

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

In re:)	
)	
)	
David Thomas Myers)	Case No. 11-51273
)	
Debtor.)	
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)	
Travis W. Myers)	
)	
Plaintiff,)	Adv. Proc. No. 11-6071
)	
vs.)	
)	
David Thomas Myers)	
)	
Defendant.)	
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**ORDER GRANTING PLAINTIFF’S MOTION TO STRIKE DEFENDANT’S
AFFIDAVITS AND DENYING PLAINTIFF’S REQUEST THAT DEFENDANT BE
REQUIRED TO PAY PLAINTIFF’S ATTORNEY FEES**

This adversary proceeding came on for hearing before the undersigned bankruptcy judge on May 30, 2012, for a hearing on Plaintiff’s Motion to Strike Defendant’s Affidavits (“Motion to Strike”). Susan J. Ryan (“Ryan”) appeared on behalf of the Plaintiff and John A. Meadows (“Meadows”) appeared on behalf of the Defendant. Having considered the Motion to Strike, the evidence offered at the hearing, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

The Plaintiff filed this adversary proceeding on November 9, 2011. The Plaintiff sought an order declaring that a judgment awarded by the Forsyth County District Court (“state court judgment”) and still owing by Defendant to Plaintiff be deemed nondischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and (a)(6). On February 27, 2012, Plaintiff filed a Motion for Summary

Judgment. Defendant responded on March 21, 2012 by filing his own Motion for Summary Judgment. In addition, on April 4, 2012, the Defendant filed an Affidavit in Opposition of Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment. On that same day, Robert D. Hinshaw ("Hinshaw"), who represented the Debtor during the earlier state court litigation, filed an affidavit in opposition of Plaintiff's Motion for Summary Judgment (collectively referred to as "the affidavits"). Plaintiff then, on April 11, 2012, filed the Motion to Strike that is now before the Court.

As noted by Plaintiff in his Motion to Strike, the affidavits filed by Defendant and Hinshaw contain a number of factual errors. Specifically, many of the dates referred to in the affidavits directly contradict the findings of fact made by the state court in the state court litigation. For this reason, the Court holds that the affidavits be stricken from the record.

In her Motion to Strike, Ryan requests, pursuant to Fed. R. Bankr. P. 7056(h), that Defendant be required to pay Plaintiff's attorney fees incurred because of the affidavits. In her billing record that she submitted to the Court, Ryan asserts that, prior to the hearing on this matter, her law firm incurred fees in the amount of \$1,739.00 for 8.8 hours of work. Ryan also estimates that her law firm will incur fees of \$209.50 for 1.1 hours of work in attending the hearing, preparing the order, and reviewing and revising the order in this matter. In total, Ryan requests that Defendant be required to pay Plaintiff's attorney fees of \$1,948.50 because of the affidavits.

Rule 7056(h) states that:

If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — *may* order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result.

Fed. R. Bankr. P. 7056(h) (emphasis added). The plain language of Rule 7056(h) therefore dictates that sanctions are discretionary, not mandatory. The wording of Rule 7056(h) is consistent with the American Rule. According to the American Rule, ““the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”” *MR Crescent City, LLC v. Giannasca Crescent City, LLC (In re Crescent City Estates, LLC)*, 588 F.3d 822, 825 (4th Cir. 2009) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975)). Thus, “the America Rule creates the presumption that parties bear their own legal costs, win or lose.” *In re Crescent City Estates*, 588 F.3d at 825 (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994)).

In the present case, the Court is not satisfied that the affidavits were submitted in bad faith or solely for the purpose of delay. Though the affidavits contain multiple errors regarding dates and other details regarding the state court litigation, the Court finds that those errors are attributable to carelessness of the Defendant’s attorney, not malicious intent on behalf of the Defendant. Such conduct does not rise to the level of sanctions under Rule 7056(h). *In re Bilzerian*, 195 B.R. 806, 808-09 (Bankr. M.D. Fla. 1996) (holding that “careless and negligent” behavior does not warrant sanctions under Rule 7056(h)). *See also In re Poli*, 298 B.R. 557, 568 (Bankr. E.D. Va. 2003) (finding that Rule 7056(h) was not applicable because there was not sufficient evidence that debtors submitted affidavits in bad faith or solely for the purpose of delay). As such, the Plaintiff’s request that Defendant be required to pay Plaintiff’s attorney fees incurred as a result of the affidavits is denied.

SO ORDERED.