
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:

JOSE ANTONIO LOPEZ,

Debtor.

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Bankruptcy Number 90B-01420

[Chapter 13]

MEMORANDUM DECISION and ORDER

This matter came before the court upon a Motion To Dismiss With Prejudice Or In The Alternative Motion For Relief From The Automatic Stay And Motion For Sanctions. The motions were filed by the Resolution Trust Corporation (RTC) as Conservator for and the Successor in Interest to American Savings and Loan Association against the debtors, Jose and Carol Lopez (Lopez)¹ and debtor's counsel, J. Richard Calder, Esq. (Calder). Calder appeared on behalf of Lopez and himself, and Lorin D. Ronnow, Esq. appeared on behalf of RTC.

At the hearing on the matters the court granted RTC relief from the automatic stay. The court granted the parties additional time within which to file briefs

¹ The court's file reflects that on August 15, 1990, an Order of Bifurcation and Dismissal was entered which dismissed the case of Carol Lopez. The case of Jose Lopez remained intact.

concerning the issuance of sanctions against Lopez and Calder for filing two concurrent chapter 13 cases. The matter now having been fully reviewed, the court enters its ruling.

STATUS OF THE CASE

Lopez originally filed a chapter 13 petition on October 1, 1986, (Case No. 86A-04273). Calder represented Lopez in the first case before the Honorable John H. Allen, United States Bankruptcy Judge. During the course of that representation, Calder was temporarily suspended from the practice of law for reasons not relevant here. Aric Cramer (Cramer), an associate of Calder's, represented Lopez for a time.

Lopez failed to make the appropriate monthly payments to the trustee in the first case. An order to show cause why the case should not be dismissed was issued. Lopez contacted his counsel and expressed his desire to continue in a chapter 13. Calder, because of his suspension, did not attend the hearing on the order to show cause. Instead, Cramer, accompanied by Lopez, attended the hearing. Cramer knew little, if anything at all, about the case. Calder, because of the suspension, had failed to provide Cramer any instructions concerning Lopez' case.

On October 30, 1989, pursuant to the order to show cause, Lopez was granted leave to file a motion to convert to chapter 7 within 10 days or the case would be dismissed. The Standing Chapter 13 Trustee was directed to prepare an order. No motion to convert or order of dismissal was ever filed or submitted for signature. As a result, the case was never closed.

After the hearing Lopez spoke with Cramer and again indicated his desire to continue in a chapter 13. Cramer was to have made a motion to vacate the dismissal, but failed to do so. Lopez continued to make his chapter 13 payments even though the case had been dismissed on the record. Neither Calder nor Cramer made any attempt to rectify the situation. Eventually, Lopez received a letter from the chapter 13 trustee instructing him to cease making payments because his case had been dismissed.

American Savings & Loan was granted relief from the automatic stay in the original case on September 25, 1989. As successor in interest to American Savings & Loan, RTC scheduled a trustee's sale of the real property on April 13, 1990. However, on March 6, 1990, Lopez filed this second chapter 13 petition (Case No. 90B-01420), notwithstanding the previous open and pending chapter 13 case. Lopez testified that he recently moved his residence to Salt Lake City, Utah, obtained new employment, and again conferred with Cramer concerning the payment of his debt.

Lopez pursued the matter because of his desire to eventually reestablish his credit some day and to pay his debts if able. Lopez was counseled to file again because of the lapse in time between the oral dismissal and because Calder did not think Judge Allen would modify his ruling. Whether Cramer or Calder counseled Lopez to refile is immaterial because Calder signed the petition. The second filing by Calder, some three and a half years after the original filing, contained substantially the same debt as the original case, including the obligation to RTC. Lopez desired to include medical expenses incurred by his daughter, but the debt was omitted from the schedules.

On April 6, 1990, RTC filed the instant motion for sanctions claiming Lopez and Calder had violated Bankruptcy Rule 9011 by filing concurrent chapter 13 cases. RTC asserts there is no basis in law or fact for such a filing and that the filing was made for improper purposes to stall a foreclosure sale and to avoid the potential for an adverse ruling by an allegedly partial judge in the original case.

ISSUE PRESENTED

Whether Bankruptcy Rule 9011 sanctions should be imposed against Calder or Lopez for filing a second chapter 13 petition to either stall a foreclosure sale or avoid an adverse determination by a judge believed to be partial while a prior chapter 13 case was still open.

DISCUSSION

In determining whether to impose sanctions against Calder and Lopez the court looks to Bankruptcy Rule 9011.² The court finds that Lopez is not subject to

² Bankruptcy Rule 9011 states in part:

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 served or filed] 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,

(continued...)

sanctions under Rule 9011. Lopez had no knowledge of any impropriety in refileing while the original case was open. He desired to surrender RTC's collateral to it and to add an additional creditor. The current filing however failed to list the new creditor. The matrix listed RTC as a creditor, but the plan failed to provide for the surrender of the real property. Lopez in good faith attempted to propose a plan to repay his creditors and did not refile to cause delay or to harass his creditors. The court must now examine whether Calder should appropriately receive sanctions as a result of his actions taken as Lopez' attorney.

Under Bankruptcy Rule 9011(a), attorneys are required to make 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. The signature of an attorney on a document is a certificate by the attorney that the document is well-founded and not filed for an improper purpose. *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988).

The Tenth Circuit has adopted the view that an attorney's actions must be objectively reasonable in order to avoid Rule 11 sanctions.³ *White v. General Motors Corp.*,

²(...continued)

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.

³ In *Styler v. Tall Oaks, Inc. (In re Hatch)*, 93 B.R. 263, 266 (Bankr. D. Utah 1988) (order rev'd in part by *Styler v. Tall Oaks, Inc. (In re Hatch)*, 114 B.R. 747 (D. Utah 1989)), this court stated that "cases interpreting Rule 11 are equally applicable to Bankruptcy Rule 9011."

Inc., 908 F.2d 675, 680 (10th Cir. 1990). "A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances." *White*, 908 F.2d at 680. The question to be asked in determining whether sanctions should be imposed is whether a reasonable attorney so situated would have filed such a document. *Adamson*, 855 F.2d at 672; *and, Hatch*, 93 B.R. at 266.

Calder argues he did not violate Rule 9011 because under the circumstances a reasonable attorney would have filed a second chapter 13. He claims that the chapter 13 trustee artificially held the first case open thereby preventing him from filing a second chapter 13 petition on behalf of his clients. Calder asserts Lopez had incurred new debt which necessitated a second chapter 13 filing and that the filing of two concurrent chapter 13 petitions is not expressly prohibited by the Bankruptcy Code.

Also, Calder claims that the chapter 13 trustee, by artificially holding open the original case for the benefit of RTC, wrongfully did so when, in fact, the trustee should have dismissed the first case. While the court agrees that any such action would be improper, the actions of the chapter 13 trustee do not justify, excuse, or sanction Calder's improper actions.

Calder could have counseled with his client to dismiss the first chapter 13 case if that was their intent. 11 U.S.C. § 1307(b) states, in part, that "[o]n request of the debtor at any time . . . the court shall dismiss a case under this chapter. Any waiver of the right to dismiss is unenforceable." If Calder had dismissed the first chapter 13

proceeding, he could have avoided forcing RTC to file a second motion for relief from the automatic stay.⁴ In any event, Calder now claims he was willing to stipulate to relief from the automatic stay had the creditor so offered. It is not appropriate however, to expect the secured creditor to initiate a stipulation when it was Calder who failed to clearly treat the creditor in the second plan. Calder's sloppy work product failed to clearly inform RTC of Lopez' intent to surrender the home and caused undue delay and expense to RTC.

Calder is an experienced practitioner before this court and is widely known in the community for his active bankruptcy practice. An objectively reasonable attorney in Calder's position would not have filed a new case while the older case remained open. The petition filed in this case indicates that the prior chapter 13 case had been dismissed when, in fact, Calder knew no order of dismissal had been entered. Calder knowingly and improperly filed the second petition knowing the first case remained open, that substantially all the creditors from the first case were listed in the second, that the failure

⁴ It also, of course, would have invoked the provisions of 11 U.S.C. § 109(g)(2), thereby preventing Lopez from filing a subsequent petition within the statutory period. 11 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).

to provide in the plan that the property was to be surrendered to RTC would cause the creditor undue delay and expense, and that by simply filing the order of dismissal to effectuate Judge Allen's ruling, the double filing would be eliminated. The court finds that Calder's filing of the second chapter 13 petition was not objectively reasonable within the meaning of Rule 9011 under these circumstances.

If the purpose of the second filing was to avoid an allegedly "partial" judge, the filing's purpose is also improper.⁵ If a bankruptcy judge's impartiality is questioned, a procedure exists to remedy that situation. Bankruptcy Rule 5004(a). Calder chose not to implement that procedure. Instead, he knowingly proceeded with two cases with substantially similar creditors, attempting to gain two discharges. Such actions constitute an improper course of conduct criticized by the case law. *Freshman v. Atkins*, 269 U.S. 121 (1925); *In re Smith*, 85 B.R. 872, 873 (Bankr. W.D. Okla. 1988); *In re Dyke*, 58 B.R. 714, 717-18 (Bankr. N.D. Ill. 1986); and, see also, *Associates Fin. Serv. Corp. v. Cowley*, 29 B.R. 888 (Bankr. S.D. Ohio 1983). Calder has not cited any case law permitting concurrent chapter 13 cases dealing with the same debt. Furthermore, Calder's unyielding statement in open court that, if put in the same situation he would again file a second chapter 13 petition prior to dismissal of the first, demonstrates the need to curb Calder's actions in the future.

⁵ Calder has long argued he is mistreated by the bench in the presentation of both his personal case and his clients' cases generally. Such an argument to this court is not persuasive on this set of facts. It is improper for an attorney to advance personal agendas at the expense of the proper representation of his clients and the misuse of judicial resources.

Once the court finds a violation of Rule 9011, sanctions are mandatory and the court is without discretion. *Hatch*, 93 B.R. at 269. In determining the appropriate sanctions, the court is guided by the case of *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S.Ct. 456 (1989). "The purpose of the provision in question, however, is not reimbursement but 'sanction', and the purpose of Rule 11 as a whole is to bring home to the individual signor his personal, nondelegable responsibility." *Pavelic*, 110 S.Ct. at 460. "Deterrence is . . . the primary goal of the sanctions." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2454 (1990). The court need only determine "an appropriate sanction" under Bankruptcy Rule 9011. The appropriate sanction should be the least severe sanction adequate to deter and punish the wrongdoer. *White*, 908 F.2d at 684 (citing *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-96 (3d. Cir. 1988)).

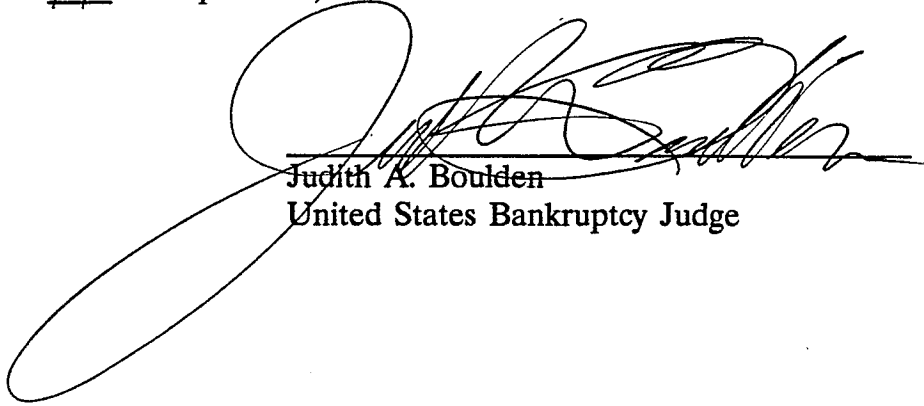
CONCLUSION

Based on an objectively reasonable standard this court concludes that Calder's filing of the second chapter 13 petition was improper within the meaning of Bankruptcy Rule 9011. The filing of a second concurrent petition in order to avoid an adverse ruling in a concurrently filed case which knowingly has the effect of causing undue delay and expense to a creditor is an improper purpose and is without basis in either law or fact. In such circumstances, the imposition of sanctions is mandatory.

Therefore, it is hereby

ORDERED, that sanctions in the amount of \$1,000.00 be paid by Calder to
Lorin D. Ronnow, Esq. on behalf of RTC.

DATED this 17 of September, 1990.



Judith A. Boulden
United States Bankruptcy Judge