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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Case No. 02-23501
)
ANNETTE L. ALLEN,) Chapter 11
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Debtor Annette Allen was ordered to appear and show cause why she should not be held in civil contempt for her failure to comply with this Court's order requiring her to appear for examination (the "Contempt Order"). (Docket 67). Annette Allen failed to appear. For the reasons stated below, she is found to be in contempt of court.

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

Annette Allen filed this Chapter 11 case on November 25, 2002.¹ The issue of contempt arises out of Ms. Allen's unexplained failure to appear for a Bankruptcy Rule 2004 examination which was ordered by this Court (the "Rule 2004 Order"). (Docket 36). The Rule 2004 Order required Ms. Allen to appear for examination by creditor Paulette Chambers. Ms. Chambers

¹ The United States Trustee's motion to convert or dismiss this case was granted at a hearing held on March 20, 2003, but the order of conversion has not yet been entered.

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made these allegations via motion:

1. The Debtor appeared for the Rule 2004 examination on February 4, 2003, but abruptly ended the examination without justification.
2. The Debtor failed to produce documents required by the Order.
3. The Movant and Debtor's counsel agreed to reconvene the interrupted examination on February 26, 2003. The Debtor, however, failed to appear on that date.

(Docket 47). As a result of these failures, Ms. Chambers asked the Court to issue an order against Ms. Allen requiring her to appear and show cause why she should not be held in contempt.

The motion was heard on March 6, 2003. Based on the statements of counsel for Paulette Chambers and Ms. Allen, the facts surrounding Ms. Allen's departure on February 4, 2003 were not clear, but the facts relating to her failure to appear for the February 26, 2003 examination were undisputed. Based on those undisputed facts, the Court issued the Contempt Order which required Ms. Allen to appear on March 20, 2003 to explain her failure to appear for examination.

Ms. Allen did not appear on March 20, 2003. Her counsel² appeared, but could not explain her failure to attend the hearing. The issue, therefore, is whether Ms. Allen's failure to comply with this Court's Rule 2004 Order constitutes contempt of court.

The Court's contempt powers derive 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). Contempt must be shown by clear and convincing

² Kenneth Freeman is Ms. Allen's attorney of record in this case. (Docket 2, 42). Although Ms. Allen filed a motion to dismiss Mr. Freeman on March 19, 2003, that motion has not yet been heard. (Docket 70).

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evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an 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 defend by showing an inability to comply with the order. *Id.*

Based on the undisputed facts, Annette Allen is in contempt of this Court’s Rule 2004 Order. Ms. Allen clearly had knowledge of the order and the requirement that she appear based on her counsel’s statements at the March 6, 2003 hearing. The motion that Ms. Allen personally filed on March 19, 2003 also clearly shows that she knew about the Contempt Order and yet chose not to appear at the hearing. This is evident from her request that her filing “be accepted as [a] response to the **request** to appear in court on March 20, 2003[.]” (Docket 71) (emphasis added). The Contempt Order was not, however, a request; it was a direction to appear in Court and the filing of a motion did not excuse Ms. Allen from appearing.

The terms of the Rule 2004 Order were specific. The order required Ms. Allen to appear for examination by Paulette Chambers. Ms. Allen agreed (through counsel) to appear on February 26, 2003 and she failed to do so. Additionally, the Contempt Order required Ms. Allen to appear on March 20, 2003 to explain her failure in this regard and once again she failed to appear.

These facts clearly and convincingly establish that Annette Allen had knowledge of the Court’s Rule 2004 Order and failed to comply. Ms. Allen had adequate notice and an opportunity to be heard on the contempt issue, yet she failed to appear and has not provided any

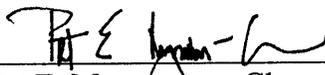
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explanation for her failure to respond to the Court's Order. The Court finds, therefore, that Annette Allen is in contempt based on her failure to comply with the Rule 2004 Order.

CONCLUSION

For the reasons stated, Annette Allen is found to be in civil contempt based on her failure to appear for examination as required by this Court's Rule 2004 Order. A separate order will be entered reflecting this decision and scheduling a hearing to determine the appropriate sanction.

Date: 25 Mar 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served on: Ms. Annette Allen (by mail)
Sandor Sternberg, Esq. (by mail)
Derrick Rippy, Esq. (court box)
Kenneth Freeman, Esq. (court box)

By: Joyce L. Gordon, Secretary

Date: 3/25/03