UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

GLORIA A. GEBHARD, Case No.: 04-10341
Chapter 13

Debtor.

APPEARANCES:

Philip John Danaher, Esq.
Attorney for the Debtor
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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Before the court is the narrow, though frequently recurring, procedural question of what constitutes an appropriate sanction, if any, for a violation of the court's standard form Scheduling Order. Although this question must be answered on a case-by-case basis, the general principle of strict adherence to court rules and orders applies without exception to all matters under this court's jurisdiction.

JURISDICTION

The court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(a), (b)(2)(L), and 1334.

BACKGROUND

Gloria A. Gebhard (the "Debtor") filed for relief under Chapter 13 of Title 11 of the United States Code ("Code") on January 23, 2004. Together with the Voluntary Petition, schedules, and statements, the Debtor filed a Chapter 13 Plan ("Plan") providing, *inter alia*, that she pay to the Chapter 13 Trustee $25 per month for thirty-six months, and that she assign to the Chapter 13 Trustee her claim and all payments thereunder against the bankruptcy estate of Michael J. Gentner, her ex-spouse, in the approximate amount of $177,277.98.[1] (Plan ¶ 2.) In addition, the Plan reports that her unsecured claims total approximately $145,935.09 (*id.* ¶ 3[F]), and the Debtor therefore anticipates a 100% distribution to unsecured creditors upon completion of the Plan.

On March 5, 2004, Mr. Gentner filed an objection to confirmation ("Objection") averring that the proposed Plan fails to meet the requirements of Code § 1325. Specifically, Mr. Gentner alleges that the Plan has not been proposed in good faith (Objection to Confirmation of Chapter 13 Plan ¶ 2); *see also* 11 U.S.C. § 1325(a)(3) ("the court shall confirm a plan if the plan has been proposed in good faith and not by any means forbidden by law"), the Debtor is not devoting all of her disposable income to the Plan (*id.* ¶ 7); *see also* 11 U.S.C. § 1325(b)(1)(B) ("if the . . . holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless . . . the plan provides that all of the debtor's disposable income [through the duration of the Plan] will be applied to make payments under the plan"), and the Plan lacks

[1] Michael J. Gentner also filed for relief under Chapter 13 of the Code on January 23, 2003 (Case No. 03-10387). For purposes of this decision, the court takes judicial notice of the record in that case. *See In re Emmett*, Case No. 04-61064, Adv. Pro. No. 04-80148, slip. op. at 7 n.2 (Bankr. N.D.N.Y. Nov. 1, 2004) ("A bankruptcy judge may take judicial notice of the court's records.") (citing *Matter of Holly's, Inc.*, 172 B.R. 545, 553 n.5 (Bankr. W.D. Mich. 1994); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990)). Due to a matrimonial proceeding, and as discussed in greater detail *infra*, *see* Background at 4-5, the Debtor and Mr. Gentner are creditors in one another's respective cases.

specificity sufficient to determine feasibility (*id.* ¶ 8); *see also* 11 U.S.C. § 1325(a)(6) ("the court shall confirm a plan if the debtor will be able to make all payments under the plan and to comply with the plan").

The Debtor's confirmation hearing was originally scheduled for March 11, 2004, but was adjourned five times to (1) 4/8/04, (2) 5/6/04, (3) 5/13/04, (4) 6/10/04, and (5) 7/15/04. On July 15, 2004, the court issued a standard form Scheduling Order providing for an evidentiary hearing on the Objection for January 31, 2005. The Scheduling Order also required the (1) completion of discovery by September 23, 2004, (2) filing and service of expert reports on or before December 30, 2004, (3) filing and service of objections to witness' qualifications on or before January 21, 2005, (4) preparation and filing of a stipulation of facts, to the extent possible, on or before January 21, 2005, (5) filing and service of pretrial statements and exhibits on or before January 21, 2005, and (6) filing of written objections to proffered exhibits or witnesses on or before January 26, 2005. As is customary, the Scheduling Order included cautionary language that "[f]ailure to comply with any of the terms of this Order may result in dismissal or the appropriate sanctions, preclusion, the striking of pleadings, and the entry of an order or judgment accordingly."

As reflected by the docket, attorney Weiskopf never filed a pretrial statement on behalf of Mr. Gentner; attorney Danaher filed a pretrial statement on behalf of the Debtor on January 26, 2005, five days after the applicable deadline expired. Under the circumstances, when counsel and their clients appeared for the January 31, 2005 hearing, rather than proceed on the merits of the Objection, the court focused solely on the consequences of each attorney's violation of the Scheduling Order. At the conclusion of the hearing, the court advised the parties and counsel that it would reserve its ruling with respect thereto, and attorneys Weiskopf and Danaher were given an

opportunity to submit letter briefs on or before February 15, 2005. Attorney Danaher's letter brief was timely filed with the court on February 14, 2004; attorney Weiskopf's letter brief was timely filed with the court on February 15, 2004. The evidentiary hearing on the Objection has been adjourned to March 31, 2005.

Because the parties' prior history is relevant to the present matter and attorney Weiskopf, at least in part, relies upon the same in defense of his violation of the Scheduling Order, the court provides the following additional background information.

The Debtor and Mr. Gentner have an extremely contentious relationship that has been the subject of litigation both here and in the state court system. Following a lengthy matrimonial proceeding that culminated in a Judgment of divorce in November 1999 (the "Judgment") (*see* Mot. to Vacate Income Execution Violating 11 U.S.C. § 362(a), Case No. 03-10387, Doc. No. 46, Ex. A), both parties filed petitions for Chapter 13 relief in this court and their cases, like their financial situations, became intertwined. Attorneys Weiskopf and Danaher have been the parties' respective bankruptcy counsel on all matters, alternating hats when appropriate to provide both debtor and creditor representation depending upon whose case was at issue.[2]

On January 23, 2003, Mr. Gentner filed a proposed Chapter 13 Plan ("Gentner Plan") that provided for monthly payments of $20 for fifty-nine months and one graduated payment of $321,500 on the sixtieth month. The funds for the lump sum payment were to have been obtained from the

[2] The court notes, however, that since the January 31, 2005 hearing in this matter, the Debtor has retained Orlando & Barbaruolo, PLLC (Paula M. Barbaruolo, Esq.) to represent her as a creditor in Mr. Gentner's case. Attorney Barbaruolo filed a notice of appearance in that case on March 4, 2005. (Case No. 03-10387, Doc. No. 144). In addition, on March 23, 2005, an order was entered in Mr. Gentner's case permitting Attorney Weiskopf to withdraw as attorney of record for Mr. Gentner as a creditor in the Debtor's case and in the appeal filed by Mr. Gentner in his case. (Case No. 03-10387, Doc. No. 150). Attorney Weiskopf continues to represent Mr. Gentner in his pending Chapter 7 case. *Id*.

sale of one or more parcels of real estate. On March 5, 2003, the Debtor filed an Objection to Confirmation of the proposed Gentner Plan alleging, *inter alia*, bad faith. Nonetheless, the Gentner Plan was confirmed by Order dated June 20, 2003. However, the Addendum to Confirmation Order ("Addendum") required that Mr. Gentner take certain steps to ensure compliance with the Gentner Plan, including securing the appointment of realtors to market the subject properties and cooperating fully in the marketing and sale processes. Importantly, the Addendum required Mr. Gentner to sell all properties involved within eighteen months of the date of the Confirmation Order.

When the Gentner Plan failed to materialize, the Debtor sought dismissal of Mr. Gentner's case or, alternatively, conversion of his case from Chapter 13 to Chapter 7. (*See* Mot. for Summary Judgment, Case No. 03-10387, Doc. No. 96.) In response, Mr. Gentner moved to modify the Gentner Plan to allow for additional time to sell the properties. After a consolidated evidentiary hearing on the motions on December 8, 2004, the court immediately issued separate orders (1) denying Mr. Gentner's motion for modification and (2) granting the Debtor's Motion for Summary Judgment and converting the case to one under Chapter 7. Mr. Gentner, dissatisfied with both the result and with attorney Weiskopf's representation during the evidentiary hearing, moved pro se on December 20, 2004 for reconsideration. That motion was denied by Order dated January 20, 2005 (Case No. 03-10387, Doc. No. 123), and by a subsequent Amended Order dated January 24, 2005 (Case No. 03-10387, Doc. No. 124). Mr. Gentner filed a pro se Notice of Appeal on January 24, 2005 (Case No. 03-10387, Doc. No. 125), and an Amended Notice of Appeal on January 28, 2005 (Case No. 03-10387, Doc. No. 128). The appeal is currently pending before the United States District Court for the Northern District of New York.

On January 14, 2004, attorney Weiskopf filed a Motion to Withdraw as Attorney for Mr.

Gentner in Mr. Gentner's individual bankruptcy case. Although attorney Weiskopf advised the court on the record in both Mr. Gentner and the Debtor's cases, on numerous occasions, that he would be withdrawing as creditor counsel for Mr. Gentner in all matters relating to the Debtor's case, including the pending Objection at issue here, he did not file the notice of withdrawal and certificate of service required by Local Bankruptcy Rule 2091-1(b).[3] Eventually, Mr. Weiskopf and Mr. Gentner reached an agreement that attorney Weiskopf would no longer represent him as a creditor in the Debtor's case, and they incorporated that agreement into the provisions of a consent order entered in connection with attorney Weiskopf's motion to withdraw filed in Mr. Gentner's case. That order was not submitted to the court until March 22, 2005. It was then signed and entered on March 23, 2005. Under the March 23, 2005 order (Case No. 03-10387, Doc. No. 150), attorney Weiskopf continues to represent Mr. Gentner in his individual Chapter 7 case, although not in connection with the pending appeal, and he no longer represents Mr. Gentner as a creditor in the Debtor's case.

ARGUMENTS

Attorney Weiskopf argues that while the Scheduling Order was routine, the particular facts and circumstances of this case, as well as Mr. Gentner's case, make it "unique" and, thus, allow the court to excuse the violation of the Scheduling Order without any "precedential effect on practice in this Court." (Weiskopf Letter Brief at 1-2.) He explains that he believed all matters scheduled for January 31, 2005 in both bankruptcy cases were rendered moot because of the court's December 8, 2004 conversion order issued in Mr. Gentner's case. After that order was granted, he "removed

[3] "Withdrawal of [non-debtor] attorneys of record may be accomplished by providing *written* notice to the court and to all creditors and interested parties. Withdrawing counsel shall furnish and file a certificate of service with the court in accordance with this rule." Local Bankruptcy Rule 2091-1(b) (emphasis added).

all of the task prompts for the 31st of January from [his] computer and [his] Palm Pilot," and he "was not alerted to the need to do anything until [he] received a copy of Mr. Danaher's pre-trial statement." (*Id.* at 2.) Further, he asks the court to allow the Objection to proceed so that his violation of the Scheduling Order will have no prejudicial effect upon his client.

Attorney Danaher advises the court that he "inadvertently read January 26th [sic], 2005, as the last day to file the pre-trial statements." (Danaher Letter Brief at 2.) He too contends that the facts and circumstances of this case, as well as Mr. Gentner's case, are unique due to the overlay of matrimonial issues. He suggests that neither his nor attorney Weiskopf's actions caused any actual prejudice to either party. On that basis, he joins attorney Weiskopf's request for the court to issue an amended scheduling order to allow the parties to reach the merits of the Objection.

DISCUSSION

Federal Rule of Civil Procedure 16, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7016, governs pretrial practice and gives the court authority to sanction a party or a party's attorney who fails to obey a scheduling or pretrial order. Rule 16 may be invoked either upon motion or the court's own initiative. FED. R. CIV. P. 16(f). Among the available sanctions are a preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. *See* FED. R. CIV. P. 16 advisory committee's notes. This list, however, is by no means exhaustive. *Id.*

Other bankruptcy judges have addressed the identical issue presented here, and their decisions are instructive.

> The judicial power to sanction for violation of scheduling orders and lack of prosecution is absolutely essential to a court's ability to control its docket.

> Experience in this Court has demonstrated that lax enforcement of standard procedures, rules and court orders results in the certainly of lax compliance and equally certain delay and prejudice to parties in interest. The vice of lax enforcement is self-compounding, because counsel form the expectation that failures and violations will be excused and the correlative perception of unfairness resulting from apparently uneven enforcement.

In re Bonfiglio, 231 B.R. 197, 198 (Bankr. S.D.N.Y. 1999). In fact, Chief Judge Gerling of this District has written on the subject in recent years.

> Violations of a scheduling order "are never technical nor trivial, but involve a 'matter most critical to the court itself: management of its docket' [sic] and the avoidance of unnecessary delays in the administration of cases." [*Martin Family Trust v. HECO/Nostalgia Enterprises Co.*, 176 F.R.D. 601, 602 (E.D.Calif. 1999)], quoting *Matter of Sanction of Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (noting that "[d]isregard of the order would undermine the court's ability to control its docket . . . and reward the indolent and the cavalier."); *H.P. Hood, Inc.[] v. Parker (In re Parker)*, Case No. 97-17732, Adv. Pro. No. 98-91154, slip. op. at 3 (Bankr. N.D.N.Y. Sept. 15, 2000) (indicating that "the disregard of scheduling order requirements is prejudicial to any efficient system of justice and cannot be condoned) . . . .

In re Geder, Case No. 99-63340, slip. op. at 9 (Bankr. N.D.N.Y. Apr. 5, 2001, Gerling, C.J.).

> This court has in the past joined in the views expressed above.
>
> [Rule 16] is obviously designed to enable courts to manage the flow of their cases in an efficient manner. However, it is impossible for the court to accomplish this when scheduling orders are routinely dismissed and/or ignored by the attorneys that appear before it. The present case is indicative of an extremely disturbing and frustrating trend where attorneys wait until days before trial to notify this court of discovery issues or other problems and then request adjournment of trials. The efficient operation of court business simply cannot withstand such conduct. Trial time is a valuable commodity and this court will not allow conduct that deprives other parties of their day in court because those scheduled to proceed on a specific day and time are not prepared.

In re Parker, Case No. 97-17732, Adv. Pro. No. 98-91154, slip. op. at 3 (Bankr. N.D.N.Y. Apr. 24, 2000) (footnotes omitted). The court's view is no different today, especially in light of the resurgence of the disturbing trend in recent months.

Sanctions under Federal Rule of Civil Procedure 16 are appropriately imposed for the unexcused failure to comply with a scheduling order even if that failure is not the result of bad faith. *In re Geder*, slip. op. at 9 (citing *Martin Family Trust*, 176 F.R.D. at 604). Cases do arise where violation of a scheduling order may be excused, *see, e.g., In re Roshan*, Case No. 02-16716, Adv. No. 02-90350, slip. op. (Bankr. N.D.N.Y. July 19, 2004) (in lieu of dismissing the complaint of a pro se plaintiff who failed to obey the scheduling order, the court, with the debtor's consent, agreed to treat the matter as fully submitted on the record before it), but absent an understandable pro se error, medical justification, or some other compelling reason, the court cannot turn a blind eye to such violations. To do so would invite "legal chaos," *In re Parker*, slip. op. at 4, by reducing "the authority of a scheduling order to nothing more than a scheduling hint or scheduling suggestion," *id.* (internal quotations omitted).

Here, the court disagrees with counsel's conclusion that the "unique" facts and circumstances underpinning the Objection render their violations of the Scheduling Order excusable. In fact, the court finds that the opposite is true: because the parties have been battling in the legal arena for so long, they would greatly benefit from the expeditious administration of their individual bankruptcy cases and perhaps achieve a final resolution of some, though admittedly not all, of their legal issues. Furthermore, both attorneys are experienced bankruptcy practitioners familiar with the intricacies of this court; as such, their noncompliance with the Scheduling Order because it was merely overlooked is not justifiable. Finally, the court dismisses counsel's arguments that their clients were not prejudiced by their actions. To the contrary, their clients, creditors of the bankruptcy estate, this court, and other litigants were prejudiced by their failure to comply with the Scheduling Order. First, the parties were entitled to the expedited resolution of their conflict, especially in light of their

former years spent tied up in state court litigation that unavoidably drives their actions and emotions here. Second, the entire creditor body benefits from a speedy resolution of objections to confirmation; in this case, Mr. Gentner is the only objector on record. Third, the parties inability to proceed to trial on the scheduled date was prejudicial to other litigants who could have utilized the court's time, and to the court whose time and resources were wasted. Under the circumstances, the court is compelled to impose sanctions.

Although attorney Weiskopf eventually withdrew from representing Mr. Gentner as a creditor in the Debtor's case by order of this court entered March 23, 2005, his failure to do so prior to January 31, 2005 meant that he had simply abandoned the filed pleading. The sanction imposed upon attorney Weiskopf must take into account that he filed the Objection placing the matter on the court's calendar. Moreover, a party who raises a disposable income challenge to a proposed Chapter 13 plan bears the initial burden of presenting evidence to sustain the objection. *See, e.g., In re Edwards*, 2004 WL 316418, at *10 (Bankr. D. Vt. Feb. 13, 2004) (citing RUSSELL, BANKRUPTCY EVIDENCE MANUAL, 2001 ed., § 301.80).

This court's Scheduling Order, however, applies equally to plaintiffs and defendants and, therefore, both parties are expected to comply with its directives. Either party who fails to make the pretrial submissions is in violation of the Scheduling Order and, pursuant to the notice given therein, subject to sanctions.[4] Additionally, as in this case, once a party in interest interposes a credible challenge to a chapter 13 debtor's good faith, the debtor has the burden of proof to establish his or her good faith. *See, e.g., id.* (citing RUSSELL, BANKRUPTCY EVIDENCE MANUAL, 2001 Ed.,

[4] The court acknowledges, however, that a non-moving party may in certain cases choose not to submit a pretrial statement for tactical reasons. Where the non-moving party has no burden of proof, the appropriate sanction would be preclusion, assuming, of course, that their trial strategy backfired and they sought to introduce proof during trial.

§ 301.82(D); *In re Reese*, 281 B.R. 735, 739-40 (Bankr. M.D. Fla. 2002)); *see also, e.g., In re Barth*, 83 B.R. 204, 206 (Bankr. D. Conn. 1988) ("It is the debtor's burden to establish all the conditions necessary for plan confirmation under § 1325(a)."). Accordingly, attorney Danaher was obligated to submit a pretrial statement in this case to sustain the Debtor's burden. Because of his late filing, he is also subject to sanctions, though in a lesser amount than those imposed upon attorney Weiskopf.

CONCLUSION

For the reasons set forth above, it is hereby

ORDERED, that attorney Weiskopf is sanctioned $500, payable to his client, Mr. Gentner; within ten days of this order; and it is further

ORDERED, that attorney Danaher is sanctioned $250, to be paid via a reduction of his administrative claim for attorney fees in this case.

It is SO ORDERED.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge