

IT IS SO ORDERED.

Dated: 04:45 PM March 22 2007



**UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION**

IN RE:)	CASE NO. 06-50567
)	
MARNITA L. MASSENGALE,)	CHAPTER 13
)	
DEBTOR(S))	JUDGE MARILYN SHEA-STONUM
)	
)	<u>ORDER GRANTING TRUSTEE'S</u>
)	<u>MOTION FOR DISGORGEMENT</u>
)	<u>OF ATTORNEY FEES AND</u>
)	<u>SUSPENSION OF ECF</u>
)	<u>PRIVILEGES</u>

This matter came on for hearing on December 7, 2006 pursuant to Chapter 13 Trustee, Jerome L. Holub's, Motion For Disgorgement of Attorney Fees and Other Sanctions ("Motion") (docket #28) upon Attorney Peter F. Fletcher, counsel for Debtor, Marnita Massengale ("Debtor"). Appearing at the hearing ("Hearing") were Keith Rucinski, Attorney for the Chapter 13 Trustee (the "Trustee"), and Attorney Fletcher. After counsel presented their respective arguments, the Court took the matter under advisement for purposes of

reviewing Debtor's deposition testimony and making a determination as to the necessity of an evidentiary hearing prior to ruling on Trustee's Motion.

I. BACKGROUND

Debtor's Chapter 13 bankruptcy case was originally filed on April 16, 2006. The Trustee contends in his Motion that Attorney Fletcher filed an amended plan ("Plan") containing Debtor's electronic signature on August 9, 2006 (docket #22) without conferring with Debtor or obtaining her approval. The primary factual basis for Trustee's contention is an e-mail received by the Trustee from Debtor on August 15, 2006 (Motion, Exhibit A) in which Debtor asserted that she had not seen the Plan until after it was filed, even though her typed signature was affixed to the Plan. Trustee also supports his allegations with portions of the deposition testimony (Motion, Exhibit C) taken at the Chapter 13 office on August 30, 2006. Though originally scheduled as a 341 meeting, it was essentially a 2004 exam in scope, and involved both Debtor and Attorney Fletcher.

The Trustee maintains that Attorney Fletcher's actions were misleading to the Court and other parties in interest who rely on the documents filed with the Court, and asks the Court to levy the following sanctions: (a) In the event that the Plan is confirmed, Attorney Fletcher's fees be reduced by \$750, or 50% of the requested fees as set forth in the Disclosure of Compensation;¹ (b) Should the Plan be dismissed prior to confirmation, a reduction in attorney fees to zero; (c) That Attorney Fletcher be prohibited from filing new Chapter 13

¹ **The Disclosure of Compensation Statement of Attorney Fletcher filed with Debtor's original petition indicates that he has agreed to accept \$1500 for his legal services in connection with Debtor's bankruptcy case, but that he had received no compensation prior to the filing.**

plans until such time as he has receives additional training on ECF protocols. Debtor's Plan was confirmed on October 30, 2006, thus the request set forth in (b) above will not be considered. Trustee cites Fed. R. Bankr. P. 9011, 11 U.S.C. § 105, and this Court's Administrative Order No. 04-01 ("AO 04-01")² as legal authority in support of his Motion.

II. DISCUSSION

This Court recognizes that generally, bankruptcy debtors are not well-versed in bankruptcy law, and therefore rely wholly on counsel to advise them as to their rights and responsibilities under applicable law and relevant court rules. As a guideline for determining whether counsel in a Chapter 13 bankruptcy case has performed a full range of services in exchange for the requested fee, this Court considers the factors outlined in AO 04-01, ¶4 (A)-(O), which include, *inter alia*, "[p]reparation of *** the Chapter 13 plan, and application of procedures to assist the debtor(s) in understanding the nature of information that is to be provided and the good faith of the debtor(s) in assembling the information." AO 04-01, ¶4(C). In sum, it is counsel's duty to make sure the client understands and agrees with the information contained in the documents filed with the Court.

Fed. R. Bankr. P. 9011 imposes obligations on both attorneys and debtors to sign certain documents, and specifically prohibits attorneys from electronically signing a debtor's name to the documents filed in a bankruptcy case without verification of the facts and personal authorization from the debtor.³ Federal Rule of Bankruptcy Procedure 1008

² **This Administrative Order governs the compensation of attorneys in Chapter 13 cases filed on and after April 10, 2004.**

³ **Federal Rule of Bankruptcy Procedure 9011, which governs the signing of pleadings and papers, provides, in pertinent part, that:**

requires that these documents be verified by the debtor and states that “[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.” Fed. R. Bankr.P. 1008.

By filing a document electronically, counsel represents to the Court that he or she has secured an originally executed document physically signed by the debtor prior to filing the document electronically. *See Administrative Procedures for Filing, Signing, Retaining and Verification of Pleadings and Papers in the Maintaining, Verifying, and Serving Pleadings and Papers in the ECF System* (“Administrative Procedures Manual”), II (B)(2)(a) (Bankr. N.D. Ohio December 1, 2005). The purpose of debtor’s signature is not merely to affirm that

(a) Signing of papers

Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney * shall be signed by at least one attorney of record in the attorney's individual name *****

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, * (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or *** are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.**

Fed R. Bankr.P. 9011(a)-(b).

the information contained in the plan or other documents is correct, but to indicate debtor's consent to the filing. *Administrative Procedures Manual, Attachment F (Declaration Re: Electronic Filing of Documents and Statement of Social Security Number)*.

The filing of a document with what amounts to a forged debtor's signature is a violation of Fed. Bankr. R. Proc. 9011. *See In re Wenk*, 296 B.R. 719, 725 (Bankr. E.D. Va. 2002) (Attorney's conduct in presenting to the court an electronic petition which stated on its face that debtor had signed it, under penalty of perjury, when in fact she had not, amounted to fraud; filing a petition electronically purporting to have debtor's signature was no different than attorney physically forging debtor's signature and handing the petition over the counter to the clerk.); *See also In re Phillips*, 433 F. 3d 1068 (8th Cir. 2006)(The bankruptcy court properly sanctioned debtor's attorney pursuant to Rule 9011 for failing to obtain debtor's authorization before filing Chapter 13 petition).

Upon finding a violation of Fed. R. Bankr. P. 9011, a court may impose sanctions. Fed. R. Bankr. P. 9011(c)(2) gives the Court wide latitude in imposing sanctions that may include monetary and non-monetary penalties. This Court also possesses power to impose sanctions on counsel by virtue of its inherent authority and pursuant to 11 U.S.C. § 105(a). *Mapother & Mapother, PSC v. Cooper (In re Downs)*, 103 F. 2d 472, 477 (6th Cir. 1996); *In re French Bourekas, Inc.* 175 B.R. 517, 525 (Bankr. S.D. N.Y. 1994). Furthermore, AO-04-01, ¶ 10 provides that "[t]he Court retains the authority to reduce and/or order disgorgement of fees for cause, after notice and a hearing." A court must be careful when considering whether to impose sanctions, and must exercise such power with restraint and discretion. *Chambers v. NASCO, Inc.* 501 U.S. 32, 44 (1991). The sanction levied must be

commensurate with the conduct at issue. *See In re Downs*, 103 F. 3d at 478.

III. CONCLUSION

After reviewing the representations of counsel during the Hearing, Trustee's Motion, and the attendant exhibits, this Court sees no need to conduct an evidentiary hearing prior to ruling on Trustee's Motion. This Court finds that Attorney Fletcher did meet and confer with Debtor prior to filing the Plan. However, he did not obtain her approval or signature prior to filing the Plan, yet affixed her typed signature nonetheless. In essence, the Plan was filed electronically at Attorney Fletcher's direction with the indication that Debtor's signature had been obtained when, in fact, it had not.

Undoubtedly, Attorney Fletcher faced a difficult situation when he was unable to contact Debtor in an effort to procure her signature. However, for the reasons noted above, under no circumstances should counsel purport to sign on behalf of his client without obtaining her written approval. Attorney Fletcher had good cause to request an extension of time, but apparently declined to do so. Accordingly, this Court concludes that Attorney Fletcher's conduct violated Fed. R. Bankr. P. 9011 and is sanctionable under the powers granted this Court.

This Court turns now to Trustee's request for the imposition of sanctions, and hereby grants Trustee's request to reduce Attorney Fletcher's fee by \$750. Furthermore, commencing ten (10) working days after the issuance of this Order, Attorney Fletcher is barred from filing new bankruptcy cases until he and his staff receive additional ECF training. Finally, this Court directs the Trustee to inform the Court henceforth of counsel whose actions constitute a violation of Fed. R. Bankr. P. 9011 9(a)-(b) in the nature of the events in the case at bar so that it may appropriately address those issues by way of a show cause

hearing.

Based on the foregoing, the Trustee's Motion is **GRANTED**.

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cc: Keith Rucinski
Peter F. Fletcher