DOCKET NUMBER: 98-11198
ADV. NUMBER: None
JUDGE: M. A. Mahoney
PARTIES: Michael John McManus
CHAPTER: 13
ATTORNEYS: L. Williams, F. V. Anderson
DATE: 2/2/99
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MICHAEL JOHN MCMANUS Case No. 98-11198

Debtor.

ORDER AWARDING SANCTIONS TO J & J FURNITURE FROM FRANKLIN V. ANDERSON AND ANDERSON & ORR

Lionel Williams, Mobile, Alabama, Attorney for Movant
Franklin V. Anderson, Mobile, Alabama, Attorney for Debtor

This case is before the Court on the motion of J & J Furniture Co., Inc. for sanctions under Fed. R. Bankr. P. 9011. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is awarding sanctions to J & J Furniture Co., Inc. against Franklin V. Anderson and Anderson & Orr in the amount of $500.00.

FACTS

Michael McManus filed this Chapter 13 bankruptcy case on April 3, 1998. He listed J & J Furniture Co, Inc. ("J & J") as a creditor for $767. His schedules also stated "1996 furniture purchase no longer in debtor's possession." J & J never filed a claim in the case. J & J never objected to confirmation. The debtor's plan was confirmed on June 9, 1998.

Ms. Randi McManus purchased some children's furniture from J & J on December 12, 1996, during her marriage to McManus. The contract is solely in her name.

The parties were divorced on September 23, 1997. Ms. McManus kept the furniture. The divorce decree states that McManus "shall pay and be responsible for the joint debts of the marriage." Neither McManus has made all of the required payments.

On October 24, October 28 and October 31, 1998, Randi McManus was contacted by a J & J representative. The J & J employee came to her house to inquire about the J & J account. Ms. McManus brought the J & J business cards left at her house by the J & J employee to her ex-husband, the debtor. On November 3, 1998, McManus' attorney, Franklin Anderson, called J & J Furniture's attorney and left a message indicating that contacting Ms. McManus was a violation of the stay in McManus' case and he would bring a motion for willful violation of the stay if J & J's collection efforts persisted.

On November 4, 1998, J & J's counsel informed Anderson that McManus was not a cosigner on the note. Anderson asserted that the codebtor stay was in place due to the divorce decree. McManus, through counsel, offered to settle the dispute by payment of his view of the value of the furniture to J & J. J & J refused, believing the value offered was too low.

On November 5, 1998, J & J's attorney sent Anderson and McManus a letter putting them on notice that J & J would seek sanctions if a motion for willful violation of the stay was filed. That same day, November 5, 1998, Anderson filed the "Motion for Relief from Willful Violation of the Automatic Stay." He signed the pleading as a member of the Anderson & Orr law firm. McManus authorized the filing. McManus was not very attentive to the details or substance of this motion or others in his bankruptcy case, but he was generally aware of the purpose of this motion. The motion alleged that J & J violated debtor's automatic stay when it left three business cards at Randi McManus' address.

On November 16, 1998, J & J filed a motion to dismiss the motion for willful violation of the stay for lack of jurisdiction. On November 24, 1998, McManus, through a pleading signed by counsel, filed a "Motion to Strike or in the Alternative Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted the Special Appearance and Motions of J & J Furniture to Dismiss for Lack of Jurisdiction and for Sanctions; and Debtor's Motion for Sanctions."

On December 10, 1998, the Court granted J & J's motion to dismiss the debtor's motion against it and denied the motions of McManus. The Court made oral findings and conclusions which essentially stated: (1) The debt of Ms. Randi McManus to J & J was not a debt of Dr. McManus. (2) Randi McManus' debt to J & J may be a "joint debt" of the parties as their divorce decree defines that term. If so, then Dr. McManus owes Randi McManus the amount of the J & J debt, but the divorce decree cannot make J & J a creditor of Dr. McManus. (3) The Court lacked jurisdiction over J & J Furniture in this case.

Dr. McManus was served with the sanctions motion which indicated that he was not a signatory on the J & J loan; however, he testified he did not read the pleadings he received very carefully and relied on his attorney to tell him what was happening. He simply put in a file whatever he received.

Dr. McManus is a medical doctor—a psychiatrist—who is employed at the Brewer Center. He is an intelligent man by the Court's observation.

J & J's attorney, Lionel Williams, spent 16.60 hours of time at $80/hour on this matter. J & J owes him $1,328 for fees and $13.25 for expenses. Two J & J employees have been to court two times for hearings—on December 9, 1998, at the stay violation hearing and on January 13, 1999, at the sanctions hearing.

LAW

Since December 1, 1997, in relevant part, Fed. R. Bankr. P. 9011 has provided:

(b) **Representations to the Court**. By presenting to the court (whether by signing, filing, submitting, or later advocating) a . . . written motion . . . 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; [or]
>
> (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.
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> * * * * * * *

(c) **Sanctions.** If . . . the court determines that subdivision (b) has been violated, the court may . . . 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) . . . Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

The burden of proving that Dr. McManus, Franklin Anderson, or the law firm of Anderson & Orr violated this rule is on the movant, J & J Furniture. It must prove its case by a preponderance of the evidence since no higher standard is dictated in the rules or the case law.

A.

The initial question to be answered is whether the filing of the motion and its prosecution were sanctionable. If so, then the liability of each party will be addressed.

"The purpose of Rule 11 is to deter litigation abuse and unnecessary filings." *In re Armwood*, 175 B.R. 779, 788 (Bankr. N.D. Ga. 1994). "The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuse." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 553, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991). The Court must look at two factors. First, did the party filing the motion make a reasonable inquiry prior to filing it? Second, if so, was the motion made for an improper purpose, were the claims and contentions warranted, and was there evidentiary support for the claims? The Court will discuss each of these issues in turn.

1.

The parties are held to an objective standard of reasonable inquiry. *Id.* at 554; *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987). The question is not whether the signer thought the inquiry was reasonable. The test is "whether the motion . . . reflected what could reasonably have been believed by the signer at the time of signing." *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993) (quoting *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1331 (11th Cir. 1992).

When Anderson filed the motion for willful violation of the stay, he knew from Williams, attorney for J & J, that McManus was not a cosigner on the J & J note. Only Randi McManus had signed. He also knew that McManus and Randi McManus were divorced and that the divorce decree obligated McManus to pay the "joint debts" of the parties. Similarly, he knew he had listed J & J as a creditor in McManus' bankruptcy and that J & J had not filed a claim.

Anderson's theory is not that the note of Randi McManus was initially an obligation of McManus. His contention is that the divorce decree made J & J a creditor of McManus when it required McManus to pay the parties' joint debts. Because of that, Randi McManus was protected by the codebtor stay as provided in 11 U.S.C. § 1301.

Was his investigation reasonable? Since Anderson knew all of the facts stated above before he filed the motion, the inquiry he made was sufficient as to the facts. The facts he knew are the relevant facts necessary to argue and explain his contentions.

2.

Was the claim presented for an improper purpose? The evidence showed that Anderson attempted to negotiate a buyout of the contract after the J & J contacts with Randi McManus occurred and a section 362(h) motion was threatened. However, the facts showed that Anderson truly believed his legal contentions were correct and a settlement offer was made based on that. The filing of the motion was not threatened solely as a settlement club. Therefore, the motion would not be sanctionable under Rule 9011(b)(1).

3.

Did the motion have evidentiary support? The motion had as much evidentiary support as it could have. J & J did not really dispute any of the facts stated in the motion. Therefore, the motion is not sanctionable under Rule 9011(b)(3).

4.

Was the claim "warranted by existing law or by a nonfrivolous agreement for the extension, modification or reversal of existing law or the establishment of new law"? Rule 11 is not meant to prevent or punish reasoned advocacy. *Davis v. Carl,* 906 F. 2d 533 (11th Cir. 1990); *Capital Factors, Inc. v. General Plastics Corp. (In re General Plastics Corp.)*, 184 B.R.

996, 1002 (Bankr. S.D. Fla. 1995). Sanctions are appropriate only when the legal arguments are patently wrong. *Id.*

According to hornbook law, a contract requires a meeting of the minds between the parties to be bound. "The rule that there must be a meeting of the minds to form a contract involves a common understanding of the identity of the parties. Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust on him without his consent." AM. JUR. 2D, Contracts § 22 (1998). "As the assignment does not bring together the assignee and the other party to the contract, there cannot be the meeting of the minds essential to the formation of a contract." AM. JUR. 2D, Assignments § 109 (1998). When a new party is to become liable on a debt, the creditor of the original debtor has the election whether to accept or reject the assumption of debt. *Copeland v. Beard*, 115 So. 389, 217 Ala. 216 (1928). A creditor's rights cannot be affected by subsequent agreements (or court orders) to which the creditor is not a party. *Id.* There was no evidence that J & J had accepted McManus as a successor to or even co-obligor on its contract with Randi McManus.

J & J was therefore not a creditor of McManus when he filed his bankruptcy. The debtor could not make it a creditor simply by listing J & J in his schedules. *In re Washington*, 137 B.R. 748, 753 (Bankr. E.D. Ark. 1992). As stated above, J & J had to accept his assumption of its debt. If J & J had filed a proof of claim, that act might have constituted such acceptance; but J & J did not file a claim.

The Bankruptcy Code gives some protection from creditors to parties who are "codebtors" with parties who have filed Chapter 13 bankruptcy cases. Codebtors are people liable with a debtor on a consumer debt. *See*, *In re Bigalk*, 75 B.R. 561 (Bankr. D. Minn. 1987). Creditors cannot "act, or commence or continue any civil action, to collect" a debt from a

codebtor until the debtor's case is closed, dismissed or converted to another chapter without relief from the stay. Since McManus was not liable on the debt to J & J, Randi McManus was not a "codebtor" according to 11 U.S.C. § 1301. Therefore, J & J's contact with her did not violate the automatic stay in McManus' case.

Anderson contended that the definition of a "claim" under the Bankruptcy Code is broad enough that the debt to J & J would be included. Section 101(5) defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." He alleges that McManus owed J & J for the furniture under the divorce decree and this obligation is a "claim."

Anderson's logic was faulty. As shown above, the divorce decree only obligated McManus to his ex-wife, not to J & J. Its debt could not be involuntarily transferred. A cursory reading of the Alabama law and a general understanding of basic hornbook contracts law would have revealed this. The Court concludes that the motion was not warranted by existing law or any nonfrivolous grounds for extension of it.

B.

Anderson is liable because he is the signer on the motion. Fed. R. Bankr. P. 9001(c). Anderson & Orr was the law firm of Mr. Anderson. Rule 9011(c)(1)(A) states: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." No special circumstances were shown. Therefore, Anderson & Orr is also liable.

Dr. McManus is a licensed psychiatrist with a medical degree. He did not review pleadings carefully but he testified that he discussed matters with his attorney and would have

authorized him to act. He did not initiate the idea of the motion but agreed that Anderson should go forward when the matter was explained to him. Since the error was in the application of the law to the facts, the Court concludes that McManus, who is not an attorney, did not know of the inappropriateness of the legal grounding for the motion. Courts impose sanctions on counsel who fail to research applicable law, but not on their clients for such an omission. *In re Cluett*, 90 B.R. 505 (Bankr. M.D. Fla. 1988); *In re Chicago Midwest Donut, Inc.*, 82 B.R. 943 (Bankr. N.D. Ill. 1998).

C.

Pursuant to Rule 9011(c)(2), courts are to limit sanctions to what is sufficient "to deter repetition of such conduct or comparable conduct by others similarly situated." The sanction can be nonmonetary or may be a monetary fine paid to the court or payment of some or all of the costs of movant.

Anderson is a sole practitioner at this time. (The firm of Anderson & Orr has disbanded.) The Court has observed him in his capacity as counsel for debtors over some time. The Court believes Anderson tries to act correctly in representing his clients. This time, however, his zeal to represent his client well took him too far. The Court believes Anderson will be deterred from further problems if he is warned by this opinion and ordered to pay $500 to J & J Furniture.[1]

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[1] Anderson and McManus asked the Court to note an earlier instance in which no monetary damages were awarded in a Section 362(h) motion. *In re Danford*, Case No. 96-11749-MAM-13, order of December 13,1996. The Court has sanctioned attorneys and litigants on occasion and has also not done so on other occasions. The review which the Court undertakes in each case is extremely fact and case specific.

The *Danford* case is distinguishable in at least two respects from this case. First, the motion at issue was for violation of the stay, not for sanctions. Any damages were to relate to the violation of the stay. In a sanctions motion, the award is not related to any litigant's harm. Second, in *Danford*, the movant provided no proof of actual damages or attorneys fees and costs.

The Eleventh Circuit Court of Appeals speaks of allowing evidence of financial ability to pay a fine. *Baker v. Alderman*, 158 F.3d 516 (11th Cir. 1998). No evidence was presented by any of the parties possibly subject to sanction. If Anderson or Anderson & Orr wish to offer evidence on this point, the Court will allow either or both of them to file a motion to reconsider to provide facts as to ability to pay.

Rule 9011 is not meant to be a fee shifting procedure which pays all of a party's fees if the action is sanctionable. Fed. R. Civ. P. 11 Advisory Committee Notes (Supp. 1998). Rule 9011 is to prevent abuse of parties, courts and the law. This sanction will accomplish that even though it does not fully pay J & J's fees and expenses. Anderson & Orr should be equally liable for this sanction pursuant to Rule 9011(c)(1).

THEREFORE, IT IS ORDERED:

1. J & J Furniture Co., Inc. is awarded a judgment of Five Hundred and No/100ths ($500.00) Dollars against Franklin V. Anderson and Anderson & Orr, jointly and severally.

In this case, proof was provided.

2. J & J Furniture Co., Inc. shall take nothing from Michael John McManus.

Dated: February 2, 1999

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE