(6). *See* Motion to Dismiss [ECF Docket

No. 47] at 1-18. Certainly, the Motion to Dismiss is not frivolous or brought merely to delay, in violation of Rule 11, as Plaintiff absurdly contends in his Motion. Indeed, the fact that Plaintiff now seeks leave to file a second amended complaint, in the vain hope that the new complaint resolves the fatal flaws identified by Lexington in its Motion to Dismiss, conclusively demonstrates Lexington's motion is not frivolous.

Nor should the Court impose sanctions against Lexington pursuant to the Court's inherent power to do so. A Court imposes such sanctions only when a litigant plainly has acted in bad faith, and Lexington has not acted in bad faith here. Neither of the two Lexington actions which Plaintiff criticizes – bringing a colorable motion to dismiss and declining to produce documents until the pleading stage is complete – constitute bad faith. As to the bankruptcy filing itself, which Plaintiff baldly avers was filed in bad faith, Lexington is not the debtor here and did not file for bankruptcy.

For all these reasons, the Court should deny Plaintiff's Motion against Lexington.

RELEVANT PROCEDURAL HISTORY

On May 1, 2023, *pro se* Plaintiff filed a disjointed 135 page, 458 paragraph Verified Adversary Complaint against 44 separate defendants, including Lexington. *See* Complaint [ECF Docket No. 1].

On June 20, 2023, Lexington moved to dismiss the Complaint with prejudice as against it. *See* Motion to Dismiss [ECF Docket No. 47].[1] Lexington argued the Complaint should be dismissed for four independent reasons: (i) Plaintiff's claims were untimely and violated the applicable statutes of limitation; (ii) The Complaint was incomprehensible and confusing, in

[1] While Plaintiff amended his Complaint on May 15, 2023 [*see* ECF Docket No. 4], as Lexington explained in its Motion to Dismiss [ECF Docket No. 47], the amended complaint suffers from the same material, systemic, and irreparable flaws as the original complaint.

violation of Rule 8(a); (iii) the Complaint did not pled any actionable facts as to Lexington, in violation of Rule 9(b); and (iv) Plaintiff failed to state plausible RICO claims, in violation of Rule 12(b)(6). *See id.* at 1-18.

On July 11, 2023, Plaintiff filed an 83-page Omnibus Response to ECF 25, 33, 46, and Lexington's Motion to Dismiss [ECF Docket No. 66].[2]

On July 31, 2023, Plaintiff moved for leave to file a Second Amended Complaint to address the multiple material flaws in his prior complaints. *See* ECF Docket No. 96. On that same day, Plaintiff filed the instant Motion. *See* ECF Docket No. 93.

The case remains in the pleading stage. There has been no discovery conference, and no discovery order has been issued.

THE PURPORTED "SANCTIONABLE" CONDUCT

Plaintiff asserts he demanded[3] the following documents from Lexington:

a. Any policies, guidelines, standards for issuing liability insurance coverage to healthcare providers.

b. Any applications submitted by [*sic*] Corizon, for coverage, along with any agreements and contracts with them.

c. Any policies, guidelines, standards for processing healthcare claims and any agreements, contracts with Corizon, for processing claims by inmates.

d. Any claims submitted by prisoners against Corizon 2013-2016.

e. Any settlements of claims by prisoners against Corizon (2013-2016).

[2] On July 17, 2023, Lexington requested permission to file a short reply to Plaintiff's Omnibus Response. *See* ECF Docket No. 68. To date, no decision has been rendered.

[3] Lexington never received this demand from Plaintiff. Had Lexington received the demand, it would have declined to provide those documents until Plaintiff filed a viable complaint and the Court had the case proceed to discovery.

Motion [ECF Docket No. 93] at 8. Plaintiff contends the failure of Lexington to provide these documents to Plaintiff in response to his demand deserves sanctions.

Plaintiff contends, *ipse dixit*, that Lexington should be sanctioned for filing its Motion to Dismiss because it was "not well grounded in fact and law" and "filed to harass and delay these proceedings." Motion [ECF Docket No. 93] at 20-21.

Plaintiff contends that Lexington should be sanctioned because the debtor – who is Tehum Care Services Inc. and not Lexington – "acted in bad faith and perpetrated one of the biggest frauds in the United States Bankruptcy Court history" by commencing the bankruptcy proceeding. Motion [ECF Docket No. 93] at 20. At most, Lexington is a creditor in the bankruptcy. *See* Proof of Claim Register, Nos. 583, 584. And it is a party to this adversary proceeding because Plaintiff named it as a defendant. *See* Complaint [ECF Docket No. 1].

ARGUMENT

I. PLAINTIFF'S MOTION FOR RULE 11 SANCTIONS SHOULD BE DENIED

"A court may impose Rule 11 sanctions . . . when an attorney files a written motion for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation or when the legal contentions are not warranted by existing law." *Luna v. Am. Nat'l Ins. Co.*, 2021 U.S. Dist. LEXIS 90464, *14 (W.D. Tex. 2021). "The purpose of [Rule 11] is to deter baseless filings in district court and to spare innocent parties and overburdened courts from the filings of frivolous lawsuits." *Butowsky v. Folkenflik*, 2020 U.S. Dist. LEXIS 256374, *48 (E.D. Tex. 2020) (internal quotation marks and citations omitted).

Relevant here, Rule 11 sanctions do "not apply to disclosures and discovery requests, responses, objections and motions under Rules 26 through 37." FRCP 11(d); *see also Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1410 (5th Cir. 1993)

(holding that Rule 11 sanctions did not apply to violation of discovery order). Thus, Plaintiff's effort to have the Court impose Rule 11 sanctions on Lexington fails as a matter of law.

Even if, *arguendo*, Rule 11 did apply to discovery (it does not), Lexington's refusal to produce documents prior to the start of discovery is simply not sanctionable conduct. Lexington is not required to produce documents to Plaintiff now merely because he wants them now. No discovery conference has been held and no discovery order has been issued. *See, e.g.*, FRCP 26(c) ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by a stipulation or court order"). Plaintiff cannot skip crucial legal steps, and demand documents now, as a pressure tactic or because he wants to engage in a fishing expedition in search of a viable claim against Lexington. Certainly, Lexington should not be sanctioned for choosing to wait until Plaintiff states a viable claim – if he ever does – before undertaking the time and expense of discovery. Plaintiff's assertion to the contrary is meritless and his Motion should be denied.

Equally meritless is any contention that Lexington should be sanctioned because it filed its Motion to Dismiss "to harass and delay these proceedings." Motion [ECF Docket No. 93] at 21. The arguments advanced by Lexington – under the statute of limitations, and FRCP 8(a), 9(b), and 12(b)(6) – are well-supported by law and fact. *See* Motion to Dismiss [ECF Docket No. 47] at 1-18. Indeed, that Plaintiff has responded to Lexington's Motion to Dismiss by seeking leave to amend his complaint to try to paper over the fatal flaws identified by Lexington [*see* ECF Docket No. 96] conclusively demonstrates that Lexington's motion is non-frivolous.

II. PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO THE COURT'S INHERENT POWER SHOULD BE DENIED

"[T]o impose sanctions against an attorney under its inherent power, a court must make a specific finding that the attorney acted in 'bad faith'." *Chaves v. M/V Medina Star*, 47

F.3d 153, 156 (5th Cir. 1995). "[M]ere violation of a rule, statute, or ethical standard does not *ipso facto* constitute bad faith." *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 716 (Tex. Sup. Ct. 2020). Rather, "conscious wrongdoing" is required (*id.*), as "when a party or its counsel maintains patently unreasonable litigation positions or engages in contumacious behavior that deliberately subverts a court's administration of a case." *Sarco Creek Ranch v. Greeson*, 167 F. Supp. 3d 835, 845 (S.D. Tex. 2016).

As discussed above, it is not bad faith to bring a colorable motion to dismiss and/or to decline to produce documents prematurely. *See* Argument, Point I. Nor can Lexington properly be charged with acting in bad faith because debtor Tehum Care Services, Inc. filed for bankruptcy, or because Lexington somehow failed to stop Tehum from doing so. In this regard, Plaintiff mistakenly contends Lexington failed "to perform their duty to investigate." Motion [ECF Docket No. 93] at 20. However, the case Plaintiff cites, *In re Phillips*, 291 B.R. 72 (S.D. Tex. 2003), makes clear that it is *debtor's counsel* that has a duty to investigate before filing a bankruptcy petition on behalf of the debtor. No such duty to investigate applies to third parties such as Lexington.

For all these reasons, Plaintiff has failed to prove Lexington acted in bad faith. As a result, the Court should not impose sanctions.

///

///

///

///

CONCLUSION

For every one of the foregoing reasons, the Court should (i) entirely deny Plaintiff's Motion for Inherent Power and Rule 11 Sanctions Against Counsel and Defendants, and (ii) grant them such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 21, 2023

Respectfully submitted,

/s/ Michael S. Davis

Michael S. Davis (*pro hac vice* approved in *Tehum* case on 03/01/2023; pro hac vice approved in Adversary case on 06/27/2023)

Yoav M. Griver (*pro hac vice* approved in Adversary case on 06/27/2023)

ZEICHNER ELLMAN & KRAUSE LLP
1211 Avenue of the Americas, 40th Floor
New York, New York 10036
(212) 223-0400
Attorneys for defendant Lexington Insurance Company

CERTICATE OF SERVICE

The undersigned attorney hereby certifies that, on August 21, 2023, a true and correct copy of the foregoing document was served upon all counsel of record through the Bankruptcy Court's Electronic Case Filing (ECF) system, and on the Plaintiff by first class U.S. mail, postage prepaid, at the following address:

Anant Kumar Tripati
Inmate # 102081
P.O. Box 8909
Yuma, AZ 85349

/s/ Michael S. Davis

Michael S. Davis