

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF:	)	
	)	
ESTER MEDINA	)	CASE NO. 12-13741
	)	
	)	
Debtor	)	

**DECISION ON ORDER TO SHOW CAUSE**

At Fort Wayne, Indiana, on January 3, 2013

If you represent a debtor and your client has filed bankruptcy before, it behooves you to review the previous case before filing another. What happened in the prior case may affect your client's ability to file again or the relief it may receive. See e.g., 11 U.S.C. §§ 109(g) (eligibility), 349(a) (court may dismiss with prejudice), 362(c)(3), (4) (automatic stay limited), 727(a)(8), (9) (ability to receive discharge), 1328(f) (same). It could also result in a sanctions inquiry under Rule 11. See, Fed R. Bankr P. Rule 9011.

This is the debtor's second case. Her previous case – 12-12105 – was dismissed by an order issued on October 18, 2012. That order went on to provide: “**debtor(s) shall not be eligible for relief under any chapter of title 11 for 180 days from this date.**” Matter of Medina, Case No. 12-10105, Order dated Oct. 18, 2012 (emphasis original). This case was one month later, on November 20, 2012, at a time when the debtor clearly was not eligible for relief. As a result, the court promptly dismissed it. See, Order dated Nov. 27, 2012. That order also required counsel for the debtor to show cause, in writing, why he should not be sanctioned for filing this case when his client was not eligible for any relief. Counsel filed a timely response to the order to show cause and it is that response which brings the matter before the court.

Rule 9011 is the bankruptcy equivalent of Rule 11 of the Federal Rules of Civil Procedure. Like Rule 11, it imposes an affirmative obligation upon counsel to conduct a reasonable investigation into both the law and the facts before presenting (“whether by signing, filing, submitting or advocating”) a particular position (“a petition, pleading, written motion, or other paper”) to the court. See, Fed. R. Bankr. P. Rule 9011(b); 11 U.S.C. § 707(b)(4)(C),(D). See also, Frantz v. United States Powerlifting Federation, 836 F.2d 1063, 1064 (7th Cir. 1987); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 751 (7th Cir. 1988); McGhee v. Sanilac County, 934 F.2d 89, 93 (6th Cir. 1991); Slater v. Skyhawk Transp., Inc., 187 F.R.D. 211, 220 (D.N.J. 1999); Terminix Int’l Co. v. Kay, 150 F.R.D. 532, 538 (E.D. Pa. 1993). In other words, it imposes a duty on counsel “to stop, think and investigate more carefully before serving and filing papers.” Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398, 110 S.Ct. 2447 (1990). The results of that investigation must lead to the conclusion that the position being taken by counsel is warranted by existing law or by a non-frivolous argument. Whether or not the obligations imposed by Rule 11 have been fulfilled “is an objective determination of whether [counsel’s] conduct was reasonable under the circumstances.” Brown v. Federation of State Medical Boards of the U.S., 830 F.2d 1429, 1435 (7th Cir. 1987). See also, In re Ronco, 838 F.2d 212, 217 (7th Cir. 1988) (“litigation must be grounded in an objectively reasonable view of the facts and the law”). Consequently, the court must “undertake an objective inquiry into whether . . . counsel ‘should have known . . . .’” his client was not eligible for relief. Dist. No. 8 International Assn v Clearing, 807 F.2d 618, 632 (7th Cir. 1986) (quoting Coleman v. CIR, 791 F.2d 68, 71 (7th Cir.1986)).

Counsel’s response to the order to show cause indicates that he did not realize the dismissal of debtor’s prior case was with prejudice. He believed it had been dismissed because she had not

completed the required pre-petition credit counseling, see, 11 U.S.C. § 109(h), and such dismissals are usually without prejudice (although they need not be, see, In re Lyons, 2008 WL 7375851 (Bankr. S.D. Ga. 2008)). Counsel's assumption is only partially correct. A review of those proceedings indicates that, at a hearing held on October 15, 2012, the court considered dismissing the prior case for two reasons. The court raised the issue on its own initiative because it appeared that the debtor had not satisfied the requirements of § 109(h) and, therefore, was not eligible for relief under title 11. See, Medina, Case No. 12-10105, Notice of Hearing dated Sept. 12, 2012. The trustee also sought dismissal because the debtor failed to attend two § 341 meetings. See, Medina, Case No. 12-10105, Motion to Dismiss, filed Sept. 10, 2012, Notice of Hearing, dated Sept 12, 2012. It was that failure which led to the with prejudice component of the dismissal.

Yet, one does not need to comb through the record of the previous case or review a transcript of the hearing to learn what happened or what its impact upon future proceedings may be. A simple reading of the court's order will tell you all you need to know. It is titled "ORDER DISMISSING CASE WITH PREJUDICE" and reads:

IT IS ORDERED that this case is **DISMISSED** and **debtor(s) shall not be eligible for further relief under any chapter of title 11 for 180 days from this date.** Order dated Oct. 18, 2012 (emphasis original).

The court could not have been clearer or have done anything more to make its intentions known. Counsel either did not read or did not pay attention to the court's order and there is no reasonable justification for either explanation. By failing to do so, and filing this case when his client was not eligible for relief, he violated his obligations under Rule 9011 (and §707(b)(4)(C),(D)).<sup>1</sup> See, In re

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<sup>1</sup>The duty to read and comprehend the order from a prior case is the exactly same whether counsel represented the debtor in that case or not, and with ECF counsel can access and review the court's orders in any case without leaving the office. In this situation, the same attorney represented

Smail, 129 B.R. 676 (Bankr. M.D. Fla. 1991). See also, In re Henry, 2006 WL 4667138 (Bankr. D. Md. 2006); In re Smith, 234 B.R. 852, 855-56 (Bankr. M.D. Ga. 1999).

Once the court has found a violation of Rule 11, whether or not it imposes sanctions, together with the nature of any sanction, is a matter committed to its discretion. Fed. R. Bankr. P. Rule 9011(c) (“the court may . . . impose an appropriate sanction”). In fashioning an appropriate sanction, the primary goal should be deterrence; in other words, to avoid a repetition of the misconduct by the sanctioned party and others similarly situated. Fed. R. Bankr. P. Rule 9011(c)(2). See also, White v. General Motors Corp. Inc., 908 F.2d 675, 685 (10th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S.Ct. 788 (1991); In re Rimsat, Ltd., 229 B.R. 914, 921 (Bankr. N.D. Ind. 1998), aff’d, 230 B.R. 362 (D. N.D. Ind. 1999), aff’d, 212 F.3d 1039 (7th Cir. 2000). Monetary sanctions are one way of doing so, but they are not the only way. In some situations, an admonition may suffice, see, Multi-Media Distributing Co., Inc. v. U.S., 836 F. Supp 606, 614 n. 7 (N.D. Ind. 1993) (“The court’s public condemnation serves as its sanction in this case.”); Slater v. Skyhawk Transp., Inc., 187 F.R.D. 211, 220 (D. N.J. 1999), while in others something much more severe will be called for. See, In re Witt, 481 B.R. 468, 479-80 (Bankr. N.D. Ind. 2012) (admonishing one attorney and sanctioning another \$4000). In fashioning an appropriate sanction, the court may consider such things as the nature of the misconduct, whether it was intentional or inadvertent, the degree of culpability, if it represents a pattern of activity in this or other litigation, its effect on the litigation, and, if appropriate, the resources of the individual or party being sanctioned. See, Fed. R. Civ. P. Rule 11, Advisory Committee Notes, 1993 Amendments. Nonetheless, deterrence is the goal.

The court is satisfied that, while this situation calls for some kind of sanction, only a little

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the debtor in both cases and so the failure to do so is particularly troublesome.

more than an admonition should suffice. Counsel's actions were negligent, not willful, he has no history of similar conduct, and there is no evidence of harm to any party, other than the debtor who, based upon counsel's disclosure, paid him \$600 in connection with this case (\$294.00 plus the filing fee of \$306.00), which accomplished nothing for her. See, Disclosure of Compensation, filed Nov. 20, 2012. In addition to the admonition that comes with the finding that Rule 9011 has been violated, refunding any fees and expenses (including the filing fee) counsel received from or on behalf of the debtor for filing of this case is appropriate, see, 11 U.S.C. § 329(b), and should accomplish the rule's deterrent purpose. An appropriate order will be entered.

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