

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

IN THE MATTER OF: )  
 )  
DAVID THOMAS FERRY ) CASE NO. 06-40284  
KAREN MARIE FERRY )  
 )  
Debtors )

**DECISION ON RESPONSE TO SHOW CAUSE**

At Fort Wayne, Indiana, on January 5, 2007.

On December 6, 2006, the court held a hearing with regard to confirmation of the debtors' proposed chapter 13 plan and the trustee's objection thereto. The trustee, David Rosenthal, appeared for the hearing, but debtors' counsel, Eric Redman, was nowhere to be seen. The court denied confirmation and, on its own motion, issued an order requiring Mr. Redman 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); 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 another member of his firm attended the meeting of creditors and talked with the trustee about the requirements for confirmation. Based upon this conversation counsel believed his attendance at the confirmation hearing would not be necessary, so long as modifications needed to satisfy the trustee’s concerns were being completed. Counsel thought that the trustee would advise the court of this fact, that the trustee’s objections would be sustained and a modification to the plan would then be filed resolving the problem.<sup>1</sup>

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<sup>1</sup>There seems to be a bit of a gap in counsel’s logic on this point. Once an objection to confirmation is sustained and confirmation of a proposed plan denied, there is no longer a plan before the court that is capable of being modified. So counsel’s perception that a modification to

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 precisely what would be done at the confirmation hearing. At best, they may have had some kind of understanding as to what might happen if something else was done first, but there is no indication that debtor’s counsel had any contact with the trustee’s office following the 341 meeting or followed through with the discussions that took place at that time. The court notes that 341 meeting was held on October 17, 2006, the trustee’s objections were not filed until nine days later and the confirmation hearing was held on December 6, 2006. Counsel had ample time during the weeks following the 341 meeting when the issue was discussed and prior to the confirmation hearing to file the relatively simple modification that was under consideration or at least to contact the trustee and affirmatively agree to making specific changes to the plan, yet he did neither of these things. Having failed to do so, he was obligated to attend the confirmation hearing and explain his position to the court.

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the plan could be submitted after the trustee’s objection had been sustained is in error. If a debtor wants to continue in Chapter 13 after an objection to a plan has been sustained and confirmation denied, it must file an entirely new plan and the entire confirmation process must begin again.

Although counsel may have made the decision to modify the plan, he did not share that information with the trustee and apparently operated on the proposition that he could take all the time he wanted in order to make those changes, without regard to other events or deadlines in the case. For example, although a modification to the plan has now been prepared and filed, the debtors did not sign that document until December 7, 2006 – the day after the scheduled confirmation hearing. Of course, by that time it was too late as the court had already sustained the trustee’s objection and denied confirmation. Had counsel attended the scheduled hearing, it is entirely possible, and quite likely, that the desired changes could have been made then and there and the plan as so modified confirmed at that time. As it is, before the court can again consider the issue of confirmation further filings, further notices, further hearings, further expense and further delays – none of which should be necessary – will be required. Actions which create such unnecessary costs and delays are sanctionable. In re Hein, 341 B.R. 903, 906 (Bankr. N.D. Ind. 2006).

The trustee was required to and did go to the trouble of preparing for and attending the scheduled confirmation 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. Redman 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

December 6, 2006. 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