UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Robin Virginia Heinze,	)	Case No. 02-83050
	)	
Debtor.	)	
	)	

OPINION AND ORDER

The matter before the court in this chapter 7 case is a motion pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure for sanctions against George Paul Laroque filed by John A. Northen, Successor Trustee in Bankruptcy for the estate of Robin Virginia Heinze (the "Rule 9011 Motion"). A hearing was held at the United States Bankruptcy Court in Durham, North Carolina on July 8, 2010. Stephanie Osborne-Rodgers and John A. Northen appeared on behalf of the Successor Trustee and Michael D. West appeared as the Bankruptcy Administrator. George Paul Laroque did not appear at the hearing, but did file an objection to the Rule 9011 Motion denying that his filings and appeals were improper and praying that the Motion be denied. Having considered the Rule 9011 Motion and the matters of record in this case, the court finds and concludes as follows:

FACTS

Robin Virginia Heinze (the "Debtor") filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code on September 20, 2002. The case was converted to a chapter 7 case on October 23, 2007, and Sara A. Conti was appointed as Trustee. John A. Northen (the "Successor Trustee") was appointed as Successor Trustee for the Debtor's estate on June 10, 2009, upon the resignation of Sara A. Conti as Trustee.

On February 22, 2008, the Trustee filed an Adversary Proceeding (Adversary Proceeding

Number 08-9012) pursuant to section 363(h) of the Bankruptcy Code to obtain authorization to liquidate property of the estate which was jointly owned with George Paul Laroque ("Mr. Laroque"), the former spouse of the Debtor. Following a trial, this court entered an Order and Judgment on August 1, 2008, authorizing the Trustee to liquidate the jointly-owned assets. Thereafter, pursuant to the authority granted the Trustee, a portion of the jointly-owned assets were sold at public auction by the Trustee. On April 16, 2009, this court ruled that pursuant to section 363(j), the net proceeds from the sale of the jointly-owned assets were to be divided equally between the estate and Mr. Laroque.

Of the net sales proceeds currently held by the Successor Trustee, the sum of $26,912.23 represents the net proceeds from the sale of the property that was jointly owned by the Debtor and Mr. Laroque.[1] Pursuant to section 363(j), Mr. Laroque would be entitled to $13,456.41 of the total proceeds currently held in this case, that sum being one half of the net proceeds realized from the sale of the jointly-owned property.

Both before and after the orders authorizing the sale of the jointly-owned property, Mr. Laroque, proceeding as a pro se litigant, filed numerous motions and pleadings in this case as well as several appeals to the district court and, in some instances, also to the Court of Appeals for the Fourth Circuit. Almost without exception, the motions and pleadings filed by Mr. Laroque have been unsuccessful, as have been all of his appeals. The motions, pleadings and appeals filed by Mr. Laroque are the subject of the Rule 9011 Motion. The Motion asserts that the motions, pleadings

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[1]In his motion, the Successor Trustee incorrectly included the proceeds from the sale of the Debtor's 2001 Saturn ($1,967.25) and her real property located at 1330-204 Park Glen Dr., Raleigh, North Carolina ($2,711.89) as proceeds from the sale of jointly-owned property. The Debtor was the sole owner of the 2001 Saturn and the real property and accordingly, these proceeds are not subject to division with Mr. Laroque.

and appeals identified in the Motion were not warranted or supported by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law in violation of Rule 9011(b)(2) and also were filed to delay and impede litigation and to harass the Trustee and thus were filed for an improper purpose and in bad faith in violation of Rule 9011(b)(1). The Motion includes an itemization of the legal fees incurred by the Trustee as a result of the improper motions, pleadings and appeals by Mr. Laroque and seeks to have such attorney fees assessed against Mr. Laroque as a sanction pursuant to Rule 9011(c)(2). Since the requested attorney fees exceed Mr. Laroque's share of the proceeds from the sale of the jointly-owned property, the Motion requests that the Successor Trustee be allowed retain Mr. Laroque's entire share of the proceeds from the sale of the jointly-owned property and that the Successor Trustee be authorized to apply such proceeds as a credit against the monetary sanction to be imposed against Mr. Laroque.

ANALYSIS

In seeking sanctions against Mr. Laroque, the Successor Trustee has invoked subparagraph (c) of Rule 9011 of the Federal Rules of Bankruptcy Procedure which provides that after notice and a hearing "the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." One of the conditions "stated below" in Rule 9011(c)(1)(A) provides as follow:

> The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b).

This provision, which frequently is referred to as a "safe harbor" provision, grants "a time period between the time of service and the time for filing, [which] is designed to allow for the correction of the alleged violation." 10 Collier on Bankruptcy ¶ 9011.06[1][b] (15th ed. rev. 2010).

Rule 9011 does not provide a time limit for filing a motion for sanctions under 9011(c)(1). However, as pointed our by Collier, "a party must serve its Rule 9011 motion before the court has ruled on the pleading . . . otherwise, the 'safe harbor' provision would be nullified." 10 Collier on Bankruptcy ¶ 9011.06[1][c] (15th ed. rev. 2010). The Fourth Circuit has reached the same conclusion. Thus, in Rector v. Approved Federal Savings Bank, 265 F.3d 248 (4th Cir. 2001), the court noted that "[t]he primary purpose for [the 1993 amendment that added the safe harbor provision] was to provide immunity from sanctions to those litigants who self-regulate by withdrawing potentially offending filings or contentions within the 21-day period." Id. at 251 (citing Ridder v. City of Springfield, 109 F.3d 288, 294 (6th Cir. 1997)). Consistent with the purpose underlying the safe harbor provision in Rule 9011(c)(1)(A), the Fourth Circuit Court held in Brickwood Contractors, Inc. v. Datanet Engineering, Inc., 369 F.3d 385 (4th Cir. 2004), that an award of sanctions was not permissible where the party who filed the offending motion was not provided an opportunity to withdraw the motion in question before there was a ruling on the motion. In so holding, the court stated:

> The requirements of the rule are straightforward: The party seeking sanctions must serve the Rule 11 motion on the opposing party at least twenty-one days before filing the motion with the district court, and sanctions may be sought only if the challenged pleading is not withdrawn or corrected within twenty-one days after service of the motion. See [Fed R. Civ. P. 11(c)(1)(A)]. Because the rule requires that the party submitting the challenged pleading be given an opportunity to withdraw the pleading, sanctions cannot be sought after summary judgment has been granted. See Hunter v. Earthgrains

> Co. Bakery, 281 F.3d 144, 152 (4th Cir. 2002) (explaining that "the 'safe harbor' provisions of Rule 11(c)(1)(A) preclude the serving and filing of any Rule 11 motion after conclusion of the case"); see also In re Pennie & Edmonds LLP, 323 F.3d 86, 89 (2nd Cir. 2003) ("[T]he 'safe harbor' provision functions as a practical time limit, and motions have been disallowed as untimely when filed after a point in the litigation when the lawyer sought to be sanctioned lacked an opportunity to correct or withdraw the challenged submission."); Ridder v. City of Springfield, 109 F.3d 288, 297 (6th Cir. 1997) (noting that because of the requirements of Rule 11(c)(1)(A), "a party cannot wait until after summary judgment to move for sanctions under Rule 11").

Id. at 389.

In Brickwood, the court found that "because the defendants waited until after summary judgment had been granted, [the offending party] could not have withdrawn or otherwise corrected the complaint even if the motion had been served before it was filed." Id. at 390. The court reversed an award for sanctions[2] as a result of the movant's failure to comply with the safe-harbor provision of Rule 11(c)(1)(A) by not serving the motion on the offending party and by filing the motion after it was too late for the offending party to take any corrective action. Id. at 399. Other courts similarly have concluded that a failure to comply with the safe harbor provision contained in Rule 11 and Rule 9011 precludes the imposition of sanctions pursuant to subparagraph (c)(1)(A) of the Rule. See, e.g., Gordon v. Unifund CCR Partners, 345 F.3d 1028, 1030 (8th Cir. 2003); Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 789 (9th Cir. 2001); Aero-Tech, Inc. v. Estes, 110 F.3d 1523, 1528-29 (10th Cir. 1997); Elliott v. Tilton, 64 F.3d 213, 216 (5th Cir. 1995); Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1328 (2d Cir. 1995).

The record in this case reflects that all of the motions, pleadings and appeals referred to in

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[2]The Fourth Circuit exercised its "discretion to notice and correct plain errors" in so holding, in spite of the fact that the issue had not been raised below.

the Rule 9011 Motion were decided before the Motion was served on Mr. Laroque. Consequently, it is clear that there was a failure to comply with the safe harbor provision contained in Rule 9011(c)(1)(A). The Successor Trustee argues, however, that sanctions nonetheless should be imposed because Mr. Laroque has forfeited the safe-harbor defense as a result of his failure to raise the failure to comply with the safe harbor provision as a defense. The Successor Trustee places heavy reliance upon the opinion in the Brickwood case in support of this position. The Successor Trustee correctly points out that the objection filed by Mr. Laroque does not assert a safe-harbor defense and that the defense was not asserted at the hearing since Mr. Laroque did not appear at the hearing. Even so, the court is not convinced that the opinion in Brickwood requires this court to impose sanctions where, as here, it is clear from the record that the movant has not complied with the safe harbor provision contained in subparagraph (c)(1)(A) of Rule 9011. The court in Brickwood summarized the holding in the case as follows:

> To summarize, we conclude that the safe-harbor provisions of Rule 11 are inflexible claim-processing rules and that a district court exceeds it authority by imposing sanctions requested through a procedurally-deficient Rule 11 motion. However, because Rule 11's safe-harbor provisions do not implicate the district court's subject-matter jurisdiction, claims of non-compliance with those provisions are subject to the general rule requiring issues to be first raised with the district court. Failure to timely raise the safe-harbor issue amounts to a forfeiture of the issue.

369 F.3d at 396.

The forfeiture referred to in Brickwood is the loss of the ability to raise an issue in the appellate court as a result of having failed to raise such issue in the trial court. Such a forfeiture occurs in the appellate court pursuant to an appellate court rule. See Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 679 n.3 (4th Cir. 2005), pointing out that a "mandatory court

rule" was involved in Brickwood. The question that arises in the trial court when a party fails to invoke the safe harbor defense is whether the defense has been waived as a result of such failure. See Rector, 265 F.3d at 254 ("Rector and the Trust's failure to raise Approved's failure to comply with the 21-day safe harbor provision in the district court in the first instance constituted a waiver of this argument."). The question for this court, therefore, is whether Mr. Laroque has waived the safe-harbor defense.

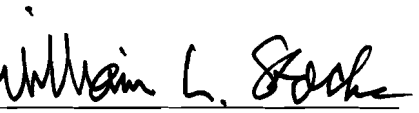
Waiver in the context of this case "is the intentional relinquishment or abandonment of a known right." Brickwood, 396 F.3d at 395 n.7 (quoting from United States v. Olano, 507 U.S. 725 (1993)). In observing that no waiver had occurred in Brickwood, the court stated: "In this case, there is no suggestion that Brickwood was aware of and intentionally relinquished its right to rely on the safe-harbor provisions of Rule 11." Id. The same is true in this case. There is nothing in the record to suggest that Mr. Laroque, a pro se litigant, was aware of the safe-harbor provisions of Rule 9011 and intentionally relinquished his right to rely on such provisions as a defense to Rule 9011 Motion. The court, therefore, declines to find a waiver on the part of Mr. Laroque.

The court is left with a record which clearly reflects that neither the Trustee nor the Successor Trustee has complied with the safe harbor provisions contained in Rule 9011(c)(1)(A). There being no waiver of such failure, the court will be guided by the Fourth Circuit 's admonition in Brickwood that a trial court "exceeds it authority by imposing sanctions requested through a procedurally-deficient Rule 11 motion." Id. at 396. In Brickwood, the court exercised its authority to consider an issue that otherwise would have been forfeited and considered whether the trial court had erred in awarding sanctions. Even though the safe harbor defense had not been raised in the trial court, it also had not been waived, and it was error for the trial court to have nonetheless imposed

sanctions. Id. at 397. It would seem to follow that it would be error for the court to impose sanctions in the present case. Accordingly, the Rule 9011 Motion not being in compliance with Rule 9011(c)(1)(A), and there being no waiver on the part of Mr. Laroque, the Rule 9011 Motion shall be overruled and denied.

IT IS SO ORDERED.

This 24th day of August, 2010.



WILLIAM L. STOCKS
United States Bankruptcy Judge