U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **16-03815-jw**

ORDER SANCTIONING COUNSEL FOR THE DEBTOR

The relief set forth on the following pages, for a total of 13 pages including this page, is hereby ORDERED.

FILED BY THE COURT
04/19/2017

Entered: 04/19/2017

John E. Waites

US Bankruptcy Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 16-03815-JW
Victorious A. Burgess,	Chapter 13
Debtor.	

ORDER SANCTIONING COUNSEL FOR THE DEBTOR

This matter comes before the Court for a hearing on an Order and Rule to Show Cause entered on April 4, 2017 ("Rule"), to determine whether counsel William J. Barr ("Mr. Barr") should be sanctioned for his failure to represent the debtor Victorious A. Burgess ("Debtor") in connection with certain matters pending before this Court in Debtor's Chapter 13 bankruptcy case. No written response was filed to the Rule; however, Mr. Barr appeared at the hearing and presented an oral response. The Chapter 13 Trustee and Debtor were also present at the hearing.

After reviewing the record and evidence presented, the Court makes the following findings of fact and conclusions of law:[1]

FINDINGS OF FACT

1. On July 29, 2016, Debtor filed a voluntary Chapter 13 case with the assistance of and representation by Mr. Barr. Mr. Barr's disclosure of compensation, filed with Debtor's schedules ("Disclosure"), indicates that for representing Debtor, Mr. Barr agreed to accept a flat fee of $3,500.[2] Prior to the filing of her case, Debtor paid Mr. Barr a portion of his flat fee

[1] 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, they are so adopted.

[2] South Carolina Local Rule 2016-1(b) provides for a "no look" fee for debtor's counsel in cases when counsel and debtors agree in writing to a fee for representation that is equal to or less than the "Expedited Fee Amount" set forth in Chambers Guidelines. In 2016, the maximum "Expedited Fee Amount" for Chapter 13 cases pending before the undersigned was $3,500.

($1,739.69), as a retainer.[3] The Disclosure states that, in exchange for the fee, Mr. Barr has "agreed to render legal services for all aspects of the bankruptcy case, . . . " but that, "[b]y agreement with the debtor(s) the [disclosed flat fee] does not include . . . [r]epresentation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions, or any other adversary proceeding."

2. Debtor's original Chapter 13 plan was filed on July 29, 2016. The original plan was amended from time to time, and was eventually confirmed by Order of this Court dated February 13, 2017. For one of Debtor's creditors, Lo-Co Manufactured Housing, Inc. ("Lo-Co"),[4] Section IV.B of the confirmed plan provides as follows: "Debtors [sic] mother is the defacto owner of the [Collateral] and will be responsible for paying Lo-Co Manufacturing Home for the same." As a result of her confirmed plan, Debtor effectively abandoned her interest in the Collateral, and disclaimed any personal obligation to make payments to Lo-Co.

3. On February 7, 2017, the Chapter 13 Trustee ("Trustee") filed a motion to dismiss Debtor's case due to her failure to make plan payments. On April 5, 2017, a P-III Order was entered resolving the Trustee's motion to dismiss based on an agreement reached by the Trustee and Debtor and/or Mr. Barr.

4. It appears that Mr. Barr remains Debtor's counsel of record in this case.

5. On February 9, 2017, Lo-Co filed a *pro se* motion seeking relief from the automatic stay to pursue its state law remedies against the Collateral ("§ 362 Motion").

[3] Debtor is paying the balance of Mr. Barr's flat fee as a priority claim by making payments to the Trustee for distribution to Mr. Barr pursuant to her confirmed plan.

[4] Lo-Co is a creditor of Debtor by virtue of a "Lease with an Option to Buy" ("Contract") executed and delivered by Debtor to Lo-Co on April 2, 2007. The property that is the subject of the Contract is a 1996 General 28x76 doublewide, vin GMHGA413968542AB ("Collateral").

6. Notice of the hearing on the § 362 Motion, including the deadline for objections to the § 362 Motion, was served on Mr. Barr electronically,[5] and on Debtor by mail. The deadline for objections to the § 362 Motion was March 20, 2017. No objections were filed to the § 362 Motion.

7. On March 21, 2017, an Order was entered rescheduling the hearing on the § 362 Motion. On March 21, 2017, this Order was served electronically on Mr. Barr, and served by mail on Debtor.

8. A hearing on the § 362 Motion was held on March 28, 2017. The Trustee and two representatives from Lo-Co were present at the hearing, but neither Debtor nor Mr. Barr appeared. On March 28, 2017, an Order Granting Lo-Co relief from the automatic stay was entered ("§ 362 Order").

9. On March 29, 2017, Mr. Barr's office faxed correspondence to the Clerk of Court enclosing a letter purportedly written and signed by Debtor,[6] pursuant to which Debtor, appearing *pro se,* asked the Court to reconsider entry of the § 362 Order ("Motion for Reconsideration"). Mr. Barr's correspondence advised the Clerk that Debtor would also be sending her Motion for Reconsideration by mail and email. Mr. Barr's signature did not appear on the Motion for Reconsideration.

10. On March 30, 2017, the Court issued an Order and Notice of Hearing on the Motion for Reconsideration ("March 30, 2017 Order"). The March 30, 2017 Order expressly directed Mr. Barr to ensure that the Motion for Reconsideration and the Order and Notice of Hearing were

[5] South Carolina Local Bankruptcy Rule (hereinafter "Local Rule") 9036-1(a) provides for the electronic service of documents filed on CM/ECF to Registered CM/ECF participants. Mr. Barr is a Registered CM/ECF participant and therefore received electronic service of documents filed in this case.

[6] A comparison of Debtor's signature on the Motion for Reconsideration with her signature on other documents in the record (*e.g.* the Contract) suggests that the signatures are not consistent.

served on Debtor, Lo-Co, and the Trustee. The Order also directed Mr. Barr to file an affidavit evidencing service of the aforementioned documents within three (3) days of service.

11. The March 30, 2017 Order was served on Debtor by mail and on Mr. Barr electronically.

12. On March 31, 2017, the Clerk's office additionally attempted to contact Mr. Barr both by telephone and by email to advise him of the entry of the March 30, 2017 Order, and to alert him to the service requirements contained therein. The Clerk's telephone messages were not returned, and the Clerk did not receive a response to the email.

13. Despite the direction in the March 30, 2017 Order, Mr. Barr failed to file the affidavit of service as required by the Court's March 30, 2017 Order.

14. On April 4, 2017, the Rule was entered requiring Mr. Barr to appear and show cause why he should not be sanctioned for his failure to represent Debtor in connection with the § 362 Motion and Motion for Reconsideration, as required by Local Rule 9011-1.

15. On April 13, 2017, a hearing was held on the Rule to determine the facts associated with Mr. Barr's representation of Debtor in this case. Testifying at the hearing were Debtor and Debtor's Counsel. The Trustee also attended the hearing.

CONCLUSIONS OF LAW

A. South Carolina Local Bankruptcy Rule 9011-1(b)

Local Rule 9011-1(b) provides:

> **Extent of an Attorney's Duty to Represent.** Except as may be provided in an attorney's written agreement with the client concerning appeals and adversary proceedings, any attorney who files documents for or on behalf of a party in interest shall remain the responsible attorney of record for all purposes including the representation of the party at all hearings and in all matters that arise in conjunction with the case.

Pursuant to Local Rule 9011-1, upon his appearance in a case on behalf of a party, counsel is responsible for representing the party at all hearings and matters arising in the case. Counsel's duty of representation continues unaffected until either the conclusion of the case, or until counsel is excused by the Court after proper motion and notice.

Local Rule 9011-1 is not new – some version of this rule has been in place in this District since 1991. Nor is this type of rule novel or unique to this District; rather, Local Rule 9011-1 is similar to the representation requirements contained in the local rules of many bankruptcy courts in the United States. *See, e.g.*, E.D.N.C. LBR 9011-1 ("Attorneys-Duties"); W.D.N.C. LBR 2091-1 (Extent of Attorney's Duty to Represent); N.D. Ga. LBR 9010-4 ("Appearances"); M.D. Fla. LBR 2091-1 ("Attorneys – Duties of Debtor's Counsel"); *see also In re Stamper*, Case No. 02-09812, slip op. at 5 n.6 (Bankr. D.S.C. December 19, 2005), and matters cited therein. Local Rule 9011-1, and other rules like it, serves the important purpose of:

> maintaining the integrity and efficient handling of matters before the Court. Among other benefits, [it] allows the Court and other interested parties to determine and rely on the appearance of counsel in order to encourage the efficient administration of cases, to include coordinating the service of pleadings and objections and the noticing of hearings . . . [and] allows the Court to determine the source of a party's legal instruction in order to hold the counsel providing assistance accountable to the applicable rules of court, other substantive requirements, and standards of conduct.

In re Mungo, 305 B.R. 762, 766 (Bankr. D.S.C. 2003).

B. Counsel's Arguments

Although he failed to file a written response to the Rule, at the hearing, Mr. Barr advanced two arguments to justify his failure to represent Debtor in connection with the defense of the § 362 Motion and the Motion for Reconsideration.[7] First, Mr. Barr noted that Local Rule 9011-1(b) permitted counsel to exclude from the scope of representation the prosecution or defense of any

[7] Mr. Barr offered no arguments to justify his failure to comply with the Court's March 30, 2017 Order.

adversary proceeding involving a debtor. Mr. Barr then pointed to Federal Rule of Bankruptcy Procedure 7001,[8] which identifies a proceeding to recover property as an adversary proceeding. In Mr. Barr's view, a motion for relief from the automatic stay filed pursuant to 11 U.S.C. § 362[9] is, in effect, a proceeding to recover property and therefore, such a motion is properly considered an adversary proceeding. Reading Bankruptcy Rule 7001, Local Rule 9011-1(b), and § 362 together, Mr. Barr concluded that since a motion for stay relief is, in effect, an adversary proceeding, Local Rule 9011-1(b) permitted him to intentionally carve out defense of a stay relief motion from the scope of his flat fee engagement.

While novel, Mr. Barr's argument must fail. As a matter of fact and law, a request for relief from the automatic stay is neither the functional or procedural equivalent of a proceeding to recover property. First, under the a plain reading of the Code, a party seeking a relief from the automatic stay is seeking just that – relief from (or "modification of") the automatic stay that is imposed upon the filing of a bankruptcy petition by § 362(a). Unless coupled with a proper request for additional relief, the only relief sought by a party filing a motion under § 362(d) is modification or termination of the automatic stay so the moving party can proceed in state court for further relief against a debtor.

In contrast, a party seeking to recover property pursuant to any of the applicable sections of the Bankruptcy Code is seeking an order from the Bankruptcy Court giving the party possession of property that is in the possession or control of a debtor or a non-debtor. *See*, *e.g.*, 11 U.S.C. § 547. If successful, a proceeding to recover property will result in a Bankruptcy Court Order

[8] Hereinafter "Bankruptcy Rule."

[9] Hereinafter, all references to provisions under the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, shall be by section number only.

requiring the person in possession of the disputed property to deliver the property to the complaining party.

A motion for stay relief is considered a "contested matter," pursuant to Bankruptcy Rule 9014. In addition, while a contested matter may involve the application of certain of the specified rules designated for adversary proceedings (*see* Bankruptcy Rule 9014(c)), the procedure for seeking stay relief is different from the procedure to recover property. Stay relief is obtained after motion, notice, and a hearing, all governed by Bankruptcy Rule 4001 and Local Rule 4001-1. In contrast, the bankruptcy rules mandate that an action to recover property be commenced by the filing of an adversary complaint, followed by the Clerk's issuance of a summons, both of which are served on the defendant in the same manner as a non-bankruptcy lawsuit. *See* Bankruptcy Rule 7001. Thus, notwithstanding Mr. Barr's argument, Bankruptcy Rule 7001 does not, as a matter of law, apply to motions for stay relief, and motions for stay relief do not constitute adversary proceedings, that may be summarily excluded from the scope of representation.

Because there are clear differences between a motion for stay relief and a proceeding to recovery property, as a matter of fact and law, the Court finds Mr. Barr's first justification for failing to represent Debtor to be without merit.

Although he admittedly and intentionally attempted to exclude defense of stay relief motions from the scope of his engagement, as further justification for his failure to represent Debtor, Mr. Barr told the Court that he would have represented Debtor in connection with the defense of the § 362 Motion and Motion for Reconsideration, but Debtor did not want him to appear and act on her behalf. When confronted with a client who does not want assistance, Mr. Barr asserted he had no alternative but to honor the client's wishes and not act.

If, in fact, Debtor had directed Mr. Barr not to act and advised him she wished to terminate his representation, Mr. Barr's second argument might be worthy of consideration.[10] However, this is not the situation before the Court. When questioned regarding her alleged desire to limit the scope of counsel's representation, Debtor initially conceded that she told Mr. Barr she did not want him to represent her in connection with the § 362 Motion or the Motion for Reconsideration. However, when questioned further by the Court, Debtor testified that she instructed Mr. Barr not to act not because she wished to proceed *pro se* or no longer wished him to represent her, but instead, because she understood that before he would act, she was required to pay him additional fees.[11] Had Mr. Barr not advised her that further representation would require additional compensation, she would have welcomed the assistance of counsel.[12]

As recognized by this and many other Courts, bankruptcy cases are unique in that they involve "a series of discrete contested matters and adversary proceedings, each of which can impact the substantive relief afforded to the debtor." *In re Davis*, 258 B.R. 510, 513-14 (Bankr. M.D. Fla. 2001). An attempt by counsel to limit or exclude certain types of representation, or to condition continued representation on the prepayment of additional fees, can leave debtors vulnerable and without representation during a crucial part of their case. *See id.* at 512-13; *In re Egwim*, 291 B.R. 559, 575 (Bankr. N.D. Ga. 2003) ("It is troubling that a represented debtor *ever*

[10] Even in this situation, however, Mr. Barr would have been required to appear at the hearing and advise the Court of the instructions he received from his client. Mr. Barr's duty of representation does not end unless and until he has been relieved by Order of the Court.

[11] The Court infers that Debtor's decision not to pay Mr. Barr any additional compensation stemmed not from a disinclination to pay, but instead from an inability to pay within a short time frame.

[12] The Court is particularly concerned with what appears to be counsel's efforts to require Debtor to pre-pay for "a la carte" legal services as a condition for receiving representation. If a debtor does not have funds readily on hand to make the prepayment, debtor's rights may be prejudiced.

make a *pro se* appearance [because this] is a clear indication to the Court that counsel is not adequately representing the client because either the debtor is there for a good reason and thus needs counsel to be there also, or the debtor is there for no reason, indicating that counsel has not advised the debtor that appearance is not necessary.") (emphasis original). In addition, counsel's efforts to extract additional fees as a condition of continued representation files in the face of the applicable rules of professional responsibility. Finally, an attorney's efforts limit the scope of her representation can wreak havoc both upon debtors and the courts:

> The positive effects provided by Local Rule [9011-1(b)] are frustrated whenever an attorney either fails to completely satisfy its provisions . . . . Clients who proceed through a case without an attorney to shepherd them through the complexities of the bankruptcy process tax the resources of the Court since these pro se individuals often require more time consuming handling by the Clerk's Office and the Court in order to insure they are provided adequate due process. Additionally, pro se litigants are more likely to make errors which require the Clerk and Court to expend resources to correct. Finally, when litigants are properly represented they are more likely to obtain the full benefits of the bankruptcy laws and follow necessary procedures.

In re Mungo, 305 B.R. at 766.

C. Sanctions

This Court has repeatedly reminded counsel of their obligation to comply with the requirements of Local Rule 9011-1 and their duty of continued representation of debtors. *See, e.g.*, *In re Stamper*, Case No. 02-09812, slip op. (Bankr. D.S.C. December 19, 2005) (the Local Rules and enforcement thereof are necessary to prevent overreaching by debtor's counsel and to prohibit the raising of the counsel's interest above those of the debtor); *In re Mungo*, 305 B.R. 762 (Bankr. D.S.C. 2003) (detailing the requirements of former Local Rule 9010-1(d), predecessor to Local Rule 9011-1, and corresponding policy concerns); *Johnson v. Bank of Travelers Rest* (*In re Johnson*), Case No. 02-12454, Adv. Pro. No. 03-80212, slip op. at 3 (Bankr. D.S.C. May 8, 2003) ("The bar of this District should be aware of the requirements of Local Rule [9011-1] and be

cautioned that failure to comply with or any manipulation of the Rule is considered sanctionable conduct); *In re Donaldson*, Case No. 02-13215-W, slip op. (Bankr. D.S.C. Feb. 26, 2003) ("Local Rule 9010-1(d) deems a debtor's attorney responsible for representing the debtor in all hearings and matters which arise in connection with the case . . . .").

By his attempt to circumvent his obligation to represent Debtor in connection with motions for stay relief, and his failure to represent Debtor in connection with the § 362 Motion and Motion for Reconsideration, Mr. Barr has violated Local Rule 9011-1(b).

Section § 105 and Bankruptcy Rule 9011(c) allow the Court to impose sanctions on counsel. This Court also has inherent contempt power to impose sanctions on attorneys that fail to comply with orders or rules of the Court. When confronted with sanctionable conduct, the Court "may invoke its inherent power in conjunction with, or instead of other sanctioning provisions such as Rule 9011." *McGahren v. First Citizens Bank & Trust, Co.* (*In re Weiss*), 111 F.3d 1159, 1173 (4th Cir. 1997); *see also In re Computer Dynamics, Inc.*, 253 B.R. 693 (E.D. Va. 2000), *aff'd*, 2001 WL 538945 (4th Cir. 2001) (unpublished) (holding bankruptcy courts have broad discretion to sanction attorneys); *In re Ford*, 522 B.R. 842, 848 (Bankr. D.S.C. 2015), and cases cited therein (same). Because of his failure to comply with the Bankruptcy Rules, the rules of this Court, and an order of this Court, the Court will sanction counsel.

CONCLUSION

Based on the evidence and the totality of the circumstances before it, the Court finds that Mr. Barr violated the provisions of Local Rule 9011-1(b). Therefore, the imposition of sanctions is necessary in this matter. This Court specifically finds that a sanction of this nature is necessary to provide a deterrent to Mr. Barr and other debtor's counsel on this critical representation issue.

In light of these considerations, the Court sanctions Mr. Barr in the amount of $750.00 ("Sanction"). The Sanction imposed herein shall be paid within ten (10) days from the entry of this Order. If Mr. Barr chooses,[13] the Sanction may be paid to South Carolina Legal Services,[14] South Carolina Appleseed Legal Justice Center,[15] the South Carolina Bar Pro Bono Program,[16] or it may be paid to the Clerk of this Court, for deposit into the United States Treasury. Mr. Barr shall file a certification of compliance within fifteen (15) days from the entry of this Order.

In addition, in each currently open Chapter 13 case in which Mr. Barr has filed disclosures of compensation that purport to similarly limit his representation contrary to Local Rule 9011-1(b), Mr. Barr shall provide a written statement to each client that notwithstanding any fee discussions or agreements to the contrary, Local Rule 9011-1(b) requires him to represent them in matters involving motions for relief from the automatic stay and other matters covered by the rule.[17] This communication shall be completed within thirty (30) days from the entry of this Order. Within thirty-five (35) days of the entry of this Order, Mr. Barr shall file in this case an affidavit of compliance indicating that he has fully complied with the provisions of this paragraph.[18]

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[13] This payment is in the nature of a sanction and may not be used by Mr. Barr to reduce taxable income. Mr. Barr shall provide a copy of this Order with the payment of this sanction to the recipient of the sanction so that the recipient is aware that the funds received are not in the nature of a charitable contribution.

[14] Florence Region Office
320 S. Coit Street
Florence, SC 29501

[15] 1518 Washington Street
Columbia, SC 29201

[16] SC Bar Pro Bono Program
P.O. Box 608
Columbia, SC 29202

[17] The Court notes that in this case, the Disclosure purports to exclude not only the defense of motions for stay relief, but also judicial lien avoidance actions. This exclusion is also prohibited by Local Rule 9011-1(b).

[18] The affidavit shall be signed by Mr. Barr and shall include: (a) a sample of the communication provided to the affected debtors; (b) a list of the debtors who received the communication, with case numbers; (c) the date(s) that written communications were mailed to debtors; and (d) the names of any debtors whose communications were returned to Mr. Barr.

The ordering of sanctions in this case is based upon 11 U.S.C. § 105 and the Court's inherent authority to regulate litigants before it and 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 at 1173, and *In re Computer Dynamics, Inc.*, 253 B.R. at 693.

The sanctions imposed herein shall survive any dismissal or the closing of this bankruptcy case.

AND IT IS SO ORDERED.