



Mystery Creditor Pushes Eagan Avenatti Into Ch. 11

By **Carolina Bolado**

Law360, Miami (March 17, 2017, 8:59 PM EDT) -- California class-action law firm Eagan Avenatti LLP was plunged into Chapter 11 bankruptcy earlier this month when an elusive Orlando creditor named Gerald Tobin filed an involuntary petition over a claim for payment worth less than \$30,000.

Since that March 1 filing, in which Tobin claims he is owed \$28,700 for services rendered, the mysterious creditor has been nowhere to be found. His whereabouts — indeed Tobin's true identity — is one of many unanswered questions in a bitter fight between attorneys who were once colleagues, with millions of dollars at stake.

At a hearing on March 8 — one in which Tobin did not appear — an attorney for Eagan Avenatti, Elizabeth Green of BakerHostetler, told the court that Tobin is an investigator who helped on one of the firm's cases.

"The petitioning creditor isn't related to the law firm," she said. "It is an independent third person."

But there's no Gerald Tobin licensed as a private investigator in Florida, where licenses are mandatory for any independent private investigators. And the address Tobin gave to the court is a UPS Store mailbox. Multiple calls and messages left at the phone number listed for him on the docket were not returned.

So who is Gerald Tobin?

"That's the \$28,700 question," Berger Singerman LLP's Isaac Marcushamer said.

Marcushamer represents Jason Frank, a former attorney at Eagan Avenatti who is in the middle of a multimillion-dollar dispute with the firm over allegedly unpaid fees owed under a contract he signed with the firm. Frank says he's owed \$14 million, while Eagan Avenatti founding partner Michael Avenatti says he has more than \$30 million in cross-claims filed against Frank and Frank's law partners.

"Mr. Frank committed fraud against our law firm," Avenatti said. "Any allegation that he's owed anything is absurd."

Frank and the firm were set to start an arbitration March 13, but now that Eagan Avenatti is in bankruptcy, the proceeding has been postponed indefinitely.

In court filings, Frank has hinted that Michael Avenatti may have orchestrated the bankruptcy filing to get out of the arbitration.

"It is telling that the alleged debtor did not seek bankruptcy protection itself," Frank said in a filing. "Indeed, given the sanctions the alleged debtor is facing, it is possible that the bankruptcy proceeding was commenced solely to stay the arbitration hearing from proceeding as scheduled."

The firm called Frank's suggestion "outrageous" and said it is "just as false as when he claims he wasn't fired from our firm for fraud."

Frank says he was a partner at Eagan Avenatti from February 2009 until May 20, 2016. In that time, he was paid under an independent contractor agreement between the firm and Frank's professional corporation Jason Frank Law PLC, according to his motion for relief from the automatic stay.

Under the terms of the agreement, Frank says, he was entitled to 25 percent of Eagan Avenatti's profits and 20 percent of the fees collected on matters that Frank originated. He says the firm failed to pay him more than \$14 million in profit-share and origination bonuses.

As Avenatti tells it, Frank was never an equity partner and was terminated because he and two other attorneys at the firm conspired to secretly establish a competing law firm while at the same time receiving compensation from Eagan Avenatti, according to a filing Tuesday. On May 20, the firm found out about the plan and locked them out of the offices and computer systems.

Avenatti claims the three attorneys formed a new firm, Frank Sims Stolper LLP, and tried to poach Eagan Avenatti clients. After the three were fired, the firm learned they had been working together since February 2016 to plot their exit, according to Avenatti's filing.

"And we have recently learned that they are misrepresenting to prospective clients on their website that their firm is responsible for countless results and clients that occurred at Eagan Avenatti years before they even formed their new firm," an Eagan Avenatti spokesperson said.

The spokesperson said Frank Sims Stolper took 17 cases from his firm, many of which were on the verge of settling, and added that they have emails showing the three attorneys convinced various Eagan Avenatti clients to leave.

Eric George of Browne George Ross LLP, who is representing Frank in the arbitration, said the clients who left were not Eagan Avenatti clients but Frank's clients and called Avenatti's claims "worthless."

"A number of them, like AT&T, date back to when Mr. Frank was a partner at Paul Hastings," he said. "There was never any doubt they would follow Mr. Frank if he left Eagan Avenatti."

The parties agreed to arbitrate the dispute, as required under their contract, but Frank says in bankruptcy filings that the firm has been needlessly delaying the process, including by failing to pay its half of the \$220,000 deposit for the legal costs, which Frank had to front entirely to secure a date. On Feb. 10, an arbitration panel agreed with Frank's assessment and ordered a number of sanctions against Eagan Avenatti for discovery violations that included failing to produce tax returns, bank statements and other accounting forms.

In that order, made public when Frank filed it as an exhibit in a bankruptcy filing, the arbitration panel said Eagan Avenatti had "acted with malice, fraud and oppression by hiding its revenue numbers," and sanctioned the firm by barring it from offering any evidence to back up its counterclaims and by opening the door for Frank to request punitive damages.

Eagan Avenatti disputes this, saying the firm did pay an unspecified amount of fees to the arbitration company in this matter and did not delay production of its tax documents.

"Frank is purposely not disclosing all of the facts relating to this issue from the arbitration, which inherently is confidential," a firm spokesperson said. "We are not likewise going to violate the confidentiality by providing other arbitration orders, transcripts of proceedings and the like that completely undercut what Frank is peddling."

A Feb. 22 order from the chair of the arbitration panel, however, states that there is no provision in the arbitration clause governing the proceeding that makes it confidential. The JAMS rules require the organization and the arbitrator to maintain confidentiality, but not the parties,

according to the order.

The arbitration was set to start March 13, but that changed when the involuntary bankruptcy petition was filed March 1. By the next day, Avenatti was emailing Frank and his counsel explaining that a bankruptcy petition had been filed and the deposition set for March 3 with Eagan Avenatti's managing partners and bookkeeper would have to be postponed.

At a hearing March 8 on Frank's motion for relief from the automatic stay, U.S. Bankruptcy Judge Karen S. Jennemann said the case had a "stench of impropriety" and gave Eagan Avenatti a choice: Either go ahead with the arbitration and get additional time to dispute the bankruptcy filing from what she called "a screwy small creditor" who couldn't independently start an involuntary case, or consent to becoming a Chapter 11 debtor and postpone the arbitration. She gave the firm until March 10 at noon to decide and said she didn't think there would be a bankruptcy.

Eagan Avenatti consented to the bankruptcy just before noon on March 10.

An Eagan Avenatti spokesperson told Law360 that Tobin is an outside investigator who was never an employee of the firm. The firm says it disputes the amount of Tobin's claim and intends to challenge "a host of issues in this case."

Law360 tried to track down Tobin, but was unsuccessful. The only person Law360 could find by that name in central Florida was Gerald Melson Tobin, with whom a number of addresses in Daytona Beach and one in Orlando are associated. Multiple attempts to reach him were unsuccessful.

Another Gerald Tobin, an attorney who has practiced in Miami for more than five decades, told Law360 that he does not have an office in Orlando and has nothing to do with this case.

Local private investigators had never heard the name, and one called his lack of a license a "major red flag," as the license is required by the state.

Another Orlando private investigator, Mike Andrews, said a law firm could have hired an unlicensed investigator as an in-house investigator to do something like gather clients for a class action, but that person would have been an employee of the firm, not an independent contractor.

The phone number Tobin gave to the court appears to be registered to a local wedding photographer with a different name who did not return messages left on his business phone.

Marcushamer has requested a Rule 2004 examination of Tobin, which is akin to a deposition, for April 7. He has also asked the manager of the UPS Store to show up and provide information about the owner of the mailbox at the address given to the court by the petitioning creditor.

Frank has filed as a creditor, along with several others. Marcushamer said that at least his client will now get the financial disclosures he has been seeking.

"One thing we know about bankruptcy is the process is designed to shine light where most people don't like to shine," he said. "There are going to be some significant financial disclosures."

Marcushamer noted that Avenatti and his firm are now subject to the strict rules of the bankruptcy process and have to clear any expenses with the court first, which could interfere with a large class action over Kimberly-Clark surgical gowns in which Avenatti is the lead attorney for the plaintiffs. The plaintiffs, surgery centers that claim the company passed off porous surgery gowns as impermeable, are seeking \$10 million in damages. The case is set to go to trial March 28.

"When a company files for Chapter 11 relief, there's a whole song and dance on how to keep the lights on," Marcushamer said. "Now he's subject to that process."

An Eagan Avenatti spokesperson said the bankruptcy would “absolutely not” affect the firm’s representation of the plaintiffs in that suit.

“We are going to continue to do great work in that case as we have done for over two years now consistently (as the docket reflects),” the spokesperson said. “The same is true in all of our cases – it is business (namely winning) as usual.”

Eagan Avenatti is represented by Elizabeth A. Green and Tiffany D. Payne of BakerHostetler.

Frank is represented by Isaac Marcushamer and Ilyse Homer of Berger Singerman LLP.

Counsel information for Tobin was unavailable.

The case is In re: Eagan Avenatti LLP, case number 6:17-bk-01329, in the U.S. Bankruptcy Court for the Middle District of Florida.

--Editing by Mark Lebetkin and Philip Shea.