

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\* CASE NUMBER 06-40050  
STEPHEN J. ROSATI and \*  
LISA MARE ROSATI, \* CHAPTER 7  
\*  
Debtors. \* THE HONORABLE KAY WOODS  
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ORDER IMPOSING SANCTIONS  
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The matter before the Court is the Order to Appear and Show Cause issued by the Court on June 29, 2006 compelling Debtor Lisa Mare Rosati ("Debtor") to appear on July 6, 2006, and show cause why she should not be held in contempt and/or sanctioned for her failure to attend the § 341 Meeting of Creditors ("341 Meeting"). At the hearing on July 6, 2006 (the "Hearing"), counsel for Debtor appeared, but Debtor failed to appear. Michael D. Buzulencia, the Chapter 7 Trustee in this case ("Trustee"), was also in attendance.

Debtor filed the instant Chapter 7 case on January 19, 2006. Debtor appeared, but failed to testify, at the 341 Meeting originally scheduled for February 13, 2006 and failed to appear at the next six continued 341 Meetings, which were scheduled for February 27, March 13, March 28, April 25, May 9, and May 23. Debtor finally appeared on June 6, 2006 and invoked the privilege against self-incrimination pursuant to the Fifth Amendment to the United States Constitution. Since Debtor filed the instant Chapter 7 case, she has had the benefit of the protections afforded by the Bankruptcy Code, including the automatic stay. At the time

this Chapter 7 case was filed, Debtor knew that she was under criminal investigation and/or charged with certain crimes even though she had not yet entered a plea in those proceedings. Debtor appeared at the initial 341 Meeting, but, upon realizing that certain law enforcement personnel were present, she refused to testify or participate. Debtor left the 341 Meeting without providing any testimony; her attorney stated that she refused to testify at the initial 341 Meeting on the grounds that doing so might tend to incriminate her. As a consequence, Trustee was unable to obtain information concerning Debtor's assets and liabilities in order to administer the case. At the request of Debtor's counsel, Trustee rescheduled the 341 Meeting.

On March 13, 2006, Debtor moved to dismiss this case. Debtor's motion to dismiss was filed *after* (i) Trustee filed a motion for turnover of property of the estate, (ii) the originally scheduled 341 Meeting and (iii) the first continued 341 Meeting. The motion to dismiss was filed on the date of the second continued 341 Meeting. Trustee filed a response opposing the motion to dismiss on the basis that he believed there were assets in the case to be administered for the benefit of creditors. On April 13, 2006, the Court held a hearing on Debtor's motion to dismiss and Trustee's separate motion for turnover of property. At that time, Trustee represented that he had been unable to conduct the 341 Meeting of Debtor because she refused to testify and had invoked her fifth amendment privilege not to incriminate herself.<sup>1</sup> The Court told

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<sup>1</sup>Since at that time, Debtor had neither testified nor invoked the fifth amendment privilege, the Court understands Trustee's argument to be that, based on the Debtor's conduct, he anticipated that Debtor was going to invoke her fifth amendment privilege.

counsel for Debtor that if Debtor wanted to assert her fifth amendment privilege, it should be properly raised so the Court could make an appropriate ruling. Debtor failed to seek immunity from self-incrimination, under 18 U.S.C. § 6001, *et seq.*, as provided in 11 U.S.C. § 344, or to make any motion to bring this issue before the Court.

At the seventh continued 341 Meeting on June 6, 2006, Debtor appeared and generally invoked the fifth amendment privilege; she failed to provide any testimony on the grounds that doing so might incriminate her.

Upon the Trustee's request, this Court issued the Order to Appear and Show Cause. At the Hearing, counsel for Debtor stated that Debtor had not entered a plea to the criminal charges at the time of the first scheduled 341 Meeting. Counsel further stated that Debtor was scheduled to be sentenced on July 13, 2006 by United States District Judge Donald Nugent and would be available for a 341 Meeting after the sentencing hearing. Counsel offered no explanation concerning Debtor's refusal to attend and testify at one of the 341 Meetings scheduled after she entered her plea. Debtor's counsel attempted to excuse Debtor on the basis that she had tried to dismiss her case in March. Debtor failed to take any steps to

obtain use immunity, despite the procedure in the Bankruptcy Code for doing so. See 11 U.S.C. § 344.

Trustee represented that he had incurred considerable expenses in scheduling and rescheduling the 341 Meeting. He further represented that he had been unable to administer this case despite the fact that it had been filed more than six months previously.

The Court found Debtor in contempt of Court for failing to appear at the Hearing and for failing to attend the first seven 341 Meetings. The Court instructed Trustee that he had ten days to apply for fees and expenses incurred in connection with the 341 Meetings. The Court stated that Debtor would then have ten days to oppose any such fees and expenses.

On July 17, 2006, Trustee filed an Affidavit setting forth his time and expenses in seeking Debtor's attendance and testimony at the 341 Meetings. Trustee submits that he spent twelve (12) hours in the pursuit of Debtor's attendance at the original and seven rescheduled 341 Meetings and requests \$2,340.38 in expenses. Debtor failed to file any response or opposition to the requested fees and expenses, as submitted by Trustee.

At the Hearing, Debtor's counsel protested that the Court was sanctioning Debtor for exercising her constitutional rights. The Court held that the sanctions were not in connection with Debtor's exercise of any constitutional right, but that Debtor would be required to reimburse Trustee for his costs and expenses relating

to Debtor's failure to attend the original and rescheduled 341 Meetings.

"A debtor who voluntarily petitions a bankruptcy court for a discharge of debts under Chapter 7 of the Bankruptcy Code does not forfeit her rights guaranteed by the United States Constitution." *In re Hulon*, 92 B.R. 670, 671, 1988 Bankr. LEXIS 1783 (Bankr. N.D. Tex. 1988). In the *Hulon* case, the debtor testified at the § 341 meeting of creditors, but, after being ordered to appear for a Rule 2004 examination by the trustee, refused to take the oath or answer any questions. Instead the debtor invoked the fifth amendment privilege against self-incrimination. The trustee moved the court to (i) hold the debtor in contempt for violation of the Rule 2004 examination order, (ii) compel debtor's testimony at a future Rule 2004 examination, and (iii) grant sanctions. The court inquired whether the United States Attorney for the Department of Justice would immunize the debtor's testimony under 11 U.S.C. § 344, but he declined to do so. The court contrasted the criminal justice system with the bankruptcy system, as follows:

The criminal justice system not only convicts the guilty, but also safeguards the accused from governmental oppression. To protect accused individuals the government must meet its burden of proof in a criminal prosecution without the forced assistance from the accused. In contrast, the bankruptcy process places greater emphasis on full disclosure of an individual's financial affairs for the benefit of all creditors of the debtor's estate and thus affords the debtor only a thin shield against wide-ranging discovery.

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The former Bankruptcy Act expressly conferred broad immunity on a debtor. See, Bankruptcy Act § 7(a)(10) (former 11 U.S.C. § 25(a)(10)). The former Bankruptcy Act provided that "[no] testimony given by [a debtor] shall be offered in evidence against [a debtor] in any criminal proceeding."

The current Bankruptcy Code eliminated that immunity. Since a debtor's bankruptcy testimony can be used in a criminal proceeding, a debtor may invoke the fifth amendment privilege against self-incrimination in a bankruptcy proceeding unless granted immunity. See, 11 U.S.C. § 344.

*Id.* at 673. (Internal citations omitted.)

The *Hulon* Court held, however, that the debtor had improperly invoked the fifth amendment privilege by generally refusing to answer all questions. The court held that in situations other than criminal prosecutions, "the privilege does not permit a person to avoid being sworn as a witness or being asked questions." The court went on to say that the debtor was required to "listen to the questions and specifically invoke the privilege rather than answer the questions . . . . The debtor should be required to object with specificity to the information sought to permit the court to rule on the validity of the claim of privilege." *Id.* at 675. The court held that the debtor's conduct did not warrant a finding of contempt of court, but did sanction the debtor \$1,350.00 to reimburse the trustee for fees and expenses. The court found that the sanction was warranted because the trustee had incurred needless expense to the detriment of the debtor's creditors and the trustee should be compensated by the debtor for those expenses.

Although the current situation involves a 341 Meeting rather than a Rule 2004 examination, the holding in *Hulon* is equally applicable here. Debtor failed to testify at the initial and six subsequently scheduled 341 Meetings. It was not until the seventh rescheduled 341 Meeting that Debtor generally invoked the fifth amendment privilege. However, even then she did not appear, listen to the questions and selectively invoke the fifth amendment

privilege. Debtor was required to properly invoke her fifth amendment privilege, which she failed to do.

In *In re French*, 127 B.R. 434, 1991 Bankr. LEXIS 721 (Bankr. D. Minn. 1991), the court was faced with a similar situation.

Mr. French refused to answer a series of innocuous, preliminary questions based on the privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. The United States Trustee suspended the meeting of creditors and moved to convert or to dismiss the Debtors' case. At the initial hearing on said motion, . . . I enquired whether the Debtors had sought immunity under part V of title 18 of the United States Code, 18 U.S.C. § 6001 et seq., as provided in section 344 of the Bankruptcy Code, 11 U.S.C. § 344. Counsel for ASCS indicated that the United States Attorney had declined to seek such immunity on behalf of the Debtors. I then informed the parties that a blanket assertion of the Fifth Amendment was impermissible, and that I would require the Debtors to assert their privilege to each question which would require a potentially self-incriminating answer.

*Id.* at 435.

Likewise, in the instant case, Debtor was not permitted to assert a blanket privilege with respect to all questions, but was required to determine whether the privilege was appropriate in response to each question. The Debtor's conduct in invoking the privilege does not warrant a finding of contempt of court, but, like the *Hulon* case, does warrant the imposition of sanctions in an amount to reimburse Trustee for his costs and expenses. Debtor also failed to appear at the Hearing in violation of the Order to Appear and Show Cause, which conduct does warrant a finding of contempt of court. This Court will not, however, impose additional sanctions against Debtor in connection with such contempt. Trustee has submitted an affidavit in the amount of \$2,340.38. Debtor has not challenged the reasonableness of the charges or the amount of time expended. As a consequence, this Court finds that Trustee's

costs and expenses in the amount of \$2,340.38 in connection with Debtor's failure to attend the 341 Meetings are reasonable<sup>2</sup> and were justified. Accordingly, the Court sanctions Debtor in the amount of \$2,340.38 and orders Debtor to pay such amount to the Trustee within thirty (30) days.

**IT IS SO ORDERED.**

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**HONORABLE KAY WOODS**  
**UNITED STATES BANKRUPTCY JUDGE**

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<sup>2</sup>The reasonableness of Trustee's conduct in scheduling a total of eight 341 Meetings before seeking the intervention of this Court may be questioned, but since Debtor did not object to or oppose the Trustee's requested fees and expenses, this Court will not reduce them.