UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

DIANNA L. DEPPE,

Debtor. BKY 96-43133

MARK K. SCHAEFER

Plaintiff, ADV 97-4041

-vs.-

DIANNA L. DEPPE,
f/k/a Dianna L. Schaefer, MEMORANDUM ORDER AWARDING SANCTIONS

Defendant.

At Minneapolis, Minnesota, June 17, 1998.

The above-entitled adversary proceeding came on for hearing before the undersigned on the motion of the Debtor-Defendant, Dianna L. Deppe ("Deppe"), for sanctions against the Plaintiff, Mark K. Schaefer ("Schaefer"), and his attorneys pursuant to Federal Rule of Bankruptcy Procedure 9011. Appearances were as noted on the record. After carefully considering the papers, pleadings, and arguments of counsel, the Court concludes that sanctions should be imposed against Schaefer, but not against one of his attorneys, John Hedback.

FACTS AND PROCEDURAL HISTORY

1. On May 16, 1996, Deppe filed a petition for relief under Chapter 13 of the United States Bankruptcy Code, which was ultimately converted to Chapter 7. On her bankruptcy schedules,

Deppe listed a debt owed to Schaefer's parents, on which she and Schaefer were jointly liable. On February 11, 1997, Deppe was granted a discharge pursuant to 11 U.S.C. § 727.

2. On February 10, 1997, Schaefer commenced the instant adversary proceeding against Deppe, claiming that Deppe's obligation to indemnify him for her share of the joint debt owed to his parents was nondischargeable pursuant to 11 U.S.C. § 523(a)(15). The adversary complaint was signed by Schaefer and by his attorney at the time, John A. Hedback ("Hedback").

3. On June 18, 1997, Hedback withdrew as counsel for Schaefer. Subsequently, on July 2, 1997, attorney Ann M. Looft was added as counsel to represent Schaefer in this proceeding, who was shortly thereafter replaced by Jay A. Benson ("Benson"). At one point, Benson withdrew from the representation ,but later agreed to continue to represent Schaefer.

4. On September 22, 1997, after various continuances at the request of counsel, this Court issued a Third Amended Scheduling Order and Order for Pretrial, setting August 25, 1997 as the final deadline for all discovery matters.

5. On October 14, 1997, this Court granted Schaefer leave to amend his complaint to add a claim that Deppe's obligation to indemnify him for her share of a joint debt owed to the law firm of O'Neill, Burke, O'Neill, Leonard & O'Brien was nondischargeable under 11 U.S.C. § 523(a)(15). The Court's order

authorized additional discovery on this issue until October 31, 1997.

6. On November 14, 1997, Schaefer filed an amended complaint against Deppe, seeking nondischargeability of his two claims of indemnification under 11 U.S.C. § 523(a)(15). The amended complaint was signed by Schaefer and by his attorney, Benson.

7. On November 14, 1997, both parties filed motions for summary judgment pursuant to Fed. R. Bankr. P. 7056. At the December 17, 1997, hearing, the Court denied Schaefer's motion for summary judgment and took Deppe's motion for summary judgment under advisement.

8. On February 2, 1998, based on the evidence presented, the Court granted summary judgment in favor of Deppe, finding that Deppe did not have the ability to pay the debts owed to Schaefer under 11 U.S.C. § 523(a)(15)(A). The findings of fact made in that opinion are hereby incorporated as part of this order.

9. On February 20, 1998, Deppe filed the current motion seeking an award of attorneys' fees and costs against Schaefer, Hedback and Benson pursuant to Federal Rule of Bankruptcy Procedure 9011.[1]

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[1]At the hearing on Deppe's motion for sanctions, Deppe's counsel indicated that Deppe was no longer seeking sanctions against Benson because Deppe and Benson had reached a settlement

CONCLUSIONS OF LAW

Federal Rule of Bankruptcy Procedure 9011[2] provides, in relevant part:

> **(a) Signature.** Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, 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, whose office address and telephone number shall be stated. A party that is not represented by an attorney shall sign all papers and state the party's address and telephone number. *The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case.* If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. *If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose*

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in the amount of $5,000.

[2]Rule 9011 was amended in 1997 to conform with the 1993 changes to Fed. R. Civ. P. 11. The amended version of Rule 9011 took effect on December 1, 1997, and it governs "all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending." See Supreme Court Order Amending Federal Rules of Bankruptcy Procedure (Apr. 11, 1997). Nevertheless, because the filing of the allegedly sanctionable papers took place prior to this date, the Court has determined that the preamendment Rule 9011 governs for purposes of this motion. See MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 73 F.3d 1253, 1257 (2d Cir. 1996) (concluding that preamendment Rule 11 applies where allegedly sanctionable conduct occurred prior to effective date of amendment).

> *on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.*

FED. R. BANKR. P. 9011(a) (emphasis added). Thus, under Rule 9011 a party's signature on a pleading, motion or other paper constitutes an affirmative certification: (1) that there was a "reasonable inquiry" of the relevant facts and law; (2) that the signer believed its filing was "well grounded in fact"; (3) that the legal theory behind the claims for relief were objectively "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"; and (4) that the filing was "not interposed for any improper purpose" such as harassment, delay, or an unnecessary increase in cost. In re KTMA Acquisition Corp., 153 B.R. 238, 247 (Bankr. D. Minn. 1993). If any of the first three conditions are violated, the filing is considered "frivolous"; if the fourth condition is violated, the filing is considered "improper." Id. To determine whether a violation of Rule 9011 has occurred, the court applies an objective standard of reasonableness under the circumstances. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 554 (1991); NAACP v. Atkins, 908 F.2d 336, 339 (8th Cir. 1990); KTMA, 153 B.R. at 248.

I. PROPRIETY OF SANCTIONS AGAINST HEDBACK

The Court finds that an award of sanctions against Hedback is not appropriate in this case. Hedback represented Schaefer in the case only long enough to file the initial adversary complaint and an answer to Deppe's counterclaim. Although the complaint's allegation that Schaefer's debt was nondischargeable under § 523(a)(15) ultimately proved to be untrue, the complaint was filed before discovery in the case began and, at the time of filing, it was unknown to Hedback whether Schaefer would resume paying his child support obligations to Deppe and thereby improve her ability to pay the debt under 11 U.S.C. § 523(a)(15)(A). When assessing whether a violation of Rule 9011 has occurred, a court "is expected to avoid using the wisdom of hindsight and should judge the signor's conduct by inquiring what was reasonable to believe at the time of the pleading, motion, or other paper submitted." Souran v. Travelers Ins. Co., 982 F.2d 1497, 1507 n.12 (11th Cir. 1993) (quoting FED. R. CIV. P. 11 Advisory Committee Note). Applying this standard to the facts at hand, there is insufficient evidence before the Court to conclude that the filings by Hedback were either frivolous or filed for an improper purpose.

II. PROPRIETY OF SANCTIONS AGAINST SCHAEFER

Allowing Schaefer the benefit of the doubt on the issue of his good faith in filing this lawsuit, the Court nevertheless

reaches the inevitable conclusion that Schaefer's filing of the amended complaint on November 14, 1997 was frivolous under the standards of Rule 9011. Discovery in this case was fully completed on October 31, 1997. As demonstrated by the Court's order for summary judgment, a reasonable examination of the evidence available to the parties at that time would have clearly shown that Deppe did not have the ability to pay the nearly $40,000 debt in question, and that Schaefer's complaint was doomed to failure under the plain language of 11 U.S.C. § 523(a)(15). Rather than withdrawing his initial complaint in the face of such adverse evidence, however, Schaefer instead pressed forward by filing an amended complaint asserting the nondischargeabilty of the debts under § 523(a)(15). Accordingly, in light of the lack of evidentiary support for Schaefer's amended complaint, the Court concludes that Schaefer's filing of the amended complaint constituted a frivolous filing under Rule 9011 because it was not well grounded in fact and because Schaefer failed to conduct a reasonable inquiry into the law and facts of the case before filing the amended complaint with the Court.

Furthermore, after objectively viewing Schaefer's conduct by looking at the facts of the case, the reasonableness of the pleadings, and the circumstances surrounding their filing, see KTMA, 153 B.R. at 265, the Court also holds that Schaefer's

original and amended complaints were filed for the improper purpose of harassing Deppe. As just stated, the evidence in this case clearly showed that Deppe did not have the ability to pay these debts as required for nondischargeability under 11 U.S.C. § 523(a)(15). Moreover, although Schaefer began to resume some of his child support payments toward the beginning of the case, the evidence showed that Schaefer paid virtually none of his child support obligations throughout the case and that, by the time of the summary judgment hearing, Schaefer's arrearages approached the sum of $30,000. Schaefer's failure to make these payments obviously further weakened Deppe's financial situation and reduced the likelihood of her ability to pay under 11 U.S.C. § 523(a)(15)(A). Thus, in light of Schaefer's failure to heed the available evidence showing that Deppe did not have the ability to pay his debt and in light of his failure to improve Deppe's prospects at paying the debt by paying his child support obligations to her, the Court finds that Schaefer did not reasonably believe that Deppe had the ability to pay these debts as required by 11 U.S.C. § 523(a)(15), and that he filed the initial and amended complaints for the improper purpose of harassing Deppe to pressure her into paying a dischargeable debt.

III. Amount of Sanctions

Because the Court has concluded that Schaefer's filings in this case violated the requirements of Rule 9011(a), the Court has no choice but to order sanctions. Ebersold v. DeLaughter (In re DeLaughter), 213 B.R. 839, 841 (B.A.P. 8th Cir. 1997); KTMA, 153 B.R. at 268. In determining the amount of sanction to impose under Rule 9011, however, courts must be mindful of Rule 9011's purpose of deterring future violations of the rule. KTMA, 153 B.R. at 268. In determining the appropriate amount, the Court should consider (1) the reasonableness of the opposing party's attorneys' fees; (2) the minimum sanction necessary to deter; (3) the wrongdoer's ability to pay; and (4) the relative severity of the Rule 9011 violation. After considering each of these factors, the court concludes that Schaefer should be sanctioned in the amount of $9,211.12.

I select this number, intended to cover $8,000 in attorneys fees and $1,211.12 in costs and expenses, after weighing the following. *First*, the fees and expenses sought are entirely reasonable for the services performed.[3] *Second*, Schaefer needs

[3]Deppe's counsel has filed an affidavit in which she attests that her reasonable attorneys fees incurred in connection with representing Deppe in this adversary proceeding are $23,250.00. The affidavit indicates that counsel reduced her hourly rate to $175.00 per hour (down from $205) and that a law clerk's and a legal assistant's work was charged at hourly rates of $65.00 and $75.00 per hour. The affidavit indicates that 6.5 hours were spent on preparation of the answer ($1,137.50); 20.2 hours in research regarding § 523(a)(15) (half of that being done by a law clerk); 18.4 hours on discovery ($3,220.00); 19.6 hours (much of it by the law clerk and the legal assistant) on factual

to be deterred. Even a casual reading of the court's prior opinion can lead to but one conclusion: Schaefer tried to use bankruptcy court to salve the wounds he suffered in state court dissolution proceedings. At a minimum, some monetary deterrent is necessary to stall a continuing pattern of vindictiveness. Because Schaefer makes a reasonably good living, a lesser sanction might have little or no deterrent effect on his future conduct and would have no deterrent warning for others. *Third*, however, Schaefer is not a wealthy individual nor a person with extensive assets. Based on the full record before me as it has developed throughout these proceedings, I came to know him as a C.P.A. struggling to build back his practice. While I would like to sanction him in a greater amount, this third criteria limits my ability to do so. *Fourth*, this was a severe violation of Rule 9011.[4] Schaefer proceeded with improper purpose and without a

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investigation ($3,045.00); 12.9 hours on procedural action, all of which were necessitated by actions initiated by Schaefer ($2,257.50); 2.8 hours on settlement ($490.00); 35 hours on the motion for summary judgment ($5,625.00); 13 hours on discovery disputes ($2,275.00); and 15.4 hours on the sanctions request ($2,695.00). Much time also was never billed to the client in recognition of her limited resources. $1,211.12 of costs were incurred. I find that these fees and costs are well within the range of reasonableness. In fact, counsel's work was of superior quality but obviously performed with attention to the need to control, fees and costs for a client with limited means.

[4]I note that Amended Rule 9011 does not allow a sanction to be imposed against a represented party for legal judgment, but does allow such where the violations are of the types which occurred in this case.

reasonable factual basis for doing so. He hired and eventually discharged three attorneys, one of whom resigned only to return. This should have caused him some concern about the propriety of his pressing forward. These are sins of the client, for which the client bears responsibility under the Rule.

ACCORDINGLY, IT IS HEREBY ORDERED THAT the Plaintiff, Mark K. Schaefer shall pay the Defendant, Dianna L. Deppe the amount of her attorneys' fees and costs to the extent of $9,211.12 as a sanction for violating Fed. R. Bankr. P. 9011.

LET JUDGMENT BE ENTERED ACCORDINGLY.

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Nancy C. Dreher
United States Bankruptcy Judge