

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re)	Bankruptcy Case No. 89C-03445
)	
EUGENE MANN and)	
REBECCA JO MANN,)	
)	
Debtors.)	MEMORANDUM OPINION AND ORDER

The matters before the court are: (1) the motion of American Savings and Loan Association ("American") for sanctions under Bankruptcy Rule 9011(a) against the debtors, Eugene and Rebecca Jo Mann ("debtors") and their attorney, Richard Calder ("Calder"); and (2) the motion by Calder seeking an extension of time to file a brief. A hearing was held on March 20, 1990, at which time the court addressed American's motion for sanctions. Lorin D. Ronnow ("Ronnow") appeared on behalf of American. Richard Calder appeared on behalf of the debtors. Barbara W. Richman, the standing Chapter 13 trustee, was also present. Argument was presented at which time the court ordered American and Calder to file simultaneous briefs on the issue of sanctions within fifteen days of the hearing and reply briefs within five days thereafter. On April 4, 1990, American filed its brief and a supporting affidavit. Calder did not file a brief or a reply

brief within the time ordered by the court. On April, 6, 1990, however, Calder filed a motion seeking an extension of time to submit a brief. The court has carefully considered and reviewed the record and the arguments of counsel and has made an independent review of the pertinent authorities. Now being fully advised, the court renders the following decision.

On June 5, 1989, the debtors filed a petition seeking Chapter 13 relief. On November 30, 1989, American filed a motion for relief from the automatic stay to allow it to foreclose on the debtors' residence because of their failure to make post-petition mortgage payments to it. American's motion was granted on December 21, 1989, and a trustee's sale of the property was scheduled for February 22, 1990.

The debtors' plan came before the court for confirmation on December 14, 1989. That hearing was continued to February 8, 1990. At the continued hearing, the court denied confirmation of the debtors' Chapter 13 plan. In response to the Chapter 13 trustee's request that the case be dismissed, American called the court's attention to its pending foreclosure sale and expressed concern about the consequences of an involuntary dismissal of the case. Concluding that American's concerns were meritorious, the court specifically ordered that the case "remain open until foreclosure or sale of [the] real property is completed." (Order Pursuant to Confirmation, March 30, 1990.) The court points out that if the debtors had moved to dismiss their case there would have been no need for American to have requested that the case be kept open

because 11 U.S.C. § 109(g)(2) would have barred the debtors from refiling another case for 180 days.¹ The court finds that all of Calder's actions described below were a bad faith attempt to avoid the purpose of § 109(g)(2).

On February 20, 1990, two days before the scheduled trustee's sale, the debtors filed a second case under Chapter 13 of the Code (Case No. 90B-01077). The debtors' first case had not yet been dismissed. The petition filed by the debtors states that "[n]o bankruptcy case initiated on a petition by or against Petitioner is now pending ..." and is signed by the debtors and Calder. As a result of the petition filed in the second case, American was forced to cancel its scheduled trustee's sale.

On February 20, 1990, the debtors also filed a "Motion to Amend or Alter Judgment Brought Pursuant to Bankruptcy Rule 8002 and 9023" in the first case asserting that the court was required to dismiss the case because it had denied

¹11 U.S.C. § 109(g)(2) provides in relevant part:

Notwithstanding any other provision of this section, no individual ... may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if-- ...

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

The legislative history of this section states that its "purpose is to provide the court with greater authority to control abusive multiple filings" S. Rep. No. 98-65, 98th Cong., 1st Sess. 74 (1983). See *In re McKissie*, 103 B.R. 189, 193 (Bankr. N.D. Ill. 1989).

confirmation of their plan. American objected to the debtors' motion and made the present motion for sanctions under Bankruptcy Rule 9011.

At the hearing on their motion, the debtors, for the first time, informed the court, American, and the Chapter 13 trustee that they had a potential buyer for the property subject to American's lien. The court heard testimony and received evidence on the issue of the sale. On the basis of the evidence presented, the court stated that the debtors and American could continue to attempt to sell the property. The court noted that if the debtors were successful in finding a buyer for the property they would have to obtain court approval of the sale and the Chapter 13 trustee would have a lien on the proceeds.

After hearing argument on the remaining issues, the court denied the debtors' motion to amend or alter the judgment stating that the ruling that it had made on February 8, 1990, was correct. Finally, it dismissed the debtors' second case concluding that it was filed in bad faith and requested briefs from American and Calder regarding the issue of Rule 9011 sanctions.

MOTION FOR AN EXTENSION OF TIME

Based on the facts in this case, the court will deny Calder's motion for an extension of time to submit a brief on the issue of sanctions. In particular, the court notes that at the hearing on March 20, 1990, it ordered American and Calder to file

their briefs on the issue of sanctions within ten days. The court orally amended its order to extend the filing date to fifteen days after Calder represented to the court that he had recently experienced a turnover of staff and would have difficulty submitting a brief within the time originally ordered. Notwithstanding the court's order granting the parties an extension of time, Calder did not file a brief. Additionally, his motion for an extension of time was filed on April 6, 1990, two days after the filing deadline for his brief had elapsed. Finally, there is no certificate of mailing attached to his motion indicating that Calder notified American of his motion seeking an extension of time.

BANKRUPTCY RULE 9011(a) SANCTIONS

In its brief, American requests that sanctions in the amount of \$5,296.75 be imposed against Calder and the debtors under Bankruptcy Rule 9011(a). The court first notes that there has not been sufficient evidence presented to impose sanctions against the debtors. Because there was no evidence or argument on behalf of the debtors at the March 20th hearing, and a conflict of interest may have existed between the debtors and Calder at that time, the court will not impose sanctions against them. If American desires to seek sanctions against the debtors, it should schedule another hearing affording the debtors and Calder an opportunity to give testimony and evidence.

Addressing the issue of whether sanctions should be imposed against Calder, the court looks to Bankruptcy Rule 9011(a) which states that:

The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry [the petition, pleading, motion, or other paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. ... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Accordingly, under Bankruptcy Rule 9011(a), the signature of an attorney on a document is a certificate by that attorney that the document is well-founded and is not filed for an improper purpose. *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988)²; *In re Hatch*, 93 B.R. 263, 266 (Bankr. Utah 1988). Under Bankruptcy Rule 9011(a), attorneys are required to make an inquiry into both the law and the facts of the particular case before they file a document with the court in order to assure that their actions are reasonably based. *In re Hatch*, 93 B.R. at 266. In determining

²*Adamson v. Bowen*, 855 F.2d 668 (10th Cir. 1988), is a case that was decided under Fed. R. Civ. P. 11. In *In re Hatch*, 93 B.R. 263, 266 (Bankr. Utah 1988), this court stated that "cases interpreting Rule 11 are equally applicable to Bankruptcy Rule 9011."

whether a filed document is well-founded, this court imposes an objective standard of reasonableness rather than a subjective standard. *Id.* In *Hatch*, the court stated that the question to be asked in determining whether 9011(a) sanctions should be imposed is whether "a reasonable attorney so situated [would have] file[d] such a document[.]" *Id.* (citing *Adamson*, 855 F.2d at 673.)

In the present case, Calder was the attorney for the debtors in their first and second Chapter 13 cases. He signed and filed the petition commencing the debtors' second Chapter 13 case when he knew, or should have known, that their first case had not yet been dismissed. Calder, who is a regular practitioner before this court, should have been aware that filing a case while another case is pending is not permitted. Indeed, he should have been on notice that the second case should not have been filed because the Chapter 13 petition which he signed asks specifically that the attorney and petitioners certify that no other case is currently pending. On the basis of these facts, a reasonable attorney would not have filed the second bankruptcy petition.

Furthermore, it appears as if the second bankruptcy petition was filed for the improper purpose of forestalling American's scheduled trustee's sale. The second case was filed just two days prior to the scheduled sale of the debtors' residence, and the schedules in that case do not indicate that the debtors had experienced a change in circumstances to warrant the second filing.

Accordingly, sanctions against Calder under Bankruptcy Rule 9011(a) are mandated in this case. *In re Hatch*, 93 B.R. at 267 ("Bankruptcy Rule 9011 provides [that] if a court is faced with a violation of the rule the court 'upon motion or upon its own initiative shall impose ... an appropriate sanction.' (emphasis added). There is no discretion on the application of sanctions")

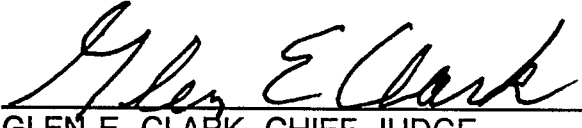
The only question left for the court to decide, therefore, is the amount of sanctions to be imposed against Calder. In addition to its brief, American has filed the affidavit of Ronnow, attorney for American. The affidavit is supported by an attached document which gives an itemized breakdown of the attorney's fees and costs Ronnow has billed American for work done in this case. Ronnow states that American has "incurred legal fees to date totaling \$4,748.50 [which represent fees for] responding to the improper Chapter 13 filing by debtors, ... bringing American's Objection to Debtors' Motion to Alter or Amend the Judgment, and bringing American's Motion for Sanctions." In addition, Ronnow states that American has incurred \$548.25 in costs. The court concludes that American is entitled to only those fees and costs that it incurred as a result of the filing of the debtors' second case. Upon a review of Ronnow's fee schedule, the court concludes that all of the costs itemized, totaling \$548.25, will be allowed, and that all of the fees incurred by American on or after January 16, 1990, totaling \$4,115.00, will be allowed.

ORDER

IT IS HEREBY ORDERED that: (1) Calder's motion seeking an extension of time to submit a brief be DENIED; and (2) American's motion seeking Bankruptcy Rule 9011(a) sanctions against Calder be GRANTED. Calder is HEREBY ORDERED to pay American the sum of \$4,663.25.

DATED this 20 day of April, 1990.

BY THE COURT:



GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT