United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Milton Scott Andros, Plaintiff, v.
Richard L. Soddy, Defendant
(In re Milton Scott Andros, Debtor)
Bankruptcy Case No. 99-34989-7, Adv. Case. No. 00-3028-7

United States Bankruptcy Court
W.D. Wisconsin

December 14, 2000

Roger Merry, Monroe, WI, for plaintiff.
Richard L. Soddy, Monroe, WI, defendant.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

Richard Soddy seeks $1,000 in attorney's fees as sanction against the debtor's counsel who waited until a week before the trial to dismiss this adversary proceeding, even though the grounds for dismissal were known more than one month earlier. The essential facts are these:

Chapter 7 debtor, Milton Scott Andros, filed the adversary on February 4, 2000, seeking to avoid Soddy's lien on his mobile home. Pursuant to the Court's pretrial order, the parties filed a joint pretrial statement on May 26, 2000. On May 31, 2000, the Court entered an order setting June 27, 2000 as the date for exchanging exhibits and July 14, 2000 as the date for the trial. On July 7, 2000, one week before the trial, the debtor's counsel dismissed the adversary complaint claiming that, after being evicted by mobile home park authorities, the debtor lacked "any significant equity" in the mobile home.

On September 5, 2000, the Court heard Soddy's motion for sanctions. At the hearing, Soddy's uncontradicted assertion was that the debtor's counsel knew of the eviction as early as May 30, 2000. As a result of counsel's delay in dismissing the adversary, Soddy, who had previously appeared pro se, claims to have incurred attorney's fees of $1,000 in preparing for the trial. The debtor's counsel did not offer any exculpatory or extenuating circumstances to explain the belated dismissal.

Because Soddy objects to the manner in which the debtor's counsel has conducted this litigation, 28 U.S.C. §1927 provides the proper basis for any award of sanctions. It provides:

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. Unlike violations of Bankruptcy Rule 9011, which depend upon the

submission of "a pleading, motion, or other paper," §1927 violations are premised on a showing of "serious and studied disregard for the orderly process of justice." Walter v. Fiorenzo, 840 F.2d 427, 433 (7th Cir. 1988). Although Rule 9011 sanctions can be imposed on a client as well as on counsel, §1927 applies only to counsel.

Whether bankruptcy courts are authorized to impose sanctions under §1927 is not perfectly clear in this circuit. Some courts have held that §1927, by its very language, only authorizes sanctions by "court[s] of the United States," which bankruptcy courts are not. Regensteiner Printing Co. v. Graphic Color Corp., 142 B.R. 815 (N.D. Ill. 1992, J. Aspen) is a case in point. There, the district court vacated the §1927 sanctions imposed by the bankruptcy court, stating:

The question of whether the Bankruptcy Court possesses jurisdiction to impose sanctions under §1927 hinges on whether that court is a "court of the United States" as employed in the statute.... For the definition of "court of the United States," the Historical and Revision Notes to §1927 refer to 28 U.S.C. §451. Section 451 provides in pertinent part:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter five of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior. 28 U.S.C. §451 (Supp.1992).

Bankruptcy judges are not entitled to hold office during good behavior, but rather serve a specified term of fourteen years. 28 U.S.C. §152(b) (Supp.1992). Accordingly, the Bankruptcy Court is not a "court of the United States" and, as such, does not have the authority to impose sanctions for vexatious and multiple filings under §1927.

Regensteiner Printing Co. v. Graphic Color Corp., 142 B.R. at 818.

See also In re Memorial Estates, Inc.,116 B.R. 108, 110 (N.D. Ill. 1990, J. Plunkett) ("Under [28 U.S.C. §451] ... it is likely that the bankruptcy court is not a court of the United States, since bankruptcy judges do not hold office during good behavior, but rather for a specified term. Therefore, we find it questionable whether the bankruptcy court would be able to impose sanctions upon anyone under §1927"); In re Rimsat, 229 B.R. 914 (Bankr. N.D. Ind. 1998, J. Grant) (same). But not all courts in the Seventh Circuit agree.

Courts affirming the bankruptcy court's authority reason that because bankruptcy courts are units of the district courts, they are by analogy "court[s] of the United States" for purposes of §1927. The fullest articulation of this argument is found in In re Volpert, 177 B.R. 87 (Bankr. N.D. Ill.1995). In Volpert, Judge Schmetterer criticized Regensteiner for framing the question as "whether 'bankruptcy courts' per se are 'courts of the United States.'" Id. at 87. "The answer to [this] question," he continued, "is clearly no because, under present law, 'bankruptcy courts' no longer exist as separate jurisdictional or legal entities." Id. Instead:

[u]nder the current statutory scheme, bankruptcy judges serve as "judicial officers of the United States district court." 28 U.S.C. § 152(a)(1). There is no "bankruptcy court" per se as a separate legal entity.... [T]he phrase "bankruptcy court" is merely a collective term of reference for all bankruptcy judges who serve within any district as judicial officers of the district court. Bankruptcy judges ... collectively constitute a "unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. §151.... Federal district courts ... have original jurisdiction over all cases and proceedings arising under the Bankruptcy Code. See 28 U.S.C. §1334(a), (d). Under §157(a), district courts are authorized to refer all cases and proceedings under title 11 to the bankruptcy

courts.... Under this statutory scheme, sanctions ordered by a bankruptcy judge emanate from a judicial officer of the district court, presiding as part of a unit of that court. The same Title of the U.S. Code that authorizes imposition of sanctions by the district courts under 28 U.S.C. §1927 also defines bankruptcy judges as judicial officers of the district courts who comprise a "unit" of the "district court." 28 U.S.C. §§151, 152(a)(1). An order is therefore entered by the district court when it is entered by a bankruptcy judge sitting as a judicial officer of that district court....[and] a district court judge is clearly authorized to impose sanctions in any bankruptcy proceeding. Therefore, if the proceeding is of a type that can be referred to a bankruptcy judge, and if the order is within a bankruptcy judge's core or related jurisdiction under 28 U.S.C. §157(b)(2), a bankruptcy judge clearly has authority to impose sanctions under 28 U.S.C. §1927.

In re Volpert, 177 B.R. at 88-89. *See also* Knepper v. Skekloff, 154 B.R. 79 (N.D. Ind. 1993, J. Lee) (same).

Several courts have adopted Judge Schmetterer's reasoning in construing other federal statutes containing the term "courts of the United States." *See* In re Yochum, 89 F.3d 661 (9th Cir. 1996, J. Hall) (bankruptcy courts are "courts of the United States" for purposes of awarding fees under 26 U.S.C. §7430); In re Grewe, 4 F.3d 299 (4th Cir. 1993, J. Hamilton), *cert. denied*, 510 U.S. 1112, 114 S.Ct. 1056, 127 L.Ed.2d 377 (1994) (same); In re Crysen/Montenay Energy Co.,1999 WL 681487 (S.D. N.Y., J. Cedarbaum) ("bankruptcy judge's jurisdiction derives from the district court"; therefore, judge has the power to compel arbitration under 9 U.S.C.A. §3).

The Seventh Circuit subsequently upheld Judge Schmetterer's levy of sanctions in Volpert, but declined to do so based on §1927, finding instead that "the bankruptcy court had authority under §105 [(1)] to sanction ... an abuse of the bankruptcy process." In re Volpert, 110 F.3d 494, 500 (7th Cir. 1997, J. Ripple). In so doing, it expressed reservations about the implications of including bankruptcy courts within the ambit of the term "courts of the United States":

[B]ankruptcy courts have indeed occupied a unique position in the country's judicial structure. Because the phrase "court of the United States" is scattered throughout Title 28, we think it imprudent, especially in the absence of more extensive briefing, to so characterize the bankruptcy court for purposes of decision in this case. Given that we have determined, for reasons that follow, that the bankruptcy court in this case had ample authority, apart from §1927, to sanction... we shall travel the more prudent course and leave unanswered whether bankruptcy judges can exercise the authority of a "court of the United States."

In re Volpert, 110 F.3d at 499-500. Thus, Volpert expresses uncertainty about whether bankruptcy courts may sanction under §1927.

The Seventh Circuit's ambivalence on this issue, as evidenced in Volpert, has plagued its other decisions as well. For example, in In re TCI Limited, 769 F.2d 441 (7th Cir. 1985, J. Easterbrook), the Seventh Circuit upheld this Court's award of §1927 sanctions without any discussion of the Court's jurisdiction for imposing the sanctions. In a subsequent decision, In re Memorial Estates, 21 F.2d 1364, 1369 (7th Cir. 1992, J. Kanne), the Seventh Circuit acknowledged this, stating: "[a]lthough we upheld a bankruptcy court's imposition of a sanction under §1927, in In re TCI Ltd. ..., we did not discuss the court's jurisdiction to impose the sanction." Instead of resolving the issue in Memorial Estates, however, it proceeded to uphold the levied sanctions based on Bankruptcy Rule 9011, even though the bankruptcy court had "sanctioned the attorney pursuant to Bankruptcy Rule 9011 *and* 28 U.S.C. §1927." Id. (emphasis added).

Notwithstanding the Seventh Circuit's guarded language in Memorial Estates, some bankruptcy courts in this circuit have imposed sanctions under §1927, citing TCI Ltd. as their authority. *See e.g.* In re Mapson, 93 B.R. 161 (Bankr. C.D. Ill. 1988, J. Ginsberg) *and* In re Chicago Midwest Donut, Inc., 82 B.R. 943 (Bankr. N.D. Ill. 1988, J. Schmetterer). The Seventh Circuit itself in an unpublished disposition, In re Lewis, 920 F.2d 935 (7th Cir. 1990), upheld a bankruptcy court's imposition of §1927 sanctions, at least partly based on TCI Ltd. And, unlike in Volpert and TCI Ltd., the Seventh Circuit in Lewis upheld the bankruptcy court's award of sanctions solely based on §1927, without considering whether sanctions were warranted under Rule 9011 or §105.

The confusion generated by Volpert and its progeny appears to have been resolved by dicta in a recent decision, in which the Seventh Circuit unqualifiedly stated that bankruptcy courts may sanction under §1927. In Adair v. Sherman, 2000 W.L. 1206490 (7th Cir., J. Ripple), the creditor in a chapter 13 bankruptcy filed a proof of claim overvaluing its collateral. After his chapter 13 plan was confirmed, the debtor filed suit in district court, objecting to the creditor's allegedly routine and fraudulent practice of overvaluing collateral in bankruptcy. The district court dismissed the suit and the Seventh Circuit affirmed the dismissal, holding that the debtor could not collaterally attack the creditor's claim post-confirmation. In so holding, the Seventh Circuit noted that a debtor was not foreclosed from challenging fraudulent claims. Rather, abuse could be policed by the bankruptcy courts pursuant to their sanctioning powers:

[P]arties who commit fraud on the bankruptcy court may be sanctioned by that court pursuant to Federal Rule of Bankruptcy Procedure 9011, which is analogous to Rule 11 of the Federal Rules of Civil Procedure.... *Bankruptcy courts also have the authority to sanction attorneys under 28 U.S.C. §1927*, which allows the court to hold attorneys liable for any excess expenses caused because of their unreasonable or vexatious conduct. See In re Volpert, 110 F.3d 494, 500-01 (7th Cir.1997).

Adair v. Sherman 2000 WL 1206490 n.8 at 4 (emphasis added). Although this recent endorsement of the bankruptcy courts' power to sanction under §1927 is dicta, it suggests that the Seventh Circuit would currently hold in favor of the bankruptcy courts' authority to sanction under §1927.

Assuming then that the Court has authority to sanction under §1927, the next issue is whether the conduct complained of meets §1927's standard for "vexatious" conduct. The Seventh Circuit has held that §1927 sanctions require "some degree of culpability on the part of counsel." In re Knorr Brake Corp., 738 F.2d 223, 227 (7th Cir. 1984, J. Flaum). This is because "Section 1927 ... is punitive and ... must be construed strictly," having as its "purpose to penalize attorneys who engage in dilatory conduct." Id. at 226. The required degree of culpability is far from clear, however. In TCI Ltd., the Seventh Circuit intimated that §1927 embodies both a subjective and objective component:

Section 1927 ... allows an award of fees only when an attorney "multiplies the proceedings ...unreasonably and vexatiously." This is another way to state the traditional approach. The statute simply permits a court to transfer any award of fees from a client to the offending lawyer. "Bad faith" sounds like a subjective inquiry.... Despite its sound, however, "bad faith" has an objective meaning as well as a subjective one.... If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious. To put this a little differently, a lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law....Subjective bad faith or malice is important only when the suit is objectively colorable. A lawyer who pursues a plausible claim because of the costs the suit will impose on the other side, instead of the potential recovery on the claim, is engaged in abuse of process. This is independently tortious, and ... may be the basis ... for an award of fees.... Even those who prevail may be liable for fees if in bad faith they cause their adversaries to bear excessive costs.... This theme also appears in cases emphasizing that dogged pursuit of a colorable claim becomes actionable bad faith once the attorney learns (or should have learned) that the claim is bound to fail.

In re TCI Ltd., 769 F.2d at 445.

Explaining TCI Ltd.'s dual subjective/objective standard, Judge Nordberg in E.E.O.C. v. Sears, Roebuck and Co.,111 F.R.D. 385 (N.D. Ill. 1986) stated:

In TCI, the court distinguished objective from subjective bad faith.... Although far from clear, the court seems to hold that a lawyer engages in 'objective' bad faith '"by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law...."' Having so defined 'objective' bad faith, the court then stated that '"[s]ubjective bad faith or malice is important only when the suit is objectively colorable...."'

This court does not interpret TCI as segregating 'objective' bad faith to non-colorable cases only and 'subjective' bad faith to colorable cases only. Subjective bad faith, or malice, may clearly be present in a frivolous, or non-colorable action. Rather, this court interprets TCI's language as pertaining to the proof of bad faith necessary in colorable and non-colorable actions. In a non-colorable action, once a prevailing party has demonstrated that the claim is frivolous, or without foundation, the court may presume from this 'objective' evidence reckless or intentional conduct constituting bad faith. In a colorable action, on the other hand, the prevailing party must present 'subjective' evidence of improper motive, or malice, in order to demonstrate bad faith.

E.E.O.C. v. Sears, Roebuck and Co., 111 F.R.D. n.8 at 389.

Judge Nordberg's interpretation appears to hold true with respect to non-colorable actions. *See e.g.* Burda v. M. Ecker Co., 2 F.3d 769 (7^{th} Cir. 1993, J. Coffey) (finding sanctionable under §1927 the "bad faith" of counsel who asserted a claim that was without plausible legal or factual basis) *and* Walter v. Fiorenzo, 840 F.2d 427 (7^{th} Cir. 1988, J. Kanne) (same). And also with respect to colorable actions, as shown by the Seventh Circuit's recent case, Kotsilieris v. Chalmers, 966 F.2d 1181 (7^{th} Cir. 1992, J. Wood). In Kotsilieris, plaintiff's counsel filed a jury demand on the eve of trial, four and a half years after the plaintiff had initiated the suit. Although the action itself was colorable, the district court sanctioned counsel for the delay in making the jury demand. The Seventh Circuit upheld the district court's imposition of §1927 sanctions, noting that Congress intended "vexatious" to mean more than "unreasonable" behavior, and to require either subjective or objective bad faith:

[Defendant] argues that objectively unreasonable behavior constitutes vexatious conduct under section 1927. Such a reading seems to equate vexatious with unreasonable conduct. However, the statute explicitly requires that counsel act unreasonably and vexatiously before sanctions are warranted. We can, therefore, assume that Congress intended vexatiously to mean something other than unreasonably. In fact, our decisions have indicated just that. That is, our past decisions have interpreted vexatious to mean either subjective or objective bad faith.

...

[I]t is difficult to apply abstract words to concrete cases. If our language has been less than clear it is because of this difficulty and not because we intended to extend the meaning of vexatious to encompass ordinary negligence. Indeed, when we look to the facts in our prior decisions, we find no cases where we have upheld sanctions upon a showing of a simple mistake or ordinary negligence. Rather, cases in which this court has upheld section 1927 sanctions have involved situations in which counsel acted recklessly, counsel raised baseless claims despite notice of the frivolous nature of these claims, or counsel otherwise showed indifference to statutes, rules, or court orders.

In re Kotsilieris, 966 F.2d at 1183-1186. Thus, Kotsilieris rejects the notion that simple mistake or negligence may constitute the requisite "bad faith" to support the imposition of sanctions under §1927. However, this does not mean that "extraordinary or extreme negligence" is immune from the reach of §1927:

Under the current state of the law, something more than ordinary negligence must exist in order to justify the order of [§1927] sanctions. Nonetheless, the fact that ordinary negligence fails to meet the bad faith test does not mean that extraordinary or extreme negligence also fails. To the contrary, we have held that the bad faith standard has an objective component, and extremely negligent conduct, like reckless and indifferent conduct, satisfies this standard.

Kotsilieris v. Chalmers, 966 F.2d at 1185.

Kotsilieris also shows that the line of demarcation between extreme and ordinary negligence is sometimes blurry. For example, the Seventh Circuit questioned whether counsel's delay in making a jury demand constituted "extreme negligence." To be sure, it agreed "that extreme confusion resulted from [the] belated motion," but found "it ... less clear that this confusion resulted from extreme negligence." Id. at 1186. The court pointed to some mitigating circumstances, including that counsel, recently retained, was laboring under the not "unreasonable assumption" that prior counsel had made the demand; and "the sheer volume of documents that counsel was dealing with." Id. However, in light of the extremely deferential "abuse of discretion" standard, the Seventh Circuit upheld the district court's imposition of sanctions.

In our case, like Kotsilieris, the allegedly vexatious conduct is dilatory conduct by counsel. Both Kotsilieris and the instant case involve colorable actions, where the bad faith alleged is to be implied from the dilatory conduct itself. In Kotsilieris, counsel waited four and half years after the suit was initiated to file a jury demand, which "is no ordinary demand." Id. at 1186. In the instant case, counsel failed to dismiss the adversary promptly for five weeks after learning that his client's claim was absolutely unsound. The Seventh Circuit in Kotsilieris characterized the facts of that case as "push[ing] the bounds of district court discretion." Id. at 1183. Further, "to balance this close call," it found that "the district court did abuse its discretion in awarding such a large sum [$5,546.25] in relationship to the sanctioned conduct." Id. But the four and ½ years in Kotsilieris may differ from the five weeks in this case no more than the difference in the overall scale of the cases (the amount in dispute and time allowed for pretrial preparation). The effect of the delay in our case was to cause the defendant to incur the costs of preparing for a trial with which the lawyer for the plaintiff had no intention of proceeding. That fact coupled with the extremely tenuous nature of the plaintiff's contention from the outset of the case suggest that harrassment, delay and obstruction of the defendant were the purposes of the adversary from the start and that the delay in notifying the defendant of the abandonment of the claim was a calculated continuation of that policy.

Kotsilieris may be distinguished on another ground as well. The Seventh Circuit's lingering doubt over whether Kotsilieris was a case of "extreme negligence" was attributable to the existence of mitigating factors, which implied that the dilatory conduct resulted from simple negligence or mistake. There is no evidence of such exculpatory circumstances in the instant case and the debtor's lawyer did not offer any.

Moreover, under the Seventh Circuit's dual subjective/objective standard for bad faith, the Court may infer bad faith where an attorney "act[s] in the teeth of what he knows to be the law," and the "dogged pursuit of a colorable claim becomes actionable bad faith once the attorney learns (or should have learned) that the claim is bound to fail." In re TCI Ltd., 769 F.2d at 445. Here, the debtor's counsel appeared to believe that the lien avoidance claim was viable so long as the mobile home was the debtor's homestead. Assuming that the debtor's counsel learned of the eviction on May 30, 2000, there was no apparent reason to delay dismissal of the adversary proceeding until a week before the trial was to proceed. Further, the debtor's counsel had an affirmative duty to dismiss a claim that he subsequently determined to be non-viable. *See e.g.* Dahnke v. Teamsters Local 695, 906 F.2d 1192 (7th Cir. 1990, J. Cudahy) *citing* Insurance Ben. Administrators, Inc. v. Martin, 871 F.2d 1354 (7th Cir. 1989) ("[u]nlike Rule 11, section 1927 has been interpreted in our circuit to impose a continuing duty upon attorneys to dismiss claims that are no longer viable").

Once a violation of §1927 is shown, the Court must determine the appropriate sanction and the propriety of the requested award. As the Seventh Circuit explained in Kapco Manufacturing Co. v. C & O Enterprises, Inc., 886 F.2d 1485 (7th Cir.1989) (per curiam):

The decision of what constitutes an appropriate sanction rests within the sound discretion of the district court. However, the amount of the sanction must be a carefully measured response to the sanctioned conduct and the district court must specify the reasons for the sanction and the manner of computation.... In imposing sanctions a court may take into consideration the sanctioned attorney's assets and his ability to pay.... This equitable consideration has particular relevance when the court imposes the sanction as deterrence and seeks to ensure that the amount is sufficient to punish the sanctioned attorney. On the other hand, when the sanction is imposed to compensate the opposing party, a court may temper the sanction award according to the sanctioned attorney's ability to pay....[T]he intent behind a sanction award imposed [is] to deter and punish. A sanction without teeth may lack sufficient bite for these purposes.

Id. at 1496. Here, Soddy does not provide an accounting for the $1,000 in attorney's fees, which he attributes to his attorney preparing the proposed findings of fact and conclusions of law. Nevertheless, a detailed accounting is not necessary to entitle Soddy to the requested fees, especially given the relatively small amount at stake. Confronted with analogous facts, the Seventh Circuit in Ordower v. Feldman, 826 F.2d 1569 (7th Cir.1987, J. Manion) affirmed the district court's award of a flat sum for a §1927 violation, stating:

[W]hen awarding sanctions under §1927, we do not believe that a district court judge familiar with the proceedings acts beyond his discretion when he awards a relatively small flat sum that bears a reasonable relationship to the burden imposed upon the non-offending party. *See* Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133, 1138 (9th Cir.1984) (court awards flat sum of $1500 without documentation as sanction for violating 28 U.S.C. § 1927), *cert. denied*, 469 U.S. 1189, 105 S.Ct. 959, 83 L.Ed.2d 965 (1985). Indeed, this circuit has on several occasions awarded a flat sum award as "damages" under Fed.R.App.P. 38 without having evidence of attorney's fees and other expenses submitted before it. *See* Cheek, 828 F.2d at 398 ($1500 award); Hilgeford v. Peoples Bank, 776 F.2d 176, 179 (7th Cir.1985) ($500 award), *cert. denied*, --- U.S. ----, 106 S.Ct. 1644, 90 L.Ed.2d 188 (1986).

In the present case, the district court did not abuse its discretion by awarding the $1,000 sanction without first having evidence of attorney's fees submitted before it. The district court's less than draconian sanction was a carefully measured response to the sanctioned conduct.

Ordower v. Feldman, 826 F.2d at 1576.

Based on the foregoing analysis, the costs incurred by Mr. Soddy should be reimbursed if reasonable under the circumstances. The time and effort required by an attorney to become familiar with a case of this sort and to prepare the proposed findings of fact and conclusions of law required by this Court's pretrial order might reasonably be expected to cost the client the sum of $1,000. Because the proposed sanction bears a reasonable relationship to the burden imposed on Mr. Soddy it appears to be an appropriate amount to be charged to the debtor's attorney, and that may be so ordered.

END NOTES:

1. 11 U.S.C. §105 provides:

The [bankruptcy] court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.