

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
ROBERT ALLEN MATHIS	:	BANKRUPTCY CASE
SUSAN STEPHENS MATHIS,	:	NO. 05-13583-WHD
	:	
Debtor.	:	
_____	:	
	:	
MUTUAL SAVINGS CREDIT UNION,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 06-1005
v.	:	
	:	
ROBERT ALLEN MATHIS	:	
SUSAN STEPHENS MATHIS,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Sanctions Pursuant to Rule 9011, filed by Mutual Savings Credit Union (hereinafter the “Plaintiff”) against Paul McCord and Paul Parker (hereinafter the “Respondents”), former counsel for Robert and Susan Mathis (hereinafter the “Debtors”) in the above-captioned adversary proceeding. The Motion arises in connection with a complaint to determine the dischargeability of a debt. This Court has subject matter jurisdiction over this matter. *See* 28 U.S.C. § 157(b)(2)(I); § 1334.

The Debtors filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 5, 2005. The Plaintiff filed a complaint against the Debtors seeking a determination

that a mortgage debt owed by the Debtors to the Plaintiff is nondischargeable. The Respondents, on behalf of the Debtors, filed an answer in which they asserted counterclaims alleging that the Plaintiff made material misrepresentations to the Debtors and were negligent when assisting the Debtors to complete the loan application required for the mortgage. The Debtors sought compensatory and punitive damages, as well as costs of litigation.

The Plaintiff filed a motion to dismiss the counterclaims for failure to state a claim and on the basis that the Debtors lacked standing to prosecute the counterclaims. On June 1, the Court dismissed the Debtors' counterclaims due to the Debtors' lack of standing. The Court noted that, although the Chapter 7 trustee had filed a report of no distribution, the trustee had not abandoned the counterclaims because the Debtors had failed to list the counterclaims as assets on their bankruptcy schedules. Accordingly, the Court held that the trustee remained the only party with standing to prosecute the pre-petition claims. Since there was no indication as to whether the trustee intended to intervene or to abandon the claims, dismissal was appropriate. The Court did not, however, dismiss the Debtors' claim for any attorney's fees that may be permitted as a result of the filing of the Plaintiff's complaint.

Subsequently, the Plaintiff filed the instant motion seeking a finding that the Respondents violated Rule 9011 when they filed the answer asserting a counterclaim for attorney's fees on behalf of the Debtors. Specifically, the Plaintiff contends that the

allegations and facts alleged by the Debtors in support of their claim for attorney's fees lacked evidentiary support at the time the Debtors' answer was filed and are likely to lack evidentiary support after a reasonable opportunity to investigate and to conduct discovery.

The Respondents filed a motion to withdraw from representing the Debtors, which the Court has granted. As of this date, no attorney has filed a notice of appearance on behalf of the Debtors. The Respondents have filed a brief in opposition to the Motion.

The Plaintiff's complaint alleged that the Debtors engaged in fraud and misrepresentation when they obtained a mortgage loan from the Plaintiff. Specifically, the Plaintiff alleged that the Debtors stated in the mortgage loan application, as well as in an affidavit, that they lived in the property at that time. The Plaintiff further alleged that the Debtors testified at the meeting of creditors that they did not live in the property at the time they applied for the loan.

In their counterclaim, the Debtors asserted that the Plaintiff should be responsible for payment of attorney's fees because the Plaintiff filed the complaint in bad faith. The Debtors also made statements in response to the Plaintiff's motion to dismiss alleging that the Debtors' testimony given at the creditors' meeting was a result of the fact that the Debtors were nervous and the Plaintiff's attorneys were "badgering" the Debtors, such that the trustee was required to "cut off" the questioning of the Debtors by the Plaintiff's attorneys. In response to an interrogatory posed by the Plaintiff, the Debtors also stated that, if they gave incorrect testimony about where they were living at the time of the

mortgage application, it was due to the “badgering” by the Plaintiff at the meeting of creditors.

The Plaintiff submits that the Respondents violated Rule 9011 when they filed the counterclaim on behalf of the Debtors and caused the Debtors to respond to the Plaintiff’s interrogatory, as the counterclaim was asserted in bad faith and was frivolous and malicious, and the contention in the interrogatory that the Plaintiff’s attorneys badgered the Debtors at the first meeting of creditors is false and not supported by the evidence.¹

The Respondents acknowledge that the transcript of the meeting of creditors does not appear to support the Debtors’ contention that the Plaintiff’s counsel badgered the Debtors into testifying incorrectly at the meeting of creditors. The Respondents claim that the attorney who drafted this pleading is no longer employed by their law firm and assert that the inclusion of this contention in a pleading filed with this Court is irrelevant because the Debtors’ only remaining claim in this case is their claim for attorney’s fees incurred due to the filing of the complaint, which occurred after the meeting of creditors.

As a preliminary matter, the Court must disagree with the Respondent’s contention that the fact that the Debtors are not seeking attorneys fees in connection with the meeting of creditors renders this issue irrelevant. The Plaintiff appears to allege that the Respondents

¹ The Court notes that the inclusion of any statement in an interrogatory response that lacked evidentiary support is not an appropriate basis upon which to sanction the Respondents under Rule 9011. See Fed. R. Bankr. P. 9011(d) (“Subdivisions (a) through (c) of this rule do not apply to disclosures and discover requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.”).

signed a pleading filed with this Court that contained a misrepresentation. The response to the motion to dismiss stated that the Debtors were “badgered” by a “team” of three attorneys employed by the Plaintiff. The response also alleged that the trustee was required to “cut off” the questioning by the Plaintiff’s “team” of attorneys. The transcript of the Debtors’ testimony, the authenticity of which the Respondents do not question, does not support these contentions. It appears from the transcript that the Debtors were questioned by one paralegal from the law firm that represented the Plaintiff. There is no indication that the trustee had to “cut off” her limited questions. In short, it would appear from the transcript that the allegation made in the Debtors’ response to the Plaintiff’s motion to dismiss was, at best, misleading and incomplete and, at worst, a complete fabrication. If this is the case, this conduct is indeed relevant to a motion for sanctions under Rule 9011 against the attorneys who signed and filed the pleading, regardless of who drafted it. *See* FED. R. BANKR. P. 9011(b) (“By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; the allegations and other factual contentions have

evidentiary support . . . ; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.").

That being said, the Court agrees with the Respondents that further investigation and discovery in the adversary proceeding could shed additional light on the question of whether the Debtors had any basis for asserting their counterclaim or for making these statements in a pleading. The Court also has reservations about rendering the necessary factual findings and conclusions of law that would be required to resolve this matter, as they may have preclusive effect on issues pending in connection with the Plaintiff's complaint and the Debtor's counterclaim. For these reasons, the Court will hold this matter in abeyance until such time as the complaint and counterclaim are resolved.

IT IS ORDERED.

At Newnan, Georgia, this _____ day of October, 2006.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE