FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
March 22, 2000
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOSEPH HAMBLIN and LINDA SUE HAMBLIN, Debtors.	BAP No. WO-99-059
JOSEPH HAMBLIN and LINDA SUE HAMBLIN, Appellants, v. LEGACY BANK, Appellee.	Bankr. No. 98-20278 Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, BOULDEN, and MATHESON, Bankruptcy Judges.

MATHESON, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. ***See*** Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

This Court has before it for review the order of the bankruptcy court imposing sanctions against the Debtors' attorney. For the reasons set forth below,

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

we REVERSE the order of the bankruptcy court.

BACKGROUND

Debtors filed a Chapter 13 case on October 19, 1999. In early February 2000, counsel for Legacy Bank ("Legacy") entered an appearance in the case. He then attempted to contact Debtors' counsel, making two phone calls that were unanswered and sending one letter, similarly not answered. Frustrated in his attempt to find out why the Chapter 13 plan had not been confirmed, he filed a motion for relief from stay. Apparently, no inquiry was made of the Chapter 13 trustee.

At the hearing on the motion for relief from stay it was established, without dispute, that Legacy held a first mortgage on the Debtors' home, that there were two junior mortgages, that Legacy was fully and amply secured, and that the Debtors had made all of their payments under their proposed plan. As to the delay in confirmation, the Trustee advised the court that she was the one holding up confirmation. Legacy's counsel presented no arguments for why Legacy was entitled to relief from stay other than the delay in confirmation. He asserted that, due to the failure of Debtors' counsel to respond to the phone calls or correspondence, Legacy had been required to file the motion from relief from stay, thereby increasing the fees payable by Legacy. He argued that sanctions should be imposed on Debtors' counsel to assuage such fees pursuant to section 105 of the Code, Rule 9011, and "general principles of decency and respect for this Court." The bankruptcy court acknowledged that the matter of unreturned phone calls by Debtors' counsel was not new. The court took the matter under advisement.

By late April the plan had still not been confirmed. Once again Legacy's attorney attempted, without success, to discuss the matter with Debtors' counsel. Another letter was sent, dated April 20, advising Debtors' counsel that a motion to dismiss would be filed on April 21. The motion to dismiss, including a

renewed motion for sanctions, was filed on April 22.

At the hearing on the motion to dismiss counsel for Legacy acknowledged that the Debtors had made all of their payments under their Chapter 13 plan and that he had "no qualms with the debtors." He nonetheless pressed for dismissal of the case due to the delay in achieving confirmation of the plan. He also continued to press for sanctions, presenting an affidavit to the court of his time in the matter (an affidavit that admittedly had never been served on nor seen by Debtors' counsel). Counsel for the Debtors described the confirmation procedure and argued that the process was under the control of the Trustee and the court. The Trustee acknowledged, again, that she had been delayed in attending to the matter and advised that the case was, indeed, ready for confirmation. At that point the court addressed counsel for the Debtors (Mr. Brown), and ruled as follows:

> Mr. Brown, I think you know that the Court has a great deal of respect for you personally; but in this case, if what the Court has experienced in the Griffin case is an example [apparently referring to another case where the court had encountered problems of lack of communication], the Court has no reason to doubt in any way the veracity of Mr. Ball, and the Court feels that sanctions are appropriate in this case. The Court is going to impose a sanction on the American Bankruptcy Attorneys, not to be passed on to the client, in the amount of $750.

JURISDICTION AND STANDARD OF REVIEW

With the consent of the parties, a Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments and orders of bankruptcy courts within this circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). As neither party has opted to have this appeal heard by the United States District Court for the Western District of Oklahoma, each is deemed to have consented to the jurisdiction of the Bankruptcy Appellate Panel. 10th Cir. BAP L.R. 8001-1(d).

A Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment or order, or remand for further proceedings. Conclusions of law are reviewed ***de novo***. ***Pierce v. Underwood***, 487 U.S. 552, 558 (1988). Findings

of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013; ***First Bank v. Reid (In re Reid)***, 757 F.2d 230, 233-34 (10th Cir. 1985). Factual findings, even those based on stipulated facts presented by the parties, are subject to a "clearly erroneous" standard of review. ***Adair State Bank v. American Cas. Co.***, 949 F.2d 1067 (10th Cir. 1991); ***see Anderson v. City of Bessemer City***, 470 U.S. 564, 573-75 (1985). "A finding is 'clearly erroneous' if it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made." ***Cowles v. Dow Keith Oil & Gas, Inc.***, 752 F.2d 508, 511 (10th Cir. 1985) (citation omitted).

DISCUSSION

Debtors' counsel argues that a variety of errors were committed by the bankruptcy court. Only one need concern us, and that is the question of whether there is any basis upon which the court's order imposing sanctions can be sustained. We conclude that it cannot.

Legacy argues, without any support whatsoever in the record, that the bankruptcy court imposed sanctions because the court "clearly found that counsel had acted vexatiously or in bad faith." (Legacy Brief, p. 11) No such findings were ever made by the bankruptcy court. Indeed, there were no findings of any kind by the bankruptcy court other than the conclusion that sanctions should be imposed. The reality is that sanctions were imposed on Debtors' counsel because he failed to return three phone calls and did not answer one letter (the second letter, sent April 20, being only an ultimatum that did not call for any kind of a response).

It is well established that all federal courts have the inherent power to impose sanctions on counsel, or parties, for bad-faith conduct that abuses the judicial process. ***Chambers v. NASCO, Inc.,*** 501 U.S. 32 (1991). In this circuit bankruptcy courts are included within the reach of this inherent authority. ***Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.)***, 40 F.3d 1084 (10th Cir. 1994).

It is, however, a power that must be exercised with "restraint and discretion." ***Chambers,*** 501 U.S. at 44.

In ***Chambers*** the Court left the lower courts with a very subjective standard for the imposition of sanctions, one that brought a sharp rebuke from the dissenting judges. However, it would be difficult to dispute the propriety of the sanctions imposed in that case. The facts of ***Chambers*** disclose that counsel had filed a number of baseless and frivolous pleadings, filed answers and counterclaims that were known to be false at the time they were filed, requested needless depositions, sought repeated and endless delays, presented various bad-faith affidavits, engaged in attempts to manipulate the jurisdiction of the court, and generally engaged in a scheme "of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance." ***Chambers,*** 501 U.S. at 41 (internal quotation omitted). In ***In re Courtesy Inns***, the Court of Appeals found that sanctions were appropriate because of the finding of the bankruptcy court that the bankruptcy filing was "purely for the purpose of delaying the creditor from enforcing its rights." ***In re Courtesy Inns***, 40 F.3d at 1090 (internal quotation omitted).

Legacy relies on ***Hawkins v. Major Electric & Supply, Inc. (In re Hawkins)***, 163 B.R. 422 (Bankr. D.R.I. 1994) as authority to support the order of the bankruptcy court. ***Hawkins***, however, is both questionable and distinguishable. In that case the parties had reached an agreement to resolve a pending adversary proceeding, and a stipulation was to be filed. However, counsel for the creditor failed to respond to phone calls and correspondence, which the court believed to be an "inexcusable interference with the conclusion of this matter without Court intervention and a hearing." ***In re Hawkins***, 163 B.R. at 423. The court there also found the behavior to be a "cavalier disregard" for the court's time. The court made no findings of bad faith activities, and cited no authority for the sanctions imposed. By contrast, the court in ***In re Nichols,*** 221

B.R. 275 (Bankr. N.D. Okla. 1998), also relied on by Legacy, declined to impose sanctions, finding that, in invoking inherent powers to sanction, "the courts have generally found subjective bad faith and vexatious, wanton and oppressive conduct." ***In re Nichols***, 221 B.R. at 280.

These cases stand in stark contrast to the case now before the Court. Here, Legacy was not at risk because there was substantial equity in the property over the amount of the Legacy loan, and two junior mortgages behind Legacy, and the Debtors were making all payments under their proposed Chapter 13 plan. At the hearing on the motion for relief from stay Legacy did not argue that there was a lack of adequate protection; the sole reason advanced for relief was the apparent delay in achieving confirmation. But it is clear from the record that this delay was not the fault of the Debtors or their counsel, but was attributable to the office of the Chapter 13 trustee. There is absolutely nothing in the record to suggest that the failure of Debtors' counsel to respond to the alleged phone calls and correspondence from Legacy was done to harass, obstruct, or delay Legacy in the ultimate satisfaction of its debt, and there are no findings to suggest this was the case.

The same can be said of the ensuing motion to dismiss. Indeed, it is notable that, in the face of an admission by the Chapter 13 trustee that she was the cause of the delay, counsel for Legacy apparently made no effort to contact the trustee at any time to determine the status of the case. Instead, the motion to dismiss was filed to bring the matter before the court, at which time the case was resolved and confirmation followed.

Without question, counsel for Legacy was miffed and frustrated by what he considered to be the lack of courtesy of Debtors' counsel in failing to respond to the phone calls and correspondence. The court was similarly miffed at having to deal with the matter under circumstances where it is possible that no court involvement might have been necessary had there been a timely and informed

response to the inquiries. But mere incivility is not sanctionable conduct when it is not indicative of an effort to abuse the process of the court, to cause unwarranted delay, or to harass the other side. None of those factors is present here, and the bankruptcy court abused its discretion in imposing sanctions under these circumstances.

Other errors are also evident. While there may have been ample notice that Legacy's attorney intended to raise the issue of sanctions at the hearing on the motion to dismiss and the general amount of the sanctions sought, there was no opportunity given to Debtors' counsel to be apprised of the exact amount of sanctions claimed and no opportunity to be heard on that issue. ***Groetken v. Davis (In re Davis)***, ___ B.R. ___, 2000 WL 287777 (10th Cir. BAP filed March 15, 2000) (sanctions overturned where attorney was not given opportunity to respond to attorney fee request by affidavit presented in open court). Thus, the basic tenets of "due process" insisted on by the ***Chambers*** Court are lacking. Similarly, although the bankruptcy court may have relied on an affidavit of fees and expenses presented in open court by Legacy's attorney, that document is not part of the record on appeal, and there is no explanation of how the court determined the amount of the sanctions.

Legacy is not without remedies. Indeed, it had, and has, a variety of remedies available. Again, Legacy's counsel could have made inquiry to the Trustee, which was never done. And, to the extent Legacy has incurred reasonable and necessary fees, such may be allowable under 11 U.S.C. § 506(b). But they are not allowable in the circumstances of this case as sanctions against Debtors' counsel.

For the reasons stated, the order of the bankruptcy court is REVERSED, and this matter is remanded for entry of judgment in accordance with the mandate of this Court.