

Dated: March 02, 2007
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
BETTY JEAN GURLEY,
Debtor.

Case No. 97-35255-L
Chapter 11

Cheryl Followell,
Plaintiff,
v.
George Mills,
Defendant.

Adv. Proc. No. 04-00335

MEMORANDUM OPINION

BEFORE THE COURT are Defendant George Mills' (i) Motion to Dismiss Second Amended and Restated Complaint to Set Aside Judgment Allowing Claim Due to Fraud Upon the Court and to Compel Turnover of Property of the Estate; (ii) Motion to Strike, (iii) Motion to Transfer Adversary to Another District, (iv) Motion for Sanctions Pursuant to Federal Rule of

Bankruptcy Procedure 9011 and 28 U.S.C. § 1927; and (v) Plaintiff's Motion for Jury Trial. These motions were held in abeyance on June 30, 2006, pending a final determination of jurisdiction.

STATEMENT OF JURISDICTION

This Court found on April 4, 2005, that the bankruptcy court for the Western District of Tennessee did not have "jurisdiction to try a collateral attack on a judgment of another bankruptcy court in another jurisdiction." *Followell v. Mills (In re Gurley)*, Adv. Proc. 04-00335 (Bankr. W.D. Tenn. April 4, 2005). The district court on appeal respectfully disagreed. The district court ruled that "[b]ecause [Mr.] Mills' proof of claim before the bankruptcy court was based on the Florida bankruptcy court judgment, the court 'may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance.'" *Followell v. Mills*, No. 05-2423, 2006 WL 889395, at *4 (W.D. Tenn. March 31, 2006) (quoting *Pepper v. Litton*, 308 U.S. 295, 305 (1939)). The district court also found that the Tennessee bankruptcy court "may . . . address any claims of fraud upon it that arise from the Florida bankruptcy court allegations." *Followell v. Mills*, 2006 WL 889395 at *5. Mr. Mills appealed. On July 25, 2006, the Sixth Circuit dismissed Mr. Mills' appeal finding that the district court's order reversing dismissal of the complaint before the bankruptcy court was not a final, appealable order. *Followell v. Mills (In re Gurley)*, No. 06-5521 (6th Cir. July 25, 2006). Accordingly, this matter is properly before the court at this time.

FACTS

Cheryl Followell ("Plaintiff"), Betty Jean Gurley's personal representative, alleges that George Mills, Chapter 7 Trustee ("Mills") and his attorney, James Foster ("Foster") committed fraud in filing a proof of claim in the Western District of Tennessee based on a Florida bankruptcy court judgment against Mrs. Gurley. Mills has responded with a motion to dismiss Plaintiff's complaint

for failure to state a claim and a motion for Rule 9011 sanctions against Plaintiff and her attorneys, Anthony C. Pietrangelo and John J. Cook.

This case initially involved two bankruptcy proceedings, one in Florida and one in Tennessee. William and Betty Gurley, a married couple, maintained residences in Tennessee and Florida and operated businesses in numerous states including Tennessee, Nevada and Arkansas. In 1987, the United States, through its agent, the Environmental Protection Agency (“EPA”), sued Mr. Gurley, Mrs. Gurley, and their son to recoup past and anticipated clean-up or remediation costs incurred at two Arkansas Superfund sites controlled by the Gurley Refining Company, Inc., the Gurley family business. In 1990, the EPA dismissed Mrs. Gurley from the civil action. It was at this time that Mr. Gurley commenced a series of transactions that purported to transfer his assets to Mrs. Gurley.

In 1992, the United States District Court for the Eastern District of Arkansas entered a judgment in favor of the EPA, holding Mr. Gurley liable for past clean-up costs in connection with Gurley Refining Company, Inc., at a facility located in Edmonson, Arkansas, in the amount of \$1.7 million plus future costs. *United States v. Gurley Refining Co., Inc.*, 788 F. Supp. 1473 (E.D. Ark. 1992); *aff’d in relevant part* 43 F.3d 1188 (8th Cir. 1994). The EPA also asserted claims against William Gurley in connection with another site located at 1000 South Eighth Street in West Memphis, Arkansas.

As a result of the EPA claims, Mr. Gurley filed a chapter 7 bankruptcy petition in the Middle District of Florida on July 26, 1995. The EPA was the sole creditor of Mr. Gurley’s bankruptcy estate. The EPA filed a proof of claim asserting that Mr. Gurley owed the United States roughly \$25,000,000 in alleged environmental clean-up costs incurred in connection with the Edmonson and

South Eighth Street sites. Mills, the chapter 7 trustee, filed a complaint against Mrs. Gurley to recover assets alleged to have been fraudulently transferred by Mr. Gurley to her.

Following lengthy negotiations, on August 30, 1996, Mills and Mrs. Gurley entered into a proposed settlement agreement (“Settlement Agreement”) whereby Mrs. Gurley agreed to pay the bankruptcy estate \$1,000,000 in exchange for a general release from all causes of action against her. The Settlement Agreement also provided that Mills and Foster would “take all appropriate action to obtain approval of the settlement from the bankruptcy court.” Pursuant to the Rules of Bankruptcy Procedure, Mills filed a motion to approve the settlement. After filing the motion, however, Mills discovered that additional assets had been transferred to Mrs. Gurley. These consisted of real property located in Nevada that contained deposits of diatomaceous earth (i.e., clay), a material used by the Moltan Company, a company controlled by the Gurleys, in the production of kitty litter and other products. Mr. Gurley told Mills that the land was worth about \$22,000. An expert for the EPA valued the land at over \$1,000,000. Based upon this information, Mills asked that the hearing to approve the settlement agreement be continued to give him time to investigate the value of the Nevada property. Mills retained an independent expert who also valued the land at over \$1,000,000. As a result, Mills withdrew his motion for approval of the Settlement Agreement at a hearing before the Florida bankruptcy court. Attorneys for the Gurleys were present at that hearing. Mills’ claims against Mrs. Gurley proceeded to trial.

On June 12, 1997, after eight days of trial, the Florida bankruptcy court entered a judgment in part in favor of Mills and in part in favor of Mrs. Gurley. The court essentially ruled that all assets transferred by Mr. Gurley to Mrs. Gurley were property of Mr. Gurley’s bankruptcy estate. Mrs. Gurley appealed this judgment to the United States District Court in Orlando, Florida. The

Orlando District Court affirmed the bankruptcy court's decision. Mrs. Gurley then appealed to the Eleventh Circuit Court of Appeals, which also affirmed the bankruptcy court's decision. Mrs. Gurley then sought certiorari review before the United States Supreme Court. Her petition was denied.

Following the entry of judgment against her, Mrs. Gurley filed her own Chapter 11 bankruptcy case in the Bankruptcy Court for the Western District of Tennessee. Mills filed a proof of claim in Mrs. Gurley's case based upon the Florida bankruptcy court's judgment. After a lengthy hearing, this court allowed and valued the claim at \$22,000,000. The claim was paid pursuant to Mrs. Gurley's confirmed Plan of Reorganization. Mrs. Gurley's chapter 11 bankruptcy case was closed February 11, 2000. Mrs. Gurley died in 2003. Plaintiff, Mrs. Gurley's daughter and personal representative, moved to have the case reopened on February 6, 2004. On May 6, 2004, Plaintiff brought this adversary proceeding against Mills to recover the \$22,000,000 that Mrs. Gurley paid to Mr. Gurley's bankruptcy estate as a result of Mills' proof of claim.

Plaintiff alleges that Mills and his attorney, Foster, committed fraud upon the Florida court in withdrawing their motion to approve the Settlement Agreement and forcing a trial. Further fraud occurred, according to Plaintiff, when Mills filed his proof of claim in this court without mentioning the Settlement Agreement. Plaintiff claims that, but for Mills' and Foster's deceit, there would have been no trial and thus, no \$22,000,000 claim against Mrs. Gurley. Plaintiff seeks to vacate this court's prior judgment allowing Mills' claim and award Plaintiff damages in an amount not less than \$22,000,000. Plaintiff also requests a jury trial. Mills has responded with a motion to dismiss the complaint for failure to state a claim and a motion for Federal Bankruptcy Rule 9011 sanctions and

fees pursuant to 28 U.S.C. § 1927. Because Mills' motion to dismiss should be granted, the only motions for this Court to consider are Mills' motion to dismiss and Mills' motion for sanctions.

ANALYSIS

A. Standards for Considering Motions to Dismiss

Federal Rule of Bankruptcy Procedure 7012, which incorporates Federal Rule of Civil Procedure 12(b)(6), governs motions to dismiss adversary proceedings. In considering a motion to dismiss for failure to state a claim, the court construes all of the allegations of the pleading in the light most favorable to the pleader. *See* 5C Wright & Miller, *Federal Practice and Procedure: Civil* 3d § 1363 (2004). A plaintiff must provide "either direct or inferential allegations respecting all the material elements [necessary] to sustain a recovery." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). Dismissal of an adversary proceeding in bankruptcy for failure to state a claim is proper when "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle plaintiff to relief." *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897 (6th Cir. 2004) (citing *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475 (6th Cir. 1990)). The court, however, is not required to "accept as true legal conclusions or unwarranted factual inferences." *Eubanks*, 385 F.3d at 897 (citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)).

When a court determines a Rule 12(b)(6) motion it may take judicial notice of the public record, including documents filed and the record in other judicial proceedings, without converting

the motion to dismiss to one for summary judgment “because such documents are capable of accurate and ready determination.” *Followell v. United States*, 2006 WL 3792686 at *7 (Bankr. M.D. Fla. Nov. 22, 2006) (slip copy) (quoting *Martin K. Eby Construction Co., Inc. v. Jacobs Civil, Inc.*, 2006 WL 1881359 at *1 (M.D. Fla. July 6, 2006)). The Court may even consider affidavits attached to the plaintiff’s complaint verifying that the statements in the complaint are true. *Song v. Elyria*, 985 F.2d 840, 842 (6th Cir. 1993) (explaining that since the plaintiff’s affidavits added nothing new, but, in effect reiterated the contents of the complaint and the defendant’s attachment did not rebut, challenge, or contradict anything in the plaintiff’s complaint, conversion of the motion to dismiss to one for summary judgment was not required). This Court takes judicial notice of the cases referenced herein, their records, their dockets, and their judgments.

This Court must determine whether, accepting all of the Plaintiff’s well-pled factual allegations as true and construing the complaint in the light most favorable to the Plaintiff, but rejecting unwarranted factual inferences and legal conclusions asserted by Plaintiff, it appears beyond a doubt that Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Plaintiff alleges that Mills and Foster (1) committed fraud upon the court; (2) violated their duty of candor; and (3) committed abuse of process. Plaintiff seeks declaratory judgment and enforcement of the Settlement Agreement.

B. Elements of a Motion to Vacate a Judgment for Fraud on the Court

Courts have inherent power to vacate a judgment that has been obtained by fraud on the court. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) (explaining that “[t]he inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question.”) (citations omitted). The Supreme Court in *Hazel-Atlas Co. v. Hartford Empire*

Co., explained that this principle exists “to fulfill a universally recognized need for correcting injustices . . . which are deemed sufficiently gross” to warrant departure from the general rule that federal courts will not alter or vacate judgments once finally entered. *Hazel-Atlas Co. v. Hartford Empire Co.*, 322 U.S. 238, 244 (1944). Federal courts have been extremely cautious in the exercise of this power, reserving it for times when enforcement of the judgment is “manifestly unconscionable.” *Id.* at 244-45 (citing *Pickford v. Tablott*, 225 U.S. 651, 657 (1912)). An action for fraud on the court is not subject to traditional statutes of limitation. Rule 60(b) of the Federal Rules of Civil Procedure explicitly states that an action for fraud on the court is not time limited. Fed. R. Civ. P. 60(b).

Precisely what constitutes “fraud on the court” is unclear. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2870 (1995). Moore’s *Federal Practice* suggests that fraud on the court is fraud that “does or attempts to, subvert the integrity of the court itself [or that is] perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” 7 Moore’s, *Federal Practice*, 2d ed. 1987, ¶ 60.33 at p. 60-360. The Court of Appeals for the Ninth Circuit, critical of Moore’s definition, has held that in order to vacate a judgment for fraud on the court, “it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.” *Toscano v. Comm’r of Internal Revenue*, 441 F.2d 930, 933-34 (9th Cir. 1971) (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)). In *Toscano*, the court referred to its previous holding that a claim for fraud (not specifically fraud on the court) must demonstrate that the acts of the adverse party “must be such as prevented the losing party from fully and fairly presenting his case or defense.” *Toscano*, 441 F.2d at 934 (quoting *Keys v. Dunbar*, 405 F.2d 955,

957-58 (9th Cir. 1969). The court in *Toscano* observed that most attempts to distinguish fraud from “fraud on the court” have proven to be uninformative. *Toscano*, 441 F.2d at 933. The most obvious examples of the type of activities that constitute fraud on the court are bribing a judge or hiring a lawyer for the purpose of improperly influencing the court.

In the bankruptcy context, a proof of claim based on a fraudulent judgment may be challenged in the bankruptcy court. In *Heiser v. Woodruff*, the Supreme Court explained that a proof of claim based on a judgment may be assailed in the bankruptcy court on the ground that the purported judgment is not really a judgment at all because it was procured by fraud. *Heiser v. Woodruff*, 327 U.S. 726, 736 (1946).

1. Fraud Upon the Florida Bankruptcy Court

The Eleventh Circuit has explained that Federal Rule of Civil Procedure 60(b)(3) “allows a court to grant relief from a final judgment if the moving party proves by clear and convincing evidence that an adverse party has obtained the verdict through fraud, misrepresentation, or other misconduct.” *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000) (citations omitted); *see also Booker v. Dugger*, 825 F.2d 281, 283 (11th Cir. 1987). Additionally, “[t]he moving party must show that the conduct prevented the losing party from fully and fairly presenting his case or defense.” *Kirby Tankships, Inc.*, 205 F.3d at 1288 (citing *Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir. 1987)).

In the present case, Plaintiff has failed to allege that the judgment of the Florida bankruptcy court upon which Mills based his proof of claim was procured by fraud. Further, she has failed to allege that Mrs. Gurley was prevented from fully and fairly presenting her defense. Rather, Plaintiff alleges that Mills’ withdrawal of the motion to approve the Settlement Agreement was fraudulent

because Mills did not really believe that the Nevada property was worth more than \$1 million. At most, the Plaintiff alleges that the trial would not have occurred had the Settlement Agreement been approved. Her theory could succeed only if there were some compulsion on the part of Mills to present the Settlement Agreement to the court for approval. Yet she does not allege that Mills breached his contract with her in failing to present the Settlement Agreement for approval. In fact, she candidly admits that any attempt to enforce the Settlement Agreement as a contract is time-barred.¹

Among the duties of a trustee is the duty to collect and reduce to money the property of the bankruptcy estate. *See* 11 U.S.C. § 704(a)(1). Pursuant to this duty, a trustee is authorized to investigate and negotiate claims for the benefit of the estate, and in the exercise of sound business judgment, propose the compromise or settlement of those claims. *See* Fed. R. Bankr. P. 9019(a)(1). A trustee is not free to settle claims belonging to the estate without giving notice and obtaining court approval. *Id.* The compromise of a claim belonging to a bankruptcy estate is a multi-step process. The trustee and the creditor first negotiate a proposed agreement. Then, the trustee submits the proposed settlement to the creditors and the court for review. The court considers any objections filed and determines whether the proposed settlement is in the best interest of the estate. If the court determines that it is, the court enters its order approving the settlement, at which point the agreement becomes binding upon the parties. Without a pending motion, there is no settlement for a court to approve. Without court approval, there is no binding agreement.

¹ Any action sounding in contract would be barred by Florida's statute of limitations on contract actions. In Florida, any legal or equitable action on a contract that is founded on a written instrument must be taken within five years. Fla. Stat. Ann. § 95.11 (2006). Because the Settlement Agreement was drafted in 1996, any contract action would have to have been taken by 2001. Plaintiff brought the current action in 2004.

In this case, the record reflects that Mills filed a motion to approve a settlement of all of the estate's claims against Mrs. Gurley for \$1,000,000. This motion was initially set for expedited hearing on October 28, 1996. The EPA filed an objection. At the scheduled hearing, Mills announced through Foster that he could not go forward with the Settlement Agreement because he had learned that Mr. and Mrs. Gurley had failed to disclose the existence of the Nevada property. Mills asked for additional time to investigate the value of that property. The hearing was continued to November 20, 1996. At that hearing, Foster made statements about information received by Mills concerning the value of the property, and asked for yet another continuance to investigate its value. The hearing was continued to December 18, 1996. At that hearing, Foster stated that the expert hired by Mills was of the opinion that the value of the Nevada property was even higher than the value derived by the expert hired by the EPA. Based upon this information, Mills withdrew the motion to approve the settlement.

Plaintiff does not allege that Foster misstated the opinion of the experts hired by Mills or the EPA. Rather, she alleges that there was additional information consisting of comparable sales indicating a lower value for the property that Mills and Foster failed to disclose to the Florida bankruptcy court. In essence, the Plaintiff maintains that Mills simply did not believe that the Nevada property was worth as much as his expert opined that it was.

The Plaintiff fails to appreciate, however, that there was no requirement that the Florida bankruptcy court approve the withdrawal of Mills' motion to approve the Settlement Agreement. Further, despite what Plaintiff suggests, there was no order of the Florida bankruptcy court "rejecting" the Settlement Agreement. The court has reviewed the docket sheet in the Florida bankruptcy case, which reveals no order issued by the bankruptcy court concerning the Settlement

Agreement.² Because no court action was required or taken, there was no fraud upon the court. Rather, Mills simply withdrew his motion. He did not seek approval of the Settlement Agreement.

Plaintiff may be aggrieved by this. She may believe that Mills was contractually obligated to present the Settlement Agreement for approval or that Mills was under some duty of good faith to present the Settlement Agreement for approval. She has not presented these theories for adjudication, however. Rather, she claims that Mills and Foster deceived the court. Unfortunately, she has alleged no action *taken by the court* that resulted from this alleged deception. She alleges that the court “accepted the withdrawal and denied the settlement motion.” There is no allegation that the bankruptcy court conducted a hearing to determine the propriety of the withdrawal of the motion, nor is there an allegation that the court conducted an independent hearing without the aid of the trustee to determine whether the Settlement Agreement should nevertheless be approved. Rather, the bankruptcy court simply accepted the decision of the trustee to withdraw the motion. Indeed, the statement that is said to have caused the Plaintiff to seek the reopening of this bankruptcy case, the bankruptcy judge’s statement that he thought “[Mills and Foster] were nuts when [they] walked away from a million dollars,” is consistent with the view that, in the opinion of the bankruptcy judge, no judicial act resulted from the withdrawal of the motion to approve the Settlement Agreement, rather Mills and Foster “walked away.”

The Plaintiff has failed to allege facts indicating fraud on the Florida bankruptcy court.

² This Court may properly take judicial notice of the Florida docket sheet because “[f]ederal courts may take judicial notice of proceedings in other courts of record.” *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969); *see also, Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980).

2. Fraud Upon the Tennessee Bankruptcy Court

The Plaintiff alleges that Mills and/or Foster defrauded this court when Mills filed a proof of claim in Mrs. Gurley's bankruptcy case based upon the Florida judgment without mentioning the Settlement Agreement. The existence of the unapproved Settlement Agreement is undisputed. The Settlement Agreement was contingent upon approval by the Florida bankruptcy court; the bankruptcy court never gave that approval. Since the agreement was contingent upon court approval, which the parties never obtained, the agreement, as a matter of law, did not bind the parties.

In the Sixth Circuit, the following elements must be proved to establish fraud on the court.

There must be an act or statement:

- (1) On the part of an officer of the court;
- (2) That is directed to the "judicial machinery" itself;
- (3) That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;
- (4) That is a positive averment or is concealment when one is under a duty to disclose;
- (5) That deceives the court.

Workman v. Bell, 245 F.3d 849, 852 (6th Cir. 2001) (citing *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993)).

Again, the essence of Plaintiff's theory that Mills and/or Foster defrauded this court is that they failed to disclose the existence of the Settlement Agreement. The Plaintiff has failed, however, to allege facts indicating that Mills or Foster was under a duty to disclose the Settlement Agreement. In fact, the pleadings reveal the opposite: there was no duty to disclose the existence of the proposed agreement which never became binding. Further, the Plaintiff has failed to allege that Mills or Foster made a statement to this court that was materially false. The proof of claim was filed based

upon a final judgment of the Florida bankruptcy court. That judgment established the obligation that was the subject of the proof of claim. The Plaintiff does not allege that the judgment was procured by fraud, only that trial would not have occurred had the Settlement Agreement been approved. The proof of claim contained no false or misleading statement.

The Plaintiff has failed to allege facts indicating fraud on this bankruptcy court.

C. Violation of the Duty of Candor

Attorneys and officers of the court owe a general duty of candor to the tribunal. Model Rules of Professional Conduct 3.3. (2002). An attorney has an ethical duty to be truthful to the tribunal. *Id.* Rules of professional conduct in both Florida and Tennessee strictly prohibit lies and misrepresentations to the court. Fla. Bar Reg. R. 4-3.3; Tenn. Sup. Ct. R. 8, Rule 3.3. An attorney who is merely disingenuous to the court, however, is not in danger of violating the duty of candor. *See* Model Rules of Professional Conduct 3.3 cmt. (2002) (explaining that “[a] lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact”).

Typically, Federal Rule of Civil Procedure 11 is the vehicle opposing parties use to admonish an attorney who violates his ethical duties. *See* Fed. R. Civ. P. 11; *see e.g., Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997). Here, Plaintiff seeks to use an alleged violation of the duty of candor to support a private cause of action. No authority supports Plaintiff’s claim against Mills or Foster for violation of their duty of candor to the court. The Plaintiff does not allege that Mills or Foster violated their duty of candor to her, an opposing party. Consequently, Plaintiff fails to state a claim that Mills or Foster violated their duty of candor to the court.

D. Abuse of Process

The elements for abuse of process in Tennessee and Florida are virtually identical. To establish a claim for abuse of process, two elements must be alleged: (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in regular prosecution of the charge. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550 (Tenn. 1999). There can be no abuse of process when the process is used “to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior motive.” *Botham v. Harrington*, 458 So. 2d 1163, 1169 (Fla. Dist. Ct. App. 1984). The most common example of abuse of process involves extortion. *Scozari v. Barone*, 546 So. 2d 750, 751 (Fla. Dist. Ct. App. 1989).

Plaintiff’s complaint fails to allege that Mills and Foster used the court process to force Mrs. Gurley to do anything other than obey the court-issued process. The crux of Plaintiff’s abuse of process argument centers on the propriety of Mills’ pending fee application. Plaintiff alleges that Mills’ request for fees, including a “success fee,” indicates an ulterior money-driven motive. This is not enough to successfully allege abuse of process. Abuse of process requires an improper act. Plaintiff has failed to allege that any specific act Mills took was an improper use of process. That Mills’ withdrew his motion to approve the Settlement Agreement was within his rights and duties as trustee. *See* 11 U.S.C. § 704; Fed. R. Bankr. P. 9019. That the ultimate result of the withdrawal of the Settlement Agreement was a large judgment in favor of the trustee is not indicative of an abuse of process. Moreover, that Mills profited professionally from his administration of the estate is ancillary to the process and not a sign of abuse of process. Plaintiff has failed to allege that Mills

initiated the court process for any reason other than maximizing the estate pursuant to his duties as a trustee.

E. Motion for Sanctions

Federal Rule of Bankruptcy Procedure 9011, as incorporated by Federal Rule of Civil Procedure 11, governs motions for sanctions against a party in adversary proceedings. Rule 9011 directs that the presentation of a pleading to the court by an attorney constitutes a certification that:

[T]o the best of the persons'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 nonfrivolous 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.

Fed. R. Bankr. P. 9011(b). The court may impose a sanction to deter improper pleading if the court finds that there has been a violation of the pleading requirements and the offending party has received notice and an opportunity to respond. Fed. R. Bankr. P. 9011(c)(2). Examples of appropriate sanctions 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." Fed. R. Bankr. P. 9011 (c)(2).

The Sixth Circuit employs a reasonableness standard to determine whether to impose sanctions. *Silverman v. Mut. Trust Life Ins. Co. (In re Big Rapids Mall Assocs.)*, 98 F.3d 926 (6th Cir. 1996). The imposition of Rule 11 sanctions turns on "whether the individual attorney's conduct was reasonable under the circumstances." *Id.* at 930. Moreover, Rule 11 sanctions are designed to encourage counsel to avoid baseless accusations or filings filed for improper purposes. *Id.* Allegations unsupported by the record that are advanced for improper purposes will not be tolerated and are sanctionable under Rule 11. Moreover, "[a] good faith belief in the merits of a case is insufficient to avoid sanctions." *Tahfs v. Proctor*, 316 F.3d 584, 594 (6th Cir. 2003) (citing *Mann v. G & G Mfg., Inc.*, 900 F.2d 953, 958 (6th Cir. 1990)).

The imposition of Rule 11 sanctions is a very serious matter, particularly when discovery is incomplete at the time of the alleged violation. *Tahfs*, 316 F.3d at 594. Specifically, the Sixth Circuit has mandated that "a district court should be hesitant to determine that a party's complaint is in violation of Rule 11(b) when the suit is dismissed pursuant to [Federal Rule of Civil Procedure] 12(b)(6) and there is nothing before the court, save the bare allegations of the complaint." *Id.* Otherwise, the imposition of sanctions would be warranted in almost any circumstance where the complaint was dismissed pursuant to Rule 12(b)(6). *Id.* at 595. In light of this directive, the Court must carefully examine Mills' motion for sanctions.

Although the present case has a long history in this Court, the current complaint alleging fraud on this court and the Florida bankruptcy court is still in the pleading stage. Plaintiff and her attorneys have conducted no discovery on this matter pursuant to this court's protective order

entered on October 14, 2004. Since this case is still at the pleading stage and dismissal is warranted under Rule 12(b)(6), this court should be hesitant to impose sanctions. Plaintiff and her attorneys do make a number of factual allegations that attack the credibility and integrity of Mills, Foster, and the Florida bankruptcy judge. It is unclear whether these allegations are well grounded in fact since “whether a case is well grounded in fact will often not be evident until a plaintiff has been given a chance to conduct discovery.” *Runfola & Assocs. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 372 (6th Cir. 1996). Plaintiff points to the transcripts and Mr. Gurley’s affidavit in support of these allegations. Plaintiff and her attorneys specified every account of possible wrongdoing throughout the Florida bankruptcy case. The court has not determined whether Plaintiff’s allegations are true. In considering the motion to dismiss, the court accepted the allegations as true, but determined that the allegations fail to state a cause of action for fraud on the court. The court’s decision turned upon the distinction between acts of Mills and Foster, and acts of the court. This was a close question, and one that might not have been immediately evident to the Plaintiff or her attorneys. The gravity of Plaintiff’s allegations are not lost on this court. Mills and Foster claim they could face prosecution for “multiple counts of at least ten federal felonies, with maximum combined penalties of imprisonment for 100 years and fines exceeding \$100,000,000, and would expose Foster to disbarment” if Plaintiff’s allegations were proved. (Trustee’s Memorandum in Support of Motion for Sanctions, p. 3). Such severe allegations should be made cautiously, of course. Nevertheless, the court does not find that the complaint was filed for an improper purpose or that the inquiry leading to the filing of the complaint was unreasonable under the circumstances. Rather, the court concludes, after careful review, that the factual allegations are legally insufficient. Although this is the court’s conclusion, it does not follow that the complaint was frivolous. Rather, as the court

has indicated, the court's decision turned on a narrow distinction. As a result, the court finds that the filing of the complaint did not violate Rule 11.

Mills also requests sanctions pursuant to 28 U.S.C. § 1927. Section 1927 states:

Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Imposition of sanctions under this section requires a court first to find that "an attorney reasonably should know that a claim pursued is frivolous." *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986). Bad faith is not necessary to impose sanctions pursuant to section 1927. *Id.* at 1230. Although there have been numerous filings from both Plaintiff and Mills in any number of courts, this is the first action alleging fraud on the court. The court has found that the complaint, though failing to state a claim, was not frivolous. This is the first appearance of present counsel for the Plaintiff in any of the proceedings involving the Gurleys. They have not unreasonably or vexatiously multiplied these proceeding. Accordingly, the request for fees and expenses pursuant to section 1927 should be denied.

CONCLUSION

Based upon the foregoing, the Defendant's motion to dismiss will be granted; the Defendant's motion for sanctions will be denied; and the motions to strike, to transfer venue, and for jury trial are moot.

The court will enter separate orders consistent with this opinion.

cc: Plaintiff
Attorneys for Plaintiff
Defendant
Attorney for Defendant