UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re RICHARD C. BRUMGARD and KAY E. BRUMGARD, Debtors.	)	Chapter 7 No. 4-02-04327-EWH
YOUNG BUILDERS, INC. PROFIT SHARING & RETIREMENT TRUST, Plaintiff, v. RICHARD C. BRUMGARD and KAY E. BRUMGARD, Defendants.	)	Adv. No. 4-02-00117 **MEMORANDUM DECISION (SANCTIONS)** (Opinion to Post)

At issue is whether sanctions should be imposed against John Young ("Young") and his counsel, Fred Gamble ("Gamble"), for misrepresenting the ownership of a judgment which Young seeks to enforce against the Debtors ("Brumgards"). Because the record indicates that Young and Gamble engaged in bad-faith litigation, sanctions will be imposed.

I. INTRODUCTION

This case has had an extended history in this court.[1] There is currently on appeal, a 55-page memorandum decision ("Memorandum Decision")[2] regarding, among other things, the rights of the Brumgards and the Young Entities[3] to a mini-storage facility. What remains to be decided is whether misrepresentations or material omissions were made in this court about the ownership of a particular judgment ("Pearce Judgment").

The Pearce Judgment is uniquely important to the Young Entities. Because it is secured by a deed of trust, it is the only judgment which cannot be avoided under state or federal law as impairing the Brumgards' homestead exemption. If the Pearce Judgment is enforceable, any homestead right that the Brumgards might have to the mini-warehouse or the proceeds from its sale will be wiped out. The Pearce Judgment was the subject of a tentative oral ruling ("Tentative Ruling") entered in July and September 2004 on pending motions for summary judgment.[4] That ruling was that the

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[1] This memorandum decision concerning sanctions contains specific references to docket entries in two cases before this court: (1) an administrative case: Richard C. Brumgard and Kay E. Brumgard, No. 4:02-bk-04327-EWH ("In re Brumgard"); and 2) an adversary proceeding: Young Builders Inc. Profit Sharing & Retirement Trust v. Richard C. Brumgard and Kay E. Brumgard, No. 4:02-ap-00117-EWH ("Young Builders v. Brumgard").

[2] Memorandum Decision entered Sep. 1, 2005 at Docket No. 27, and Correction entered on Sep. 27, 2005 at Docket No. 36 in Young Builders v. Brumgard. The same documents are also entered at Docket No. 100 and 112 in In re Brumgard.

[3] The Young Entities collectively refers to John and Ann Young ("Youngs"); the Young Builders, Inc. Pension and Profits Sharing Trust ("Trust") and Young Builders, Inc. ("Young Builders").

[4] Minute Entry for hearing held July 8, 2004 at Docket No. 72 and Transcript at Docket No. 74, In re Brumgard; and Minute Entry for hearing held Sept. 27, 2004 at Docket No. 80 and Transcript at Docket No. 81, In re Brumgard. The Memorandum Decision incorrectly listed the date

Young Entities were barred, on judicial estoppel grounds, from enforcing the Pearce Judgment unless the evidence demonstrated that the Youngs did not own it in 1995 when they filed a Chapter 13 case.[5] For reasons explained in detail in the Memorandum Decision, the Tentative Ruling was not adopted as the court's final ruling. However, the Memorandum Decision was not issued until September 2005. For over a year, Young and Gamble believed that, unless it could be proven that the Pearce Judgment was not property of the Youngs in 1995, an order would be entered holding the Pearce Judgment to be unenforceable.

II. JURISDICTIONAL STATEMENT

Jurisdiction is proper under 28 U.S.C. § 1334(a), §§ 157(b)(2)(B) and (O) and under § 105(a) and Rule 9011.

III. PROCEDURAL HISTORY

On September 1, 2005, this court entered the Memorandum Decision and Orders regarding a number of pending matters, including the enforceability of the Young Entities' claims. The Memorandum Decision was entered after a full day

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for the first issuance of the Tentative Ruling as August 20, 2004. The correct date is July 8, 2004.

[5] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

evidentiary hearing held on May 2, 2005 and after consideration of the post-hearing briefs filed by the Brumgards and the Young Entities. The Memorandum Decision determined that due to the inconsistency of the testimony by Young about the ownership of the Pearce Judgment, including assertions made in previous bankruptcy cases filed by the Young Entities, in judgment renewal affidavits and in pleadings filed in this case, a hearing would have to be held to determine if sanctions should be entered against Young and his attorney, Gamble. The Memorandum Decision listed the possible sanctions as including:

1. Disallowance of some or all of the Young Entities claims, other than the Trust's co-tenancy claims;
2. Imposition of a judgment awarding the Brumgards' attorneys fees for all time spent objecting to the Young Entities' claims other than the Trust co-tenancy claim;
3. Entry of an order barring Gamble from further practice in the Federal Bankruptcy Courts in the District of Arizona;
4. A misconduct referral regarding Gamble to the State Bar of Arizona Disciplinary Commission; and
5. A referral to the office of the United States Trustee to determine if Young and/or Gamble violated 18 U.S.C. § 152(3) or (4).

On September 1, 2005, a separate Order to Show Cause was entered, which again listed the possible sanctions set forth in the Memorandum Decision. On

September 19, 2005, an Amended Order to Show Cause was entered to clarify that sanctions, if any, would be imposed under Rule 9011 and the court's inherent authority to control its own proceedings.

The Order to Show Cause hearing set for September 27, 2005, was continued at the request of the Young Entities and was finally held on January 31, 2006 ("Order to Show Cause hearing"). At Gamble's request, the deadline for filing post-hearing briefs was set for late April 2006. The briefs have now been filed and the matter is ready for decision.

IV. DISCUSSION

A. Gamble and Young's Explanations for the Conflicting Representations Regarding Ownership of the Pearce Judgment

At the Order to Show Cause hearing, Young testified and provided supporting documentation regarding the ownership of the Pearce Judgment. The testimony of Young and the admitted exhibits demonstrated the following:

1. In 1988 or 1989, after Young sold the company, Young Builders was liquidated, but not dissolved. Most of Young Builders' assets, as of that date, were distributed to the Youngs.

2. Young Builders purchased a 50% interest in the Pearce Note and Deed of Trust and Judgment in September 1990.

3. In order to acquire the Pearce Note, Deed of Trust and Judgment, Young Builders borrowed $35,000 from the Youngs.

4. Young Builders executed a demand promissory note in favor of the Youngs in the amount of $35,000 at or about the time that Young Builders acquired the Pearce Judgment.

5. Young Builders again distributed all of its assets to the Youngs in 2002.

Young testified that he became confused about who owned the Pearce Judgment at the time the Youngs filed their Chapter 11 petition in late 1990. He testified that he mistakenly believed that when Young Builders was liquidated, it owned the Pearce Judgment and, therefore, he believed it had been distributed to him and his wife in 1988 or 1989. (Transcript p. 66, lines 10-15).[6] He further testified that he did not realize his mistake until after the Brumgards' bankruptcy case was filed. (Transcript p. 66, lines 10-23).

Young testified that the information he gave to the lawyers in the various bankruptcy cases filed by the Trust and the Youngs; his testimony before Judge Baum at a sanctions hearing in 1997; and the judgment renewal affidavits he filed for the Pearce Judgment were all based on his mistaken belief that the liquidation of Young Builders had resulted in a transfer of the Pearce Judgment to the Youngs.

[6] All citations to the "Transcript" refer to the Order to Show Cause hearing transcript, and is found at Docket No. 54 in Young Builders v. Brumgard.

(Transcript p. 67). Young also testified that he never affirmatively intended to mislead anyone about the ownership of the Pearce Judgment in any of the earlier proceedings. (Transcript p. 67, lines 23-24).

Gamble and Young concede that there have been repeated representations in this court, in the Young Entities' bankruptcy cases and in the judgment renewal affidavits for the Pearce Judgment, in which the Youngs and their lawyers, including Gamble, represented that the Youngs individually owned the Pearce Judgment. In their testimony, both Young and Gamble asserted that a primary source for this mistake was the Youngs' Chapter 13 lawyer who, they allege was provided with complete documentation regarding all of the Young Entities judgments, but failed to ascertain that there was never an assignment from Young Builders to the Youngs of the Pearce Judgment (Transcript p. 18, lines 2-10, Transcript pp. 102-103).[7]

Gamble admits that he was aware in the early 1990's that the Pearce Judgment had been acquired by Young Builders (Transcript p. 9, lines 12-15). He alleged that in 1994, at about the time that the Brumgards filed a case against Young Builders in state court, Young told him the Youngs individually owned the Pearce Judgment. Thereafter, he relied on that representation when he prepared judgment renewal affidavits for Young's signature as the owner of the Pearce Judgment and when he

[7] The lawyer was not called as a witness at the Order to Show Cause hearing. When he testified at the sanctions hearing held in 1997, he denied ever receiving copies of the judgments. That testimony went unchallenged by Gamble who participated in the hearing.

filed pleadings in this case asserting that the Youngs owned it. According to both the testimony of Gamble and Young, neither one of them discovered Young's mistake until 2003, when Gamble reviewed all of the paperwork regarding the Pearce Judgment in preparation for a settlement conference.

At the Order to Show Cause hearing, Gamble conceded that it may have been a mistake not to inform this court, after it issued the Tentative Ruling in July 2004, that there had never been a formal assignment from Young Builders to the Youngs of the Pearce Judgment or that Young had been mistaken about what assets of Young Builders were distributed to the Youngs in 1989.[8] Gamble and Young's position can be summarized as follows: Young was confused from1989 until 2003 about what Young Builders owned when it was liquidated and, therefore, incorrectly believed, and informed his lawyers, that the Youngs individually owned the Pearce Judgment. His confusion was not deliberate or willful and, therefore, no sanction should be imposed against him. Gamble reasonably relied upon his client's statements that the Youngs individually owned the Pearce Judgment from 1994 to 2003. He was entitled to rely on his client for information and, even if such reliance was negligent, it was not done in bad faith, was not objectively unreasonable and, therefore, no sanction should be imposed.

[8] At the Order to Show Cause hearing, Gamble referred to a hearing before this court in 2003 where he asserted that the Pearce Judgment was owned by Young Builders. The hearing actually occurred on July 8, 2004, when the Tentative Ruling was issued.

B. Inconsistencies with Gamble and Young's Explanations

1. Factual Inconsistencies

Young and Gamble's assertions about when Young became confused about the ownership of the Pearce Judgment and why Gamble relied on his client's mistaken assertions about the ownership of the Pearce Judgment have forced this court, yet again, to review the record in the earlier Young Entities bankruptcy cases. That review indicates that Gamble and Young's explanations do not adequately explain what happened in the earlier cases.

If Young believed that the Youngs personally owned the Pearce Judgment, Note and Deed of Trust after 1989, then the Youngs, not Young Builders, would have filed the ex parte receivership complaint in state court in 1990 (Chronology at 10).[9] Young, as a Debtor in Possession in his individual Chapter 11 case filed in 1990, had an independent duty to review the schedules filed by his lawyers. If he believed that he and his wife individually owned the Pearce Judgment, he should have made sure it was listed in the Chapter 11 Schedules. It wasn't. (Chronology at 12). If Young believed that he had obtained the Pearce Judgment because of the dissolution of Young Builders, it wouldn't have been necessary for the Trust's Chapter 11 lawyer to file pleadings in the removed receivership case, which affirmatively stated that Young Builders assigned the Pearce Judgment to the Youngs on a specific date. (Chronology

[9] All references to the Chronology are to the Chronology attached as Appendix 1 to the Memorandum Decision.

at 14(d)). They would have simply asserted that the Pearce Judgment was distributed to the Youngs as part of the liquidation of Young Builders.

In response to questions about why pleadings were filed in the Young Entities bankruptcy cases, which repeatedly asserted that the Youngs individually owned the Pearce Judgment, Young replied that he did not know, did not understand what was really happening in the bankruptcy cases or that he just did what his lawyers advised him. (Transcript p. 88). That testimony is neither credible or justified. In re Downey, 242 B.R. 5, 15 (Bankr. D. Idaho 1999) ("[A]ttorney error does not absolve a debtor, who signs the petition and schedules under penalty of perjury, from the duty to ensure the information is accurate and complete to the best of his knowledge").

Young was a successful businessman. At the time the Youngs filed their Chapter 11 case, they owned multiple assets, including real estate, oil well investments and partnership interests. The reason given for the Youngs' 1995 Chapter 13 filing was that there had been an adverse tax determination regarding some of their investments. During both their Chapter 11 and Chapter 13 cases, the Youngs maintained two corporations – Young Builders and Advanced Coatings and Insulation of Arizona, Inc. Until his retirement, Young was earning close to $200,000 a year working for those corporations as a roofing consultant. (Transcript p. 104, lines 2-5).

Young's testimony at the Order to Show Cause hearing does not explain the representations made in the Trust and Young bankruptcies about the ownership of the Pearce Judgment. Instead, his testimony provides a different representation about the

ownership of the judgment. Both representations cannot be true. Because the pleadings filed in the Youngs Chapter 11 case are closer in time to when Young Builders distributed its assets, the representations in those pleadings are more likely to be accurate than Young's testimony at the Order to Show Cause hearing. Those pleadings indicate that shortly after the Youngs and the Trust filed for Chapter 11 protection, the Pearce Judgment was assigned to the Youngs so that the bankruptcy court would maintain jurisdiction over the state court receivership action. An order was entered in the Young Entities' Chapter 11 cases which stated that the receivership action would not remain in bankruptcy court unless Young Builders filed its own petition or the Pearce Judgement was assigned to the Youngs. Shortly thereafter, pleadings were filed by the Trust's lawyers asserting that the Pearce Judgment was transferred to the Youngs on June 3, 1991 to satisfy Young Builder's obligation to the Youngs. (Chronology at 14(d)(i), (ii)). Notwithstanding the reference to a specific date, Young testified at the Order to Show Cause hearing that there is no assignment paperwork in Young's possession evidencing the transfer of the Pearce Judgment to the Youngs. For reasons discussed in greater detail later, the lack of documentation for the transfer does not nullify its occurrence.

2. Legal inconsistencies

Gamble and Young argue that because there is no documentary evidence of a transfer of the Pearce Judgment from Young Builders to the Youngs, the assertions that Young Builders owned the judgment until 2002 are not inaccurate and cannot,

therefore, be the basis for the imposition of sanctions for engaging in bad-faith litigation tactics. However, there is no merit to the argument that Young Builders owned the Pearce Judgment until 2002.

Under principles of claims preclusion and the doctrine of judicial estoppel, the Pearce Judgment belongs to the Youngs. They affirmatively alleged that it had been assigned to them in order to assure that the state court receivership action would remain in the bankruptcy court. (Chronology at 14(d)). The bankruptcy court, the creditors, and a later appointed examiner, all relied on the representation that the Pearce Judgment was an asset of the Youngs. The apparent failure of the Youngs or their lawyers to prepare the assignment paperwork, which is something only they could do and which they affirmatively represented was done, cannot be used, over a decade later to support an inconsistent claim of ownership of the Pearce Judgement. Such an inconsistent claim is barred under principles of claims preclusion because the assumption that the Youngs owned the Pearce Judgment was integral to numerous orders entered in the earlier bankruptcy cases, including orders appointing an examiner (Chronology at 14(f)) and the 1997 sanctions order (Chronology at 29). See In re Goldstein, 297 B.R. 766, 769-70 (Bankr. D. Ariz. 2003) ("Merger prevents a plaintiff from asserting a new action on a 'claim or any part thereof' when a 'final personal judgment' had previously been rendered in plaintiff's favor on that claim.'") (citing Restatement (Second) of Judgments § 18(1) (1982)). It is also barred under the doctrine of judicial estoppel.

The doctrine of judicial estoppel keeps a party from gaining an advantage by taking one position in litigation and then seeking a second advantage by taking a second inconsistent position. At the Order to Show Cause hearing, Gamble argued that the removal of the receivership action was not beneficial to the Young Entities and, therefore, they did not gain any advantage from claiming the Pearce Judgment had been transferred to the Youngs. However, the seeking of a benefit analysis must be made as of the time the representation was made. In the early stages of the Youngs and Trust Chapter 11 cases, it was the Brumgards who sought remand of the receivership action, and the Youngs who successfully argued, that the case should remain in the bankruptcy court. (Chronology at 14 (d)).

In New Hampshire v. Maine, 532 U. S. 742, 743 (2001), the U.S. Supreme Court set forth three factors for courts to use in determining the applicability of judicial estoppel: 1) a party's later position must be clearly inconsistent with its earlier position; 2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding created the perception that either the first or the second court was misled; and 3) whether the party seeking to assert an inconsistent position derived an unfair advantage or imposed an unfair detriment on the opposing party if not estopped. Those factors are present in this case:

1. The Youngs' assertion that Young Builders owned the Pearce Judgment until 2002 is inconsistent with their earlier position that it was transferred to them in 1991.

2. The Youngs succeeded in convincing Judge Baum and the other parties in the Young and Trust Chapter 11 cases that the transfer of the Pearce Judgment to them occurred in 1991.

3. The claim in this case that Young Builders owned the Pearce Judgment until 2002, was made for the purpose of obtaining an improper advantage --- a determination that the Pearce Judgment was not subject to the Tentative Ruling.

The manner in which Gamble and Young asserted that the Pearce Judgment was owned by Young Builders until 2002 demonstrates that the assertion was made in order to avoid the adverse result of the Tentative Ruling. There was no reason for Gamble and Young to assert that Young Builders, rather than the Youngs, owned the Pearce Judgment until after the Tentative Ruling was issued. The record indicates that they, in fact, did not do so until after the Tentative Ruling was issued. Prior to July 2004, but after Gamble's discovery in 2003 that there were no assignment documents, pleadings were filed which asserted that the Youngs owned the Pearce Judgment. See Docket No. 62 at pg. 3, line 23, In re Brumgard ("[T]he security claimed by the Youngs with regard to the Pearce Deed of Trust is based on a consensual lien and cannot be affected by a homestead exemption, if one even exists in this case."); see also Docket No. 50 at para. 8, attached Pleading Affidavit of John Young, In re

Brumgard ("Young Builders, Inc. assigned its interest in the Pearce's Note and Deed of Trust to John R. and Margaret A. Young").

When in May 2005, an evidentiary hearing was finally held on all of the outstanding matters between the parties, including the validity of the various Young Entities judgments, no effort was made to explain the discrepancy between all of the earlier assertions by the Youngs regarding the ownership of the Pearce Judgment and the discovery in 2003 that there was no formal assignment of the Pearce Judgment from Young Builders to the Youngs. From the limited way the evidence was presented, Young and Gamble apparently hoped they would succeed in removing the Pearce Judgment from the Tentative Ruling without having to address all the prior representations made, and relied upon in earlier proceedings, that the Youngs owned it. It was only because the decision of so many of the remaining issues in this case required the court to spend hours of time with the record in the earlier cases, that the inconsistencies regarding ownership of the Pearce Judgement came to light.

The mid-case change of position regarding the ownership of the Pearce Judgment; the lack of disclosure regarding the inconsistency of that claim from the claims made in the Young Entities bankruptcy cases; and the meritless argument that the earlier representations about the ownership of the Pearce Judgment were mistakes, were objectively unreasonable assertions made to achieve the improper purpose of avoiding an adverse ruling. The attempts to assure that the Pearce Judgment would be held to be enforceable by misrepresenting its ownership constitute the type of bad-

faith conduct which warrant the imposition of sanctions. Accordingly, sanctions will be imposed against both Young and Gamble.

V. BANKRUPTCY COURT'S POWER TO SANCTION

Bankruptcy courts may sanction parties and their lawyers for improper conduct under Rule 9011 and under the court's inherent power to police itself. In re Upland Partners, No. 97-03746, 2006 WL 980583 at *7 (Bankr. D. Hawaii, Mar. 15, 2006). If sanctions are warranted, the determination of appropriate sanctions to be imposed against an attorney must be based on consideration of the American Bar Association's standards for imposing lawyers' sanctions. In re Lachtinen, 332 B.R. 404, 408 (9th Cir. BAP 2005); In re Crayton, 192 B.R. 970, 980 (9th Cir. BAP 1996).

A. Federal Bankruptcy Rule 9011

Rule 9011 requires that all submissions to a bankruptcy court be truthful and submitted for a proper litigation purpose.[10] A bankruptcy court may, on its own motion, impose appropriate sanctions on lawyers and parties who violate the rule.[11] In order for a sanction to be entered under Rule 9011, the evidence must demonstrate that there has been objectively unreasonable conduct. In re Deville, 361 F.3d 539, 548 (9th Cir. 2004). If sanctions are warranted, the scope of the sanctions should be limited to what is sufficient to deter repetition of the sanctioned conduct.[12] Sanctions may consist of non-monetary directives or an order to pay a penalty to the court. An

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[10] Rule 9011(b) provides as follows: Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

[11] Rule 9011(c)(1)(B) provides in pertinent part: On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

[12] Rule 9011(c)(2) provides as follows: Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and other expenses incurred as a direct result of the violation.

award of attorneys fees to an adverse party may only be made if the adverse party brought the motion seeking sanctions. In re Loyd, 304 B.R. 372, 374 (9th Cir. BAP 2003).

B. Inherent Authority

Bankruptcy courts, like Article III courts, have the inherent authority to sanction bad faith or willful misconduct even in the absence of express statutory authority to do so. Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 283-84 (9th Cir. 1996). Before sanctions may be imposed under a bankruptcy court's inherent authority, there must be an explicit finding of bad faith or willful misconduct which "consists of something more egregious than mere negligence or recklessness." In re Dyer, 322 F.3d 1178, 1196 (9th Cir. 2003) (citing Fink v. Gomez, 239 F.3d 989, 993-94 (9th Cir. 2001)). However, sanctions may be imposed for recklessness when it is combined with an additional factor such as frivolousness, harassment or improper purpose. 239 F.3d at 994; see also Lachtinen, 332 B.R. at 415 ("In the Ninth Circuit, a court may also sanction upon a finding of willfulness, recklessness, or other fault by the offending party, and if a bad faith finding is required, an implicit finding will suffice.").

If a bankruptcy court determines that sanctions are appropriate under its inherent authority, the sanctions imposed must either be compensatory or designed to coerce compliance. Because bankruptcy courts lack authority to impose criminal

penalties or sanctions, the sanction may not be punitive in nature. Dyer, 322 F. 3d at 1197.

C. Due Process Requirements

The notice regarding sanctions must specify the authority for sanctions and the alleged misconduct. Deville, 361 F.3d at 548. Those requirements have been met in this case.

The Memorandum Decision determined that due to the inconsistency of the testimony of Young about the ownership of the Pearce Judgment, including assertions made in previous bankruptcy cases filed by the Young Entities, in judgment renewal affidavits and in pleadings filed in this case, a hearing would have to be held to determine if sanctions should be entered against Young and Gamble. The Memorandum Decision included a list of possible sanctions.

On September 1, 2005, a separate Order to Show Cause was entered, which again listed the possible sanctions set forth in the Memorandum Decision. On September 27, 2005, an Amended Order to Show Cause was entered to clarify that sanctions, if any, would be imposed under Rule 9011 and the court's inherent authority to control its own proceedings. Because of the inherent problems created by having a court act as both arbiter and prosecutor in a proceeding where sanctions may be imposed, the court requested the participation of a "friend of the court" at the Order to Show Cause hearing. Robert Ferrier of the law firm of Quarles & Brady Streich Lang appeared at the January 31, 2006 hearing in that capacity.

VI. SANCTIONS

A. Sanctions against John Young

As noted earlier, if imposition of sanctions under the court's inherent authority are appropriate, the authority to impose sanctions is limited to non-punitive sanctions. Dyer, 322 F.3d at 1196-97. However, under its inherent authority, a court has the power to fashion an appropriate sanction for conduct which abuses the judicial process, including awarding attorneys fees and related expenses for bad-faith conduct. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

The inherent sanction authority also allows a bankruptcy court to deter improper litigation tactics. In this case, Young and his lawyer engaged in improper litigation tactics by taking an inconsistent position about the ownership of the Pearce Judgment from the position taken during the Youngs' and the Trust's bankruptcy cases and from claims made in this case and in judgment renewal affidavits. Their purpose was to avoid the impact of the Tentative Ruling. Based on the entire record in this case, the record in the Young Entities' prior bankruptcy cases as documented in this decision, the Memorandum Decision, and Young's testimony at the Order to Show Cause hearing in which he indicated an unwillingness to accept responsibility for his conduct regarding inaccurate and inconsistent disclosures, the following sanctions are imposed:

1. The Youngs are barred and enjoined from enforcing against the Brumgards, their property, or property of their bankruptcy estate, the following judgments entered in Pinal County superior court:[13]

Pearce Judgment (CIV 37525)

Brumgard Judgment (CIV 36326)

Attorneys fees #1 (CIV 36224)

Attorneys fees #2 (CV 36224)

Attorneys fees (CV 94-042091)

2. The Youngs shall be liable to pay one-third of the Brumgards' reasonable attorneys fees and costs incurred after July 8, 2004 in litigating issues before this court.

B. Sanctions against Fred Gamble

Like Young, Gamble acted in bad faith in an effort to avoid the result of the Tentative Ruling. Like Young, he is subject, under this Court's inherent authority, to the imposition of sanctions to deter and provide compensation for the use of improper litigation tactics. The court may, under its inherent authority, assess attorneys fees against Gamble.

Once a determination is made that sanctions are appropriate, the court must apply the American Bar Association's Standards for Imposing Sanctions. Crayton,

[13] Judgments and case numbers as listed in Response to Debtors' Motion to Reconsider Claims, Docket No. 153 in In re Brumgard.

192 B. R. at 980. The factors the court must consider are: (1) duty violated; (2) lawyer's mental state; (3) actual or potential injury caused by the lawyer's conduct; and (4) existence of aggravating or mitigating factors. Id. (citing American Bar Association, Standards for Imposing Lawyer Sanctions (as amended February 1992)).

1. Duty Violated

In this case, Gamble violated his duty to the legal system by asserting an unjustified legal argument about the ownership of the Pearce Judgment. He failed to timely and completely disclose the facts which allegedly supported that argument, and he failed to address the inconsistency of that argument with representations made in earlier cases.

2. Mental State

Gamble made the claim that Young Builders owned the Pearce Judgment until 2002, knowing that the claim was inconsistent with earlier claims and determinations of ownership in the Young Entities bankruptcy cases.[14] Furthermore, Gamble is an experienced lawyer who has, in this case, argued that principles of equitable estoppel

[14] Gamble argued in his post-trial brief that from the mid 1990's until 2003 he was entitled to reasonably rely on what Young told him about the ownership of the Pearce Judgment. This claim is irrelevant because Young's claim that he personally owned the judgment after 1991 was not a mistake. Furthermore, Gamble's reliance on his client for information was not reasonable. Gamble was intimately involved in state court litigation with the Brumgards from the early 1990's. He was well aware that the Youngs, the Trust and Young Builders all held a variety of judgments and claims against the Brumgards. He should have, at a minimum, been checking with counsel in the bankruptcy cases to determine what had been claimed as property of the various Young bankruptcy estates.

and res judicata bar re-litigation of issues decided in earlier proceedings, including the Young Entities' bankruptcy case. He knew, or should have known, that the affirmative representations by the Youngs that they owned the Pearce Judgment in the Young Entities bankruptcy cases, would be a bar for a contrary claim in this case.

3. Actual and Potential Injury

Gamble's conduct resulted in actual injury. The failure to promptly disclose that the Young Entities were going to claim that Young Builders owned the Pearce Judgment, needlessly extended the litigation regarding the validity of the Young Entities' claims. After the Tentative Ruling was issued, a pleading should have been filed seeking a determination of who owned the Pearce Judgment. Nothing was ever filed. Instead, at the May 5, 2005 evidentiary hearing, a "bare bones" presentation was made which failed to address the prior representations that the Youngs owned the Pearce Judgment made in the Young Entities bankruptcy cases or the legal consequences of those representations. There was also potential injury to the Brumgards. If the court had adopted the Tentative Ruling and accepted the evidence proffered at the May 5th hearing that Young Builders, rather than the Youngs, owned the Pearce Judgment in 1995, then the Brumgards' homestead claim in the mini-warehouse would have been wiped out.

4. Aggravating or Mitigating Circumstances

Aggravating circumstances in this case include the fact that Gamble was sanctioned in 1997 by Judge Baum and the fact that he is an experienced attorney. Because he is an experienced attorney who understands doctrines of issue and claims preclusion and estoppel, he should bear more responsibility than Young for improperly asserting that the Youngs did not own the Pearce Judgment until 2002. Gamble was cooperative and responsive to the Order to Show Cause hearing, but cooperation with court proceedings is to be expected and cannot, therefore, be considered a mitigating factor. No other mitigating factors are present.

One of the potential sanctions listed in the Memorandum Decision was disbarment of Gamble from the Federal Bankruptcy Court in the District of Arizona. While the court may, under its inherent authority, suspend or bar Gamble from further litigation before this court, it will not do so. As noted by the court in Crayton, 192 B.R. at 977-978:

> While the court has both the express and inherent authority to suspend attorneys, discipline and disciplinary proceedings are best reserved to independent bodies which have been specifically created to investigate charges of unprofessional conduct and to prosecute disciplinary proceedings.

Accordingly, sanctions against Gamble will be imposed as follows:

1. Gamble is liable for two-thirds of the Brumgards' reasonable attorneys fees incurred in litigation before this court from and after July 8, 2004; and

2. The court will refer the question of any further discipline to the Arizona State Bar Disciplinary Commission by sending it a copy of this decision.

VII. CONCLUSION

The following constitutes this court's findings of fact and conclusions of law pursuant to Rule 7052. The court will simultaneously issue orders consistent with the terms of this Sanctions Memorandum Decision. Bankruptcy counsel and general litigation counsel for the Brumgards must file a fee affidavit no later than June 12, 2006. Gamble and Young shall file any objections to the fees no later than June 19, 2006. The court will then issue separate orders setting the amount of fees to be assessed against Gamble and Young.

Dated this 2nd day of June, 2006.

Eileen W. Hollowell
U.S. Bankruptcy Judge

Copy of the foregoing mailed
this 2nd day of June, 2006, to:

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