

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DAMROW CATTLE CO., INC.,)
)
Debtor(s).) CASE NO. BK01-80266

) A01-8056
SKANE, INC.,)
)
Plaintiff,) CH. 7
)
vs.)
)
FIRST NATIONAL BANK OF OMAHA,)
et al.,)
)
Defendants.)

MEMORANDUM

Hearing was held in Omaha, Nebraska, on May 27, 2003, on the motion for sanctions filed by Tom Morrow (Fil. #256) and response by First National Bank of Omaha (Fil. #259). Craig Martin appeared for the movant, Michael Snyder appeared for the plaintiff, John Guthery appeared for United Nebraska Bank, and Dennis Bartlett appeared for First National Bank of Omaha. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

The motion for sanctions is denied.

Mr. Morrow is the receiver appointed by the Phelps County District Court in First National Bank of Omaha v. Damrow Cattle, et al., Case NO. CI01-8. In that capacity, he was responsible for liquidating collateral allegedly belonging to First National Bank of Omaha and accounting for the proceeds thereof. When the bankruptcy case was filed, Mr. Morrow was ordered to account for the corn at issue in this dispute and to segregate the proceeds of the sale of the disputed cattle. Subsequently, this adversary proceeding was filed to determine which party has a superior

interest in that collateral. Mr. Morrow, as receiver, was named as defendant in this action to the extent that he held any proceeds from the cattle or corn in which Skane claims an interest. In May 2002, Mr. Morrow complied with the Chapter 7 Trustee's instructions to turn over all collateral and proceeds in his possession.

Mr. Morrow asserts that during the course of pretrial litigation, plaintiff's counsel was informed more than once that Mr. Morrow held no monies which could be the subject of this litigation. The parties attempted to craft a stipulation leading to the dismissal of Mr. Morrow, but were unsuccessful. Mr. Morrow ultimately filed a motion for summary judgment, which was granted on the eve of trial.

Mr. Morrow now argues that the plaintiff should have dismissed him from this case as soon as plaintiff was satisfied that Mr. Morrow no longer held any of the cattle or corn proceeds at issue. Plaintiff's failure to do so allegedly cost Mr. Morrow more than \$10,000 in fees and costs associated with defending the action and filing this motion.

First National Bank of Omaha acknowledged that it has advanced funds to pay Mr. Morrow's fees when the receivership estate was unable to do so. It supports Mr. Morrow's request for sanctions, asserting that the receiver, who merely acted as custodian of the funds, should not have been sued.

Skane asserts that it litigated this case in good faith, and that it had a right to try to obtain answers to its questions about the proceeds, particularly as to the corn because some unresolved questions remain as to what happened to all of the corn that Skane delivered to the debtor.

Mr. Morrow moves for sanctions under Fed. R. Bankr. P. 9011(c) and fees and costs under 28 U.S.C. § 1927. Those sections are intended to discourage and sanction particularly egregious conduct.

Rule 9011 allows sanctions to be assessed against attorneys and litigants who present a petition, pleading, motion or other paper to the court for an improper purpose or without a reasonable belief that a factual or legal basis exists for the contentions therein. The relevant inquiry is whether a specific filing was, if not successful, at least well-founded. Chambers v. NASCO, Inc., 501 U.S. 32, 53 (1991). "[T]he imposition of a

Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and if so, what sanction would be appropriate." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990).

In determining whether a violation of Rule 11 has occurred, the district court must apply an "objective reasonableness" standard. NAACP v. Atkins, 908 F.2d 336, 339 (8th Cir. 1990) (citing O'Connell v. Champion International Corp., 812 F.2d 393, 395 (8th Cir. 1987)). The factors for a court to consider in deciding whether to impose sanctions under Rule 11 include whether the improper conduct was willful or negligent; whether it was part of a pattern of activity or an isolated event; whether it infected the entire pleading or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; and whether the responsible person is trained in the law. Advisory Committee Notes on the 1993 amendments to Rule 11. "The purpose of Rule 11 sanctions is to deter rather than to compensate." Id.

Section 1927 imposes liability for excessive costs on counsel "who so multiplies the proceedings in any case unreasonably and vexatiously". "[Section] 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes." Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980). Because § 1927 is punitive in nature, courts are to strictly construe it so as not to "dampen the legitimate zeal of an attorney in representing his client." Lee v. L.B. Sales, Inc., 177 F.3d 714, 718 (8th Cir. 1999) (quoting Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc., 38 F.3d 1414, 1416 (5th Cir. 1994)). Sanctions under § 1927 are warranted when attorney conduct, "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." Lee v. L.B. Sales, Inc., 177 F.3d at 718 (quoting Perkins v. Spivey, 911 F.2d 22, 36 (8th Cir. 1990), cert. denied, 499 U.S. 920 (1991)).

"Unreasonably and vexatiously multiplies proceedings" has been interpreted by the Eighth Circuit to require a finding of both objectively unreasonable behavior

and bad faith. See N.A.A.C.P. v. Atkins, 908 F.2d 336, 340 (8th Cir. 1990); see also Joseph V. Edeskuty & Associates v. Jacksonville Kraft Paper Co., Inc., 702 F. Supp. 741, 746 (D. Minn. 1988) (denied sanctions under 28 U.S.C. § 1927 because the record did not reflect any bad faith on part of defendant's counsel). The Eighth Circuit has also found "intentional or reckless disregard of the attorney's duties to the court" to satisfy the bad faith portion of the standard. Perkins v. Spivey, 911 F.2d 22, 36 (8th Cir. 1990), cert. denied, 499 U.S. 920, 111 S. Ct. 1309, 113 L. Ed. 2d 243 (1991).

VanDanacker v. Main Motor Sales Co., 109 F. Supp. 2d 1045, 1055 (D. Minn. 2000).

In this case, Mr. Morrow asserts that he should have been dismissed long before he had to prepare for trial. The evidence contains correspondence between counsel for Skane and Morrow which makes clear that Skane was willing to dismiss Mr. Morrow if Mr. Morrow would provide certain requested information AND if all parties, particularly First National Bank of Omaha, would stipulate to a statement of facts. That condition was expressed repeatedly to Morrow's counsel. Mr. Morrow provided the necessary information, but a stipulation was never agreed to by all the parties. The inability of the parties to reach such an agreement cannot be attributed to Skane's counsel. For that reason, sanctions under Rule 11 are denied and the request for fees and costs under § 1927 is denied.

Separate order will be entered.

DATED: July 14, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Craig Martin	Dennis Bartlett
Mike Snyder	U.S. Trustee
John Guthery	

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DAMROW CATTLE CO., INC.,)
)
Debtor(s).) CASE NO. BK01-80266

) A01-8056
SKANE, INC.,)
)
Plaintiff,) CH. 7
)
vs.)
)
FIRST NATIONAL BANK OF OMAHA,)
et al.,)
)
Defendants.)

ORDER

Hearing was held in Omaha, Nebraska, on May 27, 2003, on the motion for sanctions filed by Tom Morrow (Fil. #256) and response by First National Bank of Omaha (Fil. #259). Craig Martin appeared for the movant, Michael Snyder appeared for the plaintiff, John Guthery appeared for United Nebraska Bank, and Dennis Bartlett appeared for First National Bank of Omaha.

IT IS ORDERED: The motion for sanctions filed by Tom Morrow (Fil. #256) is denied. See Memorandum filed this date.

DATED: July 14, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Craig Martin Dennis Bartlett
Mike Snyder U.S. Trustee
John Guthery

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.