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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
2003-05-16 PM 1:16  
U.S. DISTRICT COURT  
CLEVELAND, OHIO

In re: ) Case No. 02-11398  
)  
MYRTLE M. BUTLER, ) Chapter 13  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**

Attorney Ester Harber was ordered to appear on February 25, 2003 and show cause why she should not be held in contempt and sanctioned for repeated failures to comply with Court orders (the "Contempt Order"). (Docket 39). Attorney Harber failed to appear on February 25, 2003. For the reasons stated below, she is found to be in contempt of court and is sanctioned.

**JURISDICTION**

The Court has jurisdiction under 28 U.S.C. § 1334 and General Order No. 84 entered 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).

**FACTS AND DISCUSSION**

Attorney Ester Harber is the Debtor's counsel of record in this case. This contempt proceeding arises as a result of Attorney Harber's unexplained failure to appear in response to a series of orders entered by this Court. The events began when the Bank of New York filed a motion for relief from stay and Attorney Harber filed an objection to that request on the Debtor's behalf. (Docket 26, 31). The Bank's motion was heard on January 14, 2003. The Debtor appeared at that time, but Attorney Harber did not. To permit the Debtor to have the benefit of counsel, the Court adjourned the hearing to January 28, 2003 and entered an order which

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required Attorney Harber to appear at that time to explain her failure to appear and prosecute the Debtor's objection to the motion (the "First Order"). (Docket 37). Once again, on January 28, 2003, the Debtor appeared, but Attorney Harber did not. The Court again adjourned the Bank's motion and entered a second order which required Attorney Harber to appear on February 11, 2003 to explain her failure to appear in response to the First Order (the "Second Order"). (Docket 38). The Second Order also required Attorney Harber to show cause why she should not return all or some portion of the fees which she was paid by the Debtor in this case.

Attorney Harber failed to appear on February 11, 2003. At that time, the Court granted the Bank's motion for relief and overruled the Debtor's objection. The Court then entered the Contempt Order which required Attorney Harber to appear on February 25, 2003 to show cause why she should not be held in civil contempt based on her failure to comply with the First and Second Orders. (Docket 39). The Contempt Order also stated that Attorney Harber "should be prepared to address whether the compensation she has received in this case should be ordered returned to the Debtor" as a sanction for her noncompliance with the prior orders. Once again Attorney Harber failed to appear as ordered. The issue then is whether Attorney Harber's failure to comply with this Court's orders constitutes civil contempt.

This Court's contempt powers are derived from "Bankruptcy Code § 105(a) and the inherent power of a court to enforce compliance with its lawful orders." *In re Walker*, 257 B.R. 493, 496 (Bankr. N.D. Ohio 2001) (citations omitted). Sanctions for contempt may be imposed in a civil proceeding such as this upon notice and an opportunity to be heard. *Id.* To prove contempt, it must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an

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act with knowledge of that court order. *Id.* at 497. *See also Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995). “Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant.” *In re Walker*, 257 B.R. at 497. The alleged contemnor may, however, defend by showing an inability to comply with the order. *Id.*

Attorney Harber had knowledge of the First and Second Orders because she was served with them at the address which she provided when she filed this case and those mailings have not been returned to the Court. The Orders specifically required Attorney Harber to appear in court on January 28, 2003, and on February 11, 2003 and she failed to do so. The Contempt Order also required Attorney Harber to appear on February 25, 2003 to explain her failure to comply with the prior orders and again Attorney Harber failed to appear. These facts clearly and convincingly establish that Attorney Harber had knowledge of the Court’s orders and failed to comply with them. Attorney Harber was given adequate notice and an opportunity to be heard on the contempt issue, yet she failed to appear and has not provided any explanation for her failure to respond to the Court’s orders. The Court finds, therefore, that Attorney Harber is in contempt based on her failure to comply with the Court’s orders.

The next issue is the appropriate consequence for Attorney Harber’s contempt. A sanction in the form of a refund of the Debtor’s fees is appropriate under the circumstances of this case. A compensatory award of this type is an appropriate sanction for civil contempt. *See In re Walker*, 257 B.R. 493, 498 (Bankr. N.D. Ohio 2001) (discussing the appropriateness of imposing fines to compensate for damages caused by civil contempt). Attorney Harber was given notice of this sanction both in the Contempt Order and in the Second Order. (Docket 38, 39). According to Attorney Harber’s Disclosure of Compensation, she was paid \$750.00 for her

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services in this case. (Docket 1). A review of the case file indicates that she did perform services before this current problem arose. Rather than order the refund of the entire fee, therefore, the Court finds that the appropriate sanction amount is \$200.00, which Attorney Harber is to pay promptly to the Debtor.

Alternatively, even if Attorney Harber's failure to comply with this Court's Orders is not viewed as contempt, it is still appropriate to order the return of fees under the circumstances of this case. Bankruptcy Code § 329 provides that the Court may order the return of compensation paid by a debtor in connection with a case "[i]f such compensation exceeds the reasonable value of any such services." 11 U.S.C. § 329(b)(2). *See also* FED. R. BANKR. P. 2017 (providing for the Court's examination of a debtor's transactions with the debtor's attorney on its own motion). The fee paid to Attorney Harber included representing the debtor in connection with the Bank's request for relief from stay. Based on Attorney Harber's failure to appear and prosecute the Debtor's objection to that motion, the Court determines that the fee which Attorney Harber received is excessive and that \$200.00 of it should be returned to the Debtor under § 329(b)(2).

This Order will become final ten days after the date on which it is entered unless within that time period Attorney Harbor files a Motion to Reconsider that includes an affidavit explaining her failure to respond to Court orders and her plan for future compliance.

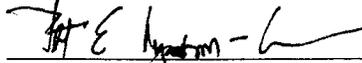
**CONCLUSION**

For the reasons stated, Attorney Ester Harber is found to be in civil contempt based on her failure to appear as required by this Court's Orders. A sanction is imposed in the form of a \$200.00 refund of fees to the Debtor. Alternatively, Attorney Harber is ordered to return \$200.00

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in fees to the Debtor under Bankruptcy Code § 329(b)(2). A separate order will be entered reflecting this decision.

Date: 5 Mar 2003

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served on: Ester Harber, Esq. (by mail)  
Craig Shopneck, Trustee (court box)  
Ms. Myrtle Butler (by mail)

By: Joyce L. Gordon, Secretary  
Date: 3/5/03