UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Amy McAdoo Santos,	)	Case No. 98-13105C-7G
	)	
Debtor.	)	
	)	

ORDER

The matter now before the court in this case is the motion of Bobby R. Evans and Graves Evans Enterprises, Inc. (collectively referred to as "Evans") for sanctions against IndyMac Mortgage Holdings, Inc. ("IndyMac") and its counsel, Jay B. Green, pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure. The involvement of IndyMac and Evans in this case is that IndyMac claims a lien against the debtor's mobile home, while Evans is the operator of the mobile home park where debtor rented a lot for the mobile home. The motion for sanctions which is now before the court was prompted by an earlier motion that was filed on behalf of IndyMac seeking sanctions against Evans for alleged violations of the automatic stay by Evans. The violations of the automatic stay alleged by IndyMac in its motion consisted of Evans instituting an ejectment action against the debtor while the debtor was proceeding in this case under Chapter 13. According to IndyMac's motion, Evans' action forced the debtor from the mobile home, as a result

of which the debtor ceased making her payments to IndyMac. IndyMac also asserted that Evans violated the stay by making demands upon IndyMac for the payment of lot rents and storage fees which accrued during this case and were not paid by the debtor after she was forced from the mobile home. IndyMac's motion for sanctions against Evans was heard on February 29, 2000, and resolved in favor of Evans.

In now seeking sanctions against IndyMac, Evans asserts that IndyMac knew or should have known that Evans had no knowledge that the debtor had filed for bankruptcy relief when Evans filed its ejectment action against the debtor and that Evans' contacts with IndyMac regarding lot rent and storage fees were not precluded by the automatic stay, with the result that IndyMac's motion was not warranted in law or fact and hence constituted a violation of Rule 9011.

Under Bankruptcy Rule 9011(a), every pleading or other paper served or filed in a bankruptcy case on behalf of a party represented by counsel must be signed by at least one attorney of record. Pursuant to Bankruptcy Rule 9011(b), by presenting a pleading motion or other paper to the court, an attorney is certifying that to the best of the attorney's knowledge, information and belief, formed after an inquiry reasonable under

the circumstances, that: (a) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (b) the claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (c) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (d) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. Rule 9011(c) provides that if the court determines that Rule 9011(b) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms or parties that have violated Rule 9011(b) or are responsible for the violation.

Whether an adequate investigation into the facts and law has been made is to be judged by a standard of objective reasonableness under the circumstances. This means that subjective good faith is not a defense to a Rule 9011 motion for sanctions. See Lancellotti v. Fay, 909 F.2d 15 (1st Cir. 1990); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985); Stevens v. Lawyers

Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056, 1060 (4th Cir. 1986); Davis v. Veslan Enters., 765 F.2d 494, 497 (5th Cir. 1985). Similarly, whether a pleading or other document has been interposed for an improper purpose also is to be judged by an objective standard. See e.g, In re Kunstler, 914 F.2d 505, 518-20 (4th Cir. 1990), cert. denied, 499 U.S. 969 (1991); Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft, 855 F.2d 385, 393 (7th Cir. 1988); National Ass'n of Gov't Employees v. National Federation of Fed. Employees, 844 F.2d 216, 223-24 (5th Cir. 1988).

The court will consider first whether the IndyMac motion had a reasonable basis in law. This requires a consideration of § 362(h) of the Bankruptcy Code, which was relied upon by IndyMac in its motion for sanctions. Under § 362(h), an individual injured by any willful violation of the automatic stay is entitled to recover actual damages and, in appropriate circumstances, may recover punitive damages. In proceeding under this section, IndyMac took the position that "individual" as used in § 362(h), includes corporations as well as individuals, and creditors as well as debtors. The rule in the Fourth Circuit is that "individual" as used in § 362(h) includes corporate debtors as well as individual debtors. See Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289 (4th Cir. 1986). While the issue of whether "individual"

includes creditors, as well as debtors, apparently has not been addressed by our Court of Appeals, there is case law which supports the proposition that a creditor may have standing to assert a claim for damages under § 362(h). See In re Goodman, 991 F.2d 613, 618 (9th Cir. 1993) ("Normally pre-petition creditors . . . shall recover damages under 11 U.S.C. §§ 362(h) and 1109(b) for willful violations of the automatic stay."; In re Clemmer, 178 B.R. 160, 164-67 (Bankr. E.D. Tenn. 1995); In re Prairie Trunk Ry., 112 B.R. 924, 929 (Bankr. N.D. Ill. 1990). Therefore, the court concludes that IndyMac's position that it had standing to seek damages for a willful violation of the automatic stay was warranted by existing law or a nonfrivolous argument for the extension of existing law.

This leaves the question of whether the motion was well grounded in fact. This requires an objective analysis of the circumstances which existed when the motion was filed and whether IndyMac and its counsel made a reasonable inquiry regarding the facts. It is undisputed that Evans instituted its ejectment action after the debtor filed for relief and while the automatic stay was in effect. However, damages are recoverable under § 362(h) only where there has been a willful violation of the stay. The record reflects that in making the motion and taking the position that a willful violation of the automatic stay had occurred, IndyMac and

its counsel relied upon a telephone conversation which counsel had with Mr. Evans. According to the affidavit filed by IndyMac's counsel, during this telephone conversation, Mr. Evans admitted that he knew that debtor had filed a Chapter 13 case when he initiated his ejectment action in state court. However, when IndyMac called Mr. Evans as a witness at the hearing, Mr. Evans denied that he knew of the Chapter 13 filing when he initiated the ejectment action or that he had told anyone that he knew that the Chapter 13 case had been filed at the time of the ejectment action. No other evidence was offered by IndyMac and the court, therefore, concluded that IndyMac had failed to show by the greater weight of the evidence that Evans willfully violated the automatic stay. According to counsel's affidavit, he noted that Evans' response to IndyMac's motion for sanctions was not verified and he, therefore, interpreted that to mean that Mr. Evans was not willing to deny under oath that he was aware of the Chapter 13 filing at the time of the ejectment action. Under Rule 5.2 of the North Carolina Rules of Professional Conduct, an attorney may not continue to represent the client if the attorney is going to be a material witness in the litigation. See Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d. 623 (1975). Under the circumstances of the present case, the court is not willing to find

a violation of Rule 9011 based upon the failure of counsel for IndyMac to anticipate that his testimony might be needed and that substitute counsel therefore should be retained. In hindsight, counsel's failure to do so was detrimental to his client's chances of succeeding on the motion, but does not necessarily mean that Rule 9011 was violated. Although a very close question under the circumstances of the present case, the court concludes that the belief of IndyMac and its counsel that there was evidentiary support for the motion was formed after reasonable inquiry.

For the foregoing reasons, the court has concluded that the motion pursuant to Rule 9011 seeking sanctions against IndyMac and its counsel should be overruled and denied.

IT IS SO ORDERED.

This 14th day of April, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge