

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ELAINE GEDER

CASE NO. 99-63340

Debtor

Chapter 7

APPEARANCES:

SELBACH & VIENCEK, LLP
Attorneys for Debtor
Suite 720
One Lincoln Center
Syracuse, New York 13202

JAMES F. SELBACH, ESQ.
Of Counsel

MENTER, RUDIN & TRIVELPIECE, P.C.
Attorneys for Creditor GMAC
500 S. Salina Street
Syracuse, New York 13292

JEFFREY A. DOVE, ESQ.
of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Presently under consideration by the Court is a motion ("Motion") filed by Elaine Geder ("Debtor") on October 17, 2000, seeking an order compelling discovery pursuant to Rule 7037(a) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). The Debtor also seeks to amend an Amended Scheduling Order, which was signed by the Court on September 1, 2000, "[b]ecause discovery has not been completed." Opposition to the Debtor's motion was filed by General Motors Acceptance Corporation ("GMAC") on November 8, 2000.

The motion was heard on November 14, 2000, at the Court's regular motion term in Binghamton, New York. Following oral argument, the Court requested that the parties submit

memoranda of law.¹ The matter was submitted for decision on November 30, 2000.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding² pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(O).

FACTS

The Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”) on June 16, 1999. GMAC is listed in the Debtor’s schedules as leasing a 1999 Chevrolet Cavalier to the Debtor. On August 2, 1999, GMAC filed a motion seeking to terminate the automatic stay so as to allow GMAC to enforce its rights relative to the vehicle. On August 18, 1999, the Court granted GMAC’s motion. The Debtor was granted a discharge on October 4, 1999, and on October 18, 1999, the case was closed.

Sometime after the case was closed, the Debtor received a letter from GMAC, dated

¹ The parties were requested to address only the issue of the Debtor’s failure to comply with the Amended Scheduling Order, which required that any motion be filed, served and made returnable on or before October 29, 2000. The Court indicated that it would not be necessary to submit memoranda of law on the discovery issues.

² By Order, signed June 29, 2000, the Court granted the Debtor’s motion to convert what had been commenced as a contested matter to an adversary proceeding in order for the Debtor to seek injunctive relief. The Court did not require that a separate file be opened and an adversary proceeding number be assigned to it, however. According to the docket in the case, the Debtor never sought to amend her pleadings to request injunctive relief.

October 27, 1999. *See* Exhibit A, attached to Debtor's Complaint,³ filed April 4, 2000. The letter states that she owed a balance of \$6,138.63 due to early termination of the lease with GMAC. The letter also includes the statement that "WE ARE ATTEMPTING TO COLLECT THE AMOUNT OUR RECORDS SAY YOU OWE US NOW. ANY INFORMATION WE OBTAIN WILL BE USED FOR THAT PURPOSE."

On January 18, 2000, the Debtor sought to reopen the case, alleging that a creditor had violated the discharge order. The Debtor's application to reopen the case was granted on January 28, 2000.

The Debtor's Complaint, filed on April 4, 2000, sought an order awarding actual and punitive damages, as well as attorney's fees, pursuant to Code § 362(h).⁴ GMAC filed its Answer on May 4, 2000.⁵ A hearing was held at the Court's regular motion term in Binghamton, New York, on May 9, 2000, at which time the Court determined that an evidentiary hearing would be necessary. The hearing was scheduled for July 6, 2000, but pursuant to the Order of June 29, 2000, converting the matter to an adversary proceeding, the evidentiary hearing was to be rescheduled as a trial pursuant to further order of the Court.⁶

³ Pursuant to the Order of June 29, 2000, the Debtor's motion filed pursuant to Code § 362(h) on April 4, 2000, and dated March 31, 2000, was to be treated as the "Complaint."

⁴ On August 15, 2000, Debtor's counsel filed an affirmation withdrawing the Debtor's request pursuant to Code § 362(h) and seeking an order of civil contempt for GMAC's alleged violation of "the permanent injunction created by the issuance of the discharge order." The Court will treat the Debtor's request as one seeking to amend the Complaint and will grant it, there being no prejudice to GMAC.

⁵ Pursuant to the Order of June 29, 2000, GMAC's opposition was to be treated as its "Answer" to the Debtor's Complaint.

⁶ On July 10, 2000, the Court signed a Scheduling Order whereby the trial was to be held on August 31, 2000.

The Debtor filed and served her First Request for the Production of Documents and her First Set of Interrogatories on or about July 7, 2000. Debtor's requests can be summarized as follows:

1. The name, position or title, address of every person or persons participating in the preparation of the answers to the interrogatories. Identify each and every document reviewed to assist in the answering of the interrogatories.
2. The number of letters, similar to the letter sent to the Debtor postdischarge which forms the basis for the relief being sought by the Debtor, which GMAC has ever sent to any person or persons who have (a) filed a bankruptcy petition from 1978 going forward; (b) had a secured debt⁷ with GMAC at the commencement of the bankruptcy case; (c) surrendered to GMAC any collateral securing the debt; (d) not reaffirmed the debt pursuant to Code § 523(c), or have timely rescinded any such reaffirmation agreement, and (e) received a discharge from the Bankruptcy Court.
3. The number of letters similar to that letter sent to the Debtor postdischarge with the language "FOR INFORMATIONAL PURPOSES ONLY," which GMAC has ever sent to any person or person who have (a) filed a bankruptcy petition from 1978 going forward; (b) had a secured debt with GMAC at the commencement of the bankruptcy case; (c) surrendered to GMAC any collateral securing the debt; (d) not reaffirmed the debt pursuant to Code § 523(c), or have timely rescinded any such reaffirmation agreement, and (e) received a discharge from the Bankruptcy Court.
4. The name and address, as well as telephone number, title and job description of every person who, in any way, is currently responsible or who in the past has been responsible for producing and forwarding to debtors similar letters as the Debtor received.
5. Identify when GMAC first began to send similar letters.
6. Has there been a time since GMAC began sending such letters that it did not send such letters?
7. If the answer to No. 6 is "yes," describe the periods of time when the letters were not sent.
8. Is there now, or has there ever been a geographic portion of the United States, or its territories, where letters similar to that received by the Debtor were not sent?

⁷ "Secured debt," as defined by the Debtor for purposes of the interrogatories, includes "any debt created by any lease or executory contract."

9. If the answer to No. 9 is “yes,” describe the geographic area, the period of time wherein no letters were sent and the reason they were not sent.
10. Identify every person who, in any way, provided Dale B. Johnson, Esq. with any information used by him in the preparation of GMAC’s Answer, dated May 3, 2000.

On August 10, 2000, GMAC filed its response, objecting to each and every interrogatory “propounded” by the Debtor on the basis that they are “not relevant to the subject matter of the pending action, nor reasonably calculated to lead to information which is relevant to the subject matter of the pending action.” GMAC also objects to Interrogatory No. 2 as being overly broad and burdensome.

Debtor’s request for the Production of Documents seeks the following:

1. All documents, diagrams, photographs, drawings, calculations or other demonstrative documents identified in the responses to the interrogatories or which form the basis for GMAC’s responses.
2. Copies of ten letters, as described in Interrogatory No. 2, for each of the years 1996-2000.
3. Copies of ten letters, as described in Interrogatory No. 3, for each of the years 1996-2000.
4. All documents which relate, in any way, to the GMAC’s “Standard Operating Procedures” as set forth in its Answer, dated May 3, 2000.

GMAC objected to the Debtor’s document request, asserting that the request seeks to discover information that is “not relevant to the subject matter of the pending action, nor reasonably calculated to lead to information which is relevant to the subject matter of the pending action.” In addition, GMAC contends that the first document request is overly broad and burdensome.

On July 28, 2000, GMAC requested an order dismissing the Debtor’s claim for punitive damages. A hearing was held on August 15, 2000, and an Order signed on August 23, 2000,

denying GMAC's motion. On September 1, 2000, the Court signed the Amended Scheduling Order as submitted by the Debtor, rescheduling the trial for November 30, 2000.

The Amended Scheduling Order provided for the completion of all discovery by October 14, 2000. As noted above, it also provided that "[a]ll motions shall be filed, served and made returnable on or before October 29, 2000." Finally, the Amended Scheduling Order required, *inter alia*, that the parties file and serve a list of exhibits and identify any witnesses to be called at the trial on or before October 29, 2000.

On or about September 5, 2000, Debtor's counsel wrote to GMAC's attorneys, asserting that GMAC's objections were "completely inadequate" and contained boilerplate language lacking in any specifics. *See* Exhibit G of Debtor's Motion. Debtor's counsel requested that GMAC's attorneys contact him in order to attempt to resolve their differences without Court intervention. A second request from Debtor's counsel sent on or about September 8, 2000, requested that GMAC's attorneys call him to discuss the matter. *See* Exhibit H of Debtor's Motion. On or about September 15, 2000, GMAC's attorneys responded, suggesting it might be necessary to seek a ruling from the Court on the Debtor's discovery requests. *See* Exhibit I of Debtor's Motion.

On October 4, 2000, GMAC filed its First Set of Interrogatories, which it served on the Debtor on October 2, 2000. GMAC requested that the Debtor answer on or before October 14, 2000. On October 17, 2000, the Debtor filed the Motion, which is now before this Court. On November 13, 2000, the day prior to the hearing on the Motion, the Debtor filed her Answers and Objections to GMAC's First Set of Interrogatories.

DISCUSSION

Compliance with the Amended Scheduling Order

The first issue the Court must address is the Debtor's failure to comply with the express terms of the Amended Scheduling Order. Of relevance to this discussion is the chronology of events which occurred prior to the hearing on this Motion on November 17, 2000.

- | | |
|------------|---|
| 8/10/2000 | GMAC filed its response, objecting to the Debtor's First Set of Interrogatories and request for Production of Documents. |
| 8/14/2000 | Deadline for discovery pursuant to original Scheduling Order. |
| 9/1/2000 | Court signed the Amended Scheduling Order, submitted by the Debtor, requiring that discovery be completed by October 14, 2000, and all motions be served, filed and made returnable by October 29 th . |
| 9/15/2000 | Letter from GMAC's attorneys to Debtor's counsel suggesting that Court intervention might be necessary to resolve certain issues with respect to the Debtor's discovery requests. |
| 10/2/2000 | GMAC served its First Set of Interrogatories on the Debtor, requesting a response by the deadline set forth in the Amended Scheduling Order, namely, October 14 th . |
| 10/17/2000 | Debtor filed her motion to compel discovery and to amend the Amended Scheduling Order, returnable November 14 th . |
| 10/29/2000 | Deadline not only for motions to be heard but also for filing and service of pretrial statements, including a list of exhibits and identification of witnesses. |
| 11/13/2000 | Debtor filed Answers and Objections to GMAC's First Set of Interrogatories. |

11/17/2000

Hearing on Debtor's Motion in Binghamton, New York.

Debtor's Motion was filed approximately two months after GMAC filed its response to the Debtor's First Set of Interrogatories and request for Production of Documents and approximately one month after receiving the letter from GMAC's attorneys indicating the need for court intervention. Debtor's counsel acknowledges that although the Motion seeking to compel discovery pursuant to Fed.R.Bankr.P. 7037 and to amend the Amended Scheduling Order was filed and served on October 17, 2000, it was not made returnable prior to the October 29th deadline set out in the Amended Scheduling Order. Debtor's counsel attributes the scheduling error to mistake, carelessness and inadvertence on the part of his office. However, Debtor's counsel does not specifically explain why there was a 1-2 month delay in filing the Motion after he received GMAC's response. In addition, Debtor's counsel's failure to schedule the Motion to be heard until after the October 29th deadline does not appear to be the only source of noncompliance with the terms of the Amended Scheduling Order. Debtor's counsel appears to have ignored the deadline for completing discovery by October 14th, having filed his responses to GMAC's interrogatories on November 13, 2000. While GMAC gave the Debtor only two weeks to furnish it with discovery, the fact remains that the October 14th deadline had already passed when the Debtor's Motion was filed seeking, *inter alia*, to amend the Amended Scheduling Order.

Rule 16 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), made applicable to adversary proceedings pursuant to Fed.R.Bankr.P. 7016, gives the Court authority to sanction a party or a party's attorney who fails to comply with the terms of a scheduling order. *See Martin Family Trust. v. HECO/Nostalgia Enterprises Co.*, 176 F.R.D. 601, 602 (E.D.Calif. 1999).

Violations of a scheduling order “are never technical nor trivial, but involve a ‘matter most critical to the court itself: management of its docket’ and the avoidance of unnecessary delays in the administration of cases.” *Id.*, 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 Bonfiglio*, 231 B.R. 197, 198 (Bankr. S.D.N.Y. 1999) (stating that “[t]he 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.”).

What is particularly disturbing in this case is the fact that the Amended Scheduling Order was drafted by Debtor’s counsel, and it is Debtor’s counsel that has ignored its terms. At a minimum, Debtor’s counsel should have sought to amend the Amended Scheduling Order prior to the expiration of the deadline for discovery.

Fed.R.Civ.P. 16(f) allows for the imposition of sanctions for the unexcused failure to comply with a scheduling order even if that failure is not the result of bad faith. *See Martin Family Trust*, 176 F.R.D. at 604 (citations omitted). Sanctions in this case are particularly appropriate given the fact that it has been necessary to again adjourn the trial, which was scheduled to be held less than two weeks after the Debtor’s October 17th Motion was heard.

As the fault, in this case, lies with the Debtor’s counsel and not the Debtor, the sanctions

should be borne by him personally. *See id.* at 604-5. Accordingly, the Court will require that Debtor's counsel pay the reasonable expenses incurred by GMAC in defending the Debtor's Motion to the extent that it was necessary of GMAC to submit a memorandum of law on the issue of noncompliance with a scheduling order. Furthermore, the Debtor should not be required to pay any attorney's fees associated with this Motion. In addition, the Court, in the interest of expediting the trial, hereby gives notice to Debtor's counsel that the Court will not consider any request to amend the Complaint to seek to enjoin GMAC from sending deficiency letters to other debtors in the Northern District of New York. This will in no way prejudice the Debtor in seeking to recover damages personal to herself for GMAC's alleged violation of the discharge injunction.

Debtor's Request to Compel Discovery

The Court next considers the Debtor's October 17th Motion seeking to amend the Amended Scheduling Order and to compel discovery. With respect to the latter request and in view of the Court's ruling that Debtor's counsel may not amend the Complaint, the Court agrees with GMAC that the Debtor's interrogatories in their current form are in some instances overbroad and made irrelevant by the Court's ruling herein.

In order to establish civil contempt of the Code § 524(a)(2) injunction against enforcement of all discharged debts, the Debtor has the burden to show by clear and convincing evidence that GMAC had knowledge of the Debtor's discharge and willfully violated the Code § 524 injunction by continuing with collection activities against the Debtor after entry of discharge. *See In re Waswick*, 212 B.R. 350, 352 (Bankr. D.N.D. 1997); *In re Arnold*, 206 B.R.

560, 568 (Bankr. N.D.Ala. 1997). As the Debtor also seeks punitive damages, it is also necessary to establish that GMAC's actions demonstrated a clear disregard and disrespect for the bankruptcy laws and that its actions with respect to the Debtor were taken with malevolent intent. *See In re Lafferty*, 229 B.R. 707, 713 (Bankr. N.D.Ohio 1998) (citation omitted); *Arnold*, 206 B.R. at 568; *In re Walker*, 180 B.R. 834, 848-49 (Bankr. W.D.La. 1995) (citations omitted).

Interrogatory No. 1 has been answered by GMAC's attorneys. Interrogatory Nos. 2-3 and 5-9 are not appropriate as they request information that does not involve the Debtor and collection activities involving her. Accordingly, the Court finds that they are not relevant to the Debtor's causes of action. With respect to Interrogatory No. 4, the Debtor certainly is entitled to the name, address, telephone number, title and job description of the individual(s) responsible for producing and forwarding the letter(s) to the Debtor. The Debtor is also entitled to the same information concerning the individual(s) responsible for the creation, implementation and/or enforcement of GMAC's Standard Operation Procedure as it applies to the collection of monies resulting from early termination of a lease agreement with GMAC and the issuance of the letter(s) received by the Debtor.

Interrogatory No. 10 seeks the identity of the individual(s) who provided information to GMAC's attorneys in connection with preparation of GMAC's Answer. GMAC asserts it is not relevant and that the information is protected by the attorney-client and/or work product privilege.

The work product doctrine applies to the disclosure of documents and materials otherwise subject to discovery. *See Breeden v. Sphere Drake Insur. PLC (In re The Bennett Funding Group, Inc.)*, Case No. 96-61376, Adv. Pro. No. 97-70049, slip op. at 14 (Bankr. N.D.N.Y. Nov.

20, 2000). Because the Debtor is only seeking the identity of the individual(s) who assisted with the preparation of the Answer, the work product privilege is not applicable. Nor does the Debtor's request seek disclosure of confidential communications between client and attorney that might otherwise be protected by the attorney-client privilege. In fact, in connection with Interrogatory No. 10, GMAC's attorneys state that "[t]he appropriate method of discovery is to seek the identity of an employee of GMAC familiar with the matters alleged in the [Answer]" *See* Exhibit B attached to GMAC's Objection to the Debtor's Motion, filed November 8, 2000. It would appear that that is exactly what the Debtor is requesting and, therefore, the Court will require GMAC to respond to Interrogatory No. 10.

With respect to the Debtor's request for the production of documents, the second and third requests are no longer appropriate since they relate back to Interrogatory Nos. 2 and 3, which were found to lack relevance to the matter at hand. GMAC is required to respond to the first and the fourth requests with the following caveat. GMAC is required to furnish Debtor's counsel with a copy of GMAC's "Standard Operating Procedure," as well as any documents and intracompany memoranda or letters addressing the establishment, implementation and enforcement of the Standard Operating Procedures as they apply to procedures to be followed by GMAC in collecting monies resulting from the early termination of a vehicle lease agreement.

Based on the foregoing, it is hereby

ORDERED that the Debtor's Motion seeking to amend the Amended Scheduling Order is granted, and the Court shall issue a second amended scheduling order in due course;

ORDERED that GMAC shall fully answer Interrogatory Nos. 4 and 10 and produce the documents requested in the Debtor's first and fourth Request within 30 days of the date of this

Order;

ORDERED that Debtor's counsel is precluded from amending the Complaint to add a cause of action seeking to enjoin GMAC from sending deficiency letters to other debtors in the Northern District of New York;

ORDERED that GMAC, within 20 days of this Order, shall submit an affidavit of reasonable attorneys' fees and expenses incurred in connection with the filing of its memorandum of law addressing the issue of noncompliance with the Amended Scheduling Order; and it is finally

ORDERED that Debtor's counsel shall have 15 days from the receipt of GMAC's affidavit of attorney's fees and expenses to file an objection thereto with the Court; thereafter and within 30 days of the date of an order awarding fees and expenses, Debtor's counsel shall reimburse GMAC for said fees and expenses and provide the Court with proof in affidavit form of said payment.

Dated at Utica, New York

this 5th day of April 2001

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge