



SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: February 1, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

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

IN RE:

**LARRY RENA BUTLER AND
SHERRY ANN BUTLER,**

CASE NO. 16-03591-NPO

DEBTORS.

CHAPTER 13

**ORDER: (1) DISMISSING BANKRUPTCY CASE EFFECTIVE
FOURTEEN (14) DAYS AFTER ENTRY OF THIS ORDER; (2) ORDERING
JERRY LEE BUSTIN TO DISGORGE \$1,100.00 IN ATTORNEY'S FEES;
AND (3) DENYING WITHOUT PREJUDICE CERTAIN PLEADINGS AS MOOT**

The following matters came before the Court for hearing on January 23, 2017 (the "Hearing"), in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"): the Chapter 13 Plan (the "Plan") (Dkt. 2) filed by the debtors, Larry Rena Butler and Sherry Ann Butler (the "Debtors"); the Application for Individuals to Pay the Filing Fee in Installments (the "Amended Application") (Dkt. 13) filed by the Debtors; the Order Scheduling Show Cause Hearing for Failure to Obtain Prepetition Credit Counseling as Required by 11 U.S.C. § 109(h)(1) (the "Credit Counseling Show Cause Order") (Dkt. 22); the Order to Show Cause (the "Deficiency Notice Show Cause Order") (Dkt. 23) requiring the Debtors to appear and show cause why the Bankruptcy Case should not be dismissed for failure to comply with the Court's Notice of Deficiency (the "Deficiency Notice") (Dkt. 11); the Certification About a Financial Management

Course (the “Financial Management Certificate”) (Dkt. 27) filed by the Debtors; the Notice of Status Conference (the “First Notice of Status Conference”) (Dkt. 41) on the Objection to Confirmation (the “Confirmation Objection”) (Dkt. 39) filed by 21st Mortgage Corporation (“21st Mortgage”); the Amended Trustee’s Objection to Confirmation (the “Trustee’s Amended Objection”) (Dkt. 49) filed by James L. Henley, Jr., the chapter 13 panel trustee (the “Trustee”); the Motion for Relief from Stay and for Other Relief (the “Motion for Relief”) (Dkt. 54) filed by 21st Mortgage; the Amendment Cover Sheet (the “Cover Sheet”) (Dkt. 59) filed by the Debtors; the Motion to Amend Bankruptcy Petition (the “Motion to Amend Petition”) (Dkt. 60) filed by the Debtors; the Bankruptcy Petition Preparer’s Notice, Declaration, and Signature (the “Preparer’s Notice”) (Dkt. 61) filed by the Debtors; the Rule 1019 Schedule of Post Petition Debts (the “Rule 1019 Schedule”) (Dkt. 62) filed by the Debtors; and the Order (1) Setting Hearing and (2) Issuing Orders to Show Cause (the “Order Setting Hearing and Issuing Show Cause”) (Dkt. 63) entered by the Court.

At the Hearing, Jerry Lee Bustin (“Bustin”) represented the Debtors; Letitia S. Johnson (“Johnson”) appeared on behalf of the Trustee, and Edward E. Lawler, Jr. represented 21st Mortgage. After fully considering the matter and being fully advised in the premises, the Court ruled from the bench that (1) the Bankruptcy Case will be dismissed, effective fourteen (14) days after entry of an order; and (2) Bustin must disgorge \$1,100.00 in attorney’s fees paid to him by the Debtors within seven (7) days after entry of an order. This Order memorializes and supplements the Court’s bench ruling and disposes of the Confirmation Objection, the Trustee’s Amended Objection, and the Motion for Relief.

Facts

1. The Debtors filed a voluntary petition for relief pursuant to chapter 13 of the

Bankruptcy Code (the “Petition”) (Dkt. 1) and the Plan on November 1, 2016.

2. The Debtors filed the Application for Individuals to Pay the Filing Fee in Installments (Dkt. 6) contemporaneously with the Petition, and subsequently filed the Amended Application on November 2, 2016.

3. The Clerk of the Bankruptcy Court entered three (3) notices of deficiency on November 2, 2016: the Notice of Deficiency (Dkt. 9) regarding the Certificate of Credit Counseling; the Notice of Deficiency (Dkt. 10) regarding the creditor’s matrix; and the Deficiency Notice.

4. The Court issued the Credit Counseling Show Cause Order and the Deficiency Notice Show Cause Order on November 17, 2016. Subsequently, the Debtors filed the Financial Management Certificate on November 28, 2016.

5. The Trustee filed the Trustee’s Objection to Confirmation (the “Trustee’s First Objection”) (Dkt. 34) on December 12, 2016, arguing that the Plan should not be confirmed. The Trustee filed the Trustee’s Amended Objection on December 27, 2016.

6. The Court held a hearing on December 28, 2016 (the “December Hearing”), on the Plan, Amended Application, the Credit Counseling Show Cause Order, the Deficiency Notice Show Cause Order, the Financial Management Certificate, the Trustee’s First Objection, and the First Notice of Status Conference. The Court subsequently entered the Order (1) Resetting Hearing and (2) Allowing Jerry Lee Bustin Fourteen (14) Days in Which to Correct Pleadings or Refer Debtors to Substitute Chapter 13 Counsel (the “Reset Order”) (Dkt. 51). At the December Hearing, Bustin explained that “due to a number of personal issues,” there were many deficiencies in the Bankruptcy Case. (Reset Order at 2). According to Bustin, he was again working full-time after an extended absence and requested time in which to correct the deficiencies. (*Id.*).

The Court granted Bustin's request, allowing him fourteen (14) days in which to correct the numerous deficiencies in the Bankruptcy Case or refer the Bankruptcy Case to competent counsel. (*Id.*) The Court also scheduled the Hearing. (*Id.*)

7. After the Court entered the Reset Order, Bustin filed on behalf of the Debtors the Cover Sheet, the Motion to Amend Petition, the Preparer's Notice, and the Rule 1019 Schedule. The Court subsequently entered the Order Setting Hearing and Issuing Show Cause. In the Order Setting Hearing and Issuing Show Cause, the Court found that because Bustin failed to comply with the Reset Order, he should appear at the Hearing and "show cause why sanctions or other relief should not be imposed" (Order Setting Hearing and Issuing Show Cause at 2). Additionally, the Court ordered Bustin to appear and show cause why sanctions or other relief should not be imposed based on his violation of Rule 5005-1 of the Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi ("Local Rule 5005-1"), which requires attorneys to file documents electronically. (*Id.*); *see* MISS. BANKR. L.R. 5005-1(a)(2)(A).

8. At the Hearing, Johnson stated that Bustin did not accomplish any of the tasks the Court required in the Reset Order and did not resolve any of the deficiencies in the Bankruptcy Case. Bustin reiterated his argument that due to personal circumstances and personnel issues in his law office, he was unable to resolve the deficiencies in the Bankruptcy Case. At the Hearing, the Debtors expressed concern about losing their home. According to the Debtors, they had paid Bustin \$1,100.00 to represent them in the Bankruptcy Case.

Discussion

Bustin's representation of the Debtors throughout the course of the Bankruptcy Case has been egregious. His careless representation has compromised the Debtors' ability to save their

home from foreclosure, which threatens their entitlement to the “fresh start” provided by the Bankruptcy Code. *See Grogan v. Garner*, 498 U.S. 279, 287 (1991) (holding that “honest but unfortunate debtors” are entitled to a “fresh start” under the Bankruptcy Code). Under the Mississippi Rules of Professional Conduct (the “Mississippi Rules”), which set forth a lawyer’s responsibilities and duties to his or her client, a lawyer acts as a “representative of clients,” and is a “public citizen having special responsibility for the quality of justice.” MISS. RULES OF PROF’L CONDUCT, Preamble (1987). Accordingly, a lawyer “should be competent, prompt, and diligent” in all professional functions. *Id.* Under the Mississippi Rules, a lawyer must “provide competent representation to a client,” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MISS. RULES OF PROF’L CONDUCT R. 1.1. Additionally a lawyer must be competent and “act with reasonable diligence and promptness in representing a client.” MISS. RULES OF PROF’L CONDUCT R. 1.3. Sanctions for violating the Mississippi Rules generally fall within the province of the Mississippi Bar. However, in considering attorney misconduct, a bankruptcy court may take into consideration the ethical rules of the state in which it sits. *In re Dobbs*, 535 B.R. 675, 689 (Bankr. N.D. Miss. 2015). Here, Bustin violated the aforementioned Mississippi Rules, among others, by incompetently representing the Debtors, and, therefore, Bustin has left the Court no choice but to dismiss the Bankruptcy Case, effective in fourteen (14) days, to allow the Debtors an opportunity to obtain competent chapter 13 counsel and consider the options available to them, including the filing of another bankruptcy case.

I. Dismissal of Bankruptcy Case

Bustin failed to comply with the Deficiency Notice and did not comply with the Credit Counseling Show Cause Order or the Deficiency Show Cause Order. Although there were many

deficiencies in the Bankruptcy Case that could have resulted in dismissal after the December Hearing, the Court allowed Bustin fourteen (14) days in which to resolve the deficiencies in the Bankruptcy Case. (Reset Order at 2). In the event that Bustin determined that he would be unable to provide adequate representation to the Debtors in the Bankruptcy Case, the Court required Bustin to refer them to an attorney who could. (*Id.*). Just as he failed to comply with the Deficiency Notice and orders to show cause, Bustin failed to comply with the Reset Order. Additionally, he failed to comply with the Order Setting Hearing and Issuing Show Cause. At the Hearing, Bustin simply repeated his arguments from the December Hearing that, due to personal circumstances and personnel issues at his law office, he was unable to accomplish the tasks prescribed by the Court.

As a result of Bustin's inadequate representation, many deficiencies remain so that the Court has no choice but to dismiss the Bankruptcy Case. For example, the Debtors were required to complete credit counseling before filing the Petition under 11 U.S.C. § 109(h)(1).¹ It appeared that they did not comply, and the Court issued the Credit Counseling Show Cause Order. (Credit Counseling Show Cause Order at 1-2). The Debtors did comply with the Credit Counseling Show Cause Order, which provided that failure to comply "may result in dismissal of the Bankruptcy Case without further notice of hearing." (*Id.* at 2). Similarly, after the Clerk of the Bankruptcy Court issued the Deficiency Notice, the Court entered the Deficiency Notice Show Cause Order, requiring the Debtors to show cause why the Bankruptcy Case should not be dismissed for failure to comply with the Deficiency Notice. (Deficiency Notice Show Cause Order at 1). The Deficiency Notice Show Cause Order also provided that failure to comply could result in dismissal

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless indicated otherwise.

of the Bankruptcy Case without further notice. (*Id.* at 2). The Debtors failed to comply.

These failures, among others, should result in the immediate dismissal of the Bankruptcy Case. Because of the unique facts of the Bankruptcy Case, however, the Court finds that the dismissal of the Bankruptcy Case should be delayed until fourteen (14) days after entry of this Order. The Court concludes that the Debtors' failure to comply is through no fault of their own, but is the fault of Bustin who was unable to serve their needs. Although the Court has not had an opportunity to consider the merits of the Bankruptcy Case, the Debtors should not lose their opportunity to receive a fresh start because of the actions or inactions of Bustin. Accordingly, the Court finds that the Bankruptcy Case should be dismissed fourteen (14) days after entry of this Order so that the Debtors can consider the options available to them, including the filing of another bankruptcy case. The automatic stay under § 362 should remain in effect until that date. Because the Bankruptcy Case will be dismissed, the Confirmation Objection, the Trustee's Amended Objection, and the Motion for Relief should be denied without prejudice as moot.

II. Disgorgement of Fees

As a result of Bustin's failure to represent the Debtors competently, the Bankruptcy Case will be dismissed. The Debtors did what they were supposed to do—they hired an attorney experienced in bankruptcy law to handle the Bankruptcy Case. Instead of providing competent representation, Bustin filed pleadings that had no merit, were inappropriate, or had no basis in law or fact.

“It is well-settled that a federal court, acting under its inherent authority, may impose sanctions against litigants or lawyers appearing before the court so long as the court makes a specific finding that they engaged in bad faith conduct.” *Knight v. Luedtke (In re Yorkshire,*

LLC), 540 F.3d 328, 332 (5th Cir. 2008) (citations omitted).² This rule applies to bankruptcy courts as well. *Id.* Courts may utilize their inherent powers to issue sanctions, as “[t]here can be little doubt that bankruptcy courts have the inherent power to sanction vexatious conduct presented before the court.” *In re Wyatt & McAlister, PLLC*, No. 09-04354EE, 2013 WL 5963581, at *9 (Bankr. S.D. Miss. Nov. 7, 2013) (citations & quotations omitted). When a court exercises its discretion to sanction a party or attorney, its decision is reviewed for an abuse of discretion. *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995).

Before a court can impose sanctions under its inherent power, “the Fifth Circuit imposes specific requirements upon the court.” *Id.*, at *10. First, “the threshold for the use of inherent power sanctions is high.” *Elliott v. Tilton*, 64 F.3d 213, 217 (5th Cir. 1995) (quoting *Chaves*, 47 F.3d at 156). Because of the “potency” of the inherent powers, the Supreme Court has cautioned that they must be exercised with restraint and discretion. *Id.* Second, “general complaints about a sanctioned party are insufficient to support [an] imposition of sanctions.” *In re Wyatt & McAlister, PLLC*, 2013 WL 5963581, at *10 (citing *Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999) (noting that the Fifth Circuit has reversed the award of sanctions when “the district court merely made general complaints about the sanctioned party.”)). The final requirement for a court to exercise its inherent powers to issue sanctions is that the court “must make specific finding[s] of bad faith.” *Id.* “In effect, to impose sanctions using its inherent powers, this Court must find that the ‘very temple of justice has been defiled’ by the party’s conduct.” *Id.* (citing

² The Supreme Court granted certiorari and recently heard oral arguments in two cases that presented a question of whether a federal court is required to tailor compensatory civil sanctions imposed under inherent powers to harm directly caused by sanctionable misconduct. The Supreme Court has not yet issued an opinion in either of these cases. *Goodyear Tire & Rubber Co. v. Haeger*; 813 F.3d 1233 (9th Cir. 2016), *cert. granted*, 137 S.Ct. 30 (2016); *Musnuff v. Haeger*, 813 F.3d 1233 (9th Cir. 2016), *cert. granted*, 137 S.Ct. 368 (2016).

Knight v. Luedtke (In re Yorkshire, LLC), 540 F.3d 328, 332 (5th Cir. 2008)); see *Boland Marine & Mfg. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995).

In addition to bankruptcy courts' inherent power to issue sanctions, § 105(a) authorizes bankruptcy courts to issue sanctions. *In re Wyatt & McAlister, PLLC*, 2013 WL 5963581, at *10. Under § 105(a), a bankruptcy court may, *sua sponte*, issue any order that is "necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a). Section 105(a) "does not exist to merely punish behavior already sanctioned by other mechanisms. Rather, § 105 is meant to 'fill in the interstices' that rules such as 9011(c) do not fill." *In re Stomberg*, 487 B.R. 775, 817 (Bankr. S.D. Tex. 2013) (quotations omitted); see *In re Wyatt & McAlister, PLLC*, 2013 WL 5963581, at *10. Nonetheless, if the Court exercises its power to sanction under § 105(a), it is still required to make "a specific finding of bad faith." *In re Parsley*, 384 B.R. 138, 179 (Bankr. S.D. Tex. 2008). Because the bankruptcy court's power to sanction under its inherent powers and § 105(a) are "essentially coterminous," it is unnecessary for the Court to conduct a separate analysis for each. *Id.* (citing *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996)).

The Court does not make the decision to sanction Bustin lightly; however, in order to protect the Debtors, requiring Bustin to disgorge \$1,100.00 in attorney's fees paid to him by the Debtors is necessary. Whether the Court utilizes its inherent power to issue sanctions or issues sanctions under § 105(a), the Court finds that Bustin's actions amounted to bad faith³ that gives rise to an imposition of sanctions. "Bad faith . . . is characterized as an attempt to abuse the judicial process." *In re Parsley*, 384 B.R. at 179 (citing *In re Gorshtein*, 285 B.R. 118, 123

³ The Court does not find that Bustin acted with malice or purposefully acted in bad faith; however, his actions were so negligent that they rise to the level of bad faith that warrants the imposition of sanctions.

(Bankr. S.D.N.Y. 2002)). “A finding of bad faith is warranted where an attorney knowingly *or recklessly* raises a frivolous argument” *Ginsberg v. Evergreen Sec., Ltd. (In re Evergreen Sec., Ltd.)*, 570 F.3d 1257, 1273 (11th Cir. 2009) (emphasis added).

Bustin’s reckless failure to comply with several Court orders resulted in an abuse of the judicial process. Not only did Bustin fail to comply with the Reset Order, the Order Setting Hearing and Issuing Show Cause Order, the Credit Counseling Show Cause Order, and the Deficiency Notice Show Cause Order, he failed to refer the Debtors’ to an attorney who could adequately represent their interests in the Bankruptcy Case. At the December Hearing, Bustin informed the Court that he would either correct the deficiencies in the Bankruptcy Case or refer the Debtors to an attorney who could. In consideration of the personal and personnel issues Bustin faced, the Court entered the Reset Order and granted him fourteen (14) days in which to correct the deficiencies or refer the Bankruptcy Case to another attorney. Instead, Bustin filed additional documents that had no legal and/or factual basis, were inappropriate in the Bankruptcy Case, and violated Local Rule 5005-1. (Order Setting Hearing and Issuing Show Cause at 2). For example, the Amended Application proposed that the Debtors would make their installment payments on dates before the Petition was even filed: \$100.00 on August 1, 2016; \$100.00 on September 1, 2016; and \$110.00 on October 3, 2016. (Amended App. at 1). The Debtors could not have paid the filing fee prior to filing the Petition on November 1, 2016.

Other examples of Bustin’s filing of incorrect documents includes the fact that the Plan filed by Bustin on behalf of the Debtors provided that the length of the plan would be zero (0) months and that they would pay their secured creditors the “amount owed” of \$0.00 at zero percent (0%) interest. (Plan at 1-2). Additionally, Bustin filed the Preparer’s Notice on behalf of the Debtors, which indicated that he was a petition preparer who prepared the Petition on behalf of the

Debtors. (Preparer's Notice at 1). Bustin, however, is not a petition preparer—he is the Debtors' attorney. *See* 11 U.S.C. § 110(a)(1) (defining “bankruptcy petition preparer” as a person other than an attorney for the debtor who prepares for compensation a document for filing). Finally, Bustin filed the Rule 1019 Schedule on behalf of the Debtors, but Federal Rule of Bankruptcy Procedure 1019 (“Rule 1019”) applies to cases that have been converted to a chapter 7 liquidation case. FED. R. BANKR. P. 1019. The Bankruptcy Case is a chapter 13 case, and it has not been converted, there has been no motion to convert, and there has been no indication that the Debtors may convert to chapter 7. Thus, Rule 1019 is inapplicable in the Bankruptcy Case.

By overtly violating the Reset Order issued by the Court, Bustin placed the Debtors at risk of losing their home. Instead of complying with the Reset Order, Bustin filed many inapplicable, unwarranted, or frivolous documents that have further delayed the administration of the Bankruptcy Case. While the Court may be more sympathetic to occasional neglect, Bustin has demonstrated an utter disregard for the Bankruptcy Code and his duties as an attorney. Bustin violated Mississippi Rules 1.1 and 1.3, which required him to act competently, promptly, and diligently with the legal knowledge, skill, thoroughness, and preparation reasonably necessary in the Bankruptcy Case. MISS. RULES OF PROF'L CONDUCT R. 1.1; MISS. RULES OF PROF'L CONDUCT R. 1.3. Despite having been given the opportunity to correct his actions and the resulting deficiencies in the Bankruptcy Case, Bustin failed to comply with the Reset Order and, in fact, exacerbated the matter by filing numerous inappropriate pleadings. In reaching the conclusion that Bustin should be sanctioned, the Court gives special consideration to the Debtors' circumstances. The Debtors stated at the Hearing that they were afraid they would lose their home. Bustin jeopardized their ability to save their home through the Bankruptcy Case by failing to provide the necessary legal services in the Bankruptcy Case. In order to ensure that the Debtors

have the opportunity to save their home and propose a confirmable chapter 13 plan, the Court finds it necessary to make them whole by requiring Bustin to disgorge the attorney's fees paid to him by the Debtors.

“Bankruptcy courts have broad leeway in forming an appropriate sanction for unethical behavior.” *In re David*, 487 B.R. 843, 873 (Bankr. S.D. Tex. 2013) (citation omitted). The Supreme Court recognized that “a primary aspect of [a bankruptcy court’s inherent power] is the ability to fashion an appropriate sanction for conduct which abuses the judicial process” *Id.* (quoting *Chambers*, 501 U.S. at 44). Accordingly, the Court will limit the sanction against Bustin “to what is sufficient to deter repetition of such conduct by others similarly situated.” *In re Yorkshire, LLC*, 540 F.3d at 332. In *In re Yorkshire*, the Fifth Circuit affirmed the bankruptcy court’s decision to use the amount of the attorney’s fees as a starting point “and then order additional sanctions, if necessary, to assure proper deterrence.” *Id.* The Court finds that disgorgement of his attorney’s fees would be sufficient to deter repetition of similar conduct by others similarly situated. At the Hearing, the Debtors stated that they paid Bustin \$1,100.00 to represent them in the Bankruptcy Case. Finding no evidence to the contrary, the Court finds that the appropriate sanction for Bustin’s conduct in the Bankruptcy Case is disgorgement of the \$1,100.00 paid to him by the Debtors. Bustin should have seven (7) days from the date of this Order in which to return \$1,100.00 to the Debtors.

IT IS, THEREFORE, ORDERED that the Bankruptcy Case shall be dismissed fourteen (14) days after entry of this Order.

IT IS FURTHER ORDERED that Bustin shall disgorge \$1,100.00 in attorney’s fees to the Debtors within seven (7) days from the date of this Order.

IT IS FURTHER ORDERED that the automatic stay shall remain in effect until the

effective date of the dismissal of the Bankruptcy Case.

IT IS FURTHER ORDERED that the Confirmation Objection, the Trustee's Amended Objection, and the Motion for Relief are hereby denied without prejudice as moot.

IT IS FURTHER ORDERED that the Clerk of the Bankruptcy Court is hereby ordered to mail a copy of this Order directly to the Debtors.

##END OF ORDER##