

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:) Case No. 04-21670
)
MARJORIE J. JUSCZAK,) Chapter 13
)
Debtor.) Judge Arthur I. Harris

ORDER TO APPEAR AND SHOW CAUSE

On September 13, 2004, the debtor, Marjorie J. Jusczak, filed a petition under Chapter 13 of the Bankruptcy Code. On November 5, 2004, Jusczak filed a motion for voluntary dismissal of her Chapter 13 case pursuant to 11 U.S.C. § 1307(b) (Docket #44). On November 9, 2004, this Court granted Jusczak's motion for voluntary dismissal, which resulted in the imposition of a 180-day filing bar pursuant to 11 U.S.C. § 109(g)(2) (Docket #47). The Court also retained jurisdiction "to consider sanctions that have been or may be requested by a party in interest or that the Court may seek to impose on its own initiative."¹ *Id.*

For the reasons that follow, the debtor and debtor's counsel are ordered to appear at an evidentiary hearing at 9:00 A.M. on December 14, 2004, in Courtroom 3102, 127 Public Square, Cleveland, Ohio, and show cause why they should not be

¹ On November 19, 2004, the debtor filed a notice of appeal of the order dismissing her case and retaining jurisdiction for possible sanctions (Docket #55). On November 22, 2004, the debtor filed a motion for disqualification and recusal of the undersigned judge (Docket #57) and a motion for a stay pending appeal under Bankruptcy Rule 8005 (Docket #58). The Court has denied both motions under separate orders.

sanctioned for their conduct in filing this petition in bad faith and in contravention of Bankruptcy Rule 9011. Debtor's counsel shall also appear and show cause why he should not be sanctioned under 28 U.S.C. § 1927.

DISCUSSION

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)). The Court's jurisdiction to impose sanctions 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 reverts 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.”), quoting *In re Lawson*, 156 B.R. 43, 45 (B.A.P. 9th Cir. 1993). See also *In re Donohoo*, 243 B.R. 536 (Bankr. M.D. Fla. 1999); *Skaggs v. Fifth Third Bank of N. Ky. (In re Skaggs)*, 183 B.R. 129, 130-31 (Bankr. E.D. Ky. 1995) (“intentional wrongful conduct should not be excused merely because the underlying bankruptcy case has been dismissed”).

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. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). The sanction levied must thus be commensurate with the egregiousness of the conduct.” *In re Downs*, 103 F.3d at 478. 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 additional sanctions warranted under either the Court’s inherent authority or specific provisions such as Bankruptcy Rule 9011, 28 U.S.C. § 1927, or 11 U.S.C. § 105.

Rule 9011

Rule 9011 of the Federal Rules of Bankruptcy Procedure was amended in 1997 to conform to the 1993 changes to the Federal Rules of Civil Procedure. Rule 9011 provides in pertinent part:

(b) *Representations to the court.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) *Sanctions.* . . .

(1) *How Initiated.*

(A) *By Motion.* . . .

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

28 U.S.C. § 1927

Section 1927 of Title 28, United States Code, provides:

Counsel's liability for excessive costs

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.

11 U.S.C. § 105

Section 105 of the Bankruptcy Code provides in pertinent part:

Power of court.

(a) The 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.

*Specific Conduct That Appears to Violate Rule 9011(b)
or Otherwise Merit Sanctions*

The specific conduct that appears to merit sanctions is the filing of this petition in bad faith and in violation of Rule 9011(b). The Court bases this supposition on the record in this case and in the debtor's previous Chapter 13 case, Case #03-20584.

Case #03-20584 was filed on Saturday, August 9, 2003, just before a sheriff sale set for August 11, 2003 (Docket #8 in Case #04-21670 at exhibit B-2). On October 23, 2003, the same day of a scheduled evidentiary hearing on creditor

Charter One Bank's motion for contempt and sanctions, the debtor filed a motion for voluntary dismissal under 11 U.S.C. § 1307(b) (Docket #66). On February 25, 2004, the Court granted Charter One's motion and imposed monetary sanctions against the debtor in the amount of \$6,000 (Docket #86 & #87). Conduct found to be sanctionable included the debtor's failure to comply with a discovery order that she make her residence available for interior and exterior inspection (Docket #86). Although the debtor and debtor's current counsel filed a notice of appeal of the sanctions order, no filing fee was timely paid. In addition, debtor's counsel apparently misrepresented to the district court hearing the appeal that the filing fee had been paid (Docket #12 in District Court Case No. 1:04CV659). In an Order dated July 20, 2004, the District Court dismissed the appeal based upon the debtor's "negligence" and "extreme indifference" in prosecuting her appeal, including the nonpayment of the filing fee. *Id.*

This second Chapter 13 case was filed on September 13, 2004, the same day as a scheduled sheriff sale of the debtor's residence. *See* docket of *Charter One Bank v. Jurczenko*, No. CV-99-379904, (Common Pleas Ct. Cuyahoga County) available at <http://www.cuyahoga.oh.us/common/>. According to the debtor's plan (Docket #14) and oral representations of debtor's counsel, the debtor was not proposing to pay any prepetition arrearages on the debtor's first or second

mortgages until the property was sold through a realtor. Yet there is no indication that the debtor has made any significant effort to market her residence for a private sale at any time either before or after the filing of this Chapter 13 case.

Rather, the conduct of the debtor and the debtor's current counsel in the two bankruptcy cases appears to be marked by delay, bad faith, and an abuse of the bankruptcy process. In fact, this Court has already cautioned debtor's counsel that arguably comparable conduct was recently determined to constitute criminal bankruptcy fraud under 18 U.S.C. § 152. *See United States v. Wagner*, 382 F.3d 598 (6th Cir. 2004) (affirming debtor's criminal conviction for concealment of assets where debtor changed locks and prevented trustee from showing interior of house to prospective buyer).

Range of Potential Sanctions

Among the sanctions that the Court is considering are:

- an order that debtor and debtor's counsel be jointly and severally liable for reasonable attorneys' fees and other costs reasonably incurred by creditors as a result of filing this case, including costs incurred preparing for the sheriff sale of September 13, 2004, cancelled by the debtor's bankruptcy filing the same morning
- an order that debtor's counsel satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of his conduct in filing this

bankruptcy case

- in rem relief, *i.e.*, modification of the automatic stay as it relates to the real property located at 1730 County Line Road, Gates Mills, Ohio, so that in any future bankruptcy filing by any party, the automatic stay of Section 362(a) will not apply to the property described above unless and until a party in interest moves to apply the stay and demonstrates that the interests of all secured creditors in the property will be adequately protected
- referral of debtor's counsel to relevant disciplinary authority such as the Office of Disciplinary Counsel of the Supreme Court of Ohio or the Committee on Complaints and Policy Compliance of the United States District Court for the Northern District of Ohio.

The Court is aware that these potential sanctions may overlap to some extent with the sanctions already being sought by Charter One. In addition, the Court acknowledges that it cannot impose monetary sanctions on its own initiative against debtor or debtor's counsel under Rule 9011. *See* Bankruptcy Rule 9011(c)(2)(B). Nevertheless, nothing in Rule 9011 prevents the Court from imposing monetary or other sanctions under separate authority, specifically this Court's inherent authority. *See, e.g., In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995) (“The fact that rules such as Rule 11 and Bankruptcy Rule 9011 have been promulgated by Congress does not displace a court's inherent power to impose sanctions for a parties' bad faith conduct.”).

CONCLUSION

For the foregoing reasons, the debtor and debtor's counsel are ordered to appear at an evidentiary hearing at 9:00 A.M. on December 14, 2004, in Courtroom 3102, 127 Public Square, Cleveland, Ohio, and show cause why they should not be sanctioned for their conduct in filing this petition in bad faith and in contravention of Bankruptcy Rule 9011. Debtor's counsel shall also appear and show cause why he should not be sanctioned under 28 U.S.C. § 1927.

IT IS SO ORDERED.

/s/ Arthur I. Harris 11/24/2004
Arthur I. Harris
United States Bankruptcy Judge