

IT IS SO ORDERED.



Dated: April 03, 2007
10:09:36 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
DIANE ELAINE BARBER,	*	
	*	
Debtor.	*	CASE NUMBER 03-40045
	*	

MARK A. BEATRICE, TRUSTEE,	*	ADVERSARY NUMBER 03-4162
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
COUNTRYWIDE HOME LOANS, INC.,	*	HONORABLE KAY WOODS
et al.,	*	
	*	
Defendants.	*	

MEMORANDUM OPINION REGARDING TRUSTEE'S MOTION FOR SANCTIONS

This cause is before the Court on Motion of Trustee for Sanctions for Failure to Comply with Discovery Order ("Motion for Sanctions") filed by Plaintiff Mark A. Beatrice, Trustee ("Trustee") seeking sanctions against Defendant The Mortgage Zone ("TMZ") for failure to comply with this Court's December 29, 2006

Order and its failure to produce any of the documents requested by Trustee on October 3, 2006.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. BACKGROUND OF THE CASE

A history of this adversary proceeding is instructive. Debtor Diane Barber ("Debtor") filed a voluntary chapter 7 case on January 6, 2003. Mark Beatrice was appointed chapter 7 trustee in the case. Debtor received a discharge on May 8, 2003 and the case was closed on July 17, 2003. Debtor moved to reopen the case on July 25, 2003 to avoid a mortgage. The Court granted the motion to reopen on July 28, 2003.

Thereafter, on August 4, 2003, Debtor filed the instant adversary proceeding against Defendant Countrywide Home Loans, Inc., America's Wholesale Lender ("Countrywide")(which was originally the only defendant named). Although a summons was issued and the complaint and summons were served, Countrywide failed to timely answer, move or otherwise respond to the complaint. As a consequence, Debtor moved for summary judgment on November 24, 2003. While the motion for summary judgment was pending, on December 31, 2003, Countrywide moved for leave to file an answer to the complaint. The Court granted the motion for leave to file answer and also granted Countrywide time to respond to

plaintiff's motion for summary judgment on March 19, 2004. Countrywide answered the complaint on March 31, 2004.

Debtor and Countrywide engaged in a series of stipulated extensions that provided for various responses, replies, sur-replies and cross-motions for summary judgment that culminated with the Court's denial of the cross-motions for summary judgment on January 12, 2006. The Court granted Debtor leave to amend the complaint on March 22, 2006 and an amended complaint was filed on March 28, 2006. The amended complaint asserted new causes of action and named TMZ, David Kotowski, Thomas N. Michaels, and Liberty Title Insurance Agency, Inc. as additional defendants. All defendants were granted extensions of time to answer the amended complaint. On May 3, 2006, Countrywide filed a motion to dismiss the amended complaint on several grounds, including that Debtor lacked standing because the alleged causes of action belonged to the Trustee. On June 14, 2006, Trustee filed a motion to join the adversary proceeding as a party plaintiff. TMZ filed a motion to dismiss on June 22, 2006. After considering the various motions and responses thereto, this Court entered a memorandum opinion and order on June 30, 2006 that denied Countrywide's motion to dismiss in its entirety, denied TMZ's motion to dismiss in part and granted the Trustee's motion to join as a party plaintiff. Trustee was also provided twenty (20) days to respond to the outstanding issues in TMZ's motion to dismiss.

On August 15, 2006, this Court entered a memorandum opinion and order denying the remainder of TMZ's motion to dismiss. Thereafter, on August 16, 2006, TMZ filed its answer to Countrywide's cross claims. On August 25, 2006, TMZ filed its

answer to the amended complaint, as well as cross-claims against the other defendants.

On September 11, 2006, the Proposed Discovery Plan, which was signed by counsel for all parties, was filed. The Discovery Plan provided for (i) completion of fact discovery by March 14, 2007, (ii) disclosure of Trustee's expert(s) and production of expert reports by January 16, 2007, and (iii) disclosure of rebuttal expert(s) and production of reports by March 19, 2007.

On December 27, 2006, Trustee filed Motion of Trustee for Order Compelling Discovery, in which Trustee alleged that he had requested production of documents from TMZ on October 3, 2006, but that TMZ had failed to make any response thereto. The motion noted that, at the telephonic status conference on November 20, 2006, TMZ had promised to produce documents by December 15, 2006, but had failed to do so. Trustee stated that counsel had called counsel for TMZ, Thomas Horwitz, on December 19, 2006, and was told that TMZ refused to produce any documents. Trustee noted that TMZ had neither filed for a protective order nor objected to the request for production of documents.

On December 29, 2006, this Court entered Order Granting Motion of Trustee for Order Compelling TMZ to Produce all Requested Documents ("December 29 Order"), which ordered TMZ to comply by January 2, 2007.

At the request of the parties, the Court held a settlement conference on January 10, 2007. Although it was not the subject of the conference, TMZ's failure to comply with the December 29 Order was discussed in light of Trustee's filing of the instant Motion for Sanctions on January 9, 2007. Because of such discussion, the

Court made it clear to counsel for TMZ that it was required to respond to the document request.

On February 26, 2007, the Court scheduled a hearing on the Motion for Sanctions for March 22, 2007 (the "Hearing"). On March 14, 2007, all defendants, including Countrywide and TMZ, filed Joint Motion of Defendants to Exclude Testimony of Plaintiff's Experts, or in the alternative, to Compel Production of Expert Reports and to Extend Deadline for Defendants' Expert Disclosure ("Joint Motion to Exclude"). Even though the Hearing was not scheduled as an evidentiary hearing, TMZ issued a subpoena to Trustee to testify. Trustee moved to quash the subpoena on March 20, 2007 on the basis that he would be out of town. The Court granted the motion to quash and stated that the Hearing would go forward without testimony on March 22, 2007. Also on March 20, 2007, Trustee filed Motion to Extend Time to Bring Motions Regarding Discovery Disputes to the Court's Attention and to File Any Necessary Motions.

The day before the Hearing, Mr. Horwitz called the Court's law clerk and inquired whether he needed to attend the Hearing since his subpoena had been quashed. The law clerk informed Mr. Horwitz that the Hearing was going forward on two separate discovery motions.

II. MOTION FOR SANCTIONS

Trustee and TMZ were represented at the Hearing by counsel. Mr. Horwitz was present for TMZ, but he did not have a client representative with him.

Trustee argues that TMZ has failed to (i) seek a protective order, (ii) object to the request for production of documents, or

(iii) respond to the request for production of documents. These were and are TMZ's only options when faced with a request for production of documents pursuant to FED. R. CIV. P. 34, incorporated into these proceedings by FED. R. BANKR. P. 7034. The documents requested by Trustee are relevant to one of the main issues in the adversary proceeding. Without the requested documents, Trustee will be at an unfair disadvantage in preparing for his case.

TMZ does not dispute that it has failed to respond to the document requests. Nor has TMZ raised any issue regarding service of the document request. As of the November 20, 2006 telephonic status conference, TMZ acknowledged that the document requests were outstanding and promised to respond thereto by December 15, 2006. TMZ's counsel stated at the settlement conference and then again at the Hearing that TMZ could not produce any documents because it had been brought into the case approximately five years after its role in the transaction and it did not have any documents to produce. In response to specific questioning from the Court, however, Mr. Horwitz conceded that he had not had any communication from or contact with TMZ since entry of the Court's December 29, 2006 Order. He further conceded that if any member of his firm would have heard from TMZ, it would have been Robert McIntyre, but Mr. Horwitz had not asked Mr. McIntyre if he had heard from TMZ and Mr. McIntyre had not communicated to him any information concerning TMZ's failure to produce documents. Mr Horwitz stated that, despite his prior representations to the Court that TMZ had no documents to produce, he had no personal knowledge concerning whether: (i) TMZ had any relevant documents to produce, (ii) TMZ had made any type of search for responsive documents, (iii) TMZ had

a document retention policy, and/or (iv) TMZ had a regular practice with respect to retention of documents.

If, after a diligent search for the requested documents, TMZ had determined that it (no longer) had any responsive documents, a written response with that information would have been the appropriate response to the request. Instead, even though TMZ knew that one of the purposes of the Hearing was to determine if it should be sanctioned for its failure to respond to the request for documents, it failed to inform its counsel concerning the kind of search undertaken for the documents and whether the documents exist. Indeed, Mr. Horwitz came to the Hearing willfully ignorant about whether his client had communicated with Mr. McIntyre and woefully ignorant about whether the documents existed.

Based upon the admissions of TMZ's counsel, it is apparent that TMZ's refusal to respond to Trustee's request for documents is willful and without justification. TMZ's conduct in not responding to the document request was not inadvertent or accidental.

Trustee has properly sought sanctions for TMZ's willful failure to respond to the request for production of documents. The Court stated on the record that it would grant the motion, but needed time to consider the appropriate sanction.

Rule 37, incorporated into these proceedings by FED. R. BANKR. P. 7037, provides the remedy for a party's failure to comply with discovery requests, as follows:

(b) Failure to Comply With Order.

(2) Sanctions by Court in Which Action is Pending. If a party. . .fails to obey an order to provide or permit discovery, . . .the court in which the action is pending may make such orders in regard to

the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37 (West 2006).

In considering the appropriate sanction in this case, the Court is mindful that the purpose of imposing sanctions is accountability. *Eckel v. Narciso (In re Narciso)*, 154 B.R. 527, 530 (Bankr. E.D. Ark. 1992) ("The goal of the rules dealing with sanctions is accountability. Sanctions should be imposed as 'an invaluable penalty and deterrent to be employed. . . to thwart discovery abuse.'" (internal citations omitted).)

This is not the first time that TMZ's attorneys¹ (but engaged by a different client) have been sanctioned by the bankruptcy court for failure to respond to discovery requests. In *In re LTV Steel Company, Inc.*, Case No. 00-43866, creditor C&K Industrial Services, Inc. ("C&K") asserted as a defense that it had offered the debtor better contract rates than it gave to its other customers and, thus, was entitled to a bonus payment to make it whole. After C&K asserted this defense, LTV Steel sent interrogatories and requested documents concerning C&K's other contracts. For more than nine (9) months, C&K refused to respond to the discovery and asserted new reasons for its failure each time the debtor pressed for a response. As a sanction for the willful withholding of this discovery, Judge Kendig entered a Memorandum of Decision and Order on January 6, 2004, which found that the appropriate sanction for the discovery abuse was to prohibit C&K from offering any evidence or making any argument pertaining to rates paid by other parties or alleging that LTV Steel received favorable rates.

In Sullivan v. Liberty Savings & Loan Assoc., Inc. (*In re Sullivan*), 65 B.R. 578 (Bankr. M.D. Fla. 1986), the bankruptcy court found that the debtor had failed, for a period of five months, to respond to interrogatories and had further failed to object or seek a protective order. The defendant did not seek an order compelling discovery, but instead filed a motion for the imposition of sanctions for failure to respond to the discovery

¹Even if the fault in failing to respond to Trustee's discovery requests may be the fault of counsel rather than TMZ, that is of no moment. "Sanctions may be imposed upon the individual defendants. 'It is of no consequence that the discovery abuse perpetrated was by counsel rather than the [client]. A litigant chooses counsel at his peril. Counsel's disregard for his professional responsibilities can lead to extinction of his client's claims.'" *In re Narciso* at 530, n.3 (quoting *Boogaerts v. Bank of Bradley*, 961 F.2d 765, 768, (8th Cir. 1992)).

requests. The defendant also sought dismissal of the case as the appropriate sanction. The court first found that, pursuant to FED. R. Civ. P. 37(d), a direct order of the court was not a prerequisite for imposition of sanctions. The court considered the sanction of dismissal and held that, since debtor had not been previously ordered to respond, dismissal was too harsh of a sanction. The court went on, however, to state, "This does not mean; (sic) however, that the Plaintiff is entitled to escape the consequences of his failure to comply with proper discovery questions." *Id.* at 580.

Despite the severity of the sanction, default against the non-complying defendant was upheld on appeal in *Brunson v. Rice (In re Rice)*, 14 B.R. 843 (9th Cir. B.A.P. 1981). In *Rice*, an involuntary petition was filed against the debtor. The debtor tried unsuccessfully to evade service of the summons and the petition. Plaintiff issued interrogatories to debtor, which debtor failed to answer. Debtor also ignored the letter and telephone contacts from plaintiff's counsel regarding such interrogatories. Only after plaintiff filed an application to shorten time to file answer to the petition - approximately nine (9) days after the answers to interrogatories were due - did debtor answer the interrogatories. Subsequently, the court struck the answer and entered an order for relief under chapter 7. The court found that the debtor had not complied, in good faith, with FED. R. CIV. P. 33 and imposed a sanction authorized by Rule 37(d). The B.A.P. noted that "the sanction of an adverse determination on the merits is, perhaps, the most severe punishment for abuse of discovery which a judge may impose." *Id.* at 845. The Court continued by saying,

"Nevertheless, the harshness of this sanction should not cause it to be omitted entirely from the arsenal of punitive options open to a trial judge, where a party has willfully abused federal or local rules of discovery." *Id.* at 846. The appellate court determined that the use of punishment by sanctions was best left to the discretion of the trial court and should only be reversed if there was a definite and firm conviction that an abuse of discretion had occurred. The B.A.P. noted, "Some sort of sanction against the Appellant was called for under the circumstances of this case. For the trial court to have held otherwise would have been to encourage a blatant disregard for the discovery mechanism which supports our flexible system of civil pleading and litigation." *Id.* at 845.

Like the cases noted above, this Court believes that it has an obligation to impose some sort of sanction against TMZ for its willful disregard for the discovery process. The issue is what kind of sanction is appropriate. A monetary sanction to compensate Trustee for his costs and expenses in pursuing the motion to compel and the motion for sanctions is appropriate, but such a sanction - standing alone - is not sufficient because it does not rectify the harm caused by TMZ's failure to respond to Trustee's proper request for documents. Trustee requested that TMZ be deemed to have admitted all factual allegations in the amended complaint as an appropriate sanction. Countrywide responded that sanctioning TMZ to that extent would also harm Countrywide, which was not at fault in TMZ's willful non-compliance.

The Court is mindful that the defendants are closely aligned in this case and that a sanction against one defendant may also adversely impact another defendant. The defendants, however, act

jointly when it is in their own best interests (e.g., Joint Motion to Exclude, *supra*). Countrywide joined with TMZ and other defendants in filing the Joint Motion to Exclude even though it was aware that TMZ had not complied with Trustee's discovery requests at the time the motion was filed.²

It is important that TMZ be held accountable for its willful disregard for the discovery rules. The requested documents go to one or more essential elements of Trustee's case. Pursuant to Rule 37(b)(2)(A), to the extent Trustee is not able to produce evidence concerning any element of his case because TMZ failed to respond to the document request, Trustee will be deemed to have carried its burden of proof on such issue.

III. CONCLUSION

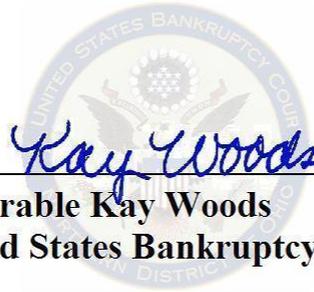
The Court finds that TMZ has willfully ignored Trustee's requests for documents. Counsel for TMZ came to the Hearing willfully ignorant about whether TMZ had possession of any responsive documents and/or even if TMZ had made any kind of search for documents. Trustee's Motion for Sanctions is well taken. Trustee is awarded its costs and expenses, including attorney's fees, in connection with the motion to compel and the Motion for Sanctions. Counsel for Trustee shall file an itemized statement of such costs and expenses with the Court on or before April 13, 2007. Counsel for Trustee shall also serve such statement upon TMZ. TMZ shall have ten (10) days (*i.e.*, until April 23, 2007) to file any objection to the itemized statement. Unless otherwise so noticed by the Court, the Court shall award an appropriate sanction based upon the itemized statement and any response thereto without an

²The Joint Motion to Exclude was withdrawn as a result of the Court's extension of the discovery schedule.

additional hearing. In addition to the monetary sanction, to the extent Trustee is not able to produce evidence concerning such element because TMZ failed to respond to the document request, Trustee will be deemed to have carried its burden of proof on such issue.

An appropriate Order will follow.

IT IS SO ORDERED.



Dated: April 03, 2007
10:09:36 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
DIANE ELAINE BARBER,	*	
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Debtor.	*	CASE NUMBER 03-40045
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MARK A. BEATRICE, TRUSTEE,	*	ADVERSARY NUMBER 03-4162
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Plaintiff,	*	
	*	
vs.	*	
	*	
COUNTRYWIDE HOME LOANS, INC.,	*	HONORABLE KAY WOODS
et al.,	*	
	*	
Defendants.	*	

O R D E R

For the reasons set forth in this Court's Memorandum Opinion, the Motion of Trustee for Sanctions for Failure to Comply with Discovery Order is granted. Trustee is awarded its costs and expenses, including attorney's fees, in connection with the motion to compel and the Motion for Sanctions. Counsel for Trustee shall

file an itemized statement of such costs and expenses with the Court on or before April 13, 2007. Counsel for Trustee shall also serve such statement upon TMZ. TMZ shall have ten (10) days (*i.e.*, until April 23, 2007) to file any objection to the itemized statement. Unless otherwise so noticed by the Court, the Court shall award an appropriate sanction based upon the itemized statement and any response thereto without an additional hearing. In addition to the monetary sanction, to the extent Trustee is not able to produce evidence concerning any element of a cause of action because TMZ failed to respond to the document request, Trustee will be deemed to have carried its burden of proof on such issue.