

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
DONALD EUGENE ELDER) CASE NO. 05-13345
VIRGINIA ILENE ELDER)
)
Debtors)

DECISION ON ORDER TO SHOW CAUSE

At Fort Wayne, Indiana, on May 12, 2006

On April 24, 2006, the court held a pretrial conference in this chapter 13 case with regard to issues raised by a motion for relief from stay filed on behalf of DaimlerChrysler Services North America. The debtors appeared for this conference, through their counsel, Patricia Lang, as did counsel for the trustee, Thomas Panowicz. Movant's counsel, Dennis Ostrowski, was nowhere to be seen. As a result, the court denied the motion for relief from stay and, on its own motion, issued an order requiring Mr. Ostrowski to show cause in writing why he should not be required to pay the reasonable attorney fees incurred by the debtors and the trustee as the result of the scheduled pretrial conference. The order was issued pursuant to Rule 16(f) of the Federal Rules of Civil Procedure which authorizes the court to impose sanctions, including the payment of attorney fees, upon an attorney who fails to appear for a pretrial conference or who is substantially unprepared to participate in such a conference. See, Fed. R. Bankr. P. Rule 7016; N.D. Ind. L.B.R. B-7016(1)(b). See also, In re Philbert, __ B.R. __, 2006 WL 995394 (Bankr. N.D. Ind. 2006). Mr. Ostrowski filed a timely response to the court's order to show cause and it is that response which brings the matter before the court for a decision.

Counsel indicates that he intended to have local counsel attend the pre-trial, although no other

attorney has filed an appearance on DaimlerChrysler's behalf, whether as local counsel or otherwise. Apparently, by the time he got around to making those arrangements, he learned that the attorney he planned on using had a family emergency and was not available. As a result, less than an hour before the scheduled pre-trial he filed a withdrawal of the motion. Counsel's office then contacted the court and was advised that the attempted withdrawal was not sufficient to remove the pre-trial and it remained on the calendar. See, Fed. R. Bankr. P. Rule 7041(a); Order of April 28, 2006. Once he realized that his participation in this court was expected, counsel planned on participating by phone, but at the appointed time found himself in a 341 meeting that ran longer than he had anticipated and so he did not call the court. Following that meeting counsel had telephone conversations with two other individuals and by the time he got around to calling the court for the pre-trial conference, it was too late.

The failure to attend a pretrial conference is one of the types of misconduct specifically identified by Rule 16(f) as providing the basis for sanctions. At least to the extent that the opposing party should be compensated for the additional costs and expenses incurred because of counsel's non-compliance, the rule is almost, but not quite, mandatory. Unless non-compliance was "substantially justified" or other circumstances would make an award "unjust," the non-defaulting 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. Matter of Sanction of Baker, 744 F.2d 1438, 1440-41 (10th Cir. 1984). 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).

Counsel's response to the court's order to show cause fails to indicate that his failure to

appear for the scheduled pretrial conference was substantially justified or to demonstrate that other circumstances would make an award unjust. The court is willing to accept that Mr. Ostrowski's absence might not rise to the level of being willful or contumacious, although it could come to that conclusion because counsel made a conscious decision to do something other than participate in the pre-trial conference. At the very least, that absence was negligent because counsel failed to plan ahead and make appropriate arrangements to attend the conference or have someone do so on his behalf and has spread himself too thin. As for the problems created by local counsel, although the court is willing to accept family emergencies as substantial justification for the failure to appear, there is no indication that local counsel had previously agreed to appear (on when that counsel was first contacted) and then was suddenly and unexpectedly unable to fulfill that commitment, leaving Mr. Ostrowski in the lurch at the last minute. Quite to the contrary, there is every indication from counsel's carefully worded response and the affidavits that accompany it that Mr. Ostrowski waited until the last minute to ask local counsel to attend and upon doing so learned that he was not available. This greatly diminishes the sympathy the court would feel for an attorney who finds himself unexpectedly delayed by proceedings elsewhere. As for that delay, there is nothing in the response that indicates Mr. Ostrowski attempted to request a brief recess of the 341 meeting – whether to allow him to conduct his business with this court or to tell us he that had been detained and ask if we would wait for him – or did so and was refused: that might be a substantial justification. In this court's experience, such courtesies are common. Rather, it seems counsel simply put his obligations to this court, debtor's counsel and the trustee, at the bottom of his list of things to do and by the time he got around to them it was too late. All of this may explain counsel's absence, but it does not make it substantially justified. Neither does it change the reality that the

trustee and debtor's counsel were required to (and did) go to the trouble of properly preparing for and attending the scheduled pre-trial conference. Because of Mr. Ostrowski's absence, their efforts were largely wasted 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. In re Philbert, ___ B.R. ___, 2006 WL 995394 (Bankr. N.D. Ind. 2006).

Dennis Ostrowski shall, therefore, pay the reasonable attorney fees and expenses incurred by both the trustee and the debtor as a result of their preparing for and attending the pre-trial conference held in this matter on April 24, 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, 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