

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In the Matter of	:	Case No. 96 - 2948 - CH
	:	
GERALD K. GWINN and	:	Chapter 13
SHERYL A. GWINN,	:	
	:	
Debtors.	:	
	:	

ORDER

On July 25, 1996, Debtors, Gerald K. and Sheryl A. Gwinn, filed a Voluntary Petition for Chapter 13 relief under the U.S. Bankruptcy Code. On June 17-18, 1997, hearing was held on five matters. Debtors were represented by attorney Jerrold Wanek; The United States of America, Internal Revenue Service was represented by attorneys Carol E. Schultze and William C. Purdy; the Chapter 13 Trustee was represented by attorney Elizabeth E. Goodman. At the conclusion of the hearing, the Court took the matters under advisement upon a briefing schedule. The deadlines for filing post-hearing briefs has passed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. §§ 157(b)(2)(A), (B), and (L). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. In 1995 and 1996, Gerald K. and Sheryl A. Gwinn operated Gwinn Trucking, a trucking company for which they were required to file employment tax returns and pay quarterly taxes.

2. In January of 1995, the USA/IRS began levying on the Gwinns' bank accounts and issued a wage levy to Gerald Gwinn's employer.

3. To avoid the USA/IRS wage levy, Gerald withheld his settlement sheets. Settlement sheets are submitted to the trucking company by the driver and are used to calculate and pay the drivers.

4. After the IRS wage levy went into effect, the Gwinns transferred title to two semi trucks to Gerald's brother.

5. On March 29, 1995, the Gwinns filed for protection under Chapter 13 of the Bankruptcy Code. That case, No. 95-891-CH, was dismissed June 14, 1996, for material default, failure to make payments under the terms of the confirmed plan.

6. Less than six weeks later, on July 25, 1996, the Gwinns again filed for protection under Chapter 13 of the Bankruptcy Code. The only debt on Debtors' schedules is an unsecured priority debt to the USA/IRS in the amount of \$72,764.80, which Debtors list as disputed and unliquidated. Debtors show the debt to be for income and employment taxes for various periods between December 1989 and December 1992, inclusive. Debtors scheduled no unsecured non-priority claims.

7. The two semis owned by Debtors, a 1985 and a 1986 International conventional, are not listed on the Debtors' bankruptcy schedules. The transfer is disclosed in the Statement of Financial Affairs, paragraph 10, which requires Debtors list "all other property, other than

property transferred in the ordinary course of the business or financial affairs of the debtors transferred either absolutely or as security within one year immediately preceding the commencement of this case.” Debtors’ retained use and control of the trucks is not disclosed in paragraph 14, which requires a list of “all property owned by another person that the debtors hold or control.”

8. Debtors filed their Chapter 13 plan on August 12, 1996. Timely objections were filed by the Chapter 13 Trustee and the USA/IRS.

9. The USA/IRS filed a proof of claim on September 5, 1996. Debtors filed an objection to the proof of claim, stating they had filed employment and income tax returns for the periods ending June 30, 1995, September 30, 1995, December 31, 1995, March 31, 1996, and September 30, 1996. Their objection contains photocopies of tax returns for those periods; none are dated and only one is signed.

10. In response to the USA/IRS request for proof of those employment tax returns filed and taxes paid in 1995 and 1996, Debtors produced several checks, three of which have been obviously and crudely altered to reflect 1995 dates. Debtors did not supply proof of having filed the required tax returns in 1995 and 1996.

11. Check number 1726, originally dated July 7, 1993, has been altered to reflect an issue date of July 7, 1995. Additionally, four bank routing stamps on this document have been crudely altered to indicate the year 1995 by writing over the ‘3’ in ‘1993’ to create the appearance of a ‘5.’ Two of the stamp alterations are done with black ink over a black stamp, one with black ink over a blue stamp, and one with red ink over a pink bank stamp. Check number 1726, for \$1,000.00, was received and credited to the Gwinns’ business account by the USA/IRS on July

13, 1993. When check number 1726 cleared National Bank & Trust on July 28, 1993, it bore a July 7, 1993 date.

12. Check number 1761, originally dated August 10, 1993, has been altered to reflect an issue date of August 10, 1995. Additionally, four bank routing stamps on this document have been crudely altered by writing over the '3' in '1993' to create the appearance of a '5.' Two of the stamp alterations are done with black ink over black stamps, one with black ink over a blue stamp, and one with red ink over a pink stamp. Check number 1761, for \$1,100.00, was received and credited to the Gwinns' business account by the USA/IRS on August 11, 1993. Check number 1761 cleared National Bank & Trust on August 12, 1993, bearing a date of August 10, 1993.

13. Check number 1769, originally dated August 14, 1993, has been altered to indicate it was issued August 14, 1995. Additionally, three bank routing stamps on the back of this document have been crudely altered by changing the '3' in '1993' to a '5.' All three alterations to the stamps are done with black ink, although one stamp is actually blue. The pink bank routing stamp on the front side of this document is not altered and shows the date "AUG 19 93." Check number 1769, for \$1,000.00, was actually received and credited to the Gwinns' business account by the USA/IRS on August 16, 1993. Check number 1769 cleared National Bank & Trust on August 19, 1993, bearing a date of August 14, 1993.

14. On February 7, 1997, Debtors submitted signed tax returns covering the periods at issue to counsel for the USA/IRS. All of these returns, Exhibit 11, are different than those returns attached to Debtors' objection to the proof of claim, Exhibit A.

15. Debtors then filed a Motion to file an Amended Plan and Amended Plan, which was again objected to by the Chapter 13 Trustee and the USA/IRS.

16. The USA/IRS filed a Motion for Sanctions against Debtors and Debtors' counsel. The motion for sanctions against Debtors' counsel was withdrawn by the USA/IRS on May 2, 1997.

DISCUSSION

Debtors' efforts both pre-petition and post-petition have been targeted at frustrating one creditor, the USA/IRS. Debtors transferred title to their semi's to Gerald's brother. To circumvent the USA/IRS' levy, Gerald withheld the settlement sheets upon which his income is determined and paid. They filed bankruptcy and failed to truthfully disclose their assets. They challenged the USA/IRS' proof of claim without a factual basis. They presented altered checks as evidence of having paid their 1995 tax liabilities. Even after being confronted with the obvious falsity of their documents, Debtors resisted the IRS' good faith efforts to resolve the dispute. Without a factual or legal basis, they engaged in tactics that delayed case administration and expended time and resources of both counsel and the court, culminating in a hearing at which Debtors testified falsely under oath.

1. USA/IRS' Motion to Dismiss Case and Debtors' Objection Thereto

The bad faith filing of a bankruptcy case can be cause for dismissal under the non-exhaustive list at 11 U.S.C. § 1307 (c). See 11 U.S.C. § 102 (3); In re Molitor, 76 F.3d 218, 220-21 (8th Cir. 1996). The totality of the circumstances must be considered in determining whether bad faith is involved. See Molitor, 76 F.3d at 220-21 (citing In re LeMaire, 898 F.2d 1346, 1349 (8th Cir. 1990)(bad faith filing of plan)). Factors to consider include:

- (1) whether the debtor has stated his debts and expenses accurately;

- (2) whether he has made any fraudulent representation to mislead the bankruptcy court; or
- (3) whether he has unfairly manipulated the bankruptcy code.

Id.

Debtors have misstated their assets on their bankruptcy petition and schedules. Debtors own two semi-trucks valued between \$8,000 and \$15,000 apiece which they failed to schedule. Although they did disclose that they had transferred the trucks to a family member, they failed to disclose the equitable interest they retained and their use and control of the trucks. Debtors transferred those assets and filed this Chapter 13 in direct response to collection efforts of the IRS.

In the administration of this case, Debtors have misled the court and their main creditor by knowingly and intentionally providing false documents. Debtors challenged the USA/IRS' proof of claim, alleging they had filed employment tax returns and paid the taxes for the periods ending June 30, 1995, September 30, 1995, December 31, 1995, March 31, 1996, and September 30, 1996. Debtors attached copies of tax returns for these periods to their objection. Each of Debtors' signed tax returns for these periods submitted on February 7, 1997 differs from those attached to their objection in support of their contention that they had filed returns for the periods in question. The record lacks any evidence the required tax returns were filed prior to February 7, 1997.

In addition to the false tax returns provided with Debtors' objection, Debtors provided the USA/IRS with obviously and crudely altered checks as evidence of having paid their tax liabilities in 1995 and 1996. Sheryl Gwinn testified that she did the bookkeeping for Gwinn Trucking and prepared IRS Forms 940 and 941. At her attorney's request, she located checks written to the IRS in 1995 and 1996. She testified that she signed each of the ten checks in evidence. She

testified that she writes only twenty to thirty checks per month. Less than six months after she contends she wrote check number 1769, she was issuing checks in the 2300 series, a gap of almost 600 checks.

Check 1726 was credited to the Gwinns' IRS account on July 13, 1993, as evidenced by the thirteen-digit number stamped at the top of the front side of the check and the corresponding number shown on the IRS' computerized remittance register. Check 1761, although received in the Des Moines IRS office on August 11, 1993, was transmitted to Kansas City for deposit. Check 1769 was credited to the Gwinns' IRS account on August 18, 1993, as evidenced by thirteen-digit number stamped at the top of the front side of the check and the corresponding number shown on the IRS' computerized remittance register. These three checks were paid by the bank in Chariton, Iowa, as evidenced by the Gwinns' bank statements from 1993. Checks numbered 1726, 1761, and 1769 were written in 1993.

Counsel argues that Debtors did nothing more after it was determined that the three checks in question had been applied to the Debtors' tax liability several years earlier. To the contrary, Debtors maintained their insupportable legal stand in opposition to the USA/IRS' filed proof of claim to the point of giving false testimony under oath. Even after their altered documents had been exposed as such, Sheryl testified to having written those checks in 1995. Gerald, at the height of his evasive testimony, would not acknowledge the obvious alterations made to the checks, denying that he could distinguish between the colors black, blue, and purple.

Debtors have abused the purposes of the Bankruptcy Code. The Code provides relief to the poor but unfortunate debtor. These are not poor but unfortunate debtors. Their actions pre-petition and while in bankruptcy have been aimed at frustrating and hindering the USA/IRS efforts to determine and collect tax liabilities. The USA/IRS is Debtors' main creditor; in fact, the

USA/IRS is Debtors' only scheduled creditor. Gerald withheld his trucking settlement sheets so that his earned income could be used in a specific way, avoiding the USA/IRS collection efforts. Debtors challenged the IRS' proof of claim without basis in fact or law. When faced with requests for proof of returns being filed and payments being made, Debtors produced altered checks and represented them as 1995 payments, knowing that to be false. In court, Sheryl falsely testified that the three altered checks were sent to the IRS in 1995.

Debtors filed this Chapter 13 in bad faith. The best interests of creditors and the bankruptcy estate are served by dismissal of this Chapter 13 case. See 11 U.S.C. § 1307 (c).

2. USA/IRS' Motion for Sanctions Against Debtor and Counsel and Debtors' Objection Thereto

The motion for sanctions against Debtors' counsel was withdrawn; the motion for sanctions against Debtors remains. Efforts by dishonest debtors that waste resources of the court and counsel and hamper the efficacy of the bankruptcy system cannot be condoned. The bankruptcy court's authority to impose sanctions for actions that violate Fed.R.Bankr.P. 9011 is well established. See Jensen v. Federal Land Bank of Omaha, 882 F.2d 340 (8th Cir. 1989). Rule 9011 in pertinent part provides:

(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 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.

(c) SANCTIONS. 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 subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. 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 that this 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. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

...

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

...

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Fed.R.Bankr.P. 9011.

The amendments to Rule 9011, which took effect December 1, 1997, are applicable to this proceeding which was then pending, "inso far as just and practicable." See Supreme Court of the United States Order April 11, 1997. Because this matter came before the Court prior to the

effective date of the amendments, the specific procedural requirements of 9011 (c)(1) are not met in this case.

Rule 9011 (b)(1) is violated when a document is presented to the court for an “improper purpose,” including purposes of harassment, intimidation, to cause delays, or to increase litigation costs. See Fed.R.Bankr.P. 9011 (b)(1); In re General Homes Corp., 181 B.R. 870 (Bankr. S.D.Tex. 1994); In re Narowetz Mechanical Contractors, Inc., 99 B.R. 850 (N.D.Ill. 1989) aff’d 898 F.2d 1306 (7th Cir. 1990). The document’s purpose can be objectively evaluated; “[t]hat is, if the filed document does, in fact, lead to needless delay or cost or is in some other way “improper,” it violates Rule 9011 regardless of the attorney’s subjective belief in the need to file the document.” In re Slaughter, 191 B.R. 135, 141 (Bankr. W.D.Wis. 1995).

Debtors filed both the Chapter 13 bankruptcy petition and the objection to the proof of claim for improper purposes. As discussed above, the petition was filed in bad faith and caused needless delays in the USA/IRS’ efforts to lawfully collect taxes due and owing from Debtors.

Filing the unsupported objection to the proof of claim set in motion a series of good faith efforts by the USA/IRS to resolve the disputed amount of their claim. Resolution of this dispute, hinging on falsified documents, could and should have been effected within a short time of the USA/IRS requesting proof of the tax returns being filed and challenging the validity of the checks. Debtors’ filing their objection to the proof of claim and pursuing it through to this hearing led to needless delays and litigation costs. Because they failed to withdraw or correct the challenged papers, Debtors fail to qualify for the safe-harbor provision of Rule 9011 (c)(1)(A).

Rule 9011 (b)(3) is violated when the representation to the court is without factual basis. Debtors’ objection to the USA/IRS’ proof of claim, filed on September 24, 1996, was not well-grounded in fact. Attached to the objection, purportedly supporting their position, are copies of

tax returns which were never filed with the USA/IRS. Debtors knew their objection was based on falsified documents. The altered checks and the photocopied tax returns were supplied by Debtors to their attorney.

Having found violations of Rule 9011 (b)(1) and (b)(3) for which Debtors are responsible, this Court may impose appropriate sanctions. See Fed.R.Bankr.P. 9011 (c)(2). Based on the egregious conduct of Debtors in this case, the Court finds that monetary sanctions are warranted to deter repetition of this or comparable conduct.

The Court reserves jurisdiction for the limited purpose of determining the amount of monetary sanctions. The USA/IRS shall submit an itemization of reasonable expenses and attorney fees incurred because of documents filed in violation of Rule 9011.

3. Debtors' Objection to IRS Proof of Claim and USA/IRS' Objection Thereto

4. Confirmation of Plan and USA/IRS' and Trustee's Objections Thereto

5. Debtors' Motion to File an Amended Plan and USA/IRS' and Trustee's Objections Thereto

Because the Court has determined that this case should be dismissed pursuant to 11 U.S.C. § 1307 (c), issues regarding proofs of claim and plan confirmation and amendment are denied as moot.

ORDER

IT IS THEREFORE ORDERED that the USA/IRS' Motion to Dismiss Case is GRANTED; this case is DISMISSED pursuant to 11 U.S.C. § 1307 (c);

IT IS FURTHER ORDERED that USA/IRS' Motion for Sanctions Against Debtors is GRANTED; the record shall remain open and this Court retains jurisdiction for the purpose of determining the amount of monetary sanctions to be assessed;

IT IS FURTHER ORDERED that Debtors' Objection to IRS Proof of Claim and USA/IRS' Objection Thereto are OVERRULED AND DENIED as moot;

IT IS FURTHER ORDERED that USA/IRS' and Trustee's Objections to Debtors' Chapter 13 Plan are OVERRULED AND DENIED as moot; the plan is not confirmed;

IT IS FURTHER ORDERED that Debtors' Motion to File an Amended Plan and the USA/IRS' and Trustee's Objections Thereto are OVERRULED AND DENIED as moot.

IT IS FURTHER ORDERED that USA/IRS file a statement of attorney fees and costs on or before January 20, 1998.

Dated this _____ day of December 1997.

RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT