

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:)
)
KEVIN W. TAYLOR) CASE NO. 05-41598
TERRY S. TAYLOR)
)
Debtors)

DECISION ON RESPONSE TO SHOW CAUSE

At Fort Wayne, Indiana, on November 29, 2006.

This case is pending under Chapter 13 of the United States Bankruptcy Code. On September 13, 2006, the court held a trial with regard to the issues raised by AmeriCredit Financial Services' Motion for Relief from Stay. The debtors appeared for trial, through their counsel Thomas Brooks, as did the trustee, David Rosenthal. Movant appeared through its local counsel, Thomas Herr. When the case was called for trial, the movant was not prepared to proceed. Despite the title of the court's notice of trial and the emphasis it contained, AmeriCredit had no witnesses to testify, no exhibits that could be properly authenticated or offered into evidence, and no stipulations with the trustee and/or the debtor. The motion was denied for the reasons stated in open court. Because the movant was not prepared to proceed at trial, on its own motion, the court issued an order requiring movant's lead counsel, Dennis Ostrowski, to show cause in writing why he and/or his client should not be sanctioned. See e.g., Fed R. Bankr P. Rule 7016(f); N.D. Ind. L.B.R. B-9014-2(b). Counsel filed a timely response to the order to show cause and it is that response which brings the matter before the court for a decision.

A court's most fundamental expectations of the attorneys who appear before it are to show up and be prepared. Thus, an attorney who fails to appear for proceedings scheduled because of

something they have filed, or who appears but is substantially unprepared to participate in those proceedings, may be sanctioned either through the court's inherent authority or through Rule 16(f) of the Federal Rules of Civil Procedure. See, G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 651-53 (7th Cir. 1989); Matter of Sanction of Baker, 744 F.2d 1438 (10th Cir. 1984); Matter of Philbert, 340 B.R. 886 (Bankr. N.D. Ind. 2006); Matter of Martin, 350 B.R. 812 (Bankr. N.D. Ind. 2006). This applies not only to pre-trial proceedings but also to the failure to appear or be prepared for trial. Baker, 744 F.2d 1438; Philbert, 340 B.R. at 889. In bankruptcy cases this is true for both adversary proceedings and contested matters. Philbert, 340 B.R. at 889; N.D. Ind. L.B.R. B-9014-2(b).

The imposition of sanctions under Rule 16(f) does not depend upon a finding of bad faith, willfulness, or contumaciousness. Baker, 744 F.2d at 1440-41. Instead, the question is whether the failure to comply was "substantially justified" or whether other circumstances would make the imposition of sanctions "unjust." Thus, negligence will suffice. Id. at 1441. See also, Harrell v. U.S., 117 F.R.D. 86, 88 (D. E.D. N.C. 1987); Barsoumian v. Szozda, 108 F.R.D. 426 (D. S.D. N.Y. 1985). Ultimately, however, the decision to impose sanctions, as well as the nature of any sanction, is a matter committed to the court's discretion. Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit International, Inc., 982 F.2d 686, 692 (1st Cir. 1993); Heileman Brewing, 871 F.2d at 655; Baker, 744 F.2d at 1440. See also, Philbert, 340 B.R. at 890; In re Syzmanski, 344 B.R. 891, 894 (Bankr. N.D. Ind. 2006).

Counsel's response to the order to show cause indicates that, on the day before trial, he attempted to obtain a witness but learned that the individual he had been directed to contact "would not testify as it was no longer part of her job" and the movant's local branch manager "would not

be able to testify.” When he realized that no one from AmeriCredit would be available to testify at trial, counsel and his client decided to attempt to authenticate and introduce documents into evidence through an affidavit, using the procedure authorized by Rule 902(11), see, Fed. R. Evid. Rule 902(11), and, late that day, counsel filed a notice of intent to offer certified domestic records into evidence. The remainder of the response argues that, absent objection, the movant should not have been expected to present evidence and the allegations in the motion should have been sufficient to warrant termination of the stay without the need for additional evidence.

This response does not show that counsel’s failure to be prepared for the scheduled trial was substantially justified or demonstrate that other circumstances would make sanctions unjust. The essence of counsel’s response to the order to show cause seems to be that the motion for relief from stay was not objected to and he did not expect it to be objected to; so he is apparently at a loss to understand why the court expected him and his client to be prepared to present evidence at trial, why the allegations in the motion were not sufficient to support the relief requested and why the court declined his client’s affidavit. Had counsel attended the scheduled trial he would not need to ask these questions because all of them were answered when the court made its findings of fact and conclusions of law at the close of trial. Thus, despite the court’s ruling, it is apparent that counsel does not understand the court’s expectations of the attorneys who appear before it.

Motions for relief from stay are to be addressed with dispatch. The court is required to hold an initial hearing on the motion within 30 days of the date it is filed and it must generally decide the matter within 60 days. 11 U.S.C. § 362(e). Consequently, any creditor and any attorney who files a motion for relief from stay should expect to, and must be prepared to, act quickly. In many ways a motion for relief from stay is not unlike a motion for a preliminary injunction; in effect it is asking

the court to terminate an injunction of sorts. See, Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 33 (1st Cir. 1994); Philbert, 340 B.R. at 889. A plaintiff or an attorney who filed a motion for preliminary injunction would hardly be surprised if the court promptly scheduled proceedings on its request or expected it to present evidence in support of that request at the resulting hearing. To the contrary, such a plaintiff would undoubtedly be deeply disappointed if the court did not act promptly. The court sees no reason why it should not have similar expectations of an attorney or a creditor that files a motion for relief from the automatic stay.

Because stay motions must be acted upon promptly, lawyers and litigants are often being notified of the need to appear on less notice than the court would like to give. Thus, the court's local rules are designed to readily differentiate between unopposed motions and those which might be contested. Where the parties agree concerning a creditor's right to relief from the automatic stay, motions to approve such agreements are subject only to a notice and opportunity to object procedure. See, N.D.Ind.L.B.R. B-2002-2(a)(1). In essence, someone files a motion to approve the parties' agreement, serves creditors and parties in interest with notice of the motion, advising them of the 15-day opportunity to file objections, and, absent objection, the court rules on the motion without scheduling a hearing. This type of procedure obviously requires an agreement, which necessitates communication between the parties, but it has substantial advantages.

A motion to approve an agreement relating to relief from the automatic stay does not require a filing fee. In the absence of such an agreement, a motion for relief from stay requires a \$150.00 filing fee. Where the court is being asked to approve some type of agreement, it has no reason to expect any objections and, therefore, no reason to schedule proceedings, whether trials, preliminary hearings, or pre-trial conferences, on a motion where the only thing that would happen is that the

parties would tell the court they have no dispute. Consequently, motions to approve agreements relating to the automatic stay can usually be disposed of following nothing more than a simple 15-day notice to creditors, without the need for counsel to appear at any proceedings whatsoever. See, N.D. Ind. L.B.R. B-2002-2. Given the availability of this more convenient, less expensive, and potentially more expeditious procedure, the court assumes that lawyers and their clients will take advantage of the opportunities it offers and would not choose the more expensive and more cumbersome procedures associated with a motion for relief from stay that is not the product of an agreement unless there was a need to do so. As a result, when a creditor files such an unagreed to motion in cases under Chapters 11, 12 and 13 the court assumes that it will be opposed and schedules proceedings accordingly. In doing so the court believes that it is acting in accordance with the movant's expectations and desires. After all, the movant, who has total control over when the motion is filed, is the one that initiated proceedings the court is required to handle with dispatch, and if it did not want to proceed quickly it would have done something else.

Here, the movant had no agreement with debtor's counsel concerning relief from the automatic stay and the court was not asked to approve such an agreement. Although counsel has given the court a very detailed history of the events leading up to the filing of the motion and the scheduled trial, nowhere in that chronology is there a recitation of any attempt to contact debtor's counsel prior to filing the motion to solicit his agreement to relief from the automatic stay.

Because the motion was apparently going to be opposed the court promptly set it for trial on September 13, 2006. The notice the court issued clearly indicated that the matter was set for trial and that the court expected "to receive evidence and arguments concerning the . . . motion." (emphasis original). While the court may have given less notice of the forthcoming trial than it

would like, given the frequency with which the court travels to its Lafayette Division, it had little alternative if it was going to conduct proceedings within the time required by § 362(e)(1). Despite the fact that counsel controlled the motion's filing and this gave him the ability to make some initial preparations before it was ever filed or scheduled to be heard, it was not until the day before trial, September 12, that he tried to arrange for a witness. Only then did he learn that his client was not able to provide one.¹ As a result, counsel attempted an alternative, by filing a notice of intent to offer certified domestic records into evidence through an affidavit, using the procedure authorized by Rule 902(11).²

Counsel makes much of the fact that there was no objection to the motion and that is true, yet counsel could not have known that the motion would pass without objection until the time of trial because objections to it were not due until that time. See, N.D.Ind.L.B.R. B-9014-1(b). So, unless counsel had reached some affirmative agreement with the debtor and the trustee, counsel should have been prepared to present evidence in accordance with the court's notice of trial. See, In re Martin, 350 B.R.812 (Bankr. N.D. Ind. 2006). Once again, although counsel has given a chronology of the events surrounding his motion, nowhere in the days leading up to trial is there a reference to any effort to contact debtor's counsel or the trustee in order to solicit an agreement concerning the relief sought.

¹This is not the first time that counsel has encountered problems by waiting until the last minute to begin making necessary preparations. See, Matter of Elder, 05-13345, Order dated May 12, 2006.

²This filing was not made until 5:31 p.m. on the day before trial. Thus, there is a real question as to whether counsel gave the required notice of his intention and made the documents in question available for inspection sufficiently in advance of their offer into evidence. At trial the court explained why it regarded the affidavit and the proffer as insufficient and its refusal to accept the documents into evidence.

Counsel is correct that absent an objection the court can operate on the proposition that the facts alleged in the motion are not disputed and may decide the motion based upon them. See, In re Szymanski, 344 B.R. 891, 895-96 (Bankr. N.D. Ind. 2006). Yet, those allegations must still justify terminating the stay before the movant is entitled to such an order and if they do not, absent additional evidence, the motion should be denied. Szymanski, 344 B.R. at 896-97. See also, Nishimatsu Constr. Co. Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)(judgment by default requires the allegations in a complaint to state a claim for relief); In re Herrin, 325 B.R. 774 (Bankr. N.D. Ind. 2005)(Klingeberger, J.)(denying motion for relief from stay based upon the insufficiency of the motion's allegations). That is precisely what the court did in this instance. It decided the motion based upon the allegations it contained and found them to be lacking. The court explained orally, and on the record, not only why counsel's evidentiary proffer was insufficient, but also why the allegations contained in the motion and the circumstances presented to the court did not, absent additional evidence which counsel was not prepared to present, justify terminating the automatic stay. Having already explained its position in connection with ruling on the motion, the court sees little reason why it should do so again.

Counsel's lack of understanding as to the reasons for the court's actions has nothing to do with the court's failure to explain its rulings or its procedures. Instead, it is largely attributable to counsel's practice of not appearing for proceedings, or appearing only through local counsel. Apparently, local counsel either is not conveying the court's rulings or movant's counsel does not believe what he is being told. If counsel would take the opportunity to attend the court's sessions in person, whether miscellaneous hearings or the trials that are frequently scheduled with regard to motions for relief from stay, counsel would quickly learn what the court's expectations are. The

court realizes that lawyers, whether because of time, distance, economics or other factors, often prefer not to appear in court and will send someone else to do so in their stead. While the court is willing to accommodate this practice, attorneys who consistently avoid appearing in court must understand that by absenting themselves from the proceedings they are missing one of the most productive educational opportunities available. There is probably no better way to learn about the court's expectations and its views than by actually watching the court in action. While this may not lead everyone to agree with the court's position on various issues, it will at least give them the opportunity to learn what those positions are, what the court's expectations might be, and how to fulfill them. Cf., In re Herrin, 325 B.R. 774, 778 (Bankr. N.D. Ind. 2005)(Klingeberger, J.)("Perhaps other courts aren't as enthralled by Dumas as the author of this opinion is, but when you're here in this court in these circumstances, you have to emulate D'Artagnan and his three companions.").

This is at least the fifth time this year that the court has had to write about counsel's failure to appear when expected or to be prepared for proceedings. See, Matter of Leill, Case No. 05-40984, Order dated Feb. 13, 2006; Matter of Elder, 05-13345, Order dated May 12, 2006; Matter of Wright, 340 B.R. 374 (Bankr. N.D. Ind. 2006); Matter of Lawson, 05-42271, Order dated March 1, 2006. No other attorney has so consistently been the object of the court's written criticism. The court does not believe these difficulties arise out of counsel's conscious desire to ignore the court's expectations. Instead, the root cause of the problem seems to be his frequent absence and, for whatever reason, his failure to be sufficiently apprised of the reasons for the court's actions when its rulings are handed down orally, as so many of them are. This case offers a prime example of the situation. Despite the fact that the court explained its local rules, the way those rules are implemented, the reasons for the court's procedures, the shortcomings of both counsel's motion and

efforts to offer documents into evidence, as well as why the facts before the court did not warrant relief from the stay, the response to the order to show cause makes it apparent that counsel truly does not understand why the court has done what it has done.

AmeriCredit Financial Services and its counsel were substantially unprepared to participate in the trial of this matter scheduled for September 13, 2006. That failure was not “substantially justified” and nothing before the court indicates that sanctions would be “unjust.” This does not mean that monetary sanctions are the inevitable result. While compensation may be one goal of any sanctions inquiry, deterrence – preventing a repetition of the objectionable conduct – is even more important. See e.g., Szymanski, 344 B.R. at 899. See also, In re Bernard, 85 B.R. 846, 867 (Bankr. D. Col. 1988)(primary purpose of sanctions is to insure reasonable management requirements for case preparation). Yet another purpose “is to convey a message to attorneys and litigants alike that expeditious management and preparation of cases for trial is not merely desirable, it is imperative.” Bernard, 85 B.R. at 867(citing Matter of Sanction of Baker, 744 F.2d at 1441). In this instance the court believes these goals can best be achieved through something other than monetary sanctions. The most appropriate way to see that counsel is fully apprised of the court’s concerns and the reasons his actions have been found wanting is to ensure that he receives the court’s explanation for himself. That way he will not have to rely upon secondhand reports concerning the court’s rulings.

If he had attended the scheduled trial and heard the court’s explanations firsthand, counsel might better understand what the court expects of the attorneys who appear before it. As counsel did not attend the scheduled trial, but sent local counsel in his stead, he did not have the benefit of hearing what the court had to say. Since he did not, perhaps reading what the court said at the trial would help to educate counsel and his client. Therefore, in lieu of imposing monetary sanctions

upon counsel and his client because of their failure to be prepared at trial, counsel shall order a transcript of the trial held in this matter on September 30, 2006, read the transcript in its entirety, and provide a copy to his client for its review. Counsel shall also, within sixty (60) days, file an affidavit certifying that he has read the transcript and provided his client with a copy of it.

An appropriate order will be entered.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court