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UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	
WALKER, McELLIOTT, WILKINSON & ASSOCIATES,	Bankruptcy Number 88B-03486
Debtor.	[Chapter 11]
WALKER, McELLIOTT, WILKINSON & ASSOCIATES,	Adversary Proceeding Number 88PB-0669
Plaintiff,	
v.	
SMITH, HALANDER, SMITH and ASSOCIATES, et al.,	
Defendant.	

MEMORANDUM DECISION AND ORDER

This matter came before the court upon the defendant Smith Halander Smith & Associates' (SHS) Motion Under BR 9011 For An Award Of Attorneys Fees &

Expenses & For Determination Of Remaining Issues Of Liability. L. Benson Mabey, Esq. of Murphy, Tolboe & Mabey, Salt Lake City, Utah, appeared on behalf of SHS; Craig G. Adamson, Esq. of Dart, Adamson & Kasting, Salt Lake City, Utah, and Charles F. Vihon, Esq. of Gaston & Snow, Boston, Massachusetts, appeared on behalf of the plaintiff Walker, McElliott, Wilkinson & Associates (WMW). No appearance was made by Mark A. Larsen, Esq.

SHS seeks an award under Bankruptcy Rule 9011 (Rule 9011) for attorney's fees, costs, expenses, and other damages incurred because of WMW's filing of this adversary proceeding and recording of a lis pendens against real property in which SHS claims an ownership interest. In the alternative, SHS seeks an award under 28 U.S.C. § 1927 for attorney's fees and expenses alleging that counsel for WMW has unreasonably and vexatiously multiplied the litigation in this adversary proceeding.

PROCEDURAL POSTURE

The hearing on this matter is the result of a previously bifurcated trial. After the first segment of trial held January 23, 1989, all of WMW's claims had been resolved, either by voluntary dismissal or by adjudication. SHS's counterclaims relating to a quiet title action and declaratory relief were also adjudicated. Under the pretrial order,

the parties stipulated that any remaining issues arising from SHS's counterclaims could be resolved by motion.[1]

The motion was subsequently filed with the court on December 15, 1989. A series of extensions of time within which to file responsive briefs was allowed by court order in January and February 1990.[2] Finally, almost a year and a half after the first segment of trial, the hearing on SHS's motion was held on Monday, July 2, 1990. The court heard the arguments of counsel and took the matter under advisement. Now, having carefully considered and reviewed the pleadings on file, the arguments of counsel, and

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[1] Specifically, the pretrial order signed June 27, 1989, states, "[t]he parties expressly agree that the claims of Defendants [SHS] under Rule 9011 and/or 28 U.S.C. Section 1927 should be presented by motion to properly apprise the individual general partners and counsel for Plaintiff [WMW] of the nature of the claims and to provide a fair opportunity to respond by memorandum and affidavit in support thereof."

[2] On February 28, 1990, SHS filed a Request for Ruling on Uncalendared Motion Under Bankruptcy Rule 9011 for an Award of Attorneys Fees And Expenses And For Determination Of Remaining Issues Of Liability. SHS asserted that because all responsive periods had expired on February 22, 1990, and no hearing had been requested, the court could enter its ruling.

WMW filed an Objection to Request for Ruling on Uncalendared Motion on March 5, 1990, stating extraordinary circumstances prevented the timely filing of a responsive pleading. WMW further requested that the matter be set for oral argument. WMW's responsive pleadings and affidavits were filed with the court on March 6, 1990.

The court considered the pleadings on file and the posture of the case and issued an Order Regarding Request for Ruling on an Uncalendared Motion and Notice of Hearing on April 26, 1990. The order requested that specific information be supplied to the court by the parties within twenty days and set the matter for hearing on June 11, 1990.

SHS's counsel then filed on May 18, 1990, a Motion for Extension of Time within which to comply with the court's April 26, 1990, order. Counsel, by affidavit, stated that for some unknown reason his office did not receive a copy of the court's order until May 17, 1990. The court granted SHS a five-day extension from May 18, 1990, to file its response.

On May 29, 1990, WMW filed a Notice of Continuance of Hearing. The notice indicated that the June 11, 1990, hearing set by the court had been continued until Monday, July 1, 1990. July 1, 1990, was a Sunday and the court was not in session.

having made an independent review of the case law, the court enters the following decision.

JURISDICTION

This court has jurisdiction over the subject matter of and the parties to this contested matter pursuant to 28 U.S.C. §§ 1334 and 157. Venue in this division is proper. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(A).

FACTS

This adversary proceeding was originally filed on July 26, 1988, by WMW against SHS seeking (1) to void a transfer of real property which allegedly took place in violation of the automatic stay arising from WMW's prior attempt to file a petition for relief in the United States Bankruptcy Court for the Eastern District of Missouri in 1987, and (2) to avoid the transfer of real property under the Utah Fraudulent Conveyance Act. Prior to the trial of the adversary proceeding in January 1989, WMW dismissed the fraudulent conveyance claim but pursued its claim that the transfer of real property by SHS was done in violation of the automatic stay.

At the first segment of trial this court ruled that the petition lodged with the bankruptcy clerk's office for the Eastern District of Missouri was incomplete and that although the deficiencies in the petition could have been corrected, WMW failed to do so. Such failure thereby evidenced an intent to abandon the petition. Furthermore, WMW

withdrew the petition from the Missouri bankruptcy clerk's office along with all accompanying documents and the non-negotiated filing fee check, taking no further action to proceed as a debtor under the jurisdiction of the bankruptcy court.

It is against this background that SHS asserts WMW's counsel violated Rule 9011. SHS contends that WMW's counsel knew about the ineffective filing of the Missouri petition and also knew that no effort was made to correct the deficiencies in the pleadings. SHS asserts that in addition to its knowledge of the ineffective filing in Missouri, WMW also knew that title to the real property had transferred according to the terms of a previously executed Settlement Agreement between the parties.[3]

In light of this knowledge, SHS asserts that counsel for WMW filed this petition in the United States Bankruptcy Court for the District of Utah, commenced this adversary proceeding, and recorded a lis pendens on the property in attempt to regain title and possession of the property.[4] SHS' allegation is that WMW's claims in this adversary proceeding fail to be "warranted by existing law or a good faith argument for the

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[3] The Missouri filing attempt took place on the afternoon of Friday, June 12, 1987. The transfer of the property under the terms of the Settlement Agreement took place on the following Monday, June 15, 1987, by the recording of a deed which had previously been placed into escrow. The Missouri filing attempt was an effort to block the enforcement of the Settlement Agreement and to use the automatic stay to prevent the transfer of the property. WMW notified counsel for SHS of the filing that day both by phone and by letter. SHS asserts that regardless of the Missouri filing, WMW knew that SHS had taken possession of the building, exercised control over it as owners, and that WMW had failed to make any attempt to assert an adverse claim relative to SHS's ownership, title, or possession of the property until the filing of this bankruptcy petition and subsequent adversary proceeding.

[4] In its motion, SHS asserts that "by commencing and maintaining this adversary proceeding and the recording of a Lis Pendens against Defendants' title to the real property: breached a prior Settlement Agreement between the parties under which Plaintiff waived all claim of interest in or title to the real property; that Plaintiff slandered Defendants' title; and, that Plaintiff, its individual general partners and its attorneys violated BR 9011 and/or 28 U.S.C. 1927."

extension, modification, or reversal of existing law." Rule 9011. No specific document is set forth as violating Rule 9011. Having considered the course of conduct and the argument of the parties, the court determines that the "commencing and maintaining" of this case refers to the filing of the Complaint, the Amended Complaint, and the Lis Pendens. Any violation under Rule 9011 caused by WMW to SHS must necessarily flow from these pleadings.

Affidavits from counsel for WMW have been filed with the court describing the amount and type of investigation conducted into the law and facts regarding the filing of this adversary proceeding. The pleadings and the representations of counsel indicate that Craig G. Adamson (Adamson) signed the Complaint as counsel for WMW and Mark A. Larsen (Larsen) signed the Amended Complaint and Lis Pendens filed in this action. The court will examine these documents relative to the allegations under Rule 9011 and 28 U.S.C. § 1927.

DISCUSSION

This court recognizes that "cases interpreting Rule 11 are equally applicable to Bankruptcy Rule 9011." *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)). Accordingly, under Rule 9011(a),[5] the signature of an attorney is a

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[5] Bankruptcy Rule 9011(a) states in pertinent part:

(continued...)

certificate by that attorney that the pleading is well-founded and not filed for an improper purpose. *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988). Attorneys are required to make an inquiry into both the law and the facts of the case before they file a document with the court to assure their actions are reasonably based. *Hatch*, 93 B.R. at 266.

In making an evaluation of whether an attorney has fulfilled his obligations of reasonable inquiry, the court uses an objective standard of reasonableness rather than a subjective standard. *White v. General Motors Corp.*, 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. . . . In addition, it is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim.

White, 908 F.2d at 680.

The United States Supreme Court has directly addressed the issue of upon whom liability rests for the signing of pleadings under Rule 11. In *Pavelic & LeFlore v.*

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[5](...continued)

> 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 it 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 impro per 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 co urt 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.

Marvel Entertainment Group, 110 S. Ct. 456, 459 (1989), the Court ruled that for purposes of Rule 11, liability rests upon the individual attorney who signed the papers and not with the attorney's law firm. A review of the pleadings, the law, and the arguments on the motion establishes that liability under the rule rests, if at all, with Adamson and Larsen. If this court finds a violation of Rule 9011, then sanctions are mandated. *Hatch*, 93 B.R. at 267.

Missouri Filing

Adamson was initially approached in June of 1988 by WMW, its counsel Charles Vihon (Vihon), a noted expert in the field of bankruptcy law, and attorney Curtis Pfunder (Pfunder) to act as local counsel for WMW in a proposed adversary proceeding. Adamson and his then-partner, Larsen, interviewed one of the general partners of WMW concerning the factual and legal background of the case. The interview with the general partner lasted over two hours, during which time the general partner answered questions from the attorneys and produced supporting documents. Following the interview, the attorneys agreed that more investigation was necessary. To that end, Larsen, Vihon, and Pfunder traveled to WMW's offices in St. Louis, Missouri, on July 5, 1988, to conduct further interviews and review more documents pertaining to the Missouri bankruptcy filing.

The task of drafting the complaint fell to Larsen, although it was drafted at Adamson's request for his signature. Adamson was the attorney who signed the

Complaint filed July 26, 1988, and Larsen was the attorney who signed the Amended Complaint filed August 4, 1988.[6]

Prior to signing the Complaint, Adamson discussed with both Vihon and Pfunder the legal and factual grounds for the claims asserted. Adamson signed the Complaint in reliance upon Vihon's expertise, the review of the witnesses and documents by his co-counsel, his initial interview of the general partner, and discussions with Vihon and Larsen. Adamson believed that a reasonable inquiry had been made. At the hearing, Adamson and Vihon further clarified their legal reasoning regarding the factual investigation they had conducted.[7]

Adamson asserts his research and inquiry led him to conclude that the filing of the Missouri petition and the related papers gave rise to the automatic stay and that

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[6] In its Order Regarding Request for Ruling on an Uncalendared Motion, the court specifically inquired of the parties as to the identity of the individual who signed the July 26, 1988, complaint. The signature on the complaint is illegible and two different names are typed below the signature line.

[7] Summarized, their argument is as follows. Counsel contend that although the bankruptcy filing in Missouri was later held by this court to be of no effect, certain legal consequences occurred as a result of the submission of the bankruptcy petition to the clerk in the Missouri Bankruptcy Court. The filing of the papers, while woefully inadequate and materially deficient under the requirements of the Bankruptcy Code and Rules, nevertheless allegedly garnered WMW the protection of the automatic stay on Friday afternoon, June 12, 1987. Under the terms of the Settlement Agreement, upon default by WMW, SHS could record the deed and take possession of the property. The purpose of the filing was to stop SHS from recording the trust deed held in escrow pursuant to the Settlement Agreement. WMW, recognizing an inability to perform under the Settlement Agreement, delivered the bankruptcy papers to the Missouri Bankruptcy Court. The time for performance under the Settlement Agreement expired on Friday, June 12, 1987. The deed was recorded by SHS on the following Monday, June 15, 1987.

Recognizing the deficiency in the papers filed, the clerk's office for the Missouri bankruptcy court never entered the filing of the petition. Shortly thereafter, the clerk's office returned the petition, all accompanying documents, and the unnegotiated filing fee check to counsel for WMW. No further action was taken by WMW to correct the deficiencies or to refile the petition in the Missouri court.

any actions taken thereafter by SHS were void. Consequently, under WMW's reasoning, SHS' recording of the deed was done in violation of the automatic stay and was void. Therefore, Adamson indicates that this adversary proceeding, filed in a legitimate bankruptcy case and alleging SHS violated the automatic stay arising from the Missouri filing, is properly before the court.

Adamson, thinking the protection of the automatic stay had been invoked in the Missouri bankruptcy court, was correct under subsequent case law in this circuit holding that acts taken in violation of the automatic stay are void and not merely voidable. *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990). This court was also correct in ruling that a debtor's unreasonable behavior gives rise to equitable principles which make actions taken in violation of the stay valid. *Job v. Calder (In re Calder)*, 907 F.2d 953, 956 (10th Cir. 1990). That being the case, Adamson is supported in his allegations contained in the Complaint. Using an objective standard, Adamson's argument for filing the pleadings has merit in the law and was made upon reasonable inquiry into the facts and based upon a good faith argument.

Section 1927 of Title 28[8] has been argued in the alternative as a basis for the award of attorney's fees. Like Rule 9011, 28 U.S.C. § 1927 requires an evaluation upon an objectively reasonable standard in determining whether or not a violation has occurred and whether the court should enforce the provision. *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985).

> 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.

TCI, 769 F.2d at 445.

Based upon the court's analysis regarding the filing of the complaint asserting a violation of the automatic stay in the Missouri case, the court likewise finds that there has been no violation of 28 U.S.C. § 1927. SHS has made no showing on an objectively reasonable basis that Adamson or Larsen undertook acts which were unsound, reckless, or performed with an indifference to the law or in the face of what they knew the law to be. Nor does their conduct evidence any unreasonable or vexatious attempt to unnecessarily multiply the proceedings.

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[8] That section of the United States Code states:

§ 1927. Counsel's liability for excessive costs

> 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.

Fraudulent Conveyance

SHS also complains that WMW failed to adequately investigate the facts surrounding its allegations in the Complaint and Amended Complaint of insolvency for purposes of determining the cause of action arising from an alleged fraudulent conveyance. The issue surrounding Adamson's and Larsen's lack of investigation into the law and the facts prior to filing the fraudulent conveyance claim arise from, and are evidenced by, a series of inconsistent responses to the interrogatories propounded by SHS.[9]

SHS argued at the hearing that WMW's inability to understand the legal meaning of insolvency under the Utah Fraudulent Conveyance Act resulted in the failure of WMW to sustain the factual allegation of insolvency necessary to prosecute its claim. That is why WMW dropped that claim prior to trial and proceeded only on the theory that the automatic stay had been violated.

The record reflects that Adamson and Larsen failed to sufficiently ascertain the legal requirements necessary to prove the elements of the fraudulent conveyance claim. The inconsistent responses in the interrogatories point out a failure to take into account the nature and extent of the assets and liabilities of each of the general partners

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[9] SHS initially sought to discount the facts upon which WMW had made a determination of insolvency by submitting interrogatories to WMW. WMW failed to adequately respond and the court granted SHS's motion to compel. In response, Larsen signed off on a set of supplemental answers which set forth WMW's legal reasoning. After reading the supplemental answers, SHS served further interrogatories inquiring into the nature of a transfer which occurred between one of the principles of WMW and a family trust. WMW answered the additional interrogatories in such a manner as to refute that a transfer to a family trust had taken place, but stated instead that a transfer to a family limited partnership had occurred at a time past the date specified in the interrogatory. SHS asserts this inconsistency proves a failure to adequately investigate the law and the facts regarding the fraudulent conveyances alleged in the Complaint and the Amended Complaint.

for purposes of determining insolvency under the Utah statute. Further inquiry into the law and the facts would have prevented the inconsistent responses to interrogatories and would have avoided the present allegations.

Larsen, in his responsive affidavit, states the extent to which he investigated the facts and case law to support the filing of this adversary proceeding. Larsen asserts that even though he conducted his pre-filing investigation properly, there later came a time (apparently when answering interrogatories) at which he became further enlightened regarding the facts. Based upon details previously not discovered during attorney-client discussions, counsel for WMW jointly decided to dismiss the counts in the Amended Complaint relating to a fraudulent conveyance.

Although counsel offered to divulge to the court the information they learned from the principal of their client regarding the facts, they nevertheless asserted the attorney-client privilege to protect against such disclosure. The court, recognizing the long-standing privilege, chose not to require a breach of that privilege. In light of the assertion of the attorney-client privilege and the court's reluctance on this set of facts to breach that privilege, the court is hard-pressed to find the flagrant violation asserted by SHS.[10] Nonetheless, the court finds that counsel failed to make reasonable inquiry into

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[10] The court, however, is aware of Larsen's obvious ignorance of the law and vague responses in open court concerning fraudulent conveyances alleged under the Utah statute. Had counsel made a more thorough inquiry into the law surrounding the elements of the fraudulent conveyance claim, and independently reviewed the facts, counsel would not have been faced with newly discovered facts after the filing of the Amended Complaint and found it necessary to drop one of the claims for relief, thus giving rise to the inference of inadequate factual investigation in the first instance. *Cooter & Gell v. Hartmarx Corp., et al.*, 110 S. Ct. 2447 (1990).

the law and facts regarding the claim for relief under the Utah Fraudulent Conveyance Act.

Rule 9011 Sanctions

As previously stated, if the court finds a violation of Rule 9011, the court "shall impose" sanctions on the attorney who signed the pleading. It must be remembered, however, that "[t]he purpose of the provision in Rule [9011] as a whole is to bring home to the individual signer his personal, nondelegable responsibility." *Pavelic*, 110 S. Ct. at 460. "Rule [9011] sanctions are meant to serve several proposes, including (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management. . . . Deterrence is, however, the primary goal of the sanctions." *White*, 908 F.2d at 683.

While the award of attorney's fees is certainly an appropriate sanction, it is but one of several methods which the court can employ to achieve the goals of Rule 9011. *White*, 908 F.2d at 683 (quoting *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988). "The rule's mention of attorney's fees does not create an entitlement to full compensation on the part of the opposing party every time a frivolous paper is filed." *White*, 908 F.2d at 683. The court is charged under the rule with determining "an appropriate sanction." Bankruptcy Rule 9011. "The appropriate sanction should be the least severe sanction adequate to deter and punish the [offending party]." *White*, 908 F.2d at 684.

The court is not bound by any stipulated amount of damages agreed upon by the parties. The court is required to exercise its own judgment and evaluate the circumstances in determining the least amount of sanctions necessary to deter future misconduct and ensure compliance with the rule. Among the criteria looked to by the court are the calculation of any fees incurred and requested, the minimum amount necessary to deter future violations, the ability of the offending party to pay, the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, and the risk of chilling the type of litigation involved. *White*, 908 F.2d at 683 (citing American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (1988)). In fixing the amount, the court must look to the totality of the litigation, the standards set forth in *White*, and whether the conduct was malicious or merely negligent. Considering all the circumstances, the court finds the appropriate sanction to be a fine of $3,000 to be paid to SHS.

28 U.S.C. § 1927

In the alternative, SHS has asserted that WMW's counsel has incurred liability under 28 U.S.C. § 1927. Section 1927 is somewhat different in purpose and effect from Rule 9011. Rule 9011 is a sanction provision directed at punishing either counsel or the party for actions taken in violation of the rule. Section 1927, on the other hand, is a compensatory statute geared toward having the offending attorney "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such

conduct." 28 U.S.C. § 1927. In order to award these fees, the court must find that the offending individual multiplied the proceedings in an unreasonable and vexatious manner.

Under the *TCI* case, an attorney's conduct is "objectively unreasonable and vexatious" if an attorney pursues a course of conduct that "a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." *TCI*, 769 F.2d at 445. This standard is similar to that required under Rule 9011. The court, having found that Adamson and Larsen violated Rule 9011, finds they have likewise violated 28 U.S.C. § 1927.

The award of fees under section 1927 is discretionary as opposed to mandatory under Rule 9011. The court finds that under the circumstances of this case the sanction under Rule 9011 suffices for both statutes.

CONCLUSION

Therefore, having found that Adamson and Larsen violated Bankruptcy Rule 9011 and 28 U.S.C. § 1927, it is hereby

ORDERED, that Adamson and Larsen pay the amount of $3,000.00 to SHS as sanctions.

DATED this 24th day of September, 1990.

JUDITH A. BOULDEN
United States Bankruptcy Judge