

Fain v. Webb, Adversary No. 05-6020-fra  
Vince Lee Webb, Case No. 603-69708-fra7

12/7/05

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Unpublished

Plaintiffs filed a complaint alleging that the Debtor/Defendant had acquired certain property of the bankruptcy estate post-petition, and knowingly and fraudulently failed to report the acquisition to the trustee, and failed to deliver the property to the trustee. The complaint sought to revoke the Debtor's discharge pursuant to Code § 727(d)(2). As it turned out, the Debtor had disclosed in his schedules and subsequent interviews with the trustee the existence of the assets, with one exception, and Debtor or his attorney were present at the interviews, prior to the time the complaint was filed and prior to the extended deadline for filing a complaint to object to the granting of discharge in the case. As to the one alleged asset not disclosed, Plaintiffs had no evidence that Debtor acquired it. Defendant filed a motion for summary judgment and the motion was allowed.

Debtor thereafter filed a motion for an order requiring Plaintiffs to pay Debtor's attorney's fees as a sanction under FRBP 9011. The Court agreed that a sanction under FRBP 9011 was warranted, especially given that Debtor's counsel had put Plaintiffs on notice of the defect in their position, but declined to award attorney's fees. Noting that a party requesting a sanction of attorney's fees must provide evidence regarding the subject party's ability to pay, and that no such evidence was presented in the present case, the Court fashioned a remedy involving the payment to court of a lesser amount and a requirement that the sanctioned attorney obtain specified continuing legal education.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 03-69708-fra7
VINCE LEE WEBB,	)	
	)	
_____ Debtor.	)	
	)	Adversary Proceeding
CHRIS FAIN and VALERIE FAIN,	)	No. 05-6020-fra
	)	
Plaintiffs,	)	
vs.	)	
	)	
VINCE LEE WEBB,	)	
	)	MEMORANDUM OPINION
_____ Defendant.	)	

Defendant filed a motion for an order requiring Plaintiffs to pay Defendant's attorney's fees, pursuant to Fed. R. Bankr. P. 9011. The Court finds that Plaintiffs and their counsel did in fact violate the rule, and that sanctions should be imposed. However, the Court declines to impose attorney's fees.

The circumstances leading to the instant motion are described in detail in the Court's memorandum opinion filed August 26, 2005 [Document No. 33]. To summarize: Plaintiffs filed a complaint alleging that

1 Defendant acquired certain property of the bankruptcy estate post-  
2 petition, and knowingly and fraudulently failed to report the acquisition  
3 to the Trustee, and failed to deliver the property to the trustee. The  
4 complaint sought to revoke the Defendant's discharge pursuant to 11  
5 U.S.C. § 727(d)(2). At the hearing on Defendant's motion for summary  
6 judgment, Plaintiffs' counsel stated that Plaintiffs contended that the  
7 specified assets were in the possession and control of the Debtor at the  
8 petition date, but were omitted from his schedules. Accordingly, the  
9 court proceeded with the case under 11 U.S.C. § 727(d)(1), the correct  
10 provision for seeking to revoke discharge for intentional omission of  
11 assets from a debtor's schedules. As it turned out, Defendant had  
12 disclosed, through his schedules and subsequent interviews with the  
13 Trustee the existence of the assets (except for a computer server farm,  
14 about which more later) and his possession of them. Either Plaintiff  
15 Chris Fain, or one of his attorneys, or both, were present at the  
16 interviews, so that Mr. Fain and/or his attorneys had knowledge of the  
17 Defendant's disclosures prior to the time the complaint was filed.

18 An additional item of property was a computer server farm. Mr.  
19 Fain alleged that the Defendant had come into possession of a particular  
20 computer server, property of the estate, without disclosing it. He  
21 assumed this to be true because the Defendant had contacted him with a  
22 proposal that the Plaintiff purchase a server farm from the Defendant. He  
23 did not investigate this tenuous conclusion, which ultimately proved not  
24 to be true.

25 Defendant's motion asserts - and Plaintiffs do not dispute - that  
26 Defendant advised the Plaintiffs of these circumstances and demanded that

1 the complaint be withdrawn. The Plaintiffs refused to do so, whereupon  
2 Defendant filed his motion for summary judgment. The motion was allowed.

3 The Defendant now seeks an order finding that Plaintiffs' conduct  
4 violated Federal Rule of Bankruptcy Procedure 9011, and seeks, by way of  
5 a sanction, an order requiring the Plaintiffs to pay Defendant's  
6 attorney's fees. The matter was heard on November 29, 2005. Both  
7 parties participated, but neither submitted any evidence. Accordingly,  
8 the Court will consider the matter based on the record made during the  
9 course of the litigation.

10 I. DISCUSSION

11 A. *Federal Rule of Bankruptcy Procedure 9011*

12 Rule 9011 provides, in pertinent part:

13 (a) SIGNATURE. Every petition, pleading, written motion,  
14 and other paper, except a list, schedule, or statement, or  
15 amendments thereto, shall be signed by at least one attorney  
16 of record in the attorney's individual name. A party who is  
17 not represented by an attorney shall sign all papers. Each  
paper shall state the signer's address and telephone number,  
if any. An unsigned paper shall be stricken unless omission  
of the signature is corrected promptly after being called to  
the attention of the attorney or party.

18 (b) REPRESENTATIONS TO THE COURT. By presenting to the  
19 court (whether by signing, filing, submitting, or later  
20 advocating) a petition, pleading, written motion, or other  
21 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, -

22 (1) it is not being presented for any improper  
23 purpose, such as to harass or to cause unnecessary  
24 delay or needless increase in the cost of  
litigation;

25 (2) the claims, defenses, and other legal  
26 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;

1 (3) the allegations and other factual contentions  
2 have evidentiary support or, if specifically so  
3 identified, are likely to have evidentiary support  
4 after a reasonable opportunity for further  
5 investigation or discovery; and  
6 (4) the denials of factual contentions are  
7 warranted on the evidence or, if specifically so  
8 identified, are reasonably based on a lack of  
9 information or belief.

6 (C) SANCTIONS. If, after notice and a reasonable  
7 opportunity to respond, the court determines that  
8 subdivision (b) has been violated, the court may, subject to  
9 the conditions stated below, impose an appropriate sanction  
10 upon the attorneys, law firms, or parties that have violated  
11 subdivision (b) or are responsible for the violation.

12 \* \* \*

10 (2) Nature of Sanction; Limitations. A sanction  
11 imposed for violation of this rule shall be  
12 limited to what is sufficient to deter repetition  
13 of such conduct or comparable conduct by others  
14 similarly situated. Subject to the limitations in  
15 subparagraphs (A) and (B), the sanction may  
16 consist of, or include, directives of a  
17 nonmonetary nature, an order to pay a penalty into  
18 court, or, if imposed on motion and warranted for  
19 effective deterrence, an order directing payment  
20 to the movant of some or all of the reasonable  
21 attorneys' fees and other expenses incurred as a  
22 direct result of the violation.

18 Rule 9011 is derived from Federal Rule of Civil Procedure 11, and  
19 cases construing that rule are applicable to cases construing Rule 9011.  
20 See In re Rainbow Magazine, 136 B.R. 545 (9<sup>th</sup> Cir. BAP 1992). While once  
21 mandatory, imposition of sanctions, once a violation is found to have  
22 occurred, is within the discretion of the trial court. Roundtree v.  
23 United States, 40 F.3d 1036 (9<sup>th</sup> Cir. 1994).

24 B. *Violation*

25 An essential element of a claim under 11 U.S.C. § 727 (d)(1) is  
26 that the Plaintiff have no knowledge of the alleged fraudulent conduct

1 prior to the entry of an order discharging the debtor. As explained in  
2 the court's Memorandum Opinion, allowance may be made where a party  
3 learns of an alleged fraud after the deadline for objecting to an entry  
4 of discharge under 11 U.S.C. § 727(a), but before the order of discharge  
5 is entered. However, Plaintiffs were on notice of the extended deadline  
6 for objection to discharge, and were present when Defendant disclosed to  
7 the Trustee the existence of the assets, and his possession.  
8 Nevertheless, the Plaintiffs failed to institute an action objecting to  
9 discharge, and improperly filed a complaint to revoke discharge after the  
10 deadline had run. While it might be said that this is a relatively  
11 technical matter, any mitigation that may be derived from that fact is  
12 overcome by the fact that Defendant put Plaintiffs on notice of the  
13 defect in their position, and Plaintiffs nevertheless persisted with the  
14 litigation.

15         With regard to the server farm, Plaintiffs had nothing more than a  
16 plausible hypothesis: that, if Defendant was trying to sell them  
17 something, and the Defendant had previously an article of the same  
18 description, it must necessarily be selling the originally acquired  
19 property. A minimal investigation would have determined that this was  
20 not the case. Such investigation is required by the rule, and  
21 Plaintiffs' failure to conduct the investigation constitutes a violation  
22 of the rule.

### 23         C. *Sanctions*

24         Rule 9011(c)(2) requires that the sanction be limited to what is  
25 sufficient to deter repetition of the conduct complained of. Sanctions  
26 may be monetary or nonmonetary. If "warranted for effective deterrence,"

1 the sanction may be or include an order directing the payment of some or  
2 all of the movant's attorney's fees.

3       Whatever form the sanction may take, it must comply with the  
4 applicable rule: that it be designed to deter proscribed conduct, and  
5 that it go no further than what is required to do so. It follows that  
6 the Court must be provided with evidence allowing it to ascertain the  
7 impact of the proposed sanctions on the party upon who they are to be  
8 imposed. With respect to monetary sanctions, this includes an inquiry as  
9 to the subject parties' ability to pay. See In re Braun, 152 B.R. 466  
10 (N.D. Ohio 1993) (holding that a sanctioning court must make some inquiry  
11 into an attorney's ability to pay a monetary sanction, and remanding the  
12 case for such determination.) The moving party has the initial burden of  
13 providing evidence on this point. The movant here declined to do so.  
14 The Court will not engage in any presumption regarding either Plaintiffs'  
15 counsel's ability to respond to a financial sanction, whether in the form  
16 of a fine or a fee-shifting order. Accordingly, any fine imposed must be  
17 minimal.

18       It is within the Court's discretion to impose nonmonetary  
19 sanctions, and the Court believes it is appropriate to do so in this  
20 instance. This is particularly so in light of the fact that the parties  
21 concerned here are opposing parties in another adversary proceeding  
22 before this Court, Adversary No. 04-6088-fra Fain v. Webb.

23       In light of the foregoing, the Court will enter an order imposing  
24 the following sanctions:

25       1. Requiring Plaintiffs to pay a fine of \$500 to the Clerk of the  
26 Court within 60 days of the date of the order;

