DOING BUSINESS IN FLORIDA, "DON'T BE A JERK: IT CAN COST YOU BIG $"

May 10, 2016

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For attorneys, the phrase “Don’t be a jerk” starts any class on professionalism or ethics. Not taking another attorney’s phone calls and failing to return those calls certainly qualifies as “being a jerk”. It is frankly, quite rude. But while being rude can be aggravating to opposing counsel, is it sanctionable? A Puerto Rican lawyer and her firm found out to the tune of $14,270.60 that it is.

In Castellanos Law Group, LLC v. FDIC (545 B.R. 401 B.A.P. 1st Cir. 2016), the Bankruptcy Appellate Panel of the First Circuit upheld a bankruptcy court’s imposition of sanctions based primarily on the attorney’s total failure to respond to opposing counsels’ repeated attempts to resolve an issue prior to a scheduled hearing.

In Castellanos, approximately 11 months following the conversion of the bankruptcy case of MJS Las Croabas Properties, Inc. (the “Debtor”) from Chapter 11 to 7, attorney Quiñones-Rodriguez of the Castellanos law firm representing the Homeowners Association of the Development (the “HOA”) filed a motion for relief from the automatic stay in the Debtors’ Chapter 7 case to present a complaint on behalf of the HOA before the Department of Consumer Affairs against the Debtor for construction defects relating to the Development.

Following the filing of the motion, Manuel Fernández-Bared (the local counsel for the FDIC (the receiver for the mortgagee of the HOA)) telephoned Quiñones-Rodriguez’s office repeatedly in an effort to resolve the motion prior to the hearing. Each time Fernández-Bared was advised that attorney Quiñones-Rodriguez was not available to take his call; each time, Fernández-Bared left a message asking Quiñones-Rodriguez to call him. The Chapter 7 trustee for the Debtor and a court-appointed receiver for the property also called Quiñones-Rodriguez several times. All calls went unreturned and unacknowledged.

Receiving absolutely no responses to any of the multiple calls to Quiñones-Rodriguez, the FDIC, as well as the Chapter 7 trustee and the receiver, filed motions to extend the their time to file responses to the HOA’s motion and to confer with Quiñones-Rodriguez in an effort to resolve the dispute prior to the hearing. The motions went unopposed and were granted by the bankruptcy court. The parties continued their attempts to contact Quiñones-Rodriguez through telephone calls and emails with the same result. Hearing nothing, the FDIC filed its 12 page response to the motion on its deadline, 5 days before the scheduled hearing. In its response the FDIC pointed out what it viewed as fatal flaws in the motion and recounted the futile efforts at contacting Quiñones-Rodriguez.

The day before the hearing at 4:51 p.m., while the FDIC’s attorney was on an airplane from Dallas, Texas to Puerto Rico to attend the hearing, Quiñones-Rodriguez without explanation filed a motion to withdraw the stay motion and to “vacate” the hearing. The FDIC responded to the withdrawal motion by requesting that the bankruptcy court sanction HOA, the Castellano firm and Quiñones-Rodriguez pursuant to the inherent authority. The response also urged the court to proceed with the previously scheduled hearing to consider the sanctions request. At the hearing, Quiñones-Rodriguez asserted that the firm was in the process of moving so that their communications were interrupted. The court gave the Castellanos firm and Quiñones-Rodriguez

additional time to respond to the sanctions request but indicated that it was inclined to grant it.

After the initial hearing, the Chapter 7 trustee filed his motion joining the FDIC's motion, asserting that the conduct of the creditor, the Castellano firm and Quiñones-Rodriguez demonstrated bad faith and were subject to sanctions under Bankruptcy Rule 9011 (a federal rule that imposes sanctions on attorneys for wrongful conduct), 28 U.S.C. § 1927 (a federal statute that imposes liability on an attorney for causing excessive costs in a case), and the court's inherent power. In subsequent filings the FDIC adopted the Trustee's theories for sanctions.

After various pleadings and orders, and without further hearing, the bankruptcy court entered a 23 page order in which it analyzed the parties conduct under each of the sources for imposing sanctions. The court found that the actions of Quiñones-Rodriguez justified sanctions under all three theories. In so finding, the court also ruled that Quiñones-Rodriguez and the Castellanos firm were jointly and severally liable for payment of costs, fees and expenses of the FDIC ($11,603.10) and the Trustee ($2,667.50), for a total of $14,270.60. The Castellanos firm appealed to the Bankruptcy Appeal Panel of the First Circuit (the "BAP").

In affirming the bankruptcy court's imposition of sanctions, the BAP focused its analysis on 28 U.S.C. § 1927. It did so based on the principle the a court should resort to its inherent power to sanction as identified by the Supreme Court in Chambers v. NASCO, Inc. only when there is not a rule or statutory basis for the sanctions. The court also noted that Rule 9011 of the Federal Rules of Bankruptcy Procedure only applies to papers filed with the court and not to litigation conduct in general.

Section 1927 provides:

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

The BAP first examined the issue whether the law firm could be sanctioned for the actions of one of its attorneys. Noting a circuit split authority on the issue (2nd, 3rd, 8th, 11th and D.C. Circuits say "yes"; 6th, 7th, and 9th Circuits say "no") the BAP ruled that § 1927 does apply to law firms. In so holding the court cited a district court opinion which reasoned that the inclusion of the term "personally" in § 1927 is not intended to limit the sanctions to the individual attorney, but rather to make it clear that the target of the sanction is to be the attorney(s) instead of an irresponsible client.

Turning to the merits of the sanctions, the BAP explained the type of conduct to which § 1927 applies (at least in the First Circuit which covers Puerto Rico where the chapter 7 bankruptcy case was pending). It points out that the phrase "multiplies the proceedings" means the conduct must affect already initiated proceedings. Conduct is "vexatious" if it is harassing or annoying, regardless of intent. It does not apply to "garden variety carelessness or even incompetence" but requires that the "attorney's actions evince a studied disregard need for an orderly judicial process, or add up to a reckless breach of the lawyers obligations as an officer of the court". It does not require a finding of bad faith, but is intended "to deter dilatory litigation practices and punish aggressive tactics that far exceed zealous advocacy."

In applying these standards to Quiñones-Rodriguez's conduct, the court found that "the record firmly establishes that the sanctioned conduct, especially Quiñones-Rodriguez's refusal to respond to numerous telephone calls and emails over the course of several weeks, and her eleventh-hour filing of the Withdrawal Motion without warning all contributed to the need for the filing of opposition papers and to conduct the September 2014 hearing, which could have been obviated."

There are several lessons to be learned from this case. If the litigation tactics of your opponent cross the line from zealous to abusive, you have several avenues for redress. If it involves the filing of a frivolous pleading, of course, Rule 9011 is available. If your opponent's conduct is sufficiently outrageous to support a finding of bad faith, but has not necessarily had the effect of multiplying the proceedings, the court's inherent power to

sanction for any abuse of the judicial process may be invoked.

When, however, your opponent is just being a jerk, and that has the effect of delaying and multiplying the proceedings, § 1927 is readily available without the procedural requirements of Rule 9011 nor the standard of proof required for the court's inherent powers. Trial courts are "accorded wide latitude in assessing when an attorney's conduct crosses the line between what is acceptable if tedious and what is unreasonable and vexatious." If you act like a jerk, the court will be more than likely to find the latter and it will cost you. It certainly did Ms. Quiñones-Rodriguez and her law firm.

For more information on this topic, please contact the author, Lew Killian, on the firm's Business Reorganization Team.

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