

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:)
)
JACK L. SHIRAR) CASE NO. 04-40519
)
Debtor)

DECISION ON ORDER TO SHOW CAUSE

At Fort Wayne, Indiana, on April 19, 2006.

On March 15, 2006, the court held a hearing with regard to the issues raised by debtor's motion for post-confirmation modification and the response thereto filed on behalf of Union Planters Bank. The debtor appeared for this hearing through its counsel, James Hodson, as did the chapter 13 trustee, David Rosenthal. The Bank's counsel, John Graub, was nowhere to be seen. The court overruled the objection and, on its own motion, issued an order requiring Mr. Graub to show cause why he should not be required to pay the reasonable attorney fees incurred by the trustee and the debtor, or otherwise sanctioned, because of his failure to appear for the scheduled hearing. Mr. Graub filed a timely response to the order to show cause and it is that response that 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 Int’l., 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 states that his filing was not intended to be an objection to the debtor’s motion for post-confirmation modification, but was, instead, simply to inform the court and other interested parties that his client planned to continue foreclosure proceedings. Accordingly, counsel did not attend the hearing because he did not consider the response to be an objection and, therefore, was under the impression that his attendance would not be required.

This response is not only inadequate, it is inexplicable. It certainly does not show that counsel’s failure to appear was substantially justified or demonstrate that other circumstances would

make an award unjust. To begin with, the court finds it difficult to understand counsel's semantic distinction between a response and an objection to the debtor's motion. If counsel did not oppose that motion, if he did not care whether the court granted it or not, why do anything at all? Why counsel would spend the time and take the trouble to prepare and file something that he now suggests was little more than an interesting bit of trivia, which the court was not expected to consider or act upon, is something the court cannot understand. If that was all counsel wanted to do, he could have called his submission a notice, rather than titling it "Response to Debtor's Motion for Post-Confirmation Modification." More significantly, the court issued a notice of hearing, indicating that it took counsel's response seriously, and scheduled a hearing at which it said it would consider the "motion for post-modification of plan filed by debtor on February 7, 2006, and response filed by Union Planters Bank, NA on February 8, 2006." Notice of Hearing dated March 2, 2006 (emphasis added). How, after reading a notice which specifically schedules a hearing to consider a filing counsel has made, an attorney can come to the conclusion that his attendance is optional is something that the court cannot fathom. Furthermore, taking counsel at his word – that he never expected the court to schedule anything with regard to his response – once he learned that the court was taking that response more seriously than he intended, why he did not do something to try to dispel the confusion that he had created is a mystery. Rather than attempt to withdraw the response, ask the court to cancel the hearing, or make some kind of filing that would clarify counsel's position and intentions with regard to the debtor's motion, Mr. Graub did nothing. He was apparently quite content to let the court, the trustee, and the debtor all proceed upon the assumption that there was something to talk about.

Because of counsel's actions, debtor's counsel and the trustee were required to and did go

to the trouble of preparing for and attending the scheduled hearing. Yet, those efforts were completely 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 appropriate, 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. Too many members of the bar 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. Graub shall reimburse the debtor and the trustee for the reasonable attorney fees and expenses they incurred as a result of preparing for and attending the hearing scheduled in this matter for March 15, 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, Mr. Graub shall also pay the clerk of this court the sum of \$200.00. An appropriate order will be entered.

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