

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
STEPHEN A. MASON) CASE NO. 06-11678
JANE MASON)
)
Debtors)

DECISION ON ORDER TO SHOW CAUSE

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

On November 14, 2006, the court held a trial with regard to the issues raised by JP Morgan Chase Bank's motion for relief from stay. The debtors appeared for the hearing, through their counsel Frederick Wehrwein. Movant's counsel, Theodore Konstantinopoulos, was nowhere to be seen. As a result, the court denied the Bank's motion, and, on its own initiative, issued an order requiring Mr. Konstantinopoulos to show cause in writing why he should not be required to pay the reasonable attorney fees incurred by the debtor in connection with the scheduled trial, or otherwise sanctioned, because of his failure to appear. Mr. Konstantinopoulos 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 states that he failed to attend the scheduled trial because he had removed it from his calendar. Counsel apparently did so because the motion for relief from stay was not objected to and debtors’ plan indicated that the debtors would surrender the collateral, so he believed, incorrectly as he now acknowledges, that the scheduled trial would be removed from the court’s calendar.

If counsel’s belief that the scheduled trial would be removed from the court’s calendar – without any order, notice or other action – had anything to support it, perhaps the court could conclude that his failure to appear was substantially justified or that the imposition of sanctions

might be unjust. But, there is absolutely no basis whatsoever, whether in the court's practice, its local rules, or the orders entered in this case, that would justify such a belief.

To begin with, the notice and opportunity to object procedure counsel apparently refers to applies only to motions for relief from stay filed in Chapter 7 cases.¹ N.D. Ind. L.B.R. B-2002-2(a)(4). It does not apply to stay motions filed in cases pending under Chapter 11, Chapter 12, or, as here, Chapter 13. This is because the court assumes, and expects, that attorneys communicate with one another concerning their cases and it has a convenient and expeditious procedure for dealing with motions to approve agreements relating to the automatic stay that would come from that communication. See, N.D. Ind. L.B.R. B-2002-2(a)(1), (b)(1)(A). Accordingly, in cases under Chapters 11, 12, and 13, when the court receives a motion for relief from stay that is not based upon an agreement between the debtor and the creditor, the court assumes the motion is going to be opposed and promptly schedules proceedings to ensure that the issue is considered with the dispatch required by § 362(e). See, 11 U.S.C. § 362(e)(court must hold a hearing within 30 days and must decide the matter within 60 days of the date the motion is filed). In doing so, the court believes that it is acting in accordance with the movant's wishes. After all, the movant is the one that initiated proceedings the court is required to address so promptly and if it was not interested in moving quickly forward it would have delayed filing the motion so that the issue could be more thoroughly discussed with debtor's counsel.

¹The court notes that the (unauthorized) notice counsel served required objections to the motion to be filed on or before October 13, 2006, yet the motion was not filed and the notice was not served until October 23, 10 days after the supposed objection deadline expired. In view of this, the court is at a bit of a loss to understand when counsel thinks any objections might have been due. Even if the notice and opportunity procedure counsel tried to use had been authorized by the court's local rules, the notice counsel served certainly did not establish an effective deadline and the court's notice of trial established none.

The court's observations about the creditor's apparent need for speed are particularly appropriate in this case. Counsel states that the debtor's proposed plan contemplated surrendering the Bank's collateral. Confirmation of that plan, which the court is scheduled to consider on December 12, 2006 – notice of which was issued well before the stay motion was ever filed – would completely moot the issues raised by the motion. The Bank must have been quite eager to have the issue addressed to go to the trouble of engaging all the machinery of an unagreed to motion for relief from stay – as well as paying the \$150.00 filing fee that goes with such a motion – when, with but a little patience, it would soon be getting everything it sought, through confirmation, without doing a thing. Even if the counsel feared confirmation might be delayed and felt it necessary to accelerate the resolution of the Bank's claim, given the provisions of the proposed plan it should have been relatively easy to get debtor's counsel to agree to relief from stay, thereby allowing a much simpler procedure to be used. Assuming all other forms of communication were tried and failed,² counsel had only to attend the meeting of creditors in order to have the opportunity to discuss the matter with his opposition.

In this case, the court scheduled the Bank's motion for trial and the notice the court used was quite emphatic on that point. It was clearly titled "Notice of Trial" and stated that the purpose of the proceeding was "to receive evidence and arguments concerning the issues raised by the motion for relief from stay. . ." See, Notice dated October 26, 2005 (emphasis original). There is nothing about this notice that even begins to suggest the scheduled trial was only a tentative setting or that it might

²Of course, if all other avenues of communication have been tried and fail, counsel can probably expect opposition and should, therefore, be "loaded for bear" at the scheduled trial – not fail to appear.

somehow removed from the court's calendar upon the happening of some other event. So why counsel believed trial might not take place is a mystery which counsel does not explain. Furthermore, if there could have been some question concerning the status of the proceedings, a simple check of the docket in this case or the court's calendar for November 14, both of which counsel can access from the comfort of his office, would have quickly shown that the matter was still set to be heard as originally scheduled.

Counsel's response does not show that his failure to appear for the scheduled trial was substantially justified. While his unfounded belief that trial would not be held may explain counsel's absence, that is not enough.

Debtor's counsel was required to and did go to the trouble of preparing for and attending the scheduled trial. Those efforts were largely unnecessary and the court sees nothing unjust about requiring an attorney who has caused its opposition to unnecessarily devote time and trouble to a matter to reimburse them for the reasonable value of their labors. In the court's opinion such a result is necessary, not only as a matter of economic and procedural fairness, but also in order to impress upon litigants the importance of appearing for and being prepared for proceedings scheduled with regard to the things they file. In re Philbert, 340 B.R. 886 (Bankr. N.D. Ind. 2006).

Therefore, Mr. Konstantinopoulos shall pay debtor's counsel the reasonable attorney fees and expenses incurred as a result preparing for and attending the trial scheduled in this matter for November 14, 2006. Furthermore, in order to compensate the United States for the costs he has unnecessarily imposed upon it and the additional time and attention he has required the court to devote to this matter, thereby depriving other litigants of its attention, and to deter similar conduct, he shall also pay the clerk of this court the sum of \$150.00.

An appropriate order will be entered.

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