

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY

IN RE: Kevin W. Kulek

Chapter 7 Petition
16-21030-dob
Honorable Daniel Opperman

RANDALL L. FRANK, TRUSTEE,
Plaintiff,

Adversary Case Number
16-2073
Honorable Daniel Opperman

V

AMANDA LYNN KULEK,
ALSO KNOWN AS
AMANDA L. KULEK AND
AMANDA KULEK,
Defendant.

Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
Keith M. Nathanson, PLLC
2745 Pontiac Lake Road
Waterford, MI 48328
(248) 436-4833
kn@nathanson-law.com

Jaimie D. Knickerbocker, P77491
Attorney for Defendant
120 West Exchange Street, Suite 104
Owosso, MI 48867-2834
(989) 472-4242
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F.R.BANK.P. 9011 MOTION FOR SANCTIONS

NOW COMES Plaintiff, Randall L. Frank, Trustee, by and through his attorneys, Keith M. Nathanson, PLLC, and for motion for sanctions pursuant to B.R. 9011, states as follows:

1. Plaintiff initiated the instant adversary complaint against Defendant on September 16, 2016.

2. Defendant filed her answer to the complaint on October 14, 2016. See Exhibit "A" attached.

3. Defendant retained Counsel shortly after the answer was filed.

4. The answer has not been amended, withdrawn or otherwise changed.

5. The time for amendments pursuant to the parties' Rule 26(f) Conference and subsequent scheduling order of this Court, issued on November 18, 2016 has passed.

6. Defendant's deposition was taken in the instant matter on January 30, 2017

7. Defendant in her answer, listed twenty-one affirmative Defenses.

8. Defendant in her deposition testified that her lawyer, John Emaus, who is not her Counsel in this action, assisted her in preparing the answer.

9. Defendant testified that:

a. She had no idea what the first affirmative defense was nor any idea what F.R.Civ.P. 12(b)(6) was (Deposition, page 29-30);

b. She had no facts to support affirmative defense number 1 (Deposition, page 30);

c. She had no idea what the 'business judgment rule' was (Affirmative Defense number 2) (Deposition, page 31-32);

d. She had no facts to support affirmative defense number two (Deposition, page 32)

e. She had no idea what the 'doctrine of setoff or doctrine of recoupment' were (Affirmative Defense number 3, deposition, page 32);

f. She had no facts to support affirmative defense number three (Deposition, page 32);

g. She had no idea what 'reasonably equivalent value' was (Affirmative Defense number 4) (Deposition, page 32-33);

h. She had no facts to support affirmative defense number four (Deposition, page 33);

i. She had no idea what Affirmative Defense number 5, entitled "No Damage" meant (Deposition, page 33-34);

j. She had no facts to support Affirmative Defense number 5 (Deposition, page 34);

k. She had no idea what Affirmative Defense number 6, entitled "Duplicative Claims" meant (Deposition, page 34);

l. Her "facts" to support affirmative defense number six are "Just that I am not my husband or my husband's business" (Deposition, page 34);

m. She had no idea what Affirmative Defense number 7, entitled "Waiver" was (Deposition, page 34-35);

n. She has no facts to support that affirmative defense (Deposition, page 35);

o. She had no idea what Affirmative Defense number 8, entitled “Estoppel” is (Deposition, page 35);

p. Her “facts” to support affirmative defense number eight are “I’m not my husband or his business, which is what I was being sued for” (Deposition, page 35);

q. She has no idea what Affirmative Defense number 9, entitled “Laches” is (Deposition, page 35);

r. Her “facts” to support affirmative defense number 9 are the same as above are “Just that I am not my husband or my husband’s business” (Deposition, page 35);

s. In response to questioning about affirmative defense number 11, “Exempt Property”, Defendant stated her facts were because [the house] “is mine and not my husband”, but could not advise what law she relied upon (Deposition, page 36);

t. In response to questioning about affirmative defense number 12, “lack of property interest”, Defendant stated that “Me and my husband are two separate people. Other than that, I have no idea”. (Deposition, page 36);

u. In response to questioning about affirmative defense number 13, “limitation period”, Defendant did not know what §548 of the bankruptcy code was and had no facts to support the affirmative defense (Deposition, page 36-37);

v. Defendant could not even provide the appropriate “statute of limitation” (Deposition, page 37);

w. In response to questioning about affirmative defense number 14, “standing”, Defendant stated “Probably because I have no clue. I have no idea” (Deposition, page 37), and when asked what facts Defendant had to support the affirmative defense, Defendant answered “no idea” (Deposition, page 37-38);

x. In response to questioning about affirmative defense number 15, “bona fide purchaser”, Defendant stated she did not know what a bona fide purchaser was (Deposition, page 38), and that it was “in there” because “It’s probably in there because I paid for my house” (Deposition, page 38);

y. In response to questioning about affirmative defense number 16, “good faith rule”, Defendant had “no idea” what the affirmative defense means (Deposition, page 39); and had no facts in support of it (Deposition, page 39);

z. In response to questioning about affirmative defense 17, “improper party”, Defendant responded “I shouldn’t be sued because of my husband” (Deposition, page 39);

aa. In response to questioning about affirmative defense 18, “jurisdiction”, Defendant stated “... I don’t know what any of the affirmative actions [sic] are” (Deposition, page 40);

bb. In response to questioning about affirmative defense number 19, “reasonably equivalent value”, Defendant when asked what that meant,

answered “No idea” and that she had no facts to support the affirmative defense (Deposition, page 40);

cc. In response to questioning about affirmative defense number 20, “state law preemption”, Defendant did not know what MCL 557.1 was and her facts in support were because “I don’t know” (Deposition, page 40-41);

dd. In response to questioning about affirmative defense number 21, “tenancy in the entireties”, Defendant did not know what the “UFTA” was [as cited in her affirmative defense] and her facts were “I reside there. I live there. I pay the bills. I don’t know” (Deposition page 41);

10. Defendant has responded to the majority of the adversary complaint filed in this action failing to admit or deny allegations based upon the premise the allegation is a “legal conclusion” or denying allegations as being legal conclusions;

11. Defendant does not know what a legal conclusion is.

12. Defendant has violated F.R.Bank.P. 9011 by signing the answer and representing that the defenses and other legal contentions are warranted by existing law and that the allegations and factual contentions have evidentiary support.

13. Defendant has further filed answers labeled as “denials” which are not warranted on the evidence.

14. Due to the frivolous answer to the complaint and frivolous affirmative defenses for which Defendant has testified she has no facts nor any knowledge of the law, statutes or other contentions stated, Plaintiff through his Counsel has had to spend significant time in discovery.

15. Defendant and her Counsel have had significant time to withdraw the pleadings referenced, but have failed to do so.

16. This Honorable Court should impose, pursuant to F.R.Bank.P. 9011, sanctions for violations of (b)(2); (b)(3); and (b)(4) against Defendant and her Counsel.

17. This motion was served upon Defendant's Counsel (and upon Defendant through her Counsel, who advised she was authorized to accept service on behalf of Defendant) on February 28, 2017, which is more than twenty-one days prior to the filing of this motion, and Defendant has not withdrawn the pleadings.

WHEREFORE Plaintiff moves this Honorable Court to enter an order pursuant to F.R.Bank.P. 9011 that:

a. Finds Defendant and her Counsel in violation of F.R. Bank.P. 9011;

b. Grants costs and attorney fees to Plaintiff's Counsel of \$2,500.00 to be paid forthwith;

c. Strike Defendant's answer and affirmative defenses as nonmonetary directive;

d. Grant such other relief as may be equitable.

Respectfully submitted,

/s/ Keith M. Nathanson
Keith M. Nathanson, P41633
Special Litigation Counsel for the Chapter 7 Trustee
Keith M. Nathanson, PLLC
2745 Pontiac Lake Road
Waterford, MI 48328
(248) 436-4833

kn@nathanson-law.com
Dated: March 23, 2017

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PROPOSED F.R.BANK.P. 9011 ORDER FOR SANCTIONS

This matter having come before this Honorable Court upon Motion of Trustee, and the Court being first duly advised in the premises:

IT IS HEREBY ORDERED THAT

- a. The Court finds Defendant and her Counsel in violation of F.R. Bank.P. 9011;
- b. The Court grants costs and attorney fees to Trustee's Counsel of \$2,500.00 to be paid forthwith by Defendant and her Counsel, jointly;
- c. Defendant's answer and affirmative defenses are hereby stricken as a nonmonetary directive;

United States Bankruptcy Court Judge

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EASTERN DISTRICT OF MICHIGAN
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_____/

NOTICE OF F.R.BANK.P. 9011 MOTION FOR SANCTIONS

Plaintiff, Randall L. Frank, Trustee has filed papers with the court to award
F.R.Bank.P. 9011 Sanctions against Defendant.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court grant F.R.Bank.P. 9011 Sanctions, or if you want the court to consider your views on the motion, within 18 days, you or your attorney must:

1. File with the court a written response or an answer, explaining your position at:¹

United States Bankruptcy Court
111 First Street, Bay City, MI 48708

If you mail your response to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above. All attorneys are required to file pleadings electronically.

You must also send a copy to:

Trustee Keith M. Nathanson, Special Litigation Counsel to Randall L. Frank,
2745 Pontiac Lake Road, Waterford, MI 48328

2. If a response or answer is timely filed and served, the clerk will schedule a hearing on the motion and you will be served with a notice of the date, time and location of the hearing.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: 3/23/2017

Signature /s/ Keith M. Nathanson, P41633

Keith M. Nathanson, P41633
2745 Pontiac Lake Road
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¹ Response or answer must comply with F. R. Civ. P. 8(b), (c) and (e)

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F.R.BANK.P. 9011 BRIEF IN SUPPORT OF MOTION FOR SANCTIONS

There are several statutes and rules in place that permit the imposition of sanctions for certain well-defined violations. See Fed. R. Civ. P. 11(c), 16(f), 26(g)(3), 56(h); 18 U.S.C. § 401; 28 U.S.C. § 1927; see also 8 U.S.C. § 1229a(b)(6) (immigration proceedings); 37 C.F.R. § 2.120(g) (trademark proceedings); Fed. R. App. P. 38 (appellate proceedings); Fed. R. Bankr. P. 9011 (bankruptcy proceedings).

It would undermine that regulatory scheme “to invoke that power to ease the burden of satisfying existing Civil Rules — to punish practices exempted by a Rule or that fall short of meeting a Rule’s standard for sanctionable conduct.” *Aleo*, 681 F.3d at 307 (Sutton, J., concurring). On the other hand, those rules and statutes do not cover the gamut of potentially offensive conduct. Those “mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.” *Chambers*, 501 U.S. at 46. As the Court explained, many of the rules apply only in well-defined situations, whereas “the inherent power extends to a full range of litigation abuses.” *Ibid*.

And although the inherent power may be exercised to redress bad faith conduct, the rules reach misconduct that might be merely unreasonable. *Id.* at 46-47. By recognizing that the conduct that triggers the court’s inherent power to remediate or punish must include an element of bad faith. See *Chambers*, 501 U.S. at 46-47 (explaining that “the inherent power must continue to exist to fill in the interstices,” but acknowledging that certain “narrow exceptions” to fee-shifting rules “effectively limit a court’s inherent power to impose attorney’s fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience” (emphasis added)).

That limitation is consistent with Sixth Circuit precedent. See, e.g., Metz v. Unizan Bank, 655 F.3d 485, 489 (6th Cir. 2011). To use inherent power as the authority for imposing monetary or other sanctions against an attorney for his or her filings, a court must find that these three elements are present: “[1] that ‘the claims advanced were meritless, [2] that counsel knew or should have known this, and [3] that the motive for filing the suit was for an improper purpose such as harassment.’” Ibid. (quoting Big Yank Corp. v. Liberty Mut. Fire Ins. Co., 125 F.3d 308, 313 (6th Cir. 1997)).

In the instant matter, Defendant has filed affirmative defenses which she does not even know what they mean. Defendant retained Counsel and despite having ample opportunity to withdraw or correct the answer and affirmative defenses, Defendant and her Counsel have done nothing.

Defendant’s testimony is telling. She had a lawyer prepare an answer, and is unaware of what it says or contains or any factual basis for the answer and affirmative defenses, and is completely unaware of any law cited. It should be noted this case differs as Defendant filed this answer and the accompanying affirmative defenses in pro per. Nothing has been corrected or withdrawn. Counsel for Defendant agreed to a 26(f) report and a subsequent scheduling order was entered allowing Defendant an opportunity to amend. Nothing was done.

The answer and the affirmative defenses are frivolous. Plaintiff has filed an accompanying motion to strike the affirmative defenses and will be filing a F.R.Bank.P. Rule 9056 motion for summary judgment to dispose of this matter. This Court should not tolerate such abuses, especially given the lengthy opportunity Defendant and her Counsel have had to correct the deficiencies.

RELIEF REQUESTED

Plaintiff moves this Honorable Court to enter an order pursuant to F.R.Bank.P. 9011 that:

- a. Find Defendant and her Counsel in violation of F.R. Bank.P. 9011;
- b. Grants costs and attorney fees to Plaintiff's Counsel of \$2,500.00 to be paid forthwith;
- c. Strike Defendant's answer and affirmative defenses as a nonmonetary directive;
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Respectfully submitted,

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CERTIFICATE OF SERVICE

Keith M. Nathanson, being first duly sworn, states that on March 23, 2017, he did serve by ECF/PACER notice/filing:

- Motion for 9011 Sanctions, Brief in Support of Motion, Notice of Motion & Opportunity to Object, Certificate of Service, Proposed Order, Affidavit of Trustee Counsel

Upon Jaimie D. Knickerbocker, at the address listed in the ECF/PACER notification system..

Respectfully submitted,

/s/ Keith M. Nathanson
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AFFIDAVT OF COUNSEL FOR TRUSTEE

Keith M. Nathanson, being first duly sworn states that:

1. I am counsel for Trustee in the instant adversary proceeding.
2. The quotes listed in the motion and brief were taken directly from the deposition transcript of Defendant, Amanda Kulek, and accurately represent her deposition testimony as transcribed by the Court Reporter.

Further the Affiant Sayeth Not.

/s/ Keith M. Nathanson
Keith M. Nathanson

Subscribed and sworn to before me on March 23, 2017

/s/ Monica Dinko
Monica Dinko, Notary Public, Oakland County, Michigan
My Commission Expires: 10/19/19