

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
LYNN M. HUNT) CASE NO. 07-13578
)
)
Debtor)

DECISION AND ORDER ON RESPONSE TO SHOW CAUSE

At Fort Wayne, Indiana, on January 22, 2009.

On January 5, 2009, the court held a pretrial conference with regard to a motion for relief from stay and abandonment filed by Vanderbilt Mortgage and Finance, Inc. and debtor's objection thereto. The debtor appeared for the hearing in person and through her counsel, Joshua Twombly. Vanderbilt Mortgage's counsel, Elizabeth Wysong, was nowhere to be seen. As a result, the court denied Vanderbilt Mortgage's motion, and, on its own motion, issued an order requiring Ms. Wysong to show cause, in writing, why she should not be required to pay the reasonable attorney fees incurred by debtor's counsel or otherwise sanctioned due to the failure to appear for the scheduled pretrial conference. See, Fed. R. Civ. P. Rule 7016(f). Christopher Clark filed a timely response to the order to show cause on Ms. Wysong's behalf. In that response, Mr. Clark acknowledges that he is the one who is responsible for the failure to appear and that the order to show cause should be directed to him, not his associate. The court appreciates Mr. Clark's candor and so considers the issues before it based upon the information contained in that response.

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). In bankruptcy cases this is true for both adversary proceedings and contested matters. Philbert, 340 B.R. at 889. See also, N.D. Ind. L.B.R. B-9014-2(b).

The failure to appear is one type of conduct specifically identified by Rule 16(f) as the basis for sanctions. At least to the extent that the opposing party should be compensated for the reasonable costs and expenses incurred because of counsel's non-compliance, the rule is almost, but not quite, mandatory. Unless non-compliance was "substantially justified" or other circumstances would make an award "unjust," the non-defaulting party is entitled to reimbursement. As a result, the imposition of sanctions under the rule does not depend upon a finding of bad faith, willfulness, or contumaciousness. Matter of Sanction of Baker, 744 F.2d 1438, 1440-41 (10th Cir. 1984). A negligent failure to comply 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).

Counsel's response does not show that the failure to appear for the scheduled pretrial conference was substantially justified or demonstrate that other circumstances would make an award unjust. After the debtor filed an objection to the motion for relief from stay, in which she denied any default, counsel learned from his client that she was current in the required payments. Although he had intended to contact debtor's counsel prior to the pretrial conference to inform him that it would not be necessary, he "failed without excuse to do so."

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).

Although counsel’s response suggests that he understands this obligation – he intended to contact debtor’s counsel prior to the pretrial conference to reach some sort of understanding – it also recognizes the he inexcusably failed to fulfill it. Absent sanctions, the economic burdens coming from that failure will be visited upon the debtor and her counsel. Debtor’s counsel was required to (and did) go to the trouble of properly preparing for and attending the scheduled pretrial conference and his client took time off from work so that she could be there as well. (Although the debtor’s appearance at the pretrial was not required, given the importance of the issue – the potential loss of her home – her desire to be there is understandable.) The court sees nothing unjust about requiring an attorney who has unnecessarily caused its opposition to 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.

Christopher Clark shall, therefore, pay the reasonable attorney fees and expenses incurred by debtor’s counsel as a result of preparing for and attending the pretrial conference held in this matter on January 5, 2009. He shall also reimburse the debtor for any wages she may have lost and any reasonable expenses she may have incurred as a result of attending the pretrial. 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, see, BondPro Corp. v. Siemens Power Generation, Inc., 466 F.3d 562, 563 (7th Cir. 2006) (“The time has come to impose an exemplary public sanction in the hope of deterring further violations.”); Hill v Porter Memorial Hospital, 90 F. 3d 225-27 (7th Cir. 1996)(\$1000 sanction for failing to comply with procedural rules concerning the content of appellate briefs), he shall also pay the clerk of this court the sum of \$150.00.

The amounts due the clerk of this court shall be paid within fourteen (14) days. Debtor’s counsel shall have fourteen (14) days from this date within which time to file and serve affidavits itemizing any wages, fees, or expenses recoverable under this order. Mr. Clark shall have ten (10) days thereafter in which to file any objections thereto. In the absence of objection, the court will determine the reasonable amount of any wages, fees and expenses without further notice or hearing.

SO ORDERED.

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