

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

IN THE MATTER OF:)
)
ROBERT MERRILL SKELTON) CASE NO. 08-40954
JO ANNE SKELTON)
)
Debtors)

DECISION AND ORDER

At Fort Wayne, Indiana, on March 31, 2009.

On March 18, 2009, the court held a preliminary hearing with regard to a motion for relief from stay and abandonment filed by US Bank. The debtors appeared for the hearing, through their counsel Steven Taylor, as did the trustee, David Rosenthal. US Bank's counsel, Laura Faulkner, was nowhere to be seen. As a result, the court denied US Bank's motion, and, on its own motion, issued an order requiring Ms. Faulkner to show cause, in writing, why she should not be sanctioned and/or required to pay the reasonable attorney fees incurred by debtors' counsel and the trustee in connection with the scheduled hearing. John Day filed a timely response to the order to show cause on Ms. Faulkner's behalf. In that response, Mr. Day stated that Ms. Faulkner has been on maternity leave, that he has been handling her files, and that he is the one who is responsible for the failure to appear.

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 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 expenses – “including attorney’s fees” – 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 his failure to appear for the scheduled hearing was substantially justified or demonstrate that other circumstances would make an award unjust. The response he filed indicates that he failed to attend (or have local counsel attend) because of a clerical error which resulted in local counsel not being informed of the hearing or of the need to attend it.

The court acknowledges that Mr. Day’s absence was not willful or contumacious. It was, instead, simply negligent because whatever procedures his office had in place to identify and process the court’s orders scheduling proceedings failed. That may make counsel’s absence understandable, but it does not make it “substantially justified.” Neither does it change the reality that the trustee and debtors’ counsel were required to (and did) go to the trouble of properly preparing for and attending

the scheduled hearing. Because of Mr. Day's absence, their efforts were wasted and 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.

Mr. Day shall, therefore, pay the reasonable attorney fees and expenses incurred by both the trustee and debtors' counsel as a result of preparing for and attending the preliminary hearing held in this matter on March 18, 2009. 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."), he shall also pay the clerk of this court the sum of \$250.00.

The amounts due the clerk of this court shall be paid within fourteen (14) days. The trustee and debtors' counsel shall have fourteen (14) days from this date within which time to file and serve affidavits itemizing any recoverable fees and expenses. Mr. Day 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 fees and expenses without further notice or hearing.

SO ORDERED.

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