

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
MECHEL MINTON) CASE NO. 05-18767
GLEN ALLEN MINTON, JR.)
)
Debtors)

DECISION AND ORDER

At Fort Wayne, Indiana, on February 13, 2006.

In this chapter 13 case, the chapter 13 trustee and counsel for the debtors have filed three separate joint motions to commence adequate protection payments without notice. These motions state little more than that the debtors and the trustee would like the trustee to initiate payments to particular creditors prior to confirmation. The only suggested reason for doing so is to avoid possible late fees. The motions do not indicate why the creditors are to be favored, whether they have liens upon any property of the estate, what that property may be, how the proposed payment amount has been calculated or what it might represent. Is it a full payment of the debt, accruing interest on the debt, an amortization of the principal and interest over a particular period of time, depreciation on account of the decline in the value of the creditor's (unidentified) collateral, or something else? Similarly, the motions contain no suggestion as to what the recipients are supposed to do with this money or what kind of effect it should have on their claims. Are those claims supposed to remain unchanged or are the payments to somehow reduce the amount otherwise due? The joint motions also fail to give any reason why they are of such urgency that the court should completely dispense with the fifteen (15) days notice which its local rules otherwise require. N.D.

Ind. L.B.R. B-2002-2(b)(1)(A).

In reality, each of these motions make two separate requests of the court. First, the court is asked to approve an agreement between the debtor and the trustee concerning adequate protection. Then, it is also asked to approve that agreement without the notice required by either the Federal Rules of Bankruptcy Procedure or the local rules of this court. See, Fed. R. Bankr. P. Rule 4001(d); N.D. Ind. L.B.R. B-2002-2(a)(1). As such, the motions fail to comply with the requirements of local bankruptcy rule B-9013-1 which states that every motion or other request for an order from the court “shall be filed separately.” N.D. Ind. L.B.R. B-9013-1(a).

Movants frequently fail to observe the requirement of filing things separately in this type of situation, where they have asked the court to do something on less notice than contemplated by the local rules of this court – whether by shortening it or dispensing with it all together. Where the court is willing to shorten or dispense with notice, few, if any, problems are created by the oversight. Where, however, the court is not inclined to do so, things can become a bit confusing. For example, if the court issues an order denying the motion just what does such an order mean? Does it mean that only the request to dispense with notice has been denied, but that the court would be willing to consider the motion if the notice as otherwise contemplated by its local rules is given or does it mean that the court views the underlying request as being so deficient that it would refuse to approve it even if creditors had been given notice of it? The ambiguity inherent in such an order is just one reason for the requirement of the local rules. But, there is also some ambiguity from the court’s perspective concerning the relief sought in these situations. Should the court view the motion as requested relief only if it can be had without notice, so that if notice is required there is no need to proceed or the issue might somehow be moot? Or should the motion be viewed as a request which

asks the court to act without notice, but if it is not inclined to do so give the parties instruction as to what to do next? The recipient of such a motion must also be a little bit confused. How is it to respond if it does not share the movant's view concerning either the merits of the request or the need for notice of it? Furthermore, if the court would decide that it was not willing to dispense with notice to creditors, what is the recipient likely to think when it receives notice of an opportunity to object to a motion seeking to do something without notice?

The rules of procedure usually have an underlying purpose and are designed to facilitate the expeditious resolution of disputes, through clear and efficient procedures. Matters generally proceed much more smoothly if litigants will follow those procedures, rather than trying to take shortcuts which avoid them. See, In re Taylor, 289 B.R. 379, 388-89 (Bankr. N.D. Ind. 2003). Local bankruptcy rule B-9013-1 is no different.

At the present time there is only one situation in which the court is willing to approve an agreement for adequate protection without any notice whatsoever. That involves an agreement concerning the regular monthly mortgage payments due a creditor holding a security interest in a chapter 13 debtor's principal residence, when the proposed plan contemplates that those payments will be made through the trustee rather than by the debtors. Section 1322 prohibits the debtor from modifying the rights of such a creditor and limits the plan to providing for the cure of any default while maintaining regular payments. 11 U.S.C. § 1322(b)(2), (5). Since, absent agreement of the parties, the creditor's rights cannot be changed, the court sees no real need to give creditors the opportunity to object to something which the Bankruptcy Code requires. The rights of any other creditor, however, including creditors holding liens upon other types of collateral can be modified. Thus, if the court is to authorize payments to such a creditor prior to confirmation of a proposed

plan, it only seems appropriate for creditors to be given notice of what is to be done, together with an explanation of why, prior to acting. See, Fed. R. Bankr. P. Rule 4001(d); In re Kmart, 359 F.3d 866 (7th Cir. 2004).

The rules concerning notice to creditors are not the only procedural rules governing contested matters such as that now before the court. Rule 9013 of the Federal Rules of Bankruptcy Procedure addresses the substance of motions initiating such a matter. Unlike adversary proceedings and traditional civil litigation where notice pleading is the rule, motions initiating contested matters must state both the relief sought and the reasons for doing so “with particularity.” Fed. R. Bankr. P. Rule 9013. This is the same standard of detail that the rules of civil procedure demand when one is pleading fraud and the like. Fed. R. Civ. P. Rule 9(b). Thus, rather than a short plain statement showing that the pleader is entitled to relief, which will be sufficient unless there is no set of facts consistent with the allegations under which it could succeed, see, Fed. R. Civ. P. Rule 8(a); 12(b)(6), to properly plead with particularity requires much more information. See, Bankers Trust Co. v. Old Republic Insurance Co., 959 F.2d 677, 682 (7th Cir. 1992). The reader should not be left with any serious questions concerning either what is to be done or why doing it is appropriate.

The joint motions before the court are not adequate when measured by the requirements of Rule 9013. Not only do they fail to allege facts which would support dispensing with notice to creditors, they also fail to allege facts suggesting why the favored creditors are entitled to the payments movants propose to make, or how those payments have been determined. Debtors’ counsel and the trustee may think that making those payments constitutes a good thing, but, if that were all that was required, there would be no need to seek the court’s permission; the Bankruptcy Code and the Rules of Procedure would authorize it to be done just because the trustee and debtors’

counsel wish it. Instead, a motion is required which must allege specific facts that, if true, would lead the court and others to the conclusion that granting the relief sought is the proper thing to do.

For all of these reasons, the joint motions to commence adequate protection payments without notice are DENIED without prejudice to resubmission.

SO ORDERED.

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