

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FEB 10 2004
at _____
JAN 23 2004
BRENDA L. ... CLERK
United States District Court
Columbia, South Carolina (34)

IN RE:

Charlotte S.Sims,

Debtor.

C/A No. 03-11405-W

Adv. Pro. No. 03-80505-W

Charlotte S. Sims,

Plaintiff,

JUDGMENT

ENTERED

v.

Chapter 13

JAN 23 2004

Cash Advance Inc., Checkloans, Blank Check
and Check World

Defendants.

KPD

Based on the Findings of Fact and Conclusions of Law in the attached Order, Blank Check Inc.'s Motion to Dismiss is granted. Blank Check Inc.'s Rule 9011 Motion for Sanctions is also granted; and therefore, as a Rule 9011 sanction, counsel for Debtor, Paul W. Owen, Jr., shall remit to counsel for Defendant, John B. Butler, III, five hundred dollars (\$500.00) within ten (10) days from the entry of this Judgment and attached Order. Furthermore, the award of sanctions shall survive dismissal of this adversary proceeding and the dismissal, if any, of Debtor's case.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 23, 2004.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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IN RE:

Charlotte S. Sims,

Debtor.

C/A No. 03-11405-W

Adv. Pro. No. 03-80505-W

Charlotte S. Sims,

Plaintiff,

ORDER

ENTERED

v.

Chapter 13

JAN 23 2004

Cash Advance Inc., Checkloans, Blank Check
and Check World

Defendants.

KPD

This matter comes before the Court upon Blank Check, Inc.'s ("Defendant") Motion to Dismiss or In the Alternative for Summary Judgment ("Motion to Dismiss") which was filed in response to a Complaint filed by Charlotte S. Sims ("Debtor"). Defendant also filed a Motion pursuant to Federal Rule of Bankruptcy Procedure 9011 (the "Rule 9011 Motion") seeking sanctions against Debtor's Counsel, Paul W. Owen, Jr., Esq. ("Owen"). The Court scheduled a hearing concerning Defendant's Motion to Dismiss for December 18, 2003. At the December 18, 2003 hearing, the parties stipulated that Defendant's Rule 9011 Motion can be adjudicated by the Court without a further hearing. Upon the arguments of counsel, as well as a review of the pleadings, the Court finds and concludes as follows.

FINDINGS OF FACT¹

1. On September 2, 2003, Debtor entered into an agreement (the "Agreement") with

¹ The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any of the following Conclusions of Law constitute Findings of Fact, that are also so adopted.

Defendant whereby Debtor agreed to provide Defendant with a check (the "Check") and Defendant agreed to hold the Check until September 17, 2003. The Check was numbered 01305 and payable in the amount of \$345.00. In return, Defendant paid Debtor \$300.00. As part of the Agreement, Debtor represented that she did not intend to file bankruptcy.

2. On September 12, 2003, Debtor filed a Chapter 13 Petition seeking bankruptcy relief. Defendant also received notice of Debtor's bankruptcy filing later that day. Debtor listed Defendant as a creditor on her schedules as a result of the Check and her Agreement with Defendant.

3. On October 8, 2003, Defendant presented the Check to Debtor's bank for payment. However, Debtor's bank rejected Defendant's presentment because Debtor had insufficient funds available in her account. Thus, Defendant collected no funds, and Debtor's bank charged Debtor a \$20.00 non-sufficient funds fee ("NSF fee").

4. On October 21, 2003, Debtor filed a Complaint against Defendant that alleged Defendant's post-petition presentment of the Check for payment violated the automatic stay protection provided to Debtor by 11 U.S.C. § 362.²

5. On November 17, 2003, Defendant served the Rule 9011 Motion on Owen in order to provide him with notice and an opportunity to withdraw the Complaint. Defendant filed the Rule 9011 Motion citing an exception to the automatic stay contained in § 362(b)(11) and alleging that Debtor's Complaint against Defendant for the post-petition presentment of the Check as a negotiable instrument is not warranted by existing law or the modification or reversal of existing law. Despite Defendant's recitation of § 362(b)(11), Owen did not withdraw the Complaint.

5. Defendant then filed a Motion to Dismiss on November 20, 2003, again citing §

² Internal references to the Bankruptcy Code shall be by section number only.

362(b)(11). Owen responded to the Motion to Dismiss by filing a Brief/Memorandum in Opposition to Defendant's Motion to Dismiss on December 2, 2003, alleging that the Check was not a negotiable instrument entitled to the exception provided for in § 362(b)(11) in that Defendant was not a holder in due course and that Defendant knew the instrument was not negotiable due to insufficient funds at the time it accepted the Check from Plaintiff .

6. On December 11, 2003, approximately 22 days after Defendant's service of the Rule 9011 Motion on Owen, Defendant filed its Rule 9011 Motion with the Court.

7. Following the December 18, 2003 hearing on Defendant's Motion to Dismiss, the Court provided Owen with an opportunity to file a written response to Defendant's Motion for Sanctions. On January 9, 2004, Owen filed such a response by filing a Return to Defendant's Blank Check, Inc.'s Motion for Sanction (the "Rule 9011 Return").

8. In the Rule 9011 Return, Plaintiff acknowledges the applicability of the exception provided by § 362(b)(11) but now contends that Plaintiff's Complaint sought to retain funds represented by the Check, and therefore asks the Court to consider the voidability of the transaction pursuant to § 542 had it been paid.

9. Finally, Plaintiff alleges that Defendant did not submit an adequate affidavit of his attorney's fees and that despite the exception for a negotiable instrument provided by § 362(b)(11), both the equitable and statutory positions of the parties counteract each other and Defendant is not entitled to an award of attorney's fees.

CONCLUSIONS OF LAW

Since Defendant's Motion to Dismiss and Rule 9011 Motion share common facts, but concern different legal standards, they will be discussed and analyzed separately.

I. Defendant's Motion to Dismiss

On a motion to dismiss, all facts must be construed in the light most favorable to the non-moving party and the allegations of the Complaint are taken as true. Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1993); Martin Marietta Corp. v. Int'l Telecommunications Satellite Org., 991 F.2d 94 (4th Cir. 1992). A motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Rogers v Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989) (citing Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969)).

Subsection (b)(11) of Section 362 of Title 11 provides as follows:

[t]he filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay – . . . under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument.”

11 U.S.C. § 362(b)(11). This Court has also recognized “[w]hile the post-petition presentment of a pre-petition check as a negotiable instrument is not a violation of the automatic stay pursuant to 11 U.S.C. § 362(b)(11) and Roete v. Smith (In re Roete), 936 F.2d 963 (7th Cir. 1991), the retention of funds as property of the estate after demand for their return may be a violation of the automatic stay.” In re Staley, C/A No. 02-15294-W, slip op. at 2 (Bankr. D.S.C. May 8, 2003).

Plaintiff's argument that the adversary proceeding should not be dismissed because Defendant was not a holder in due course pursuant to S.C. Code § 36-3-302(3) in that Defendant knew the Check was not negotiable due to insufficient funds is unfounded.³ Not only did Plaintiff

³ Plaintiff's argument that even if funds had been paid to Defendant, such transfer would have been avoidable pursuant to § 549, is irrelevant based upon the allegations pled by Plaintiff as well as the

not cite a single authority in support of this proposition, a plain read of the applicable South Carolina Code Sections clearly set forth the definition of a negotiable instrument. § 36-3-104 provides, in relevant part:

Form of negotiable instruments; "draft"; "check"; "certificate of deposit"; "note".

(1) Any writing to be a negotiable instrument within this chapter must

- (a) be signed by the maker or drawer; and
- (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
- (c) be payable on demand or at a definite time; and
- (d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

- (a) a "draft" ("bill of exchange") if it is an order;
- (b) a "check" if it is a draft drawn on a bank and payable on demand;
- (c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
- (d) a "note" if it is a promise other than a certificate of deposit.

S.C. CODE ANN. § 36-3-104 (Law. Co-op. 2003). Nowhere does the statute reference a lack of negotiability if the instrument is to be presented at a later time. See also S.C. CODE ANN. § 36-3-114(1) ("the negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.")⁴ Further, case law commonly refers to checks presented to deferred check entities as negotiable instruments. See In re Roete, 936 G.2d at 966; Franklin v. Kwik Cash (In re Franklin),

facts of this case. First, the Complaint only seeks an award of damages for an alleged § 362 violation. Second, there is no dispute that Defendant did not recover any funds upon presentment of the Check. A recitation of "what ifs" cannot be the basis to overcome a Motion to Dismiss based upon the facts herein.

⁴ Plaintiff's Complaint alleges that the Check was post-dated and therefore a promissory note. Even if the allegation concerning post-dating is correct, which Defendant contends it is not, the definition of a negotiable instrument includes a "note" if it is a promise other than a certificate of deposit. S.C. CODE ANN. § 36-3-104(2)(d).

254 B.R. 718, 720 (Bankr. W.D. Tenn. 2000); EZ Cash 1, LLC v. Brigance (In re Brigance), 219 B.R. 486, 493 (Bankr. W.D. Tenn. 1998), aff'd on other grounds, 234 B.R. 401 (W.D. Tenn. 1999). Finally, Plaintiff's citation to S.C. CODE § 36-3-302(3) regarding a holder in due course misses the mark of relevant inquiry. For the reasons set forth above, and recognizing that this Court has previously recognized that a check is a negotiable instrument for purposes of § 362(b)(11) in Staley, the Court finds that Defendant's post-petition presentment of the Check is exempted from the automatic stay. In re Staley, C/A No. 02-15294-W, slip op. at 2. Finally, although the withholding of a bankruptcy estate's assets may constitute a violation of the automatic stay, Bolen v. Mercedes Benz, Inc. (In re Bolen), 295 B.R. 803, 809 (Bankr. D.S.C. 2002), Defendant withheld no assets from Debtor's bankruptcy estate. Since Defendant collected no money upon the presentment of the Check post-petition, section 362 of Title 11 does not provide Debtor with a cause of action against Defendant for a violation of the automatic stay. See id. Therefore, the Court finds the turnover grounds for Debtor's violation of stay claim unavailing. Inasmuch as Plaintiff's Complaint states no basis for relief, Defendant's Motion to Dismiss should be granted.

II. Defendant's Motion for Rule 9011 Sanction

Defendant also seeks its legal fees in the amount of \$3,510.56 as a Rule 9011 sanction against Owen for a violation of Rule 9011(b)(2). Rule 9011(b)(2) provides, in pertinent part:

(b) By presenting to the court (whether by signing, filing, submitting or later advocating) a petition, pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed by a reasonable inquiry under the circumstances, –

(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.

Further, Rule 9011(c) provides, in pertinent part:

(c) Sanctions

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

(1)(A) 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. . . (2) A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. . . the sanction may consist of, or include, . . . if on motion and warranted for effective deterrence, an order directing payment to the movant of some or all the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Fed. R. Bankr. P. 9011(c). Defendant properly moved for Rule 9011 relief in accordance with Rule 9011(c)(1)(A) by serving its Rule 9011 Motion on Owen approximately 22 days prior to filing its Rule 9011 Motion with the Court on December 11, 2003. Furthermore, Defendant complied with Rule 9011(c)(1)(A) by specifically describing the conduct that gave rise to its Rule 9011 Motion by stating:

Movant is informed and believes that [Debtor's] pleading regarding Defendant's action in presenting a negotiable instrument after the filing of the [Debtor's Chapter 13 Petition] is not warranted by existing law or the modification or reversal of such and is so violative of F. R. Bankr. 9011.

Therefore, pursuant to the stipulation of Defendant and Owen, the Court can properly adjudicate

Defendant's Rule 9011 Motion at this time.

The relevant standard to be applied is an objective standard of reasonableness. McGahren v. First Citizens Bank & Trust Co. (In re Weiss), 111 F.3d 1159, 1169 (4th Cir. 1997). In Weiss, the Court upheld the bankruptcy court's imposition of sanction upon a pro se litigant for filing pleadings not warranted by existing law or fact. Id. at 1171. Further, in Cleveland Demolition Co. v. Azcon Scrap Corp., the Fourth Circuit stated as follows:

In sum, Rule 11 "explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the validity of a pleading before it is signed." The Rule does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed. The Rule attempts to discourage the needless filing of groundless lawsuits. To fulfill his duty, an attorney must investigate the facts, examine the law, and then decide whether the complaint is justified. Cleveland failed to discharge this duty; it conducted only a minimal factual inquiry and a cursory legal investigation.

827 F.2d 984, 988 (1987) (internal citation omitted).

The Court notes that Owen failed to heed the express language of § 362(b)(11), providing that post-petition presentment of a pre-petition check as a negotiable instrument is exempted from the automatic stay. No other reading of this Bankruptcy Code provision could lead Owen to think otherwise. Even the most basic investigation of the facts would show that Defendant received no funds from the post-petition presentment of the Check; and thus, Defendant withheld no assets from the bankruptcy estate. Therefore, Defendant did not prejudice the bankruptcy estate in a manner that could constitute a violation of the automatic stay. See Staley, C/A No. 02-15294-W, slip op. at 2 (retention of property of estate after demand to return such property may constitute willful violation); Bolen, 295 B.R. at 809 (same).

Further, Plaintiff's argument that the Court should consider that Debtor's adversary proceeding sought to retain the funds represented by the Check as assets of the estate had it been paid is baseless. First, the Complaint only seeks damages for a violation of stay and Owen never sought to amend the Complaint to modify his allegations. Second, as previously stated, there also appears to be no basis for any turnover action under the facts of this case. More than a minimal investigation of the facts and a review of the Bankruptcy Code would have brought these conclusions to light.

As a defense to the sanction motion, Owen cited to the incorrect section of the S.C. Code when attempting to demonstrate, after the fact, that Debtor's Check was somehow not a negotiable instrument. Owens citation to S.C. Code § 36-3-302(3) has no applicability to the relevant analysis. Compare S.C. CODE ANN. § 36-3-104 (Law Co-op. 2003) (providing the definition of negotiable instrument) with S.C. CODE ANN. § 36-3-302 (Law Co-op. 2003) (providing the criteria for who can be a holder in due course). While this factor alone does not warrant sanctions, it demonstrates Owen's lack of thorough examination of the law prior to filing his Complaint. Careful review of the S.C. Code would have revealed as much.

Finally, Owen also shifts his argument in his Rule 9011 Return and argues that the Court should consider the voidability of the transaction pursuant to § 542. Plaintiff again references the definition of a holder in due course. As previously noted, the situation presented to the Court herein is one in which no funds were paid to Defendant upon presentment. Any argument that revolves around a different factual circumstance is irrelevant.

In sum, the Court finds that Plaintiff's failure to examine the basic factual circumstances surrounding the Check and the relevant law, including § 362(b)(11), and the applicable state

statutory authority, leads this Court to conclude that the Complaint as pled was not well grounded in fact or law.

The primary purpose of Fed. R. Bankr. P. 9011 is to deter future abuse of the judicial process.

The Fourth Circuit has stated:

A district court can and should bear in mind that other purposes of the rule include compensating the victims of the rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets and facilitating court management. But the amount of a monetary sanction should always reflect the primary purpose of deterrence.

Miltier v. Downes, 935 F.2d 660, 665 (4th Cir. 1991) (quoting In re Kunstler, 914 F.2d 505, 522-23 (4th Cir. 1990)); see also Brandt v. SCHAL Assoc., Inc., 960 F.2d 640, 646 (7th Cir. 1992) (“[D]eterrence may well include the payment of expenses and attorneys’ fees generated as a result of the filing of abusive litigation. Case law acknowledges compensation as another important objective and purpose for Rule 11.”). While the appropriate sanction is often to reimburse the movant for either the full or a partial amount of the costs, expenses, and attorney fees incurred as a result of the petitions filed in violation of the Rule; the rule permits a court to vary from that amount and set sanctions as required to deter further unreasonable conduct. See Fox v. Acadia State Bank, 937 F.2d 1566, 1571 (11th Cir. 1991).

As previously noted, this Court first addressed whether a cash advance or deferred presentment company’s post-petition presentment of a check which debtor provided pre-petition constituted a violation of the automatic stay in In re Staley. In re Staley, C/A No. 02-15294-W, slip op. at 2. In determining sanctions, the Court has considered that Staley was not published. However, § 362(b)(11) is clear. Therefore, the Court reminds the debtor’s bar of the importance of investigating facts and adequately researching the law prior to filing such a serious cause of

action.

In addition, in considering sanctions in this case, the Court notes that Defendant presented the Check almost a month *after it received notice* of Debtor's bankruptcy filing. Although the presentment of the Check would not necessarily violate the automatic stay even had Defendant received funds from such presentment, Debtor would have the right to a return of the funds collected from such a post-petition presentment since the funds in a debtor's bank account become property of the bankruptcy estate post-petition. See 11 U.S.C. § 541 (providing a cause of action for turnover if the funds were not returned upon demand). While this result may seem inconsistent, it arises because the § 362(b)(11) exception to the automatic stay provisions of § 362(a) originates from a recognition of the commercial realities associated with the quick and efficient processing of checks in today's business world. It was enacted in consideration of the great burden on banks and businesses to halt their operations and sift through the numerous checks they process to identify and separate a bankruptcy debtor's check from a large batch being processed. See In re Franklin, 254 B.R. at 721 (quoting Wittman v. State Farm Life Insurance Co., Inc. (In re Mills), 167 B.R. 663, 664 (Bankr. D. Kan. 1994)). However, once funds are collected from presentment, a debtor is well within the rights provided by the Bankruptcy Code to demand a return of those funds once the funds are identified as part of the bankruptcy estate post-petition. Id. at 721-22. Therefore, in the wake of Staley and Franklin, it seems futile for cash advance, money loan, or deferred-presentment companies to intentionally make a post-petition presentment of a debtor's pre-petition check well after receiving notice of that debtor's bankruptcy. To do so invites a demand for turnover and the potential attenuating litigation for turnover or a violation of the stay for failure to comply; thus, cash advance, money loan, or deferred-presentment companies in this District should take great care when

dealing with a debtor's check after receiving notice of the debtor's bankruptcy filing.⁵

The ordering of sanctions in this case is based upon a consideration of the totality of the circumstances present, including consideration of the lowest amount necessary to deter future abuses and upon R. 9011, the Court's authority to sanction pursuant to § 105(a), 28 U.S.C. § 1927, and the Court's inherent authority to regulate litigants before it and to address improper conduct as recognized by the Fourth Circuit Court of Appeals in McGahren v. First Citizens Bank & Trust, Co. (In re Weiss), 111 F.3d 1159 (4th Cir. 1997). In consideration of all of the above referenced factors, the Court limits the sanctions awarded to Defendant to \$500.00.

III. Conclusion

For the reasons stated above, it is therefore

ORDERED, that Defendant's Motion to Dismiss is granted and Debtor's cause of action against Defendant is dismissed with prejudice, and it is further

ORDERED, that Defendant's Rule 9011 Motion for Sanctions is granted and Owen is to remit \$500.00 to counsel for Defendant within ten (10) days. The award of sanctions shall survive dismissal of this adversary proceeding and the dismissal, if any, of the case.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
January 23, 2004.

⁵ The Court recognizes that the cash advance, money loan, or deferred-presentment industry may be subject to abuse whereby a debtor could enter into these deferred-presentment agreements and receive cash while in contemplation of a bankruptcy filing, and then prevent collection by filing bankruptcy. Under these circumstances, the Bankruptcy Code appears to provide some protection in that creditors have the opportunity to seek dismissal of debtor's case for bad faith, seek an exception from discharge, or challenge confirmation of any plan of reorganization.