

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
JASON LEE MANWARREN,)	CASE NO. 09-33752 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
WELLS FARGO AUTO FINANCE, INC.,)	
SERVICER FOR WELLS FARGO BANK, N.A.,)	
PLAINTIFF,)	
vs.)	PROC. NO. 09-3129
)	
JASON LEE MANWARREN,)	
)	
DEFENDANT.)	

Appearances:

Karen L. Lobring, Esq., counsel for plaintiff, Lobring & Associates, L.L.P., 5977 West State Road 252, Edinburgh, Indiana 46124; and

Mark P. Telloyan, Esq., counsel for defendant, O'Brien & Telloyan, P.C., Post Office Box 449, South Bend, Indiana 46624-0449.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 24, 2011.

Before the court is the “Motion to Reopen Adversary to Allow Court to Consider Motion Requiring Defendant to Pay Cost of Handwriting Expert and Related Attorney Fees,” filed by Wells Fargo Auto Finance, Inc. (“plaintiff”). The defendant, chapter 7 debtor Jason Lee Manwarren (“defendant”), filed a “Response to Motion to Reopen Adversary.” For the reasons that follow, the court grants the plaintiff’s Motion to Reopen.¹ It also considers and grants the Motion for fees and costs.

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

This court may reopen a case “to administer assets, to accord relief to the debtor, or for other cause.” 11 U.S.C. § 350(b); *see also* Fed. R. Bankr. P. 5010. The plaintiff asks to reopen this adversary proceeding for “cause”: It seeks an award of reasonable attorney’s fees and expert witness fees pursuant to Federal Rule of Civil Procedure 37(c)(2).

“The decision to reopen a bankruptcy case is within the broad discretion of the bankruptcy court.” *Redmond v. Fifth Third Bank*, 624 F.3d 793, 798 (7th Cir. 2010). One factor to consider when making that decision is the length of time that the case has been closed. The defendant argued that the plaintiff’s request was untimely, that it should have been presented while the adversary case was open. The statute provides no time limitations to guide a bankruptcy court when weighing whether to reopen a closed case. *See In re Plumlee*, 236 B.R. 606, 610 (E.D. Va. 1999). The Seventh Circuit agrees with other circuits that “[t]he longer a party waits to file a motion to reopen a closed bankruptcy case, the more compelling the reason to reopen must be.” *Redmond*, 624 F.3d at 799 (citing cases, affirming denial of reopening two years later); *see also In re Bianucci*, 4 F.3d 526, 529 (7th Cir. 1993) (affirming denial of reopening more than two years later). When deciding whether a motion to reopen was timely, “courts may consider the lack of diligence of the party seeking to reopen and the prejudice to the nonmoving party caused by the delay.” *Redmond*, 624 F.3d at 799.

In this case, the adversary proceeding was closed on March 31, 2011; the request for reopening was filed on June 1, 2011, two months later. “The passage of time in itself does not constitute prejudice,” *In re Bianucci*, 4 F.3d at 528, and the defendant did not claim to be prejudiced by the delay. Courts weighing whether to reopen a case generally find that a 2-month delay is not unreasonable. *See, e.g., In re Case*, 937 F.2d 1014, 1018-19 (5th Cir. 1991) (no abuse of discretion in reopening bankruptcy estate after 7 months); *In re Bloxsom*, 389 B.R. 52, 62 (Bankr. W.D. Mich. 2008) (reopening case after 14 months); *In re Winburn*, 196 B.R. 894, 899 (Bankr. N.D. Fla. 1996) (reopening case after 3 1/2 months). The court finds

that, in this case, there is no allegation or evidence of the plaintiff's lack of diligence or of prejudice to the defendant. It determines that this Motion to Reopen is timely presented to the court.

The party asking to reopen the case must present a sufficient "cause" or reason. In this case, the plaintiff sought reopening to hold the defendant responsible for the payment of the attorney's fees of the plaintiff and the costs associated with retaining and using a handwriting expert. According to the plaintiff, the defendant denied that he had signed the Retail Installment Contract and Security Agreement ("Contract") between the parties; as a result, the plaintiff was required to retain a handwriting expert to determine whether the signature on the Contract was the defendant's handwriting. Both the expert and the defendant testified at trial, and the court found that the defendant in fact had signed the Contract.

The plaintiff based its request on Federal Rule of Civil Procedure 37(c)(2), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7037, which provides:

If a party fails to admit what is requested under Rule 36 [Requests for Admission] and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A) the request was held objectionable under Rule 36(a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c)(2). The court must award the reasonable fees and costs incurred by a party in proving the denied admission, unless it finds that one of the four listed explanations (exceptions (A) through (D)) for failure to admit is true. The rule "directs (and does not just permit) a . . . court to award attorneys' fees and other costs to the party put to such proof by refusal to admit." *Hinklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 351 (7th Cir. 2006); *see also Mutual Service, Inc. v. Frit Indus., Inc.*, 358 F.3d 1312, 1326 (11th Cir. 2004). The court finds that such a mandate is sufficient cause to reopen the adversary proceeding. It therefore grants the plaintiff's Motion to Reopen.

The plaintiff also asked the court to consider a motion requiring the defendant pursuant to Rule 37(c)(2) to pay those attorney's fees and expert witness costs. The defendant responded to the second motion, as well. The court finds that the materials submitted by the parties are sufficient to allow the court to make findings on this matter. No evidentiary hearing is needed to determine whether Rule 37 sanctions should be imposed. *See Langly by Langly v. Union Elec. Co.*, 107 F.3d 510, 515 (7th Cir. 1997) (stating that court has discretion to impose sanctions without a hearing); *Frazier v. Layne Christensen Co.*, 486 F.Supp. 2d 831, 846 (W.D. Wis. 2006) (imposing Rule 37(c)(2) sanctions because defendants' missteps in discovery were too numerous to escape sanctions).

Under Rule 37(c)(2), the party seeking the award must prove that (a) the defendant failed to admit what was required in a request for admission, and (b) the document was genuine or the matter was true. In this case, the plaintiff presented evidence at trial that the debtor's signature on the Contract was genuinely his handwriting. The court found, in its Memorandum of Decision, that "[t]he credible evidence demonstrated that the signatures of Jason Manwarren on the documents in question in fact were the signatures of the debtor." R. 33 at 8.

However, the defendant insisted that exception (C) of Rule 37(c)(2) applied to him: He said he had a reasonable ground to believe that he might prevail. The court does not agree that such a belief would be reasonable. During discovery, the defendant had denied signing the Contract. At trial, however, after considering the testimony of the handwriting expert and the defendant, the court concluded that the defendant in fact had signed the Contract. *See id.* at 8-9 ("[T]he expert's careful and thorough presentation was sufficient to convince the court that the signatures were the defendant's and that he had lied when he said he did not sign the documents."). The court further found that "nothing in the defendant's testimony rang true" and that his "story simply did not sound credible or hold together." *Id.* at 9. Consequently, it determined that the defendant's denial of the validity of his signature was deliberate and intentional, willful and malicious, in violation of 11 U.S.C. § 523(a)(6).

It is clear from its Memorandum of Decision that the court, weighing the evidence and credibility of the witnesses, concluded that the defendant lied concerning his signatures. It also found that the defendant never gave the court a plausible, legitimate explanation for claiming that the signature on the Contract was not his. In its view, the evidence was not equivocal. *See Hillside Productions, Inc. v. County of Macomb*, 2009 WL 3059147 at *4 (E.D. Mich. Sept. 24, 2009) (denying fees under Rule 37(c)(2) when the evidence was equivocal). It does not agree, therefore, that the defendant “had a reasonable ground to believe that [he] might prevail” by claiming he did not sign that document. The court finds that the defendant’s refusal to admit the genuineness of his signature on the Contract is not excused under subsection (C) or any of the other exceptions to Rule 37(c)(2).

The court therefore determines that Rule 37(c)(2) mandates the award of attorney’s fees and forensic document expert witness’s fees to the plaintiff. The court, having considered the plaintiff’s Motion for such an award, will not put that party to a further proof of the Rule’s application. It finds that the sanctions award under Rule 37(c)(2) is required and is appropriate.

The plaintiff stated that it incurred \$2,037.50 in attorney’s fees and costs and \$2,980.00 in fees for the expert witness. The defendant objected that the attorney’s fees were unreasonable. “In determining the amount of fees that should be awarded under Rule 37(c)(2), a court looks ‘for a sufficient causal nexus between the expenses claimed and the failure to admit.’” *JD Factors, LLC v. FreightCo, LLC*, 2010 WL 4316881 at *4 (N.D. Ind. Oct. 25, 2010) (citation omitted). A party is entitled only to “those expenses incurred in obtaining and proffering the evidence necessary to prove those facts which they would not have had to prove if the [other party] had admitted the . . . requests for admission.” *Id.* The court will allow the plaintiff to recover the reasonable expenses incurred in proving the matters that the defendant refused to admit. *See Hicklin Engineering, L.C. v. Bartell*, 2005 WL 3805914 at *1 (E.D. Wis. Mar. 31, 2005) (quoting 3 James Wm. Moore et al., *Moore’s Federal Practice* § 13.31 (3d ed. 2004 Supp.)). In light of those guiding

principles, the court directs the plaintiff to submit a detailed application for attorney's fees and expert witness's fees, in compliance with 11 U.S.C. § 330, within 21 days of the date of this Order.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the court grants the "Motion to Reopen Adversary," filed by the plaintiff Wells Fargo Auto Finance, Inc. It also grants the plaintiff's "Motion Requiring Defendant to Pay Cost of Handwriting Expert and Related Attorney Fees" pursuant to Federal Rule of Civil Procedure 37(c)(2).

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT