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CLERK U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
HARRY L. HAUBERT,

Debtor.

ELLEN EVANS and CHRISTINA
TURPELA,

Plaintiffs,
v.
HARRY L. HAUBERT,

Defendant.

Bankruptcy No. 05-12816-M7
Adversary No. 06-90080-M7

MEMORANDUM DECISION DENYING
REQUEST FOR SANCTIONS

I

Ellen Evans and Christina Turpela ("Plaintiffs") were listed as creditors holding a claim for \$12,000.00 in the Chapter 7 bankruptcy case filed by Harry L. Haubert ("Debtor"). The Plaintiffs filed this adversary proceeding seeking to have their debt declared nondischargeable pursuant to 11 U.S.C. § 523(a) and for a denial of the Debtor's discharge under various subsections of 11 U.S.C. § 727.

1 After a motion for summary judgment, the sanctions portion of the
2 debt of \$2,860 was determined to be non dischargeable. After a trial
3 on June 5, 6, and 15, 2007, the Court issued a Memorandum Decision and
4 Judgment to deny the Debtor's discharge under §§ 727(a)(2), (3) and
5 (4) for concealing assets, concealing or failing to maintain adequate
6 records, and making false oaths in connection with his Chapter 7 case.
7 The Memorandum Decision issued after the trial contains many findings
8 of fact which will not be repeated in this Decision.

9 Plaintiffs filed a Motion for Sanctions, Fees and Costs pursuant
10 to Fed.R.Bankr.P. 9011(c)(2) and the Court's inherent power under
11 §105(a) ("Sanctions Motion"). Plaintiffs requested over \$53,000 in
12 fees and costs which they associate with this adversary proceeding.
13 After the Sanctions Motion was filed, a Bill of Costs for \$4,947.46
14 was taxed by the Clerk of the Court in favor of the Plaintiffs. The
15 Sanctions Motion was heard on January 31, 2008, and taken under
16 submission. Since the hearing, the Court has reviewed the entire
17 record of the case. For the following reasons, the Sanctions Motion
18 is denied.

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20 II

21 DISCUSSION

22
23 A. Fed.R.Bankr.P. 9011

24 Before a motion for sanctions under Rule 9011(c) can be filed,
25 the Movant must comply with the 21 day "safe harbor provision" found
26 in Rule 9011(c)(1)(A). The only exception to this requirement is if
27 the sanctions are sought for the bad faith filing of a bankruptcy
28 petition.

1 The case of In re Silberkraus, 253 B.R. 890 (C.Cal. 2000), aff'd
2 316 F.3d 864 (9th Cir. 2003), supports the proposition that the Court
3 has the authority to award sanctions against a Debtor for costs
4 incurred by creditors when a debtor files a petition in bad faith.
5 To determine there was bad faith, there must be evidence that the
6 filing was frivolous and done for an improper purpose. In
7 Silberkraus, a solvent debtor filed a Chapter 11 petition to reject
8 a contract to sell commercial property. The bankruptcy court
9 converted the case to Chapter 7 rather than allowing dismissal, and
10 also awarded sanctions in the amount of half the fees and costs
11 incurred by the creditors as a result of the filing.

12 The circumstances in Silberkraus are quite different from those
13 presented here. In this case, the underlying debt arose from a breach
14 of contract, and sanctions were added when the Debtor claimed an
15 exemption from levy for his escrow accounts. Other than an appeal of
16 the sanctions, the litigation was over in the state court. The
17 petition was not filed in an attempt to delay proceedings in the state
18 court, but to discharge the obligation to Plaintiffs. The Debtor's
19 schedules indicated that his liabilities exceeded his assets.

20 The Debtor's lack of candor in connection with his Chapter 7 case
21 was sufficient to deny his discharge. He failed to disclose a change
22 in his income, his potential claims against the Hitt Trust and Asset
23 Escrow, and his reversionary interests in the family trusts. In
24 addition, his records were inadequate to provide reliable information
25 under the circumstances.

26 However, even after all the discovery performed by the Plaintiffs
27 and three days of trial, the Plaintiffs did not establish that there
28 were assets of significant value which could be recovered for the

1 estate so as to render the filing of the petition an act of bad faith.
2 Since the Plaintiffs have not proved that the petition was frivolous
3 or filed for an improper purpose, their motion under Rule 9011 must
4 fail.

5
6 **B. Inherent Power under Section 105**

7 The Court of Appeals has recognized that bankruptcy courts have
8 inherent sanction authority to "deter and provide compensation for a
9 broad range of improper litigation tactics." In re Dyer, 322 F.3d
10 1178, 1196 (9th Cir. 2003). However, before imposing a sanction based
11 on this authority, the Court must make an explicit finding of bad
12 faith or willful misconduct, consisting of something more than
13 negligence or recklessness. Id. After a thorough review of the
14 record in this case, this Court cannot make such a finding. Granted,
15 the record contains instances of tardy responses, inadequate notice
16 periods, and discovery motions which bordered on frivolous.

17 Sanctions for discovery disputes are covered by Rule 7037, and
18 excepted from the Rule 9011 sanctioning authority under Rule 9011(d).
19 There were no motions for sanctions filed regarding the discovery
20 disputes in this case, and from the correspondence between the Debtor
21 and Plaintiff's counsel that is in the file, there were very few good
22 faith efforts to resolve any such disputes.

23 A significant part of the problems during this case can be traced
24 back to the Complaint. The Complaint is so lacking in specific facts
25 as to the objection to discharge, that that portion of the Complaint
26 would likely have been quickly dismissed under the standard announced
27 by the Supreme Court in Bell Atlantic Corp. V. Twombly, 127 S.Ct. 1955
28 (2007). The facts alleged in the Complaint focused mainly on

1 prepetition transaction and litigation between the Plaintiffs and the
2 Debtor. That litigation was over, and had little to do with the
3 issues concerning the Debtor's discharge under § 727. The claims in
4 the Complaint concerning § 727, were merely recitals of the statutes,
5 with no additional facts concerning concealed assets, inadequate
6 records or inaccurate statements. Based on the facts set forth in
7 the Complaint, the Debtor's attempts to depose the Plaintiffs was not
8 unreasonable, as the scope of the impending trial was still undefined
9 by the pleadings.

10 In addition, without naming the trusts, or beneficiaries of the
11 trusts as defendants in this case, it appears that a good deal of the
12 fees and costs incurred by the Plaintiffs were generated while chasing
13 after windmills. Significant time was spent in attempting to depose
14 a notary in person in Virginia, and obtain expert opinion concerning
15 the handwriting of the repudiation of the Debtor's interest in one of
16 the family trusts. Despite all the time spent on the validity of the
17 signature on the repudiation document, there is no indication that any
18 inquiries were made to the Debtor's adult children who provided
19 declarations under penalty of perjury at the time of the summary
20 judgment motion concerning their interests in the trusts.

21 The focus and course of Plaintiffs' discovery is puzzling, and
22 provides additional reason not to impose any award of sanctions
23 against the Debtor for bad faith or willful misconduct. After a
24 complete review of the pleadings, declarations and exhibits presented
25 in this case, there is not sufficient evidence to find that Debtor's
26 efforts to defend his discharge amounted to bad faith or willful
27 misconduct as required to impose sanctions under the Court's inherent
28 authority.

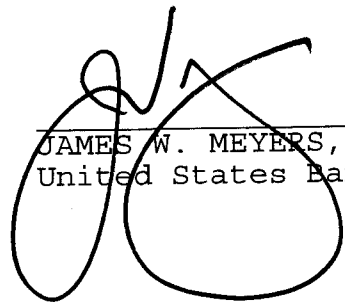
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III

CONCLUSION

The Plaintiffs have not established that Debtor's petition was filed for a frivolous or improper purpose or that his actions in defending this lawsuit constitute bad faith or willful misconduct to support an award of sanctions under Rule 9011 or §105. This Memorandum Decision shall serve as the Court's findings of fact and conclusions of law. The Court will issue a separate Order this same date.

Dated: **APR 01 2008**



JAMES W. MEYERS, Judge
United States Bankruptcy Court