

APR 27 1995

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

J. BARON GROSHON
BY: [Signature]
Deputy Clerk

In Re:

CHARLES W. MONDAY, and
LYNN MONDAY,

Debtors.

) Case No. 93-20083
) Chapter 7

) JUDGEMENT ENTERED ON APR 27 1995
)
)
)
)

**ORDER FOR SANCTIONS AND
ORDERING DEBTORS TO APPEAR AT RULE 2004 EXAMINATION**

THIS MATTER came before the court for hearing on April 20, 1995, upon this court's Order Requiring Corps Style, Inc. to Issue Notice of Hearing and Requiring Debtors and Robert B. Patterson, Esq. to Show Cause Why They Should Not Be Held In Civil Contempt, dated March 30, 1995. Among those present at the hearing were Edward C. Hay, Jr., counsel of record for the debtors, Robert B. Patterson, Esq., who represented to the court that he represented the debtors in their relations with Corps Style, Mr. Eugene Hooper, debtor Lynn Monday's father, the debtors, and Brad Pearce, Esq., counsel for Corps Style. Based on the representations and arguments of counsel and the record before this court, the court orally issued sanctions against Robert B. Patterson, an attorney for the debtors, and ordered the debtors to appear at a Rule 2004 examination. This Order memorializes and supports that oral ruling:

Procedural and Factual Background

On January 25, 1995, after a contested hearing, the court reopened this bankruptcy case upon the motion of Corps Style, a creditor of the debtors. At the hearing, Mr. Hay, the debtors'

attorney of record, made an oral motion that the court admit Robert B. Patterson *pro hac vice* for this case. The court admitted Mr. Patterson *pro hac vice*, and reopened the debtors' case for all purposes.

On February 17, 1995, counsel for Corps Style petitioned the court for an Order authorizing the Rule 2004 examinations of the debtors. This court issued the Order pursuant to the provisions of Rule 2004 of the Federal Rules of Bankruptcy Procedure. The Order authorizing the Rule 2004 examinations provides, *inter alia*, that:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Debtors Charles W. and Lynn Monday shall appear for examination by counsel for Corps Style at 1:00 p.m., Eastern Standard Time, March 7, 1995 at the offices of Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux and Belser, P.A. in Asheville, North Carolina

Neither the debtors nor their counsel ever filed an objection or any motion regarding the Order authorizing the Rule 2004 Examinations. Nor did debtors' counsel contact counsel for Corps Style to raise any objection to the examination.

On March 7, 1995, at Mr. Hay's law offices, counsel for Corps Style commenced the Rule 2004 Examinations of the debtors. Among those present were the debtors, Mr. Patterson, Mr. Hooper, Mr. Hay and William Schutters, an officer of Corps Style. Mr. Patterson announced his appearance as counsel for the Debtors at the Rule 2004 Examinations, and objected to the conduct of the Rule 2004 Examinations by Corps Style's counsel apparently because Corps Style's directors had not authorized the corporation's actions in the Debtors' bankruptcy case, including the

examination of the Debtors. After counsel for Corps Style noted the objection for the record, Mr. Patterson instructed the Debtors to leave prior to answering any questions. Mr. Patterson and the Debtors then left the Rule 2004 Examinations. The transcript of the 2004 examination reads, in relevant part, as follows:

BY MR. PEARCE:

Q. Good afternoon, Mr. Monday.

As you know, I'm Brad Pearce. I represent Corps Style, Inc., a creditor in your Chapter VII bankruptcy case, a case that has just reopened recently.

This deposition is being conducted pursuant to Rule 2004, the Federal Rules of Bankruptcy Procedure. The only point of this deposition is to establish a record regarding certain facts of the bankruptcy. That's all--nothing more, nothing less.

MR. PATTERSON: At this point, Mr. Pearce, you indicated you represented Corps Style, Inc.

MR. PEARCE: That's correct.

MR. PATTERSON: By what authority do you represent Corps Style, Inc.?

MR. PEARCE: Mr. Patterson, I'm conducting this examination.

MR. PATTERSON: I'm objecting to your conducting this examination because I happen to represent two members of the Board of Directors of Corps Style, Inc., directors who control 50 percent of the stock. They have not authorized you to represent the corporation. There has been no resolution by the Board of Directors, there has been no authorization to retain you, and certainly when you are about what you are about here, as a member of the Bar you know that corporate action seeking to obtain and repurchase stock is an action which would require the approval of the Board of Directors, and unless you can produce authority to show that you have the legal authority to represent the corporation, I'm going to object to your proceeding.

MR. PEARCE: Let the objection be noted. I'm proceeding.

The order was entered by Judge Hodges.

MR. PATTERSON: I'm not going to permit my clients to be cross-examined by an attorney who does not have the authority to represent the client.

You do not have a client--

MR. PEARCE: Mr. Patterson, I'll point out to your observation that there was an order entered authorizing a 2004 exam. Mr. Hay, who appeared in court on behalf of the Mondays, consented to this. The Mondays are here voluntarily. I will note your objection for the record, and we'll go forward.

If you want to go forward for contempt or for sanctions, feel free.

MR. PATTERSON: We're out of here.

MR. PEARCE: Mr. Monday, do you wish--

MR. MONDAY: I'm being advised by my attorney.

MR. PEARCE: Your attorney is not licensed to practice law in this district. He's not licensed to appear before Judge Hodges.

MR. MONDAY: I don't know anything about that, but I know that he's representing me.

MR. PEARCE: You're here under court order. Let the record reflect you're here under court order to appear for a 2004 examination.

Let the record reflect that Mr. Patterson has made an objection and had directed his clients to leave. Let the record further reflect that Mr. and Mrs. Monday are so leaving with Mr. Patterson.

Mr. Hay, before you terminate this, would you care to speak on the record?

MR. HAY: Yes. Let me come back and do that. Okay?

MR. PEARCE: Do you want to take a recess?

MR. HAY: Yes. Take a recess for two or three minutes, and I'll be back in before you terminate.

At this point in the 2004 examination, the transcript reflects that Mr. Patterson and the Mondays left the offices and did not submit to the Rule 2004 examination that had been ordered by the court.

As a result of the actions of Mr. Patterson and the debtors, Corps Style filed and served a Certificate of Contempt and Ex Parte Application by Corps Style, Inc. for the court to issue a Notice Requiring debtors and Robert B. Patterson, Esq. to Show Cause Why They Should Not be Held in Civil Contempt for Violating court Order Authorizing Rule 2004 Examinations of debtors Charles W. and Lynn Monday (the "Certificate"). Attached as exhibits to the Certificate were a certified transcript of the Rule 2004 Examinations and an affidavit of Mr. William Schutters, who was present at the Rule 2004 Examinations, verifying that the transcript accurately reflected the events that occurred at the Rule 2004 Examinations.

Based on the Certificate, the transcript, the affidavit and the record before the court, the court issued the Show Cause Order which set the civil contempt issue on for hearing on April 20, 1995 and which required Corps Style to issue a notice to Mr. Patterson, Mr. Hay and the debtors pursuant to the provisions of Rule 9020(b) of the Federal Rules of Bankruptcy Procedure. The court's records indicate that Corps Style properly issued and served this notice, the Show Cause Order and a copy of the Certificate.

No objection to the conduct or notice of the April 20, 1995 civil contempt hearing was filed with this court or made at this

hearing. As a result of the foregoing, these matters were properly on for hearing pursuant to the provisions of Rules 2004(a) and 9020(b) of the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rule 7.

Sanctions

Although this matter came before the court upon the Order Requiring Corps Style, Inc. to Issue Notice of Hearing and Requiring debtors and Robert B. Patterson, Esq. to Show Cause Why They Should Not Be Held In Civil Contempt, the court has determined that sanctions pursuant to Bankruptcy Rule 7037 are more appropriate than a finding of civil contempt pursuant to Bankruptcy Rule 9020. Bankruptcy Rule 9014 governing contested matters provides that Rule 7037 has application in this proceeding, and case law further supports the imposition of sanctions under Rule 7037 for disobedience of an Order requiring a Rule 2004 examination. In re: Sofro, 117 B.R. 745, 750 (Bkrtcy. S.D. Fla. 1990); In re: Alderson, 114 B.R. 672, 677-78 (Bkrtcy. D.S.D. 1990); and In re: Olson, 105 B.R. 654, 655-56 (D. Kan. 1989).

At the hearing, Mr. Patterson admitted that he had adequate actual notice of the Rule 2004 Examinations. Further, Mr. Patterson admitted that he had not communicated his objection to the Rule 2004 Examinations to counsel for Corps Style or to this court prior to the Rule 2004 Examinations.

This court is unpersuaded by Mr. Patterson's argument that Corps Style does not have proper authority to conduct the Rule 2004 Examinations of the debtors or to take other actions in this

bankruptcy case. The court concludes that Mr. Patterson's assertion was a mere pretext for his misconduct and subterfuge for his efforts to frustrate Corps Style's efforts to obtain information about the debtor's conduct:

(a) It is apparent to the court that the parties have a larger dispute involving issues of corporate control and transactions, and the raising of this "authority" issue for the first time at the 2004 examination effectively stymied examination of that larger issue;

(b) Patterson had ample opportunity to raise and have the "authority" issue resolved prior to the date for the examination. The fact that Patterson made no effort to present his objection by any means suggests an ulterior motive to his assertion of the issue at the 2004 examination at which point the issue could not be resolved without termination of the proceeding;

(c) Patterson's conduct has all the indicia of bush league "hardball" or "bully boy" tactics designed to frustrate the exchange of information without justification; and

(d) Patterson's conduct violates the Order of the court dated February 21, 1995 which set the Rule 2004 examination.

Based on Mr. Patterson's actions at the examinations, his arguments at the April 20, 1995 hearing and the record before this court, this court finds that Mr. Patterson acted in willful defiance of this court's Order authorizing the Rule 2004 Examinations of the debtors and of the provisions of the Federal Rules of Bankruptcy Procedure. This court further finds that Mr.

Patterson's activities in this case have caused unnecessary and unreasonable delay in the administration of this reopened bankruptcy case and warrant the imposition of sanctions.

The court has considerable discretion in determining the type of sanctions to be imposed. Bankruptcy Rule 7037(b)(2). Sanctions insure that a party will not profit from its failure to comply with the court's Order requiring submission to a 2004 examination and also secure future compliance with the Order that a party has previously ignored. In addition, sanctions have an important deterrent effect with regard to other cases. In re: Dinublio, 177 B.R.932, 946 (E.D. Cal. 1993), on remand In re: Dinublio, 177 B.R. 949 (Bkrtcy. E.D. Cal. 1994).

Several factors should be considered in setting the appropriate sanction. The court has garnered the following factors from case law in this area.

1. The diligence of the party against whom the motion is made;
2. The impact on the estate and the prejudice to the opposing party suffering the delay;
3. The notice and warning to the party that is to be sanctioned;
4. The effectiveness, availability, and effect of lesser alternative sanctions;
5. The severity of the sanctions imposed;
6. Is there a history of dilatory conduct demonstrating bad faith?
7. The public interest;
8. The court's need to manage its docket; and

9. The sanction must specifically relate to the particular claim at issue in the order.

Id. at 946-49; In re Rubin, 769 F.2d 611, 616 (9th Cir 1985); Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498, 499 (9th Cir.1987); In re: Tong Seae (U.S.A.), Inc., 81 B.R. 593, 597-98 (9th Cir.BAP 1987); and In re: Paolino, 87 B.R. 366, 368 (Bkr-tcy E.D. Pa. 1988).

After due consideration of these factors, and after having heard from the parties, it appears to this court that sanctions are clearly warranted. The court has the duty to monitor, regulate and, where necessary, sanction the conduct of attorneys practicing in cases under its jurisdiction even where the conduct takes place outside of the court's presence. The court deems Patterson's conduct to be uncivil, unprofessional, and designed solely to obfuscate and frustrate legitimate inquiry into the facts without justification and in violation of the court's Order.

The court finds that Patterson's actions require the imposition of monetary sanctions in order to compensate Corps Style and its attorney for the costs they incurred that would not have been incurred but for Patterson's conduct, and to discourage such conduct from occurring in the future. The monetary sanctions against Mr. Patterson imposed herein are reasonable in light of Mr. Patterson's defiance of this court's orders, of the provisions of the Federal Rules of Bankruptcy Procedure and of the standards of proper professional conduct of attorneys practicing before this court. The court considered the imposition of lesser

sanctions such as reprimand, education requirements or similar sanctions, but it is the court's experience and judgment that the only truly effective way to sanction conduct such as occurred here is with significant economic sanctions. Reprimands and other lesser sanctions have not proven effective in deterring uncivil and unprofessional behavior.

In addition, the court withdrew Patterson's admission *pro hac vice*. Patterson is not a member of the Bar of this State or this court. He was permitted by the court to appear on behalf of the debtors pursuant to Rule 1(b) of the Rules of the United States District court for the Western District of North Carolina. It is in the court's discretion to admit an attorney *pro hac vice*, and by implication, admission *pro hac vice* may be withdrawn at the court's discretion. Patterson's conduct was an abuse of the privilege to practice in this court, and consequently, that privilege is withdrawn. The court notes that the debtors are already ably represented by Edward Hay, a skilled member of the Bar of this court, and so there is no prejudice to the debtors by withdrawing Patterson's privilege to appear.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- A. Robert B. Patterson, Esq. is hereby sanctioned by this court;
- B. Robert B. Patterson, Esq. shall, no later than May 20, 1995:

- (i) Pay Corps Style the costs incurred by Corps Style in connection with the March 7, 1995 Rule 2004 examinations, including Corps Style's attorney fees and costs (including fees and costs incurred as a result of travel to and from Mr. Hay's offices), the travel costs incurred by Mr. Schutters, and the court reporter's fees; and
- (ii) Pay the sum of \$2,500.00 to the Clerk of the United States Bankruptcy court;

C. Corps Style shall submit a statement of the costs which Mr. Patterson is required to pay Corps Style hereunder to this court no later than Wednesday, April 26, 1995, and shall serve a copy of this statement on Mr. Hay and Mr. Patterson;

D. This court's admission of Robert B. Patterson *pro hac vice* is hereby rescinded, and Mr. Patterson is barred from appearing at any further hearing herein and from appearing at any proceeding in this case that may occur outside of the courtroom, including without limitation any examinations conducted pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure;

E. Corps Style shall submit a statement to this court on or after May 20, 1995 stating whether Mr. Patterson has complied with the provisions of decretal paragraph B(i) of this Order;

F. The debtors shall appear and submit to examination at a Rule 2004 examination to be conducted by Corps Style no later than Thursday, May 5, 1995 at Mr. Hay's offices in Asheville, North Carolina;

G. Pursuant to 11 U.S.C. §§ 105(a) and Rule 2005(a) of the Federal Rules of Bankruptcy Procedure, Rule 615 of the Federal Rules of Evidence shall apply to such Rule 2004 examinations and Mr. Hooper is specifically prohibited from attending such examinations of the debtors.

H. While the court has sanctioned only the debtors' attorney, nothing herein absolves the debtors for any actions they have taken to date in this case, including their actions on March 7, 1995 at the Rule 2004 Examinations.

This the 27th day of April, 1995.



George R. Hodges
United States Bankruptcy Judge