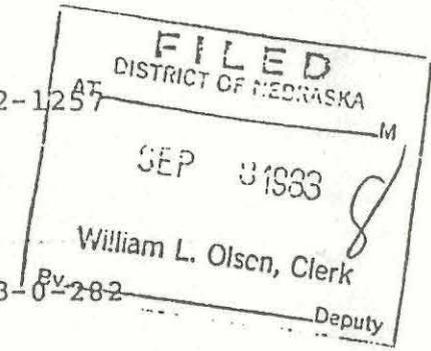


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:)
)
 CASSIDY LAND AND CATTLE CO.,)
)
 Debtor.)
)
 CASSIDY LAND AND CATTLE CO.,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES S. CASSIDY, et al.,)
)
 Defendants.)

BK 82-1257



MEMORANDUM AND ORDER

This matter is before the Court on appeal from an interlocutory order of contempt entered by the Bankruptcy Court for the District of Nebraska on April 15, 1983. The order of contempt and fine of \$1,000 plus \$500 attorney fees were imposed in response to the debtor's failure to appear at an examination scheduled by appellee, Commercial National Bank and Trust Company of Grand Island, Nebraska, pursuant to the Bankruptcy Court's order of January 24, 1983, authorizing the examination. Because the case has come before this Court on an inadequate record, the order of the Bankruptcy Court cannot be affirmed.

The record does not reveal whether the Bankruptcy Judge intended to find the debtor in civil or criminal contempt, and the order has aspects of both. For the difference between these, see, e.g., Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983); Thyssen, Inc. v. S/S Chuen Co., 693 F.2d 1171 (5th Cir. 1982).

If a contempt order is punitive in purpose, i.e., is primarily intended to punish the debtor for completed acts of wilful disobedience, is phrased in terms of a "fine," cannot be purged, and does not appear to be measured with respect to the actual losses sustained by another party, then it is likely to be considered criminal in character. In this event, the Bankruptcy Court is limited by Local Rule 51 to punishing only those criminal contempts committed in the actual presence of the Court. There exists precedent to the effect that absence at a scheduled court appearance is not a contempt committed "in the presence of the Court." See, e.g., Thyssen, 693 F.2d at 1174-75.

On the other hand, if the contempt order is construed as a "coercive" civil contempt, i.e., to enforce compliance with the Court's order authorizing the debtor's examination, it is unclear whether the Bankruptcy Court intended the penalty to be lifted upon compliance by the debtor. Furthermore, if the order was intended as a "compensatory" civil contempt, no record exists by which this Court can review the actual losses sustained by appellee, the creditor who applied for the order of contempt.

Appellant argues that the Bankruptcy Court was without jurisdiction or authority to impose any order of contempt and cites Martin-Trigona v. Shiff, 19 B.R. 1001 (D. Conn. 1982), a decision which has been vacated on appeal. See Martin-Trigona v. Shiff, 702 F.2d 380 (2nd Cir. 1983). While the Second Circuit expressed some doubts about the contempt powers of the bankruptcy courts in Martin-Trigona, id. at 383-84 n.8, the Eighth Circuit has recently upheld a civil contempt order entered by a Missouri

bankruptcy court. See Carter v. Buskirk, 691 F.2d 390 (8th Cir. 1982). Therefore, the law of this Circuit by which this Court is bound, appears to sanction a bankruptcy court's exercise of the contempt power to enforce its lawful orders, notwithstanding the decision in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982), on which appellant relies.

Appellant also urges that Bankruptcy Rule 920 limits an order of civil contempt to a monetary amount of \$250.00. However, see contra, the well-reasoned opinion in In re Johns-Manville Corp., 26 B.R. 919, 923-24 (Bankr. S.D.N.Y. 1983), with which this Court agrees. The Court finds, therefore, that the Bankruptcy Judge has the power to impose an order of coercive or compensatory civil contempt in an amount determined by him to be appropriate in the circumstances, so long as due process safeguards are observed, and the record reflects his intent and the factual basis for his order.

IT IS THEREFORE ORDERED that the contempt order of the Bankruptcy Court entered on April 15, 1983, is vacated, and this action is remanded for such proceedings as the Bankruptcy Court deems appropriate in accordance with this Memorandum and Order.

DATED this 8th day of September, 1983.

BY THE COURT:



C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE