

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-03229

ORDER DENYING REQUEST FOR SANCTIONS

The relief set forth on the following pages, for a total of 6 pages including this page, is hereby ORDERED.

FILED BY THE COURT
01/04/2007



Entered: 01/08/2007

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Cecil H. Hanna and
Sandra Rena Hanna,

Debtor(s).

C/A No. 06-03229-DD

Chapter 13

**ORDER DENYING REQUEST
FOR SANCTIONS**

THIS MATTER is before the Court on Anderson Brothers Bank's ("ABB") Objection to Confirmation of Plan ("Objection") and request for attorney's fees and costs pursuant to Fed. R. Bankr. P. 9011. A hearing was held in this matter December 18, 2006. Cecil H. Hanna's and Sandra Rena Hanna's ("Debtors") counsel, Paul Held, and ABB's counsel, William Short, attended the hearing. The Court was informed at the hearing that Debtors' most recent amended plan resolved ABB's Objection. Therefore, the only matter for the Court's consideration is Mr. Short's request for attorney's fees and cost against Mr. Held.

Facts¹

ABB has a secured interest in a farm tractor ("Collateral") owned by the Debtors.² Debtors' original schedules and first plan were filed on August 15, 2006. The plan treated ABB as an unsecured creditor and ABB's debt was listed on Debtors' schedule F. The confirmation hearing was held on October 3, 2006 and an order was entered requiring Debtors to file an amended plan within ten (10) days.

The first amended plan was filed on October 16, 2006. This plan was withdrawn and a second amended plan was filed the same day. The second amended plan again treated

¹ To the extent any finding of fact is a conclusion of law, it is adopted as such and to the extent any conclusion of law is a finding of fact, it is adopted as such.

² There was some confusion at the hearing as to whether Debtors were the actual owners of the Collateral. Mr. Held indicated that his clients stated to him that it did not belong to them. A review of ABB's loan documents readily supports a finding that Cecil H. Hanna owned the tractor at the time he borrowed money from ABB.

ABB's claim as unsecured based on Debtors' assertion that ABB's claim constituted an avoidable lien. On October 26, 2006 Debtors amended schedules E, I, and J. Schedule F was not amended to re-categorize ABB, nor was schedule D amended to add ABB as a secured creditor.

On October 31, 2006 a third amended plan was filed. It also failed to treat ABB as a secured creditor. It was only after this third amended plan was filed that ABB filed an objection to confirmation of the plan on November 8, 2006. Two days later on November 10, 2006 a fourth amended plan was filed that surrendered the Collateral, and resolved ABB's objection to confirmation. On December 20, 2006 Debtors amended their schedules to move ABB's claim from schedule F to schedule D.

Mr. Short stated at the hearing that while the objection to confirmation was resolved he nevertheless wanted to recover attorney's fees pursuant to Fed. R. Bankr. P. 9011. His basis for his request is that Mr. Held failed to properly treat ABB's claim as secured after he had knowledge of the secure nature of ABB's claim. Mr. Short represented to the Court at the Hearing that after having received the first plan and up until he ultimately filed ABB's objection to confirmation he attempted to contact Mr. Held on numerous occasions, by both telephone and by written letter in hopes of resolving the problem without having to file an objection to confirmation.

He stated that he offered proof, by attachment to the letter, of ABB's secured claim, and that Mr. Held failed to timely respond or amend the plan to correct the problem. Mr. Held stated that while he was unable to state for certain that his office did not receive the correspondence, he personally did not recall any such attempted contact by Mr. Short. Mr. Short asserts that Mr. Held's failure to correct the problem caused him to incur attorney's fees in filing the objection to confirmation even though Mr. Held knew that ABB should be

treated as a secured creditor in the plan. The Court finds that Mr. Short did contact Mr. Held's office on more than one occasion.

Law/ Analysis

Mr. Short seeks sanctions in the form of attorney's fees pursuant to Fed. R. Bankr. P. 9011, which states in relevant part,

(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 in 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;

(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; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(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.

Fed. R. Bankr. P. 9011.

“The 1997 amendment to Rule 9011 brought it into conformity with Civil Rule 11, which was itself extensively amended in 1993. Because Bankruptcy Rule 9011 now conforms to Civil Rule 11, precedents that have and will be developed under the latter will be of significant assistance in interpreting the former.” *10-9011 Collier on Bankruptcy-15th Edition Rev. P 9011.02(internal citations omitted)*.

The U.S. Court of Appeals for the Fourth Circuit has determined the procedural requirements with respect to Fed. R. Civ. P. 11 by stating,

The requirements of the rule are straightforward: The party seeking sanctions must serve the Rule 11 motion on the opposing party at least twenty-one days before filing the motion with the district court, and sanctions may be sought only if the challenged pleading is not withdrawn or corrected within twenty-one days after service of the motion...

It is clear from the language of the rule that it imposes mandatory obligations upon the party seeking sanctions, so that failure to comply with the procedural requirements precludes the imposition of the requested sanctions...

Rule 11(c)(1)(A) thus establishes conditions precedent to the imposition of sanctions under the rule. If those conditions are not satisfied, the Rule 11 motion for sanctions may not be filed with the district court. If a non-compliant motion nonetheless is filed with the court, the district court lacks authority to impose the requested sanctions.³

Brickwood Contrs., Inc. v. Datanet Eng'g, Inc., 369 F.3d 385(4th Cir. 2004) (Internal Citations Omitted).

Thus, for sanctions to be granted pursuant to Fed. R. Bankr. P. 9011 the Rule requires that (1) the requests for sanctions be made by separate motion, independent of all other motions or requests. *Fed. R. Bankr. P. 9011(c)(1)(A)*. (2) The motion must describe with specificity the alleged conduct that violates Rule 9011(b). *Id.* (3) The party to be charged with sanctions must be *served* with the motion in accordance with Fed. R. Bankr. P. 7004 at

³ “The failure of a party to comply with the safe-harbor requirements affects only the district court's authority to impose sanctions requested by a party under Rule 11(c)(1)(A). For example, failure to comply with the safe-harbor provisions would have no effect on the court's authority to sua sponte impose sanctions under Rule 11(c)(1)(B), to award costs pursuant to 28 U.S.C.A. § 1927, or to impose sanctions within its inherent power, see *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 461-62 (4th Cir. 1993).” *Brickwood Contrs., Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389 *fn.2* (4th Cir. 2004).

least 21 days before *filing* the motion with the Court. *Brickwood Contrs., Inc.*, 369 F.3d 385(4th Cir. 2004). (4) Finally, sanctions may only be imposed if the challenged pleading is not withdrawn or corrected within twenty-one days after *service* of the motion on the party to be charged. *Id.*

Based on the reading of Rule 9011 and Fourth Circuit case law, this Court is without authority to award Mr. Short sanctions under Fed. R. Bankr. P. 9011(c)(1)(A). Mr. Short stated to the Court that he “notified Mr. Held orally and in writing that [ABB was] going to proceed with attorney’s fees.” Regardless, under applicable law, oral or written notification alone does not meet the procedural safeguards for Rule 9011 in this Circuit.

First, the request should have been made by separate motion, instead of included in the objection to confirmation of the plan. Second, the *separate* motion should have been *served* on Mr. Held at least twenty-one (21) days before the motion was filed with the Court. The Court does note and understands the frustration that occurs from inadequate communication between opposing counsel. Mr. Held has been sanctioned by this Court in the past. His actions here fall short of the requirements of Rule 9011(b). Nevertheless, based on Fourth Circuit precedent, ABB’s request for sanctions is DENIED. The Trustee at the hearing recommended that the plan filed on November 10, 2006 be confirmed if the trustee recommends confirmation.

AND IT IS SO ORDERED.
Columbia, South Carolina
January 4, 2007