

**Do You Want to Know a Secret?  
Do You Promise Not to Tell?  
Confidentiality of Personal  
Data Identifiers: Impact  
of Foreclosure Firm's Bankruptcy  
or ABC; Mailing Lists; Proof  
of Claim Issues; Consequences  
of Disclosure**

**Donald R. Kirk, Moderator**

*Carlton Fields Jordan Burt, P.A.; Tampa, Fla.*

**Lee Ann Bennett**

*U.S. Bankruptcy Court (M.D. Fla.); Tampa*

**Guy G. Gebhardt**

*Office of the U.S. Trustee; Atlanta*

**Dennis J. LeVine**

*Kelley Kronenberg; Tampa, Fla.*

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**CASE LAW ON WHETHER A COURT CAN ISSUE SANCTIONS  
AGAINST A CREDITOR FOR FAILURE TO REDACT DOCUMENTS  
FILED WITH THE COURT**

**The Court denied sanctions against Creditor**

*In re Haley*, 418 B.R. 432 (Bankr. M.D. Fla. 2009)(J. Paskay)

*In re Dunbar*, 446 B.R. 306 (Bankr. E.D. Ark. 2011)(J. Evans)

*Carter v. Flagler Hospital, Inc. (In re Carter)*, 411 B.R. 730 (Bankr. M.D. Fla. 2009)(J. Glenn)

*Carter v. Checkmate (In re Carter)*, 2009 WL 3425828, at \*1 (Bankr. N.D. Ala. Oct. 23, 2009)(J. Mitchell)

*In re Dorsey*, 2015 WL 7754642, at \*2 (Bankr. E.D. La. Dec. 1, 2015)(J. Magner)

*In re Lenz*, 448 B.R. 832 (Bankr. D. Or. 2011)(J. Dunn)

*In re Maple*, 434 B.R. 363 (Bankr. E.D. Va. 2010)(J. Huennekens)

*In re Brooks*, 430 B.R. 902 (Bankr. D. Colo. 2010)(J. Brooks)

**The Court found only a claim for civil contempt**

*French v. American General Financial Services (In re French)*, 401 B.R. 295 (Bankr. E.D. Tenn. 2009) (J. Stair)(allegations in Chapter 13 debtor's complaint, regarding creditor's electronic filing of proof of claim which contained, as attachments, documents that disclosed debtor's full social security number and birth date in violation of requirements of Bankruptcy Rule, were sufficient to state claim to hold creditor in civil contempt)

*In re Ricker*, 2012 WL 2562760, at \*5, 6 (Bankr. E.D. Tenn. June 29, 2012 (J. Rucker)

**The Court Granted sanctions against Creditor**

*In re Lunden*, 524 B.R. 410, 415-16 (Bankr. D. Mass. 2015)(J. Boroff)

In re Haley, 418 B.R. 432 (2009)

22 Fla. L. Weekly Fed. B 119

418 B.R. 432  
United States Bankruptcy Court,  
M.D. Florida,  
Fort Myers Division.

In re Robert HALEY, Dawn Haley, Debtors.  
Robert Haley, Plaintiff,  
v.

Gorell Windows & Doors, LLC, a Pennsylvania  
limited liability company, Defendant.

Bankruptcy No. 9:08-bk-20621-ALP.

|  
Adversary No. 9:09-ap-00103-ALP.

|  
June 12, 2009.

#### Synopsis

**Background:** Chapter 7 debtor filed adversary complaint against creditor, alleging that creditor improperly failed to redact nonpublic information in its proof of claim and objecting to the claim. Creditor moved to dismiss complaint.

**Holdings:** The Bankruptcy Court, Alexander L. Paskay, J., held that:

[1] debtor did not state a cognizable claim for violation of court policy and a local rule;

[2] debtor did not state a cognizable claim for violation of the bankruptcy rule governing privacy protection for filings made with the court;

[3] debtor failed to state a claim under Florida law for the tort of invasion of privacy;

[4] given the speculative nature of his damages, debtor failed to state a claim for negligence under Florida law;

[5] debtor was not entitled to an injunction precluding creditor from filing any amended claim; and

[6] there was no basis for holding creditor in civil contempt.

Motion to dismiss granted.

#### West Headnotes (15)

#### [1] Bankruptcy

⚡ Pleading; dismissal

For a complaint to survive a motion to dismiss for failure to state a claim, factual allegations must be enough to raise a right to relief above the speculative level; it must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action. Fed.Rules Bankr.Proc.Rule 7012(b), 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

#### [2] Bankruptcy

⚡ Carrying out provisions of Code

#### Bankruptcy

⚡ Pleading; dismissal

Chapter 7 debtor, who alleged that creditor improperly failed to redact nonpublic information in its proof of claim, did not state a cognizable claim for violation of court policy and a local rule; although debtor asserted that this violation of the court's rules could be enforced through the section of the Bankruptcy Code authorizing the court to issue any order necessary or appropriate to carry out the provisions of title 11, that provision was not a source of independent power that created an enforceable claim. 11 U.S.C.A. § 105.

Cases that cite this headnote

#### [3] Bankruptcy

⚡ Carrying out provisions of Code

Section of the Bankruptcy Code authorizing the court to issue any order necessary or appropriate to carry out the provisions of title 11 is not a source of independent power that creates a claim that can be enforced; rather, the provision is only designed to assist the court to enter such orders or judgments that are necessary or appropriate to carry out the provisions of the Code. 11 U.S.C.A. § 105.

In re Haley, 418 B.R. 432 (2009)

22 Fla. L. Weekly Fed. B 119

Cases that cite this headnote

[4] **Bankruptcy**

☞ Carrying out provisions of Code

**Bankruptcy**

☞ Rules

**Records**

☞ Court records

Chapter 7 debtor, who alleged that creditor improperly failed to redact nonpublic information in its proof of claim, did not state a cognizable claim for violation of the bankruptcy rule governing privacy protection for filings made with the court; although debtor asserted that this violation of the rules could be enforced through the section of the Bankruptcy Code authorizing the court to issue any order necessary or appropriate to carry out the provisions of title 11, that provision was not a source of independent power that created an enforceable claim. 11 U.S.C.A. § 105; Fed.Rules Bankr.Proc.Rule 9037, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 5.2, 28 U.S.C.A.

Cases that cite this headnote

[5] **Bankruptcy**

☞ Rules

Debtors' social security numbers, among others, must be redacted from court filings unless the bankruptcy court orders otherwise. Fed.Rules Bankr.Proc.Rule 9037, 11 U.S.C.A.

Cases that cite this headnote

[6] **Bankruptcy**

☞ Pleading; dismissal

**Torts**

☞ Miscellaneous particular cases

Debtor, who alleged that creditor improperly failed to redact nonpublic information in its proof of claim, failed to state a claim under Florida law for the tort of invasion of privacy; the personal data disclosed in the proof of claim, including debtor's social security number, was not deemed

to be highly offensive to a reasonable person. Restatement (Second) of Torts § 652D.

Cases that cite this headnote

[7] **Torts**

☞ Publications or Communications in General

Under Florida law, in order to establish a viable claim for violation of the tort of invasion of privacy, the party bringing such action must show both that the matter publicized is of a kind that (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. Restatement (Second) of Torts § 652D.

1 Cases that cite this headnote

[8] **Bankruptcy**

☞ Pleading; dismissal

Debtor, who alleged that creditor improperly failed to redact nonpublic information in its proof of claim, namely, debtor's entire social security number, failed to state a claim for negligence under Florida law; even assuming that creditor owed debtor a duty of care, debtor failed to plead anything more than speculative damages arising from the breach.

Cases that cite this headnote

[9] **Negligence**

☞ Elements in general

Under Florida law, to establish a viable claim based on negligence, plaintiff must prove that a duty existed, that the duty was breached and that, as a result of the breach, plaintiff suffered compensatory damages.

Cases that cite this headnote

[10] **Bankruptcy**

☞ Representation of debtor, estate, or creditors

Chapter 7 trustee has no duty, obligation, and/or power to remove a proof of claim which was properly filed by a creditor.

Cases that cite this headnote

In re Haley, 418 B.R. 432 (2009)

22 Fla. L. Weekly Fed. B 119

[11] **Bankruptcy**

⚡ Injunction or stay of other proceedings

**Bankruptcy**

⚡ Amendment or withdrawal

Chapter 7 debtor was not entitled to an injunction precluding creditor, who had improperly failed to redact nonpublic information in its proof of claim, from filing any amended, modified, or substitute claim; although debtor alleged that he was exposed to an increased risk of identity theft and, in order to protect his identity, would be required to retain a credit monitoring service for the rest of his natural life, debtor failed to demonstrate a “real and immediate threat” of future injury accompanied by “continuing, present adverse effects.” Fed.Rules Bankr.Proc.Rule 9037, 11 U.S.C.A.

Cases that cite this headnote

[12] **Injunction**

⚡ Clear, likely, threatened, anticipated, or intended injury

In order to obtain an injunction against future conduct, a party must demonstrate a “real and immediate threat” of future injury accompanied by “continuing, present adverse effects.”

Cases that cite this headnote

[13] **Bankruptcy**

⚡ Parties

Without “continuing, present adverse effects,” an alleged injury remains “wholly inchoate,” and the “injury” requirement of standing is not satisfied.

Cases that cite this headnote

[14] **Federal Courts**

⚡ Nature of dispute; concreteness

No justiciable controversy exists when the claim is based upon the possibility of a factual situation that may never develop.

Cases that cite this headnote

[15] **Bankruptcy**

⚡ Contempt

Bankruptcy court would deny Chapter 7 debtor's request to hold creditor in civil contempt for failing to redact nonpublic information in its proof of claim; there was no order that was entered in the case which had been willfully violated by creditor, and none of creditor's alleged rules violations otherwise formed a basis to find civil contempt against creditor. Fed.Rules Bankr.Proc.Rule 9037, 11 U.S.C.A.

Cases that cite this headnote

**Attorneys and Law Firms**

\*434 Carmen Dellutri, David W. Fineman, The Dellutri Law Group, P.A., Fort Myers, FL, for Plaintiff.

Jill Locnikar Bradley, Cohen & Grigsby PC, Pittsburgh, PA, for Defendant.

**ORDER ON DEFENDANT'S MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT WITH PREJUDICE**

(Doc. No. 6)

ALEXANDER L. PASKAY, Bankruptcy Judge.

THE MATTER under consideration in the above-captioned Chapter 7 case of Robert and Dawn Haley (the Debtors) is a Motion to Dismiss Plaintiff's Complaint with Prejudice (Doc. No. 6) filed by Gorell Windows & Doors, LLC, (Defendant). The Complaint filed by Robert Haley (Plaintiff) is an attempt by counsel for the Debtors, Carmen Dellutri, Esquire, to assert viable claims under several different theories against the named Defendant in the above-captioned adversary proceeding.

The Complaint sets forth five (5) distinct claims. Each claim is based on a single act by Gorell and they are as follows:

In re Haley, 418 B.R. 432 (2009)

22 Fla. L. Weekly Fed. B 119

First Claim: Alleges a Violation of Federal District Court and Bankruptcy Court Orders and Policy: Failure to redact nonpublic information;

Second Claim: Alleges a Violation of Federal Rule of Bankruptcy Procedure 9037; Failure to redact nonpublic information;

Third Claim: Alleges Invasion of privacy;

Fourth Claim: Alleges Negligence; and

Fifth Claim: Alleges Objection to the Claim.

In the factual allegations in his Complaint, the Plaintiff states that the Plaintiff holds an account with Gorell and that the account is primarily for the purchase of household and/or consumer use. See Paragraph 9 of the Complaint. The Plaintiff further alleges that Gorell filed a Proof \*435 of Claim in the Debtor's Chapter 13 case, Claim No. 13. Gorell's claim is listed as an unsecured debt owed by the Plaintiff in the amount of \$90,399.00. Furthermore, attached to Gorell's Proof of Claim are exhibits, the third page of which is a document entitled Credit Application. The fourth page of the exhibit attached to the Proof of Claim disclosed the Debtor's Social Security number without redaction.

According to the Plaintiff, the Electronic Case Filing (ECF) Proof of Claim is a public document that is available to anyone who wishes to view the document via the Public Access to the Court Electronic Records System (PACER System). As a result, the documents attached to the Proof of Claim filed by Gorell contained sufficient personal and private information which would enable an identity thief to hijack the Plaintiff's identity and ruin the personal life of the Plaintiff. Thereby, the Plaintiff alleges that he has been exposed to an increased risk of identity theft and, in order to protect his identity, the Plaintiff will be required to retain a credit monitoring service for the rest of his natural life at the cost of \$25.00 per month.

Before discussing the viability of the claims asserted in the Complaint, certain matters should be noted.

First, as mentioned earlier, the Plaintiff contends in Paragraph 9 of the Complaint that the Plaintiff had an account with Gorell representing charges incurred by the Plaintiff for the purchase of goods used primarily for household and/or consumer use. This statement is incorrect and is not supported by the record. The exhibit attached to the Proof of Claim

No. 13 filed by Gorell leaves no doubt that the account was maintained by Cornerstone Replacement Windows, Inc., a corporation owned and controlled by the Plaintiff (Cornerstone). Also, the Credit Application identifies that it was Cornerstone and not the Plaintiff that applied for a line of credit from Gorell. Moreover, the last page attached to the claim leaves no doubt that the Plaintiff was only the guarantor of the debt incurred by Cornerstone.

Second, in Paragraph 20 of the Complaint, the Plaintiff alleges that Gorell's failure to redact the Plaintiff's personal data necessitated the Plaintiff's counsel to take action to protect the Plaintiff's privacy by filing a motion to redact the personal data from the Proof of Claim costing the attorney, the Court, and the Clerk time and expense in correcting the violation. This allegation by the Plaintiff is not supported by the record. The record only reveals that on May 6, 2009, the Debtors' filed their Emergency Motion to Restrict Public Access to the Proof of Claim No. 13 of Creditor Gorell Windows & Doors, LLC (Emergency Motion)(Doc. No.5). The record reveals that on May 13, 2009, this Court, without hearing, denied the Emergency Motion because it was not filed pursuant to the rules and it also directed counsel to file a motion to redact in order to obtain the relief requested, if so inclined (Doc. No. 52). With the exceptions of the above, the operating and controlling facts are without dispute and as are follows:

The Motion under consideration filed by Gorell challenges the Plaintiff's Complaint based on Fed.R.Civ.P. 12(b)(6) as adopted by Fed.R.Bankr.P. 7012(b)(6), which provides that "failure to state a claim upon which relief can be granted" is grounds for dismissal.

The Supreme Court, in the case of *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), considered the scope of this rule and held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

\*436 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Over the years various courts have reviewed the language of *Conley* and have held that "[t]he 'no set of facts' language ... is best forgotten as an incomplete, negative gloss on an acceptable pleading standard ..." as there must be some grounds on which the claim rests. *Bell Atlantic Corp. et al. v. Twombly*, 550 U.S. 544, 546, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007); *Ashcroft v.*

In re Haley, 418 B.R. 432 (2009)

22 Fla. L. Weekly Fed. B 119

*Iqbal*, 556 U.S. 662, —, 129 S.Ct. 1937, 1939, 173 L.Ed.2d 868 (2009); *Weissman v. National Ass'n of Securities Dealers, Inc.*, 500 F.3d 1293, 1303 (C.A.11 (Fla.) 2007); *Watts v. Florida Intern. University*, 495 F.3d 1289, 1295 (C.A.11 (Fla.) 2007).

[1] “Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp.* at 546, 127 S.Ct. 1955. It must “contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Bell Atlantic Corp.* at 546, 127 S.Ct. 1955.

[2] In the First Claim of the Complaint, the Plaintiff asserts that Gorell, by filing the nonpublic information, intentionally communicated to others and made available to the general public personal and private data of the Debtor in direct violation of the Uniform Local Rules of the United States District Court for the Middle District of Florida enacted by the Standard Operating Procedure Governing Protection of Personal and Sensitive Information and Public Access to Court Files in Accordance with The E-Government Act of 2002, 44 U.S.C. §§ 3500, et. seq.

The Plaintiff asserts that by filing the nonpublic information of the Plaintiff, Gorell has violated the “Court Policy and Local Rule according to the Judicial Conference” putting the Plaintiff at risk and causing damage by making publicly available the Plaintiff's personal information. Furthermore, according to the Plaintiff, this Court pursuant to “... 11 U.S.C. § 105 has the inherent ability to enforce the Courts orders, rules and to prevent an abuse of process.” See Paragraph 32 and 33 of Complaint.

[3] It needs no elaborate discussion to point out the obvious that Section 105 of the Bankruptcy Code is not a source of independent power that creates a claim that can be enforced. Section 105 is only designed to assist the court to enter such orders or judgments that are necessary or appropriate to carry out the provisions of 11 U.S.C. Title 11—Bankruptcy. It is evident from the foregoing, that the Plaintiff's reliance on Section 105 to assert a claim for which relief can be granted is not established as a matter of law and, therefore, the First Claim of the Complaint is not well taken and should be dismissed.

[4] [5] In the Second Claim of his Complaint, the Plaintiff asserts that by filing the nonpublic information of the Plaintiff, Gorell violated Fed.R.Bankr.P. 9037

and Fed.R.Civ.P. 5.2. The Plaintiff further states that Fed.R.Bankr.P. 9037 and Fed.R.Civ.P. 5.2 were enacted to strengthen the local rules and policies of the district. There is no question that social security numbers, among others, must be redacted unless the court orders otherwise. Based on this violation, the Plaintiff again asserts that he has a viable claim pursuant to 11 U.S.C. § 105 and that this “Court has the inherent ability to enforce the Courts orders, rules, and to prevent an abuse of process.” See Paragraph 38 of Complaint. The comments of the Plaintiff concerning the power of this Court under Section 105 are equally applicable to this Claim and this Claim is not established as a matter of law. Therefore, the Defendant's Motion to \*437 Dismiss the Second Claim of the Complaint is well taken and should be granted.

[6] [7] In the Third Claim of the Complaint, the Plaintiff charges Gorell with invasion of privacy pursuant to the Restatement (Second) of Torts § 652D. The Plaintiff cites some cases in support of his position; however the cases cited apply only in circumstances of minor children and victims of sexual offenses. The right to recover on this Claim has been dealt with in the case of *Cape Publications, Inc. v. Hitchner*, 549 So.2d 1374 (Fla.1989). The *Cape* court adopted the Restatement (Second) of Torts § 652D, which covers public disclosure of private facts. Under this Rule, the tort of invasion of privacy means to give private information out “... if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” *Id.* at 1377. This standard is conjunctive rather than disjunctive thus, in order to establish a viable claim pursuant to § 652D of Restatement (Second) of Torts, the party bringing such action must meet both of the requirements set forth above. In the present instance, it is clear that the information disclosed in the Proof of Claim filed by Gorell is not deemed to be highly offensive to a reasonable person and, therefore, does not meet the first prong of the rule laid out in *Cape*, regardless of the fact that the information may be of legitimate concern to the public. Therefore, under the present circumstances, the Claim as pled does not meet the requirements for a viable claim based on invasion of privacy and, thus, the Motion to Dismiss with respect to this Claim pursuant to Fed. R.Civ.P. 12(b)(6) as adopted by Fed.R.Bankr.P. 7012(b)(6), should be granted.

[8] [9] In the Fourth Claim, the Plaintiff seeks damages based on the alleged negligence of Gorell in filing its Proof of Claim with the attachments containing the Plaintiff's entire Social Security number. To establish a viable claim based on negligence, the Plaintiff must plead the existence of a

In re Haley, 418 B.R. 432 (2009)

22 Fla. L. Weekly Fed. B 119

duty flowing from Gorell to himself. The Plaintiff must prove that a duty existed, the duty was breached and, as a result of the breach, the Plaintiff suffered compensatory damages. Assuming without conceding that there was, in fact, a duty of care imposed on Gorell, it is clear from this record that the Plaintiff has not pled sufficient specificity as to damages which pass the stage of speculative. Based on the foregoing, this Court is satisfied that the claim asserted by the Plaintiff in the Fourth Claim is equally defective and, therefore, subject to dismissal.

In the Fifth Claim, the Plaintiff asserts the following: (1) that the creditor intentionally revealed the Debtor's private and sensitive data and nonpublic information in violation of the Local Rules of this Court and Fed.R.Bankr.P. 9037; (2) that the Court should direct the "Chapter 13 Trustee" to strike the claim and the creditor be precluded from filing any amended, modified or substitute claim in this case and the underlying debt be canceled and forever discharged whether or not the debtor receives a Discharge Order in this case; (3) that the creditor should be sanctioned for the intentional revelation of the Debtor's private data and sensitive information and the Debtor be awarded attorney fees and expenses for filing the objection; and (4) that the Court should order the claim number disabled within the PACER system or the claim removed so that it is inaccessible to any further members of the general public.

[10] There are several flaws in this Claim for the following reasons. First, this is a Chapter 7 case and this Court has no jurisdiction to order a Chapter 13 Trustee to do anything in a Chapter 7 case. \*438 Even if the request had been directed to the Chapter 7 Trustee, the request as proposed by the Plaintiff would be improper because the Chapter 7 Trustee has no duty, obligation and/or power to remove a proof of claim which was properly filed by a creditor.

[11] [12] [13] [14] Secondly, in Paragraph 54 of the Complaint the Plaintiff seeks an injunction precluding Gorell from filing any amended, modified or substitute claim. In order to obtain an injunction against future conduct, a party must demonstrate a "real and immediate threat" of future injury accompanied by "continuing, present adverse effects." *Elend v. Basham*, 471 F.3d 1199, 1207-08 (11th Cir.2006); *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir.2004) quoting *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1241 (11th Cir.2003). Without "continuing, present adverse effects," the injury remains "wholly inchoate," and the "injury" requirement of standing

is not satisfied. *Elend*, 471 F.3d at 1207, 1209; see, e.g., *Bellefonte Reins. Co. v. Aetna Cas. and Sur. Co.*, 590 F.Supp. 187 (S.D.N.Y.1984). No justiciable controversy exists when the claim is based upon the possibility of a factual situation that may never develop. See, e.g., *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28-29 (5th Cir.1989); *Hunt v. Anderson*, 794 F.Supp. 1551 (M.D.Ala.1991).

Therefore, based on the foregoing, this Court is satisfied that the Plaintiff has failed to plead an indispensable element required for the right to an injunction.

The Plaintiff also seeks declaratory relief that the debt be cancelled and forever discharged whether or not the Debtors receive a discharge. This is indeed an attempt to disallow a properly filed claim. In addition, the Debtor seeks a declaration determining that the claim of Gorell should be discharged and unenforceable. Section 502 of the Code specifically sets forth the bases for disallowing a claim in Bankruptcy. There is nothing alleged in the Complaint of any of the exceptions noted in Section 502. Therefore, the relief sought is baseless and cannot be allowed.

In addition, the declaratory relief sought that the claim be cancelled and forever discharged should be determined pursuant to Section 523 which deals with exceptions to discharge and should be presented to this Court in the form of an adversary proceeding, pursuant to Fed.R.Bankr.P. 7001(6). This Court is satisfied that the Plaintiff's request for declaratory relief fails to meet the requirements necessary to substantiate the Claim and, therefore, the Claim as filed should be dismissed.

Regarding the Debtor's request that the claim number be disabled within the PACER system or removed so that it is inaccessible to any further members of the general public, it should be noted that a review of this record reveals that Gorell did remove the offending document and it is no longer available to anyone on the PACER system. Therefore, the relief sought is moot.

[15] Finally, there is no order that has been entered in this case which has been willfully violated by Gorell. None of the alleged violations of the sections or rules cited in the Complaint form a basis to find civil contempt against the Defendant. Therefore, the prayer for relief to find civil contempt should be denied.



In re Haley, 418 B.R. 432 (2009)

22 Fla. L. Weekly Fed. B 119

In sum, based on the foregoing, this Court is satisfied that none of the Plaintiff's Claims asserted in his five-Count Complaint state grounds for which relief can be granted and, therefore, the Defendant's Motion to Dismiss should be granted, the Complaint dismissed and the above-captioned adversary proceeding closed.

\*439 Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice (Doc. No. 6) be, and the same is hereby, granted. It is further

ORDERED, ADJUDGED AND DECREED that the Complaint as filed, be and the same is hereby, dismissed. It is further

ORDERED, ADJUDGED AND DECREED that the above-captioned adversary proceeding be, and the same is hereby, closed.

**All Citations**

418 B.R. 432, 22 Fla. L. Weekly Fed. B 119

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In re Lunden, 524 B.R. 410 (2015)

524 B.R. 410  
United States Bankruptcy Court,  
D. Massachusetts,  
Central Division.

In re Kristen L. LUNDEN, Debtor.

No. 14-40412-HJB.

Signed Jan. 15, 2015.

**Synopsis**

**Background:** Chapter 7 debtor moved for award of sanctions against creditor for filing paper with court without redacting debtor's Social Security number and other identifying information.

**Holdings:** The Bankruptcy Court, Henry J. Boroff, J., held that:

[1] financial statement that Chapter 7 debtor had previously filed in litigation with creditor in Small Claims Court was not part of public record of state court proceeding, so that exception to creditor's obligation to redact did not apply;

[2] debtor did not waive protections of Bankruptcy Rule protecting private information from disclosure in court filings;

[3] creditor's violation of Bankruptcy Rule supported contempt sanctions in form of debtor's attorney fees and costs, in addition to credit monitoring costs to forestall any risk of damages in future; and

[4] creditor's conduct was sufficiently egregious to support punitive damages award.

So ordered.

West Headnotes (9)

- [1] **Bankruptcy**  
Rules  
**Bankruptcy**

Proceedings

Financial statement that Chapter 7 debtor had previously filed in litigation with creditor in Small Claims Court was not part of public record of state court proceeding, so that when creditor later sought to introduce financial statement as evidence of value of homestead property mentioned therein, in order to show that debtor was not entitled to avoid its lien on exemption-impairment grounds, creditor was not relieved of obligation to redact debtor's Social Security number and other identifying information on ground that statement was "official record" of a state court proceeding; by rule of Small Claims Court, financial statements filed with it were confidential and not available for public inspection unless the Court so ordered. 11 U.S.C.A. § 522(f); Fed.Rules Bankr.Proc.Rule 9037(b)(3), 11 U.S.C.A.; Uniform Small Claims Rule 9(c).

Cases that cite this headnote

[2] **Bankruptcy**

Rules

Chapter 7 debtor did not waive protections of Bankruptcy Rule protecting private information from disclosure in court filings made in bankruptcy case by including her Social Security and other personal information in financial statement that she had filed in litigation with creditor in Small Claims Court, which financial statement the creditor then sought to file with bankruptcy court; by rule of Small Claims Court, financial statements filed with it were confidential and not available for public inspection, such that debtor, in filing financial statement with Small Claims Court, had not filed it without redaction and "not under seal." Fed.Rules Bankr.Proc.Rule 9037(b)(3), 11 U.S.C.A.; Uniform Small Claims Rule 9(c).

Cases that cite this headnote

[3] **Bankruptcy**

Carrying out provisions of Code

**Bankruptcy**

Contempt

In re Lunden, 524 B.R. 410 (2015)

**Bankruptcy**

☞ Frivolity or bad faith; sanctions

Regardless of whether Bankruptcy Rule protecting private information from disclosure in court filings made in bankruptcy case provided any damages remedy for parties injured by violation of this Rule, bankruptcy court had power to sanction contemptuous violations of the Rule 9037 pursuant to its inherent authority and in exercise of its power to enter "necessary or appropriate" orders. 11 U.S.C.A. § 105(a); Fed.Rules Bankr.Proc.Rule 9037, 11 U.S.C.A.

Cases that cite this headnote

[4] **Contempt**

☞ Nature and Elements of Contempt

Contempt sanctions are appropriate where requirements of the law are clear, and party has flouted the law with knowledge of its proscriptions, failed to take remedial action once violations were discovered, or acted deliberately as opposed to mistakenly or inadvertently.

Cases that cite this headnote

[5] **Bankruptcy**

☞ Contempt

**Bankruptcy**

☞ Frivolity or bad faith; sanctions

When contempt sanctions are warranted, bankruptcy court has broad discretion to fashion a contempt remedy.

Cases that cite this headnote

[6] **Bankruptcy**

☞ Contempt

Appropriate use of bankruptcy court's contempt power is to order monetary relief, in form of actual damages, attorney fees, and punitive damages.

Cases that cite this headnote

[7] **Bankruptcy**

☞ Contempt

**Bankruptcy**

☞ Frivolity or bad faith; sanctions

Contempt sanctions, in form of attorney fees and costs incurred by Chapter 7 debtor to enforce creditor's obligation to redact debtor's personal information from documents filed with bankruptcy court and credit monitoring costs to forestall any risk of damages in future, were appropriate for creditor that, in electronically filing document with court without redacting debtor's Social Security number and other identifying information, not only ignored its obligations under Bankruptcy Rule but also express warnings in electronic filing system, and that, after its violation of Rule was brought to its attention, did not promptly correct its error, but raised frivolous arguments as to why no action on its part was required. Fed.Rules Bankr.Proc.Rule 9037, 11 U.S.C.A.

Cases that cite this headnote

[8] **Bankruptcy**

☞ Contempt

Punitive damages, for party's contempt of obligations imposed by bankruptcy law, are most appropriate when there has been an arrogant defiance of the Bankruptcy Code, or when party responds to its obvious error with frivolous and meritless defenses.

Cases that cite this headnote

[9] **Bankruptcy**

☞ Contempt

Punitive damages award, in amount of \$1,000, was appropriate for creditor's conduct in electronically filing document with bankruptcy court without redacting Chapter 7 debtor's Social Security number and other identifying information, not only in violation of requirements of Bankruptcy Rule, but also in indifference to express warnings on obligation to redact provided by court's electronic filing system, at least where creditor, once this failure to redact was brought to its attention, failed to take steps to promptly correct its error and instead asserted frivolous arguments for why

In re Lunden, 524 B.R. 410 (2015)

no conduct on its part was required. Fed.Rules  
Bankr.Proc.Rule 9037, 11 U.S.C.A.

Cases that cite this headnote

#### Attorneys and Law Firms

\*412 David M. Nickless, Nickless, Phillips & O'Connor,  
Fitchburg, MA, for Debtor.

#### MEMORANDUM OF DECISION

HENRY J. BOROFF, Bankruptcy Judge.

Before the Court is a request filed by Kristen L. Lunden, the debtor in this Chapter 7 case (the "Debtor"), seeking sanctions as compensation for a creditor's failure to redact from one of its filings certain of her personal identifying information in contravention of the redaction requirements contained in Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule" or "Rule") 9037(a). In ruling on the sanctions request, the Court must first determine whether Rule 9037(a) was actually violated. Assuming a violation of the rule is established, the Court must then decide whether sanctions are appropriate in this case, and, if so, the amount of sanctions that should be imposed.

#### I. FACTS AND POSITIONS OF THE PARTIES

The Debtor commenced this case under Chapter 7 of the United States Bankruptcy Code (the "Bankruptcy Code" or the "Code")<sup>1</sup> on March 7, 2014. In the schedules and statements filed with the petition, the Debtor disclosed her interest in real property located in Athol, Massachusetts that serves as her primary residence (the "Property"), and claimed an exemption of "up to \$5,820.00" in any equity in the Property pursuant to § 522(d)(1). Schedule C—Property Claimed as Exempt, ECF No. 1.

<sup>1</sup> See 11 U.S.C. § 101 *et seq.* All references to statutory sections are to the Bankruptcy Code unless otherwise specified.

On March 19, the Debtor filed a motion to avoid a judicial lien against the Property (the "Motion to Avoid") held by Lenkar, LLC ("Lenkar"). In the Motion to Avoid, the Debtor estimated the fair market value of the Property as ranging between \$141,704 and \$148,971, based upon a comparative

market analysis attached to the motion. Given that the balance of the mortgage debt secured by the Property was approximately \$162,000, the Debtor argued that there was no non-exempt equity available to satisfy Lenkar's lien, that the lien impaired her exemption, and that the lien was accordingly avoidable in its entirety pursuant to § 522(f).

Lenkar, through its attorney, Russell Chernin, filed an objection to the Motion to Avoid (the "Objection"), arguing that the value of the Property was actually \$180,000, which after deduction of the mortgage lien and the Debtor's claimed exemption would leave \$12,180 in equity to at least partially satisfy Lenkar's lien. In support of the asserted higher value for the Property, Attorney Chernin attached as an exhibit to the Objection a copy of a "Financial Statement of Judgment Debtor" (the "Financial Statement") that had previously been submitted in conjunction with proceedings against the Debtor by Lenkar \*413 in the Small Claims Session of the Trial Court of Massachusetts (the "state court proceeding"). The Financial Statement, completed by the Debtor and executed on November 5, 2013, contained an estimate of the fair market value of the Property in the amount of \$180,000. But that document, filed by Attorney Chernin without redaction, also contained the Debtor's full social security number, home telephone number, address, and date of birth.

The following day, having received notice of the filed Objection, the Debtor's Attorney, David Nickless, contacted Attorney Chernin via email, demanding that Attorney Chernin notify the Court of his error in filing the Financial Statement on the public docket without redaction and request that the Court remove it from the public record. In that initial email to Attorney Chernin, Attorney Nickless also requested indemnification for any damages incurred by the Debtor on account of the public filing of the unredacted document.

Attorney Chernin responded by refusing to withdraw the Opposition, claiming that the Financial Statement was an "admission by Ms. Lunden as to all matters contained thereon." Motion to Strike Ex. 1, ECF No. 14. Attorney Chernin then apologized for not "noticing" that the document contained the Debtor's social security number, but claimed that even if he had noticed its presence, he "would be most reluctant to modify a document signed by someone else's client." *Id.* He did state, however, that he would not oppose any request to the Court by the Debtor to have the social security number redacted.

In re Lunden, 524 B.R. 410 (2015)

Less than pleased with this response, Attorney Nickless replied that if Attorney Chernin did not take steps to have the document struck from the record or redacted, Nickless would file a motion to have the exhibit removed and would seek payment for damages arising from the violation of the Debtor's privacy rights. By the end of the business day, Attorney Chernin had not brought the unredacted filing to the Court's attention and later that evening, Attorney Nickless, on behalf of the Debtor, filed the "Debtor's Emergency Motion (A) to Strike from the Public Record and this Court's Electronic Filing System the Exhibit to Opposition of Lenkar, LLC to Debtor's Motion to Avoid Judicial Lien and (B) for Sanctions" (the "Motion to Strike," "Request for Sanctions").

In the motion, the Debtor requested that the Court immediately strike the Financial Statement from the public docket and asked the Court to award to the Debtor "current and potential future damages, including but not limited to the attorney's fees and costs to correct Lenkar's error, and potential future identity theft." Motion to Strike 1-2, ¶ 6. On the morning of March 27, the Court granted the Motion to Strike and removed the Financial Statement from the public docket, as it contained information required to be redacted by Bankruptcy Rule 9037(a),<sup>2</sup> and scheduled \*414 a further hearing on the Request for Sanctions.<sup>3</sup>

<sup>2</sup> Bankruptcy Rule 9037 provides in relevant part:

- (a) **Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:
  - (1) the last four digits of the social-security number and taxpayer-identification number;
  - (2) the year of the individual's birth;
  - (3) the minor's initials; and
  - (4) the last four digits of the financial account-number.
- (b) **Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following:
  - (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
  - (2) the record of an administrative or agency proceeding unless filed with a proof of claim;
  - (3) the official record of a state-court proceeding;

- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by subdivision (c) of this rule; and
- (6) a filing that is subject to § 110 of the Code.

....  
 (g) **Waiver of Protection of Identifiers.** An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

Fed. R. Bankr.P. 9037(a), (b), (g).

3

The Order read:

"GRANTED INASMUCH AS THE EXHIBIT TO THE OPPOSITION SHALL BE MAINTAINED IN THE COURT'S ELECTRONIC DOCUMENT SYSTEM ONLY AS A 'PRIVATE EVENT' TO WHICH ONLY COURT PERSONNEL IS (*sic*) GIVEN ACCESS, UNLESS OTHERWISE ORDERED BY THIS COURT. THE REMAINDER OF THE RELIEF REQUESTED IN THIS MOTION SHALL BE HEARD ON MAY 20, 2014 AT 11:30 A.M. IN WORCESTER."

Order dated March 27, 2014, ECF No. 15.

On March 31, Attorney Chernin filed an opposition to the Debtor's Request for Sanctions (the "Sanctions Objection"), and both parties have since filed post-hearing briefs. Attorney Chernin first disputes the assertion that the filing of the Financial Statement ran afoul of Bankruptcy Rule 9037. He argues that the Financial Statement qualifies as an "official record of a state court proceeding," and is thus exempt from the redaction requirement under Rule 9037(b)(3). Attorney Chernin further asserts that he was relieved of any obligation to redact the document pursuant to Bankruptcy Rule 9037(g), because the Debtor previously filed the Financial Statement in small claims court without redaction. According to Attorney Chernin, he "simply used an already existing public record to support [Lenkar's] position" and that "[t]he information that the debtor seeks to redact *was already made public* by the debtor before Lenkar included it in its opposition." Sanctions Obj. 1 ¶ 4, ECF No. 19 (emphasis supplied). And

In re Lunden, 524 B.R. 410 (2015)

at the hearing on the Request for Sanctions, Attorney Chernin further asserted that he was, in fact, able to obtain a copy of the Financial Statement by simply calling the state court and asking for it.

The Debtor says the redaction exception contained in Rule 9037(g) does not apply to the Financial Statement. First, the Debtor argues, Bankruptcy Rule 9037(g) applies only to documents submitted to the bankruptcy court, not documents previously submitted to other courts. And, more importantly, says the Debtor, the Financial Statement was never (prior to the filing of the Objection) made available to the public. Instead, the Debtor maintains that the Financial Statement was submitted as a confidential document in connection with the state court proceeding. According to the Debtor, Attorney Chernin was able to obtain a copy of the document only because he represented Lenkar in connection with the state court proceedings.

With respect to damages, Attorney Chernin maintains that, even if this Court were to find that the filing of the unredacted Financial Statement violated Rule 9037, there is no private right of action for damages under Rule 9037. Therefore, he posits that the appropriate remedy is that provided in Rule 9037 itself—namely, for the Court to require the redaction of the \*415 information or prohibit non-party access to the information, which the Court has already done.

Attorney Chernin next contends that although the Court may use its contempt powers to address violations of Rule 9037, such an exercise should be limited to “violations that are malicious or repetitive, and where the remedies provided by rule 9037(d) are insufficient.” Mem. in Opp. to Request for Sanctions 6, May 28, 2014, ECF No. 46. Analogizing this case to others in which courts have declined to impose sanctions on creditors for failure to redact filed documents, Attorney Chernin says the violation here was similarly not egregious, public access was quickly restricted, and the remedy provided by that restriction appears sufficient in that the Debtor is unable to demonstrate any particular harm. Accordingly, he argues, there is no justification for the exercise of the Court’s contempt powers in this case.

Although she agrees that Rule 9037 does not create a private right of action for damages, the Debtor argues that the Court can impose sanctions for its violation pursuant to the Court’s contempt powers under § 105(a).<sup>4</sup> The Debtor maintains that sanctions are warranted here, because the conduct in this case “constitutes a blatant disregard for [the] obligations under

the Bankruptcy Rules and is a contemptuous action.” Mem. in Support of Request for Sanctions 4, May 30, 2014, ECF No. 47. The Debtor contends that she is entitled to damages in the amount of her attorney’s fees and expenses, monetary compensation for the publication of her personal information, and credit monitoring for the next ten years.

4 Section 105(a) provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

Following a hearing on the Request for Sanctions and the opportunity for further briefing, the Court took the matter under advisement.

## II. DISCUSSION

### A. The Rule 9037 Violation

Documents filed in a bankruptcy case are public records and open to examination by any entity. 11 U.S.C. § 107(a). However, in recognition that this broad right of public access may also place individuals at risk of having certain sensitive, private information exposed and misused, the Bankruptcy Code and Rules require the redaction of sensitive personal information from documents filed with the Court, *see* Fed. R. Bankr.P. 9037(a), and empower the Court to order redaction or to restrict public access in order to protect such information, if necessary, *see* 11 U.S.C. § 107(c)(1); Fed. R. Bankr.P. 9037(d).

Bankruptcy Rule 9037(a) requires a party filing a document with the bankruptcy court containing “an individual’s social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number” to redact such information from that filing, disclosing only: “(1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual’s birth; (3) the minor’s initials; and (4) the last four digits of the financial account number.” Fed. R. Bankr.P. 9037(a).

In re Lunden, 524 B.R. 410 (2015)

\*416 In the District of Massachusetts, attorneys are required to file documents electronically with the Bankruptcy Court using the Electronic Case Filing system ("ECF").<sup>5</sup> See Mass. Local Bankr.R. ("MLBR") 9036-1; MLBR Appendix 8 ("Electronic Filing Rules") 1.<sup>6</sup> To access the ECF system, an attorney must enter a unique user name and password online at <https://ecf.mab.uscourts.gov/cgi-bin/login.pl> (the "Log-In Screen"). On the Log-In Screen, directly adjacent to the boxes where the user name and password are entered, there appears a notice that reads:

5 Certain exceptions to the electronic filing requirement, none of which are relevant here, are found in MLBR Electronic Filing Rule 1(a)-(e).

6 Only Court personnel and registered users may access filings through the ECF system. However, any person may view an electronic docket, including all documents filed in a case, through the Public Access to Court Electronic Records system ("PACER"), managed by the Administrative Office of the United States Courts.

**IMPORTANT NOTICE OF REDACTION RESPONSIBILITY:** All filers must redact: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; and financial account numbers, in compliance with Fed. R. Bankr.P. 9037. This requirement applies to all documents including attachments.

Directly underneath this notice (the "Redaction Notice") is a check box next to which is printed: "I understand that, if I file, I must comply with the redaction rules. I have read this notice" (the "Acknowledgment"). Attorneys must check the box next to the Acknowledgment in order to file a document through the ECF system. In addition, upon submission of a pleading, but prior to finalization, a warning again appears which states:

"Attention!! Submitting this screen commits this transaction. You will have no further opportunity to modify this submission if you continue. **Have you redacted?"**

Here, despite the prominent Redaction Notice and required Acknowledgment, Attorney Chernin logged into the ECF system and electronically filed Lenkar's Opposition to which was attached the Financial Statement containing information he was required to redact under Bankruptcy Rule 9037(a).

Attorney Chernin has raised the rather specious argument that the redaction requirements of Rule 9037(a) did not apply to the Financial Statement because it constituted "the official record of a state-court proceeding," Bankruptcy Rule 9037(b) (3), and was filed by the Debtor "without redaction and not under seal," Bankruptcy Rule 9037(g). But neither of these exceptions to the redaction requirements applies here.

[1] First, the Financial Statement was not exempt from redaction pursuant to 9037(b)(3), because it was not part of the public record of the state court proceeding. At the bottom of the Financial Statement appears the following:

**Pursuant to Uniform Small Claims Rule 9(c), all information in this affidavit is CONFIDENTIAL. It shall be available to any other party to this litigation, but shall not be available for public inspection unless the Court so orders.**

The referenced Massachusetts Uniform Small Claims Rule 9(c) provides that financial statements filed pursuant to that rule "shall be kept separate from other papers in the case and shall not be available for public inspection." The comments to the rule indicate that the financial statement \*417 "shall be treated as confidential information in terms similar to those of Rule 401(d) of the Supplemental Rules of the Probate Court. See Rule 7(g) and the Commentary thereto." Uniform Small Claims Rule 9 cmt. to 2001 Amendments. Supplemental Rule 401(d) of the Probate Court, in turn, requires that financial statements be "impounded or kept separate from other papers in the case," and thus do not become part of the official record of the case.

[2] For the same reason, the exception to the redaction requirement under Rule 9037(g) does not apply. Under that exception, a party waives the protection of the redaction requirements by filing a document "without redaction and not under seal." But here, the Debtor *did* file the Financial Statement under seal in the state court, because, as the above-cited rules make clear, the Financial Statement was from the outset treated as a confidential document, protected from public view. And Attorney Chernin's argument that his ability to simply call the state court and ask for a copy of the Financial Statement demonstrates that the document was available to the public is belied by the fact that he was able to obtain a copy *only* because he represented a party to the case.

Accordingly, neither exception to the redaction requirements of Rule 9037(a) posited by Attorney Chernin applies, and the Court finds that he was obligated to redact the first 5 digits of

In re Lunden, 524 B.R. 410 (2015)

the Debtor's Social Security number and the month and day of the Debtor's birth date before filing the Financial Statement as an attachment to his Opposition. His failure to redact that information thus constituted a violation of Rule 9037.

#### B. Sanctions

The parties agree, consistent with extant case law, that Rule 9037 does not itself create a private right of action for damages upon violation.<sup>7</sup> The only remedy found in Rule 9037 itself is the power granted to a bankruptcy court to order redaction or to "limit or prohibit a nonparty's remote electronic access to a document filed with the court." Fed. R. Bankr.P. 9037(d).

<sup>7</sup> See, e.g., *Lenz v. Auto Acceptance (In re Lenz)*, 448 B.R. 832, 839 (Bankr.D.Oregon 2011); *Maple v. Colonial Orthopaedics, Inc. (In re Maple)*, 434 B.R. 363, 374 (Bankr.E.D.Va.2010); *Davis v. Eagle Legacy Credit Union (In re Davis)*, 430 B.R. 902, 909 (Bankr.D.Colo.2010); *French v. Am. Gen. Fin. Servs. (In re French)*, 401 B.R. 295, 307 (Bankr.E.D.Tenn.2009).

[3] But regardless of whether the Rule itself contains a damages provision, the Court has the power to sanction contemptuous violations of Rule 9037 pursuant to § 105(a) and its inherent authority to sanction a party for contempt. As the First Circuit Court of Appeals has explained:

section 105(a) empowers the bankruptcy court to exercise its equitable powers—where “necessary” or “appropriate”—to facilitate the implementation of other Bankruptcy Code provisions. While it is true that the considerable discretion conferred on courts sitting in bankruptcy by § 105 is not unlimited, in that is not a roving commission to do equity, a court is well within its authority if it exercises its equitable powers to enforce a specific code provision.... Thus, § 105 does not itself create a private right of action, but a court may invoke § 105(a) if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code, so long as the court acts consistent with the Code and does not alter the Code's distribution of other substantive rights.

\*418 It follows, therefore, ... that § 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have. Those contempt powers inherently include the ability to sanction a party.

*Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 444–45 (1st Cir.2000) (internal quotations and citations omitted).<sup>8</sup>

<sup>8</sup> See also *Lenz*, 448 B.R. at 842–43; *Dunbar v. Cox Health Alliance, LLC (In re Dunbar)*, 446 B.R. 306, 310 (Bankr.E.D.Ark.2011); *Maple*, 434 B.R. at 374; *Barnhart v. Union Bank, Inc. (In re Barnhart)*, 2010 WL 724703, \*3 (Bankr.N.D.W.V. Feb. 26, 2010); *Dixon v. Bay Financial, Inc. (In re Dixon)*, 2010 WL 501547 (Bankr.S.D.Miss. Feb. 5, 2010); *Carter v. Flagler Hospital, Inc. (In re Carter)*, 411 B.R. 730, 737–38 (Bankr.M.D.Fla.2009); *French*, 401 B.R. at 315.

[4] Sanctions for contempt are appropriate where the requirements of the law are clear, see *Ameriquist Mortgage Co. v. Nosek (In re Nosek)*, 544 F.3d 34, 46–47 (1st Cir.2008), and a party has “flaunted the law with knowledge of its proscriptions, failed to take remedial action once violations were discovered, or acted deliberately as opposed to mistakenly or inadvertently.” *Maple*, 434 B.R. at 374 (quoting *Barnhart*, 2010 WL 724703 at \*4).

[5] [6] Where sanctions are warranted, the bankruptcy court has broad discretion to fashion a contempt remedy. As the First Circuit has recognized, an appropriate use of the court's contempt powers is to order monetary relief, in the form of actual damages, attorney fees, and punitive damages.

*Bessette*, 230 F.3d at 445.<sup>9</sup>

<sup>9</sup> See also *Hann v. Educational Credit Management Corp. (In re Hann)*, 711 F.3d 235, 243 (1st Cir.2013); *Fatsis v. Braunstein (In re Fatsis)*, 405 B.R. 1, 7 (1st Cir. BAP 2009); *56 Assoc. v. Diorio*, 381 B.R. 431, 440–41 (Bankr.D.R.I.2008); *In re Barry*, 330 B.R. 28, 37–38 (Bankr.D.Mass.2005); *Curtis v. LaSalle Nat'l Bank (In re Curtis)*, 322 B.R. 470, 485–86 (Bankr.D.Mass.2005).

[7] Here, the Court finds that sanctions are warranted for Attorney Chernin's violation of the redaction requirements of Rule 9037(a). The redaction requirements are not only clearly stated in the Rule itself, but are repeatedly emphasized throughout the electronic filing process. In fact, Attorney Chernin checked the box next to the Acknowledgment, affirmatively indicating his awareness of the redaction requirements before he electronically filed the Opposition. The mere failure to redact may not always give rise to sanctions for contempt.<sup>10</sup> But in this case, when the error was brought to his attention, Attorney Chernin refused to take any corrective action and then defended his failures with ex post facto excuses bordering on the frivolous.



In re Lunden, 524 B.R. 410 (2015)

- 10 See, e.g., *Maple*, 434 B.R. at 374; *Barnhart*, 2010 WL 724703 at \*4; *Carter*, 411 B.R. at 738; *Cordier v. Plains Commerce Bank (In re Cordier)*, Bankr. No. 08–20298(ASD), Adv. No. 08–2037, 2009 WL 890604, \*5 (Bankr.D.Conn. March 27, 2009).

Accordingly, the Court rules that compensatory damages are warranted here. Attorney Nickless is entitled to recover his fees and costs associated with the filing and prosecution of the Motion to Redact and Request for Sanctions. See *Barry*, 330 B.R. at 38 (in award of sanctions for contempt, “[t]he Debtor is entitled to include attorneys’ fees amongst his actual damages, provided that they are reasonable.”).<sup>11</sup> No further compensatory award appears appropriate at this time, inasmuch \*419 as the Debtor has failed to demonstrate, at least at this juncture, that she has incurred any damages. Still, the Debtor is entitled to reimbursement of the costs of credit monitoring in the interim to forestall any risk of damages in the future.

- 11 Because those fees and costs have yet to be quantified, the Court will order Attorney Nickless to file an affidavit of those fees and will allow for a reasonable period of time for Attorney Chernin to raise any objection before ordering payment.

[8] [9] The Court also finds that punitive sanctions are appropriate in this case. “[P]unitive damages’ ... are most appropriate ‘where there has been an ‘arrogant defiance’ of the Bankruptcy Code,’ ” *In re Zine*, 521 B.R. 31, 38 (Bankr.D.Mass.2014) (quoting *Curtis*, 322 B.R. at 486), or where a party responds to its obvious error with “frivolous and meritless defenses.” *Curtis*, 322 B.R. at 486. In this case, Attorney Chernin has done both. “The amount in which punitive damages should be awarded is ... a fact specific determination within the discretion of the bankruptcy courts.” *Id.* at 487. In general, however, “[p]unitive damages should be awarded in an amount sufficient to serve their purpose of deterrence.” *Id.*

The Court finds and rules that a sanction in the amount of \$1,000.00 is an appropriate award of punitive damages. This amount should be sufficient to deter not only the careless behavior that led to the original unredacted filing, but also to motivate Attorney Chernin to take swift action to notify the Court and request redaction in the event of any subsequent filing containing information protected by Rule 9037(a).

### III. CONCLUSION

For all the foregoing reasons, the Court will GRANT in part the Debtor’s Request for Sanctions and will order Attorney Chernin to 1) compensate Attorney Nickless for his attorney’s fees and expenses incurred in connection with bringing forward and prosecuting the Motion to Strike and Request for Sanctions and 2) reimburse the Debtor the costs of credit monitoring for one year from the date of the entry of the Order accompanying this Memorandum of Decision. The Court will further sanction Attorney Chernin in the amount of \$1,000.00, such amount to be paid within 30 days of the entry of the Order to Attorney Nickless for the benefit of the Debtor. An Order in conformity with this Memorandum of Decision will be entered herewith.

### ORDER

For the reasons set forth in this Court’s Memorandum of Decision of even date, the “Debtor’s Emergency Motion (A) To Strike From The Public Record And This Court’s Electronic Filing System The Exhibit To Opposition Of Lenkar, LLC To Debtor’s Motion To Avoid Judicial Lien And (B) For Sanctions” (the “Request for Sanctions”) is GRANTED in part and DENIED in part, as follows:

1. Within fourteen (14) days from the date of this Order, Attorney David Nickless shall file an Application for Compensation, conforming in substantial part to MLBR 2016–1, setting forth his attorney’s fees and expenses incurred in connection with bringing forward and prosecuting the Request for Sanctions. Attorney Russell Chernin shall file any opposition thereto within seven (7) days thereafter. If an objection is filed, the Court will schedule a hearing on the Application. If no objection is filed, the Court will deem any objection waived and will consider the Application without a hearing and issue an Order allowing the Application in whole or in part. Attorney Chernin shall pay to Attorney Nickless the amount ordered by the Court within thirty (30) days from the date of the entry of that Order.

2. Within fourteen (14) days from the date of the entry of this Order, the Debtor shall file a request for reimbursement of the cost of credit monitoring for the period \*420 of one year from the date of the entry of this Order, together with documentary evidence of the amount needed to pay for that service. Attorney Chernin shall file any opposition thereto within seven (7) days thereafter. If an objection is filed, the Court will schedule a hearing on the request. If no objection is filed, the Court will deem any objection waived and will

In re Lunden, 524 B.R. 410 (2015)

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consider the request without a hearing and issue an Order allowing the request in whole or in part. Attorney Chernin shall pay to Attorney Nickless on behalf of the Debtor the amount ordered by the Court within thirty (30) days from the date of the entry of that Order.

3. Within thirty (30) days from the date of the entry of this Order, Attorney Chernin shall pay an additional sum of \$1,000.00 to Attorney Nickless for the benefit of the Debtor.

**All Citations**

524 B.R. 410

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**11 U.S.C. § 107 - Public access to papers**

- (a) Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
- (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
  - (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
  - (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.
- (c)
  - (1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:
    - (A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title.
    - (B) Other information contained in a paper described in subparagraph (A).
  - (2) Upon ex parte application demonstrating cause, the court shall provide access to information protected pursuant to paragraph (1) to an entity acting pursuant to the police or regulatory power of a domestic governmental unit.
  - (3) The United States trustee, bankruptcy administrator, trustee, and any auditor serving under section 586(f) of title 28—
    - (A) shall have full access to all information contained in any paper filed or submitted in a case under this title; and
    - (B) shall not disclose information specifically protected by the court under this title.

**FRBP 9037. Privacy Protection For Filings Made with the Court**

- (a) *Redacted Filings.* Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:
  - (1) the last four digits of the social-security number and taxpayer-identification number;
  - (2) the year of the individual's birth;
  - (3) the minor's initials; and
  - (4) the last four digits of the financial-account number.
- (b) *Exemptions From the Redaction Requirement.* The redaction requirement does not apply to the following:
  - (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
  - (2) the record of an administrative or agency proceeding unless filed with a proof of claim;
  - (3) the official record of a state-court proceeding;
  - (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
  - (5) a filing covered by subdivision (c) of this rule; and
  - (6) a filing that is subject to §110 of the Code.
- (c) *Filings Made Under Seal.* The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.
- (d) *Protective Orders.* For cause, the court may by order in a case under the Code:
  - (1) require redaction of additional information; or
  - (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.
- (e) *Option for Additional Unredacted Filing Under Seal.* An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

- (f) *Option for Filing a Reference List.* A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.
- (g) *Waiver of Protection of Identifiers.* An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

**FRBP 9018. Secret, Confidential, Scandalous, or Defamatory Matter**

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

**Local Rule 1001-3 (MD FL). Privacy Policy Regarding Public Access to Electronic Case Files**

- (a) *Application of Rule.* In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, parties shall not include, or shall partially redact where inclusion is necessary, the following personal data identifiers from documents and pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court or required by statute, the Federal Rules of Bankruptcy Procedure, or the Official Bankruptcy Forms. This rule applies to:
- (1) *Social Security Numbers.* If an individual's Social Security number must be included in a pleading, only the last four digits of that number shall be used.
  - (2) *Names of Minor Children.* If the involvement of a minor child must be mentioned, only the initials of that child shall be used.
  - (3) *Dates of Birth.* If an individual's date of birth must be included in a pleading, only the year shall be used.
  - (4) *Financial Account Numbers.* If financial account numbers are relevant, only the last four digits of these numbers shall be used.
- (b) *Responsibility.* The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review papers for compliance with this rule.
- (c) *Unredacted Papers May Be Filed Under Seal.* In compliance with the E-Government Act of 2002, a party wishing to file a paper containing the personal data identifiers listed above may file an unredacted paper under seal. This paper shall be retained by the Court as part of the record. The party shall also file a redacted copy via CM/ECF.

**Notes of Advisory Committee**

**2015 Amendment**

The amendments to this rule are stylistic.

**2004 Amendment**

This amendment serves as guidance for implementing the Judicial Conference Privacy Policy and the E-Government Act of 2002.

**Local Rule 5005-4 (MD FL). Sealed Documents**

Papers may be filed under seal only on such terms and conditions as the Court may order. Papers ordered to be filed under seal shall be filed in paper form, not electronically, unless specifically authorized by the Court. A paper copy of the order allowing the paper to be filed under seal must be attached to the paper and delivered to the Clerk. The Clerk shall seal the paper in a manila envelope, with initials or a signature written across the envelope closure and tape placed on top of the signature to provide additional security.

**Notes of Advisory Committee**

**2004 Amendment**

This new rule sets out that sealed documents must remain in paper form and not made part of CM/ECF. It also instructs the Clerk on maintenance of sealed documents.

**Local Rule 5073-1 (MD FL). Photographs; Broadcasting or Television; Use of Computers or Communication Devices**

Rule 4.11 of the Local Rules of the United States District Court for the Middle District of Florida applies in the Court in all cases under Title 11 and in all civil proceedings arising under Title 11, or arising in or related to cases under Title 11.

**Notes of Advisory Committee**

**1998 Amendment**

The local rules of the District Court generally do not apply in the Bankruptcy Court. *See* Local Rule 1001-1(d). In most instances within the District, the Bankruptcy Court's facilities are now located in the same federal courthouse in which the District Court's facilities are located. It is therefore desirable to have the same rules apply in both the District Court and the Bankruptcy Court that govern the photographing, broadcasting, and televising of court proceedings, the use of computers and communication devices in court facilities, and the introduction of such equipment and devices into the building in which court proceedings are conducted. Accordingly, this amendment simply deletes the Bankruptcy Court's rule on these subjects and applies in the Bankruptcy Court the provisions of the District Court's corresponding local rule.

The text of the District Court's local rule presently is as follows:

**RULE 4.11 PHOTOGRAPHS; BROADCASTING OR TELEVISING; USE OF COMPUTERS AND COMMUNICATION DEVICES**

(a)(1) As approved by the Judicial Conference of the United States at its March, 1979 meeting, the taking of photographs and the recording or taping of ceremonies for the investing of judicial officers and of naturalization proceedings and the possession of necessary equipment therefor is authorized in courtrooms of this Court and the environs thereof. At least three (3) hours prior notice of the use of recording or television equipment shall be given to the presiding judge who may control the placement of such equipment in the courtroom.

(a)(2) Otherwise, the taking of photographs, the operation of recording or transmission devices, and the broadcasting or televising of proceedings in any courtroom or hearing room of this Court, or the environs thereof, either while the Court is in session or at recesses between sessions when Court officials, attorneys, jurors, witnesses or other persons connected with judicial proceedings of any kind are present, are prohibited.

(b) In order to facilitate the enforcement of subsection (a)(2) of this rule, no photographic, broadcasting, television, sound or recording equipment of any kind (except that of Court personnel and as authorized by subsection (a)(1) hereof) will be permitted in that part of any building where federal judicial proceedings of any kind are usually conducted in this District, as is designated by the resident judges of the Division in which such building is located. Such designation shall be made by order, filed in the office of the Clerk in such division. Except that of Court personnel, cellular telephones and computer equipment are likewise prohibited in that part of any building where federal judicial proceedings of any kind are usually conducted in this District, as designated by the resident judges in the manner set forth in the preceding sentence, unless otherwise permitted by the judicial officer before whom the particular case or proceeding is pending. This rule does not prohibit the possession of telephonic pagers in such locations, provided that such pagers are either switched off or placed in a silent activation mode while in such locations.

(c) Employees of other federal agencies resident within the security perimeters of buildings in this District housing federal courts or proceedings, with valid agency identification, are permitted to transport any of the equipment identified above through security checkpoints for the purpose of using same, in their official capacities, within areas of such buildings not covered by subsection (b) of this rule.



Said equipment shall be subject to inspection by the United States Marshals Service.

*1997 Amendment*

This amendment conforms the existing Local Rules to the uniform numbering system prescribed by the Judicial Conference of the United States and to the model system suggested and approved by the Advisory Committee on Bankruptcy Rules of the Judicial Conference's Committee on Rules of Practice and Procedure. In renumbering the Local Rules to conform to the uniform numbering system, no change in substance is intended. This amendment was effective on April 15, 1997. This rule was formerly Local Rule 1.09. The Advisory Committee Notes to the superseded rules may be helpful in interpreting and applying the current rules.

*1995 Amendment*

The amendment which adds new subparagraph 1.09(c) makes clear that the prohibition of recording and photographic equipment is not intended to prohibit the use of dictation equipment in conjunction with the review of the Clerk's Office files or the use of computer equipment, subject to Court control, generally. These amendments were effective on February 15, 1995.