THIS OPINION IS NOT INTENDED
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-12736
	)	
JOSEPH E. DANCZAK,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

The debtor Joseph Danczak and creditor Ian Abrams have a pre-bankruptcy history of contentious litigation which has been imported into this bankruptcy case. Mr. Abrams, who purchased a 1959 Harley Davidson motorcycle from the debtor's chapter 7 estate, now seeks sanctions against the debtor and his attorney, Alexander Jurczenko, alleging that they raised baseless claims, defenses, and legal positions to thwart his efforts to complete the sale and obtain possession of the motorcycle. The debtor and Mr. Jurczenko oppose this request. (Docket 65, 71). For the reasons stated below, the motion for sanctions is granted.

FACTS

Joseph Danczak filed a chapter 13 case which he voluntarily converted to chapter 7. The chapter 7 trustee moved for authority to sell the debtor's 1959 Harley Davidson motorcycle free and clear of liens and other interests. No one objected to the motion and the court granted it on December 9, 2003. The trustee noticed a public sale for January 5, 2004. No one objected to the notice and the trustee held the sale as scheduled. The trustee accepted a $2,000.00 bid from Ian Abrams, the sole bidder, and then filed his report of sale on January 27, 2004. No one responded to that report.

On March 3, 2004, the trustee moved for an order directing the debtor to turn the motorcycle over to him. The motion included a standard clause requiring objections to be filed 7 days before the April 8, 2004 hearing. No timely objections were filed[1] and the court granted the motion.

Despite the fact that the debtor did not participate in any of the motions described above, he filed a motion to redeem the motorcycle on April 7, 2004. Mr. Abrams objected, pointing out that the property had been sold and there was nothing to redeem.[2] After a hearing, the court sustained the objection and denied the motion, finding that there was no basis in law or fact for attempting to redeem this property. The debtor did not appeal from this decision.

When the debtor still did not turn over the motorcycle, the trustee pursued contempt proceedings. The debtor did not respond to the trustee's motion for an order directing the debtor to appear and show cause why he should not be held in contempt for violating a court order, and the court issued such an order. By the time of the final hearing, the trustee had filed an affidavit stating that Mr. Abrams's counsel had informed him that the debtor had delivered the motorcycle. The court concluded the hearing based on this action.

While the trustee's contempt request was pending, the debtor filed a motion to vacate the trustee's report of sale which Mr. Abrams opposed. The motion was filed more than seven months after the sale, the debtor did not in any way explain his delay, and he did not provide

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[1] After the objection period expired, the debtor filed an untimely objection asking that the motion be denied because the debtor had: (1) asserted a $1,000.00 exemption in the motorcycle; and (2) filed a motion to redeem the motorcycle.

[2] Mr. Abrams's response also included a request for sanctions under bankruptcy rule 9011. The court denied this without prejudice on the ground that such a request must be made by separate motion under the terms of the rule. *See* FED. R. BANKR. P. 9011(c)(1)(A).

evidentiary support for his statement that the sale was not done by competitive bidding. The debtor sought to vacate the sale so that he could purchase the motorcycle for $3,000.00. The court denied the motion because it did not have a basis in law or fact. The debtor did not appeal from this decision.

After the case took a few more twists and turns, Mr. Abrams moved for sanctions under bankruptcy rule 9011 arguing that the debtor had filed his various pleadings for the purpose of delay and increasing the cost of litigation. In response, the debtor requested an evidentiary hearing without stating any legal position. The court consulted with all counsel and set a hearing date with a briefing schedule that included a requirement for filing witness lists, exhibit lists, and a hearing brief that "set[s] forth the factual and legal reasoning on which the party relies." (Docket 72).

Mr. Abrams timely met the filing requirements; the debtor did not. After court personnel called debtor's counsel twice to ask for the documents without success, the court issued a sanction order prohibiting the debtor from presenting witnesses or exhibits.[3] The debtor could still have filed his hearing brief, but did not.

At the hearing, the debtor orally moved to dismiss the sanctions motion on the ground that Mr. Abrams did not comply with the "safe harbor" provisions of rule 9011 that require a party to demand that the offending pleading or position be withdrawn and then give the other side 21 days in which to comply. The court queried counsel as to whether he had made this argument

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[3] The order states in part that: "[t]he court requires witness lists, exhibit lists, and hearing briefs to make sure that the parties are focused on the issue before the hearing, to provide the other side with full notice of the arguments being presented, and to permit the court to prepare for the hearing so as to facilitate decision-making. A party who fails to comply with this requirement interferes with the administration of justice." (Docket 78).

at the earlier hearing or in the required hearing brief; counsel responded he had not because he believed the court was familiar with the rule and, therefore, there was no need to file a hearing brief. Counsel also opined that he was sure the court was familiar with the 1885 United States Supreme Court case that he found dispositive and thus it was pointless to file a brief on the topic. He further argued that bankruptcy rule 7007 permitted him to make oral motions at trial raising any issue he wished. He did not present any authority that a general bankruptcy rule of procedure overrides a specific court order directing counsel to file a hearing brief with the authority on which he relies.

Julie Rabin, co-counsel for Ian Abrams, then testified as to the work that she did on his behalf to obtain the motorcycle. She acknowledged that she had not complied with the "safe harbor" provisions but believed she had complied in spirit by setting the hearing date on her motion more than 21 days after it was filed.

DISCUSSION

Bankruptcy Rule 9011

Bankruptcy rule 9011 provides that a court may impose sanctions when an attorney submits a pleading, motion or paper for an improper purpose, that is not warranted by existing law or a reasonable extension of it, or if the factual allegations do not have evidentiary support. *See* FED. R. BANKR. P. 9011(b). The test "is whether the attorney's conduct was reasonable under the circumstances." *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997).

Bankruptcy rule 9011(c)(1)(A) sets out the procedures for requesting sanctions:

> (A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be

> served as provided in Rule 7004. **The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected [with exceptions not relevant here].**

FED. R. BANKR. P. 9011(c)(1)(A) (emphasis added). The Sixth Circuit interprets this rule strictly, requiring a party to "follow a two-step process: first, serve the Rule 11 motion on the opposing party for a designated period (at least twenty-one days); and then file the motion with the court." *Ridder*, 109 F.3d at 294 (discussing federal civil rule 11 which includes the same relevant language as bankruptcy rule 9011). In this way, the rule allows "for a twenty-one day period of 'safe harbor', whereby the offending party can avoid sanctions altogether by withdrawing or correcting the challenged document or position after receiving notice of the allegedly violative conduct." *Id.* Sanctions are not available unless the motion for sanctions was served on counsel 21 days before it was filed with the court. *Id.* at 296-97.

Mr. Abrams did not comply with the safe harbor requirement of rule 9011. The request for sanctions under rule 9011 must, therefore, be denied.

11 U.S.C. § 105

Mr. Abrams asks, alternatively, that the court exercise its powers under bankruptcy code § 105 to sanction the debtor and his counsel. All courts possess the inherent power to sanction conduct which is abusive to the judicial process. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 49-50 (1991). The bankruptcy court's power to sanction is acknowledged in 11 U.S.C. § 105(a):

> [t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any

determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Both attorneys and parties may be sanctioned for improper conduct. *See Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996); *Riser v. Bostic (In re Riser)*, 58 Fed. Appx. 169,171 (6th Cir. 2003) (unpublished opinion) (citing *Brown v. Smith (In re Poole)*, 222 F.3d 618 (9th Cir. 2000)). This power may be invoked even if a procedural rule exists to sanction the same conduct. *See Chambers*, 501 U.S at 49; *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 511 (6th Cir. 2002). Generally, sanctions are imposed under this power when a party or an attorney has acted in bad faith. *See Chambers,* 501 U.S. at 49; *First Bank of Marietta*, 307 F.3d at 520.

In this case, the debtor and his counsel approached the dispute with Mr. Abrams in a manner designed to increase the costs and aggravation associated with bankruptcy litigation, the exact opposite of what the code and rules contemplate. This is a summary of the offending conduct:

(1) the debtor did not timely make an offer to purchase the motorcycle from the chapter 7 estate, although he could have.

(2) the debtor did not object to the trustee's motion to sell the motorcycle free and clear of liens and other interests, although he could have.

(3) the debtor did not participate in the public sale, although he could have.

(4) the debtor did not voluntarily turn the motorcycle over to the trustee, although he should have based on his duty to cooperate with the trustee (*see* 11 U.S.C. § 521(3)).

(5) the debtor filed a motion to redeem the motorcycle when his counsel, a very experienced bankruptcy lawyer, must have known

that there was no legal right to redeem under these circumstances. It is a basic bankruptcy principle that a chapter 7 debtor may redeem property of the estate that is exempt by paying the creditor with a lien on the property the amount of the allowed secured claim. *See* 11 U.S.C. § 722. According to the debtor's own schedules, there are no liens on the motorcycle. The debtor did not schedule Mr. Abrams as a secured creditor and Mr. Abrams acknowledged when the case was still in chapter 13 that he is an unsecured creditor. Redemption does not, therefore, apply in the context of this case.

In defense of his position, the debtor cited law (in a post-hearing brief) relating to repossession of property by secured creditors. Again, this argument is inapplicable to the facts of this case. Counsel also cites the case of *Traer v. Clews*, 115 U.S. 528 (1885) for the proposition that a debtor is not prohibited from purchasing property out of the bankruptcy estate and counsel then argues "[b]y the same token, there is nothing in the policy of the Bankruptcy Code which prevented [this debtor] from seeking to redeem the motorcycle from the estate." (Docket 80 at 11). What the *Traer* opinion actually says is: "After his adjudication as a bankrupt **and surrender of his property to be administered in bankruptcy**, [the debtor] was just as much at liberty to purchase, if he had the means, any of the property so surrendered as any other person." *Id.* at 541 (emphasis added). The case does not say anything about buying property after it has already been sold to a third party or about motions to redeem, nor did the debtor make any argument about any logical extension of this holding to the present case. Simply saying that something follows from one proposition does not make it so. The court, therefore, finds this argument to be frivolous.

Additionally, the debtor argued that he did not have to turn the motorcycle over to the trustee until the trustee tendered the $1,000.00 exemption to the debtor. There is nothing in the bankruptcy code that permits a chapter 7 debtor unilaterally to retain property of the estate in this fashion. To the contrary, the code requires a debtor to cooperate with the trustee in the administration of the bankruptcy estate, not to dictate the terms under which the debtor will do so. Ironically, the *Traer* opinion cited by the debtor assumes that the trustee can require the debtor to surrender the property, after which time the debtor may participate in a sale if he has the means to do so.

(6) even after losing the motion to redeem, the debtor still did not turn the motorcycle over to the trustee.

(7) the debtor did not deliver the motorcycle to the trustee's designee until the trustee requested that the debtor be held in contempt.

(8) the debtor filed a motion to vacate the trustee's notice of sale to Mr. Abrams without citing any facts or authority for doing so. The debtor argues that the trustee did not oppose the motion and so it must follow that the motion had merit. Decisions are not, however, made based on the number of parties who join in a motion. While courts do consider opposition or the lack thereof, a motion must still state a legal and factual basis to be granted.

(9) the debtor and his counsel failed to file a required hearing brief without cause, thus putting Mr. Abrams at a disadvantage as well as unnecessarily prolonging the hearing.

(10) the debtor's counsel filed a post-hearing brief without requesting or receiving permission for the filing and did so after the court specifically told the parties that it was taking the motion under advisement. In so doing, the debtor deprived Mr. Abrams of any opportunity to rebut the arguments during the already-concluded hearing.

In contrast to what *did* happen here, it is instructive to consider what should have happened. Since the debtor did not timely offer to purchase the motorcycle from the estate and did not timely object to the Abrams sale, he should have delivered the motorcycle (or made it available) to the trustee's designee in January 2004. That should have concluded this routine issue. Instead, the court was forced to hold five hearings over the next nine months, causing additional expense to Abrams and burdening the court's already-crowded docket.

The vast majority of debtors are honest people in genuine need of financial relief who take whatever relief the system offers them, and no more. In contrast, behavior of the sort seen in this case causes people to question the bankruptcy system, believing that debtors and their

attorneys play games to frustrate creditors and emerge from bankruptcy with assets to which they are not entitled. Indeed, the debtor's actions here might well have caused Mr. Abrams to throw up his hands and withdraw his bid. This would have left the debtor as the only party interested in buying his motorcycle from the estate, exactly the position to which he tardily aspired. The court will not tolerate this kind of game-playing in general or in the administration of this particular estate.

The debtor and his counsel conducted these proceedings in bad faith with the intent to interfere with and derail the trustee's sale of the motorcycle. A variety of sanctions are available under §105 to redress this situation. *See Chambers,* 501 U.S. at 43-44 (listing a number of judicial acts that are within a court's inherent authority). They include both the assessment of fees and reprimand. *See First Bank of Marietta v. Hartford Underwriters Ins. Co.,* 307 F.3d 501, 521 (affirming the district court's imposition of attorney fees and costs); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1999 (9th Cir. 1999) (noting that formal reprimand is an available sanction). Sanctions must be imposed with restraint and discretion. *See Chambers*, 501 U.S. at 44-45. The court finds that the appropriate sanction is to reprimand both the debtor Joseph Danczak and his counsel Alexander Jurczenko through this opinion.

28 U.S.C. § 1927

Mr. Abrams also requests sanctions under § 1927 which provides that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C.A. § 1927. There is a split of authority over whether bankruptcy courts have power to act under this section. It is not necessary to resolve this question because the court has awarded sanctions under bankruptcy code § 105(a).

CONCLUSION

For the reasons stated, the motion is granted under 11 U.S.C. § 105(a). The court sanctions the debtor Joseph Danczak and his counsel Alexander Jurczenko for their conduct in this case through a reprimand. A separate order will be entered reflecting this decision.

Date: 19 Nov 2007

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Julie Rabin, Esq.
Lawrence Rich, Esq.
Alexander Jurczenko, Esq.

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In re:	)	Case No. 03-12736
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JOSEPH E. DANCZAK,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion issued this same date, Ian Abrams's motion for sanctions is granted under 11 U.S.C. § 105(a). (Docket 65). The debtor Joseph Danczak and his counsel Alexander Jurczenko are reprimanded for their conduct in this case.

IT IS SO ORDERED.

Date: 19 Nov 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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Julie Rabin, Esq.
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