

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF: )  
 )  
PAUL D. GRABILL, JR. ) CASE NO. 06-11414  
 )  
Debtor )

**DECISION ON RESPONSE TO SHOW CAUSE**

At Fort Wayne, Indiana, on December 15, 2006.

On November 14, 2006, the court held a hearing with regard to confirmation of the debtor's proposed chapter 13 plan and the trustee's objections thereto. The trustee, Donald Aikman, appeared for the hearing, but debtor's counsel, Brian Kaiser, was nowhere to be seen. The court denied confirmation<sup>1</sup> and, on its own motion, issued an order requiring Mr. Kaiser to show cause, in writing, why he should not be required to pay the reasonable attorney fees incurred by the trustee, or otherwise sanctioned, because of his failure to attend the scheduled hearing. 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);

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<sup>1</sup>The court also denied the debtor the opportunity to file any further plan. The reasons for doing so were stated in open court.

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 hearing because, based upon conversations his paralegal had with the trustee’s staff, he believed that the confirmation hearing would not take place and counsel’s attendance would not be necessary. He did not attend the scheduled hearing because he understood that the trustee was going to ask that it be continued. Counsel now realizes that there was some misunderstanding or a miscommunication on this point.

The court has previously observed that its expectations of the attorneys who appear before

it “are really quite simple: If the court needs to rule on something you have filed, you need to be there.” In re Martin, 350 B.R. 812, 817 (Bankr. N.D. Ind. 2006). “Absent a concrete understanding with opposing counsel as to what that ruling should be – in other words something that had been affirmatively agreed to by both parties – an attorney needs to appear for proceedings they are responsible for having initiated.” Id. at 816. See also, Philbert, 340 B.R. at 891(counsel’s attendance is not optional).

Measured by this standard, counsel’s absence was not substantially justified. There was no concrete understanding between counsel and the trustee as to what would be done at the confirmation hearing. They had no understanding whatsoever. The communication undertaken was not between counsel and the trustee but only between their respective staff members. Even that communication did not involve reaching an agreement as to what would take place at the hearing. It was more of an inquiry into the status of some aspects of the trustee’s objection, which, when reported to counsel, he understood to mean that the trustee would be asking for another hearing. Based upon this interpretation of what he was told by his paralegal, counsel decided his attendance at the hearing was not necessary.

Counsel’s explanation suffers from a number of shortcomings which lead the court to the conclusion that counsel’s absence was not substantially justified. To begin with, there is a fundamental misunderstanding as to where the authority to decide to continue hearings lies. It does not rest with the parties or the trustee, but with the court. Just because counsel believed the trustee would be asking for a continuance, does not mean the court would agree. The court only continues hearings such as these where doing so would serve some meaningful purpose. That was not case here. Given the nature of all the trustee’s objections, continuing the confirmation hearing simply to

give the debtor another chance to attend a 341 meeting – even assuming the debtor appeared – would not have resolved the trustee’s numerous problems with confirming the plan. The confirmation hearing is the time to consider whether the plan has the possibility of being confirmed. At that hearing, debtor’s counsel should be able to advance at least a colorable argument that the facts as they exist, and which the debtor would be able to offer evidence to prove, will demonstrate that the plan is worthy of being confirmed. If counsel cannot do so, confirmation should be denied. The court should not multiply proceedings and delay ruling when the debtor would not be able to offer proof of the facts confirmation requires. Consequently, a debtor’s repeated failure to appear for the meeting of creditors justifies denying confirmation, not a continuance.

Even if the parties’ agreement would determine whether the court would continue the hearing, the communication that was taking place between debtor’s counsel and the trustee was not directed toward reaching a concrete understanding, which the court would only need to implement, of what was to be done. Instead, it was designed to learn about the position the trustee would be taking at the hearing. Communicating in order to clarify what your opponent will be doing at an upcoming hearing, while helpful and important, is not the same thing as reaching an understanding concerning the outcome of that hearing. Even if the exchange leads you to the conclusion that your position is so weak your opponent will be victorious, absent an agreement concerning the court’s ruling, you need to attend.

Finally, it seems that the reason the parties were not communicating about the right issue – they were communicating about what the trustee would be doing at the hearing, not what the result of that hearing would be – and the reason for the misunderstanding, was that the communication was not taking place between the proper individuals. Counsel did not talk to the trustee directly or even

try to do so. Instead, he had his paralegal talk with someone in the trustee's office and the respective staffers then relayed messages back and forth between counsel and the trustee. As with the children's game of telephone, this presents is a classic opportunity for garbled messages and misunderstandings – which is precisely what occurred.

The trustee was required to and did go to the trouble of preparing for and attending the scheduled hearing. Because of counsel's absence, 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. Philbert, 340 B.R. at 891.

Therefore, Mr. Kaiser shall reimburse the trustee for the reasonable attorney fees and expenses he incurred as a result preparing for and attending the hearing scheduled in this matter for November 14, 2006.<sup>2</sup> 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

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<sup>2</sup>Counsel's response indicates that he has talked with the trustee about the sanctions inquiry and the trustee will not be seeking any attorney fees. The court believes that the trustee should have the option of seeking a recovery. Whether or not he chooses to take advantage of the opportunity is entirely up to him.