

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
2013 10 21 10:52
CLERK OF COURT
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Case No. 01-12289
)
DONALD BUCHANAN and) Chapter 7
CAROL BUCHANAN,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

On motion of Geauga County Newspaper Acquisition, LLC (the “Buyer”) and after a hearing, the Court issued an Order and Notice of Hearing for the Debtors Donald Buchanan and Carol Buchanan to show cause why they should not be held in civil contempt for violating Orders issued December 14, 2001 and January 9, 2002 relating to the sale of estate property to the Buyer. (Docket 67). The Court held an evidentiary hearing on April 11, 2002.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

CONTEMPT

Under recently amended Bankruptcy Rule 9020, contempt proceedings are governed by Bankruptcy Rule 9014. Contempt sanctions “may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.” *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994). In addressing a contempt request, a court must consider three issues: (1) did the respondent receive appropriate notice of the alleged contempt; (2) did the acts or failures to act constitute contempt of court; and (3) if so, what is the appropriate

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

consequence. The movant has the burden of proving by clear and convincing evidence that the respondent violated a specific and definite order that required the respondent to act or refrain from acting, with knowledge of that order. *In re Walker*, 257 B.R. 493, 497 (Bankr. N.D. Ohio 2001) (citing *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996)).

“The primary purpose of a civil contempt order is to ‘compel obedience to a court order and compensate for injuries caused by non-compliance’.” *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000) (quoting *TWM Manuf. Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983)). “Compensatory contempt orders compensate the party harmed by the other party’s contemptuous actions; coercive orders seek to cajole the party in contempt to act in the manner desired by the court.” *Consolidated Rail Corp. v. Yashinsky*, 170 F.3d 591, 595 (6th Cir. 1999).

In re Walker, 257 B.R. at 497 (footnote omitted).

The respondent may defend by showing an inability to comply with the order. *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998). This must be established “categorically and in detail.” *Rolex Watch U.S.A., Inc.*, 74 F.3d at 720 (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983)).

Id.

The Debtors do not contest that they received notice of the contempt allegations and a reasonable opportunity to prepare their defense. The only issues are whether their acts and failures to act were contemptuous and, if so, what the remedy should be.

FACTS

The December 14, 2001 Order

Prepetition, the Debtors Donald Buchanan and Carol Buchanan owned and operated a weekly newspaper called the Geauga County Maple Leaf. They continued to operate the paper after they filed their Chapter 7 petition, at first without the knowledge of the Chapter 7 Trustee and then with her knowledge but without her consent. The Chapter 7 Trustee moved to sell

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

certain estate assets to the Buyer. In her Amended Notice to Sell Assets, the Trustee identified the property to be sold as:

. . . the following intangible assets of the Geauga County Maple Leaf which are property of the bankruptcy estate. This includes, without limitation:

- Name, “Gauga [County] Maple Leaf”;
- Subscriber list, including names, addresses, subscription expiration dates;
- Newspaper vendor list, including names, addresses, quantity received terms;
- Advertising list, including advertising contracts, including names, addresses, contacts, terms;
- Legal notice rate sheet;
- Display/classified rate sheet(s);
- USPS [United States Postal Service] Permit No. 011-535;
- Name registration; and
- The rights to the telephone and fax numbers.

(Docket 37). The Debtors contested the Trustee’s right to enter into this transaction and the dispute went to trial on December 5, 2001. The Debtors showed a great deal of hostility and resentment during that hearing. A few days after the hearing, but before the Court ruled, the Debtors attempted to transfer the valuable postal permit from the name “Gauga County Maple Leaf” (a trade name registered to the Chapter 7 Trustee) into the name “The Leaf”, which the Debtors had registered as a trade name. The Postmaster refused to make the transfer. On December 14, 2001, the Court entered an Order treating the Trustee’s notice to sell as a motion and granting it. (Docket 50). *In re Buchanan*, 270 B.R. 689 (Bankr. N.D. Ohio 2001).

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

Events Following the December 14, 2001 Order

The Debtors filed a timely appeal on December 26, 2001. (Docket 51). Although the Debtors did not obtain a stay pending appeal, the Debtors and Jeffrey Karlovec, a principal of the Buyer, all believed that the filing of the appeal “put the transfer on hold.” The Debtors continued to publish a newspaper, putting out editions dated December 20, 2001, January 3, 2002, and January 10, 2002 under the heading “Geauga County” followed by “The Leaf.” The Debtors also continued to use the postal permit that had been sold to the Buyer under the December 14, 2001 Order for these mailings. Mrs. Buchanan testified at the contempt hearing that she did so because “it saved me money” and “it still belonged to us” since there was not an order directing them to turnover the property by a certain date. The Buyer contacted its attorney and the Trustee in an effort to obtain possession of the assets and to prevent the Debtors from holding themselves out as the continued owners of the Geauga County Maple Leaf.

The January 9, 2002 Order

On January 3, 2002, the Trustee filed a Motion for Turnover of the property which was heard on an expedited basis on January 9, 2002. (Docket 52, 54). The Debtors were represented at that hearing. The Court granted the motion at the hearing and ordered the Debtors to turn over the property by the close of business on January 10, 2002, with the instruction that “[a]ll documents are to be legible and complete.” (Docket 55). The Order was entered on January 9, 2002.

The Debtors’ Response to the January 9, 2002 Order

The Buyer argues that the Debtors are in contempt of the January 9, 2002 Order because they:

- (1) did not timely turn over the complete subscription and vendor lists;

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

- (2) interfered with the Buyer's right to use the telephone number;
- (3) improperly used the postal permit; and
- (4) have confused advertisers and the public by trying to convince them that the Buyer's publication is not a continuation of the Geauga County Maple Leaf.

The Court will address each of the concerns, together with the Debtors' response.

The Subscriber List

On January 10, 2002, the Debtors turned over a subscriber list to Mr. Karlovec. When Mr. Karlovec examined it the next morning, he found that it had 2,527 names, but of those names only seven were current subscribers according to the subscription expiration information on the document. As a result, the Buyer could only send its January edition of the Geauga County Maple Leaf to a small number of subscribers. The Debtors finally turned over the accurate list sometime in February.

Mr. Buchanan agreed at the contempt hearing that the subscriber list was incorrect and incomplete. He explained that this happened because the January 9, 2002 Order did not give him much time to prepare the list, he was busy with a publication, and he asked his son to print out the list. Mrs. Buchanan did not offer a reason for her non-compliance. Both of the Debtors knew from the December 14, 2001 Order that the Trustee had sold the subscriber list and that they were the ones who had that list. The January 9, 2002 Order was specific and definite regarding their obligation to turn the list over to the Buyer. The Court finds by clear and convincing evidence that both Donald and Carol Buchanan knew about their obligation to turn over a complete and legible subscriber list by the close of business on January 10, 2002, they could have complied with the Order, and they did not. Delegating this critical task to their son did not excuse compliance. At a minimum, the Debtors should have reviewed the list that their son gave them

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

to make sure that it complied with the Court's Order. Their failure to timely provide a complete and legible subscription list amounted to contempt of the January 9, 2002 Order.

The Vendor List

The Debtors were also required to turn over the vendor list to the Buyer. In addressing this issue, Donald Buchanan defined "vendors" as entities who sold the newspaper and kept a portion of the sale price as a commission. Using this definition, when he turned over the vendor list to the Buyer he excluded the identity and location of outdoor boxes where the newspaper was sold. He later provided the box information to the Buyer.

There was no testimony about the meaning ordinarily given to the term "vendor" in this context and the Order did not define it. In light of those facts, the Buyer did not prove that Donald or Carol Buchanan violated the January 9, 2002 Order in initially failing to turnover the outdoor box information.

The Telephone and Fax Numbers

The Buyer also purchased the rights to the newspaper's telephone and fax number. Shortly after January 9, 2002, the Debtors claim they abandoned the telephone number. What they mean by this is that they changed the telephone number and had calls placed to the old number referred to their new number. Donald Buchanan said that they did this because they were in the middle of a big project and they couldn't tell people that their phone number was going to be changed. The Debtors further justified their actions by saying that no one contacted them on behalf of the Buyer about taking over the telephone number. About one week later, the Trustee and/or the Buyer made arrangements for the telephone number to be put back in place and connected to the Buyer's operations. The January 9, 2002 Order does not refer to this issue. While the Debtors certainly were not trying to make anything any easier for the Buyer, the

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

evidence did not prove by the required degree of proof that the Debtors' actions with respect to the telephone number amounted to a violation of a court order.

The Postal Permit

The Buyer points to two acts in particular with respect to the postal permit. The first is Mr. Buchanan's effort on December 8, 2001 to convince the Postal Service to transfer the Geauga County Maple Leaf permit to The Leaf to the detriment of the Chapter 7 estate. While Mr. Buchanan did not have any right to do this, he did it before the Court entered either of the two Orders at issue here. His actions cannot, therefore, have been in violation of those Orders as is required for a finding of contempt.

The second act is that the Debtors used the postal permit to mail a newspaper on three dates after the permit had been sold to the Buyer: December 20, 2001; January 3, 2002; and January 10, 2002. The Debtors testified without contradiction that the January 10th paper was actually mailed on January 9th before the turnover hearing. As all parties were under the mistaken impression until January 9, 2002 that the filing of the appeal alone stayed the December 14, 2001 Order, the evidence did not show that the Debtors knowingly violated the Order by using the permit before that date. The Debtors may well have suspected that they should not use it, but that does not rise to clear and convincing evidence that they knew they were prohibited from doing so.

The Confusion Allegation

The Buyer also asks that the Debtors be held in contempt because, since the sale of the estate assets to the Buyer, the Debtors have been publishing a newspaper under the name The Leaf; they are using the circulation history of the Geauga County Maple Leaf in that publication instead of labeling their new paper as Volume 1, Number 1; they are attempting to obtain a

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

second class postal permit based on the subscriber list that was sold to the Buyer; and they are telling the public that the Buyer is not operating the real Geauga County Maple Leaf. The significance of all this is that only newspapers that have been in business for a set amount of time and with a certain circulation are entitled under Ohio law to publish legal notices (which apparently are a major source of revenue). The Buyer and the Debtors are battling over which publication meets the criteria for carrying those notices. While the Court understands the significance of the issue to the parties, it does not fall within the parameters of this contempt proceeding and the Court will not, therefore, address it.

The Contempt Sanctions

If contempt is established, the remaining issue is the appropriate consequence to the contemnor.

In keeping with the two purposes of civil contempt, there are two kinds of civil fines that may be imposed. One kind is intended to compensate for damages caused by the contemnor's noncompliance. A fine of this kind must be based on evidence of actual loss. *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391 (6th Cir. 1991). The second kind of fine is "payable to the court, but the [contemnor] can avoid paying the 'fine' by performing the act required by the court's order." *Id.* at 1400 (quoting *Roe v. Operation Rescue*, 919 F.2d 857, 868 (3d Cir. 1990)). To determine what monetary sanctions are appropriate, "[t]he magnitude of the sanctions imposed should be assessed by weighing the harm caused by noncompliance, 'and the probable effectiveness of any suggested sanction in bringing about the result desired.'" *Glover v. Johnson*, 199 F.3d 310, 312 (6th Cir. 1999) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947)).

In re Walker, 257 B.R. at 498.

The only act that rises by clear and convincing evidence to the level of contempt is the failure of Donald and Carol Buchanan to turn over a full and complete subscriber list in compliance with the Court's January 9, 2002 Order. The Debtors have now turned over this property to the Buyer and so there is no need to impose a sanction to encourage compliance. The

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

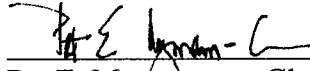
other potential sanction is to compensate the Buyer for actual loss caused by the Debtors' failure to turn the list over in a timely fashion. Mr. Karlovec testified that the delay slowed down the Buyer's efforts to publish the Geauga County Maple Leaf, but that delay was not quantified into actual damages. The Court finds, therefore, that it will not impose a fine on the Debtors.

CONCLUSION

For the reasons stated, the Court finds that Donald and Carol Buchanan acted in contempt of this Court's January 9, 2002 Order when they failed to timely turn over to Geauga County Newspaper Acquisition, LLC the complete and legible subscriber list for the Geauga County Maple Leaf. No fine will be imposed as they have now turned over that list.

A separate order will be issued reflecting this decision.

Date: 18 April 2002



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: John Fickes, Esq.
Mary Ann Rabin, Trustee
Jonathan Blakely, Esq.

By: Joyce L. Gordon, Secretary

Date: 4/18/02