

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
KENNETH JAMES HOEMIG) CASE NO. 08-11241
)
)
Debtor)

DECISION

At Fort Wayne, Indiana, on January 9, 2009.

On August 13, 2008, Richard Helwig filed a motion to add his client, Howard Hoemig, to the debtor's list of creditors holding the twenty largest unsecured claims in this chapter 11 case. See Fed. R. Bankr. P. Rule 1009(a) ("On the motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule or statement to be amended . . ."). This list is required by Rule 1007(d) of the Federal Rules of Bankruptcy Procedure and is to contain "the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders¹ . . ." (emphasis and footnote added). In accordance with Rule 1009(a), the court scheduled the motion for a hearing. At the hearing, the court asked about the relationship between the movant and the debtor. Counsel² responded that the movant was the debtor's brother and asked to dismiss the motion, explaining that the problem (movant was an insider) had not been realized before. The court permitted the motion's withdrawal based upon the condition that Mr. Helwig justify his actions and show cause, in writing, why he should not be sanctioned under Rule 9011 for having filed the motion without having made a reasonable inquiry into the law and the facts concerning it. The

¹"Insider" is defined by 11 U.S.C. § 101(31) and includes a relative of the debtor.

²Mr. Helwig did not attend the hearing. He sent another attorney to do so for him.

matter is before the court to consider Mr. Helwig's response to that inquiry.

Rule 9011 is the bankruptcy equivalent of Rule 11 of the Federal Rules of Civil Procedure. Like Rule 11, it imposes an affirmative obligation upon counsel to conduct a reasonable investigation into both the law and the facts before presenting ("whether by signing, filing, submitting or advocating") a particular position ("a petition, pleading, written motion, or other paper") to the court. See, Fed. R. Bankr. P. Rule 9011(b). See also, Frantz v. United States Powerlifting Federation, 836 F.2d 1063, 1064 (7th Cir. 1987); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 751 (7th Cir. 1988); McGhee v. Sanilac County, 934 F.2d 89, 93 (6th Cir. 1991); Slater v. Skyhawk Transp., Inc., 187 F.R.D. 211, 220 (D.N.J. 1999); Terminix Int'l Co. v. Kay, 150 F.R.D. 532, 538 (E.D. Pa. 1993). In determining whether an attorney's pre-filing inquiry was reasonable, the court must consider the circumstances of the particular case. Mars Steel Corp. v. Continental, 880 F.2d 928, 932 (7th Cir. 1989)(en banc); In re Excello Press, 967 F.2d 1109, 1112-13 (7th Cir. 1992). Nonetheless, "every lawyer must do the necessary work to find the law before filing" Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986). See also, Chambers v. American Trans Air, Inc., 17 F.3d 998, 1007 (7th Cir. 1994).

In this case, Mr. Helwig filed a motion to add his client to the debtor's list of the twenty largest creditors. Yet the plain language of the rule that requires this list, Bankruptcy Rule 1007(d), clearly excludes his client from it. That exclusion is repeated on the list itself. See, Official Form 4, "List of Creditors Holding 20 Largest Unsecured Claims" ¶ 1, sent. 2 ("This list does not include persons who come within the definition of 'insider' set forth in 11 U.S.C. § 101 . . ."). Thus, simply by reading the rule and the form for the list in question, it is obvious that something more than holding a large claim is required for inclusion.

Counsel's response to the court's inquiry is inadequate. To begin with, it never really acknowledges what his obligation was or what the standard that governs his actions may be. He was directed to file a brief, together with appropriate affidavits, demonstrating how he satisfied his obligation to make a reasonable inquiry into the law and the facts with regard to the motion for inclusion. Counsel's response never mentions Rule 9011 or what it requires. As a result it never advanced an argument that counsel's actions satisfied that standard, see, In re King, 2006 WL 1994679 *1 (Bankr. N.D. Ind. 2006), or, if that was not possible, acknowledge that counsel failed to fulfill his obligations. Instead, the court was presented with a litany of excuses, most of which are either irrelevant to the question of whether Mr. Helwig fulfilled his duty or which try to put the blame for his actions on someone else. That he cannot do. He is the one that, by filing and signing it, presented the motion to the court and he is the one that is responsible for it.

The various components of counsel's response fall into four main categories. First counsel indicates that he read Rule 1007(d), and the instructions for Form 4, but missed their references to excluding insiders. Second, he indicates that he has limited his bankruptcy practice since October 2005³ and so consulted with another attorney who concentrates his practice in the bankruptcy area, but that attorney has admitted that he too inadvertently missed the insider exclusion. The third component of the response tries to provide information concerning the debtor's obligation to his client. The fourth complains about the information contained in the debtor's schedules and statement of affairs and what counsel perceives to be discrepancies in them. The response also indicates that counsel did not intend to deceive the court, rather his purpose in filing the motion was

³The requirements concerning the list of the 20 largest unsecured creditors and the rules governing them are the same now as they were before October 2005.

to try to advise the court of the incorrect information given by the debtor. To counsel's credit, the closing lines of the response acknowledge that, despite the attempted finger pointing, he is ultimately responsible for the motion.

The focus on the present inquiry is upon Mr. Helwig and his actions;⁴ in particular whether he conducted a reasonable inquiry into the law and the facts concerning the motion for inclusion before presenting it to the court.⁵ The only answer to this question is no. While he may have conducted an adequate investigation into whether his client was a creditor, that was not enough. His motion was based entirely upon the requirements of Rule 1007(d) and the proposition that his client was not just a creditor but one of the creditors that should be included upon the list required by that rule. Since his client was a relative of the debtor, he should not have been.

Rule 1007(d) is neither long nor complex, yet counsel gave it no more than a cursory glance,⁶ and by doing so he missed the provisions that drained his motion of any possible merit. To base a request for relief upon the requirements of a particular rule without having carefully read all the requirements of that rule is not a reasonable investigation, particularly when those requirements are simple and straight-forward. It requires no particular bankruptcy expertise to read Rule 1007(d) and

⁴Because of this only the first and second categories of counsel's response need to be addressed.

⁵The court has never been concerned that the motion might have been filed for an improper purpose, see, Fed. R. Bankr P. Rule 9011(b)(1), only that, lacking any merit, it was filed without the reasonable inquiry required by Rule 9011(b)(2).

⁶Counsel was not facing any impending deadline, requiring immediate action, which might justify an otherwise inadequate pre-filing inquiry. See, Fed. R. Civ. P. Rule 11 advisory committee's notes ("what constitutes a reasonable inquiry may depend upon such factors as how much time for investigation was available . . ."). See also, Martin v. American Kennel Club, Inc., 1989 WL 2522511 *3 (N.D. Ill. 1989).

note the words “excluding insiders.”⁷ From there it does not take an expert to realize that perhaps the definition of “insider” should be consulted to determine who comes within that exclusion.⁸ But counsel did not do any of this. He contented himself with quick read of the rule and a consultation with a more experienced bankruptcy attorney who also “inadvertently missed” the exclusion. While it is certainly laudable that Mr. Helwig recognized his limitations and consulted with another attorney in an effort to overcome them, an attorney cannot avoid sanctions under Rule 11 by claiming to have relied on the professional advice of another attorney, unless they also demonstrate that the attorney upon whom they relied conducted a reasonable investigation into the issue. See, Miller v. Wolpoff & Abramson, L.L.P., 471 F. Supp. 2d 243, 251 (E.D. N.Y. 2007). The response to the court’s inquiry makes no attempt to demonstrate that Mr. Mayer made a reasonable investigation into the issue and so Mr. Helwig cannot escape his obligation to have done so by trying to put the blame there.⁹

Once the court has found a violation of Rule 11, whether or not it imposes sanctions, together with the nature of any such sanction, is a matter committed to the court’s discretion. Fed. R. Bankr. P. Rule 9011(c)(“the court may . . . impose an appropriate sanction”). In fashioning an appropriate sanction, the court’s primary goal should be deterrence; in other words, to avoid a repetition of the problem. Fed. R. Bankr. P. Rule 9011(c)(2). See also, White v. General Motors Corp. Inc., 908 F.2d

⁷The same exclusion is stated on the form itself. So, to be able to read the list to determine who is and who is not on it, is to be able to read that it “does not include insiders.”

⁸This is what the instructions for completing Official Form 4 say should be done.

⁹Mr. Mayer did not sign or file the motion, or otherwise advocate the position it espoused and so, in this instance, the rule does not apply to him.

675, 685 (10th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S.Ct. 788 (1991); In re Rimsat, Ltd., 229 B.R. 914, 921 (Bankr. N.D. Ind. 1998), aff'd, 230 B.R. 362 (D. N.D. Ind. 1999), aff'd, 212 F.3d 1039 (7th Cir. 2000). In this case, the motion was filed as a result of counsel's ignorance. The best remedy for ignorance is education. See e.g., In re Thomas, 337 B.R. 879, 895 (Bankr. S.D. Tex. 2006); Bergeron v. Northwest Publications, Inc., 165 F.R.D. 518, 522 (D. Minn. 1996); Vandeventer v. Wabash Nat. Corp., 893 F. Supp. 827 (N.D. Ind. 1995). Completing six (6) hours of continuing legal education specifically focused upon bankruptcy law and bankruptcy procedures should help counsel avoid future problems.

An appropriate order will be entered.

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