

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

Chapter 13 Case

Mitchell T. Klempf, individually and
as surety for EEE Parts Warehouse,
Inc., a Minnesota corporation,
a/k/a Klempf's British Parts,

BKY Case No. 3-89-3402

MEMORANDUM ORDER

Debtor.

At St. Paul, Minnesota this ____ day of _____, 1990.

This matter came before the Court on July 2, 1990 on motion by Patrick and Kelly Carr, creditors, for sanctions pursuant to 11 U.S.C. 9011, and Debtor's response seeking a determination that the Court lacks jurisdiction to impose sanctions in a closed Chapter 13 case, or, in the alternative, even if the Court has jurisdiction, that the creditors are not entitled to sanctions. The Debtor is represented by Paul W. Bucher. The Carrs are represented by Mark G. Stephenson. The Court, having considered the arguments of counsel, having reviewed all of the files and records pertinent to the issues raised, and being fully advised in the matter, now makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
FACTS

When the Debtor(FN1) filed his Chapter 13 petition on September 13, 1989, two lawsuits were pending in state court. The first, brought by Patrick Carr under M.S.A. Section 181, alleged that the

(FN1) The Debtor is married, but his wife has not joined in this petition.

Debtor and EEE Parts Warehouse, Inc., owed him unpaid commissions of \$15,133 plus interest, attorney's fees, and penalties; the second, brought by both Carrs against the Debtor and Farmers & Merchants State Bank, Blooming Prairie, Minnesota, alleged the Debtor and the Bank violated the Fair Credit Reporting Act, 15 U.S.C. Section 1681 (n) and (q). The Debtor allegedly obtained credit information about them, assisted by the Bank, to force Patrick Carr to abandon his other lawsuit for the commissions. On January 26, 1989, the Minnesota District Court(FN2) denied motions

for

summary judgment brought by the Debtor and the Bank. The case was set for trial to begin September 13, 1989, but actions against the Debtor were stayed by the filing of his Chapter 13 petition on the scheduled trial date.

On September 28, 1989, the Debtor filed his schedules, Chapter 13 statement, and proposed plan. In his statement, he disclosed

EEE Parts Warehouse, Inc., as his employer. In his schedules, he listed one secured creditor (the mortgagee on his homestead) with a claim of \$7,200, and eight unsecured creditors (including the Carrs) with claims of \$9,083. Of that amount, only the \$8,650 owed his present bankruptcy counsel for pre-petition legal services, is both specific and undisputed. The Carrs' claims were scheduled as "unknown." Among the Debtor's scheduled assets, was "inventory and stock-in-trade" valued at \$5,000, subject to the interest of EEE Parts Warehouse, Inc.(FN3)

The Debtor's Chapter 13 Plan provided that he pay \$100 per month to the trustee for payments to creditors, commencing October 13, 1989. Filed claims, in the amount of \$145,141.56, consist of: \$8,908.81 for Dunlap, Finseth, Berndt & Sandberg, P.A., Debtor's bankruptcy counsel; \$135,800 for the Carrs; and \$432.75 for Towey Law Offices. No specific distributions to creditors under the Plan were proposed.(FN4)

On December 6, 1989, the Carrs objected to confirmation of the Debtor's plan on the grounds that it was not filed in good faith; that it failed to provide distributions to unsecured creditors of at least as much as would be received in a Chapter 7 case; and that all of the Debtor's disposable income was not committed to payments under the Plan. 11 U.S.C. Section 1325(a)(3), (a)(4) and (b)(1)(A). At confirmation, the Carrs vigorously disputed the Debtor's valuation for the inventory and stock-in-trade. Their position, supported by the testimony of Patrick Carr, and a separate appraisal paid for by them, is that the inventory is valued at approximately \$75,000.

The Bankruptcy Court denied confirmation of the proposed plan, and the Debtor appealed. The District Court affirmed on June 4, 1990.(FN5) Both the Bankruptcy Court, in denying confirmation of the Debtor's plan, and the District Court, in affirming the Bankruptcy Court, found the Carrs' evidence supporting a \$75,000 value for inventory and stock-in-trade to be more credible than the Debtor's value.

On June 8, 1990, the Carrs sought dismissal of the Chapter 13 case under 11 U.S.C. Section 1307(c)(FN6), and requested sanctions. On June 18, 1990, the Debtor requested dismissal under 11 U.S.C.

(FN2) The Honorable O. Russell Olson, Minnesota District Judge.

(FN3) The extent of the interest of EEE Parts Warehouse, Inc., in the inventory and stock-in-trade, as a legal entity separate from the Debtor, was not determined in this case. Debtor's counsel argued that the Debtor "voluntarily pierced the corporate veil" to take advantage of the Minnesota exemptions.

(FN4) The amount of the Carrs' claim against Mr. Klempf, if approved in full by the Bankruptcy Court, would make the Debtor ineligible for Chapter 13 relief. 11 U.S.C. 109(e). No provision was made in the Plan for homestead mortgage payments. All debts, other than to present counsel, are listed as either "unknown," or "disputed," or both.

(FN5) Mitchell T. Klempf, individually and as surety for EEE Parts Warehouse, Inc., a Minnesota Corporation, a/k/a Klempf's British Parts v. Patrick Carr, No. 3-90-146 (D. Minn. June 4, 1990).

(FN6) 11 U.S.C. 1307(c) reads in pertinent part:

"Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may...dismiss a case under

this chapter,...for cause...."

case 1307(b),(FN7) and a standard, form order dismissing the Chapter 13 was entered.

II.
ISSUES

1. Can the Bankruptcy Court impose sanctions post-dismissal?
2. Are sanctions appropriate in this case?

III.
DISCUSSION

1. Jurisdiction.

The parties agree that the Bankruptcy Court has subject matter jurisdiction over these proceedings. 28 U.S.C. Sections 1334 and 157(a), and Local Rule 103(b). The Debtor, however, contends the Court lacks jurisdiction to impose sanctions post-dismissal.

The scope of the Bankruptcy Court's equitable jurisdiction is determined by 11 U.S.C. Section 105(a)(FN8), and Bankruptcy Rules 7054(a)(FN9) and 9011.(FN10) Those provisions, and relevant case law interpreting them, make it clear that this Court has the power to award sanctions post-dismissal. First, 11 U.S.C. Section 105(a) specifically provides that no other provision of the Code may be construed to deprive the court of its power to issue appropriate orders. Therefore, the effect of dismissal under 11 U.S.C. Section 1307(b) cannot be interpreted to divest this court of jurisdiction to exercise its traditional role in maintaining the integrity of the legal process. In re Jacobs, 43 B.R. 971, 974 (Bankr. E.D.N.Y. 1984). Second, under Rule 7054(a) the Court may supplement or amend orders to afford a complete remedy to all parties. Eighty South Lake, Inc. v. Bank of America N.T. & S.A.(In re Eighty South Lake, Inc.), 81 B.R. 580, 581, 582 (9th Cir.BAP 1987). Finally, Rule 9011 requires that the Court impose sanctions, when warranted; and, the Bankruptcy Court's authority under this Rule is undisputed in this jurisdiction. In re Arkansas Communities, Inc., 827 F.2d 1219, 1221 (8th Cir. 1987).(FN11)

2. Sanctions.

The purpose of a Chapter 13 plan is to provide payments to creditors. Therefore, the percentage of repayment proposed for

(FN77) 11 U.S.C. 1307(b) reads as follows:

"On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."
(Emphasis added.)

(FN8) 11 U.S.C. 105(a) reads in pertinent part:

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." (Emphasis added.)

(FN9) Bankruptcy Rule 7054(a) as it incorporates Rule 54(b) of the Federal Rules of Civil Procedure reads in pertinent part:

"...any order or other form of decision, however designated,

which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and liabilities of all the parties."

(FN10) Rule 9011(a) reads in pertinent part:

"(a) Signature. ...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, to cause delay, or to increase the cost of litigation...If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to 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...." (Emphasis added.)

(FN11) There is a disagreement among the Circuits concerning the authority of the Bankruptcy Court to award sanctions under 28 U.S.C. 1927. See *In re Silver*, 46 B.R. 772, 773, 774 (D.C. 1985). And see *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir. 1985). But see *In re unsecured creditors* can be one indication whether a debtor filed in good faith. Courts also consider a number of other factors important when evaluating the good faith of a debtor or counsel, including: amount of proposed payments; accuracy of a plan's statements of debts and expenses; whether any inaccuracies are an attempt to mislead the court; type of debt sought to be discharged, and whether any such debt is non-dischargeable in Chapter 7; and, the motivation and sincerity of the debtor in seeking Chapter 13 relief. *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982).

In this case: the Debtor never provided the Court with proposed payment information; he listed only the debt due his present bankruptcy counsel as an undisputed, specific amount; and he failed to provide credible evidence regarding his assets. The filing of a Chapter 13 case, without more, will not ordinarily constitute bad faith. But here, the Debtor's failure to supply substantial and accurate information, and his abrupt dismissal of his case once his creditor's valuation was accepted by the Court, is strong evidence this Chapter 13 case was not filed to provide meaningful payments to creditors within the Debtor's ability.(FN12) Accordingly, the Court finds that the Petition was filed in bad faith.

Based on the foregoing, sanctions are appropriate against the Debtor. The Carrs are awarded the sum of \$2,500 for the delay caused by the bad faith filing of the Petition in this case.

NOW, THEREFORE, IT IS ORDERED:

The Carrs are entitled to judgment against the Debtor in the amount of \$2,500.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated:

Dennis D. O'Brien

(FN12) The Court noted on the record at the conclusion of the confirmation hearing that the Debtor's testimony was substantially without credibility in every significant respect.

U.S. Bankruptcy Judge