

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 04-11537
)
BARRY RICE,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The debtor Barry Rice moves for sanctions under bankruptcy rule 9011 against creditor ABN AMRO Mortgage Group, which holds a note secured by a mortgage on the debtor’s house. As grounds, the debtor alleges that ABNO AMRO has a pattern of filing frivolous motions to harass the debtor, including two motions for relief from stay, a motion for abandonment, and an amended motion for abandonment each of which falsely stated either that (1) the debtor had failed to make required payments; (2) the market value of the debtor’s property was significantly less than it actually was; and/or (3) the principle balance owed to ABN AMRO was higher than it really was. The rule 9011 motion is aimed specifically at the motion for abandonment. ABN AMRO responds that the debtor’s motion fails to comply with rule 9011 because debtor’s counsel did not sign the motion and also argues that it made reasonable inquiries before filing the challenged documents. At hearing, ABN AMRO dropped the second defense. As discussed below, the court finds that ABN AMRO and its attorneys violated rule 9011(b)(3) through multiple filings containing materially untrue statements, but that sanctions cannot be awarded and the motion must be denied on procedural grounds.

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)(A).

FACTS

I.

The court held an evidentiary hearing on September 9, 2005. The debtor testified on his own behalf and introduced exhibits into evidence. ABN AMRO presented its case through cross-examination of the debtor and documents. Having observed the debtor throughout the examinations, the court finds his testimony is consistent with the documents presented and is otherwise credible. *See* FED. R. BANKR. P. 9014(c) (incorporating FED. R. BANKR. P. 7052).

II.

Barry and Andrea Rice own a house at 311 Country Lane, Richmond Heights, Ohio. ABN AMRO holds a note secured by a mortgage on this property. When the Rices fell behind in payments, Barry Rice, individually, filed a chapter 7 case on February 11, 2004.

The legal brouhaha with ABN AMRO began almost immediately. On February 13, 2004, ABN AMRO moved for relief from stay and abandonment.¹ The debtor opposed it on the ground that he had already negotiated a forbearance agreement with ABN AMRO, the main terms of which ABN AMRO's representative confirmed to him in writing.² The court set the motion for

¹ Case no. 04-11537, docket 3. The motion is signed by Edward Boll of Lerner, Sampson & Rothfuss.

² Debtor's exh. 19.

an evidentiary hearing when the parties could not resolve the issue. ABN AMRO withdrew its motion at the hearing.³

When the parties still could not reach an agreement, the debtor filed a chapter 13 case to try to save his house. Since that June 21, 2004 filing,⁴ he has made each required payment to the chapter 13 trustee and each required payment outside the plan to ABN AMRO. Despite this, ABN AMRO took several actions which are the heart of this dispute.

On July 22, 2004, counsel to ABN AMRO sent a letter to the debtor returning his regular monthly mortgage payment on the ground that it “was insufficient to reinstate [his] mortgage account.”⁵ ABN AMRO should have accepted the payment under the terms of the debtor’s proposed chapter 13 plan. On August 31, 2004, ABN AMRO filed a motion for relief from stay against the debtor and a motion for relief from co-debtor stay against Andrea Rice.⁶ Both motions represent that the property at issue is valued at \$265,000.00 and the debtor has no equity in it. They further state that the debtor “has failed to provide adequate protection for the lien held by [ABN AMRO because] . . . Debtor has failed to make periodic payments to [ABN AMRO] since the commencement of this bankruptcy case, which unpaid payments are in the aggregate amount of \$8,481.18, which consists of 3 payments at \$2,760.70 each from July 2004 through September 2004, together with 2 late charges at \$99.54 each from July 2004 through August

³ Case no. 04-11537, docket entry 6/2/04; docket 28.

⁴ Case no. 04-17881.

⁵ Debtor’s exh. 5. The letter is signed by Kelemework Yifru of Lerner, Sampson & Rothfuss.

⁶ Case no. 04-17881, docket 15, 18. The motions are signed by Jon Lieberman of Lerner, Sampson & Rothfuss.

2004.” In truth, the debtor had made each payment and ABN AMRO had sent each one back. Again, ABN AMRO ultimately withdrew both motions.⁷

The dispute then returned to the chapter 7 forum. On March 23, 2005, the court granted the debtor’s motion to reopen his chapter 7 case to deal with an issue with a different creditor. On March 25, 2005, ABN AMRO filed a motion in the chapter 7 to abandon the property.⁸ The motion represents that:

1. The debtor is in default for July 2004 and all subsequent months.

The court finds that this is not a true statement. The debtor had tendered each payment for that time period.

2. The approximate loan balance due and owing is \$277,174.78 plus interest.

The court finds that this is not a true statement. The approximate loan balance is \$256,000.00.

3. The fair market value of the property as listed by the Cuyahoga County Auditor is \$204,600.00.

The court finds that this is not a true statement. The auditor’s tax value was \$265,000.00. Moreover, the fair market value, defined as the amount for which the debtor could actually sell his house on the open market, was closer to \$300,000.00.⁹

4. The debtor has no equity in the property, movant lacks adequate protection, and the property has no value to the debtor’s estate.

⁷ Case no. 04-17881, docket 27, 28.

⁸ Case no. 04-11537, docket 58. The motion is signed by Edward Boll.

⁹ Debtor’s direct testimony.

The court finds that this is not a true statement. The movant had received adequate protection in the form of the monthly payments and the debtor did have equity in the property.

On April 8, 2005, the debtor sent ABN AMRO a demand under bankruptcy rule 9011 that ABN AMRO withdraw the motion to abandon. ABN AMRO responded on April 15, 2005 with an amended motion in which it repeated that the debtor had failed to make any payments from July 2004 forward and that the debtor lacked equity in the property, but corrected the misstatement about the property's tax value.¹⁰

The court set the dispute for hearing. On April 20, 2005, the day before the hearing, ABN AMRO withdrew the motion.¹¹

III.

In addition, on three occasions after the debtor filed for bankruptcy protection, ABN AMRO sent men to the debtor's house. The men would not identify themselves other than to say that the mortgage company sent them and they told the debtor and his wife that they needed to call the mortgage company. ABN AMRO has also reported to credit agencies that the debtor is consistently one month behind in making his payments, which is not true. This prevented Andrea Rice from buying a car. All of this has put a strain on the debtor's marriage. The debtor has been assuring his wife that he has been making his payments to both ABN AMRO and the chapter 13 trustee and yet she keeps receiving motions and other communications alleging that payments have not been made. The debtor has had his wife talk to his attorney to try to convince

¹⁰ Case no. 04-11537, docket 76. The amended motion is signed by Edward Boll.

¹¹ Case no. 04-11537, docket 81.

her that he is telling her the truth. After the latest problems, the debtor's wife has concluded that he is lying to her and she is divorcing him.

THE POSITIONS OF THE PARTIES

The debtor moves for sanctions under federal bankruptcy rule 9011(b)(1),(2), and/or (3). He argues that ABN AMRO filed the motion to abandon without a factual basis and did so to harass the debtor and to increase the debtor's costs, as seen by the pattern of filing frivolous motions. ABN AMRO's defense is two-pronged. First, it contends that the motion should be denied because the motion as filed is missing the last page and a signature by debtor's counsel. Second, ABN AMRO claims that it complied with the safe harbor provision of rule 9011 when it withdrew the March 25, 2005 motion to abandon in the chapter 7 case and filed an amended motion. The amended motion, it argues, is accurate because in a chapter 7 a creditor can move for relief from stay based on lack of equity. This property, it continues, lacked equity and, therefore, the statements were not false. ABN AMRO had also argued in its brief that it made a reasonable inquiry before it filed each motion. Because it did not present any evidence on this point, the court considers it waived.¹²

¹² ABN AMRO took two other positions in its response to the sanctions motion that it did not pursue at the hearing. First, that it filed the August 31, 2004 motion for relief from stay and relief from co-debtor stay because the "Debtors had defaulted pursuant to their Chapter 13 plan obligations." (Response at 2). This is not factually true. Second, that it filed the March 25, 2005 motion to abandon because the re-opening of the chapter 7 case reimposed the § 362 automatic stay in the chapter 7 and it wanted to move forward with a foreclosure action. (Response at 3). The notion that the automatic stay is reimposed under these circumstances is a dubious legal proposition for which ABN AMRO cited no authority. Moreover, the debtor had a pending chapter 13 in which he was current in all payments and thus was entitled to the stay protection.

DISCUSSION

Every attorney who files a motion is certifying to the court that the motion is filed for a proper purpose and that it is filed only after an inquiry that is reasonable under the circumstances. FED. R. BANKR. P. 9011; *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997). An attorney who violates these principles is potentially liable for sanctions. In this case, the debtor seeks sanctions under bankruptcy rule 9011(b)(1), (2), and (3). Those sections provide:

(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 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; [and]

(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[.]

* * *

The rule also sets out procedures that an injured party must follow before seeking sanctions:

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(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, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(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.

In this case, ABN AMRO violated rule 9011(b)(3) multiple times by filing motions that did not have evidentiary support. The court's ability to impose sanctions on ABN AMRO and/or its attorneys for such conduct is, however, limited by the rule's procedures. The Sixth Circuit interprets rule 9011 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 has the same language as bankruptcy rule 9011). The debtor made his demand to withdraw the motion to abandon on April 8, 2005, which gave ABN AMRO an action deadline of April 29, 2005. Before that date, ABN AMRO had withdrawn the motion and the amended motion as seen by the fact that the April 21 hearing on the amended motion did not go forward. The debtor may

not, therefore, recover sanctions under rule 9011. As that rule is the only basis raised for the motion, it must be denied.¹³

CONCLUSION

For the reasons stated, the debtor's motion for sanctions under rule 9011 is denied. A separate order will be entered reflecting this decision.

Date: 14 September 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Court

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¹³ The court notes that this not the analysis put forward by ABN AMRO. Instead, ABN AMRO argues that the motion should be denied because the motion does not have a last page or a signature, which itself violates rule 9011. It does not cite any authority that a movant's failure to sign a rule 9011 motion is a defense to the motion. The relevant consideration is whether ABN AMRO had adequate notice of the motion, given that the motion as filed lacks the last page. The court finds that the debtor has been making the same argument for months that he made at the hearing; i.e., that ABN AMRO filed its four motions without a factual basis. ABN AMRO, therefore, had ample notice of the grounds on which the debtor went forward at the hearing. Additionally, ABN AMRO defended its actions by arguing that it had the right to file the motion to abandon because a lack of equity is a legitimate ground for filing such a motion in a chapter 7. A creditor does have such a right, but the error here is that ABN AMRO did not have any **factual** grounds for filing the motion.

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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 debtor's motion for the imposition of sanctions against ABN AMRO Mortgage Group under bankruptcy rule 9011 is denied. (Docket 85).

IT IS SO ORDERED.

Date: 14 September 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Court

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