NOT INTENDED FOR PUBLICATION OR CITATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:	)	
	)	
JOSEPH J. FERGUSON	)	CASE NO. 09-12870
LEYSA D. FERGUSON	)	
	)	
Debtors	)	

DECISION ON ORDER TO SHOW CAUSE

At Fort Wayne, Indiana, on March 26, 2012

On February 13, 2012, the court held a hearing with regard to a motion for relief from stay filed by JPMorgan Chase Bank and the debtors' objection thereto. In preparation for that hearing, the order scheduling it directed counsel to file briefs addressed to particular issues no later than five days prior to the hearing. The hearing was attended by John Joseph, who appeared on behalf of Randy Eyster, counsel for JPMorgan Chase Bank; Anthony Adolf, who appeared on behalf of debtors' counsel, Jeffrey Schreiber; and the trustee. Despite the directions in the notice of hearing and the specific questions the court wanted answered, debtors' counsel did not file the required brief and local counsel who attended the hearing was not prepared to address them. Instead, the court was advised that Mr. Schreiber wanted to withdraw the objection that he had filed: the objection which prompted the court to schedule the hearing in the first place. See, N.D. Ind. L.B.R. B-2002-2 (identifying matters the court will consider without a hearing unless a party in interest files an objection). Because the debtors were not prepared to proceed, the court, on its own motion, issued an order requiring Mr. Schreiber to show cause, in writing, why he should not be sanctioned under Rule 16(f) of the Federal Rules of Civil Procedure. Mr. Schreiber 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 imposition of sanctions under Rule 16(f) does not depend upon a finding of bad faith, willfulness, or contumaciousness. Baker, 744 F.2d at 1440-41. Instead, the question is whether the failure to comply was "substantially justified" or whether other circumstances would make the imposition of sanctions "unjust." Thus, negligence 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). Ultimately, however, 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); Heileman Brewing, 871 F.2d at 655; Baker, 744 F.2d at 1440. See also, Philbert, 340 B.R. at 890; In re Szymanski, 344 B.R. 891, 894 (Bankr. N.D. Ind. 2006).

Counsel's response to the order to show cause indicates that, at approximately 5:30 in the afternoon on the Friday prior to the Monday hearing, Mr Schreiber left a message with movant's counsel advising him that the objection would be withdrawn and on the next day he attempted to

withdraw it.[1] Based on these actions, Mr Schreiber believed local counsel had been sufficiently prepared for the hearing, because all he would need to do is show up.

This response does not show that counsel's actions were substantially justified or that other circumstances would make sanctions unjust. The response appears to be based upon the proposition that any warm body filling a chair satisfies the requirements of the rule. It does not. Rule 16(f) has two requirements: appear and be prepared to participate. Fed. R. Civ. P. Rule 16(f)(1)(A), (B). See also, Philbert, 340 B.R. at 888. To facilitate this it also requires counsel to obey a scheduling order. Fed R. Civ. P Rule 16(f)(1)(C). Particularly in the circumstances of this case – where the order scheduling the hearing required counsel to file briefs five days prior to the hearing – to appear and be prepared required more than just showing up and saying "objection withdrawn." It required counsel to consider the merits of the matter well prior to the weekend before the hearing and to be prepared to proceed on those merits at the scheduled hearing.

Rule 16(f) is designed to address and deter conduct that does little more than waste the time of both the court and opposing counsel. It identifies three evils – the failure to appear, the failure

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[1]This filing counsel made to attempt the withdrawal bore the caption of a completely different case and thus could be of no effect in this case. See, Fed. R. Civ. P. Rule 10(a) ("Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation."); Fed. R. Bankr P. Rule 9004. Cf., In re Hargrove, 2006 WL 2855079 (Bankr. N.D. Ind. 2006) ("perhaps the single most common error in electronic filing is that the document actually filed with the court is not the document counsel wanted to file. Viewing electronic documents before sending them to the court avoids this problem."); In re Bradley, 342 B.R. 783 (Bankr. N.D. Ind. 2005) (Klingeberger, J.). Even if the notice had the correct caption, once a hearing has been scheduled on a motion, an objection may not be withdrawn unilaterally. See, Fed. R. Civ. P. Rule 41(a)(1); Fed. R. Bankr. P. Rules 9014 and 7041. Furthermore, filing some sort of withdrawal during the weekend prior to a Monday hearing, in an attempt to have a hearing removed, is simply too late. Cf., In re Quintana, 43 B.R. 668 (Bankr. D. Colo. 1984) (failing to promptly notify the court of desire not to pursue a matter, "causes the court unnecessary expense and ties up the court's docket unnecessarily when other matters could have been set and heard").

to be prepared, and the failure to obey a scheduling order – which are among the biggest causes of delay and wasted effort in litigation. The waste caused by the failure to appear and the failure to be prepared are relatively obvious. The waste caused by the failure to obey a scheduling order is no less real but may be less obvious. The purpose of a scheduling order is to ensure that litigation proceeds efficiently and smoothly, and that counsel properly prepare themselves by timely focusing their attention on the matter at hand, rather than putting things off until the last minute. That was the purpose behind the requirement in the notice of hearing that counsel file briefs directed to specific issues no later than five days prior to the hearing. The court was concerned that the parties were fighting over things that were not germane to the issues presented by a motion for relief from stay and, in an effort to expedite the matter (or avoid the hearing altogether), it directed counsel to confront that concern and to file briefs well prior to the hearing. Debtors' counsel did not obey that order. Rather than file the required brief – which was due no later than Wednesday the 8th – he waited until after the close of business on Friday the 10th to leave a message for movant's counsel that the objection would be withdrawn, and then unsuccessfully attempted to act on that desire the next day. Had counsel done what he was supposed to do, when he was supposed to do it, there would have been plenty of time to work with opposing counsel and jointly do something that would have eliminated the need for the scheduled hearing or enabled a single attorney to report their agreement on a particular result, conserving everyone's time and effort. See, In re Martin, 350 B.R. 812, 816 (Bankr. N.D. Ind. 2007); Philbert, 340 B.R at 891. As it was, by failing to follow the court's directive, counsel was reduced to trying to leave untimely messages and making sloppy, unilateral efforts over the weekend.

Debtors' counsel failed to comply with the order of January 23, 2102 and, as a result, was

substantially unprepared to participate in the hearing scheduled for February 13, 2012. Those failures were not "substantially justified" and nothing before the court indicates that sanctions would be "unjust." This does not mean that monetary sanctions are the inevitable result. While compensation may be one goal of any sanctions inquiry, deterrence – preventing a repetition of the objectionable conduct – is even more important. See e.g., Szymanski, 344 B.R. at 899. See also, In re Bernard, 85 B.R. 846, 867 (Bankr. D. Col. 1988)(primary purpose of sanctions is to insure reasonable management requirements for case preparation). Yet another purpose "is to convey a message to attorneys and litigants alike that expeditious management and preparation of cases for trial is not merely desirable , it is imperative." Bernard, 85 B.R. at 867(citing Matter of Sanction of Baker, 744 F.2d at1441). In this instance the court believes these goals can best be achieved through something other than monetary sanctions.

The court does not believe the present difficulties arise out of counsel's desire to ignore the court's expectations. Instead, it seems that counsel may not fully understand what those expectations are. Yet, counsel's lack of understanding has nothing to do with the court's failure to explain its rulings or its procedures. Rather, it may be a function of counsel's practice of rarely appearing himself for proceedings and instead appearing only through local counsel. The court realizes that lawyers, whether because of time, distance, economics or other factors, often prefer not to appear in court and will send someone else to do so in their stead, and it is willing to accommodate this practice. Yet, attorneys who consistently avoid appearing in court should realize that by absenting themselves from proceedings they are missing one of the most productive educational opportunities available. There is probably no better way to learn about a court's expectations and its views than by actually watching it in action. While this may not lead everyone

to agree with the court's position on various issues, it will at least give them the opportunity to learn what those positions are, what the court's expectations might be, and how to fulfill them. Cf., In re Herrin, 325 B.R. 774, 778 (Bankr. N.D. Ind. 2005) (Klingeberger, J.) ("Perhaps other courts aren't as enthralled by Dumas as the author of this opinion is, but when you're here in this court in these circumstances, you have to emulate D'Artagnan and his three companions.").

This case offers an excellent example. At the hearing, the court took time to explain why it felt counsel's actions fell short of the mark, and had he been present to hear that explanation this decision might not have been necessary. Yet, because he sent local counsel, Mr. Schreiber has not had the benefit of hearing what the court had to say, and although it is confident that local counsel reported the results of the hearing to him, he may not have fully conveyed all of the court's remarks. As counsel did not attend the scheduled hearing, the most appropriate way to see that he is fully apprised of the court's concerns and the reasons his actions have been found wanting is to ensure that he receives the court's explanation for himself. Therefore, in lieu of monetary sanctions, Mr. Schreiber shall obtain a transcript of the hearing held in this matter on February 13, 2012, read that transcript in its entirety, and, within sixty (60) days, file an affidavit certifying that he has done so.

An appropriate order will be entered.

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