UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
JOHN NED HARMAN	:	04-17195-WHD
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Sanctions and the Application for Compensation, filed by Ara Hansard Realty, Inc (hereinafter the "Movant"). The Application for Compensation is opposed by John Ned Harman (hereinafter the "Debtor") and Aaron McWhorter (hereinafter "McWhorter"). These matters constitute core proceedings, over which this Court has subject matter jurisdiction. See 28 U.S.C. § 157(b)(2)(A)-(B); § 1334.

FINDINGS OF FACT

The Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on April 6, 2004. At the time of the filing, the Debtor owned two tracts of land located in Carroll County, Georgia. The larger tract contained at least 550 acres and was operated as a family farm, and the smaller tract was comprised of approximately 159 acres, which the Debtor rented to McWhorter, who operated a sod farm on the property. The 550-acre tract was encumbered by a first priority lien held by the Farm Services Administration (hereinafter the "FSA"), a second priority lien in favor of the Small Business Administration

(hereinafter the "SBA"), a third priority lien in favor of Jerry Tolbert, and possibly a fourth priority lien held by McWhorter. The 159-acre tract was subject to a first priority lien held by the FSA, a second priority lien held by the SBA, and third priority lien held by McWhorter. The Debtor also owned a 21.5-acre tract of land in Heard County (hereinafter the "Chicken House Property"), Georgia, upon which the Debtor operated a business. Tolbert held a lien on the Chicken House Property. According to the Debtor's disclosure statement, as of January 10, 2005, the most recent appraisals of the properties had been completed on behalf of the FSA in June 2001 and indicated values of $1.2 million for the 550-acre tract and $652,000 for the 159-acre tract, based upon a single-family, residential use for the land. In January 2005, the Debtor estimated that the 550-acre tract could be sold for $4,000 per acre for residential use and that the 159-acre tract could not be sold for residential use, but would be worth approximately $320,000 as agricultural land. The Debtor also estimated that the Chicken House Property was worth $1 million.

On January 10, 2005, the Debtor filed a disclosure statement and a proposed plan of reorganization (hereinafter the "Plan"). The Plan provided for the Debtor, acting as a debtor-in-possession, to sell the 159-acre tract and that portion of the 550-acre tract necessary to pay all creditors in full. The Debtor planned to retain the Chicken House Property and realize revenues of $2,000 per month from the associated business, with the expectation that the debt owed to Tolbert would eventually be refinanced. The sales contemplated under the Plan were expected to take up to one year from the effective date

of the Plan to complete.

The Debtor filed an amended disclosure statement on March 17, 2005, which disclosed that the Debtor was in default under the terms of the loan to Tolbert and that Tolbert would likely foreclose on the Chicken House Property. On April 5, 2005, prior to the approval of the Debtor's disclosure statement and confirmation of the Plan, the Debtor filed a motion to sell the Chicken House Property for $1.2 million. That sale was approved by the Court on May 18, 2005, and the Debtor used the proceeds of the sale to pay off the debt owed to Tolbert. Despite the sale of the Chicken House Property, which the Plan provided would be retained by the Debtor, the Debtor did not file an amended plan to address this change.

All of the secured creditors objected to the Plan. A common concern shared by the secured creditors was the fact that the creditors could be required to wait for up to one year to receive any distributions under the Plan. Objections raised also included the fact that the Plan did not provide a minimum sales price which the Debtor would be required to accept for the properties to be sold and that the Plan did not require the Debtor to abandon the properties to the respective secured creditor in the event the sale was not consummated within the one-year period. Additionally, two creditors objected to the fact that, although the Debtor had allegedly received offers to purchase the properties, which exceeded the "high-end" valuations disclosed by the Debtor in the disclosure statement, the Debtor had not disclosed these offers in the disclosure statement and had not acted on the offers. The

consensus among the secured creditors, as well as the United States Trustee and the Internal Revenue Service, was that the Debtor should be required to liquidate the properties in a more timely fashion to provide for faster payments to creditors and to avoid the risk that the sales would not be completed within the one-year period.

On June 17, 2005, the Movant filed an application to be employed by the Debtor to market and sell the 550-acre tract. The Movant alleged that, prior to the filing of the Debtor's petition, the Movant's representative had met with the Debtor to discuss the sale of the 550-acre tract and that the Debtor had authorized the Movant to show the 500-acre tract. The Movant also contended that the Debtor promised a 10% commission on any sale. The Movant stated that it had located a ready, willing, and able buyer and, on April 14, 2004, presented the Debtor with an offer to purchase the 550-acre tract for a price well in excess of the Debtor's expected sales price. The Movant also claimed that, when the Debtor did not close the sale, it continued to work to maintain the purchaser's interest and procured an extension of the offer. By its motion, the Movant sought approval of its employment, *nunc pro tunc* to the petition date, as the real estate agent for the estate, and sought a waiver of the requirement of filing a fee application. The Debtor opposed the Movant's request for approval of employment and denied that he had entered an agreement with the Movant for the marketing and sale of the 550-acre tract. The Debtor also objected to the *nunc pro tunc* approval of the employment on the basis that the Movant had allegedly known about the bankruptcy filing and had failed to take action sooner.

The U.S. Trustee filed a motion for the appointment of a trustee in the Debtor's case on June 20, 2005. As grounds for the appointment of the trustee, the U.S. Trustee pointed to the fact that the Debtor had proposed a plan that was strongly opposed by the Debtor's creditors and the U.S. Trustee and that a trustee could commence selling the properties immediately and would provide for a quicker recovery to the creditors. The U.S. Trustee also alleged that the Debtor had "demonstrated dishonesty and gross mismanagement by substantially under valuing his property and by failing to disclose and act upon an offer received for the purchase of the" 550-acre tract.

At a hearing held on June 24, 2005, the Court granted the motion for the appointment of a trustee and reserved ruling on the employment application. On July 17, 2005, the U.S. Trustee appointed Griffin Howell, III (hereinafter the "Trustee") as trustee, and the Court approved the appointment on August 11, 2005.

On September 3, 2005, the Trustee filed a motion to substitute himself as the moving party in the Movant's application for employment. The Court granted the Trustee's motion and approved the employment of the Movant as the real estate agent for the Trustee by order dated October 21, 2005. The October 21st Order states that the Movant's application is "granted in all respects," that the Movant's employment is approved *nunc pro tunc* to the commencement of the case, and that the "real estate commission shall be approved at the hearing on the motion to sell property of the estate."

The Movant presented the Trustee with two offers to purchase the 500-acre tract. The first offer was for $4,500 per acre, and the second offer was for $4,800 per acre. On October 26, 2005, the Trustee filed a motion to sell the 550-acre tract for $4,500 per acre to Alan Swindall and a motion to sell the 159-acre tract to McWhorter for $358,000. In the motion to sell, the Trustee also sought permission to pay a 10% commission on the sale of the 550-acre tract to the Movant. The Debtor objected to the motions to sell and argued that the Trustee, as a Chapter 11 trustee, lacked the authority to the sell the Debtor's properties and to essentially liquidate the Debtor's business. The Debtor contended that his previously filed plan was a better alternative to the sale of the properties and that he should be permitted more time to attain confirmation of the plan. In response to the Debtor's objection, the Movant filed a reply and a motion requesting that the Court issue an order for the Debtor to appear and show cause why he should not be sanctioned for his conduct during the course of the bankruptcy case. Specifically, the Movant alleged that the Debtor "engaged in a systematic and calculated scheme of unlawful conduct specifically to undermine any sale of the" 550-acre tract and the efforts of the Movant to market the property.

At the hearing on the Trustee's motions to sell, the Debtor and the Trustee announced that the Debtor was negotiating with McWhorter, who had expressed an interest in lending approximately $2.5 million to the Debtor. This transaction was proposed as a means to permit the Debtor to pay his existing secured creditors in full, while retaining the 550-acre

tract. The Trustee and the remaining secured creditors agreed that the Trustee would go forward with his intention of auctioning off the 550-acre tract unless the refinancing transaction closed by February 20, 2006. On January 27, 2006, the Court approved the above-mentioned terms and on February 3, 2005, the Court approved the joint motion of the Debtor and the Trustee to incur the $2.5 million loan, which was to be secured by the 550-acre tract. It is the Court's understanding that the refinancing did in fact close on schedule and that the sale of the159-acre tract to McWhorter also closed. Because the sale of the 550-acre tract never took place, the Movant's real estate commission was never approved by the Court and no compensation was paid to the Movant.

On March 7, 2006, the Movant filed the instant application for compensation and also filed a notice of hearing with regard to the Movant's Motion for Sanctions. The Movant seeks total compensation of $314,000, which is comprised of the 10% of the expected sales price of the 550-acre tract ($264,000) and a $50,000 fee enhancement. On April 10, 2006, the Debtor filed an objection to the application for compensation, as well as an objection to the motion for sanctions. Additionally, McWhorter has objected to the payment of the requested compensation.

At the hearing on the application and sanctions motion, the Movant presented evidence that established that the Debtor interfered with the Movant's ability to market and sell the 500-acre tract. As a result of this evidentiary hearing, the Court finds that the Debtor removed, destroyed, or damaged, or caused to be removed, destroyed, or damaged,

sixty-one marketing signs and two digital cameras placed on the 550-acre tract by the Movant. The Court also finds that the Debtor engaged in other behavior, such as repeatedly causing the gates to the property to be locked, changing the locks, and making statements to prospective purchasers that the Movant had no legal authority to sell the 500-acre tract, which made the Movant's task of marketing and selling the 550-acre tract more difficult, more time consuming, and more expensive. The signs at issue cost the Movant $50 each to replace, and the two cameras were purchased by the Movant at a cost of $375. The Movant incurred attorney's fees of $5,124 in dealing with the Debtor's misconduct.

CONCLUSIONS OF LAW

A. *Application for Compensation*

The Bankruptcy Code provides two standards for the approval of compensation to be paid to professionals employed pursuant to section 327. The first is found within section 330, which provides that the bankruptcy court, after notice and a hearing, may award to a professional employed pursuant to section 327 or 1103 reasonable compensation for actual and necessary services rendered and reimbursement of expenses. *See* 11 U.S.C. §§ 330(a)(1). Section 330 allows the court the express leeway to review compensation after the services have been rendered and award compensation less than that requested, but mandates that the court consider the nature, extent, and value of the services rendered in determining the amount of compensation. *See id.* §§ 330(a)(2)-(3). The alternative method

is found in section 328, which permits a trustee or debtor-in-possession, with the court's approval, to "employ . . . a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on contingent fee basis." *Id.* §§ 328(a). If compensation terms are approved in advance of the services being rendered, the court may alter the pre-approved compensation arrangement only if "such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." *Id.* Accordingly, under section 328, the court has no opportunity, absent developments not capable of anticipation, to consider in hindsight the actual services rendered or the results obtained. *See In re Chewning and Frey Security, Inc.*, 328 B.R. 899 (Bankr. N.D. Ga. 2005).

The parties appear to agree that the Court pre-approved the terms of the Movant's compensation. The Court agrees with this conclusion. To determine whether compensation has been approved in advance, the Court considers all of the circumstances of the case, including whether section 330 or 328 were cited in the application or the order, whether language in the order reserved the right to review fees for reasonableness, whether the order discussed the terms of the compensation, and whether the order required the professional to submit an application and time records. *See In re Dan River, Inc.*, Case Number 04-10990, Order Granting Final Application for Compensation of Conway Del Genio, Gries, & Co., LLC, Docket Number 1585 (Bankr. N.D. Ga. Oct. 3, 2005) (citing *In re Airspect*

Air, Inc., 385 F.3d 915, 921 (6th Cir. 2004)).

In this case, although the original application for employment did not cite section 328, all other aspects of the application indicated an intent that the employment terms would be pre-approved. The application specifically seeks compensation equal to a "10 percent standard sales commission relating to the acquisition of a ready, willing and able purchaser." Further, the Movant requested that "the Court enter an order eliminating the need for it to file fee applications for payments made" in connection with the retention. The original application was accompanied by a proposed order that stated that the Movant would be "entitled to allowance of compensation at the rate of ten percent of the sales price of the Property without further Order of this Court." The application clearly requested that the Court pre-approve the employment terms and anticipated that, if the application were granted in full, the Movant would not be required to file a fee application and that the Trustee would be permitted to disburse the commission without an order from this Court.[1] Finally, the Order approving the Movant's employment also evidences the Court's pre-approval of the terms of the Movant's compensation. Although the Order does not cite section 328, neither does it cite section 330. Additionally, the Order granted the application

[1] The Trustee's Motion for Substitution and Joinder stated that the Trustee was being substituted as the moving party. It simply requested that the Court grant the Movant's application, without any modification. Accordingly, the Trustee's motion similarly exhibits an intent that the Court would pre-approve the terms of the Movant's employment and compensation and would not later review the commission for reasonableness during any kind of fee approval process.

in all respects and, although it states that the commission will be approved at the hearing on the motion to sell the property, the Order does not expressly reserve the Court's right to review the requested commission for reasonableness. Presumably, as all parties, as well as the Court, were aware of the facts necessary to determine whether a 10% commission was reasonable and had an opportunity to object to the commission prior to the entry of the Court's Order, there was no need to review the reasonableness of the commission at the sale hearing. In fact, doing so would obviate the purpose of pre-approving the fee. Presumably, any objections to the fee at that time would have been limited to whether or not the terms of employment were improvident in light of developments that were not capable of being anticipated at the time the Court approved the Movant's employment.

Although the parties appear to agree that the Court pre-approved the terms of the Movant's compensation, the parties do not agree on the terms of the compensation itself. The Movant asserts that the Court's Order clearly approved the payment of a commission upon the production of a ready, willing, and able buyer. The Debtor argues that the Order is, at best, ambiguous as to when the commission would be earned. McWhorter agrees with the Debtor as to the ambiguity of the Order and points out that permitting a real estate professional to earn a commission payable by the estate upon the production of a buyer, rather than upon the closing of a sale, is not reasonable and would set a bad precedent.

In support of its position, the Movant points out that the Order granted the application in all respects. The application requested payment of a commission "upon the

acquisition of a ready, willing and able purchaser" for the 550-acre tract. Therefore, the Movant submits that the Order granted the request for payment of the commission absent a sale of the property. The Movant also relies on the fact that the Order specifically excused the Movant from filing a fee application for payment of the commission. Although the Order does provide that the Court will "approve" the commission at the hearing on the motion to sell the property, which could indicate that the Trustee intended the Court to condition payment of the commission on the completion of a sale, the Movant argues that this provision was intended merely to provide an opportunity for the Court to determine the actual amount of the commission. Although the reference to a sale hearing seems to indicate that the Trustee expected that a sale hearing would be held and that the 550-acre tract would be sold, the Order does not specifically condition the payment of the commission on the closing of a sale or the holding of a sale hearing. As the Movant argues, the Trustee could have been more clear in his drafting of the proposed order, or the Court could have modified the Trustee's order to specify clearly that no commission would be paid unless a sale actually closed. The Court agrees with the Movant that it was incumbent upon the Trustee in drafting the proposed order to clarify the terms of employment. When the Trustee filed his joinder and substitution, he adopted the Movant's application without modification. His motion does not indicate any intent to deviate from the terms of the compensation requested by the Movant. The addition to the proposed order of the language regarding the approval of the commission at the sale hearing was, in the Court's opinion,

insufficient to create an additional condition on the payment of the compensation.

As for McWhorter's concern that the Court's decision will create a bad precedent, the Court is cognizant that, in general, the bankruptcy estate should not be required to pay commissions for sales of property that do not close and that do not produce a benefit to the estate or to creditors. This case, however, is not a typical case, and the facts of this case are unlikely to present themselves again in such a fashion. Additionally, as a policy matter, the Court does not believe that the services rendered by the Movant were valueless to the Debtors' estate and its creditors. In many ways, the Movant performed the same type of service performed by what is called a "stalking horse" bidder in many business cases. In those cases, a bidder is often reimbursed for its costs in investigating the purchase of the debtor's property even though the bidder is not successful on the theory that the stalking horse bidder brings value to the estate by encouraging other buyers to bid more for the property. In this case, the Movant was somewhat of a catalyst that resulted in the Debtor's decision to refinance the debt on his property, which enabled him to pay the secured creditors in a manner that would benefit creditors, as well as the Debtor.

The Trustee hired the Movant to market and sell the property, and the Movant performed the required services with the understanding that it would be compensated if a willing and able buyer were presented. It appears to the Court that the Movant achieved this condition, as the Trustee was prepared to close the transaction on the property. The Court finds no reason why the terms of the employment should not now be honored as written and

approved.

That being said, the Court finds that the Movant is not entitled to an enhanced fee. The terms of the Movant's compensation were pre-approved in accordance with section 328. The Court may alter the compensation only after making a finding that such terms and conditions were improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions. The Movant has not persuaded the Court that there were any facts unknown or not capable of being anticipated at the time the Movant agreed to market the property for a 10% commission. The evidence suggests that, at the time the Trustee employed the Movant, the Movant was fully aware that the Debtor was not likely to cooperate with the Trustee in his efforts to sell the property.

B. *Motion for Sanctions*

The Court has the inherent authority to sanction a litigant for bad conduct during the course of proceedings. *See In re Mroz,* 65 F.3d 1567 (11th Cir. 1995) ("Rule 9011 is not the only basis for imposing sanctions against an attorney or other party; sanctions may be justified under the bankruptcy court's inherent power."); *In re Weiss*, 111 F.3d 1159 (4th Cir. 1997) (bankruptcy court properly invoked its inherent sanction authority when the debtor's "'entire course of conduct throughout the [proceedings] evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address.'"). The imposition

of such sanctions "'transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.' " *In re Mroz,* 65 F.3d at 1575 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)). "However, because of their potent nature, 'inherent powers must be exercised with restraint and discretion.'" *Id.* To assess such sanctions, the Court must make a finding that the party being sanctioned acted in bad faith. *See id.* Bad faith can be found when a party delays or disrupts litigation or hampers the "enforcement of a court order." *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1320 (11th Cir. 2002).

Having considered the evidence presented, the Court finds that the Debtor did in fact remove, destroy, or damage a portion of the Movant's signage and that his actions were an intentional attempt to interfere with the efforts of the Trustee and the Movant to sell the 550-acre tract. These actions were undertaken in bad faith and were intended to hamper the ability of the Trustee and the Movant to fulfull the terms of this Court's Order directing the marketing and sale of the property for the benefit of the creditors. The Debtor's conduct also resulted in additional expense and time on behalf of the Movant and caused the Movant to incur additional attorney's fees. Sanctions are necessary to make the Movant whole and to protect the integrity of the Bankruptcy system. The Debtor voluntarily availed himself of the protections of the Bankruptcy Code and had an obligation to cooperate with the

Trustee's attempts to administer estate property. His attempts to undermine the Trustee's ability to do so are indicative of bad faith and cannot go unsanctioned. Accordingly, the Court finds that the Debtor shall compensate the Movant for the cost of replacing the signs and purchasing the digital cameras and shall reimburse the Movant for the attorney's fees incurred solely to deal with the Debtor's misconduct. Under the circumstances of this case, the Court finds that further sanctions are not necessary or appropriate.

CONCLUSION

For the reasons stated above, the Application for Compensation, filed by Ara Hansard Realty, Inc is hereby **GRANTED in part and DENIED in part**. Ara Hansard Realty, Inc. shall be entitled to an administrative expense claim in the amount of $264,000. The Motion for Sanctions is **GRANTED**. John Ned Harman is hereby sanctioned in the amount of $8,549, which represents $3,050 for the cost of signs, $375 for the cost of the digital cameras, and $5,125 for attorney's fees. Said sanction shall be payable to Ara Hansard Realty, Inc.

IT IS SO ORDERED.

At Newnan, Georgia, this 12 day of October, 2006.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE