Attorney Sanctions

In re Susan Jensen 698-64677-fra7

2/25/99 FRA Unpublished

Debtor came to Debtor's attorney and was given a lengthy questionnaire and a retainer agreement was signed. The questionnaire was later completed by the Debtor and returned on September 23, 1996, but the matter did not thereafter proceed because the Debtor was unable to pay all of the attorney's fees. On March 27, 1998, the balance of the fees were paid and a bankruptcy petition and schedules were prepared using the 18 month old information set out in the questionnaire. An appointment was scheduled for the Debtor to sign the petition, but the Debtor did not show. The petition and schedules were thereafter mailed to the Debtor for her review and signature. The Debtor returned them on July 15, 1998, noting some changes to be made on Schedules F and I. Those changes were made, the revised draft was sent out and signed by Debtor, and was returned to the attorneys. The attorney signed the petition and filed it with the court on August 10. On August 14, the Debtor called her attorneys and advised them that, while she signed the petition, she no longer owned the vehicle shown on the schedules, had acquired other vehicles, and that there were other discrepancies in the schedules. No action appears to have been taken at that time, other than a notation made in the file that "All schedules wrong."

At the § 341(a) hearing, the trustee discovered the discrepancies and suggested to the attorney that amended schedules should be filed. The attorney stated that amended schedules had already been prepared, but that the trustee had not yet received a copy. In fact, amended schedules had not been prepared and it would be a further two months before they were filed.

The U.S. Trustee filed a motion requesting sanctions. The court noted the attorneys' use of 18 month old information in preparing the schedules, the failure to correct those schedules prior to the § 341(a) hearing when informed by the Debtor of errors, the attorney's dishonesty with regard to the trustee, and other recent admonitions to this firm by the court. The court imposed a $750 sanction pursuant to the court's inherent power under § 105(a) to sanction vexatious conduct. As it also appeared that ethical violations may have occurred, the court informed the attorneys that it was forwarding a copy of the opinion and exhibits to the disciplinary counsel of the Oregon State Bar.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	698-64677-fra7
SUSAN L. JENSEN,	)	
	)	MEMORANDUM OPINION
Debtor.	)	

The United States Trustee has filed a motion seeking sanctions against debtor's attorney. The matter was heard by the Court on January 27, 1999. The motion is allowed in part, and denied in part.

FACTS

The evidence in this case is based largely on the Debtor's attorney's file[1] and a transcript of the § 341(a) meeting with

[1] Exhibit 1, consisting of 107 pages, is a copy of the Attorney's file placed into evidence by the U.S. Trustee. According to a cover letter, page 1 of the exhibit, it is the entire file for the Debtor. The Court notes with some amazement that the file does not contain any notices or correspondence from the Court or Trustee, copies of motions filed by the U.S. Trustee, or reports filed by the Trustee. The Court's own record indicates that a copy of the notice of commencement of case was mailed to the Attorneys on August 13, 1998. This document gives formal notice of the commencement of the case, and contains crucial deadlines, such as the date of the § 341(a) hearing, and the deadline for objections to discharge. The absence of such information from the file is incomprehensible.

Trustee David Wurst. The file reflects that the first meeting between the Debtor and the Attorneys was in June 1996, at which time Debtor met with attorney Lars Olsen. A retainer agreement was signed, and the lawyer and client discussed the lawyer's fee requirement. There appears to have been some discussion of the client's legal concerns, as disclosed by a cursory "Bankruptcy Client Information Sheet." The client was given a lengthy questionnaire to fill out. The instruction sheet attached to the questionnaire directed the client to "contact Kaisa or Shantra with any questions about filling out the forms." These individuals are not identified anywhere in the record, but it is clear from the letterhead and the testimony that they are not associates or members of the firm.

The questionnaire was completed and returned to the Attorneys on September 23, 1996. The matter did not proceed from that point, because the Debtor was unable to pay all of the Attorney's fees.

On or about March 27, 1998 the balance of the fees were paid. A petition and schedules were prepared some time in late March or early April, using the 18 month old information set out in the questionnaires. An appointment was scheduled for April 16, 1998 in Medford for the purpose of signing the schedules. The Debtor did not appear for that meeting. It was subsequently agreed that the schedules would be mailed to her for her review and signature. According to a cover letter in the file the schedules were mailed to the Debtor on May 20. The Debtor returned them on July 15, noting some changes to be made on Schedules F and I. These changes were

made, and the revised draft mailed out on July 22. They were signed by the client on July 30, returned, and signed by attorney Eric Olsen on August 6. According to the court's files, the petition was filed with the Court in Eugene on August 10.[2]

According to a printout of computerized file notes included in Exhibit 1, the client called the Attorneys on August 14 to advise that, while she had signed the petition, she did not mention that she no longer owned the vehicle set out in the petition, had acquired new vehicles, and that there were other discrepancies in the schedules.

It appears that no action was taken at that time, notwithstanding the client's warning. A single page of handwritten notes is in the file between the final draft of the petition and a form letter sent to the client on September 23. The notes include reference to the inaccurate schedules ("All schedules wrong") and a message from Eric Olsen to a staff member: "Please require new schedules when it is this old." The computerized file notes of October 12 have the cryptic entry "Note on file to see atty. All scheduels [sic] wrong."

The § 341(a) hearing was on October 5, 1998. At the hearing the Trustee discovered the discrepancies, and suggested to Mr. Eric Olsen that it would be necessary to file an amended schedule. Mr.

[2] The only indication that the case was commenced is a computer note dated August 6: "File petition with court, copy to client." There is nothing reflecting the actual date of filing.

Olsen's response was that a new schedule had already been prepared, and that the Trustee had simply not received a copy.[3]

The attorney's file -- including the October 12 computer note -- make it clear that no amended schedules had been prepared at the time of the § 341(a) meeting. In fact, two months went by before amended schedules were prepared and filed.

DISCUSSION

The attorney's conduct in this case was deplorable in many respects. The most significant problems are:

1. Counsel, or staff members under his supervision, prepared for filing Bankruptcy schedules based on information which was over 18 months old. The inevitable result was that the schedules were inaccurate.

---

[3] TRUSTEE:. . . .Did you have an opportunity, Ms. Jensen, to read and review your schedules prior to signing them?
DEBTOR: Yes, sir.
Q.: Everything correct and accurate to the best of your knowledge?
A.: Yes, sir.
Q.: Have you been involved in a bankruptcy case before?
A.: No, sir.
Q.: Okay. You stated on your statement of intent that you wish to – that you're just going to keep the Mitsubishi Mirage and –
A.: No, sir. That was turned back in.
Q.: You've surrendered it?
A.: Yes, sir.
Q.: When did you surrender it?
A.: February of '97.
MR. OLSEN: Oh, I see. You got the schedules in '96. You waited a long time to file this, right?
THE WITNESS [Debtor]: Yes. I was hoping to get a good paying job and pay them all off.
MR. OLSEN: You've got a –
THE TRUSTEE: I need you to do another one. Some of this stuff is going to be way off, huh?
MR. OLSEN: We did one; you've got no copy of it yet.
– Transcript of § 341(a) meeting on October 5, 1998 (UST Ex. 3)

2. Counsel was made aware of material errors in the schedules no later than August 14, 1998. This was over seven weeks before the § 341(a) hearing on October 5. This date is significant, since the meeting was the trustee's first opportunity to examine the Debtor concerning her finances. Failing to ensure that the trustee had reliable information in hand for the meeting was prejudicial to the client's interest, and the court's interest in maintaining an efficient chapter 7 process. The two month delay thereafter in filing amended schedules compounds the prejudice. It is notable that the Attorney's file does not reflect any contact with the client between August 14 and October 5, other than the form letter regarding the § 341(a) meeting. Mr. Olsen testified that there was a brief meeting with the Debtor prior to the meeting. A review of the transcript of the meeting makes it clear that there was little accomplished.

3. Counsel was not truthful when he told the trustee that he had already prepared amended schedules.

This is unprofessional and unacceptable conduct. However, the rules invoked by the UST, and the Court's powers to sanction attorney misbehavior are not without limits, and require some discussion.

Fed.R.Bankr.P. 9011

The UST brought this motion under Fed.R.Bankr.P. 9011. The rule provides that the execution of a document filed with the court constitutes an undertaking by the attorney that the information is factually correct, based on a reasonable inquiry. Had the attorney

filed the schedules immediately after they were prepared – using 18 month old information – the rule certainly would have been violated. However, here the client reviewed the documents and even made some changes immediately before they were filed. While attorneys may not blindly rely on every statement by a client, it cannot be said in this case that there was a lack of reasonable inquiry.

What, then, of the fact that the attorney did nothing to correct the errors once he learned of them? Again, Rule 9011 does not extend to this conduct. The Rule looks to the time the document was filed, and does not impose a continuing duty to correct errors found after the fact. MGIC Indemnity Corporation v. Moore, 952 F.2d 1120 (9th Cir. 1991). Moreover, Rule 9011 does not provide for sanctions for failure to prepare and sign a document. United Energy Owners Come. v. United States Energy Management Systems, 837 F.2d 356 (9th Cir. 1988).

Inherent Authority

While there may be no statute or rule-based authority[4] to sanction the conduct described above, the court is nevertheless empowered to act to deter such behavior. In re Rainbow Magazine Inc., 77 F.3d 278, 283 (9th Cir. 1996) ("There can be little doubt that bankruptcy courts have the inherent power to sanction vexatious conduct presented before the court"); Volpert v. Ellis, 110 F.3d 494 (7th Cir. 1997) ("Under 11 U.S.C. § 105(a), bankruptcy courts may

[4] 28 U.S.C. § 1927 allows a District Court to impose sanctions for vexatious behavior; however, Bankruptcy Courts are without jurisdiction to apply the statute. In re Westin Capital Markets, Inc., 184 B.R. 109 (Bankr. D. Or. 1995).

punish an attorney who unreasonably and vexatiously multiplies the proceedings before them.").

Counsel for the debtor unreasonably delayed the case by failing to correct the schedules prior to the § 341(a) meeting. The delay was compounded thereafter. When the discrepancy was discovered by the Trustee at the meeting, counsel falsely stated that corrected schedules had been prepared and were forthcoming. This conduct is made all the more troubling by the fact that this attorney, and his firm, have been admonished in the past over their professional practices.[5] Given the nature of the misconduct, and past misconduct, the court finds that a monetary sanction in the sum of $750.00 should be imposed. Payment, in the form of a check payable to the United States Treasury, shall be delivered to the clerk within 14 days of the date this opinion is docketed.

The UST has also sought an order reducing the fees charged by debtor's attorneys. 11 U.S.C. § 329. Given the fact that Debtor is herself partly to blame, and the sanction already awarded, such a reduction is not appropriate.

Finally, the court must note that some of the acts described in this memorandum may be violations of the Code of Professional Responsibility enacted by the Oregon Supreme Court. The Court has a duty to assist the Bar in upholding the Code; however, actual

---

[5] See, e.g. In re Novak, Case No. 698-65692-fra7 (decided contemporaneously with this opinion, and awarding sanctions); In re Dahm, Case No. 698-61616-fra7 (order awarding sanctions entered on August 6, 1998); In re Miller, Case No. 698-63138-aer7 (report by court, dated August 7, 1998 to UST, citing attorney's failure to disclose previous filing by client).

enforcement is the province of the Bar and the Oregon Supreme Court. Accordingly, a copy of this memorandum, and of the exhibits presented, will be forwarded to the disciplinary counsel of the Oregon State Bar for whatever action the Bar deems appropriate.

This memorandum contains the Court's findings of fact and conclusions of law, which will not be separately stated. Counsel for the UST shall prepare an order and judgment consistent with this Memorandum.

FRANK R. ALLEY, III
Bankruptcy Judge