UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

EARL CARROLL,

Debtor.
_____/

Case No. DG 14-05844
Chapter 7
Hon. Scott W. Dales

MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

The acrimony between the Debtor's current and former lawyers has blossomed into a contested matter through which former counsel, Kurt O'Keefe, Esq., seeks an order imposing sanctions against current counsel, Jeffrey H. Bigelman, Esq., for multiplying proceedings "unreasonably and vexatiously," relying on 28 U.S.C. § 1927. On September 5, 2019, in Grand Rapids, the court held a hearing to consider Mr. O'Keefe's Motion to Sanction Attorney Bigelman (the "Motion," ECF No. 255). Mr. O'Keefe appeared through counsel and Mr. Bigelman appeared *pro se*. Both parties declined to offer evidence, instead asking the court to resolve the Motion based on the papers, the docket, and oral argument. At the conclusion of the hearing, the court took the matter under advisement. For the following reasons, the court will deny the Motion.

At the outset, the court assumes, as the Sixth Circuit evidently has in several unpublished opinions, that a bankruptcy court is a "court of the United States" within the ambit of 28 U.S.C. § 1927. *See Grossman v. Wehrle (In re Royal Manor Management, Inc.)*, 652 Fed. Appx. 330, 341-42 (6th Cir. 2016) (noting circuit split but upholding bankruptcy court's authority to issue sanctions under § 1927 and citing with approval *Followell v. Mills*, 317 Fed. Appx. 501, 513-14 (6th Cir. 2009), and *Maloof v. Level Propane Gasses, Inc.*, 316 Fed. Appx. 373, 376 (6th Cir. 2008)). Mr.

Bigelman takes issue with this assumption but conceded at oral argument that a bankruptcy court has authority to impose sanctions upon misbehaving attorneys in appropriate circumstances. The two sources of sanction authority are not identical, as the Sixth Circuit explained, but their purposes and to some extent the standards overlap. For example, a finding of subjective "bad faith" is required for imposing sanctions based on a court's inherent authority, but not under § 1927 (which authorizes courts to impose sanctions for objectively unreasonable behavior). *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986).

Section 1927, the statutory basis for sanctions upon which Mr. O'Keefe principally relies, provides as follows:

> Any attorney ... admitted to conduct cases in any court of the United States ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

The Sixth Circuit has explained that "Section 1927 sanctions are warranted when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.'" *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) (citation and quotation omitted). As noted above, the lawyer need not have "subjective bad faith," but something more than negligence or incompetence is required. *Carter v. Hickory Healthcare, Inc.*, 905 F.3d 963, 968-69 (6th Cir. 2018) (citing *Red Carpet Studios*). Sanctions under § 1927 may be available against an attorney who "'abuses the judicial process or knowingly disregards the risk' that he will needlessly multiply proceedings." *Id.* Stated somewhat differently, a trial court in our Circuit "may impose sanctions under § 1927 when it determines that 'an attorney reasonably should know

that a claim pursued is frivolous.'" *Salkil v. Mount Sterling Twp. Police Dept.*, 458 F.3d 520, 523 (6th Cir. 2006) (quoting *Jones v. Continental Corp.*, 789 F.2d at 1230).

Finally, sanctions must be applied carefully and sparingly so as not to chill zealous advocacy while deterring over-zealous advocacy. To this end, a sanctions award must be causally linked to the offense, therefore tailored to compensate, not just deter. *See* 28 U.S.C. § 1927 (court may award attorney's fees etc. "incurred because of" misconduct) and *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1184 (2017) (award based on court's inherent authority "is limited to the fees the innocent party incurred solely because of the misconduct -- or put another way, to the fees that party would not have incurred but for the bad faith").

Having carefully considered the parties' submissions, the court declines to impose sanctions either under § 1927 or its inherent authority. First, the court is not persuaded that Mr. Bigelman multiplied proceedings by *responding* either to Mr. O'Keefe's earlier fee petition or his motion to convert in the manner that he did. He did not multiply proceedings in taking action, or omitting to take action, that prompted Mr. O'Keefe to file various motions (such as a request for redaction and to correct an earlier order). Although the court ultimately sided with Mr. O'Keefe with respect to each contested matter, Mr. Bigelman's arguments were colorable and, as he explained during the hearing, largely premised on his client's sworn statements and documentary evidence. The court and the United States Trustee took seriously the allegations about the payments and hunting privileges that Mr. O'Keefe received because, as Mr. Bigelman suggested during the hearing, incomplete or inaccurate disclosures in connection with the retention of a bankruptcy estate professional may jeopardize the professional's payment from estate assets. Mr. O'Keefe concedes in his brief that the court and the United States Trustee were justifiably concerned about the relationships between Mr. O'Keefe, Whitehouse Whitetails, LLC, and the

Debtor's wife based on the Debtor's affidavit and the previously under-disclosed deer-hunt privileges that Mr. O'Keefe derived from his relationship with the Debtor. *See* Breif [sic] in Support of Motion for Sanctions Under 11 USC 1927 at p. 4 ("The U. S. Trustee and this Court understandably had to investigate these allegations.").

It is not surprising that the Debtor may have been confused about the circumstances surrounding the cash payments to Mr. O'Keefe from his wife's limited liability company on account of Mr. O'Keefe's representation of the wife in her failed chapter 12 proceeding. It does not seem unreasonable to assume that a struggling enterprise such as Whitehouse Whitetails, LLC, would pay its own debts, rather than the debts of its principal, so perhaps this may explain the difference of opinion regarding the payment and its impact on Mr. O'Keefe's retention and entitlement to fees for representing the Debtor in this case. Indeed, the court itself was confused on this score, and was obliged to acknowledge its misapprehension in a recent order entered at Mr. O'Keefe's behest. *See* Order to Correct Order (ECF No. 252). Bankruptcy attorneys who represent numerous entities involved in a single enterprise, such as Whitehouse Whitetails, LLC, should not be surprised if they are called upon to assist the court and others in disentangling and understanding the close and frequently confusing relationships, especially (as here) where a non-client pays for representation of a related entity.

Second, Mr. Bigelman's failure to redact Mr. O'Keefe's driver's license number from an exhibit upon the latter's request, though perhaps discourteous, does not strike the court as vexatious or likely to multiply proceedings. Mr. O'Keefe evidently felt the need to file a motion to redact, but that motion seemed born more of hyper-vigilance on Mr. O'Keefe's part, rather than the inevitable result of Mr. Bigelman's action or omission. Indeed, Mr. Bigelman in fact redacted Mr. O'Keefe's birthdate from the driver's license exhibit as originally filed, which tends to show

that he took some care to protect Mr. O'Keefe's private information, undercutting any inference of bad faith or vexatious behavior.

More generally, the court is unwilling to find that Mr. Bigelman harbored "subjective bad faith" based on the current record, especially without an evidentiary hearing (which Mr. O'Keefe's counsel abjured). Under the circumstances, the record does not compel any adverse inference concerning Mr. Bigelman's motives, and the court draws none. The court, therefore, will not invoke its inherent authority to impose sanctions.

As Judge McKeague recently observed, "a lawyer's good name and professional reputation are his primary stock in trade, an asset to be cultivated and safeguarded throughout his career . . ." *In re Doud*, 713 Fed. Appx. 491, 491 (6th Cir. 2018). Mr. O'Keefe clearly feels that Mr. Bigelman has attacked his character in the *ad hominem* manner in which he opposed the motion to convert. Mr. O'Keefe's desire to protect his reputation seems to have prompted the current Motion, but the court has already preserved his reputation to some extent, albeit indirectly, by ruling in his favor in connection with the fee awards and by granting his motion to convert over the objections that Mr. Bigelman asserted on his client's behalf.

Although the court shares Mr. O'Keefe's disdain for arguments directed at an attorney's character and reputation, Mr. Bigelman's arguments were not frivolous. Sometimes the context of a dispute requires a challenge to a person's veracity, regrettably, and the court will not second-guess Mr. Bigelman's judgment that the situation called for the approach he took. The court is not in the habit of enforcing its own views of professional courtesy or good judgment through the imposition of sanctions. Instead, it will rely on direct communication with counsel (in open court) to induce civility, as it did during the hearing on the Motion.

Having carefully considered the record, the court finds no basis for imposing sanctions and will deny the Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (ECF No. 255) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Earl Carroll, Roger Cotner, Esq., Kurt A. O'Keefe, Esq., and Jeffrey H. Bigelman, Esq.

END OF ORDER

IT IS SO ORDERED.

Dated September 11, 2019

Scott W. Dales
United States Bankruptcy Judge