

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

IN THE MATTER OF:)
)
JOHN W. MARTIN) CASE NO. 05-41771
LYNN M. MARTIN)
)
Debtors)

DECISION ON ORDER TO SHOW CAUSE

At Fort Wayne, Indiana, on July 17, 2006.

On June 7, 2006, the court held a hearing with regard to the issues raised by the trustee's application to sell personal property and the objection thereto filed by Bill Bingham. The debtors appeared for the hearing, through their counsel David Rosenthal, as did the trustee, Kimberly Gilbert. Objector's counsel, Brian Belding, was nowhere to be seen. As a result, the court overruled the objection and granted the trustee's motion, and, on its own motion, issued an order requiring Mr. Belding to show cause in writing why he should not be required to pay the reasonable attorney fees incurred by the trustee¹ as the result of the scheduled hearing. Mr. Belding 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.

Counsel's response to the order to show cause indicates that he failed to attend the scheduled hearing because he was under the impression, from a discussion with counsel for Kentland Bank, that the hearing had been removed from the court's calendar and counsel believed the hearing had

¹Although debtors appeared for the scheduled hearing through their counsel, their participation in the proceedings was not anticipated since they had not objected to the trustee's motion.

been vacated due to the order of May 17 based upon counsel's failure to file an appearance.² Counsel further indicates that he learned that his client no longer wished to pursue the objection. Thus, counsel believed that appearing was not necessary.

A court's most fundamental expectations of the attorneys who appear before it are to show up and be prepared. Thus, an attorney who fails to appear for proceedings scheduled because of something they have filed, or who appears but is substantially unprepared to participate in those proceedings, may be sanctioned either through the court's inherent authority or through Rule 16(f) of the Federal Rules of Civil Procedure. See, G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 651-53 (7th Cir. 1989); Matter of Sanction of Baker, 744 F.2d 1438 (10th Cir. 1984); Matter of Philbert, 340 B.R. 886 (Bankr. N.D. Ind 2006). In bankruptcy cases this is true for both adversary proceedings and contested matters. Philbert, 340 B.R. at 889.

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 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

²The order of May 17, 2006 threatened to strike the objection to the trustee's notice of sale, and stated that the court would take no action with regard thereto, unless counsel filed a written appearance within fourteen days of that date. Counsel timely complied and filed his appearance on May 23. Two days later, on May 25, 2006, the court issued a notice stating that it would hold a hearing on June 7 to consider the trustee's motion to sell and the objection thereto. Counsel does not explain how the order of May 17, 2006 might operate to vacate a hearing that was not scheduled until more than a week later.

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 does not show that his failure to appear for the scheduled hearing was substantially justified or demonstrate that other circumstances would make an award unjust. He made a conscious decision not to attend because he was told, by an attorney for a third party, that the hearing had been removed from the court's calendar and his client had apparently lost interest in the litigation. While that may explain counsel's absence, that is not enough. It must have been substantially justified.

Had counsel been told by his opposition, the attorney for the trustee who filed the motion he had objected to, that the hearing had been removed from the court's calendar, counsel's absence would have been justifiable. But here, that information came from a stranger to the litigation, an attorney for one of the debtor's creditors, and counsel apparently did nothing to try to verify what he had been told. He did not contact his opposition and he did not check the court's docket or its calendar to see what, if anything, might have happened to the hearing. If he had done so, he would have discovered that the hearing remained on the court's calendar. That his client may have lost interest in the litigation also does not justify counsel's absence; that would reflect the decidedly inappropriate attitude that attendance at hearings scheduled because of something counsel filed was optional. See, In re Szymanski, __ B.R. __, 2006 WL 1744291 *2 (Bankr. N.D. Ind. 2006); In re Hein, 341 B.R. 903, 904 fn.1 (Bankr. N.D. Ind. 2006); In re Philbert, 340 B.R. 886, 889-90 (Bankr. N.D. Ind. 2006). If the objection could not be properly withdrawn sufficiently before the hearing to let all concerned know what was going on, counsel should attend and ask to withdraw it in open court.

The trustee was 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. In re Philbert, 340 B.R. 886 (Bankr. N.D. Ind. 2006).

Therefore, Mr. Belding shall reimburse the trustee for the reasonable attorney fees and expenses she incurred as a result preparing for and attending the hearing scheduled in this matter for June 7, 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