UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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| In re: | ) | Case No. 03-20584 |
| | ) | |
| MARJORIE J. JUSCZAK, | ) | Chapter 13 |
| | ) | |
| Debtor. | ) | Judge Arthur I. Harris |

MEMORANDUM OF OPINION AND DECISION

This case is currently before the Court on the motion of Charter One Bank, N.A., (Charter One) for sanctions against the debtor and debtor's former counsel (Docket #50). Charter One seeks sanctions for the debtor's alleged noncompliance with various discovery orders that this Court issued in connection with the debtor's Chapter 13 case. The Court held a hearing on the motion for sanctions on October 23, 2003, and December 9, 2003. Although the debtor moved for a voluntary dismissal of her case under 11 U.S.C. § 1307(b) on October 23, 2003, which the Court granted that same day, the Court specifically retained jurisdiction to consider sanctions against the debtor and debtor's former counsel (Docket # 68) . For the reasons that follow, Charter One's motion for sanctions is granted in part and denied in part, and the Court enters judgment in favor of Charter One and against debtor, Marjorie Jusczak, (but not against her former counsel) in the amount of $6,000.00 (six thousand dollars).

This memorandum constitutes the Court's findings of fact and conclusions

of law as required by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

## FACTUAL AND PROCEDURAL HISTORY

The debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on August 9, 2003. On August 22, 2003, Charter One filed a motion for sanctions (Docket #3) and a motion to dismiss the bankruptcy case and request for a one-year refiling injunction (Docket # 5). The Court held a hearing on Charter One's motions to dismiss and motion for sanctions on September 11, 2003, and scheduled an evidentiary hearing regarding both motions for October 29, 2003. In addition, Charter One filed a motion for relief from the automatic stay and request for *in rem* relief on September 4, 2003 (Docket #17), and the Court scheduled a hearing on that motion for October 29, 2003, in conjunction with Charter One's other two motions (Docket # 38).

In preparation for the October 29, 2003, evidentiary hearing, Charter One requested various items of discovery from the debtor on or about October 1, 2003. The debtor failed to comply with those requests, and Charter One filed a motion to expedite a hearing on (i) its motion to authorize and direct the appraisal of the debtor's residence (Docket # 39) and (ii) its motion for a 2004 examination of the debtor and for an order requiring production of documents (Docket # 40). On October 2, 2003, the Court held an expedited hearing on these matters and,

subsequently, granted both discovery motions (Docket ## 44, 45). Charter One, in its request for an appraisal of the debtor's residence, cited the debtor's proposed plan as an important factor necessitating the appraisal. Specifically, the debtor's amended plan proposed payment of $223.00 per month for 12 months (Docket # 23). The claims of Charter One and Wells Fargo Financial, which are secured by the debtor's residence, were to be paid from the proceeds of the sale of the debtor's residence, which was to take place "on or after July 1, 2004, but no later than September 1, 2004." The debtor, in her schedules, placed the value of her residence in Gates Mills, an affluent Cleveland suburb, at $950,000 with secured claims in the amount of $306,000. Charter One, in its proof of claim, placed the value of the debtor's residence at $800,000.

The 2004 examination was to take place on October 17, 2003, from 3:00 p.m. to 6:00 p.m. at the office of counsel for Charter One, and the debtor was required to produce certain documents on or before 5:00 p.m. on October 15, 2003. The appraisal of the debtor's residence was to take place at 3:30 p.m. on October 16, 2003. On October 15, 2003, counsel for the debtor, Fred P. Lenhardt, filed a motion to withdraw as attorney of record for the debtor and for an extension of time to permit the debtor to retain new counsel (Docket #48). According to the motion, the debtor notified Attorney Lenhardt in writing on October 11, 2003, that

he had been relieved of further responsibility for representing her in her Chapter 13 proceeding. Subsequently, Charter One filed its motion for contempt and request for sanctions on October 16, 2003 (Docket # 50). In this motion, Charter One noted that the debtor did not appear at the scheduled 2004 examination, that the documents Charter One had requested were never produced, and that the debtor's residence was not made available for inspection at the time of the appraisal. The Court ordered a hearing on the motion to withdraw as attorney of record and the motion of Charter One for contempt and sanctions for October 23, 2003 (Docket #58).

The debtor, through Attorney Lenhardt, filed a last-minute motion on October 23, 2003, to continue the hearing to withdraw as attorney of record and the motion of Charter One for contempt and sanctions (Docket # 65), but the Court denied that motion (Docket # 69). Also on October 23, 2003, the debtor filed a motion to voluntarily dismiss her case pursuant to 11 U.S.C. § 1307(b) (Docket # 66). The Court granted the debtor's motion to dismiss but retained jurisdiction to impose sanctions against the debtor and debtor's former counsel (Docket # 68).

On December 9, 2003, the Court held a hearing regarding Charter One's motion for sanctions, and Attorney Alexander Jurczenko–the debtor's present or former husband–made an oral motion to appear on behalf of Marjorie Jurczak.

However, given Attorney Jurczenko's failure to file a notice of appearance or disclosure statement that complied with 11 U.S.C. § 329(a) or Bankruptcy Rule 9010(b) and failure to comply with the Scheduling Order dated October 31, 2003 (Docket #75), the Court denied the oral motion.

JURISDICTION

The Court has jurisdiction in this proceeding pursuant to 28 U.S.C. § 1334(b) and Local 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 pursuant to 28 U.S.C. § 157(b)(2)(O), and venue in this matter is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

This Court has inherent authority to impose sanctions on offending parties and counsel. *See, e.g.*, *Mapother & Mapother, PSC v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996) ("Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct."); *In re Bourekas*, 175 B.R. 517, 525 (Bankr. S.D.N.Y. 1994) (noting that bankruptcy court possesses power to impose sanctions as inherent authority and by virtue of 11 U.S.C. § 105(a)). This jurisdiction exists notwithstanding the debtor's absolute right of dismissal pursuant to 11 U.S.C. § 1307(b). While a dismissal order ends the bankruptcy estate and revests property of the estate in the debtor by operation of

11 U.S.C. § 349, the Court can still retain inherent jurisdiction over the debtor and her former counsel for purposes of sanctions. *See, e.g.*, *Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359, 364 n.2 (6th Cir. 1997) ("Since dismissal of an underlying bankruptcy case does not automatically strip a federal court of residual jurisdiction to dispose of matters after the underlying bankruptcy case has been dismissed, exercise of such jurisdiction is left to the sound discretion of the trial court."), *citing In re Lawson*, 156 B.R. 43, 45 (9th Cir. B.A.P. 1993). *See also In re Donohoo*, 243 B.R. 536, 537 (Bankr. M.D. Fla. 1999); *Skaggs v. Fifth Third Bank of N. Ky. (In re Skaggs)*, 183 B.R. 129, 131 (Bankr. E.D. Ky. 1995).

While a voluntary dismissal in the face of a motion for relief from stay has the same effect as if the Court had dismissed the case under 11 U.S.C. § 109(g)(1) for willful noncompliance, nothing suggests that the Court is barred from considering sanctions warranted by Bankruptcy Rule 7037, particularly since 11 U.S.C. § 109(g) does not compensate a creditor for damages–such as costs and attorneys fees–incurred as a result of alleged noncompliance by the debtor with this Court's discovery orders.

A Court must be careful when considering whether to impose sanctions. "When a court metes out a sanction, it must exercise such power with restraint and discretion. . . . The sanction levied must thus be commensurate with the

egregiousness of the conduct." *In re Downs*, 103 F.3d at 478, *citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). With these principles in mind, the Court turns to the issues at hand.

## APPLICABLE LAW

Rule 37(b) of the Federal Rules of Civil Procedure, as made applicable to these proceedings by operation of Bankruptcy Rule 7037, provides:

> (1) *Sanctions by Court in District Where Deposition is Taken*. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.
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> (2) *Sanctions by Court in Which Action is Pending*. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> > (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> > (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
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> > (C) An order striking out pleadings or parts thereof, or staying further

> proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
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> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
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> (E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

DISCUSSION

The debtor opposes discovery sanctions in this case by challenging the necessity of conducting an appraisal on the debtor's residence. According to the debtor's briefing, Charter One requested and obtained an appraisal on the debtor's residence sometime in 2001, again in early 2003, and later on July 2, 2003, and therefore Charter One had no "justification for seeking another appraisal on the residence." Docket # 84 at 4, Joint Opposition to Motion for Sanctions. While the debtor may have had a good faith basis in disputing Charter One's later request to

re-inspect the property for appraisal, once the Court granted Charter One's request, the debtor was no longer free to resist the appraisal. Perhaps the debtor could have requested reconsideration of the October 7, 2003, order granting the motion for appraisal or filed an appeal, but without doing so, the debtor ignored the order at her own peril.

This Chapter 13 case is unusual in the sense that the debtor proposed a liquidating plan, with no payments on huge prepetition arrearages to the first and second mortgage holders until property was sold. Furthermore, the proposed plan seemed to provide no regular postpetition payments to secured creditors. As such, the valuation of the debtor's residence would have been an important element regarding the feasibility of the plan under relevant case law such as *In re Newton*, 161 B.R. 207 (Bankr. D. Minn. 1993) and *In re Anne Marie* (Case # 01-18950, Bankr. N.D. Ohio 2002, Docket # 23, Order Denying Confirmation of Debtor's Plan).

While the Court is aware of other recent valuations on the debtor's residence, the Court felt that an interior inspection and appraisal were important to help determine the feasibility of the proposed plan and to decide whether Charter One's interests were being adequately protected. For instance, the ability to market a high end home like that of the debtor on a quick basis may well depend on the

current condition of the home, especially in light of the proof of claim filed by Wells Fargo Financial, the second mortgage holder, for $80,000 (Court Claim # 4, filed Sept. 16, 2003). Furthermore, evidence that the home was in poor condition might affect the Court's analysis of the debtor's good faith in proposing the given plan. Therefore, the ability of a liquidating plan, like the one proposed by the debtor, to cover *all* secured claims, not just that of Charter One, was potentially at issue. *See generally* 11 U.S.C. § 506(a) ("value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest").

In order for a court to consider imposing sanctions under Bankruptcy Rule 7037(b), the court must find that a party or its counsel violated an order compelling discovery. *See, e.g.*, *Freeland v. Amigo*, 103 F.3d 1271, 1276 (6th Cir. 1997). In the case at hand, the debtor and her former counsel do not dispute that the Court, pursuant to Federal Rule of Civil Procedure 37(a), issued an order authorizing and directing appraisal of the debtor's residence (Docket # 44) and another order granting Charter One's motion for a 2004 examination of the debtor and requiring the production of certain documents (Docket # 45). The debtor and her former counsel similarly do not dispute that these orders were not

complied with. Therefore, conduct sanctionable under Federal Rule of Civil Procedure 37(b) did take place, and the Court must determine what, if any, sanction to impose on the offending party or parties.

In imposing sanctions, the Court has determined that an award of attorneys fees and costs against the debtor and in favor of Charter One is the most appropriate means to address the issue. The Court has considered a variety of factors in order to decide which attorneys fees and costs should be included in the sanction, and the Court has made the following findings:

(1) Charter One is entitled to the cost for the appraiser to appear at the debtor's residence in an attempt to conduct the scheduled appraisal.[1] Cost: $300.00.

(2) Charter One is entitled to some of the cost for 2004 examinations that did not go forward. Specifically, Charter One should be reimbursed $101.25 for the court reporter fees from October 17, 2003. The Court declines to award Charter One attorneys fees incurred for attending a

[1] The fact that the appraiser could have done a partial appraisal from the outside of the residence does not suggest that Charter One should be awarded less than the full cost of the appraisal. For example, in the related state foreclosure proceeding, the debtor herself argued that an exterior-only appraisal was wholly inadequate. *See* Combined Motion to Strike Alias Land Appraisal and For Sheriff to Return Alias Order of Sale Without Execution (Exhibit S to Docket # 82).

brief examination that was scheduled to take place at the office of Charter One's counsel. However, Charter One should receive reimbursement for the fees that its counsel generated in preparation for the 2004 examination. The decision by the debtor to discharge her own attorney, without having arranged a replacement and in the face of court-ordered deadlines, did not justify an extension of time for the examination or excuse her noncompliance with the Court's order. Had the debtor moved to voluntarily dismiss her case on October 15, 2003, that dismissal would have terminated her obligation to comply with the discovery orders. On the other hand, debtor's decision to discharge her attorney without first retaining a replacement did not stop the clock for purposes of discovery. Moreover, the Court does not find Attorney Lenhardt's desire to attend a funeral a basis for excusing the debtor from her requirement to appear at the examination, after she had discharged Attorney Lenhardt.

(3) Charter One is not entitled to fees for noncompliance with the request for production of documents. The debtor's failure to comply with this aspect of the court order does not appear to have resulted in any out-of-pocket expense to Charter One.

(4) Charter One is entitled to attorneys fees resulting from counsel preparation for the motion for sanctions (Docket # 50); preparation and attendance at the hearing of October 23, 2003; and preparation and attendance at the hearing of December 9, 2003. According to his affidavit, Attorney Matthew Matheney spent 39.10 hours working on those issues, including preparing for the debtor's 2004 examination (Docket # 80). At his normal hourly rate of $140.00 per hour, this amounts to $5474.00 in attorneys fees. Attorney Brian Roof spent 34.25 hours working on these matters (Docket # 80). Charging $185.00 per hour, this results in a cost of $6512.00 to Charter One for his fees. Together, these amounts represent $11,986.00 in attorneys fees.

The Court does not find that debtor's former counsel should be sanctioned. No party has presented any evidence that he encouraged the debtor to ignore court-imposed obligations or that he did anything otherwise sanctionable under Bankruptcy Rule 7037 or 28 U.S.C. § 1927.

While the Court believes that Charter One incurred substantially more than $6,000.00 in costs and attorney's fees as a result of debtor's sanctionable conduct, the Court declines to award more, in part because the debtor's voluntary dismissal

in the face of Charter One's motion for relief from stay has had the same effect as if the Court had dismissed her case for willful noncompliance with a court order. The Court has decided to temper its sanctions accordingly. *See In re Downs*, 103 F.3d at 478. Furthermore, the Court is aware that Charter One may be entitled to additional costs and attorneys fees under the note and mortgage executed by the debtor and Attorney Jurczenko. Because such a determination is not before this Court, nothing in this decision should be construed to determine or otherwise affect the parties' rights under those agreements.

In short, the debtor had an absolute right to dismiss her case, but chose not to do so, at least immediately, perhaps because of the automatic filing bar of 11 U.S.C. § 109(g)(2). Rather, the debtor sought to remain under the protection of the Bankruptcy Code and discharged her attorney in the face of court-imposed discovery deadlines without first retaining replacement counsel. In choosing to ignore those court-imposed deadlines, the debtor acted at her own peril.

## ATTORNEY JURCZENKO'S ATTEMPT TO APPEAR ON BEHALF OF DEBTOR AT DECEMBER 9, 2003, HEARING

As previously mentioned in this memorandum, the Court denied the oral request of Attorney Jurczenko on December 9, 2003, to appear on behalf of the debtor. The Court denied the request because nothing was filed in advance of that

hearing to indicate that the debtor had retained new counsel, despite the long lead time since the discharge of the debtor's former attorney. *See* FED. R. BANKR. P. 9010(b) (notice of appearance to be in writing). In this case, the proper notice of appearance was not filed by Attorney Jurczenko until after the December 9, 2003, hearing (Docket # 81). Nor did the debtor or Attorney Jurczenko comply with the various deadlines in the Scheduling Order dated October 31, 2003 (Docket #75). Nevertheless, Attorney Jurczenko was permitted to sit at counsel table with debtor's former counsel during the hearing on December 9, 2003, and assist Attorney Lenhardt. In addition, the debtor was free to appear on her own behalf any time after she discharged her attorney.

The Court, therefore, extended several opportunities to the debtor to appear on her own behalf, and she repeatedly declined to do so. For example, there is no evidence that the debtor was unable to attend court and defend her interests on December 9, 2003, nor did she offer any reason why she should be excused from the deadlines contained in the order scheduling the hearing for December 9, 2003. Furthermore, while the debtor sought to delay her attendance at the hearing of October 23, 2003, because of alleged work obligations, the Court declined to excuse her absence from the hearing because (i) she had failed to obtain replacement counsel prior to discharging her former attorney, (ii) the request was

made at the last possible moment, and (iii) the very subject of the hearing involved noncompliance with previous court orders. Thus, the debtor repeatedly refused to avail herself of numerous opportunities to defend her interests. The Court therefore rejects any argument by Attorney Jurczenko or the debtor that the debtor failed to receive fair notice and an opportunity to be heard.

## CONCLUSION

For the foregoing reasons, Charter One's motion for sanctions is granted in part and denied in part, and the Court enters judgment in favor of Charter One and against debtor, Marjorie Jusczak, (but not against her former counsel) in the amount of $6,000.00 (six thousand dollars).

A separate judgment shall be entered in accordance with this memorandum of opinion and decision.

IT IS SO ORDERED.

/s/ Arthur I. Harris 02/25/2004
Arthur I. Harris
United States Bankruptcy Judge