



Dated: May 15, 2020
The following is ORDERED:

Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re
QUEENA CHANDRA SANDERS,
Debtor.

Case No. 17-28379-L
Chapter 13

Queena Sanders,
Plaintiff,
v.
Wells Fargo Dealer Services,
Defendant.

Adv. Proc. No. 19-00195

**ORDER ON DEFENDANT'S
MOTION TO DISMISS ADVERSARY PROCEEDING**

BEFORE THE COURT is the "Motion by Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services, to Dismiss Adversary Proceeding." [Dkt. No. 10]. The Motion seeks dismissal of the Complaint for Turnover with prejudice and reimbursement of fees and expenses incurred in responding to the Complaint and prosecuting the Motion. The Motion was filed on March 16, 2020. On March 19, 2020, the Court entered its Order and Notice of Defendant's Motion to

Dismiss Adversary Proceeding giving the Debtor/Plaintiff until April 15, 2020, to file a response to the Motion. The Debtor/Plaintiff has filed no Response to the Motion to Dismiss and neither party has requested oral argument.

JURISDICTION AND AUTHORITY

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 8-30 (W.D. Tenn. July 10, 1984). Matters concerning orders to turn over property of the estate and administration of the estate are core proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(A) and (E). Accordingly, this court has authority to hear and determine this Adversary Proceeding and Motion to Dismiss subject to appellate review under section 158 of title 28. 28 U.S.C. § 157(b)(1).

ADVERSARY PROCEEDING SUMMARY

The Complaint for Turnover was filed September 4, 2019, against Wells Fargo Dealer Services (“Wells Fargo” or “Defendant”), holder of an allowed prepetition claim secured by the Debtor’s 2012 Nissan Altima. Payment of the Defendant’s \$17,774.12 claim was provided for in the Debtor’s plan which was confirmed December 21, 2017. [Bankr. Dkt. No. 26]. According to the Complaint, the Defendant’s secured claim was paid in full with insurance proceeds after the Debtor/Plaintiff was involved in an accident and the 2012 Nissan Altima was deemed a total loss. The relief sought in the Complaint was “a judgment ordering the Defendant to turn over the funds received from the Bankruptcy Trustee after the secured debt on the 2012 Nissan Altima was paid

in full by MetLife and Safe Guard Products (Gap Insurer).” Dkt. No. 1, p. 1. The Defendant filed its Answer on September 10, 2019. [Dkt. No. 4]. In its Answer, the Defendant admitted receipt of insurance proceeds from MetLife from the Debtor’s March 2019 accident, but stated it was without sufficient information to admit or deny the payment from Safe Guard Products or whether the insurance payments had paid its claim in full. The Answer further stated that it was investigating the matter and reserved the right to supplement the pleading. The Defendant denied that any funds received after the payoff date should be returned to the Debtor because: (1) if its contract balance was not satisfied, turnover of the funds would prematurely strip its security interest in the proceeds in violation of the lien retention provisions of Code section 1325(a) and the confirmed plan; and (2) if the case was later dismissed, it would be deprived of its revesting rights under Code section 349.

On September 18, 2019, the Court issued its Preliminary Pretrial and Scheduling Order. [Dkt. No. 5]. The Order directs counsel for each party to, by November 1, 2019, make Federal Rule of Civil Procedure 26(a) disclosures, confer with each other, prepare and file a joint or individual pretrial statement that contains specified information about the proceeding, and attend a Scheduling Conference before the court on November 14, 2019. The final paragraph in the Preliminary Pretrial Order states, “Failure to comply with the requirements of this order may result in dismissal of the complaint, default, assessment of costs including attorneys’ fees, or other penalties.” Dkt. No. 5, p. 2.

Counsel for the Defendant filed an individual Pretrial Statement on November 1, 2019. The Pretrial Statement includes the following provision: “Counsel for the Defendant emailed the Plaintiff’s Counsel multiples times seeking to confer regarding the adversary proceeding and pre-trial statement; however, Counsel did not any receive response from opposing counsel or his

portion of this statement.” Dkt. No. 7, p. 2.¹ Plaintiff’s counsel did not file a Pretrial Statement before the Scheduling Conference on November 14, 2019. Counsel for both parties attended the Scheduling Conference on November 14, 2019, at which time, according to the Motion to Dismiss, the Court ordered Plaintiff’s counsel to file a Pretrial Statement and continued the Scheduling Conference to December 19, 2019. Further according to the Motion to Dismiss, counsel for Wells Fargo attended the Scheduling Conference on December 19, 2019. Counsel for the Plaintiff had still not filed his Pretrial Statement and thus, the Scheduling Conference was continued to January 9, 2020. However, counsel for Wells Fargo later reviewed the minutes of the hearing on Pacer and it seems counsel for the Plaintiff announced that this matter was “resolved” and stated that an order to this effect would be filed with the court. Wells Fargo had neither reached an agreement to resolve nor been able to reach counsel for the Plaintiff at all to discuss his pending Complaint. On January 8, 2020, Counsel for the Defendant sent a letter to the court and requested that the Scheduling Conference be reset on the court’s next available 10:00 a.m. docket.² Dkt. No. 10.

Notwithstanding the letter of January 8, 2020, requesting that the Scheduling Conference be reset, Defendant’s counsel attended the Scheduling Conference previously set on January 9, 2020. At that time, Plaintiff’s counsel announced that he would “withdraw the Complaint.”³ Dkt.

¹ In its Statement of Uncontested or Admitted Facts, Defendant’s Pretrial Statement also provides that if interest payments made by the Chapter 13 Trustee (\$1,636.56), after Defendant charged off the account during the case which caused the accrual of interest to cease under the Defendant’s system of record, are included in the calculation of payments applied to its prepetition claim, the Defendant would have been overpaid, i.e., received \$18,405.78 on its allowed claim of \$17,774.12, which Defendant is willing to return to the Chapter 13 Trustee if ordered to do so by the court.

² The Defendant’s letter was docketed in the Chapter 13 case, 17-28379-L, as Dkt. No. 89.

³ A complaint may not be “withdrawn” but is subject to voluntary dismissal by “filing a stipulation of dismissal signed by all parties who have appeared” or by court order “on terms that the court considers proper.” Fed. R. Bankr. P. 7041(a)(1) and (2).

No. 10. meanwhile, in response to Defendant's counsel's letter, the court entered an Amended Preliminary Pretrial Order on January 13, 2020, directing the filing of a Pretrial Statement, if not previously filed, by January 31, 2020, and setting a Scheduling Conference on February 6, 2020. The Amended Pretrial Order contains the same notice of potential penalties for failure to comply with the order as the original Preliminary Pretrial Order. Dkt. No. 8. Counsel for the Plaintiff did not confer with counsel for the Defendant or file a Pretrial Statement as ordered.

The disposition on the Chapter 13 docket call calendar for February 6, 2020, shows the matter "withdrawn." Since that time, according to the Motion to Dismiss, Defendant's counsel has "repeatedly requested Plaintiff's counsel to submit an order withdrawing the Complaint," but he has not done so. Neither has he filed a Pretrial Statement.

DISCUSSION

The relief sought by the Defendant is dismissal of the Complaint with prejudice and reimbursement of the fees and expenses it incurred in responding to the Complaint and prosecuting the Motion to Dismiss. The court has wide discretion under the Federal Rules of Bankruptcy Procedure to dismiss an adversary proceeding for failure to prosecute that proceeding or disobedience of a court order; statutory authority to take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process; and, like other federal courts, inherent authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases by imposing sanctions. See, Fed. R. Bankr. P. 7041(b); 11 U.S.C. § 105(a); *Rosellini v. U.S. Bankr. Court (In re Sanchez)*, 941 F.3d 625, 628 (2nd Cir. 2019), citing, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 2132 (1991). See also, *Law v. Siegel*, 571 U.S. 415, 420-21; 134 S. Ct. 1188, 1194 (2014); *Charbono v. Sumski*

(*In re Charbono*), 790 F.3d 80, 86-87 (1st Cir. 2015); *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d. 472, 477 (6th Cir. 1996).

The Motion to Dismiss

Federal Rule of Civil Procedure 41, made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7041, governs the voluntary and involuntary dismissal of adversary proceedings. Rule 7041(b) provides:

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 – operates as an adjudication on the merits.

“The Rule is a safeguard against delay in litigation and harassment of a defendant.” *In re Acosta*, 497 B.R. 25, 33 (Bankr. D. P.R. 2013). Although a court may consider lesser sanctions, “[d]ismissal for lack of prosecution is appropriate without consideration of lesser sanctions where the Plaintiff has engaged in ‘extreme conduct’ such as knowing disobedience of a court order.” *Id.* See also, *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-32, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (Federal courts, even *sua sponte*, may dismiss a case for any of the reasons prescribed in Federal Rules 41(b).). Dismissal under Rule 41(b) operates as an adjudication on the merits and principles of res judicata prevent any relitigation of the matter. *Paul v. Marberry*, 658 F.3d. 702, 704 (7th Cir. 2011).

The Sixth Circuit Court of Appeals is increasingly reluctant to uphold dismissal under Rule 41(b) “merely to discipline an errant attorney because such a sanction deprives the client of his day in court.” *Knoll v. American Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999). Thus, the Sixth Circuit has adopted the following four-part test for evaluating whether a matter should be dismissed for failure to prosecute under Rule 41(b):

- (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal of the action.

Id. While none of the factors is typically outcome dispositive on its own, a case is properly dismissed where there is a clear record of delay or contumacious conduct. *Id.*, *Schafer v. City of Defiance Police Dept.*, 529 F.3d 731, 737 (6th Cir. 2008).

In order to satisfy the first factor, the plaintiff's conduct "must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of his conduct on those proceedings." *Schafer* at 737, citing, *Wu v. T.W. Wang, Inc.*, 420 F.3d 641, 643 (6th Cir. 2005). Knowing disobedience of court orders can satisfy the first factor. *Id.* Conduct that is extremely dilatory in pursuing a claim may not show bad faith but will support a finding of willfulness and fault for purposes of this first factor. *Id.* at 739. Turning to the second factor, a plaintiff is prejudiced "where the defendant waste[d] time, money, and effort in pursuit of cooperation which [the plaintiff] was legally obligated to provide." *Id.* at 738, citing, *Harmon v. CSX Transport, Inc.*, 110 F.3d 364, 368 (6th Cir. 1997). A defendant is prejudiced only by the effort and steps necessitated by the plaintiff's lack of cooperation and not by taking the steps typical in responding to a complaint such as filing an answer and attending pretrial conferences. *Schafer* at 738. Dismissal without putting the plaintiff on notice that dismissal would result from continued noncompliance with court orders or failure to act in response to pretrial orders or pleadings may be considered an abuse of discretion. *Id.* *Cf.*, *Link*, 362 U.S. at 630-33; 82 S. Ct. at 1389-90. Finally, according to the court of appeals, dismissal is only appropriate "if the attorney's actions amounted to failure to prosecute and no alternative sanction would protect the integrity of the pretrial process." Even so, the court of appeals "has never held that a district court is without

power to dismiss a complaint, as a first and only sanction, solely on the basis of the plaintiff's counsel's neglect." *Id.*; *Knoll* at 366; *Harmon* at 368 (“[W]e understand this factor to require particular caution in the *absence* of contumacious conduct.”) (emphasis added.).

In this proceeding, counsel for the Plaintiff knowingly disobeyed both of the court's Preliminary Pretrial and Scheduling Orders by refusing to communicate and cooperate with opposing counsel in order to prepare for trial or facilitate resolution of the matter and by failing to prepare a Pretrial Statement; disregarded the court's verbal instructions at the November 14, 2019, Scheduling Conference to prepare a Pretrial Statement; announced that the matter was settled when no agreement had been reached; and subsequently announced that he would prepare an order “withdrawing” the Complaint which, four months later, he has not done. This extremely dilatory conduct supports a finding that the first factor in determining whether a complaint should be dismissed for failure prosecute under Rule 7041(b) is satisfied.

According to counsel for the Defendant, Plaintiff's counsel did not confer or correspond with her or participate in preparing and filing a Joint Pretrial Statement. In addition, counsel for the Plaintiff announced to the court at the Scheduling Conference on December 19, 2019, that the adversary proceeding was resolved but counsel for the Defendant “had not been able to reach Counsel for the Plaintiff at all to discuss his pending Complaint” nor agreed to any resolution. This required the Defendant to file a letter requesting a re-setting of the Scheduling Conference. Subsequently, on January 9, 2020, counsel for the Plaintiff announced to the Court and Defendant's counsel that he would “withdraw” or voluntarily dismiss the Complaint. His failure to submit such an order two months after the announcement necessitated the Defendant's Motion to Dismiss. This conduct and the Defendant's responses establish that the Defendant was prejudiced by this lack of cooperation.

As set forth above, the court's Preliminary Pretrial and Scheduling Orders contain notice that failure to comply with the requirements in the Orders may result in dismissal of the complaint or other penalties. In addition, the certificate of service on the Motion to Dismiss signed by Counsel for the Defendant states that counsel for the Plaintiff and the Plaintiff were served with the motion via electronic transmission or first class U.S. mail postage prepaid. The Order and Notice of Defendant's Motion to Dismiss Adversary Proceeding warns that a failure to respond to the Motion to Dismiss may result in granting the relief requested. Dkt. Nos. 10 and 11.

Knowing, repeated disobedience of a court's orders and ignoring warnings that a proceeding may be dismissed for failure comply with those orders, constitutes "extreme behavior" or contumacious conduct which justifies dismissal of a proceeding under Rule 7041(b). *Link*, 370 U.S. at 630-32, 82 S. Ct. 1390; *Harmon*, 110 F.3d 368-69. See also, *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir.2003) ("[D]isobedience of court orders is inimical to the orderly administration of justice and, in and of itself, can constitute extreme misconduct."). Thus, the four factors for determining whether this adversary proceeding should be dismissed for failure to prosecute under Rule 7041(b) are satisfied and the Complaint will be dismissed.

Reimbursement of Fees and Expenses

The Defendant requests reimbursement of attorneys' fees incurred for the prosecution of this motion and defense of the adversary proceeding. In addition to the authority to dismiss a complaint for failure to prosecute under Rule 7041(b), bankruptcy courts have statutory authority under Code section 105 to take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process; and, like other federal courts, possess inherent authority to sanction upon proper notice. *Chambers*, 501 U.S. at 44, 111 S. Ct. at 2123. See also, *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d.

472, 477 (6th Cir. 1996); *Lowe v. Ransier (In re Nicole Gas Prod., Ltd.)*, 581 B.R. 843, 854-55 (B.A.P. 6th Cir. 2018), *aff'd*, 916 F.3d 566 (6th Cir. 2019). Federal Rule of Bankruptcy Procedure 7016(f) also authorizes the imposition of sanctions when a party or the party's attorney fails to comply with the court's pretrial procedures and disobeys a scheduling or other pretrial order.

The equitable authority enjoyed by a bankruptcy court under Code section 105 exceeds the equitable authority available under "traditional equity jurisprudence" to issue sanctions to prevent an abuse of process. *In re Gorges*, 590 B.R. 771, 794 (Bankr. E.D. Mich. 2018), citing, *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002). This power is not limitless, however, "and must not be exercised in a way that is inconsistent with the Bankruptcy Code." *Id.* Similarly, the courts' "inherent powers," not conferred by rule or statute, "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" includes "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.*, citing, *Goodyear Tire & Rubber Co. v. Haeger*, ___ U.S. ___, 137 S. Ct. 1178, 197 L. Ed. 585 (2017). "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers* at 44, 111 S. Ct. 2132. This inherent authority includes the right, in "narrowly defined circumstances," to assess attorney fees against counsel. *Id.* at 45, 111 S. Ct. 2132. Thus, exercise of these statutory or inherent sanction powers by bankruptcy courts most often involves awarding compensatory punitive awards of attorney's fees after findings of bad faith or contempt. *Ardell v. John Richards Homes Bldg. Co. (In re John Richards Homes Bldg. Co)*, 552 F. App'x 401, 414 (6th Cir. 2013).

Indeed, "an appropriate sanction for conduct which abuses the judicial process ... is an 'assessment of attorney's fees'—an order ... instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side." *Goodyear Tire & Rubber*, 137 S. Ct. at 1186. The *Goodyear* court further "held that such sanctions must be 'limited to the fees the

innocent party incurred solely because of the misconduct—or put another way, to the fees that party would not have incurred but for the bad faith.” *Gorges* at 793, citing *Goodyear* at 1184. Nonetheless, a court “has broad discretion to calculate fee awards under that standard.” *Id.*

In this proceeding, the Preliminary Pretrial and Scheduling Orders and the Order and Notice of Defendant’s Motion to Dismiss Adversary Proceeding contained express notice that assessment of costs including attorneys’ fees could be a consequence of failure to comply with pretrial orders and procedure. The Defendant’s Motion to Dismiss stated that the Defendant was seeking reimbursement of its fees and expenses. The court has determined that counsel for the Plaintiff engaged in extremely dilatory conduct based on findings that he knowingly disobeyed both of the Preliminary Pretrial and Scheduling Orders by (1) refusing to communicate and cooperate with opposing counsel in order to prepare for trial or facilitate resolution of the matter; (2) failing to prepare a Pretrial Statement; (3) disregarding the Court’s verbal instructions at the Scheduling Conference to prepare a Pretrial Statement; (4) announcing that the matter was settled when no agreement had been reached; (5) and subsequently announcing that he would prepare an order “withdrawing” the Complaint which, four months later, he has not done. These actions delayed the proceedings and caused the Defendant to incur additional fees and expenses for which it should be reimbursed.

CONCLUSION

From the foregoing, the court concludes that counsel for the Plaintiff in this adversary proceeding has acted in bad faith and engaged in conduct that abuses the judicial process. This conclusion justifies dismissal of the proceeding for failure to prosecute under Federal Rule of Bankruptcy Procedure 7041(b). Further, pursuant to the court’s statutory and inherent authority

to issue sanctions, the court concludes that Defendant is entitled to the reimbursement of its fees and expenses solely related to the dilatory conduct.

IT IS THEREFORE ORDERED that the Motion to Dismiss with prejudice and for reimbursement of fees and costs is **GRANTED**. The Defendant is directed to submit an affidavit of fees and expenses solely related and due to Plaintiff's counsel's dilatory and bad faith conduct for the Court's consideration.

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendant
Attorney for Defendant
Chapter 13 Trustee