

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

)	CHAPTER 13
)	
IN RE:)	
)	CASE NO. 04-66188
JON D. AMOS,)	
TARA L. AMOS,)	JUDGE RUSS KENDIG
)	
Debtors.)	
)	MEMORANDUM OPINION

This matter comes before the court upon an amended motion to disgorge fees, request for special report, and request for sanctions filed by Chapter 13 trustee Toby Rosen (hereinafter "Trustee") on February 28, 2005. Attorney Deborah Mack (hereinafter "Attorney Mack") filed her response on May 17, 2005.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334, 157, and the general order of reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2). Venue in this district and division is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTS & PARTIES' ARGUMENTS

Jon and Tara Amos (hereinafter "Debtors") filed their chapter 13 petition on November 18, 2004. Attorney Mack filed a disclosure of compensation of attorney for debtor with this petition, stating that she agreed to provide legal services in connection with this bankruptcy case for \$1,750. Both the petition and plan were electronically signed by Attorney Mack and Debtors. On the same date, Debtors filed their chapter 13 plan and confirmation review summary. After the Trustee objected to Debtors' first plan, an amended plan was filed on January 20, 2005. The amended plan contained the electronic signatures of Debtors and Attorney Mack. Amended Schedules I, J, and Statement of Financial Affairs were filed January 20, 2005, and were electronically signed by Debtors and Attorney Mack. Trustee also objected to the amended plan because of disposable income issues. Trustee filed her motion to disgorge fees on February 24, 2005. Debtors filed a motion to dismiss their case on February 28, 2005. Trustee filed an amended motion to disgorge and request for special report on February 28, 2005, to correct the

service date.

The motion to disgorge asks the court to expunge all amounts paid to Attorney Mack in relation to this chapter 13 case and seeks an additional sanction because Debtors failed to review, sign, and approve documents and plans. Furthermore, Trustee requests that Attorney Mack prepare a report of any other such violations. A hearing was held on March 24, 2005, on the motion. According to Trustee, Tara Amos placed a call to Trustee's office, objecting to the increase in payments of an amended plan and indicating that she had not signed the amended plan that was filed by Attorney Mack. Trustee states that when she requested signed copies of the amended plan, bankruptcy petition, and original plan, Attorney Mack failed to provide them and instead moved to dismiss the case.

Attorney Mack admits that she did not have Debtors sign the amended plan. Transcript of March Hearing at 7, In re Amos, No. 04-66188 (Bankr. N.D. Ohio 2004). She states that Jon Amos agreed to the amended plan, but that she had difficulty obtaining Tara Amos' consent and information concerning other costs. Id. at 8-9. Further, she states that she has already disgorged the attorneys' fees she received in connection with this case. Id. at 9. Attorney Mack asserts that though she cannot locate the originals Debtors signed, Debtors have now signed the petition and the original plan, but that the documents are dated March 2005, since she could not locate the originals. Id. at 9-10.

At the March 23, 2005 hearing, the court instructed Trustee to submit proposed findings of facts and conclusions of law and allowed time for Attorney Mack to object to these findings. Trustee filed her proposed findings of fact and conclusions of law on April 22, 2005. On May 17, 2005, Attorney Mack filed an objection to Trustee's findings of facts and conclusions of law. Trustee filed a notice of filing of documentation in support of her proposed findings of fact and conclusions of law on May 19, 2005, stating that Debtors signed the voluntary petition, declaration, statement of financial affairs, notice regarding consumer debt, and amended plan on March 9, 2005, and that Debtors signed the electronic filing declaration on November 1, 2005.

Trustee argues that the signature irregularities in this case violate General Order 03-1, which requires that Debtors physically sign all pleadings filed with the court on any document that requires Debtors' signature. Transcript of March Hearing at 3, In re Amos, No. 04-661488 (Bankr. N.D. Ohio 2004). Further, that the ECF Administrative Procedures Manual instructs counsel to have Debtors sign any required documents before electronically signing them, and requires counsel to maintain the original document for one year after the close of the case. Id. at 4. Trustee is most concerned with the failure of Attorney Mack to obtain consent from Debtors for the amended plan. Id. at 5-6.

Attorney Mack states that Debtors verbally verified information contained in amended Schedule J and that Jon Amos approved the increase in payments since he thought Attorney Mack had already filed the amended plan. Brief of Deborah Mack at 2, In re Amos, No. 04-661488 (Bankr. N.D. Ohio 2004). However, Attorney Mack admits that Jon Amos learned that

the payments would increase only after he thought she filed the amended plan. Id. Attorney Mack believed that she did not need Debtors' signatures on the amended schedules, statement of financial affairs, or the amended plan since Debtors signed the original petition. Id. She argues that Bankr. R. 1008 does not specify that verification be in writing and that Rule 9011 only requires the attorney's signature. Id. at 5. Further, she states that Debtors' signature was not required on the amended petition because the bankruptcy rules and code are devoid of any mention of this requirement. Id. at 9. Attorney Mack argues that, based on her office staff's conversation with Jon Amos, she had consent to file the amended plan and schedules. Id. at 10. Finally, Attorney Mack argues that any misunderstanding of the rules on her part constituted harmless error in this case. Id. at 21.

At a December 15, 2005 status conference, Trustee and Attorney Mack clarified the issues in this case. Trustee stated that she no longer wished to pursue the special report portion of this motion. Further, she stated that, due to the fact that Attorney Mack returned the attorney's fees to Debtors in this case, Trustee is only seeking sanctions for signature irregularities, primarily due to the fact that Debtors did not sign or consent to the amended chapter 13 plan.

DISCUSSION

I. Application of Rule 9011

Rule 9011(b)(3) states that, by filing documents with the court, an attorney is certifying that, to the best of his or her knowledge "the allegations and other factual contentions have evidentiary support." Fed. R. Bankr. P. 9011(b)(3). While it is likely that Attorney Mack violated this rule by filing the amended plan without Debtors' signatures, the Trustee did not take the proper procedural steps for the imposition of Rule 9011 sanctions. The motion for sanctions must be made separately, specifically describe the offending conduct, and be served formally in accordance with Rule 7004. Fed. R. Bankr. P. 9011(c)(1)(A). The motion may not be filed with the court unless the offending paper is not withdrawn or corrected within twenty-one days after service of the motion for sanctions. Id. The moving part must prove, by way of evidence at a hearing or other facts in the record, that the requirements of safe harbor were met. If the unambiguous requirements of the statute are not met, the court may not award sanctions pursuant to Rule 9011(c)(1)(A). In re M.A.S. Realty Corp., 326 B.R. 31, 42 (Bankr. D. Mass. 2005).

The Trustee did not provide the court with any evidence that indicates that she complied with the procedural requirements of Rule 9011(c)(1)(A). The motion was filed on February 28, 2005 without documentation supporting compliance with the rule. It does not indicate whether the Trustee served the motion on Attorney Mack and allowed her to remedy the problem.¹ Accordingly, the court may not impose the sanctions sought by the Trustee under this theory.

¹ However, the court notes that motion for dismissal is not the proper way to remedy this particular problem. Attorney Mack should have withdrawn the offending amended plan and re-filed the plan with the appropriate signatures.

Despite such procedural problems, Attorney Mack did not fulfill her obligation to her client or to this court.

II. Signature Irregularities / Consent to File Amended Plan

Rule 5005 allows bankruptcy courts to “permit documents to be filed, signed or verified by electronic means...” Fed. R. Bankr. P. 5005(a)(2). Pursuant to this rule, the Northern District of Ohio bankruptcy courts require documents to be filed through the Electronic Case Filing (hereinafter “ECF”) system. The electronic filing of documents in this district is subject to the court’s CM/ECF Administrative Procedures Manual (hereinafter “APM”), effective October 1, 2002. Electronic Case Filing (ECF) Administrative Procedures Manual – United States Bankruptcy Court N.D. Ohio (2002). Since the court requires attorneys to file documents electronically, attorneys are expected to maintain and produce the originals upon request. General Order 02-02 states that: Federal Rules of Bankruptcy Procedure 5005(a)(2), 9011, 9029 and 9036...authorize this court to establish practices and procedures for filing, signing, maintaining, and verifying pleadings and papers by electronic means. The APM states: “any document requiring the debtor’s signature shall first be signed by the debtor, followed by the electronic submission of a copy of the document with the debtor’s signature indicated as /s/name.” APM at 7. Further, the APM states that “any documents bearing the handwritten signature of the user, or the handwritten signature of any signer on whose behalf the user files such documents, shall be maintained by the user for a period of one year following the closing of the case.” APM at 6. This requirement is necessary to maintain the integrity of the filing process, and assure that the original purpose of the signature requirement (verifying that facts set forth are correct) is maintained. See Briggs v. LaBarge (In re Phillips), 317 B.R. 518, 523 (B.A.P. 8th Cir. 2004).

The chapter 13 form plan used by this court and required by Administrative Order 05-05 specifically delineates a space for “Debtor’s Signature.” Thus, according to the APM, Debtors must first sign the amended plan before it is electronically submitted and Attorney Mack must retain a copy of the amended plan with the handwritten signatures for one year following the closing of the case. Attorney Mack did not comply with these procedures as she “believed...the actual signatures on those documents were unnecessary.” Affidavit of Attorney Mack at 2-3, In re Amos, No. 04-66188 (Bankr. N.D. Ohio 2004). Attorneys are officers of the court and are held to a high standard in terms of being aware of and applying the court’s rules and administrative procedures. Pursuant to 11 U.S.C. § 105, the court can sanction an attorney who fails to comply with its procedural requirements. See Walton v. LaBarge (In re Clark), 223 F.3d 859, 864 (8th Cir. 2000) (bankruptcy court has the inherent authority to impose civil sanctions for abuse of process); In re Stamper, 2005 Bankr. LEXIS 2722 (Bankr. D.S.C. 2005); U.S. v. Boren (In re Lincoln), 2005 Bankr. LEXIS 1152 (N.D. Tex. 2005).²

² Attorney Mack was given clear notice that sanctions were being considered on or before the December hearing, was given an opportunity to orally respond to the contentions at the hearing, and waived the opportunity to present more information in written form. December 15, 2005 Hearing, In re Amos, 04-66188 (Bankr. N.D. Ohio 2004).

The concern in this case is not only with the technical breach of signature procedures, it is also with the substance of the plan and the contention that Debtors were not informed of the increase in payments pursuant to the plan. In this case, it is particularly disconcerting that, even though Debtors claim they gave Attorney Mack “verbal...authority” to file an amended plan, Attorney Mack filed the plan when Debtors “did not believe that the payment with regard to the Chapter 13 Plan would increase.” Affidavit of Tara Amos at 2, In re Amos, No. 04-66188 (Bankr. N.D. Ohio 2004); Affidavit of Jon Amos, In re Amos, No. 04-66188 (Bankr. N.D. Ohio 2004). Because of the facts presented, it is difficult to discern whether Debtors actually consented to the filing of the amended plan. While Debtors state that they gave Attorney Mack “authority” to file the amended plan with the court, it is clear that Debtors did not know about the increase in payments under the plan when they gave Attorney Mack this authority to file. Affidavit of Tara Amos at 2; Affidavit of Jon Amos at 2. In addition, the statement of Attorney Mack’s paralegal that she “might” have indicated to Debtors that they “had no real choice in accepting the increase in payment,” does little to convince the court that Debtors consented to the amended plan. Affidavit of Traci Miller at 1, In re Amos, No. 04-66188 (Bankr. N.D. Ohio 2004). This confusion concerning the consent to file the amended plan demonstrates the importance of the signature requirement – had Attorney Mack properly obtained the signatures of Debtors on the amended plan, Debtors would have seen, confirmed, and consented to the increase in monthly payments.³

When a court imposes a sanction, it must be “commensurate with the egregiousness of the conduct.” In re Downs, 103 F.3d 472, 478 (6th Cir. 1996). Further, courts have ordered such sanctions payable to the Trustee bringing the motion in order to deter repetition of such conduct and help to defray the cost of bringing the motion before the court. See In re Brown, 328 B.R. 556,559 (Bankr. N.D. Cal. 2005). Though Attorney Mack contends that the signature omissions were simply a mistake, the court places trust in its officers to uphold the procedures established in this district. The court believes that sanctions in the amount of \$200 are the absolute minimum that could be appropriate. By sanctioning Attorney Mack, the court seeks to maintain the integrity of the procedures established by this court.

Accordingly, Trustee’s motion for special report and sanctions under Rule 9011 is **DENIED**. Sanctions are imposed pursuant to 11 U.S.C. § 105.

A separate order is issued herewith.

/s/ Russ Kendig MAR 31 2006
Judge Russ Kendig
U.S. Bankruptcy Judge

³ The Chapter 13 Form Plan required by this court requires the Debtors’ signature on lines directly under the part of the form that details the amount of payments to the Trustee.

Service List

Jon & Tara Amos
327 Hetrick Drive
Galion, OH 44833

Toby Rosen
400 W. Tuscarawas St.
Charter One Building Bldg
4th Floor
Canton, OH 44702

Deborah Mack
P.O. Box 486
Mansfield, OH 44901

Dianna M. Anelli
500 S. Front Street, Suite 102
Columbus, OH 43215