

United States Bankruptcy Court

For the NORTHERN District of IOWA

FILED
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

JIM D. KOLB, CAROL E. KOLB, Trustee,
and EDWARD F. SAMORE, Trustee, } Plaintiff

Chapter 7
Case No. L-83-04127

v.

CITIZENS SAVINGS BANK and
LARRY HENDERSON, } Defendant

SEP 04 1990

BARBARA A. EVERLY, CLERK
Adversary Proceeding No. L-89-0037S

JUDGMENT

This proceeding having come on for trial or hearing before the court, the Honorable Michael J. Melloy, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

[OR]

The issues of this proceeding having been duly considered by the Honorable Michael J. Melloy, United States Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED: that the motion of Citizens Savings Bank to impose sanctions pursuant to Bankruptcy Rule 9011 is granted. Judgment shall enter in favor of the Bank and against Jim D. and Carol E. Kolb in the amount of \$1,500 as a Bankruptcy Rule 9011 sanction. Interest shall accrue at the rate of 7.95% from the date of entry of judgment.

Recorded: Vol II
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BARBARA A. EVERLY

Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]

Date of issuance: September 4, 1990

By: Michael J. Melloy
Deputy Clerk

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NORTHERN DISTRICT OF IOWA

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

BARBARA A. EVERLY, CLERK

IN RE:

Chapter 7
BANKRUPTCY NO.

JIM D. KOLB and
CAROL E. KOLB,

L-83-04127

Debtors.

JIM D. KOLB, CAROL E. KOLB, and
EDWARD F. SAMORE, Trustee,

ADVERSARY NO.

Plaintiffs,

L-89-0037S

v.

CITIZENS SAVINGS BANK and
LARRY HENDERSON,

Defendants.

ORDER RE: Bankruptcy Rule 9011 Sanction

The matter before the Court is the motion of Citizens Savings Bank ("Bank") to have sanctions imposed against the Plaintiffs, Jim D. Kolb and Carol E. Kolb, pursuant to Bankruptcy Rule 9011. The Court, having held a hearing on this matter and having heard the evidence and arguments of the parties, enters the following findings of fact, conclusions of law and order.

Findings of Fact

The motion to impose sanctions pursuant to Bankruptcy Rule 9011 came on for hearing on June 27, 1990. The attorney for Jim D. and Carol E. Kolb ("Kolbs") had filed a motion to withdraw. That motion to withdraw was granted and the Kolbs appeared pro se at the hearing. The Court entered an order on June 29, 1990, giving the Kolbs the opportunity to obtain an attorney and request a further

hearing. The Kolbs were also given an opportunity to supplement the evidence and testimony of the June 29, 1990 hearing. A document titled "Evidence, Testimony and Arguments and Opposition to Bankruptcy Rule 9011 Sanctions" was filed by the Kolbs on July 27, 1990. That document indicates the Kolbs are continuing to appear pro se in these proceedings.

In connection with the motion to impose sanctions, the entire record has been carefully reviewed. The Court has taken into consideration the various pleadings and exhibits introduced into evidence. The Court has included in its review and has taken into consideration the document filed by the Kolbs on July 27, 1990. The Court will set forth those findings of facts which it deems to be necessary to resolve the motion for sanctions.

1. The Kolbs filed a Chapter 11 petition on May 13, 1983. The Chapter 11 petition was later converted to Chapter 7 on July 2, 1984. The Kolbs were represented during the Chapter 11 and Chapter 7 proceedings by attorney Lester Gurdin.

2. On December 10, 1984, the Kolbs filed a pro se complaint in the U.S. District Court for the Northern District of Iowa. That complaint alleged various causes of action against the Bank, including various allegations of violation of federal and state banking and security laws.

3. Attorney Robert Walker eventually agreed to represent the Kolbs in the U.S. District Court action. On July 14, 1988, the Kolbs filed an amended and recast complaint. That complaint was personally signed by the Kolbs. It is that complaint which is the

basis for the motion for rule 9011 sanctions.

4. The amended and recast complaint included as Count I an alleged fraudulent violation of federal bankruptcy laws. Count I essentially alleges that the Kolbs had sold livestock pursuant to a cash collateral agreement. The checks from the sale of the livestock were made payable jointly to the Kolbs and the Bank. Count I alleges that the Kolbs refused to sign the checks but did deliver the checks to attorney Gurdin for transmittal on to the Bank. Count I goes on to allege that the Bank or an unknown agent of the Bank forged the Kolbs names on the checks and fraudulently obtained the proceeds. The Kolbs allege that the Bank fraudulently converted the funds to their own use and that the Kolbs were damaged in an amount not less than \$112,198.85.

5. The amended and substituted complaint contained other counts which basically deal with causes of action which allegedly occurred prior to Kolbs filing their bankruptcy petition. These include allegations of interference with business relationships (Count II), intentional infliction of emotional distress (Count III), and breach of fiduciary duty (Count IV).

6. The Bank filed a motion to dismiss the amended and recast complaint and motion for summary judgment as to Counts II, III, and IV, in the U.S. District Court. On February 24, 1989, the Honorable Donald E. O'Brien, Chief Judge, United States District Court for the Northern District of Iowa, entered an order in which he severed and transferred Count I of Plaintiffs' complaint to this Court. In that order, Judge O'Brien stated that the bankruptcy

court should be the initial forum to hear Plaintiffs' allegations of fraudulent violation of the stipulation regarding use of cash collateral and alleged violations of the cash collateral order.

7. Subsequent to transferring Count I to this Court, a dispute arose as to the ownership of Count I. The Kolbs took the position that Count I had been abandoned to them pursuant to an abandonment filed by the Trustee on November 27, 1987. The Bank took the position that the Trustee had no knowledge of the allegations set forth in Count I as of the date of the November 27, 1987 abandonment, since the recast complaint was not filed until July 14, 1988. The Bank went on to argue that the abandonment of November 27, 1987, could not abandon an asset of which the Trustee had no knowledge. The Court agreed with the Bank's contention and entered a ruling on August 2, 1989, in which the Court found that the cause of action set forth in Count I of the amended and recast complaint filed by the Kolbs had not been abandoned by the Trustee and remained property of the estate.

8. The Trustee subsequently attempted to sell the cause of action. He filed a complaint to sell an interest in litigation on October 10, 1989. That complaint was resisted by the Kolbs as well as other parties who alleged to be creditors. The Court entered an order on January 19, 1990, denying the Trustee's complaint to sell his interest in the litigation.

9. The matter then preceded through pretrial procedures. A trial date to try the merits of the allegations set forth in Count I of the amended and substituted complaint was set for June 26,

1990. The Trustee requested the Court authorize his retention of attorney Robert Walker to represent him in the suit against the Bank. Since Mr. Walker had been involved in the case since the filing of the amended and substituted complaint in the U.S. District Court, it was felt that he would be the person most familiar with the case and best able to represent the Trustee in this action. An order was entered approving Mr. Walker's retention as attorney for the Trustee.

10. As part of the Trustee's pretrial preparation, the Trustee, acting through his attorney, requested authority to retain the services of a handwriting expert. An order was entered approving the retention of Sister Mary E. Engler. Sister Mary Engler examined various handwriting samples and came to a conclusion as to the person who signed the checks which are at issue in Count I of the amended and substituted complaint. She testified in a deposition taken on May 18, 1990, that it was her expert opinion that the endorsements on the check were written by attorney Lester Gurdin. She also testified that it was her professional opinion that the handwriting on the checks did not match the handwriting of any attorney for the Bank or Bank employees who had submitted handwriting samples.

11. Based upon the testimony of Sister Mary Engler, the Trustee filed a motion to dismiss Count I of the amended and substituted complaint. The Trustee indicated that based upon the evidence available to him, the cause of action did not have merit and should be dismissed. Attorney Walker concurred in this

opinion. However, the Kolbs resisted the motion to dismiss and felt that further handwriting samples should be submitted and possibly a second handwriting expert consulted. Since a conflict existed between the Kolbs, attorney Walker's original clients, and the Trustee, attorney Walker's current client in the litigation, attorney Walker felt that he had an ethical obligation to withdraw as attorney for both parties. At the hearings held on June 27, 1990, the Court granted the motion of attorney Robert E. Walker to withdraw as attorney for Jim D. and Carol E. Kolb and to withdraw as attorney for the Trustee.

12. The Court entered an order on June 29, 1990, granting the Trustee's motion to dismiss. As indicated, the Kolbs resisted the motion to dismiss, appeared at the hearing, and made statements as to why they felt the complaint should not be dismissed. Attorney Gurdin also testified at the hearing. He testified that he did not recall signing the checks and continues to believe that he was not the person who put Jim Kolb's name on the back of the two checks in question.

13. The Bank cites as support for its motion for Rule 9011 sanctions a portion of the deposition transcript of the deposition of Jim D. Kolb. The relevant pages from the deposition transcript are attached to the Bank's pleading filed December 11, 1989, in support of the Trustee's sale of interest in litigation. That deposition transcript shows that Mr. Kolb did not know who had placed his name on the checks but that he did know he had not endorsed them. His answers concerning what he was told by Mr.

Gurdin and what Mr. Gurdin did with the checks was at best inconclusive. The following sequence of questions and answers from pages 96-97 of the deposition transcript are relevant in this regard:

Q. Well, did Lester Gurdin tell you what happened to the checks after you delivered them to him?

A. Not specifically, no. Because I asked him the question. He says he don't know whether he sent them to their bankruptcy attorney or whether he sent them to the bank. I honestly --

Q. He said he didn't know?

A. That's what he told me. He'd have to go back and check records. I have no way of knowing what he did with the checks.

Mr. Kolb stated that he "assumed" that someone associated with the Bank put his name on the checks. However, he had no evidence or proof to support that assumption.

14. The Kolbs have interposed several defenses to the Bank's motion. Those defenses include: (1) the fact that they did have an attorney who agreed to take the case on a contingency basis; (2) the Bank should have hired a handwriting expert at a much earlier date to prove their innocence; (3) the cause of action was eventually determined to belong to the Trustee; (4) that the Bank and some of its attorneys have a personal vendetta against the Kolbs; and (5) the Kolbs had been assured by attorney Gurdin that he had not signed the checks.

15. Defendant's exhibit 3 submitted at the hearing on June 27,

1990, shows the following charges for legal fees and expenses incurred by the Bank in connection with the defense of this matter to be as follows:

June 29, 1990 billing	-	\$ 2,811.50
August 16, 1989 billing	-	2,236.00
November 15, 1988 billing	-	<u>4,232.03</u>
TOTAL		\$ 9,279.53

Discussion and Conclusions of Law

This motion is brought pursuant to Bankruptcy Rule 9011 which reads as follows:

(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, statement of financial affairs, statement of executory contracts, statement of intention, Chapter 13 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 who 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 of 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 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 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.

The Bankruptcy Court has the authority to impose sanction pursuant to Bankruptcy Rule 9011 when appropriate. In re Arkansas Communities, Inc., 827 F.2d 1219 (8th Cir. 1987). The Court has

the obligations to impose sanctions when a violation of Bankruptcy Rule 9011 is found. Weil v. Markowitz, 829 F.2d 166, 171 (D.C. Cir. 1987).

Rule 9011 requires that there must be a reasonable inquiry prior to filing a pleading in order that the party signing the complaint can certify that it is ". . . well-grounded in fact . . ." In this case the pleading is not well-grounded in fact and there was no reasonable inquiry or investigation made prior to filing to ascertain the true factual situation. The complaint is based upon the "assumption" that the Bank must have done something wrong since Jim Kolb knew he did not endorse the checks. However, there is no factual basis for this assumption, nor did the Kolbs have any evidence available to them to support their allegations. This lack of any factual basis for the complaint constitutes a clear violation of Rule 9011.

The Kolbs argue that the Bank should have hired a handwriting expert to disprove their allegation. However, the Kolbs are off the mark in placing the burden of proof in this case. It is not the burden of the Bank to prove their innocence, but rather the burden of the Plaintiffs (Jim and Carol Kolb) to prove the Bank's misconduct. If anything, the Kolbs should have hired a handwriting expert early in the case in order to determine if they had a viable cause of action against the Bank or any of its officers, agents, attorneys, or employees.

It should be noted that the Bank has specifically requested sanctions only against Jim and Carol Kolb. The Bank is not

requesting sanctions against attorney Walker or the Trustee. Thus, the Court having found a violation of Rule 9011, must determine what an appropriate sanction should be. Although the Court has a duty to impose sanctions once a violation of Rule 9011 is found, the Court has considerable discretion to tailor the sanction to the appropriate facts of the case. Weil v. Markowitz, 829 F.2d 166, 177 (D.C. Cir. 1987); In re Cedar Falls Hotel Properties, Ltd. Partnership, 102 B.R. 1009, 118-121 (Bankr. N.D. Iowa 1989). In fashioning an appropriate remedy, the Court keeps in mind the fact that deterrence is the principle policy behind Rule 9011. Cedar Falls Hotel Properties, 102 B.R. at 1020.

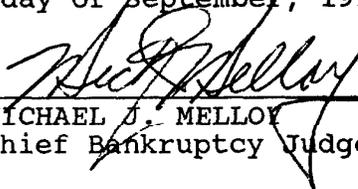
The Bank has been put to considerable expense in defending a groundless lawsuit in this case. However, certain mitigating factors are at work in terms of the severity of the sanction. Among these factors, is the fact that the Kolbs were represented by an attorney when the amended and substituted complaint was filed. It should also be noted that while Mr. Gurdin's answers appear to be somewhat equivocal as to his role in the signing the checks, it does not appear that he ever discouraged the Kolbs from pursuing this claim. The Court also takes the into consideration the financial ability of the Kolbs to pay a sanction. While there was no specific testimony given as to the Kolbs financial situation, the Court does note that they have gone through a Chapter 7 bankruptcy proceeding. The deposition testimony of Mr. Kolb previously referred to, also indicates that the Kolbs have very few assets available to them to pay creditors.

The Court believes that an appropriate sanction to be imposed against the Kolbs in this case is in the amount of \$1,500. The Court believes that this amount will not be overly punitive while at the same time impressing upon the Kolbs the fact that they have a duty to file suits that are only well-grounded in fact and upon which there is a reasonable basis to believe that a valid cause of action exists.

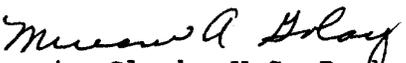
ORDER

IT IS THEREFORE ORDERED that the motion of Citizens Savings Bank to impose sanctions pursuant to Bankruptcy Rule 9011 is granted. Judgment shall enter in favor of the Bank and against Jim D. and Carol E. Kolb in the amount of \$1,500 as a Bankruptcy Rule 9011 sanction.

DONE AND ORDERED this 4th day of September, 1990.


MICHAEL J. MELLODY
Chief Bankruptcy Judge

Copies to: (w Judgment)
Robert Walker,
Former Atty for Plaintiff;
Jim D. & Carol E. Kolb,
Plaintiffs;
Edward Samore, Trustee;
Lester Gurdin,
Atty for Debtors;
David Jennett, Colin McCullough,
and A. Frank Baron,
Attys for Citizens Savings Bank;
U.S. Trustee;
this September 5, 1990


Deputy Clerk, U.S. Bankruptcy Court
P.O. Box 74890
Cedar Rapids, Iowa 52407