United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Daniel F. Lane

Bankruptcy No. 98 B 32553

Adversary Caption: Barbara Lane v. Daniel F. Lane

Adversary No. 99 A 00118

Date of Issuance: June 21, 1999

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Donald B. Garvey, Esq., Garvey & Associates, Ltd., 1301 West 22nd Street, Suite 812, Oak Brook, IL 60523

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
DANIEL F. LANE,	)	
	)	Chapter 13
Debtor.	)	Bankruptcy No. 98 B 32553
	)	Judge John H. Squires
	)	
BARBARA LANE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 99 A 00118
	)	
DANIEL F. LANE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion for sanctions under Federal Rule of Bankruptcy Procedure 9011, filed by the defendant debtor Daniel F. Lane (the "Debtor") against the plaintiff Barbara Lane, his former spouse, (the "Creditor") and her attorney, Donald B. Garvey ("Garvey"). For the reasons set forth herein, the Court grants the motion in part, and imposes sanctions against Garvey in the sum of $2,000.00. The Court declines to impose sanctions against the Creditor.

I. JURISDICTION AND PROCEDURE

The Court has the power to entertain this matter pursuant to 28 U.S.C. § 1334 and Local General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. FACTS AND BACKGROUND

On October 14, 1998, the Debtor filed a Chapter 13 petition. The Creditor filed the instant adversary proceeding on February 3, 1999. The complaint alleged that the Debtor violated 11 U.S.C. § 727(a)(2) and (a)(4) in that he committed various acts of false oaths in the filing of his bankruptcy schedules by omitting assets and income; undervaluing assets; concealing, destroying, falsifying or failing to keep or preserve recorded information from which his financial condition or business transactions might be ascertained; and falsely testifying under oath at the meeting of creditors held under 11 U.S.C. § 341.

On March 9, 1999, the Debtor's attorneys sent a letter to the Creditor's attorney requesting the authority relied upon as the basis for the complaint and indicating, among other things, that the pleaded objections to discharge under § 727 were not applicable in a Chapter 13 case. The letter also requested that the complaint be voluntarily dismissed within a week, and if that were not done, the Debtor would file a motion to dismiss the complaint and would request sanctions under Bankruptcy Rule 9011 for alleged harassment.

The Creditor did not voluntarily dismiss the complaint until April 12, 1999. The Debtor filed the instant motion on April 23, 1999. The Debtor and the Creditor agreed to a voluntary dismissal of this adversary proceeding without prejudice, with the Court retaining jurisdiction to decide the instant motion.

The Creditor was given leave to respond to this motion by May 19, 1999, and the matter was set for hearing on June 2, 1999. The Creditor's response was not filed until June 1, 1999, and her attorney did not appear at the hearing as he was allegedly on trial elsewhere. The Debtor's attorney appeared at the hearing and filed his affidavit of fees incurred in this

matter. Subsequently, an amended affidavit was filed. The Debtor seeks $2,600.00 in fees to be assessed against the Creditor and her attorney for the 17.30 hours of attorney and paralegal time expended on this matter. Neither party requested an evidentiary hearing, so the Court took the matter under advisement.

III. APPLICABLE STANDARDS

Bankruptcy Rule 9011 is modeled after Federal Rule of Civil Procedure 11. Rule 11 was amended in 1993 to add certain notice requirements[1] and these same amendments were later made to Bankruptcy Rule 9011, effective in 1997. Thus, in applying the current version of Bankruptcy Rule 9011, courts frequently look to Rule 11 and the cases decided thereunder. See In re Famisaran, 224 B.R. 886, 894 (Bankr. N.D. Ill. 1998). Some Rule 11 cases decided prior to the procedural amendment are still applicable today in analyzing Bankruptcy Rule 9011 because the substantive provisions were not altered. See State Bank of India v. Kaliana (In re Kaliana), 207 B.R. 597, 601 (Bankr. N.D. Ill. 1997) (citations omitted).

The goal of the sanctions remedy provided under Bankruptcy Rule 9011 (and former Rule 11) is to deter unnecessary filings, prevent the assertion of frivolous pleadings, and to

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[1] Rule 11 was amended in 1993 to broaden the obligations of the parties to refrain from conduct which frustrates the judicial process while also placing greater constraints on the imposition of sanctions. Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendments. To this end, the provisions of (c)(1)(A) were included to provide parties with notice and an opportunity for "curing" offensive pleadings before a remedy could be sought in court. Bankruptcy Rule 9011 was amended in 1997 in order to bring it in conformance with Rule 11's earlier 1993 revision. Commonly known as the "safe-harbor provision," this notice requirement is not at issue in the instant matter.

require good faith filings. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077-80 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988). The Rule is not intended to function as a fee shifting statute which would require the losing party to pay costs. Kaliana, 207 B.R. at 601 (citing Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989)). Thus, the Rule focuses on the conduct of the parties and not the results of the litigation. Bankruptcy Rule 9011 provides in relevant part:

> (a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. . . .
> (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 and 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. . . .

. . .

(2) Nature of Sanction; Limitations. *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.* Subject to the limitations in subparagraphs (A) and (B), *the sanction may consist of, or include,* directives of a nonmonetary nature, an order to pay a penalty into court, or if imposed on motion and warranted for effective deterrence, *an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.*

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

. . .

> (3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Fed. R. Bankr. P. 9011 (emphasis supplied).

The present version of Bankruptcy Rule 9011 provides that upon presenting in the manner of signing, filing, submitting or later advocating documents to the court, a party or their counsel represents that to the best of that person's knowledge, information and belief, formed after a reasonable inquiry under the circumstances, such document is not presented (1) for any improper purpose, (2) based upon frivolous legal arguments, (3) without adequate evidentiary support for its allegations, and (4) without a basis for denials of fact. These provisions essentially create two grounds for the impositions of sanctions: (1) the "frivolousness clause," which looks to whether a party or an attorney made a reasonable inquiry into both the facts and the law; and (2) the "improper purpose clause," which looks to whether a document was interposed for an illegitimate purpose such as delay, harassment, or increasing the costs of litigation. Kaliana, 207 B.R. at 601 (citations omitted).

With respect to the "frivolousness clause," the relevant inquiry has two prongs: (1) whether the attorney made a reasonable inquiry into the facts and (2) whether the attorney made a reasonable investigation of the law. Home Savs. Ass'n of Kansas City, F.A. v. Woodstock Assocs. I, Inc. (In re Woodstock Assocs. I, Inc.), 121 B.R. 238, 242 (Bankr. N.D. Ill. 1990) (citing Brown v. Federation of State Medical Bds. of the United States, 830 F.2d 1429, 1435 (7th Cir. 1987)). In making the determination of whether a reasonable inquiry was made with respect to the facts of a case, courts must consider five factors: (1)whether

the signer of the document had sufficient time for investigation; (2) the extent to which the attorney had to rely on his client for the factual foundation underlying the pleading; (3) whether the case was accepted from another attorney; (4) the complexity of the facts and the attorney's ability to perform a sufficient pre-filing investigation; and (5) whether discovery would have been beneficial to the development of the underlying facts. Id. In sum, the investigation of the facts must have been reasonable under the particular circumstances of the case. In re Excello Press, Inc., 967 F.2d 1109, 1112-13 (7th Cir. 1992).

A pleading is well-grounded in fact if it has some reasonable basis in fact. Woodstock, 121 B.R. at 242 (citations omitted). On the other hand, a pleading is not well-grounded in fact if it is contradicted by uncontroverted evidence that was or should have been known by the attorney signing the document. Id. (citation omitted). Nonetheless, the Rule does not require investigation to the point of absolute certainty. Kaliana, 207 B.R. at 601 (citation omitted).

IV. DISCUSSION

The Creditor explains in her response that she advised her attorney, Garvey, that the Debtor failed to schedule assets and undervalued others. Garvey, in turn, consulted with a bankruptcy attorney who allegedly advised him to file an objection to the Debtor's discharge under § 727 within the sixty-day period following the creditors' meeting. After receiving the March 9, 1999 letter from the Debtor's attorney, Garvey reviewed it with the other bankruptcy attorney who then advised him that the proper procedure was to file an objection to the confirmation of the Debtor's plan, rather than a complaint objecting to discharge. The

Creditor still contends that the Debtor failed to properly schedule all of his property, (as supposedly verified by the Creditor checking the records), but rather, chose to take a voluntary dismissal of the underlying bankruptcy case as contemplated by 11 U.S.C. § 1307(b), without amending his schedules to make the appropriate corrections and additions. The Creditor and her attorney assert that it was reasonable for them to consult with, and rely in good faith upon the advice of, an experienced bankruptcy attorney for guidance and that they promptly agreed to dismissal of the adversary proceeding when they discovered their procedural error. The Creditor maintains that the complaint was not filed merely to harass the Debtor. Thus, she argues, the imposition of sanctions under Bankruptcy Rule 9011 is inappropriate and unnecessary.

The principal authorities relied upon by the Debtor in support of the motion are Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552 (1990); In re Brown, 56 B.R. 293 (Bankr. N.D. Ill. 1985); and In re Jones, 31 B.R. 485 (Bankr. N.D. Ill. 1983). These cases are cited for the undisputed proposition that Chapter 13 offers debtors more liberal treatment with respect to non-dischargeable claims than Chapter 7, because the scope of the discharge under § 1328 is broader than the Chapter 7 discharge under § 727. All of these authorities are inapposite to the matter at bar, however, because Bankruptcy Rule 9011 was neither cited nor discussed in those cases. Hence, those authorities provide no guidance on the issue at bar. The Debtor has failed to cite any authority to support the imposition of sanctions. Consequently, the Court was required to perform his research. The Court does not have a duty to research and construct legal arguments available to a party. Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency 11, 46 F.3d 629, 635 (7th Cir.

1995).

From a review of the relevant case law cited above, it does not appear that the filing of the complaint was done for an "improper purpose" under that clause of the Rule. There was no undue delay, proven harassment, or unnecessary increase in the costs of litigation occasioned by the erroneous filing of the complaint, rather than the procedurally correct objection to confirmation. After all, the gravamen of the complaint was that the Debtor omitted certain assets from his schedules and significantly undervalued others, and the Creditor attached various documents to her response purportedly supporting those contentions. Though inconvenient to the Debtor and procedurally defective, the complaint was not demonstrative of any pattern of delay or improper harassment of the Debtor, who would have been obliged to respond in opposition had the Creditor filed an objection to confirmation on the same grounds.

It appears, however, that by filing the complaint, Garvey violated the "frivolousness clause" of the Rule in that he did not make a reasonable investigation of the law as required by the second prong of the clause. Clearly, a reasonable inquiry was made into the facts. It appears from the documents attached to the response–the state court judgment of dissolution of the marriage of the parties containing property division between them, an account statement concerning the allegedly unscheduled stock fund in the name of the Debtor, a 1998 real property appraisal, and a 1999 NADA valuation for a motor vehicle--that the Creditor and Garvey were relying on those materials when making the factual contentions regarding the alleged bankruptcy schedule deficiencies of the Debtor. There is no doubt in the Court's mind that the violation of the Rule was committed by the well-

intentioned attorney who made the tactical decision to file the wrong pleading on the wrong legal theory, not the Creditor who undoubtedly deferred to her attorney for the appropriate legal advice and steps to protect her interest.

The Rule requires attorneys to study the law before representing its contents to the Court. See Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.), cert. denied, 479 U.S. 851 (1986). "An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating. Counsel who puts the burden of study and illumination on the defendants or the court must expect to pay attorneys' fees under the Rule." Id. (citations omitted). Garvey's conduct must be judged by inquiring what was objectively reasonable to believe at the time the pleading was signed. See LaSalle Nat. Bank of Chicago v. County of DuPage, 10 F.3d 1333, 1338 (7th Cir. 1993).

The entire legal theory of the complaint was wholly inapposite and inapplicable to a Chapter 13 case and thus forced the Debtor to the time, trouble and legal expense of defending same and expending efforts after the request to withdraw the complaint was made. Garvey only consulted with another attorney as to the legal basis for filing the complaint. He performed no other pre-filing legal investigation, such as research of the applicable case law. The Court finds Garvey's reliance on this advice as his sole pre-filing investigation of the law unreasonable and insufficient. Therefore, Bankruptcy Rule 9011 sanctions are appropriate. Accordingly, the Court imposes sanctions against Garvey and in favor of the Debtor. The Court awards the Debtor his reasonable attorney's fees in the sum of $2,000.00. The Court finds that some of the time expended by counsel for the Debtor was unreasonable and unnecessary. Hence, the Court awards only this reduced figure. The Court will not impose sanctions against the Creditor.

V. CONCLUSION

For the reasons set forth above, the Court grants the Debtor's motion in part, and imposes sanctions pursuant to Bankruptcy Rule 9011 against Garvey in the sum of $2,000.00. The Court declines to impose sanctions against the Creditor.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: ______________________________

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
DANIEL F. LANE,	)	
	)	Chapter 13
Debtor.	)	Bankruptcy No. 98 B 32553
	)	Judge John H. Squires
	)	
BARBARA LANE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 99 A 00118
	)	
DANIEL F. LANE,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 21st day of June, 1999, the Court hereby grants, in part, the motion of Daniel F. Lane for sanctions under Federal Rule of Bankruptcy Procedure 9011. The Court imposes sanctions against Donald B. Garvey in the sum of $2,000.00. The Court declines to impose sanctions against Barbara Lane.

ENTERED:

DATE: ______________________________

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List