

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re: Case No. 9:09-bk-01818-FMD
Chapter 7

Jason R. Yerk,

Debtor.

**ORDER DENYING
SPECIAL COUNSEL'S MOTION
FOR SANCTIONS AGAINST PETA**

THIS CASE came before the Court without a hearing for consideration of *Special Counsel's Motion for Sanctions Against People for the Ethical Treatment of Animals* (Doc. No. 106) (the "Sanctions Motion"). For the reasons stated below, the Court will deny the Sanctions Motion.

Background

The Sanctions Motion arises under somewhat unusual facts. Robert Tardiff, as the duly appointed trustee in this Chapter 7 case (the "Trustee"), retained the law firm of Vernis & Bowling as special counsel ("Special Counsel") to represent the bankruptcy estate in a lawsuit pending in the United States District Court for the Middle District of Florida, Fort Myers Division, between the Debtor, as plaintiff, and People for the Ethical Treatment of Animals ("PETA"), as defendant (the "District Court Litigation"). The Trustee was substituted as plaintiff in the Debtor's stead.

After years of apparently contentious litigation and a lengthy jury trial, the Trustee obtained an amended judgment against PETA for damages of \$155,000.00 and costs of \$7,296.05 (the "Amended Judgment").¹ The judgment was amended, *inter alia*, to clarify that the Debtor, who had failed to list his claim against PETA in his bankruptcy schedules, could not benefit from the award against PETA. The Amended Judgment states:

Plaintiff [the Trustee] may enforce and execute on this Amended Judgment to the extent necessary to pay all claims allowed in Bankruptcy Court Case No. 9:09-bk-01818-ALP in their entirety, the costs of the administration of the Chapter 7 proceedings, and the reasonable attorney fees expended by the Trustee to obtain the judgment . . . in the instant case, all as approved by the Bankruptcy Court. If there is any excess amount left under the Amended Judgment, the Trustee may not enforce or execute on that portion of the Amended Judgment and the excess amount may not be collected on behalf of or disbursed to Jason Yerk.

PETA appealed the Amended Judgment to the Eleventh Circuit Court of Appeals. While the appeal was pending, the Trustee and PETA entered into a settlement agreement to resolve all issues between them (the "Settlement Agreement").² The Settlement Agreement provided that PETA would pay the Trustee "the total sum of, but not to exceed, the amount of \$107,000.00" to be allocated in the manner set forth in the Amended Judgment.

On January 21, 2013, the Trustee filed a *Motion for Authority to Compromise Controversy* pursuant to Federal Rule of Bankruptcy Procedure 9019 (the "Motion to Compromise").³ The Motion to Compromise stated that PETA had agreed to pay \$107,000.00 in settlement of the Trustee's claims against it. Shortly thereafter, the Trustee filed an *Application for Compensation by Special Counsel for Trustee* in which Special Counsel sought attorney's fees of \$42,800.00 (a 40% contingency fee based upon the recovery of \$107,000.00) and costs of \$34,644.48 (the "Fee Application").⁴ When PETA filed objections to the Motion to Compromise and the Fee

¹ Doc. No. 80-1.

² Doc. No. 80-2.

³ Doc. No. 67.

⁴ Doc. No. 70.

Application in February and March 2013,⁵ the Trustee withdrew them.⁶

PETA's objection to the Fee Application was titled *Objection to Application for Compensation by Special Counsel for Trustee and Motion to Adjudicate and Approve Amounts Due in Compromise Settlement* (the "Motion to Adjudicate").⁷ In the Motion to Adjudicate, PETA requested that the Court adjudicate the amount due under the Settlement Agreement. PETA contended that the language of the Amended Judgment set forth above required that all unsecured claims in the Chapter 7 case be paid prior to the payment of attorney's fees and costs and that the unsecured claims totaled only approximately \$34,339.27; that Special Counsel's contingency fee should be calculated based upon a percentage of the distribution to creditors; that Special Counsel had a conflict that precluded their representation of the Trustee because of their prior representation of the Debtor in the District Court Litigation; that reimbursement of costs incurred by Special Counsel in the District Court Litigation was limited to the district court's award of costs against PETA in the amount of \$7,296.05; and, finally, that the Trustee's compensation calculated under 11 U.S.C. § 326 was limited to a percentage of the amount distributed to unsecured creditors, exclusive of the amount paid to Special Counsel.

The Motion to Adjudicate was originally set for hearing in April 2013, but the hearing was continued at the Trustee's request because the Trustee had filed a motion to enforce the Settlement Agreement, then pending in the Eleventh Circuit Court of Appeals.⁸ On May 23, 2013, the Eleventh Circuit issued an order staying the appeal until such time as this Court either approved or disapproved the Settlement Agreement.⁹ The Motion to Adjudicate was then rescheduled for hearing in July 2013, and continued at the request of PETA's counsel (due

his longstanding travel plans) to August 22, 2013.¹⁰

In advance of the August 22, 2013 hearing, Special Counsel filed various responses to PETA's objection to the Fee Application.¹¹ On the morning of the hearing, Special Counsel filed additional responses.¹² Although Special Counsel and counsel for PETA argued their respective positions at the hearing, PETA's counsel requested that he be afforded the opportunity to review Special Counsel's recent filings and to respond to them in writing. The Court established a briefing schedule, and scheduled a hearing for September 13, 2013, at which the Court would announce its ruling.

The Trustee filed his *Renewed Motion for Authority to Compromise Controversy*,¹³ and the parties complied with the Court's briefing schedule.¹⁴ In paragraph 19 of *Special Counsel's Response to PETA's Reply to Trustee's Recent Filings*,¹⁵ Special Counsel stated that it had expended attorney's fees and costs in litigating PETA's "unfounded, misleading and disparaging position." Special Counsel requested that the Court invoke "its inherent authority to sanction PETA for its conduct by sanctioning it in the amount of attorney's fees and costs incurred in enforcing the settlement agreement."

On September 13, 2013, after having considered the arguments of counsel at the August 22, 2013 hearing and the parties' supplemental filings, the Court orally announced its ruling. The Court determined that a ruling on the Motion to Adjudicate required the Court to rule on both the Motion to Compromise and the Fee Application. The Court overruled PETA's objections, specifically finding that each of PETA's contentions was wholly without merit. The Court was critical of PETA's actions in the bankruptcy

⁵ Doc. Nos. 71 and 80.

⁶ Doc. Nos. 76 and 87.

⁷ Doc. No. 80.

⁸ Doc. Nos. 84 and 85.

⁹ Doc. No. 88-1.

¹⁰ Doc. Nos. 90 and 92.

¹¹ Doc. Nos. 94 and 95.

¹² Doc. Nos. 96, 97, and 98.

¹³ Doc. No. 100.

¹⁴ Doc. No. 101 filed by PETA; Doc. Nos. 102, 103 and 104 filed by Special Counsel (these papers appear to be duplicative).

¹⁵ Doc. No. 104.

case, stating that the Court had observed the lengths to which PETA was willing to go to put the Trustee and the Trustee's counsel to additional burden and expense. At the conclusion of the hearing, Special Counsel asked the Court for a ruling on their request for sanctions; the Court reserved jurisdiction on the request.¹⁶

Analysis

Federal Rule of Bankruptcy Procedure 9011(b) provides that an attorney, by presenting a paper to the court, is certifying that to the best of that attorney's knowledge, information and belief, formed after a reasonable inquiry, the paper 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" and that the "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." Rule 9011(c) outlines the manner in which a sanctions motion is to be initiated:

(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. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(emphasis supplied).

Special Counsel did not comply with the procedure outlined in Rule 9011(c)(1)(A). The Certificate of Service attached to Special Counsel's Sanctions Motion states that the motion was served on the date it was filed – September 17, 2013. Therefore, it appears that Special Counsel did not afford PETA's counsel notice that his failure to withdraw PETA's objections within 21 days of service of a motion for sanctions would result in the filing of the motion with the court and the possible award of sanctions against counsel.

So, having failed to comply with the requirements of Rule 9011(c)(1)(A), Special Counsel asks the Court to exercise its inherent authority to impose sanctions. But as the

¹⁶ Doc. No. 108.

Supreme Court stated in *Chambers v. NASCO, Inc.*,¹⁷

. . . [W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

In this case, Rule 9011(c)(1)(A) provided Special Counsel with the ideal mechanism to address the conduct of PETA's counsel. Special Counsel could have served PETA's counsel with a sanctions motion shortly after the objection to the Motion to Compromise and the Motion to Adjudicate were filed in February and March 2013. There was more than ample time to follow the procedure outlined in Rule 9011(c)(1)(A). But it was not until September 11, 2013, two days before the Court announced its ruling on the Motion to Adjudicate, the Motion to Compromise, and the Fee Application, that Special Counsel requested the Court, for the first time, to award sanctions against PETA. And it was not until after the Court orally announced its ruling that Special Counsel filed the Sanctions Motion.

If PETA's counsel had been served with a sanctions motion, he might have decided to withdraw the challenged papers within 21 days of service of the motion. And if PETA's counsel persisted with his course of action, it would have been at his own risk. But, PETA's counsel was not given the 21-day safe harbor afforded by Rule 9011(c)(1)(A).

Therefore, consistent with the holding of *Chambers v. NASCO*, because Rule 9011(c)(1)(A) provided Special Counsel with adequate means to address the conduct of PETA's counsel, this Court will decline to exercise its inherent power. However, the Court reaffirms its statement that PETA's arguments were frivolous and without

merit. Accordingly, the Court will consider an award of sanctions under the procedure outlined in Rule 9011(c)(1)(B) if PETA presents papers to this Court that violate Rule 9011(b) or otherwise engages in actions that would invoke the inherent power of the Court to assess sanctions.

Accordingly, it is

ORDERED

1. The Motion for Sanctions is **DENIED**.

2. The Court reserves jurisdiction to consider a future award of sanctions against PETA if such an award is warranted.

DONE and **ORDERED** in Chambers at Tampa, Florida, on September 26, 2013.

/s/
Caryl E. Delano
United States Bankruptcy Judge

Counsel for PETA, Philip J. Hirschkop, is directed to serve a copy of this order on interested parties within 3 days and to file a proof of service with the Court.

¹⁷ 501 U.S. 32, 50 (1991).