

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
MOSSBERG INDUSTRIES, INC.) CASE NO. 03-12993
)
)
Debtor)

DECISION ON ORDER TO SHOW CAUSE

At Fort Wayne, Indiana, on April 19, 2006

On March 8, 2006, the court held a hearing with regard to the issues raised by debtor's application for final decree and the objections thereto filed by the unsecured creditors committee. The debtor appeared for the hearing, through its counsel Daniel Skekloff, as did the United States Trustee, through its counsel Ellen Triebold. Objector's counsel, Alan Mills, was nowhere to be seen. Instead, at 4:00 p.m., on March 6, 2006, he filed a notice of withdrawal of the objection. Although the court granted the debtor's application, it specifically retained jurisdiction for the purpose of considering whether sanctions should be imposed upon objector's counsel, who was ordered to show cause why he should not be required to pay the reasonable attorney fees incurred by both the debtor and the United States Trustee, or otherwise sanctioned, as a result of his failure to appear for the scheduled hearing. Mr. Mills 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.

Rule 16(f) of the Federal Rules of Civil Procedure allows the court to impose sanctions upon an attorney who fails to appear for a pre-trial or other conference or who is substantially unprepared to participate in such a conference. The rule is an expression of the court's inherent authority, G. Heileman Brewing Co. Inc. v. Joseph Oat Corp., 871 F.2d 648, 651-53 (7th Cir. 1989); Matter of

Baker, 744 F.2d 1438, 1441 (10th Cir. 1984), and articulates two of the court’s most fundamental expectations of the attorneys who appear before it – show up and be prepared. By its terms, however, the rule applies only to pre-trial and other preliminary conferences in adversary proceedings. Fed. R. Bankr. P. Rule 7016. It does not specifically apply to contested matters, see, Fed. R. Bankr. P. Rule 9014(c), or to trials. Does this mean that counsel can, with impunity, fail to appear for trials or hearings scheduled in contested matters or that the court is powerless if counsel appears and yet is not prepared? Hardly.

Rule 16 was not designed to restrict the court’s authority and the “absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition.” Heileman Brewing, 871 F.2d at 652. See also, Baker, 744 F.2d at 1441 (no reason for applying sanctions differently to other pretrial matters). The vices the rule was designed to combat – wasted effort, unnecessary expense, and delay – are just as real and the goals it seeks to promote – efficient and expeditious management of cases – are just as important in contested matters as they are in adversary proceedings. Furthermore, even though they may be called “hearings,” proceedings in many contested matters are more analogous to pre-trial or scheduling conferences in civil litigation than they are to anything else, because the court’s purpose is to explore the nature of the dispute and, if it cannot be resolved at that time, establish a schedule for its resolution. This similarity in purpose justifies a similarity in the court’s expectations of the participants and in the consequences of a failure to fulfill them. Accordingly, the court holds that it may, whether through Rule 16(f) or its inherent authority, impose sanctions upon an attorney who fails to appear for proceedings scheduled in contested matters because of something they have filed or who appears, but is substantially unprepared to participate in those

proceedings. In re Philbert, ___ B.R. ___, 2006 WL 99534 (Bankr. N.D. Ind.). This conclusion is appropriate not only because of the purpose and spirit of the rule but also because the court is exercising its “power . . . ‘in a manner that is in harmony with the Federal Rules of Civil Procedure.’” Heileman Brewing, 871 F.2d at 652 (quoting Landau & Cleary Ltd. v. Hribar Trucking, Inc. 867 F.2d 996, 1002 (7th Cir. 1989)).

The failure to appear is one type of conduct specifically identified by Rule 16(f) as the basis for sanctions. At least to the extent that the opposing party should be compensated for the reasonable costs and expenses incurred because of counsel’s non-compliance, the rule is almost, but not quite, mandatory. Unless noncompliance was “substantially justified” or other circumstances would make an award “unjust” the nondefaulting party is entitled to reimbursement. As a result, the imposition of sanctions under the rule does not depend upon a finding of bad faith, willfulness, or contumaciousness. Baker, 744 F.2d at 1440-41. A negligent failure to comply 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.

Counsel’s response to the order to show cause indicates that, during the first week of February 2006, he realized the issues raised by the committee’s objection to the debtor’s application for a final decree no longer presented a live controversy and he gave instructions to a junior associate to promptly see that the objection was withdrawn and the hearing removed from the court’s calendar. The associate failed to do so. So it was that, on Monday, March 6, 2006, Mr. Mills learned that the

objection had not been withdrawn and that the hearing remained on the court's calendar. Accordingly, he instructed his associates to see that the objection was immediately withdrawn, to make certain that the hearing was no longer on the court's calendar, and, if that could not be done, attend. These instructions apparently prompted the filing late on the afternoon of March 6. Yet, for reasons which counsel acknowledges he cannot explain, no one bothered to alert the court, opposing counsel or the U.S. Trustee to that filing, tried to confirm whether the withdrawal had been successful and the hearing cancelled or, obviously, attend the hearing.

This response does not show that counsel's failure to appear for the scheduled hearing was substantially justified or demonstrate that other circumstances would make an award unjust. The court acknowledges that Mr. Mills' absence was not willful or contumacious. It was, instead, simply negligent because he assumed, incorrectly it turned out, that the firm's associates would carry out his instructions. While that may explain counsel's absence and help to make it somewhat understandable, that is not enough. It must have been substantially justified.

While the court is heartened by the fact that Mr. Mills understood his professional obligations to both the court and to opposing counsel and tried to fulfill them, it is discouraging to see that the younger members of his firm did not have a similar appreciation for the requirements of professional etiquette. Yet, whether those associates understood what courtesy, if nothing else, required, does not change the ultimate fact that, because of his office's negligence, debtor's counsel and the U.S. Trustee were required to and did go to the trouble of preparing for and attending the scheduled hearing. Those efforts were largely unnecessary and the court sees nothing unjust about requiring an attorney who has caused its opposition to unnecessarily devote time and trouble to a matter to reimburse them for the reasonable value of their labors. In the court's opinion such a result is

necessary, not only as a matter of economic and procedural fairness, but also in order to impress upon litigants the importance of appearing for and being prepared for proceedings scheduled with regard to the things they file.

The court's expectations of the attorneys who appear before it are simple: show up and be prepared. They are not unusual and nothing about them seems to be unreasonable. Yet, all too often they are disappointed. Whether it arises out of a lack of care, a lack of interest, or just a lack of manners, the unexpected failure of attorneys to appear for proceedings that are scheduled because of something they have filed is far too common. Many members of the bar seem to operate on the proposition that, even though they are the moving force which prompts the court to schedule something on its calendar, appearing for those proceedings is optional. There are many adjectives that can be applied to such an attitude; none of them complimentary. In the past the court has tried to convey its expectations, without having to resort to sanctions, by simply grumbling, with lectures and admonitions from the bench, and by requiring attorneys to show cause why they should not be required to retain local counsel, but without success. The problem persists and shows no signs of diminishing. Sterner measures appear to be needed.

Therefore, Mr. Mills¹ shall reimburse the debtor and the U.S. Trustee for the reasonable attorney fees and expenses they incurred as a result preparing for and attending the hearing scheduled in this matter for March 8, 2006. In order to compensate the United States for the costs he has unnecessarily imposed upon it and the additional time and attention he has required the court to devote to this matter, thereby depriving other litigants of its attention, and to deter similar conduct,

¹Mr. Mills acknowledges that he is the one who is ultimately responsible to the court and to opposing counsel for the present situation, recognizing, quite rightly, that while authority can be delegated, responsibility cannot.

he shall also pay the clerk of this court the sum of \$150.00.

An appropriate order will be entered.

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