

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

In re: ) Case No. 02-24124  
)  
ROSE FORD, ) Chapter 13  
)  
Debtor. ) Judge Arthur I. Harris

MEMORANDUM OF OPINION

On January 21, 2005, the Court issued an order (Docket #46) requiring that debtor and debtor's counsel appear and show cause why they should not be sanctioned for failing to disclose in the debtor's schedules and statement of affairs: (1) the debtor's ownership interest in real property located at 1063 Elbon Road, (2) the secured interest of creditor National City Bank in the same property, and (3) a foreclosure action involving the same property pending in state court. On February 23, 2005, the Court heard testimony from debtor and debtor's daughter and argument from debtor's counsel in response to the order to show cause. For the reasons that follow, the Court declines to impose any sanctions against the debtor or debtor's counsel, and the order to appear and show cause (Docket #46) is concluded.

BACKGROUND

The debtor Rose Ford filed this Chapter 13 case through her attorney, Alexander Jurczenko, on December 11, 2002. The Court granted the debtor two

extensions of time to file her plan, schedules, and statement of affairs; however, the debtor did not file her plan, schedules, and statement of affairs until February 13, 2003, the same day that the debtor was to appear in response to an order to show cause why the case should not be dismissed.

In the schedules and statement of affairs, filed under penalty of perjury, the debtor did not disclose: (1) the debtor's ownership interest in real property located at 1063 Elbon Road, (2) the secured interest of creditor National City Bank in the same property, and (3) a foreclosure action involving the same property pending in state court.

National City Home Loan Services, Inc., fka Altegra, however, filed a proof of claim on March 31, 2003, and included documentation of a note and mortgage with respect 1063 Elbon Road. The note and mortgage were signed by Mary L. Ford and Rose L. Ford on November 9, 1998, and recorded with the Cuyahoga County Recorder on November 16, 1998. The mortgage was also signed by Horace Ford as spouse of Rose Ford. Rose Ford's Chapter 13 plan does not mention or otherwise provide for the treatment of Altegra's secured claim. There is nothing in the record to show that Altegra was ever served with a copy of the debtor's Chapter 13 plan or the notice of meeting of creditors, *see* Docket #14 (certificate of service of 341 notices). The plan was confirmed on November 17,

2003 (Docket #31).

On January 17, 2003, attorney Alexander Jurczenko filed a Chapter 13 petition, Case #03-10690, on behalf of Rose Ford's daughter, Mary L. Ford. Mary Ford's petition lists her address as 1063 Elbon Road, in Cleveland Heights, Ohio. After the Court granted Mary Ford an extension of time until February 18, 2003, to file her plan, schedules, and statements (Case #03-10690, Docket #5), Mary Ford filed her plan, schedules, and statements on February 19, 2003 (Case #03-10690, Docket #7). In Schedule A, Mary Ford indicates that she holds a 1/2 interest in the property located at 1063 Elbon Road with Rose Ford. In Schedule D, Mary Ford includes the mortgage of Altegra with respect to 1063 Elbon Road, and in Schedule H she lists Rose Ford as a codebtor on the debt owed to Altegra. In the Statement of Affairs, Mary Ford discloses a pending foreclosure case, *Altegra Credit Company v. Mary L. Ford, et al.*, CV-02-480968. The docket sheet for the state foreclosure case, available at [www.cuyahoga.oh.us](http://www.cuyahoga.oh.us), indicates that Attorney Jurczenko filed a notice of stay of proceedings on February 11, 2003. The same docket also indicates that the state court proceedings were stayed by the state judge on October 29, 2003: "THE COURT HAVING BEEN INFORMED OF A PENDING BANKRUPTCY CASE, BANKRUPTCY CASE NO. 02-24124."

On March 21, 2003, National City filed a motion in the Mary Ford case

seeking relief from stay and relief from the codebtor stay (Case #03-10690, Docket #9). The motion and attachments reflect the 1/2 ownership interest of Rose Ford in the Elbon Road property and indicate an arrearage on the note in excess of \$11,000. On March 27, 2003, attorney Alexander Jurczenko filed a response to the motion for relief from stay in the Mary Ford case (Case #03-10690, Docket #12). His response *admits the allegations* as to the 1/2 ownership interest of Rose Ford in the Elbon Road property. *Id.* at ¶ 11.

As the Court indicated in its order to show cause:

The Court's review of recent bankruptcy cases filed by (1) Rose Ford, the current debtor; (2) Mary Ford, the apparent co-owner with Rose Ford of the Elbon Road property; and (3) Horace Ford, who signed the 1998 mortgage of the Elbon Road property as spouse of Rose Ford, suggests a disturbing pattern of serial filings, lack of prosecution, and noncompliance with bankruptcy laws, rules, and court orders. Although the Court wishes to emphasize that the subject of this show cause order is limited to the conduct of the debtor and debtor's counsel *in the current case*, the record in these related cases provides important context to the specific conduct at issue in the current case.

Docket #46 at 8-9. At the hearing on February 23, 2005, the Court further explained its concern that the failure to schedule Rose Ford's ownership interest and secured obligations in the Elbon Road property may have enabled the debtor to confirm a Chapter 13 plan without giving the notice required by the Bankruptcy Code and Rules and without properly providing for a creditor's secured claim as

required by Subsection 1325(a)(5).

Rose Ford testified at the February 23, 2005, hearing that she signed papers regarding the property located at 1063 Elbon Road solely to enable her daughter to purchase the property, and she disclaimed any ownership interest in the property itself. She also disclaimed any personal obligation to pay under the note that she co-signed with her daughter for the purchase of this property, and further denied being a party to any state foreclosure proceeding involving this property. Although the note and mortgage show that Rose Ford is mistaken in her belief, the Court finds that Rose Ford believed in February, 2003, that she had no interest or obligations with respect to the Elbon Road property where her daughter still resides. It further appears that Rose Ford's attorney has made little or no effort to inform his client as to her true interests and obligations with respect to this property.

#### DISCUSSION

The Court has jurisdiction 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)(A) and (O). *See In re Desilets*, 247 B.R. 660, 663 (Bankr. W.D. Mich. 2000) (holding that possible attorney suspension for unauthorized practice of law

with potential of fee disgorgement would “affect the estate or debtor” and was core proceeding), *aff'd*, 255 B.R. 294 (W.D. Mich. 2000), *rev'd on other grounds*, 291 F.3d 925 (6th Cir. 2002); *cf. In re Sheridan*, 362 F.3d 96, 111-12 (1st Cir. 2004) (deeming non-core an omnibus disciplinary proceeding against attorney for conduct in multiple bankruptcy proceedings over a considerable period of time, and distinguishing circumstances from those in *In re Desilets*). This memorandum constitutes the Court's findings of fact and conclusions of law to the extent that Rule 7052 of the Federal Rules of Bankruptcy Procedure may be applicable. *Cf. FED. R. BANKR. P. 9020* (“Rule 9014 governs a motion for an order of contempt.”); Advisory Committee Note to 2001 amendment of Rule 9020 (“This rule, as amended, does not address a contempt proceeding initiated by the court *sua sponte*.”).

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 French Bourekas, Inc.*, 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)). 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.

### *Rule 9011*

Rule 9011 of the Federal Rules of Bankruptcy Procedure was amended in 1997 to conform to the 1993 changes to Rule 11 of 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.



During the proceedings on February 23, 2005, the Court indicated it would conclude the matter with respect to Rose Ford and not impose any sanctions, other than the possibility of estopping Rose Ford from asserting that her bankruptcy effects any stay with respect to the property located at 1063 Elbon Road. *See generally Maine v. New Hampshire*, 532 U.S. 742, 749-50 (2001) (discussing doctrine of judicial estoppel); *Eubanks v. CBSK Financial Group, Inc.*, 385 F.3d 894, 897-99 (6th Cir. 2004) (same). Given the separate order entered this date dismissing Rose Ford's Chapter 13 case under 11 U.S.C. § 1307(c) for lack of funding, the Court finds it unnecessary to address the issue of estoppel at this time. Should Rose Ford file a new petition or a motion to reinstate this case and assert that her bankruptcy effects a stay with respect to the property located at 1063 Elbon Road, the Court may revisit the issue of estoppel.

During the proceedings on February 23, 2005, the Court also concluded the order to show cause as to any sanctions against debtor's counsel, with the exception of possible sanctions under Rule 9011 for failure to reasonably investigate the debtor's ownership interest and obligations regarding the Elbon Road property.

Rule 9011 places an affirmative duty on attorneys and litigants to make a

reasonable inquiry, under the circumstances, of the facts and the law before signing any petition, pleading, motion, or other paper. *See Tahfs v. Proctor*, 316 F.3d 584, 593-94 (6th Cir. 2003) (describing standard for sanctions under Rule 11 of the Federal Rules of Civil Procedure).

Rule 11 sanctions are appropriate when the district court determines that an attorney's conduct is not "reasonable under the circumstances." A good faith belief in the merits of a case is insufficient to avoid sanctions.

*Id.* at 594 (citations omitted). The inquiry standard is an objective one of reasonableness under the circumstances. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 548 (1991) (noting that Rule 11 was amended to replace subjective standard with objective standard).

The current version of Rule 9011, which incorporates the 1993 revisions to Rule 11, requires that an attorney conduct an inquiry reasonable under the circumstances into whether factual contentions have evidentiary support. No longer are attorneys required to certify that their representations are well grounded in fact. Thus, the certification has less to do with whether the facts, themselves, are true. Rather, it has to do with the reasonableness of the inquiry under the circumstances.

Merely talking to the client may not be enough. An attorney may not rely

blindly on assertions made by his client, especially when the story told is implausible. *Compare Lemaster v. United States*, 891 F.2d 115, 119-20 (6th Cir. 1989) (Rule 11 sanctions appropriate when the sham ownership put forth by the plaintiffs was so “inartful and the scheme so transparent” that the attorney could not have believed it and could not believe that the court would accept it), *with Rodick v. City of Schenectady*, 1 F.3d 1341, 1351 (2d Cir. 1993) (reversing Rule 11 sanctions because given time constraints it was reasonable for plaintiff’s attorney to have relied on clients’ affidavits). If documents or witnesses controvert what the client has said, further investigation must be undertaken before filing the paper. *See Insurance Benefit Administrators, Inc. v. Martin*, 871 F.2d 1354, 1357 (7th Cir. 1989) (attorney sanctioned for relying on client’s statements in the face of contrary documentary evidence).

A reasonable inquiry into the facts also includes examination of available relevant documents. *See Medical Emergency Service Associates, S.C. v. Foulke*, 844 F.2d 391, 398-401 (7th Cir. 1988) (imposing sanctions where complaint claimed defendants were employees but attorney failed to review contracts that showed defendants were independent contractors). When documents are difficult to obtain, a reasonable pre-filing inquiry may not necessarily include obtaining and reviewing them. *See William Iselin & Co., Inc. v. Boardwalk Regency Corp.*,

703 F.Supp. 1087, 1090-91 (S.D.N.Y. 1989) (relying on ledger entries instead of actual checks was reasonable because subpoenaing the non-party banks to obtain checks would take some time). On the other hand, where electronic databases are readily available, a search of bankruptcy or other legal databases may be appropriate. For example, in the Northern District of Ohio, counsel can easily search the bankruptcy court's electronic docket over the Internet either by debtor's name or social security number to check for other bankruptcy cases that their clients may have filed in the past but failed to disclose. Similarly, anyone with Internet access can search the electronic docket for the Cuyahoga County Court of Common Pleas for cases in which a client may have been or is currently a party. *Cf. Jones v. International Riding Helmets, Ltd.*, 145 F.R.D. 120, 124 (N.D. Ga. 1992) (attorney sanctioned for not having checked company's certificate of incorporation, which would have disclosed that company was not in existence at time allegedly defective helmet was manufactured), *aff'd*, 49 F.3d 692 (11th Cir. 1995).

In the present case, debtor's counsel concedes that in February, 2005, the circumstances would warrant more investigation than was done when he signed and filed the schedules and statement of affairs in this case back in February, 2003. Debtor's counsel also concedes that it is a fair question whether, in February, 2003,

a reasonable investigation under Rule 9011 would have required more than just reliance on the representations of an unsophisticated client. Nevertheless, under the totality of circumstances, including the dismissal of this Chapter 13 case on separate grounds, the Court is satisfied that no sanctions are warranted under Rule 9011, regardless whether debtor's counsel violated Rule 9011 by not conducting a reasonable inquiry under the circumstances back in February, 2003. In addition, given the separate order entered this date dismissing Rose Ford's Chapter 13 case under 11 U.S.C. § 1307(c) for lack of funding, the Court finds it unnecessary to address the issue of estoppel. Should Rose Ford file a new petition or a motion to reinstate this case and assert that her bankruptcy effects a stay with respect to the property located at 1063 Elbon Road, the Court may revisit the issue.

#### CONCLUSION

For the foregoing reasons, the Court declines to impose any sanctions on the debtor or debtor's counsel, and the order to appear and show cause (Docket #46) is concluded.

IT IS SO ORDERED.

/s/ Arthur I. Harris      03/02/2005  
Arthur I. Harris  
United States Bankruptcy Judge