Docket #0117 Date Filed: 8/21/2023

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

In re: Tehum Care Services, Inc., Debtor.	Case No. 23–90086 (CML) Chapter 11
Anant Kumar Tripati, Plaintiff, v. Sarah Tirschwell, *et al.*, Defendants.	Adv. Pro. No. 23–03072 (CML)

M2 LOANCO LLC'S AND NORTON ROSE FULBRIGHT US LLP'S OPPOSITION TO PLAINTIFF'S MOTION FOR INHERENT POWER AND RULE 11 SANCTIONS AGAINST COUNSEL AND DEFENDANTS

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Defendant M2 LoanCo LLC ("M2 LoanCo") and its undersigned counsel, Norton Rose Fulbright US LLP ("NRF" and together with M2 LoanCo, the "Objectors"), file this opposition (the "Opposition") to the *Motion for Inherent Power and Rule 11 Sanctions Against Counsel and Defendants* (the "Sanctions Motion") [Dkt No. 93] filed by the Plaintiff, Anant Kumar Tripati (the "Plaintiff), pursuant to Rule 11 of the Federal Rules of Civil Procedure (the "Rules"), made applicable to this adversary proceeding by Rule 9011 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and the Court's inherent authority.

I. PRELIMINARY STATEMENT[1]

The Sanctions Motion should be denied because it is fundamentally flawed in several ways. First, the Sanctions Motion is procedurally deficient because it fails to strictly comply with the mandatory safe harbor requirements of Bankruptcy Rule 9011. The filed Sanctions Motion is not identical to the Safe Harbor Motion transmitted by the Plaintiff and was not separately served upon M2 LoanCo. In fact, the Plaintiff added substantive allegations against two NRF attorneys to the Sanctions Motion that were not identified in the Safe Harbor Motion. Under clear Fifth Circuit precedent, this failure is fatal to the Sanctions Motion. Second, the only specific conduct the Plaintiff attributes to the Objectors is not sanctionable under Bankruptcy Rule 9011 or the Court's inherent authority. The Objectors did not misstate any facts in M2 LoanCo's Motion to Dismiss; rather, the Objectors assumed the facts the Plaintiff alleged in his Complaint to be true for the purpose of the Motion to Dismiss (as required on a motion to dismiss under Rule 12(b)(6)) and annexed court docket sheets and governmental records to further support their arguments. Nor did the Objectors misstate the law. The Objectors' arguments for dismissal of the Complaint are supported by well-established precedent. The Plaintiff's disagreement over the correct

[1] Capitalized terms used but not defined in the Preliminary Statement shall have the meanings ascribed in Section II. below.

interpretation of the law is simply not a basis for sanctions. Moreover, the Plaintiff's generalized and indiscriminate allegations of fraudulent behavior, failure to investigate, harassment and delay, and bad faith by the Objectors are insufficiently described or attributed to them, and in any event, lack the clear and convincing evidentiary support required for the imposition of sanctions.

Third, Bankruptcy Rule 9011 does not apply to discovery disputes. Although no formal discovery has been served on M2 LoanCo in this adversary proceeding, the Plaintiff accuses the Objectors of withholding documents and communications he claims to have requested. Apart from the Safe Harbor Letter, the Plaintiff previously sent a letter to NRF's attorneys opposing M2 LoanCo's Motion to Dismiss his Complaint. In that letter, the Plaintiff informally requested any documents in M2 LoanCo's possession from Valitas Corizon and communications regarding an unspecified loan. However, nearly all of the categories of documents and communications identified in the Safe Harbor Motion and the Sanctions Motion that the Plaintiff claims the Objectors failed to produce do not match those the Plaintiff informally requested by letter. Furthermore, any discovery by the Plaintiff is premature because the time to seek discovery has not yet begun under the Rules. And even if the Plaintiff's letter could be construed as an early discovery request under the Rules, the deadline for M2 LoanCo to respond has not begun to run either.

For these reasons, and those more fully set forth below, the Objectors respectfully request that the Court deny the Sanctions Motion.

II. BACKGROUND

On February 13, 2023 (the "Petition Date"), Tehum Care Services, Inc. (the "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court commencing the above-captioned chapter 11 bankruptcy case

(the "Chapter 11 Case"). The Debtor is operating as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

The Plaintiff commenced this adversary proceeding by filing a complaint on May 1, 2023 (the "Original Complaint"). The Clerk of the Court issued a summons (the "Summons") with respect to the Original Complaint on May 4, 2023. [Dkt No. 2]. The Original Complaint asserts two claims for relief under RICO and Arizona law.

On May 15, 2023, the Plaintiff filed but did not serve upon M2 LoanCo the *Omnibus Motion to Amend Adversary and Consolidate ECF 244; 261; 280 and Proofs of Claims*. [Dkt No. 4]. The Plaintiff attached the Amended Complaint as an exhibit to his motion. The Amended Complaint adds a third claim for relief for a declaratory judgment.

On May 19, 2023, the Plaintiff filed a certificate of service reflecting service of the Summons and Original Complaint on May 10, 2023 upon M2 LoanCo at "1450 Brickell Ave #1900, Miami FL 33131." [Dkt Nos. 17, 24]. The Clerk of the Court has not issued a summons with respect to the Amended Complaint. To date, the Plaintiff has not served a copy of the Amended Complaint upon M2 LoanCo.

On June 5, 2023, M2 LoanCo filed its *Motion to Dismiss the Plaintiff's Complaint* (the "Motion to Dismiss") [Dkt No. 32] pursuant to Rule 12(b)(1), (5), and (6). In the Motion to Dismiss, M2 LoanCo argued that the Court lacked subject matter jurisdiction to adjudicate the declaratory judgment claims, the Court lacked personal jurisdiction over M2 LoanCo because the Complaint was improperly served, and the Plaintiff had failed to adequately plead plausible claims for relief.[2] As exhibits to the Motion to Dismiss, M2 LoanCo attached true and correct copies of

[2] Although the Plaintiff failed to properly serve either the Original Complaint or the Amended Complaint and no summons has been issued for the Amended Complaint, M2 LoanCo nevertheless presumed the Amended Complaint (referred to herein as the "Complaint" where applicable) to be the operative pleading for the purpose of the Motion to Dismiss in the interest of expeditiously resolving this adversary proceeding.

records from the Florida Secretary of State showing M2 LoanCo's current mailing address[3] and the docket sheets for various lawsuits involving the Plaintiff.[4]

On or about June 13, 2023, the Plaintiff sent NRF a letter (the "June 13th Letter") requesting a meet and confer, disputing the legal arguments raised in the Motion to Dismiss, and seeking the informal production of various documents.[5] Specifically, the June 13th Letter requested "any documents – emails – metadata – notes – letters – agreements from Valitas Corizon – to include minutes – loan evaluation risk assessments – communications as to the loan from counsel (those are not protected due to crime fraud)."[6]

On June 26, 2023, the Plaintiff filed a response to the Motion to Dismiss. [Dkt No. 58] The Motion to Dismiss has been fully briefed but has not been set for hearing or decided by the Court.

On or about July 7, 2023, the Plaintiff sent a letter (the "Safe Harbor Letter") together with a draft motion for sanctions to NRF (the "Safe Harbor Motion").[7] M2 LoanCo was not separately served with a copy of the Safe Harbor Motion. According to the Safe Harbor Motion, the Plaintiff had requested the production of several categories of documents from the Debtor's counsel and other parties.[8] With respect to the requested documents, NRF attorneys are identified by name in a heading but the Plaintiff does not allege that those documents were actually sought from M2 LoanCo or NRF.[9] The Plaintiff also accuses several entities – "M2HoldCo, LLC," "M2Loan Co, Inc," "M2EquityCo LLC," and "Valitas Intermediate Holdings, LLC" – but not M2 LoanCo LLC of various non-specific fraudulent activities, including perpetrating a fraud upon the Court.[10] The

[3] Motion to Dismiss, Exhibit 1.
[4] Motion to Dismiss, Exhibits 2–4.
[5] Attached hereto as **Exhibit 1** is a true and correct copy of the June 13th Letter.
[6] *Id.* at p. 5.
[7] Attached hereto as **Exhibit 2** are true and correct copies of the Safe Harbor Letter and Safe Harbor Motion.
[8] *See* Safe Harbor Motion, at pp. 4-5.
[9] *Id.* ("I contacted counsel for the Debtor and as Sara Tirschwell and Valitas have no counsel, I also contacted them. I asked them to provide the following documents and they did not.").
[10] *See id.* at p. 9.

Plaintiff further claims that one of the undersigned NRF attorneys "misstates the facts and law on Rico on pp. 12-22 and declaratory judgment pp. 23-24" in the Motion to Dismiss.[11] Finally, without attributing any specific conduct to the Objectors, the Plaintiff argues that the bankruptcy case, motions to dismiss the Complaint, and other motions were filed to perpetrate a fraud, contain falsehoods, are not grounded in fact and law, were filed without counsel conducting an investigation and to harass and delay proceedings, and that the attorney-client privilege was used to commit crimes.[12]

On July 31, 2023, the Plaintiff filed the Sanctions Motion. Although similar to the Safe Harbor Motion in many respects, the Sanctions Motion has one key difference: two of the NRF attorneys not previously accused of specific misconduct are identified for the first time as having "misstat[ed] the facts and law on Rico on pp. 12-22 and declaratory judgment pp. 23-24" in the Motion to Dismiss.[13] As of the filing of this Opposition, the Plaintiff has not filed proof of service of the Safe Harbor Motion or the Sanctions Motion.

No scheduling order has been issued by the Court nor have the parties conducted a Rule 26(f) conference.

III. LEGAL STANDARDS

A. Sanctions Under Bankruptcy Rule 9011.

Bankruptcy Rule 9011 provides in part:

> (b) Representations to the Court. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of

[11] *Id.* at p. 10.
[12] *Id.* at p. 18.
[13] *Compare* Safe Harbor Motion at p. 12 *with* Sanctions Motion at p. 13.

> the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Bankr. P. 9011(b).

Those who violate Bankruptcy Rule 9011(b) may be sanctioned under Bankruptcy Rule 9011(c), which provides that "if, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subsection (b) or are responsible for the violation." Fed. R. Bankr. 9011(c)

With few exceptions, Bankruptcy Rule 9011 is "essentially identical" to Rule 11. *In re David*, 487 B.R. 843, 868 (Bankr. S.D. Tex. 2013). Therefore, courts may apply Rule 11 jurisprudence when considering sanctions under Bankruptcy Rule 9011. *Cadle Co. v. Pratt (In re Pratt)*, 524 F.3d 580, 586 (5th Cir. 2008). The burden of proof is on the moving party when considering Rule 9011 sanctions. If a prima facie case is made, only then does the burden shift to the attorney or party against whom sanctions are sought to demonstrate a legitimate basis for the offending filing. *In re KPMA P'ship*, 2006 Bankr. LEXIS 2727, at *4 (Bankr. S.D. Tex. Oct. 5, 2006). Importantly, "sanctions are normally reserved for rare and exceptional case[s] where the action is clearly frivolous, legally unreasonable, or without legal foundation or brought for an

improper purpose. It is an extraordinary remedy, one to be exercised with extreme caution." *Sievert v. Howmedica Osteonics Corp.*, 2020 U.S. Dist. LEXIS 86064, at *3 (N.D. Tex. May 15, 2020) (cleaned up).

B. Inherent Authority Sanctions.

Bankruptcy courts have the inherent power to award sanctions for bad faith and abusive litigation tactics in a bankruptcy court proceeding. *In re Butan Valley, N.V.*, 2009 U.S. Dist. LEXIS 83860, at *12 (S.D. Tex. Sept. 15, 2009) (citing *F.D.I.C. v. Maxxam, Inc*., 523 F.3d 566, 590-594 (5th Cir. 2008) (stating that court's inherent power to sanction is "governed not by rule or statute but by the control *necessarily* vested in courts to manage their own affairs") (emphasis in original); *In re Case*, 937 F.2d 1014, 1023 (5th Cir. 1991) (holding that the bankruptcy court "has the inherent power to award sanctions for bad-faith conduct in a bankruptcy court proceeding.")).

The standard for imposing such sanctions is "extremely high." *Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999)). To impose sanctions using its inherent powers, the court must find that the "very temple of justice has been defiled" by the party's conduct. *Knight v. Luedtke (In re Yorkshire, LLC)*, 540 F.3d 328, 332 (5th Cir. 2008). Courts have applied a clear and convincing evidence standard when imposing sanctions under their inherent powers. *In re Parsley*, 384 B.R. 138, 180 (Bankr. S.D. Tex. 2008).

IV. ARGUMENT

A. The Plaintiff Failed to Strictly Comply with Bankruptcy Rule 9011's Safe Harbor Provision.

Bankruptcy Rule 9011 provides that a motion for sanctions "shall be served" on the opposing party and "may not be filed with or be presented to the court, unless, within 21 days after service of the motion . . . the challenged paper, claim, defense, contention, allegation or denial is withdrawn or appropriately corrected." Fed. R. Bankr. P. 9011(c)(1). Strict compliance with the

"safe harbor" provision is a mandatory prerequisite to an award of sanctions. *See Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995) ("The plain language of the rule indicates that this notice and opportunity prior to filing is mandatory."); *see also Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2000) (affirming denial of sanctions because (1) the defendant failed to serve a copy of the motion on the respondents twenty-one days prior to filing with the court, and (2) the defendant did not file motion until after the trial had concluded). Failure to strictly comply with the safe harbor requires denial of a sanctions motion brought under Bankruptcy Rule 9011. *See Pratt*, 524 F.3d at 588.

Strict compliance means that each respondent must be served with a copy of the to-be-filed motion for sanctions at least 21 days in advance of filing the motion, *Tilton*, 64 F.3d at 216 (denying sanctions motion for failure to serve defendants and defense counsel with the motion prior to filing). It also means that the served motion and the filed motion must be identical. *Uptown Grill, L.L.C. v. Camellia Grill Holdings, Inc.*, 46 F.4th 374, 389 (5th Cir. 2022) ("We hold today that the Rule 11 safe harbor provision requires identicality.").

The Sanctions Motion fails to strictly comply with both of these requirements. First, the Safe Harbor Motion and the Sanctions Motion are not identical. For instance, the Safe Harbor Motion identifies allegedly sanctionable conduct against only one of the three NRF attorneys against whom the Sanctions Motion was filed. Second, M2 LoanCo was not served with a copy of the Safe Harbor Motion. Nor was M2 LoanCo properly identified by name therein.

B. The Plaintiff's Accusations Against the Objectors are Vague and are Otherwise Not Sanctionable.

Under Bankruptcy Rule 9011, a motion for sanctions "must describe the specific conduct" that allegedly violates the rule. Fed. R. Bankr. P. 9011(c)(1)(A). Vague, conclusory, and general allegations of misconduct are not a proper basis for awarding sanctions. *Jeanty v. Txfm, Inc.*, 2020 U.S. Dist. LEXIS 246929, *3–4 (E.D. Tex. Nov. 24, 2020) (denying Rule 11 motion based on

general allegations of fraud on the court, false representations, and filing documents without a legal basis for failing to describe specific conduct that allegedly violates the rule); *Alley Bros., LLC v. Krishnan*, No. 4:18-CV-742, 2019 U.S. Dist. LEXIS 64730, 2019 WL 1614625, at *2 (E.D. Tex. Apr. 16, 2019) (overruling the defendants' arguments regarding their Rule 11 motion because they raised "only conclusory allegations, which do not support granting such relief"). With respect to inherent authority sanctions, general complaints of misconduct are also insufficient. *David*, 487 B.R. at 870 (citing *Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999)). Indeed "[t]he imposition of sanctions using inherent powers must be accompanied by a specific finding of bad faith." *Id.*

Whether the identified conduct violates Rule 11 or Bankruptcy Rule 9011 is assessed under an objective, not a subjective, standard of reasonableness. *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 528 (5th Cir. 2016). With respect to legal contentions, a signatory violates Bankruptcy Rule 9011 by advancing arguments lacking support in existing law, and for which no *reasonable* justification for extension of existing law is offered. *See id.* (sanctions are appropriate if counsel submits a "legally indefensible" filing); *see also CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791, 793 (5th Cir. 1993) (courts should not impose sanctions for advocating a plausible legal theory).

Here, the only specific conduct the Plaintiff identifies with respect to the Objectors are alleged misstatements of "the facts and law on Rico on pp. 12-22 and declaratory judgment pp. 23-24" in the Motion to Dismiss.[14] These accusations do not withstand scrutiny. First, the Objectors did not make any misstatements of facts in M2 LoanCo's Motion to Dismiss. The factual content in the Motion to Dismiss is based entirely on (i) the allegations the Plaintiff himself made

[14] *See* Sanctions Motion, at p. 13.

in the Complaint, which the Objectors assumed to be true for the purpose of the Motion to Dismiss (as required on a motion to dismiss under Rule 12(b)(6)), (ii) docket sheets reflecting the Plaintiff's participation in several lawsuits in federal court, and (iii) records from the Florida Secretary of State showing M2 LoanCo's correct mailing address. Second, the Objectors advocated for dismissal of the Complaint based on well-established Supreme Court and Fifth Circuit precedent and Arizona law.[15] The Plaintiff has failed to articulate why these legal positions are objectively unreasonable.

Moreover, the Plaintiff has otherwise failed to explain – other than through general, vague, and conclusory allegations – how the Objectors have committed fraud, what they specifically failed to investigate, how they harassed or delayed the proceedings, or acted in bad faith.[16] Nor does the Plaintiff offer any evidentiary support for his accusations. At bottom, the Plaintiff's failure to describe in detail the specific conduct that violates Bankruptcy Rule 9011 or constitutes bad faith is fatal to the Sanctions Motion.

C. Bankruptcy Rule 9011 Does not Apply to Discovery Disputes, and in any Event, the Alleged Discovery-Related Conduct is Not Sanctionable.

Bankruptcy Rule 9011(d) specifically states that the rule does not apply to discovery requests. Fed. R. Bankr. P. 9011(d). Moreover, in federal litigation, with few exceptions, a party may not seek discovery until the parties have held a Rule 26(f) planning conference. Fed. R. Civ. P. 26(d)(1); *Grimes v. Avis Budget Grp., Inc.*, 2020 U.S. Dist. LEXIS 113502, at *3 (N.D. Tex. June 29, 2020) (denying motion to compel responses to discovery requests because the parties had not yet conducted their Rule 26(f) conference). Although requests for production under Rule 34

[15] *See* Motion to Dismiss at pp. 12-22 (arguing that the Plaintiff's claims for alleged violations of RICO and Arizona's statutory equivalent should be dismissed due to various pleading deficiencies) and pp. 23-24 (arguing that Plaintiff has failed to state a plausible declaratory judgment claim for spoliation, fraud, breach of fiduciary duty, and supervisory liability).
[16] *See* Sanctions Motion at pp. 19-21.

may be delivered to opposing parties more than 21 days after service of the summons and complaint, the time for the opposing party to respond to those requests does not begin to run until the parties have held their Rule 26(f) conference. *See* Fed. R. Civ. P. 26(d)(2) (early requests for production under Rule 34 considered served at the Rule 26(f) conference) and 34(b)(2)(A) (responses to early requests for production due within 30 days of first Rule 26(f) conference).

The Plaintiff's allegations of discovery-related misconduct are highly flawed for several reasons. First, the Plaintiff has failed to describe what the Objectors specifically failed to do. Although NRF attorneys are identified by name in a heading to the Sanctions Motion regarding the Plaintiff's alleged requests for documents, the Plaintiff does not allege that those documents were actually sought from M2 LoanCo or NRF.[17] In fact, the documents informally requested by the Plaintiff from NRF do not match many of the categories of documents identified in the Sanctions Motion.[18] Second, the Plaintiff's arguments are based on a misunderstanding of the discovery process under the Rules. The informal requests Plaintiff sent to NRF (even assuming the June 13th Letter could qualify as proper discovery under the Rules, which it does not) are premature because the parties have not yet conducted a Rule 26(f) conference. Moreover, in light of the pending Motion to Dismiss and the motions to dismiss filed by other defendants, no discovery should take place until those motions, along with other pending procedural motions are addressed by the Court and the Plaintiff has any claims that survive. Accordingly, any response to the Plaintiff's requests are not yet due.

[17] *Id.* at pp. 4-5 ("I contacted counsel for the Debtor and as Sara Tirschwell and Valitas have no counsel, I also contacted them. I asked them to provide the following documents and they did not.").
[18] *Compare* June 13th Letter at p. 5 *with* Sanctions Motion at pp. 5-7.

V. CONCLUSION

For all the foregoing reasons, the Objectors respectfully request that the Court deny the Sanctions Motion and award the Objectors their reasonable attorneys' fees and other expenses incurred in presenting and opposing the Sanctions Motion.

[*Remainder of page intentionally left blank*]

Dated: August 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing document was served upon the counsel and parties of record, electronically through the Bankruptcy Court's Electronic Case Filing System on those parties that have consented to such service on the 21st day of August, 2023. The undersigned attorney further certifies that a true and correct copy of the foregoing was served on the Plaintiff by first class U.S. mail on the 21st day of August, 2023.

/s/Kristian W. Gluck
Kristian W. Gluck