THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	Case No. 93-51406
	)	
DONALD EVAN NEUMANN	)	Chapter 7
Debtor	)	
	)	
	)	
ANTONIA M. NEUMANN	)	
Plaintiff	)	Adversary No. 94-5011
	)	
and	)	
	)	
MULE-HIDE PRODUCTS CO., INC.	)	**JUDGE MARILYN SHEA-STONUM**
Intervening Plaintiff	)	
	)	
v.	)	
	)	**ORDER**
DONALD EVAN NEUMANN [f.d.b.a. NEUMANN BUILDING PRODUCTS]	)	**RE: ASSESSMENT OF COSTS AGAINST DEBTOR; DENIAL OF PLAINTIFFS' MOTION FOR**
Defendant	)	**ATTORNEY FEES**

A. INTRODUCTION AND BACKGROUND

This matter came before the Court on plaintiffs' submission of a bill of costs (docket #64) and a joint motion for attorney fees. (Docket #63). Both pleadings were filed with this Court on May 4, 1995, and addressed the fees and costs required to prosecute plaintiffs' case against defendant-debtor to

determine dischargeability pursuant to 11 U.S.C. §727(a), and in the case of plaintiff, Antonia Neumann, §523(a)(2)(A), (a)(5), and (a)(6), and to determine whether defendant-debtor converted certain items of her property. The corresponding certificates of service indicate that a copy of the bill of costs was mailed to defendant-debtor at his home address on May 4, 1995, and that a copy of the joint motion for attorney fees was mailed to defendant-debtor's attorney at his business address on May 4, 1995. Despite such service, no response to either of these pleadings has been filed.

On March 10, 1995, a trial was held. Prior to the beginning of that trial, defendant-debtor informed the Court that he would waive his discharge pursuant to 11 U.S.C. §727(a)(10). A formal waiver was accepted by this Court and filed on March 15, 1995. (Docket #61). Following the waiver of discharge, plaintiff, Antonia Neumann, sought to proceed with her claims determination action for conversion. At the conclusion of the trial, the Court took the matter under advisement and issued a Memorandum Opinion on May 15, 1995. (Docket #66). In that opinion, the Court found for plaintiff, Antonia Neumann, and awarded her damages based upon defendant-debtor's conversion of her property.

In the bill of costs, plaintiffs request that the clerk of the Bankruptcy Court tax $5,769.44 as costs incident to the trial against defendant-debtor. Although no detailed justification of these costs was submitted with the bill, the following breakdown was provided:

Fees for the clerk.....	$ -0-
Fees for service of Summons and and Complaint ($120.00 x 2).....	$ 240.00
Fees of the court reporter for any and all part of the transcripts necessarily obtained for use in the case.....	$2,621.05

Fees and disbursement for printing..... $ -0-
Fees for witnesses..... $ -0-
Fees for exemplifications and copies of papers necessarily obtained for use in this case..... $ 982.72
Costs incident to taking of depositions.. $ 363.17
Other costs:
Costs for services of David Van Cleave Lincicome..... $1,562.50

TOTAL..... $5,769.44

In the joint motion, plaintiffs' request that this Court, pursuant to its inherent authority and Bankruptcy Rule 9011, assess attorney fees in the amount of $17,303.50 (for services rendered to plaintiff, Mule-Hide Products Co.) and $14,070.00 (for services rendered to plaintiff, Antonia Neumann), jointly against defendant-debtor, Donald Neumann, and debtor's estate. However, other than generally stating that these fees were incurred to attend pre-trial conferences, prepare a trial brief, draft proposed findings of fact and conclusions of law, and organize trial exhibits, the motion provides no other details for how and when these fees were incurred.

B. DISCUSSION

According to the "American Rule," each litigant is responsible for payment of his own attorney fees. See Alyeska Pipeline and Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). An exception to this rule can be made, however, pursuant to a Bankruptcy Court's inherent power to award counsel fees to a successful party when the opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Generes v. Morrell (In re Generes), 165 B.R. 1011, 1020 (N.D. Ill. 1994), citing Hall v. Cole, 412 U.S. 1, 5 (1973).

Another exception to the "American Rule" can be made pursuant to Bankruptcy Rule 9011.

(1) BANKRUPTCY RULE 9011 ("Rule 9011")

Rule 9011 of the Federal Rules of Bankruptcy Procedure provides in pertinent part that:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation...If a document is signed in violation of this rule, the court on motion or on its own initiative shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney's fee.

The kinds of debtor misconduct that justify denial of discharge under 11 U.S.C. §727 may sometimes also establish the basis for sanctions pursuant to Rule 9011. Railroad Ctr. V. Thompson (In re Thompson), 165 B.R. 30, 32 (Bankr. M.D. Tenn. 1994). Should that basis be established, the Court has an affirmative duty to impose some type of sanction. INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 401 (6th Cir. 1987), cert. denied, 484 U.S. 927 (1987). What that sanction will be, however, is left to the broad discretion of the Bankruptcy Court. Thompson, 165 B.R. at 32.

(A) Was There a Violation of Rule 9011?

It is uncontroverted that both before and after defendant-debtor filed for bankruptcy, he transferred monies to and from his personal accounts, to and

from the accounts of his current wife, and failed to report these transactions on his bankruptcy Petition or Schedules. (See Joint Stip. of Fact para. 21 - Docket #53). It is also uncontroverted that defendant-debtor, although engaged in a business relationship with a corporation called Thermal Laminar, failed to disclose that relationship on his bankruptcy Petition or Schedules. (See Joint Stip. of Fact para. 31 - Docket #53). Further, it is uncontroverted that prior to filing for bankruptcy, defendant-debtor worked for North Coast Roofing, a relationship that he failed to disclose on his bankruptcy Petition or Schedules. (See Joint Stip. of Fact para. 37 - Docket #53).

Given defendant-debtor's level of intelligence, his business acumen, and his own admissions it is apparent that he signed his Petition and Schedules with the knowledge that the information provided was not true and accurate and complete. Within the bankruptcy process, these documents serve as the basis upon which the Court, the trustee, and the creditors rely to assess the debtor's financial situation. Therefore, it is imperative that all relevant information be included on the original documents, or that there be a prompt amendment of such documents if previously unknown information comes to light. Any willful violation of the requirement that debtor disclose all relevant financial information on his Petition and Schedules, acts to subvert the bankruptcy process. Therefore, because in this instance defendant-debtor signed these documents in violation of Rule 9011, some sanction is appropriate.

(B) What are the Appropriate Sanctions?

The proper measure of a Rule 9011 sanction is not necessarily the actual fees or expenses incurred by the petitioning parties, but rather, an amount that is

reasonable. Railroad Ctr. v. Thompson (In re Thompson), 165 B.R. 30, 33 (Bankr. M.D. Tenn 1994). The Court must consider whether the fees and expenses incurred are proportional to the violation committed, the deterrent effect of the sanction, and the sanctioned party's ability to pay. Id. See also Orlett v. Cincinnati Microwave, Inc., 954 F.2d 414, 420 (6th Cir. 1992); Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229-30 (6th Cir. 1989); INVST Fin. Group, Inc. v. Chem-Nuclear Sys. Inc., 815 F.2d 391, 404 (6th Cir. 1987).

In the case at bar, plaintiffs alleged that defendant-debtor violated 11 U.S.C. §727 when he (1) transferred property of the estate with the intent to hinder, delay, or defraud his creditors; (2) failed to list assets on his schedules and his statement of affairs; (3) concealed, destroyed, mutilated, falsified, or failed to keep or preserve recorded information from which his financial condition could be ascertained; and (4) made false oaths with respect to his schedules and statement of affairs. (See Plaintiffs' Joint Mot. For Atty. Fees p.3). However, defendant-debtor's waiver of discharge prior to trial precluded the introduction of any direct evidence regarding these allegations. Further, although the plaintiffs acted to shed a light upon the fact that defendant-debtor may have concealed some assets, none of those assets were recovered and brought into the bankruptcy estate.

In Gerzof v. Miller (In re Miller), 14 B.R. 443 (Bankr. E.D. N.Y. 1981), the Court determined that a creditor who expended his own funds in seeking out assets which the debtor allegedly concealed was not entitled to attorney fees following debtor's waiver of discharge on the eve of trial, as such waiver was

insufficient in and of itself to establish the bad faith that would justify such an award. Unlike the case at bar, however, the creditor's investigation in the Miller case uncovered several thousand dollars of unscheduled assets which were brought into the bankruptcy estate. Id. at 444. In denying the award of attorney fees the Miller Court stated that "although the [debtor] may have been guilty of "bad faith" in the sense that he apparently concealed assets...such conduct is not, in and of itself, sufficiently oppressive to justify the imposition of counsel fees as costs in addition to the statutory penalty of a denial of discharge." Id. at 448.

Creditors who successfully pursue an objection to a debtor's discharge are not entitled to recover all of the attorney fees expended in that pursuit when those fees were incurred in matters not directly related to any violations of Rule 9011. See Railroad Ctr. v. Thompson (In re Thompson), 165 B.R. 30 (Bankr. M.D. Tenn. 1994). In the case at bar, plaintiff, Antonia Neumann, was seeking to preserve her own claim against her ex-husband for conversion of former marital property that was to be distributed pursuant to a Divorce Decree. Plaintiff, Mule-Hide Products Co., was seeking to preserve its right to pursue defendant-debtor to collect a $1,000,000.00 default judgment that would have otherwise been dischargeable in this chapter 7 proceeding. Therefore, although both creditors expended time and money developing evidence that would preclude defendant-debtor's discharge, that time and money was generally unrelated to defendant-debtor's violation of Rule 9011.

From a review of the bill of costs, motion for attorney fees, the exhibits submitted for trial, and the entire course of this litigation, the appropriate

sanction for defendant-debtor's violation of Rule 9011 is the recovery of the costs ($5,769.44) associated with the prosecution of this matter. Given the standard of living which the defendant-debtor is still somehow able to enjoy, despite his financial troubles, this amount shall be paid personally by the defendant-debtor, and is not to be assessed against the debtor's chapter 7 estate. This sanction, coupled with the overall denial of defendant-debtor's discharge, is meant to act as a deterrence, which is the primary goal of Rule 9011 sanctions. See In re Carruth, 161 B.R. 170, 172 (W.D. La. 1993) (stating that "[a]lthough the bankruptcy court is granted considerable latitude in determining the "appropriate" sanction to impose upon a violator of Rule 9011, the court must take care to impose the "least severe" sanction necessary to promote the purposes of Rule 9011.").

(2) THE COURT'S INHERENT AUTHORITY

The power of a court to assess attorney's fees, like the court's other inherent powers, is based upon the need to control court proceedings and to protect the exercise of judicial authority in connection with those proceedings. Generes v. Morrell (In re Generes), 165 B.R. 1011, 1020 (N.D. Ill. 1994), citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). This authority, however, should not be invoked to sanction a party if such a sanction could be issued pursuant to an established rule or statute. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991). As the sanctioning in this case has been accomplished pursuant to Rule 9011, this Court need not need not rely upon its inherent authority.

(C) CONCLUSION

Based upon the foregoing, the Court hereby finds that defendant-debtor's

failure to disclose required information on his Petition and Schedules constituted sanctionable conduct. Given the facts of this case, that sanction will be in the amount of $5,769.44, the total bill of costs for the prosecution of this case. That sanction is to be paid by the defendant-debtor personally, and is not to be assessed against the debtor's chapter 7 estate. This Order is issued without prejudice to the plaintiffs, should either one seek to recover attorney fees in any other relevant judicial forum.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 9/27/95