UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

Cite as: [Unpublished]

Michelle D. Green, Debtor
Bankruptcy Case No. 01-34494-13

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

March 28, 2002

Michelle D. Green, Pro Se Debtor

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The Estate of Elizabeth R. Mohring has moved for sanctions against debtor's counsel for filing a Chapter 13 petition solely to harass the Estate and cause it unnecessary delay. The Estate had received a Judgement of Foreclosure against certain real property of Ms. Green and a sheriff's sale had been scheduled and noticed for May 8, 2001. On that day Ms. Green filed a Chapter 7 petition, signed by her attorney Howard Young, by which the sheriff's sale was stayed. The Estate obtained relief from that stay on June 13, 2001.

A second sheriff's sale was scheduled and noticed for August 14, 2001. On August 6, 2001, Ms. Green filed a Chapter 13 petition, without schedules or a plan, signed by Mr. Young, and another automatic stay was obtained. The 15 day period in which the debtor may file a payment plan ended August 21, 2001 without any plan being filed. The next day, August 22, 2001, Mr. Young filed a Motion to Withdraw as Counsel citing Ms. Green's failure to confer with him on a payment plan and Ms. Green's failure to pay Mr. Young his retainer fee. On August 24, 2001, Mr. Young's motion was granted and the Chapter 13 case was dismissed. That same day counsel for the Estate filed the Motion for Sanctions under Bankruptcy Rule 9011.

The Estate maintains Mr. Young had no legal basis for filing the Chapter 13 petition before a discharge was entered in the prior Chapter 7, that Mr. Young knew, or should have known, there was no legal basis for such a petition and knew, or should have known, the debtor's sole purpose in filing the Chapter 13 was to improperly prevent the second sheriff's sale from proceeding.

Federal Rule of Bankruptcy Procedure 9011 provides in relevant part:

Rule 9011. Signing of Pleadings, Representations to Court; Sanctions; Verification and Copies of Papers

(a) Signature. Every petition, pleading, written motion, and other paper except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to 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 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.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made

> separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). ....

Bankruptcy Rule 9011 and Federal Rule of Civil Procedure 11 are very similar and Bankruptcy Courts have relied on cases interpreting Rule 11 in analyzing Bankruptcy Rule 9011.[1] See, e.g. In re Kaliana, 207 B.R. 597 (N.D. Ill. 1997) (Squires, J.).

There are two separate grounds for establishing a Rule 9011 violation. The first is "frivolousness" which encompasses two subparts which need to be satisfied to avoid a Rule 9011 violation: whether the attorney made a reasonable inquiry into the facts and whether the attorney made a reasonable inquiry into the law. See Brown v. Fed'n of State Med. Bd. of the U.S., 830 F.2d 1429, 1435 (7th Cir. 1987). The second ground is "improper purpose." A signed document may not be presented for purposes of delay, harassment or increasing the costs of litigation. See id. at 1436. Under both the frivolousness and improper purpose standards, an objective determination is made whether the attorney's conduct was reasonable under the circumstances. See id. at 1435. When determining if the attorney's inquiry into the law is reasonable, Brown directs the trial court to consider: "the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the document was a [nonfrivolous] effort to extend or modify the law." Id.

Turning first to the "improper purpose" clause. Mr. Young is an experienced consumer bankruptcy lawyer. He is presumed to know that if the debtor had a genuine motive of paying

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[1]There are, however, some pitfalls to be avoided in reading the older case law. Bankruptcy Rule 9011 was amended in 1997 to conform to amendments made to Fed. R. Civ. P. R. 11 in 1993. See F. R. Bankr. P. R. 9011 advisory committee's note (1997). The first amendment relevant to the instant memorandum is the word "nonfrivolous" in the current Rule 9011(b)(2) was substituted for the phrase "good faith." While most courts had interpreted the pre-amended language as requiring an objective standard, the amendment was intended to remove all doubt that any "empty-head pure-heart" justification remained. See Fed R. Civ. Proc. R. 11 advisory committee notes (1993).

Secondly, the amended language of Rule 9011(c) now gives discretion to the trial court to impose sanctions. Previously, sanctions were required upon a finding of a violation of the rule. See Land v. Chicago Truck Drivers, 25 F.3d 509, 515 (7th Cir. 1994).

Another major change in the amended rule was the insertion of a safe-harbor in Rule 11(c)(1)(A). Under the current rule any challenged document must be allowed 21 days to be withdrawn or amended. However Bankruptcy Rule 9011 does not provide this safe harbor when the challenged document is, as it is in this proceeding, a petition.

her creditors she had the option to convert her pending bankruptcy case to one under Chapter 13. See 11 U.S.C. §706. He also knew that such a conversion would not result in a new stay. See 11 U.S.C. §348. I must infer, therefore, that the choice of filing a new case was for the purpose of obtaining a stay like the one which had very recently been terminated. In so doing, he carried out the debtor's intention to thwart the creditor who had obtained relief from the prior stay. Filing a Chapter 13 case for the purpose of thwarting creditors rather than repaying them has been identified as filing in bad faith. See In re Schaitz, 913 F.2d 452, 453 (7th Cir. 1990). Bad faith filing is an "improper purpose."

Mr. Young filed his motion to withdraw as counsel prior to the Estate's motion for sanctions. Mr. Young's timing of his withdrawal does not prevent a finding Mr. Young acted with an improper purpose.

Considering next the "frivolousness" clause, there was no colorable legal argument supporting the filing of the Chapter 13 petition. It is a matter of some debate when the back-end of a "Chapter 20" may be filed, but that debate is inapposite here. Though not specifically prohibited by the Bankruptcy Code, simultaneous filings are prohibited by the venerable judge-made "single estate rule." See Freshman v. Atkins, 269 U.S. 121 (1925). To determine if the second petition is to be allowed, the courts have needed to address the precise end-point of the estate created by the first petition. The courts' debate has centered on whether it is necessary to have a formal order closing the first case or if a discharge order is sufficient. See In re Kosenka, 140 B.R. 40, 43-49 (Bankr. N.D. Ind. 1989 Conrad, J.) However, Ms. Green's Chapter 7 had not been discharged at the time of the Chapter 13 filing, thus Mr. Young cannot avail himself of the legal arguments put forward in that debate.

The fact that bankruptcy petitions must often be filed in the most expeditious manner does not excuse Mr. Young. The Seventh Circuit has already taken note that much of bankruptcy practice is high-volume and low-profit margin. See In re TCI Ltd., 769 F.2d 441, 446 (7th Cir. 1985). In such a practice it would be inappropriate to require all petitions be handcrafted and the result of extensive research. A "lawyer may rely on memory or seasoned intuition" but not where, as here, the offered petition cuts against all established precedent. Id. at 447. The filing of a petition carries with it serious and immediate consequences, most notably the automatic stay under §362. Not coincidently, when bankruptcy courts have found subsequent filings to be purely a delaying tactic, the courts have dealt harshly with the debtor, e.g., granting sanctions and enjoining the debtor from further filings. See In re Standfield, 152 B.R. 528, 538 (Bankr. N.D. Ill. 1993 Squires, J.). Having represented Ms. Green from the outset of her Chapter 7 case, Mr. Young was certainly aware that relief from stay had been granted in that case. Mr. Young was also aware that filing a Chapter 13 petition would result in a new stay which would be resisted and, thus, present legal issues which would not lend themselves to routinized legal practice. Had the debtor truly sought to employ Chapter 13 to provide payment to creditors the Chapter 7 case could have been converted. See In re Schaitz, 913 F.2d at 453. It is clear that Mr. Young had not done the legal research and analysis that the strategy he selected would require to meet the requirements of Rule 9011.

Having established Mr. Young has violated Rule 9011, we now turn to the matter of determining the appropriate sanction. The sanction is to be limited "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Bankr. P. R. 9011(c)(2). The Estate claims to have incurred legal fees and expenses of $3,780.06 with respect to the second Chapter 13 through the relief from stay hearing on August 24th and have legal fees and expenses related to the second cancelled sheriff's auction of $623.84. The Estate estimates legal expenses related to the Rule 9011 hearing held on September 24th to be $522.00. While there is little reason to doubt these expenses might have been incurred, it is my best judgement that paying $2,500.00 would deter similar conduct. Since deterrence not recompense is the object of the sanction, the payment of $2,500.00 by Mr. Young to the Estate shall be ordered.