

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
SCOTT NELSON,) CASE NO. 11-31008 HCD
) CHAPTER 7
)
DEBTOR.)

Appearances:

Ellen L. Triebold, Esq., Office of the United States Trustee, One Michiana Square, Suite 555, 100 East Wayne Street, South Bend, Indiana 46601; and

Scott Nelson, pro se, 415 16th Street, Mishawaka, Indiana 46544.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 4, 2013.

Before the court is the “United States Trustee’s Motion to Determine Violations of Section 110 Against Richard Kuhns, Dennis Miller, and/or Vanguard Properties, LLC and Award Damages to the Debtor” (“Motion”), filed by the United States Trustee Nancy Gargula (“U.S. Trustee”), in the reopened bankruptcy case of Scott Nelson (“Mr. Nelson” or “debtor”). This Motion was heard together with the U.S. Trustee’s “Complaint to Determine Violations of 11 U.S.C. § 110 And/Or Abuse of the Bankruptcy Process, Impose Fines and Sanctions, and Obtain Injunctive Relief,” commencing an adversary proceeding in the bankruptcy case of Ernest Bowyer, Jr. (Case No. 11-31568, Adversary Proceeding No. 11-3043), and the U.S. Trustee’s “Motion to Determine Violations of Section 110 Against Richard Kuhns, Dennis Miller, and/or Vanguard Properties, LLC and Award Damages to the Debtor” in the bankruptcy case of Tery W Moore (Case No. 11-32896). A joint hearing was held for the purpose of consolidating the evidentiary presentation, arguments, and briefing of the parties. Companion decisions in each of the three cases have been rendered and judgments have been entered for the U.S. Trustee in each case on this date. The central opinion, issued in the adversary proceeding of Ernest Bowyer, Jr., *see* R. 80, presents a detailed record of

the conduct of Richard Kuhns, Dennis Miller, and Vanguard Properties LLC toward five debtors and holds that Richard Kuhns, Dennis Miller, and Vanguard Properties LLC jointly and severally violated 11 U.S.C. § 110. The companion decisions rendered in the Moore and Nelson cases reflect the § 110 violations committed by Richard Kuhns, Dennis Miller, and Vanguard Properties LLC on those two individual debtors.

For the reasons set forth below, the court grants the U.S. Trustee's Motion and approves the requests for damages and fines. However, it denies the U.S. Trustee's Request that Mr. Nelson's bankruptcy case be expunged.¹

BACKGROUND

Richard Kuhns, Dennis Miller, and Vanguard Properties LLC are non-attorney bankruptcy petition preparers ("BPPs") who prepared or assisted in the preparation of the bankruptcy petitions of this debtor, Scott Nelson, and of at least four other debtors: Ernest Bowyer, Jr. (Case No. 11-31568), Tery W Moore (Case No. 11-32896), Jason Brown (Case No. 11-31589), and Kyle Brendon Pestow (Case No. 11-31590). Because the facts underlying each case were similar and the violations and requested relief related to the same course of conduct by the BPPs acting together, the court held the evidentiary hearing and considered the cases together, reviewing the BPPs' conduct toward each debtor.

Richard Kuhns, Dennis Miller, and Vanguard Properties LLC participated throughout the adversary proceeding and evidentiary hearing.² At the conclusion of the evidentiary hearing, counsel for the U.S. Trustee summarized the requests for damages, fines, sanctions, and injunctive relief in the adversary

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)(A).

² The motions, affidavits, and responses of the BPPs are described in the court's Memorandum of Decision of this date issued in the adversary proceeding of Ernest Bowyer, Jr. (Adv. Proc, No. 11-3043), hyperlinked above. In addition, the failure of the BPPs to respond to the U.S. Trustee's motions is documented therein and need not be reiterated.

proceeding of Mr. Bowyer and for damages and fines in the bankruptcy cases of Mr. Nelson and Mr. Moore. Dennis Miller and Richard Kuhns made closing statements, as well; they asserted that counsel for the U.S. Trustee used “false grammar” and failed to communicate with syntactical or grammatical propriety. However, in none of the proceedings did Richard Kuhns, Dennis Miller, or Vanguard Properties LLC contest the allegations of the U.S. Trustee. There was no challenge to the U.S. Trustee’s Motions or Complaint. The court entered defaults and judgments by default against the three BPPs in the Bowyer case, without response from the three BPPs. No objections were raised to the testimony and evidence presented at the evidentiary hearing. Based on those unchallenged facts, therefore, the court made the following findings of fact concerning the BPPs’ conduct and relationship with Mr. Nelson.

Mr. Nelson testified at the hearing that in February 2012, when he was living in Noblesville, Indiana, he filed a bankruptcy case in the Southern District of Indiana, with the help of an attorney named Penny Carey. That attorney told him that his credit report reflected a bankruptcy case that had been filed in his name in the Northern District of Indiana on March 24, 2011. *See* Pl. Exs. 9, 10, 16.³ However, it listed a social security number that was not his. Mr. Nelson said that he was unaware of that case and was shocked and surprised to learn of it.

He explained that he had owned a home on East 16th Street in Mishawaka, Indiana, in March 2011, that he was renting it, and that its mortgage was in foreclosure then. In a phone call, Richard Kuhns and Dennis Miller told Mr. Nelson that they would purchase the real estate from him and would continue to rent it to the current tenant. Mr. Nelson, who was living in Indianapolis at the time, met Richard Kuhns at a coffee shop in Nappanee and signed the paperwork that Richard Kuhns presented to him. Mr. Nelson drove from Indianapolis for that meeting, incurring expenses of \$80. Richard Kuhns and Dennis Miller told him that they would take care of everything once Mr. Nelson signed over a power of attorney to Richard Kuhns. *See* Pl. Ex. 11. He signed the document, based on their promises to help him, but he did not prepare

³ The court’s reference to “Pl. Ex. _” designates exhibits proffered by the U.S. Trustee at the evidentiary hearing and admitted in evidence without objection.

it. That document purported to give Richard Kuhns his power of attorney “for the purpose of closing, insurance, mortgage payments, taxes or any other matter not herein specified” pertaining to the Mishawaka property. That power of attorney was dated March 30, 2011, six days after his bankruptcy case had been filed. He believed that the power of attorney gave the BPPs the authority to obtain the right paperwork, to purchase his house, and to rent it to the current tenant. He did not believe that it gave them the authority to file a bankruptcy case in his name. According to Mr. Nelson, the only time the topic of bankruptcy was discussed was when Mr. Nelson told the BPPs that he probably would file a bankruptcy case in the future.

The bankruptcy documents filed in this court, in the Northern District of Indiana, were signed “Scott Nelson/Richard Kuhns POA.” Pl. Exs. 9, 10. The plaintiff determined, from the court’s PACER record, that the petition filed for Mr. Nelson listed the same social security number as the one listed in Richard Kuhns’ bankruptcy case, which was filed March 27, 2012.⁴ See Pl. Ex. 33. Mr. Nelson testified that he did not sign the documents filed in the Northern District of Indiana. He pointed out that the BPPs’ names, addresses, and social security numbers, and Vanguard Properties LLC’s ITIN number were not disclosed as petition preparers. It was clear, as well, that the documents were incomplete and inadequate. See Pl. Exs. 9, 10, 23.

Mr. Nelson also met with Dennis Miller in the spring of 2011 at the St. Joseph County courthouse to sign more papers to stop the sheriff’s sale on his property. Mr. Nelson again drove from Indianapolis, incurring expenses of \$80 for the trip, to file a quit claim deed and two notices of Lis Pendens in the courthouse. He understood that the documents deeded the property to Richard Kuhns, Dennis Miller, and Vanguard Properties LLC. See Pl. Exs. 12, 13, 14. However, the BPPs did not give him copies of the documents filed, and they never told him that they had filed a bankruptcy case in his name. In the end, Mr. Nelson’s bankruptcy case was dismissed on May 4, 2011, for failure to pay the filing fee. On July 21, 2011,

⁴ PACER is an acronym which stands for Public Access to Court Electronic Records. It is a public database provided by the United States Judiciary. It “is designed to make official case and docket information from the federal courts available to the public electronically.” *In re Sterling Rubber Prods. Co.*, 316 B.R. 485, 493 n. 3 (Bankr. S.D. Ohio 2004).

the real estate was sold at a sheriff's sale. *See* Pl. Ex. 15. However, the bankruptcy case was reopened by the court on June 7, 2012, upon the U.S. Trustee's Motion to Reopen. In that Motion the U.S. Trustee stated that the BPPs Richard Kuhns, Dennis Miller, and Vanguard Properties LLC had received monies from the debtor, had caused bankruptcy documents to be filed in this case, and had violated § 110. The court reopened the case to accord relief to the debtor under § 350(b).

Mr. Nelson traveled from Indianapolis to attend the hearing, at an expense of \$70. He testified that, when he looked for a job, having two bankruptcy cases on his record was difficult to explain. He also said that he did not want to file one bankruptcy case, but he was further harmed by having a record of two cases. The court found Mr. Nelson extremely credible. The BPPs asked him no questions and did not challenge any of his testimony or exhibits.

The Senior Bankruptcy Analyst in the office of the U.S. Trustee, Dianne Froehlke, testified at the hearing as an expert witness. She reviewed the bankruptcy petitions of each debtor for completeness and accuracy. Ms. Froehlke reviewed the documents of Scott Nelson and determined that there were 14 inaccuracies. For example, the petition failed to state, on the top of the first page, that it was filed in the "Northern" District of Indiana. *See* Pl. Ex. 9. The required "name of debtor" and "telephone number" of the debtor, if not represented by an attorney, were left blank on page 3. The required "Signature of Non-Attorney Bankruptcy Petition Preparer" and all other information concerning the preparer were left blank throughout the bankruptcy documents. In addition, Ms. Froehlke pointed out contradictory information in the documents. For example, on Exhibit D the debtor stated that he received a credit counseling briefing within 180 days; however, on his Certification Concerning Debt Counseling he declared that he did not have time to take the course because the sheriff's sale was scheduled that day. Schedule B reflected that Mr. Nelson's only "personal property" was a car and that he had no wearing apparel, but Schedule J stated that the debtor spent \$120 per month on clothing.

Ms. Froehlke also pointed out that several documents, including Schedules F and the Statement of Intention, are incomplete. She noted that Schedule G and the Statement of Intention indicated that the debtor's mortgages were leases. It was noteworthy, as well, that the BPP neither signed the Declaration concerning Debtor's Schedules nor provided his social security number. Although Mr. Nelson testified that he received rent from his Mishawaka house, the Statement of Financial Affairs indicated that the debtor had no income from employment, from operation of business, or from other source, during the two years prior to filing bankruptcy. As a last example, the Statement of Financial Affairs marked "NONE" for payments made to debt counselors or petition preparers. However, Mr. Nelson testified that he transferred his real estate to the BPPs for their services. It was clear from Ms. Froehlke's testimony that Mr. Nelson's bankruptcy documents were incomplete, inaccurate, and deceptive or fraudulent.

DISCUSSION

The U.S. Trustee requests a finding that Richard Kuhns, Dennis Miller, and Vanguard Properties LLC are "bankruptcy petition preparers" under 11 U.S.C. § 110(a) who violated § 110 and committed acts that are fraudulent, unfair, or deceptive against this debtor. The court examined the documents, listened to the testimony of the witnesses, and weighed the arguments of the parties concerning whether the BPPs repeatedly violated § 110 and engaged in fraudulent, unfair, or deceptive conduct in each case. In the central opinion, the court reviewed the subsections of § 110, "Penalty for persons who negligently or fraudulently prepare bankruptcy petitions," set forth the legal analyses of each subsection, and concluded that the BPPs Richard Kuhns, Dennis Miller, and Vanguard Properties LLC violated § 110(b)(1), (b)(2), (c), (d), (e)(1), and (e)(2) in their actions with regard to some or all of the debtors.⁵

In this bankruptcy case of Scott Nelson, the court has found that Richard Kuhns, Dennis Miller, and Vanguard Properties LLC, jointly and severally acting as bankruptcy petition preparers, had failed to

⁵ The central opinion in this matter was issued in the bankruptcy case of Ernest Bowyer, Case Number 11-31568, Adversary Proceeding Number 11-3043, R. 80.

comply with subsections (b)(1), (b)(2), (c), (d) and (e)(1) of § 110. The BPPs failed to sign and print their names and addresses on the documents, in violation of § 110(b)(1). They failed to provide to the debtor and to file written notice before preparing any document for filing or accepting any fees, in violation of § 110(b)(2). They failed to provide their social security numbers or other identifying number on documents for filing, in violation of § 110(c). They failed to provide Mr. Nelson with a copy of each document to be filed in his bankruptcy case, in violation of § 110(d). Finally, the BPPs prepared and executed all the documents on behalf of Mr. Nelson without obtaining his signature or consent to the filings, in violation of § 110(e)(1). Their use of “POA” after their names did not give the BPPs the power to act as the debtor’s agents in executing their bankruptcy documents. *See In re Steward*, 312 B.R. 172, 178 (Bankr. N.D. Ill. 2004). The court determines that the BPPs Richard Kuhns, Dennis Miller, and Vanguard Properties LLC are bankruptcy petition preparers under § 110(a) who violated § 110(b)(1), (b)(2), (c), (d), and (e)(1).

Under § 110(l)(1), BPPs who fail to comply with § 110(b), (c), (d), or (e) may be fined up to \$500 for each such failure. Even though the BPPs had violated those subsections, the U.S. Trustee (quite generously) did not request those fines in this case, and the court in its discretion will not impose them. However, she did request that damages be paid to the debtor Mr. Nelson. Under § 110(i)(1), BPPs who violate § 110 or commit any act that the court finds to be fraudulent, unfair, or deceptive are required to pay the debtor actual damages, either \$2,000.00 or twice the amount paid by the debtor to the BPPs for their services (whichever is greater), and reasonable attorneys’ fees and costs. The court finds that the BPPs violated § 110 in Mr. Nelson’s case and committed fraudulent, unfair, or deceptive acts. It concludes that the BPPs are jointly and severally liable to the debtor for actual damages of \$230.00. *See* § 110(i)(1)(A). They also are jointly and severally liable to the debtor for statutory damages in the amount of \$2,000.00. *See* § 110(i)(1)(B). In addition, because the U.S. Trustee moved for damages on behalf of the debtor, the court is required to order the BPPs to pay to the U.S. Trustee the additional amount of \$1,000.00 plus reasonable attorneys’ fees and costs incurred, if any. *See* § 110(i)(2).

However, the U.S. Trustee's final request, that the court strike Mr. Nelson's case from the record, is denied. The court finds that its equitable powers under § 105 of the Bankruptcy Code are limited; the court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a); see *In re Fesco Plastics Corp., Inc.*, 996 F.2d 152, 154 (7th Cir. 1993) (stating that under § 105 "a court may exercise its equitable power only as a means to fulfill some specific code provision"). The U.S. Trustee has not provided the court with a code provision which would be fulfilled by the court's use of its equitable powers; nor has she cited authorities in support of her position. Although the court has reopened Mr. Nelson's bankruptcy case to accord relief to him, it must act within the confines of the Bankruptcy Code. Accordingly, the court denies the U.S. Trustee's request that Mr. Nelson's bankruptcy case be expunged pursuant to § 105.

Nevertheless, the court finds that alternative relief is available. *Cf. In re Dick*, 2006 WL 6544157 at *5 (Bankr. N.D. Tex. May 19, 2006) (finding, in bankruptcy filing involving identity theft, that "expunging the Case at this point may make it *more* difficult for the Purported Debtor to convince the credit reporting agencies and prospective creditors that the filing was unauthorized," suggesting alternative relief). The uncontested facts revealed, and the court found, that Mr. Nelson was unaware of the filing of this bankruptcy case in the Northern District of Indiana and did not authorize the BPPs to file it. The court therefore directs the Clerk of the Court to create a "flag" which states "**This filing not authorized by debtor**" and to associate that flag with this case in such a manner that the information is viewable publicly and prominently whenever the case information is electronically accessed. *See id.*

CONCLUSION

Accordingly, for the reasons presented in this Memorandum of Decision, the court concludes that Richard Kuhns, Dennis Miller, and Vanguard Properties LLC are bankruptcy petition preparers under 11 U.S.C. § 110(a) who violated § 110(b)(1), § 110(b)(2), § 110(c), § 110(d), and § 110(e)(1) of the

Bankruptcy Code, and who committed fraudulent, unfair, or deceptive acts warranting damages under § 110(i). It further holds that Richard Kuhns, Dennis Miller, and Vanguard Properties LLC are jointly and severally liable to the debtor Scott Nelson in the amount of actual damages of \$230.00 under § 110(i)(1)(A) and statutory damages of \$2,000.00 under § 110(i)(1)(B). The court awards the U.S. Trustee \$1,000.00 and reasonable attorneys' fees and costs, if any, under § 110(i)(2), as well.

Richard Kuhns, Dennis Miller, and Vanguard LLC are ordered to make full payment of these damages and fines by certified check or money order, and to provide proof of those payments to the U.S. Trustee and to this Bankruptcy Court, within thirty (30) days of the date of this Memorandum of Decision and Judgment.

The court denies the U.S. Trustee's request that Mr. Nelson's bankruptcy case be expunged pursuant to 11 U.S.C. § 105.

SO ORDERED.

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