IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
BRIAN JON CRAIG and	§	Case No. 05-40722
KIMBERLY A. CRAIG,	§	(Chapter 7)
	§	
Debtors.	§	
_____	§	
	§	
M&I MARSHALL AND ILSLEY BANK,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 05-4100
	§	
BRIAN JON CRAIG,	§	
	§	
Defendant.	§	

ORDER REGARDING DEFENDANT'S MOTION FOR SANCTIONS

This matter is before the Court on the DEFENDANT'S MOTION FOR SANCTIONS filed by the Defendant, Brian Jon Craig, against the Plaintiff, M&I Marshall and Ilsley Bank. In the motion, the Defendant requests that the Court sanction the Plaintiff for violating Federal Rule of Bankruptcy Procedure 9011 by including baseless claims in its COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT (the "Complaint"). The Court heard the Motion on May 15, 2007, and, following the hearing, took the matter under advisement for later ruling.

Bankruptcy Rule 9011 is the bankruptcy counterpart of Federal Rule of Civil Procedure 11. *See* FED. R. BANKR. P. 9011, 1997 Advisory Committee Note; FED. R. CIV.

P. 11, 1993 Advisory Committee Note. [1] The purpose of sanctions under Bankruptcy Rule 9011 is to deter frivolous litigation and filings. *See id*. Liability under Rule 9011 is triggered by "signing, filing, submitting, or later advocating" a paper that violates the rule's certification standards. FED. R. CIV. PROC. 11(b); FED. R. BANKR. P. 9011. The use of the word "advocating" in the text of the rule means that continuing to advocate a position orally after a paper has been signed, filed or submitted may result in the imposition of sanctions. *See* FED. R. CIV. P. 11, 1993 Advisory Committee Note.

Bankruptcy Rule 9011 requires the party requesting sanctions to give notice of the allegation of violation of the rule and an opportunity to withdraw the offending pleading before sanctions may be awarded. The rule provides:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except the limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion ...

FED. R. BANKR. P. 9011(c)(1)(A). This provision is intended to provide a type of "safe harbor" against motions under Bankruptcy Rule 9011 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. The timely withdrawal of a contention

[1] Bankruptcy Rule 9011 was amended in 1997 in order to conform to Civil Rule 11, which was itself extensively amended in 1993. The Advisory Committee Note to the 1997 amendment to Bankruptcy Rule 9011 refers to the 1993 Advisory Committee Note for the 1993 amendments to Civil Rule 11 for an explanation of the amendments to Bankruptcy Rule 9011.

will protect a party against a motion for sanctions. *See Elliot v. Tilton,* 64 F.3d 213, 216 (5th Cir. 1995) (discussing FED. R. CIV. P. 11(c)); *Matter of Sadkin,* 36 F.3d 473, 477 n. 3 (5th Cir. 1994) (Bankruptcy Rule 9011 is substantially similar to FED. R. CIV. P. 11).

Here, prior to bankruptcy, the Plaintiff loaned the Debtor a portion of the purchase price for a home located in Apple Valley, Minnesota. The Plaintiff subsequently loaned the Debtor funds to improve his home and refinanced both mortgages on the home. In or around October 2004, the Debtor relocated to Florida for his job as a mortgage broker. Two months later, in December 2004, a water pipe burst on the second floor of the vacant Minnesota house. The Debtor allowed the Plaintiff access to the house to obtain damage estimates but did not grant the Plaintiff permission to make repairs prior to filing for bankruptcy in February 2005.

The Plaintiff's Complaint sought a judgment that the Debtor's obligations to the Plaintiff are non-dischargeable in bankruptcy under 11 U.S.C. §523(a)(2)(A) and (a)(6). The Plaintiff's §523(a)(2)(A) claim was based on, among other things, an alleged conspiracy to defraud the Plaintiff through inflated appraisals of the value of the Debtor's home, while the Plaintiff's §523(a)(6) claim was based on, among other things, alleged damages sustained by the Plaintiff as a result of the Debtor's alleged refusal to allow the Plaintiff immediate access to the Minnesota house to make repairs.

The Court scheduled the Plaintiff's Complaint for a trial on April 20, 2006. On or around March 15, 2006, counsel for the Defendant drafted and sent counsel for the Plaintiff a copy of a motion for sanctions relating to the Plaintiff's §523(a)(2)(A) claim. The trial was subsequently continued to April 5, 2007 at the request of the parties.

Shortly prior to the rescheduled trial, in March 2007, counsel for the Defendant filed the motion for sanctions.

During the approximately one-year period between receiving a copy of the motion for sanctions and the eventual filing of the motion, the Plaintiff did not amend its Complaint to abandon its §523(a)(2)(A) claim. On April 2, 2007, the Court entered the parties' Joint Pretrial Order in which the Plaintiff contended that disputed issues of fact and law existed regarding its §523(a)(2)(A) claim.[2] At trial, however, the Plaintiff only presented argument and evidence regarding its §523(a)(6) claim. In response to a direct question from the Court regarding whether the Plaintiff was going forward with its §523(a)(2)(A) claim, counsel for the Plaintiff responded that the Plaintiff was only going forward with its §523(a)(6) claim.

The Court heard the Plaintiff's motion for sanctions on May 15, 2007. At the hearing, the Debtor requested that the Court sanction the Plaintiff by, at a minimum, requiring the Plaintiff to pay all attorneys' fees incurred by the Debtor in connection with this adversary proceeding. In opposition to the Debtor's request, counsel for the Plaintiff testified that he conducted a reasonable inquiry into the facts prior to filing the Complaint as well as limited discovery after filing the Complaint. According to counsel for the Plaintiff, the Debtor was unable to explain significant variations in the appraised value of the real property at issue, which was particularly troubling to the Plaintiff in light of the fact that the appraiser used for the valuations had been recommended by the Debtor.

[2] At the hearing on the Debtor's motion for sanctions, the Plaintiff argued that it informed the Debtor that it did not intend to proceed with the §523(a)(2)(A) claim in its pre-trial correspondence with the Defendant. The Court pointed out at the hearing that the Plaintiff's correspondence did not clearly express an intention to abandon the §523(a)(2)(A) claim. Moreover, the Plaintiff's argument that it abandoned its §523(a)(2)(A) claim prior to trial is inconsistent with the positions taken by the Plaintiff in the Joint Pretrial Order subsequently submitted to the Court.

Counsel for the Plaintiff testified that the Plaintiff intended to continue investigating its §523(a)(2)(A) claim after filing the Complaint.

There was no dispute at the sanctions hearing that the investigation was complete by the time the Defendant filed his motions for sanctions. The Plaintiff knew or should have known that it could not, in fact, establish a claim under §523(a)(2)(A) of the Bankruptcy Code. The Plaintiff nevertheless ignored Bankruptcy Rule 9011 as well as the Debtor's threatened motion for sanctions. The Court finds that, under the circumstances, the Plaintiff's inclusion of the §523(a)(2)(A) claim in the Joint Pretrial Order submitted to the Court is sanctionable under Bankruptcy Rule 9011.

With respect to the Defendant's request for the entirety of his attorney's fees, Bankruptcy Rule 9011 does not compel the shifting of fees as a sanction, nor is full compensation a rigid requirement in every case. *See Thomas v. Capital Sec. Serv.*, 836 F.2d 866, 877 (5th Cir. 1988). The discretion vested in the trial court is granted so its thoughtful exercise will carry out the educational and deterrent functions of the rule. *See id.* Any sanction imposed for a violation of Bankruptcy Rule 9011 should be the minimum necessary to deter future violations. *See Smith Int'l, Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1197 (5th Cir. 1988).

Here, according to his billing records, counsel for the Defendant spent 3.2 hours at $200 an hour ($640) researching and drafting the motion for sanctions. Counsel for the Defendant testified that he spent an additional 3.8 hours at $200 ($760) prosecuting the sanctions motion. The Court finds that these fees were necessary and reasonable and that an award in this amount is the minimum sanction necessary to deter future violations of Bankruptcy Rule 9011 by the Plaintiff.

IT IS THEREFORE ORDERED that the Motion for Sanctions shall be, and it is hereby, **GRANTED** in part;

IT IS FURTHER ORDERED that the Plaintiff shall pay the Debtor the sum of $1,400.00 within ten days of the entry of this Order.

Signed on 9/28/2007

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE