

# Not Intended for Publication and/or Citation

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

IN RE: CASE NO. 10-40966	)	
	)	
WARREN TAM	)	
	)	
Debtor	)	
	)	
	)	
WARREN TAM	)	
YAODI HU	)	
	)	
Plaintiffs	)	
	)	
vs.	)	PROC. NO. 11-4008
	)	
MARQUETTE BANK	)	
MMBC	)	
PAULINE KEMP	)	
	)	
Defendants	)	

## **DECISION ON JOINT RESPONSE TO ORDER TO SHOW CAUSE**

At Fort Wayne, Indiana, on August 2, 2011.

The plaintiffs in this adversary proceeding are both proceeding pro se. One of them, Warren Tam, is the debtor in the underlying Chapter 11 bankruptcy case which provides the court with a basis for some type of subject matter jurisdiction. See, 28 U.S.C. § 1334(b), (e); § 157. The complaint alleges that Tam is the owner of real estate located in Illinois, which the Defendant MMBC is purchasing on contract and upon which the Defendant Marquette Bank holds a mortgage. As a Chapter 11 debtor in possession, see, 11 U.S.C. § 1107, Tam contends that he is entitled to possession of these properties, that the defendants have failed to turn them over to him and so, pursuant to 11 U.S.C. § 542, he seeks an order that possession be turned over to him. As for the other plaintiff, Yaodi Hu, the complaint says nothing specific about his interest in the matter,

alleging only that he is a party in interest under 11 U.S.C. § 1109. Based upon what has transpired in a similar proceeding filed by both Tam and Hu, Adv No. 10-4035, the court understands that he claims to have a 5% interest in the properties. See also, Joint Response to Order to Show Cause, filed July 8, 2011, ¶ 1.

By an order issued on June 6, the court set this matter for a scheduling conference to be held on June 29, 2011, and directed the parties to file the litigation plan required by Rule 26(f) no later than three days prior to the conference. The Bank appeared for the conference, through its counsel Raymond Ostler, as did MMBC, through its counsel, Edward Chosnek. Neither plaintiff appeared, although Tam called the clerk's office earlier that day to inform the court that he would not be attending. Furthermore, the required plan was not filed. Based upon the plaintiffs' failure to appear for the scheduling conference, the court, on its own motion pursuant to Rule 16(f), issued an order requiring them "to show cause, in writing, . . . why this adversary proceeding should not be dismissed and/or Plaintiffs otherwise sanctioned as the result of their failure to appear for the proceedings." Order dated June 30, 2011. The plaintiffs filed a joint response to the order to show cause and it is that response which brings the matter before the court for a decision.

Although the two plaintiffs filed a joint response to the order to show cause, that response does not address the debtor's absence from the conference; it only address Hu's failure to appear. Yet, neither pro se plaintiff can represent the other, see, Belpasso v. Bender, 2009 WL 2762354 (D. N.J. 2006); something of which Hu is well aware.<sup>1</sup> See, Hu, et al. v. Cantwell, et al., 2008 U.S. Dist.

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<sup>1</sup>Based upon the court's observations in both the main bankruptcy case and a similar adversary proceeding, Tam, et al v. MMBC, et al, Adv. Pro. 10-4035, it is apparent that Hu is controlling the debtor's litigation and that Tam is playing Charlie McCarthy to Hu's Edgar Bergen. The court has repeatedly reminded both of them that Tam must speak for himself and that Hu may not represent him.

LEXIS 77219 n.2 \*4-5 (D. N.D. Ill. 2008). Both plaintiffs had the obligation to attend the conference and both plaintiffs had to explain their respective absences. Hu's explanation for his absence is that he needed to focus his attention on other things; so he decided not to attend. He informed Defendants' counsel of that fact the day before the hearing and indicated they should work out whatever litigation schedule they wanted with the court.<sup>2</sup> The joint response also states that Hu urged Tam to attend the hearing, but it never explains why he did not.

Rule 16(f) of the Federal Rules of Civil Procedure, which Rule 7016 of the Federal Rules of Bankruptcy Procedure applies to adversary proceedings, allows the court to impose sanctions "if a party . . . fails to appear at a scheduling or other pretrial conference." Fed. R. Civ. P. Rule 16(f)(1)(A). The available sanctions include those authorized by Rule 37(b)(2)(A)(ii)-(vii) and run the gamut from mild to severe, including dismissal. Fed. R. Civ. P. Rule 37(b)(2)(A)(v). See also, Link v. Wabash R.R. Co., 370 U.S. 626, 82 S.Ct. 1386 (1962). 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); G. Heileman Brewing Co, Inc. v. Joseph Oat Corp., 871 F.2d 648, 655 (7th Cir. 1989); Matter of Baker, 744 F.2d 1438, 1440 (10th Cir. 1984). See also, In re Philbert, 340 B.R. 886, 890 (Bankr. N.D. Ind. 2006); In re Syzmanski, 344 B.R. 891, 894 (Bankr. N.D. Ind. 2006). In this regard, the court should tailor its response to the nature of the misconduct confronting it. While even a single negligent failure to appear is sanctionable, more severe misconduct may justify more severe sanctions, Pescia v. Auburn Ford-Lincoln Mercury, Inc., 177 F.R.D. 509, 510 (M.D. Ala. 1997)

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<sup>2</sup>It is the plaintiffs' duty, not the defendants', to bring the case to trial. Washington v. Walker, 734 F.2d 1237, 1238 (7th Cir. 1984); Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 378-79 (E.D. Pa. 1962), aff'd 314 F.2d 944 (3rd Cir. 1963).

(“Obviously, the more egregious the conduct the more severe the sanction should be.”), and when a party “displayed willfulness, bad faith or fault” dismissal may be appropriate. In re Thomas Consolidated Industries, Inc., 456 F.3d 719, 724 (7th Cir. 2006). See also, Wilson v. Park Center, Inc., 2010 WL 5818293 (N.D. Ind. 2010) (citing Link v. Wabash R. Co., 370 U.S. 626, 629, 82 S.Ct. 1386, 1388 (1962)) (The “failure to appear . . . absent a bonafide excuse is grounds for dismissal.”).

Neither plaintiff has come forward with an acceptable explanation for their failure to attend the scheduling conference of June 29. Tam has totally failed to explain his absence. As for Hu, his response indicates that he made a conscious decision not to attend.

Given the plaintiffs’ response to the order to show cause, not only are sanctions appropriate but the only appropriate sanction is dismissal. Hu’s absence was nothing less than willful and, since Tam has offered no explanation at all for his absence, he has, in effect failed to respond to the order to show cause. The court understands that both plaintiffs are pro se and are entitled to a degree of deference and more latitude than would be given to an attorney. See, Godlove v. Bamberger, Foreman, Oswald, and Hahn, 903 F.2d 1145, 1148 (7th Cir. 1990); Childs v. Duckworth, 705 F.2d 915, 922 (7th Cir. 1988). But “that does not give the pro se litigant the discretion to choose which of the court’s rules and orders it will follow, and which it will willfully disregard.” Downs v. Westphal, 78 F. 3d 1252, 1257 (7th Cir. 1996). Furthermore, they are not entitled to “one opportunity to disregard the court’s schedule without fear of penalty . . . .” Fischer v. Cingular Wireless, LLC, 446 F.3d 663, 665 (7th Cir. 2006).

The plaintiffs’ failure to attend the court’s scheduling conference in this adversary proceeding

was not due to inexperience<sup>3</sup> or the failure to understand what was expected of them, it was a conscious decision not to participate. By itself such defiance justifies the sanction of dismissal. Downs, 78 F.3d at 1257. Yet, the court is also convinced that no lesser sanction will adequately serve to both penalize the plaintiffs and to deter others from similar conduct. See, National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S.Ct 2778, 2781 (1978). Tam is a debtor under Chapter 11 and Hu is contemplating filing his own bankruptcy. Under these circumstances “monetary sanctions would likely prove ineffective . . . .” Hueston v. Heimlick, 2011 WL 2437437 (D. N.D. Ind. 2011).

This adversary proceeding should be dismissed and an order doing so will be entered.

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

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<sup>3</sup>Hu has been a frequent and apparently frustrating litigant in the Northern District of Illinois; so much so that his filing privileges have been restricted. See, Hu v. Huey, 2008 WL 2797000 (N.D. Ill. 2008); Matter of Yaodi Hu, Civil Action No. 08 C 5194, Executive Committee Order dated Nov. 12, 2008.