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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 03-14613
)
ANDREA WASHINGTON,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The United States trustee (UST) moves for an order holding petition preparer Ronald Smedley in civil contempt because he failed to comply with a judgment that directed him to: (1) pay \$1,500.00 to the Court as a fine under bankruptcy code § 110; (2) turn over his \$199.00 fee to the Chapter 7 trustee; and (3) pay the remaining \$100.00 court filing fee that he received from the debtor but kept for himself. (Docket 17). While Mr. Smedley did not file any formal opposition to this motion, he opposes the request and has asked that the payments be reduced. (Docket 24).¹ The court held hearings on the motion on August 14, 2003 and September 4, 2003.

I. JURISDICTION

Jurisdiction exists 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).

II. CONTEMPT

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

¹ To the extent his filing was intended to be a separate motion, it is overruled for the reasons stated in this memorandum of opinion.

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U.S. 821, 827 (1994).² 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 consequence.

The primary purpose of civil contempt:

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.493, 497 (Bankr. N.D. Ohio 2001) (footnote omitted).

The UST has the burden of proving by clear and convincing evidence that Mr. Smedley violated a specific and definite order that required him to act or refrain from acting, with knowledge of that order. *In re Walker*, 257 B.R. at 497 (citing *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996)). Mr. Smedley can successfully defend by establishing that he is unable to comply with the order. *Id.* (citing *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998)). The inability to comply must be established categorically and in detail. *Electrical Workers Pension Trust Fund of Local Union #58 v. Gary’s Electrical Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003); *Rolex Watch U.S.A., Inc.*, 74 F.3d 716, 720 (6th Cir. 1996).

² Under Bankruptcy Rule 9020, contempt proceedings are governed by Bankruptcy Rule 9014. See FED. R. BANKR. P. 9020 and FED. R. BANKR. P. 9014.

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III. FACTS

A. The June 27, 2003 Judgment

Ronald Smedley served as the bankruptcy petition preparer for Andrea Washington when she filed her chapter 7 case. In connection with that activity, the UST filed a motion asking that Mr. Smedley be (1) fined for failing to comply with bankruptcy code § 110; (2) required to return the fees paid by the debtor because his services were of little value to the debtor; and (3) ordered to pay the remaining \$100.00 filing fee because he had received the money from the debtor, but failed to pay it over to the clerk's office. After notice and a hearing, the court entered a judgment on June 27, 2003 which required Mr. Smedley to: (1) pay a \$1,500.00 fine under § 110 to the clerk of court; (2) turn over his \$199.00 petition preparer fee to the chapter 7 trustee; and (3) pay the remaining \$100.00 filing fee to the court (the Judgment). (Docket 15, 16).

B. Mr. Smedley's Response to the Judgment

Mr. Smedley moved for relief from the Judgment. Because his motion failed to meet the requirements for such relief, it was denied. (Docket 22, 23).

The UST's contempt request was first heard on August 14, 2003. Mr. Smedley appeared and acknowledged that he had received the Judgment and had not made the required payments. He stated that he did not have contempt for the court or its findings, but he is angry and intends to fight this issue until he dies. In response to the court's inquiry into when he intended to comply with the Judgment, Mr. Smedley responded that he is disabled and had no idea when he could make the required payments. He also stated that he had appealed the Judgment, although the case docket indicates he has not done so to date.

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The court adjourned the hearing to September 4, 2003 to allow Mr. Smedley to provide evidence that he is unable to pay the required amounts in a lump sum. Mr. Smedley was instructed to provide evidence of his finances and a proposed payment plan.

On August 29, 2003, Mr. Smedley filed a pleading entitled "Motion to Reduce Fines and Penalties" which the court will interpret as a response to the September 4th hearing.³ (Docket 24). In this filing, Mr. Smedley argues that the payments called for by the Judgment are unreasonable and requests an unspecified reduction. He also asks that he be allowed to make installment payments, but does not propose such a payment plan. Mr. Smedley states that he cannot pay the Judgment because he is unemployed and disabled. The affidavit that he filed with his motion, however, does not support that because it refers to a verification of income that is not attached and also is vague and short on detail. Additionally, Mr. Smedley states in his affidavit that he is unemployed, but he has acknowledged many times in court that he is self-employed as a bankruptcy petition preparer for numerous debtors.

The adjourned contempt hearing was held as scheduled on September 4, 2003. Mr. Smedley did not appear. The UST reported that Mr. Smedley still has not made the payments required by the Judgment.

C. Mr. Smedley's Contempt

Mr. Smedley had notice of the contempt proceedings and an opportunity to respond. It is beyond question that Mr. Smedley has knowledge of the Judgment and has not complied with it. The terms of the Judgment are definite and specific. Mr. Smedley asserts that he is unable to

³ The motion requests relief in five unrelated cases. Two of those cases are assigned to another judge.

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make the required payments. The inability to comply with a court order is a valid defense, but it must be established “categorically and in detail.” The court advised Mr. Smedley of this requirement at the August 14th hearing and adjourned that hearing to give him time to provide that evidence. He was instructed to file specific evidence of his inability to pay, such as his federal income tax return or an affidavit as to his income. Instead, Mr. Smedley offered unsupported statements that fail to meet that standard. The affidavit which he provided fails to include verification of his income and it is internally inconsistent, stating that he is both unemployed and currently serving as a paid petition preparer. Mr. Smedley has not established that he is unable (rather than angry and unwilling) to make the payments required by the Judgment. The UST has, therefore, proven that Mr. Smedley is in contempt of this court for his failure to comply with the Judgment.

D. The Contempt Sanction

The remaining issue is the appropriate consequence of Mr. Smedley’s contempt:

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)).

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

The UST asks that Mr. Smedley be fined or imprisoned for his contempt. The court believes a coercive per diem fine is the appropriate first step to encourage Mr. Smedley to honor his obligations under the Judgment. *Id.* at 498. The totality of the circumstances must be considered in determining the amount of the fine, including these factors:

1. The type of actions that led to the issuance of the [Judgment], and the consequences of non-compliance with the [Judgment];
2. The reasons advanced by [Mr. Smedley] for non-compliance with the [Judgment] . . . and any good faith issues, even if [that] factor[] [does] not serve as a defense to the contempt charge;
3. Whether [Mr. Smedley] expresses an intention to promptly comply with the [Judgment];
4. The amount of time that has elapsed since the [Judgment] was entered; and
5. [Mr. Smedley's] financial circumstances.

Id. (footnote omitted).

Several months have passed since the Judgment was entered and Mr. Smedley has not made any of the required payments despite being well aware of his obligation to do so. One of those payments is the remaining \$100.00 filing fee for Ms. Washington's case. Mr. Smedley was ordered to pay this fee because he took the filing fee from the debtor and kept it rather than paying it to the court. Mr. Smedley was given ample opportunity to prove that he is unable to make the required payments and he failed to do so. He also failed to appear at the continued hearing on the contempt issue. Mr. Smedley had every right to disagree with the Judgment and appeal it. He did not. He has instead chosen to ignore it, a course that cannot be permitted to

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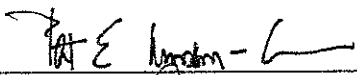
continue. Under these circumstances, the court concludes that imposing a \$25.00 a day fine is appropriate to make Mr. Smedley reconsider his failure to comply with the Judgment.

IV. CONCLUSION

For the reasons stated, the court finds that Ronald Smedley is in contempt of court because he has failed to make the payments required by the Judgment and has failed to establish his defense to that obligation. Mr. Smedley is required to pay a fine in the amount of \$25.00 for each day going forward that he fails to make those payments. This fine will be imposed starting on the tenth day after the date on which this order is entered, unless within that time Mr. Smedley complies with the terms of the Judgment.

A separate order will be issued reflecting this decision.

Date: 15 Sept 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Mr. Ronald Smedley
Dean Wyman, Esq.
Lauren Helbling, Trustee
Ms. Andrea Washington

By: Joyce R. Gordon, Secretary

Date: 9/15/03

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In re:) Case No. 03-14613
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ANDREA WASHINGTON,) Chapter 7
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Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the motion of the United States Trustee for an order holding Ronald Smedley in civil contempt is granted because Mr. Smedley failed to comply with the Judgment entered June 27, 2003 and did not establish his defense to compliance. (Docket 17).

As a sanction for the contempt, Mr. Smedley is required to pay a fine to the Clerk of the Bankruptcy Court in the amount of \$25.00 for each day going forward that he fails to make the payments called for by the Judgment. This fine will be imposed starting on the tenth day after the date on which this order is entered, unless within that time Mr. Smedley complies with the terms of the Judgment.

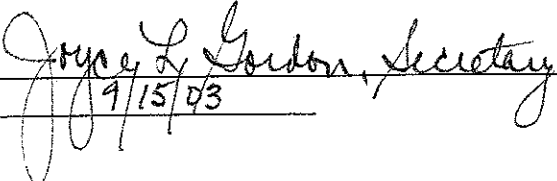
IT IS SO ORDERED.

Date: 15 Sept 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Mr. Ronald Smedley
Dean Wyman, Esq.
Lauren Helbling, Trustee
Ms. Andrea Washington

By: 
Date: 9/15/03