

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
ROY E. WARD and DANA A. WARD,) Bankruptcy Case No. 97-60070
)
Debtors.)
_____)
)
DONALD HOAGLAND, Trustee,)
)
Plaintiff,)
)
vs.) Adversary Case No. 03-4027
)
ROY E. WARD, DANA A. WARD,)
JOHN H. HUSTAVA, P.C., JOHN)
HUSTAVA, LAW OFFICES OF)
WILLIAM A. MUELLER,)
MICHAEL G. CURRY, PRUDENTIAL)
SECURITY, VIRGINIA E. BELL,)
and ALLSTATE INSURANCE,)
)
Defendants.)

OPINION

This matter having come before the Court on a Motion for Entry of an Order Awarding Sanctions Under Bankruptcy Rule 9011 filed by the Debtors, Roy E. Ward and Dana A. Ward; Motions for Sanctions filed by the Law Offices of William A. Mueller, L.L.C. and Michael G. Curry, John H. Hustava, P.C., and John Hustava; and all motions and memoranda related thereto; the Court, having heard arguments of counsel, having reviewed the written memoranda filed by the parties, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052

of the Federal Rules of Bankruptcy Procedure.

The Defendants who have filed Motions for Sanctions in this matter seek sanctions against both the Plaintiff/Trustee and his attorney for violations of Rule 9011(b)(2) and (3) of the Federal Rules of Bankruptcy Procedure. Simply put, the Defendants argue that the Complaint filed in this matter, on April 10, 2003, was wholly without merit, not supported by existing law, and not supported by evidence known to the Plaintiff and his attorney or likely to have evidentiary support after further reasonable opportunity to investigate or conduct discovery.

Rule 9011(b)(2) and (3) of the Federal Rules of Bankruptcy Procedure states, in pertinent part, as follows:

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, 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, . . .

(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;

(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; . . .

The goal of the sanctions remedy provided under Bankruptcy Rule 9011 is to deter unnecessary filings, prevent the assertion of frivolous pleadings, and require good faith filings. In re Rossi, 1999 WL 253124 (Bankr. N.D. Ill. 1999); Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901, 108 S.Ct. 1101 (1988). The rule is not intended to function as a fee shifting statute which would require the losing party to pay costs. State Bank of India v. Kaliana, 207

B.R. 597 (Bankr. N.D. Ill. 1997) (*citing* Mars Steel Corp. v. Continental Bank, 880 F.2d 928 (7th Cir. 1989)). Thus the Rule focuses on the conduct of the parties and not on the results of the litigation.

The present version of Bankruptcy Rule 9011 provides that, upon presenting in the manner of signing, filing, submitting, or later advocating documents to the Court, a party or their counsel represents to the best of that person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, such document is not presented (1) for any improper purpose, (2) based upon frivolous legal arguments, (3) without adequate evidentiary support for its allegations, and (4) without a basis for denials of fact. These provisions essentially create two grounds for the imposition of sanctions: (1) the "frivolousness clause" which looks to whether a party or an attorney made a reasonable inquiry into both the facts and the law; and (2) the "improper purpose clause" which looks to whether a document was interposed for an illegitimate purpose, such as delay, harassment, or increasing the costs of litigation. See: Kaliana, supra, at 601.

With respect to the "frivolousness clause" the relevant inquiry has two prongs: (1) whether the attorney made a reasonable inquiry into the facts, and (2) whether the attorney made a reasonable investigation of the law. Home Savings Assn. of Kansas City v. Woodstock Asso., 121 B.R. 238 (Bankr. N.D. Ill. 1990), *citing* Brown v. Federation of State Medical Boards of the United States, 830 F.2d 1429 (7th Cir. 1987). The investigation of the facts must have been reasonable under the particular circumstances of the case. In re Excello Press, Inc., 967 F.2d 1109 (7th Cir. 1992). A pleading is well grounded in fact if it has some reasonable basis in fact. Woodstock, supra, at 242. On the other hand, a pleading is not well grounded in fact if it is contradicted by uncontroverted evidence that was or should have been known by the attorney signing the document. Id. at 243.

Rule 9011(c) states:

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanctions upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitations shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing the attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, and order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

It is clearly stated in Rule 9011(c)(2) that a sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. The Rule is not designed as a fee shifting rule from the prevailing parties to the losing parties. Sanctions are limited to those that are "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." See: In re Poli, 298 B.R. 557 (Bankr. E.D. Va. 2003).

In an Opinion and Order dated August 22, 2003, this Court dismissed Plaintiff's Complaint finding that it agreed with all of the arguments advanced by the Defendants in support of their motions for summary judgment and/or motions to dismiss. The Court further found that all of the applicable statutes of limitations on the causes of actions advanced by the Plaintiff/Trustee in his Complaint had expired long before the filing of the Complaint. The uncontroverted facts in this matter clearly establish that the Plaintiff/Trustee was aware of the subject lawsuits prior to the entry of discharge and closing of the Debtors' Chapter 7 bankruptcy case, and that the Plaintiff/Trustee had all of the information necessary to enable him to determine whether or not the lawsuits represented assets which were of considerable value to the bankruptcy estate. The Court further found that the facts presented by the Defendants in their pleadings and affidavits, together with the facts in the Plaintiff/Trustee's own pleadings simply did not support the Plaintiff/Trustee's mere allegations of a grand fraudulent scheme to conceal the proceeds of the subject

lawsuits. This Court made these findings based upon the pleadings filed by the Defendants and oral argument made by Plaintiff/Trustee's counsel at hearing on August 8, 2003.

On March 3, 2004, the United States District Court for the Southern District of Illinois affirmed this Court's decision of August 22, 2003, indicating that the motions for summary judgment and/or motions to dismiss could have been allowed based upon the mere fact that the Plaintiff/Trustee failed to respond to those motions in writing as is required by rule. The decision of the United States District Court was not appealed, and the dismissal of Plaintiff/Trustee's Complaint stands as ordered by this Court on August 22, 2003.

The findings of this Court in its Opinion of August 22, 2003, and of the United States District Court in its Opinion of March 3, 2004, both support the award of sanctions pursuant to Rule 9011(b)(2) and (3). The bottom line is that the Plaintiff/Trustee's Complaint should have never been filed. There was no colorable basis in law or fact supporting the Plaintiff/Trustee's argument that the statutes of limitations as to the causes of actions asserted in the Plaintiff/Trustee's Complaint had not long expired prior to the filing of the Complaint. The undisputed facts reveal that both the Plaintiff/Trustee and his attorney had ample opportunity to investigate this matter, that a reasonable inquiry would have led to the conclusion that the filing of the Complaint was not timely, and there was not sufficient evidentiary support for it.

The Court finds that, pursuant to the provisions of Bankruptcy Rule 9011(c), sanctions are appropriate against both the Plaintiff/Trustee and his attorney for the clear violations of Rule 9011(b)(2) and (3). The Court finds that the Plaintiff/Trustee and his attorney should be jointly and severally liable for the award of sanctions.

While the Court is mindful of the attorneys' fees generated on behalf of the Defendants herein, it

must conclude, based upon the cases cited above, that those fees are not an appropriate measure of the amount of sanctions which should be awarded. The clear language of Rule 9011(c)(2) indicates that sanctions imposed for violations of Rule 9011 shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. In this regard, the Court has carefully reviewed the entire record of this proceeding and finds that the Plaintiff/Trustee and his attorney should be sanctioned in the amount of \$18,000. This sanction shall be shared equally among the Defendants who have filed motions for sanctions, with an award to the Debtors in the amount of \$6,000, an award to John H. Hustava, P.C. and John Hustava in the amount of \$6,000, and an award to the Law Offices of William A. Mueller and Michael G. Curry in the amount of \$6,000. As stated above, this award of sanctions shall be the joint and several liability of both the Plaintiff/Trustee and his attorney. It is reasonable that these sanctions should be paid in their entirety within 30 days of the date of this Opinion.

ENTERED: June 8, 2004.

/s/Gerald D. Fines
GERALD D. FINES
United States Bankruptcy Judge