

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

IN THE MATTER OF:)
)
ELBERT GRIFFITH, JR.) CASE NO. 09-40587
JADRANKA GRIFFITH)
)
Debtors)

DECISION AND ORDER

At Fort Wayne, Indiana, on August 28, 2009.

On August 12, 2009, the court held a pretrial conference with regard to motions for relief from stay filed by Green Tree Servicing LLC, as well as the Chapter 13 trustee’s objections thereto. The debtors appeared for the pretrial conference, through their counsel Jerry Paeth, as did the trustee, David Rosenthal. Green Tree’s counsel, David Demers, was nowhere to be seen. As a result, the court denied the motions, and, on its own initiative, issued an order requiring Mr. Demers to show cause, in writing, why he 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 pretrial conference. Mr. Demers 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). 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 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 indicates that he did not attend the scheduled pretrial (or have another attorney appear on his behalf) because, after unsuccessfully attempting to settle the dispute with the trustee, he decided to withdraw the motion, as the trustee had previously suggested. Yet, he never shared that decision with either the trustee or debtors’ counsel and his attempt to do so came a mere 19 minutes before the scheduled pretrial;¹ so it was simply a unilateral effort on his part. As a result, it was untimely and ineffective. See, Fed. R. Bankr P. Rules 9014(c), 7041; Fed R. Civ P. Rule 41(a); In re Martin,

¹Counsel’s office is in New Albany, Ohio, approximately four hours from the federal building in Lafayette, Indiana. So the decision not to attend the pretrial was obviously made well before the attempt to withdraw the motion.

350 B.R. 812, 814-815 (Bankr. N.D. Ind. 2006).

The court has previously stated its expectations of counsel quite clearly: “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 (emphasis added). See also, Matter of Philbert, 340 B.R. 886, 891 (Bankr. N.D. Ind. 2006) (counsel’s attendance is not optional). Here there was no understanding between the movant and debtors’ counsel or the trustee. Instead, Mr. Demers made a unilateral decision not to attend the scheduled pretrial, treating his participation in that proceeding as though it were optional. His absence was not “substantially justified.”

The trustee and debtors’ counsel were required to (and did) go to the trouble of properly preparing for and attending a pretrial conference that had been scheduled to consider the motions Mr. Demers had filed. Because of his 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. Demers 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 pretrial conference held in this matter on August 12, 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. Demers 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