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SOUTHERN DISTRICT OF CALIFORNIA
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NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In re
LARRY MERLE HOKE,
MARY KATHRYN HOKE,
Debtors.

Case No. 05-01853-A7
Adv. No. 06-90487-A7

LARRY MERLE HOKE,
MARY KATHRYN HOKE,
Plaintiffs,

MEMORANDUM DECISION

v.

NANCY WOLF, Trustee, and
DOES 1 through 10, inclusive,
Defendant.

I.
INTRODUCTION

Nancy Wolf ("Trustee") moves for sanctions pursuant to Federal Rule of Bankruptcy Procedure Rule 9011 for Larry and Mary Hoke's ("Plaintiffs") improper filing of this adversary proceeding ("Action"). The Action seeks damages for conversion under California Civil Code § 3336 and for violation

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1 Bankruptcy Code § 526.¹ Trustee argues the Action was filed in violation of
2 Bankruptcy Rule 9011(b). Trustee seeks to recover a monetary sanction of
3 \$4,672.29, representing a portion of the costs and attorney's fees that she
4 incurred defending the Action. For the reasons more fully set forth below, the
5 Court denies the motion.

6 **II.**

7 **FACTS**

8 On March 9, 2005, Plaintiffs filed a voluntary chapter 13 petition.
9 Plaintiffs' original bankruptcy schedules listed two vehicles: a 1990 Acura
10 Legend; and a 1999 Ford Ranger ("Ranger Truck"). Plaintiffs exempted the
11 Acura Legend but not the Ranger Truck. At some point during their chapter
12 13 case, Plaintiffs totaled their Ranger Truck. They made a claim on the
13 insurance policy and received \$5,000 in insurance proceeds. Plaintiffs used
14 the proceeds as a down payment toward the purchase of a Toyota Tacoma
15 ("Tacoma Truck"). Plaintiffs did not disclose these events until they converted
16 their case to a chapter 7 case.

17 Plaintiffs' amended schedules in the converted case listed the Tacoma
18 Truck and exempted it under California Civil Code § 704.010. Further,
19 Plaintiffs disclosed that the lien on the Tacoma Truck had not yet been
20 perfected, and that they intended to make a claim of rescission for return of
21 the \$5,000 deposit. They disclosed that the source of the \$5,000 deposit was
22 the insurance proceeds received from the Ranger Truck insurance policy.

23 [Main Case Doc. #45]

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26 ¹ Section 526 was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and
27 Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 § 227 (2005). Pursuant
28 to § 1501 of BAPCPA, § 526 is effective in bankruptcy cases commenced on or after October 17,
2005.

1 against the Trustee and Toyota. The initial adversary complaint sought to
2 rescind the underlying contract with Toyota and it requested return of the
3 \$5,000 deposit to Plaintiffs. [Adv. Proc. Doc. #3] On December 19, 2006,
4 Plaintiffs amended their complaint to delete Toyota and their rescission claims
5 (“Amended Complaint”). The Amended Complaint seeks damages for
6 violation of § 526 and conversion. Although the Amended Complaint does not
7 allege the precise date of conversion, it seeks reimbursement of rental car
8 charges of \$7,178.95 from August 15, 2006 forward.³

9 The Trustee responded with a letter warning Plaintiffs that the Action
10 was a Rule 9011 violation and requesting that it be withdrawn. Then, on
11 December 12, 2006, the Trustee sent the “first 9011 notice” requesting that
12 the Action be withdrawn. [Declaration of Yosina Lissebeck filed in Support of
13 Motion for Rule 9011 Sanctions at ¶ 4, Adv. Proc. Doc. #13] On December
14 29, 2006, Trustee served Plaintiffs with the “Amended 9011 Notice” because
15 she was served with the Amended Complaint. [*Id.* at ¶ 7]

16 Specifically, the Amended 9011 Notice was titled: “Trustee’s Notice of
17 Federal Rule of Bankruptcy Procedure 9011 Motion.” The notice informed
18 Plaintiffs they had 21 days to withdraw their Amended Complaint or “a motion
19 for sanctions may be filed with the court” Further, it included a one and
20 one-half page summary stating what “[t]he bases of this motion will be”
21 [Adv. Proc. Doc. # 13]

22 On January 8, 2007, Trustee filed a Motion to Dismiss the Amended
23 Complaint pursuant to Rule 12(b)(6); or alternatively, to Strike a SLAPP Suit
24 (“Motion to Dismiss”). Trustee believed a responsive pleading was due at that
25 time since she had not been served with an amended summons.

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27 ³ The Debtor’s Declaration filed in support of their Ex Parte Motion to Compel Turnover
28 of Vehicle states that they incurred \$7,178.95 from August 15, 2006 forward. [Main Case Doc. #72
at ¶ 4]

1 Plaintiffs did not formally withdraw their Amended Complaint. However,
2 during the 21-day period, both orally and in writing, they conveyed their
3 willingness to withdraw the complaint. Plaintiffs explained that because
4 Trustee had already filed a responsive pleading, they believed Rule 41(a)
5 required the Trustee to sign a stipulation of dismissal in order for Plaintiffs to
6 dismiss the Action. Trustee responded that she would stipulate to withdrawal
7 of the Amended Complaint only if it was with prejudice “and **only** if your client
8 [Plaintiffs] also withdraws the motion seeking turnover and stipulates that the
9 Vehicle is Property of the estate and agrees to waive any claim of
10 exemption in the Vehicle.” [Trustee’s letter dated January 11, 2007 (emphasis
11 in original)]⁴

12 Plaintiffs were unwilling to agree to her conditions. Thus, Plaintiffs filed
13 a “Notice of Impossibility to Comply with 9011 Safe Harbor Notice” explaining
14 that they had timely communicated their desire to dismiss the Action but that
15 the Trustee refused to stipulate. [Main Case Doc. #92; Adv. Proc. Doc. #15]⁵

16 After expiration of the 21-day safe harbor period, Trustee served and
17 filed the Amended 9011 Notice along with CSD Form 3015 (notice of hearing
18 and motion), her memorandum of points & authorities, and a supporting
19 declaration. Additionally, Trustee’s motion requested judicial notice of and
20 incorporated the arguments made in her Motion to Dismiss. [See Trustee’s
21 Points & Authorities in Support of her Motion for Rule 11 Sanctions at
22 4:22-26, Adv. Proc. Doc. # 13]

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25 ⁴ In fact, Rule 41(a) does not apply to a motion to dismiss. *See Concha v. London*, 62 F.3d
26 1493, 1506 (9th Cir. 1995). Trustee indicates she knew the Plaintiffs incorrectly believed they needed
her to stipulate to the dismissal. She elected not to enlighten the Plaintiffs.

27 ⁵ Plaintiffs mistakenly filed this notice in the main case on January 11, 2007. Thereafter,
28 they re-filed it in the Adversary Proceeding. The Trustee’s January 11, 2007 letter is attached as an
Exhibit to this notice.

1 III.

2 ANALYSIS

3 Rule 9011(a) provides that “[e]very petition, pleading, written motion,
4 and other paper ... shall be signed by at least one attorney of record in the
5 attorney’s individual name.” Rule 9011(b) provides, in part:

6 **(b) Representations to the court**

7 By presenting to the court (whether by signing, filing,
8 submitting, or later advocating) a petition, pleading,
9 written motion, or other paper, an attorney or
10 unrepresented party is certifying that to the best of the
11 person's knowledge, information, and belief, formed
12 after an inquiry reasonable under the
13 circumstances,--

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

17 (2) the claims, defenses, and other legal contentions
18 therein are warranted by existing law or by a
19 nonfrivolous argument for the extension, modification,
20 or reversal of existing law or the establishment of new
21 law;

22 (3) the allegations and other factual contentions have
23 evidentiary support or, if specifically so identified, are
24 likely to have evidentiary support after a reasonable
25 opportunity for further investigation or discovery

26 [Emphasis in original.]

27 Rule 9011(c) provides that if, after notice and a reasonable opportunity
28 to respond, the court determines subdivision (b) has been violated, the court
may impose an appropriate sanction upon those who are responsible for the
violation.

Further, 9011(c)(1)(A) provides the procedural requirements for initiating
a motion for sanctions. It provides that a Rule 11 motion shall be made by
separate motion. The motion is not to be filed with the court unless, within 21
days after service of the motion, the alleged violation is not withdrawn or
appropriately corrected. This procedure is confirmed by the Advisory

1 Committee Notes to the 1993 Amendment to Rule 11 (“Advisory Notes”)
2 which provide:

3 The rule provides that requests for sanctions must be
4 made as a separate motion The motion for
5 sanctions is not, however, to be filed until at least 21
6 days ... after being served.

7 To stress the seriousness of a motion for sanctions,
8 and to define precisely the conduct claimed to violate
9 the rule, the revision provides that the “safe harbor”
10 period begins to run only on service of the motion.

11 The Advisory Notes explain the 21-day hold is intended to provide a “safe
12 harbor” to allow a party to correct the alleged violation without fear that the
13 correction will be viewed as evidence of a Rule 11 violation. If during this
14 21-day hold the alleged violation is corrected, as by withdrawing (whether
15 formally or informally), the party will not be subject to sanctions and the
16 motion is not to be filed with the court. *Id.*

17 Compliance with the safe harbor provision is an absolute prerequisite
18 to imposing Rule 11 sanctions. *Radcliffe v. Rainbow Const. Co.*, 254 F.3d
19 772, 789 (9th Cir. 2001)(holding that because compliance with the safe harbor
20 is mandatory, no sanctions can be imposed under a motion that failed to
21 comply with this provision no matter how frivolous the conduct sought to be
22 sanctioned); see also *Barber v. Miller* , 146 F.3d 707, 710 (9th Cir.
23 1998)(confirming the safe harbor time period begins to run only upon service
24 of the motion because it would wrench both the language and the purpose of
25 the amendment to the Rule to permit a warning to substitute for service of the
26 motion).

27 In the present case, the Trustee argues her motion is timely and proper
28 because she complied with the safe harbor requirements. However, the Court
concludes otherwise. The Trustee served the Plaintiffs with a document that
she titled a “notice,” not a “motion.” Likewise, the Trustee’s supporting

1 declaration describes this document as a “first 9011 notice” and an “Amended
2 9011 Notice.” [Lissebeck Decl. at ¶¶ 4 and 7] Therefore, the Trustee herself
3 characterized this document as a “notice,” not a “motion.”

4 More importantly, the document is *not* a proper motion. Local
5 Bankruptcy Rule 9014-2 sets forth the “Content of a Motion.” It provides that
6 all motions shall be in writing and shall be accompanied by: (a) a statement
7 of the relief sought; (b) a memorandum of points and authorities; (c) affidavits
8 or declarations of material facts, as appropriate; and (d) authenticated copies
9 of all other documentary evidence upon which the movant intends to rely.
10 The Trustee and her counsel are well versed with the rules of this Court. The
11 motion which she actually served and filed with the Court complied with
12 LBR 9014-2.

13 Notwithstanding, the Trustee urges her earlier notice was the “motion.”
14 She urges that this document gave ample notice of her intent to file the
15 motion, and it described the conduct which she believed to be a Rule 11
16 violation. The Court rejects this argument. The earlier notice was not labeled
17 a “motion”; it was not a motion in compliance with the Court’s local rules; and
18 it was not the complete “motion” that she filed with the Court.⁶ Rule 11 clearly
19 requires the movant to serve more than just a “notice” of the alleged violation.
20 The movant must serve the actual motion they intend to file with the court and
21 wait 21 days after service of the actual motion before filing it with the court.

22 Moreover, even if Trustee’s notice sufficed, the Court concludes that
23 the Plaintiffs appropriately corrected the Rule 11 violation under the
24 circumstances. Rule 9011(c)(1)(A) does not mandate the challenged
25 pleading must be withdrawn to escape monetary sanctions. Instead, it

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27 ⁶ As indicated above, Trustee’s complete motion includes CSD Form 3015, her Amended
28 9011 Notice, a Memorandum of Points & Authorities, a Supporting Declaration, and a request for
judicial notice asking to incorporate her Motion to Dismiss.

1 provides that it should be withdrawn or “appropriately corrected.” The
2 Advisory Notes to Rule 11 confirm the correction can be either “formal or
3 informal.” Thus, although a formal withdrawal is the safest route to avoid the
4 filing of a Rule 11 motion, a declaration of withdrawal or a letter to the other
5 side stating that the challenged pleading is withdrawn, can also suffice. See
6 Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial (The
7 Rutter Group 2007), Ch. 17-B, ¶ 17:398.

8 In the present case, Plaintiffs timely acknowledged their desire to
9 dismiss the complaint. They explained to the Trustee their belief that Rule
10 41(a) required the Trustee’s written stipulation to dismiss the Action because
11 the Trustee had already filed a responsive pleading. The Trustee knew the
12 Plaintiffs incorrectly believed they needed her stipulation. See *Concha v.*
13 *London*, 62 F.3d 1493, 1506 (9th Cir. 1995)(plaintiff may terminate the action
14 voluntarily by filing a notice of dismissal under Rule 41(a) even if the
15 defendant has already filed a motion to dismiss). The Trustee elected not to
16 enlighten the Plaintiffs and instead requested additional, inappropriate
17 concessions as a condition giving to her consent to dismiss. Although
18 Trustee owed no duty to do the Plaintiffs’ research for them, she cannot
19 purport to block dismissal while at the same time demanding that the action
20 be dismissed. Accordingly, the Court concludes the Plaintiffs’
21 acknowledgment was appropriate under the circumstances.

22 Finally, the Court will not award attorney’s fees and costs to either side.
23 Rule 9011(c)(1)(A) provides that *if warranted*, the court *may* award to the
24 prevailing party on the motion the reasonable expenses and attorney’s fees
25 incurred in presenting or opposing the motion. Such an award is not
26 warranted in this case. The Trustee obtained her desired relief – dismissal
27 of the Action which was brought for an improper purpose and which lacked
28 legal merit in alleging (i) a § 526 claim for a pre-BAPCPA bankruptcy case;

1 and (ii) dismissal of the conversion claim which sought damages beginning
2 in August 2006 even though there is absolutely no evidence to support a
3 conversion in August 2006.

4 However, the Trustee did not prevail on this motion for Rule 11
5 sanctions due to her noncompliance with the safe harbor prerequisite.
6 Although it appears the Trustee believed in good faith that she did comply, her
7 compliance fell short of the requirements of Rule 9011(c)(1)(A) and
8 LBR 9014-2.

9 Likewise, the Court will not award the Plaintiffs their attorney's fees and
10 costs. The Court concludes that Plaintiffs committed clear Rule 11 violations
11 as set forth above. Moreover, had Plaintiffs done their research, they would
12 have known they could voluntarily dismiss their complaint even though the
13 Trustee had filed a motion to dismiss. Their voluntary dismissal would have
14 assured that the Rule 11 motion would not be filed. Thus, the circumstances
15 warrant that both sides should bear their own attorney's fees and costs of
16 presenting and defending the motion.

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18 **IV.**
19 **CONCLUSION**

20 The Court concludes that Plaintiffs violated Rule 11 by filing this Action.
21 Notwithstanding, the Trustee's failure to comply with the safe harbor
22 procedural prerequisite precludes the Court from imposing sanctions for the
23 Rule 11 violations. It appears that the Trustee attempted in good faith to
24 comply with the safe harbor prerequisite, but her compliance fell short of what
25 is required by Rule 9011(c)(1)(A) and LBR 9014-2.

26 Even if the Trustee did comply, Plaintiffs timely expressed their desire
27 to voluntarily dismiss the Action but they mistakenly believed they needed the
28 Trustee to stipulate. Trustee was not required to do their research for them.

1 However, she cannot refuse to stipulate while simultaneously demanding that
2 the Action must be dismissed. Because both sides bear some responsibility
3 for what has happened in this case, both sides should bear their own
4 attorney's fees and costs.

5 This Memorandum Decision is in lieu of Findings of Fact and
6 Conclusions of Law. The Court has prepared its own order in accordance
7 with this Memorandum Decision.

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Dated: MAR 05 2007



LOUISE DE CARL ADLER, Judge