

Summary Judgment. For the reasons set forth below, this Court VACATES each of these Orders and REMANDS the case to the Bankruptcy Court.

I. BACKGROUND

Trustee filed an Adversary Proceeding against Appellant on May 21, 1997 in which he alleged that Frank Clyde Goudreau, Appellant's father and debtor in the underlying bankruptcy action ("debtor"), had given Appellant real property in Greene, Maine and \$23,259.46 in cash in violation of Bankruptcy Code, 11 U.S.C. §§ 547-548 (1994) and the Maine Uniform Fraudulent Transfers Act, 14 M.R.S.A. §§ 3571-3578 (West Supp. 1997). Appellant filed a timely answer to the complaint.

Following a telephone conference on July 8, 1997, the Bankruptcy Court issued a pre-trial order establishing deadlines for completion of discovery and the filing of pretrial motions, and scheduling a final pretrial conference for October 8, 1997. The order also directed the parties to submit Proposed Findings of Fact and Conclusions of Law at least ten days prior to the final pretrial conference. Specifically, the order stated:

The parties, through counsel, shall engage in good faith efforts to stipulate to all uncontested facts and legal issues and file a stipulation with the Court at least 10 days prior to the final pretrial conference. To the extent that the parties are not in agreement as to facts and legal issues, each party, through counsel, shall file suggested findings of fact and conclusions of law with the Court at least 10 days prior to the final pretrial conference. If valuation is an issue, each party, through counsel, shall include such value in its

suggested findings of fact and state the evidence to be introduced
in support of that finding.

Over the next several months, both parties engaged in discovery, including service on Appellant by Trustee of 22 requests for admission, nine of which were admitted by Appellant.

Pursuant to the pretrial order, Trustee forwarded his Proposed Findings and Conclusions to Appellant on September 25, 1997 and filed them with the Bankruptcy Court on September 26, 1997. Appellant failed to file his own Proposed Findings and Conclusions by the deadline set forth in the pretrial order, nor did he file them before the pretrial conference.

At the October 8, 1997 pretrial conference, the Bankruptcy Court questioned Defense Counsel about why he had not complied with the scheduling order by submitting Proposed Findings and Conclusions.¹ The Bankruptcy Court suggested to Trustee that it would entertain a Motion for Sanctions against Appellant.

On October 9, 1997, Trustee filed a Motion for Sanctions pursuant to Fed. R. Civ. P. 16(f) in which he requested that the Bankruptcy Court prohibit Appellant from "offering any evidence refuting the suggested findings of fact offered by the Trustee." (Trustee's Mot. for Sanctions at 3.)

Five days after the pretrial conference, Appellant filed his Proposed Findings and Conclusions. On October 17, 1997, Appellant submitted a Memorandum Opposing Trustee's Motion for Sanctions and a hearing on the issue was held on October 22, 1997. At the hearing, the Bankruptcy Court found that the pretrial order was clear and that because Defense Counsel

¹ A transcript of the pretrial conference is not part of the record on appeal. However, the Bankruptcy Court referred to the conference during the hearing on Trustee's Motion for Sanctions. (Tr. of hearing on Motion for Sanctions at 8.)

had not had contact with Appellant since July 8, 1997, their failure to comply with the order was intentional.² (Tr. of hearing on Motion for Sanctions at 8.)

In an order dated October 27, 1997, the Bankruptcy Court deemed Trustee's Proposed Findings and Conclusions conclusive for the reasons it offered at the hearing. Shortly thereafter, Trustee moved for Summary Judgment on all Counts of his Complaint. Appellant responded by filing a Motion for Reconsideration of sanctions and a Memorandum in Opposition to Trustee's Motion for Summary Judgment.

At a hearing on Appellant's Motion for Reconsideration and Trustee's Motion for Summary Judgment, the Bankruptcy Court affirmed its earlier imposition of sanctions. In doing so, the court noted its reasoning on the record:

The Court believes that pretrial orders which state clearly to the parties what it is that the Court expects from those parties in moving the case along on the docket goes far beyond the necessity of just filing stipulations as to facts. It goes well beyond that because it is an order indicating to parties who have received that order just exactly what the Court expects the parties to do to move the case along, including getting it prepared for trial. And that with respect to this specific case, the Court was satisfied after having questioned you that it was not just a question of your having

² At the hearing on the Motion for Sanctions, the Bankruptcy Court said "what frustrates this Court even more is your assertion to the Court on the record the last time we had a pretrial conference that you didn't even have a single conversation with the *debtor*." (Tr. of hearing on Motion for Sanctions at 8.) The parties and the Bankruptcy Court later make clear, however, that the Bankruptcy Court intended to refer to Defense Counsel's contact with *Appellant*.

supplied the Court with the agreed statement of facts or an attempt to get it prepared, but that from the date of the previous pretrial when it was so ordered right through the date on which the Court entered its orders, the Court got the impression that you had not even spent the time discussing the issues with counsel or paying attention to the case in order to move it along for trial.

(Tr. of hearing on Motion for Reconsideration at 4-5.) Later in the hearing the court further stated:

I think basically that's what the underlying problem is here. All during this time you were attempting to sandbag the plaintiff by sitting back and making them prove by delay, intentional delay, those facts which not only were not in dispute but could have resolved this case without going forward further.

(Tr. of hearing on Motion for Reconsideration at 9.)

Following the hearing, the Bankruptcy Court memorialized its findings in a one-page order and subsequently granted Trustee's Motion for Summary Judgment on the basis of Trustee's Proposed Findings and Conclusions.

A final order resolving the matter of double damages was issued on July 29, 1998. Appellant filed Notice of Appeal on September 8, 1998.

II. JURISDICTION

The Court notes jurisdiction over this appeal pursuant to 28 U.S.C. §158(a)(1) (1994) and Rule 8001 of the Federal Rules of Bankruptcy Procedure.

III. STANDARD OF REVIEW

The Court reviews the Bankruptcy Court's imposition of sanctions for abuse of discretion. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976). Like a district court, a bankruptcy court has great latitude concerning case management, including the issuance and nature of sanctions. See Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 691 (1st Cir. 1993). However, while there is a high burden on the party challenging a sanction, “such a deferential approach does not confer carte blanche power to the district court,” Jones v. Winnebago Realty, 990 F.2d 1, 5 (1st Cir. 1993), and a reviewing court must do more than “rubber-stamp the decisions of the district court.” Velazquez-Rivera v. Sea-land Service, Inc., 920 F.2d 1072, 1075 (1st Cir. 1990).

IV. DISCUSSION

A. Sanctions

Appellant argues that if any sanction was warranted in this case, it was one far less severe than the sanction imposed. Appellant further argues that the Bankruptcy Court unfairly penalized him for misconduct attributable solely to Defense Counsel. Trustee responds that the sanction was both appropriate and reasonable given the Bankruptcy Court’s findings concerning the conduct of Appellant and Defense Counsel. While the Court agrees with Trustee that the Bankruptcy Court was well within its discretion to issue a sanction in this case, it finds the sanction imposed to be excessive.

To reflect existing practice in the district courts and in recognition of the importance of pretrial conferences and scheduling orders to the effective administration of justice, Congress amended Rule 16 of the Federal Rules of Civil Procedure in 1983 to include Rule 16(f). See Fed. R. Civ. P. 16 advisory committee's note (1983) (Sanctions). Rule 16(f) authorizes the imposition

of sanctions on a party, counsel, or both for failure to comply with pretrial orders or attend pretrial conferences.³

There is no question in this case that Defense Counsel failed to submit Proposed Findings and Conclusions ten days prior to the pretrial conference as required by the Bankruptcy Court's scheduling order. Notwithstanding Appellant's explanation that Defense Counsel's failure to comply arose from an erroneous belief that submission of Proposed Findings and Conclusions was unnecessary based on his previous experiences in bankruptcy court, the Court finds the dictates of the Bankruptcy Court's order abundantly clear. Moreover, the Court observes that Appellant and Defense Counsel had ample time to negotiate with Trustee regarding a stipulation, and to prepare Proposed Findings and Conclusions concerning those issues on which no stipulation could be reached. The Bankruptcy Court was entitled to reject the excuse proffered by Defense Counsel in his Response to Plaintiff's Motion for Sanctions that untimely filing was

³ Rule 16(f) provides:

If a party or a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require that party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 16(f). Rule 37(b)(2)(B) authorizes the court to "refus[e] to allow the disobedient party to support or oppose designated claims or defenses, or prohibit[] that party from introducing designated matters in evidence." Fed. R. Civ. P. 37(b)(2)(B).

due to Appellant's busy schedule as a medical resident in Michigan.⁴ Thus, the Court finds that the Bankruptcy Court's imposition of a sanction was appropriate.

With regard to the severity of the sanction imposed, however, the Court concludes that the Bankruptcy Court abused its discretion. By deeming Trustee's Proposed Findings and Conclusions conclusive, the Bankruptcy Court paved the way for summary judgment in favor of Trustee. Though technically not a dismissal, the sanction was tantamount to a dismissal with prejudice. The First Circuit has stated that "dismissal with prejudice is a 'harsh sanction,' Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971), which runs counter to our 'strong policy favoring the disposition of cases on the merits.'" Fegueroa Ruiz v. Alegria, 896 F.2d 645, 647 (1st Cir. 1990) (quoting Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1077)). The Circuit also has provided some guidance regarding the factors that district and bankruptcy courts should consider before imposing a sanction of such magnitude. See Velazquez-Rivera, 920 F.2d at 1075. Velazquez-Rivera involved an appeal of a district court's decision to dismiss the action and fine plaintiffs' counsel \$1,000 for failure to appear at a pretrial conference. In vacating the dismissal, the Court considered several factors: the number of sanctionable incidents, whether the sanctionable conduct was willful, whether previous warnings had been given, prejudice to the opposing party, and whether dismissal would serve to deter violations by other parties. See id. at 1076-1078; see also Robson v. Hallenbeck, 81 F.3d 1, 2 (1st Cir. 1996) (listing factors for consideration including "the severity of the violation, the

⁴ Even if Defense Counsel did not receive Trustee's Proposed Findings and Conclusions until three days before they were due, Appellant had an independent obligation to file his own Proposed Findings and Conclusions. For this reason, the Court is unpersuaded by Appellant's argument that the Bankruptcy Court erred by in imposing a sanction on Appellant for actions that were entirely the responsibility of Defense Counsel.

legitimacy of the party's excuse, repetition of violations, the deliberateness vel non of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of lesser sanctions").

The most significant of these factors for the Court in the instant case is the matter of wilfulness on the part of Appellant and Defense Counsel. Appellant explains that Defense Counsel failed to comply with the scheduling order because he misunderstood the order and the significance of the required Proposed Findings and Conclusions. At the hearing on the Motion to Reconsider, however, the Bankruptcy Court stated that Appellant and Defense Counsel had “sandbagged” Trustee by “making them prove by delay, intentional delay, those facts which not only were not in dispute but could have resolved this case without going forward further.” (Tr. of hearing on Motion for Reconsideration at 9.) Trustee argues that this amounts to a finding of wilfulness, an element not present in Velazquez-Rivera where the Court found that counsel’s entry of the wrong date in his diary and resulting failure to appear at the pretrial conference was inadvertent.

Here, however, the Court finds little support in the record for the conclusion that Appellant or Defense Counsel did, in fact, “sandbag” Trustee beyond the Bankruptcy Court’s observation at the hearings that Defense Counsel had had little contact with his client, Appellant, in approximately three months.⁵ Moreover, even if Appellant and Defense Counsel did disregard

⁵ At the hearing on the Motion to Reconsider, Defense Counsel pointed out that he had some contact with Appellant during the period from July to September in order to facilitate a response to Trustee's requests for admission.

In its brief, Trustee alleges that Appellant sought several extensions for his Bankruptcy Rule 2004 examination and that the Proposed Findings and Conclusions eventually submitted by Appellant were inadequate. Trustee implies that these alleged incidents were part of a strategy by Appellant to delay the proceeding. Since the Bankruptcy Court does not refer to these as a basis for
(continued...)

their duty to narrow the issues for trial, a sanction which amounted to dismissal with prejudice is disproportionately severe when viewed in light of all the factors in the case. See Velazquez-Rivera at 1076 (“in determining whether conduct is sufficiently serious to warrant the harsh action of dismissal, the court must consider all of the factors involved”).

Examining these factors, the Court first observes that Appellant's violation was not particularly severe in its nature or effect. While failure to submit Proposed Findings and Conclusions understandably frustrated and inconvenienced both the Bankruptcy Court and the opposing party, the pretrial conference at which the document was to be used could have been postponed. See id. at 1075 (noting "only apparent delay caused by the disobedience is the postponement of one pretrial conference"). Moreover, Appellant's misconduct was apparently an isolated incident, since there is no indication in the record that Appellant or Defense Counsel had missed other deadlines for pleadings or discovery, or had failed to attend scheduled conferences. See e.g., Jones v. Winnepesaukee Realty, 990 F.2d 1, 5-6 (1st Cir. 1993) (upholding \$5,000 sanction where party missed four hearings); Robson, 81 F.3d at 3-4 (remanding for finding on wilfulness where party failed to meet discovery and stipulation deadlines and failed to make exhibits available to opposing party). Trustee apparently had never objected to dilatory tactics or carelessness on the part of Appellant before bringing its Motion for Sanctions, nor had such behavior been the subject of previous warnings by the Bankruptcy Court.

Second, Appellant's failure to submit the Proposed Findings and Conclusions did not result in more than minimal prejudice to Trustee, especially in light of the fact that Appellant filed his Proposed Findings and Conclusions five days after the pretrial conference. Trustee

⁵(...continued)
its imposition of sanctions, however, the Court will not consider them in its analysis.

complains that Appellant's assertions in the belated document were inadequate and made in bad faith. The Court makes no finding in that regard, however, since it is the timing of the filing which formed the basis for the Bankruptcy Court's sanction and any prejudice to Trustee.

Unlike a case in which a party's failure to comply is based solely on inadvertence or extenuating circumstances, imposition of a sanction in this case puts future parties on notice that the Bankruptcy Court takes Proposed Findings and Conclusions seriously and will not tolerate strategic or negligent failures to comply. Nevertheless, a lesser sanction may have served a similar purpose and been more proportional to the transgression of Appellant and Defense Counsel. While it is true that courts have no obligation to impose less stringent sanctions before leveling the ultimate sanction of dismissal, "dismissal should be employed only if the district court has determined that it could not fashion an 'equally effective but less drastic remedy.'" Velazquez-Rivera, 920 F.2d at 1076 (quoting United States v. Pole No. 3172, 852 F.2d 636, 642 (1st Cir. 1988)). The Court remands to the Bankruptcy Court to fashion an appropriate but less drastic sanction.

B. Summary Judgment

In light of the Court's decision to vacate the Order of Sanctions which deemed Trustee's Proposed Findings of Fact and Conclusions of Law conclusive, the Order of Summary Judgment also is vacated.

V. CONCLUSION

For the reasons discussed above, the Court VACATES the Order of Sanctions, the Order Denying Motion to Reconsider and the Order granting Summary Judgment. The case is REMANDED to the Bankruptcy Court for further action consistent with this opinion.

SO ORDERED.

MORTON A. BRODY

United States District Judge

Dated this ____ day of November, 1998.