IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	**CASE NO. 05-34015-H4-7**
WILLIAM C. BOSSART AND	§	**Chapter 7**
MARILYNN W. BOSSART,	§	
Debtors.	§	
	§	
KENNETH R. HAVIS,	§	
CHAPTER 7 TRUSTEE,	§	**Adversary No. 06-03540**
Plaintiff,	§	
	§	
VS.	§	
	§	
AIG SUNAMERICA LIFE	§	
ASSURANCE COMPANY,	§	
Defendant	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE SHOW CAUSE ORDER ISSUED ON OCTOBER 8, 2008
[Docket No. 92][1]

I. INTRODUCTION

On October 8, 2008, this Court issued an order requiring the law firm of two defendants in this adversary proceeding to appear and show cause why it should not be sanctioned for the conduct of one of its attorneys, Robert G. Miller (Miller), with respect to inappropriate language and allegations in his pleadings. Specifically, Miller accused this Court of being "dishonest" and "unethical" in issuing a prior memorandum opinion and order in this adversary proceeding (which has been affirmed by both the District Court and the Fifth Circuit). Miller also alleged that the attorney for the Chapter 7 trustee, David R. Jones (Jones), made a "material misrepresentation" to

[1] All references to the docket are to the docket for the adversary proceeding, not the main case, unless reference to the main case is expressly made.

this Court and that this Court's memorandum opinion and order contained "an intentional lie." The Court held a hearing on this matter on November 5, 2008. For the reasons set forth below, the Court concludes that the law firm should not be sanctioned for Miller's conduct.

Set forth below are this Court's Findings of Fact and Conclusions of Law. To the extent that any finding of fact is construed as a conclusion of law, it is adopted as such. To the extent that any conclusion of law is construed as a finding of fact, it is adopted as such. The Court reserves the right to make additional findings of fact and conclusions of law as it deems necessary and appropriate.

II. FINDINGS OF FACT

1. On March 18, 2005 William C. Bossart and Marilynn W. Bossart (collectively, the Debtors) jointly filed a Chapter 7 petition in this Court. [Main Case No. 05-34015, Docket No. 1.]

2. On August 24, 2006, the Chapter 7 trustee, through his attorney, Jones, instituted this adversary proceeding against AIG Sun America Life Insurance Company (Sun America) in order to recover the premium on an annuity purchased from Sun America by the Debtors on the theory that the Debtors' purchase of the annuity constituted a fraudulent transfer under 11 U.S.C. § 548. [Case No. 05-34015, Docket No. 9.] The Court allowed the Debtors to intervene as co-defendants in this adversary proceeding. [Adversary Docket No. 28.] On November 21, 2006, this Court signed an agreed order requiring Sun America to deposit the accumulated cash value of the annuity into the Court's registry. [Adversary Docket No. 25.] A trial in the adversary proceeding was held on May 29, 2007 and concluded on June 11, 2007.

3. On December 21, 2007, this Court issued an Order Regarding Trustee's First Amended Complaint (the Order). [Adversary Docket No. 57.] On this same day, this Court also issued

a Memorandum Opinion on the Trustee's Amended Complaint (the Opinion). [Adversary Docket No. 56.] In the Opinion and Order, the Court determined that the Debtors' purchase of the annuity on the eve of their Chapter 7 filing constituted a fraudulent transfer pursuant to 11 U.S.C. § 548 and permitted the trustee to recover the funds held in the registry of the Court (comprising the accumulated cash value of the annuity), including any accrued interest.

4. On December 31, 2007, the Debtors filed a Motion to Alter or Amend Judgment (Motion to Reconsider). [Adversary Docket No. 60.] In their Motion to Reconsider, the Debtors, through their attorney, Miller, asserted that the Court, in issuing the Order, "intentionally disregarded controlling authority and wrote a result-oriented decision." As authority for the Motion to Reconsider, Miller attached an article that he published in the Texas Bar Journal entitled "Machiavellian Justice: A Response to 'Law, Morality, and Judicial Decision-Making." The Court denied the Motion to Reconsider on January 11, 2008. [Adversary Docket No. 62.]

5. On January 18, 2008, the Debtors filed an Appeal of the Order. [Adversary Docket No. 64.] On this same day, the Debtors filed a Motion to Stay Pending Appeal. [Adversary Docket No. 65.] On January 31, 2008, this Court held a hearing on the Motion to Stay Pending Appeal. On February 5, 2008, this Court signed an order denying the Motion to Stay Pending Appeal. [Adversary Docket No. 71.]

6. Thereafter, the Debtors sought a stay pending appeal from the District Judge to whom the appeal was assigned, the Honorable Nancy F. Atlas. On March 6, 2008, Judge Atlas issued a stay pending appeal of this Court's Order. On April 14, 2008, Judge Atlas affirmed this Court's decision as set forth in the Opinion and the Order. *Bossart v. Havis*, 389 B.R. 511

(S.D. Tex. Apr. 14, 2008). On August 18, 2008, Judge Atlas also signed an order lifting the stay pending appeal. [Civil Action No. 4:08cv0463, Docket No. 14.]

7. Judge Atlas's order lifting the stay pending appeal prompted the Trustee to file a motion in this Court seeking approval to distribute the funds which have been the subject of this adversary proceeding. [Adversary Docket No. 85.] The Debtors, through Miller, filed a response to this motion (the Debtors' Response to the Motion to Disburse) alleging that Jones, in his capacity as attorney for the Chapter 7 trustee, made a material misrepresentation by stating in the motion that "the annuity payment and all income earned thereon were deposited into the Court's registry." [Adversary Docket No. 86.] The Debtors' Response to the Motion to Disburse also described this Court's Opinion as a "silent-assertion lie" and claimed that this Court created the appearance of impropriety by stating that it needed to reflect on certain issues but then failed to address those issues in the Opinion. Miller asserted that "[t]his creates the appearance that the Opinion dated December 21, 2007 included an intentional lie and the Order dated January 11, 2008 told another lie to obscure the earlier lie." On August 18, 2008, the Court granted the relief sought by the Trustee. [Adversary Docket No. 87.]

8. Granting this relief led the Debtors, on September 2, 2008, to file a Second Motion to Stay Pending Appeal (the Second Motion) while they prosecuted their appeal of the District Court's decision to the Fifth Circuit. [Adversary Docket No. 89.] On September 17, 2008, the Trustee filed an objection to the Second Motion (the Objection). [Adversary Docket No. 90.] Thereafter, on September 23, 2008, the Debtors filed a response to the Trustee's objection (the Debtors' Response). [Adversary Docket No. 91.]

9. In the Second Motion, the Debtors, through their attorney, Miller, made the following allegations:

a. In paragraph 3, Miller wrote that "[t]he Court has consistently refused to explain any honest reason for taking the proceeds of Bossarts' exempt annuity."

b. In paragraph 3, he also wrote the following:

i. The Trustee bases his case on the material misrepresentation that this Court ordered AIG to refund the annuity premium.

ii. This Court's decision in favor of the Trustee rewards that material misrepresentation.

iii. This Court's rulings created the appearance that the opinion dated December 21, 2007 included an intentional lie and the Order dated January 11, 2008 told another lie told to obscure the earlier lie.

iv. Disregarding controlling law and the Court's own previous order creates an appearance of impropriety.

v. A judge should avoid even the appearance of impropriety. *U.S. v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999).

vi. Refusing to address the appearance of impropriety would confirm that the appearance is correct.

c. In paragraph 4, Miller further wrote, "However, the Court continues to ignore this ethical issue thereby confirming that the appearance of impropriety is correct. This Court made a dishonest and unethical decision that contradicts controlling law and the Court's own previous order."

d. In paragraph 6, Miller wrote that "[t]he Court's dishonest and unethical decision is a clear abuse of power. The right to a stay of the dishonest judgment is 'clear and indisputable.'"

e. In the Conclusion, Miller wrote that "[a]ny decision that continues to ignore these simple truths is another lie."

10. On October 8, 2008, this Court issued an order entitled: "Order (1) Setting Hearing on the Debtors' Second Motion for Stay Pending Appeal and the Trustee's Objection Thereto; (2) Requiring the Law Firm of O'Donnell, Ferebee, Medley, & Keiser, P.C. to Show Cause Why It Should Not Be Sanctioned for the Conduct of One of Its Attorneys, Robert G. Miller; and (3) Requiring at Least One Name Partner of this Law Firm to Appear at this Show Cause Hearing." (the Show Cause Order). [Docket No. 92.] This Show Cause Order required the law firm representing the Debtors—O'Donnell, Ferebee, Medley, & Keiser, P.C. (the Firm)—to show cause why it should not be sanctioned for the conduct of Miller, the attorney at the Firm who has represented the Debtors and who signed the Second Motion.

11. On October 16, 2008, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's order affirming this Court's Order. *See Bossart v. Havis (In re Bossart)*, No. 08-20305, 2008 WL 4600496 (Oct. 16, 2008).

12. On October 16, 2008, Miller, on behalf of the Debtors, amended the Second Motion and the Debtors' Response to remove the offending language. [Docket No. 94 & 95.]

13. On November 3, 2008, the Firm filed its Response of O'Donnell, Ferebee, Medley & Keiser, P.C. to the Court's Order to Show Cause (the Firm's Response). [Docket No. 96.] In the Firm's Response, it admits that Miller's language in the Second Motion and the Debtors' Response "plainly fail[s] to meet the guidelines of" professional conduct as set forth in Appendix D of the Local Rules for the Southern District of Texas, the code of conduct of the Houston Bar Association, and the Texas Lawyer's Creed. However, the Firm urges this

Court not sanction the Firm based on Miller's conduct in this instance because "[n]o shareholder or associate of the Firm was aware of [Miller's] statements prior to the receipt of the Show Cause Order" and because "the Firm's shareholders acted to remediate the filings and assure that nothing of a similar sort would ever occur in the future." [Docket No. 96.]

14. The Court held a hearing on the matters described in the Show Cause Order on November 5, 2008 (the Show Cause Hearing).

15. At the Show Cause Hearing, the Court heard testimony from James Michael O'Donnell (O'Donnell), a name partner of the Firm.

16. O'Donnell testified that the Firm did not review the Second Motion or the Debtors' Response, and was not aware of the language that Miller used therein. He also testified that, based on his twenty years of experience working with Miller, he believes Miller's use of inappropriate language in the Second Motion to be an isolated incident. However, O'Donnell has not reviewed all of Miller's past pleadings in order to verify this statement.

17. O'Donnell also testified that "of counsel" attorneys employed by the Firm, like Miller, are authorized to act on behalf of the Firm.

18. O'Donnell further testified that the Firm does not condone the use of the language in the Second Motion, and that it has taken steps to ensure that every pleading filed by Miller will be reviewed by a partner at the Firm.

19. At the Show Cause Hearing, the Court also heard testimony from Miller.

20. Miller first testified that he could not determine whether his conduct violated the Local Rules for the Southern District of Texas, the Code of Conduct of the Houston Bar Association, or

the Texas Lawyer's Creed. However, when examined by the Court, Miller admitted that he believed that his use of language in the Second Motion: (1) violated the guideline which requires a lawyer to show utmost respect to the Court; (2) violated his duty of personal dignity and professional integrity with respect to his comments directed at the Court; (3) violated the Code of Conduct provision requiring lawyers to treat the Court, its staff, and opposing counsel with courtesy and civility and to conduct themselves in a professional manner at all times; and (4) violated the directive that effective advocacy should not involve antagonistic or obnoxious behavior.

21. Miller testified that he regretted his use of language in the Second Motion and the Debtor's Response. Specifically, Miller testified that he should not have used the word "lie" or the word "dishonest."

22. However, Miller stands by the language in the Second Motion accusing the attorney for the Chapter 7 Trustee, Jones, of making a "material misrepresentation" to the Court.

23. Miller testified that, although he believes Jones made a material misrepresentation to the Court, he has not reported this alleged misconduct to the State Bar. Miller did not report Jones's alleged misconduct to the appropriate grievance committee because he believed that it was a matter for the "appeal process."

24. Miller testified that he did not discuss the language in the Second Motion or the Debtors' Response with his clients, i.e. the Debtors. In fact, he testified that it is his practice that, before he files a pleading, he does not send it to his client to approve. Rather, he sends copies of pleadings to his clients only after those pleadings have already been filed with the Clerk. In support of this practice, Miller testified, "I have the authority to represent my client

and, as a general rule, I do not ask permission from client (sic) on every word that goes into every pleading."

25. Miller testified that when he wrote that this Court's Opinion contained "an intentional lie," he was "relying on the Fifth Circuit and other Circuit Court authority that a half-truth is a lie." The "half-truth" to which Miller refers is the fact that the Court never ruled on an issue which Miller articulated despite the Court's statement at the hearing on June 11, 2007 that it would reflect upon that issue.

26. Additionally, when asked whether he presently believes that this Court uttered a lie, Miller answered that he would replace the word "lie" with the word "result-oriented."

27. Miller also testified that he stands by his statement in the Second Motion that this Court has created the appearance of impropriety by "disregarding . . . controlling law" despite the fact that this Court's ruling was affirmed by District Judge Atlas, whose ruling was then affirmed by the Fifth Circuit.

28. With respect to the statement made in the Second Motion that "[t]his Court made a dishonest and unethical decision," Miller testified that this language was inappropriate because "to call it 'dishonest' is a judgment that I neither have the power, nor the right to make." However, Miller subsequently testified,

> You know, in a layman's sense, there – you know, you can find a dictionary definition where perhaps it might fit the term "dishonest," but as a lawyer, I understand there are different contexts and different meanings for words and I shouldn't have used that word in this context.

29. When asked whether he believed that this Court's decision was unethical, Miller responded, "Truthfully, Your Honor, I'd look you in the eye and have to say 'yes,' I believed that."

30. Miller also made the following statements when questioned by the Court:

> Q: Tell me what was going through your mind at the time that you wrote it. Did you mean to convey that this Court was issuing a lie by virtue of the opinion that it issued?
>
> A: Well, to say what was going on in my mind, the best straight answer I can give you, Your Honor, is that I believed then—and still believe now—that result-oriented jurisprudence is wrong. And I had hoped that by using very blunt and direct language, I might get the Court to address what I perceived to be a very important ethical issue.
>
> Q: So, in other words, by calling this Court a liar, you hoped to persuade this Court to change its opinion?
>
> A: Actually, that's true, Your Honor. I don't stand by that today, but you asked me if that's what I intended at the time and I have to say that's true, Your Honor.

31. Miller testified that he has never been sanctioned or suffered an adverse decision from any grievance committee.

III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), and 157(b)(1). This matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A). Additionally, this adversary proceeding is a core proceeding under the general "catch-all" language of 28 U.S.C. § 157(b)(2). *See In re Southmark Corp.*, 163 F.3d 925, 930 (5th Cir. 1999) ("[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."); *In re Ginther Trusts*, No. 06-3556, at *19 (Bankr. S.D. Tex. Dec. 22, 2006) (holding that an "Adversary Proceeding is a core proceeding under 28 U.S.C. § 157(b)(2) even though the laundry list of core proceedings under §

157(b)(2) does not specifically name this particular circumstance"). Venue is proper pursuant to 28 U.S.C. § 1409(a).

B. No Sanctions Against the Firm Will Be Imposed

A bankruptcy court's power to impose sanctions upon a party or its attorney derives from Federal Rule of Bankruptcy Procedure 9011 and its role as guardian of the integrity of the bankruptcy process. *See, e.g., Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 356 n.1 (5th Cir. 2008) (noting that Bankruptcy Rule 9011 and 11 U.S.C. § 105 provide "mechanisms to impose sanctions on parties who may attempt to abuse the procedural mechanisms within the bankruptcy court"). Under 11 U.S.C. § 105, a bankruptcy court has the power to issue sanctions against parties and their attorneys to effectuate the provisions of the Bankruptcy Code. *See In re Volpert*, 110 F.3d 494, 500-01 (7th Cir. 1997); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283-84 (9th Cir. 1996); *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1089 (10th Cir. 1994). Additionally, this Court may impose sanctions pursuant to 28 U.S.C. § 1927 by requiring attorneys to pay excess costs attributable to their misconduct. *See, e.g., Bishop v. W. Fid. Mktg., Inc. (In re W. Fid. Mktg., Inc.)*, No. 4:01-MC-0020-A, 2001 WL 34664165, at *22 (N.D. Tex. June 26, 2001) (determining that bankruptcy courts are "courts of the United States" that may award sanctions pursuant to 28 U.S.C. § 1927).

This Court also has the inherent power to police the conduct of litigants and attorneys who appear before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991); *see also Flaska v. Little River Marine Const. Co.*, 389 F.2d 885, 888 (5th Cir. 1968) ("The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it."). This Court has previously noted that "a federal court's

inherent power to sanction bad faith conduct serves the dual purpose of covering the gaps where there are no applicable rules and also covering situations where 'neither the statute nor the Rules are up to the task.'" *In re Cochener*, 360 B.R. 542, 570 (Bankr. S.D. Tex. 2007) (quoting *Chambers v. NASCO*, 501 U.S. 32, 50 (1991)) *aff'd per curiam*, No. 08-20048, 2008 WL 4681579 (5th Cir. Oct. 23, 2008) ("The bankruptcy court acted well within its authority to enforce the integrity of the process by policing the accuracy of debtors' schedules and representations to the court."). The imposition of sanctions to control attorney misconduct "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.'" *Chambers*, 501 U.S. at 46 (citations omitted). Accordingly, a court may sanction an attorney for violating the local rules, even if the violation was not committed wilfully. *See Barbosa v. County of El Paso*, No. 97-51098, 1998 WL 648596, at *2 n.1 (5th Cir. 1998) (unpublished) ("Only a violation of a requirement of form must be willful before the court may sanction the party; a court may sanction any other violation of its local rules even if nonwillful."); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 520-21 (9th Cir. 1983). An attorney's misconduct may also be imputed to his law firm. *See, e.g.*, *In re Parsley*, 384 B.R. 138, 182 (Bankr. S.D. Tex. 2008) (holding that it may be appropriate to impose responsibility for an attorney's misconduct on his law firm).

Appendix D of the Local Rules for the Southern District of Texas—which also apply to the Bankruptcy Courts in this District, *see* Bankruptcy Local Rule 1001(b)—sets forth guidelines for professional conduct. Among these guidelines are the following:

> A lawyer owes, to the judiciary, candor diligence and utmost respect.
>
> A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.
>
> Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.
>
> Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients and the public may rightfully request.

Additionally, the Houston Bar Association has adopted a code of conduct, which includes the following: "I will treat opposing counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility." The Texas Lawyer's Creed has similar language.

The Firm and Miller, himself, admit that Miller's use of language in the Second Motion violates all of these mandates. [Finding of Fact No. 13 & 20.] O'Donnell testified that Miller is authorized to file pleadings on the Firm's behalf, and that he did so in this case. [Finding of Fact No. 17.] However, O'Donnell also testified, and the Court believes—and therefore concludes—that the Firm had no knowledge of Miller's use of language in the Second Motion. [Finding of Fact No. 16.] Additionally, given the Firm's long history with Miller, who has apparently never exhibited such egregious behavior in the past, it appears that the Firm did not have reason to know that Miller might engage in such misconduct that would give rise to a duty to inspect Miller's pleadings. [Finding of Fact No. 16.] The Court is also convinced that the Firm has taken adequate steps to prevent such misconduct from occurring in the future. Indeed, the Firm has instituted measures to ensure that any and all future pleadings written by Miller are reviewed by a name partner of the Firm before they are filed. [Finding of Fact No. 18.]

Because the Firm did not know or have reason to suspect that Miller would engage in such misconduct, and because it has taken adequate steps to prevent Miller from doing so in the future, the Court concludes that sanctions are not warranted against the Firm. To ensure that Miller receives adequate due process, this Court will issue a separate order requiring Miller to appear and show cause as to why he, personally, should not be sanctioned for the conduct set forth in these Findings of Fact and Conclusions of Law.[2] The Court reserves the right to take future action against Miller, individually, and to make additional findings of fact and conclusions of law as it deems necessary and appropriate.

IV. CONCLUSION

The Court appreciates the absolute candor with which O'Donnell testified at the Show Cause Hearing. Further, the Court appreciates the concise, coherent, and compelling response that Eugene B. Wilshire filed on behalf of the Firm two days prior to the Show Cause Hearing. [Docket No. 96.] Mr. Wilshire's persuasive oral arguments at the Show Cause Hearing matched the high quality of his written work product. Good lawyering does make a difference.

An order consistent with these Findings of Fact and Conclusions of Law will be entered on the docket simultaneously with the entry of these Findings of Fact and Conclusions of Law.

Signed this 17th day of December, 2008.

Jeff Bohm
United States Bankruptcy Judge

[2] With respect to the show cause hearing to be held for Miller, this Court reserves the right to adopt some or all of the Findings of Fact and Conclusions of Law set forth herein.