

Dated: December 18, 2020



Brenda Moody

Brenda Moody Whinery, Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:
STEVE AGUIAR,
Debtor.

Chapter 7 Proceeding
Case No. 0:19-bk-00346-BMW

JIM D. SMITH, as Chapter 7 Bankruptcy
Trustee,
Plaintiff,

Adversary Case No. 0:19-ap-00133-BMW

**RULING AND ORDER REGARDING
APPLICATION FOR ALLOWANCE OF
ATTORNEY’S FEES / SANCTIONS**

v.
STEVE AGUIAR,
Defendant.

This matter is before the Court pursuant to the *Application for Allowance of Attorney’s Fees / Sanctions* (the “Application”) (Adv. Dkt. 18) filed by Jim D. Smith, the Chapter 7 Trustee and the Plaintiff in this action (hereinafter, “Mr. Smith”); the *Notice of Errata* (Adv. Dkt. 20) to which the *Response to Application for Fees and Sanctions* (the “Response”) (Adv. Dkt. 20) filed by Steve Aguiar, the Debtor/Defendant (hereinafter, the “Debtor”), is attached;¹ and all filings related thereto.

The Court held a status hearing on the Application on December 7, 2020, at which time

¹ The Court will note that the Response and exhibits thereto were originally filed in the administrative case, case 0:19-bk-00346-BMW, at Dkt. 34. The Response only was later filed in this Adversary Case, at Dkt. 20.

1 the parties presented oral argument. At the conclusion of the hearing, the parties rested on the
2 pleadings with respect to the threshold issue of whether sanctions are appropriate, and the Court
3 took this discrete issue under advisement.

4 Based upon the pleadings, arguments of counsel, and entire record before the Court, the
5 Court now issues its ruling.

6 **I. Jurisdiction**

7 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Given
8 the silence in the pleadings, both parties are deemed to consent to the authority of the Court to
9 enter final orders or judgments. *See* Local Rules 7008-1 & 7012-1.

10 **II. Factual & Procedural Background**

11 On January 11, 2019, the Debtor filed a voluntary petition for relief under chapter 7 of the
12 Bankruptcy Code, and Mr. Smith was appointed Chapter 7 Trustee. The Debtor originally
13 scheduled cash in the amount of \$25.00, as well as two checking accounts with a combined
14 balance of \$215.00. (Admin. Dkt. 1 at 15).² The Debtor claimed exemptions in his cash on hand
15 and checking accounts. (Admin. Dkt. 1 at 23).

16 On February 18, 2019, Mr. Smith filed an application to be employed as attorney for the
17 estate, which application was approved by the Court. (Admin. Dkts. 8, 9, 13).

18 On February 21, 2019, Mr. Smith filed a *Trustee's Motion to Require Debtor to Turnover*
19 *Estate Assets* (the "Turnover Motion") (Admin. Dkt. 14), in which he asked the Court to order
20 the Debtor to turnover \$1,543.37, representing a cash withdrawal made one day before the
21 petition date (the "Cash Withdrawal"). The Trustee alleged that the Debtor had not provided
22 receipts regarding the disposition of the Cash Withdrawal, and that the Cash Withdrawal was in
23 the possession of the Debtor as of the filing, such that it became property of the estate. Prior to
24 or around the time the Turnover Motion was filed, the parties engaged in settlement discussions
25 with respect to the Cash Withdrawal, which settlement discussions were unsuccessful. (Admin.
26 Dkt. 34 at Ex. A).

27
28 ² References to Admin. Dkt. are references to the administrative docket, case number 0:19-bk-00346-BMW.

1 On March 14, 2019, the Debtor filed a response to the Turnover Motion, in which he
2 asserted that the Cash Withdrawal was mistakenly made and alleged that he could trace the Cash
3 Withdrawal to the payment of expenses related to exempt assets and necessities of life,
4 specifically a mortgage payment, electricity bill, and car insurance payment. (Admin. Dkt. 21).

5 On March 15, 2019, Mr. Smith filed a reply in support of the Turnover Motion, in which
6 reply Mr. Smith alleged that there was no dispute that the Debtor had the Cash Withdrawal in his
7 possession when he filed his petition, which Cash Withdrawal was not disclosed on his schedules.
8 (Admin. Dkt. 22). In the reply, Mr. Smith alleged Federal Rule of Bankruptcy Procedure 9011
9 (“Rule 9011”) violations and requested attorneys’ fees. (Admin. Dkt. 22).

10 On March 29, 2019, Mr. Smith commenced this adversary proceeding.

11 On or about April 19, 2019, the Debtor delivered a check in the full amount of the Cash
12 Withdrawal to Mr. Smith, which check Mr. Smith refused.

13 On May 2, 2019, the Debtor amended his schedules to disclose the Cash Withdrawal and
14 the Debtor filed an answer to the adversary complaint. (Admin. Dkt. 26; Adv. Dkt. 7). In the
15 answer, the Debtor admits that he had the Cash Withdrawal in his possession when he signed and
16 filed his original schedules, but reiterates his argument that he set aside the funds to pay and did
17 pay what he refers to as “necessities of life.” Further, the Debtor denies the § 727 allegations
18 raised in the complaint, and notes that he delivered a check in the amount of the Cash Withdrawal
19 to Mr. Smith.

20 On July 11, 2019, Mr. Smith filed a motion for summary judgment in the administrative
21 case, in which he again asked the Court to order the Debtor to turn over the amount of the Cash
22 Withdrawal and make certain findings regarding the propriety of the Debtor’s prior refusal to
23 turn over the Cash Withdrawal. (Admin. Dkt. 28).

24 On August 8, 2019, the Court held an initial Rule 7016 scheduling conference in the
25 adversary, at which time the Court ordered the Debtor to remit a check in the amount of the Cash
26 Withdrawal, which check the Court ordered Mr. Smith to accept. The Court also authorized Mr.
27 Smith to file an application for attorneys’ fees for the Court’s consideration.

28 The Debtor complied with the Court’s order and remitted a check in the amount of the

1 Cash Withdrawal to Mr. Smith. (12/7/2020 Hearing Tr. 4:24-5:2).

2 Despite the Debtor's remittance and Mr. Smith's acceptance of this check, and despite the
3 Debtor's amendment to his schedules, the parties continued to brief the motion for summary
4 judgment in the administrative case, and Mr. Smith continued to pursue this adversary action.

5 On October 1, 2019, Mr. Smith filed the Application, in which he requests attorneys' fees
6 in the amount of \$4,500, as sanctions against the Debtor and counsel for the Debtor, for 18 hours
7 of work done in connection with the Turnover Motion, the summary judgment motion, and this
8 adversary proceeding.

9 The Debtor opposes the Application on the basis that he remitted a check in the full
10 amount of the Cash Withdrawal early in these proceedings, which check the Debtor argues Mr.
11 Smith unreasonably refused. It is the Debtor's position that Mr. Smith has unreasonably increased
12 the costs of litigation.

13 **III. Legal Analysis & Conclusions of Law**

14 Rule 9011 provides in relevant part:

15 (b) **Representations to the court.** By presenting to the court
16 (whether by signing, filing, submitting, or later advocating) a
17 petition, pleading, written motion, or other paper, an attorney or
18 unrepresented party is certifying that to the best of the person's
19 knowledge, information, and belief, formed after an inquiry
20 reasonable under the circumstances, –

19 (1) it is not being presented for any improper purpose, such as
20 to harass or to cause unnecessary delay or needless increase
21 in the cost of litigation;

21 (2) the claims, defenses, and other legal contentions therein are
22 warranted by existing law or by a nonfrivolous argument for
23 the extension, modification, or reversal of existing law or
24 the establishment of new law;

23 (3) the allegations and other factual contentions have
24 evidentiary support or, if specifically so identified, are likely
25 to have evidentiary support after a reasonable opportunity
26 for further investigation or discovery; and

26 (4) the denials of factual contentions are warranted on the
27 evidence or, if specifically so identified, are reasonably
28 based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to
respond, the court determines that subdivision (b) has been

1 violated, the court may, subject to the conditions stated below,
2 impose an appropriate sanction upon the attorneys, law firms,
3 or parties that have violated subdivision (b) or are responsible
4 for the violation.

5 (1) **How initiated.**

6 (A) **By motion.** A motion for sanctions under this rule
7 shall be made separately from other motions or requests and
8 shall describe the specific conduct alleged to violate
9 subdivision (b). It shall be served as provided in Rule 7004.
10 The motion for sanctions may not be filed with or presented
11 to the court unless, within 21 days after service of the
12 motion (or such other period as the court may prescribe),
13 the challenged paper, claim, defense, contention,
14 allegation, or denial is not withdrawn or appropriately
15 corrected, except that this limitation shall not apply if the
16 conduct alleged is the filing of a petition in violation of
17 subdivision (b). If warranted, the court may award to the
18 party prevailing on the motion the reasonable expenses and
19 attorney's fees incurred in presenting or opposing the
20 motion. Absent exceptional circumstances, a law firm shall
21 be held jointly responsible for violations committed by its
22 partners, associates, and employees.

23 ...

24 (2) **Nature of sanction; limitations.** A sanction imposed for
25 violation of this rule shall be limited to what is sufficient to deter
26 repetition of such conduct or comparable conduct by others
27 similarly situated. Subject to the limitations in subparagraphs
28 (A) and (B), the sanction may consist of, or include, directives
of a nonmonetary nature, an order to pay a penalty into court,
or, if imposed on motion and warranted for effective deterrence,
an order directing payment to the movant of some or all of the
reasonable attorneys' fees and other expenses incurred as a
direct result of the violation.

(A) Monetary sanctions may not be awarded against a
represented party for a violation of subdivision (b)(2).

....

“[B]ankruptcy courts must consider both frivolousness *and* improper purpose on
a sliding scale, where the more compelling the showing as to one element, the less decisive need
be the showing as to the other.” *In re Marsch*, 36 F.3d 825, 830 (9th Cir. 1994). “An award
of sanctions for a violation of [Rule] 9011 or its counterpart in the FRCP, Rule 11, is an
exceptionally serious matter, and is reserved for those rare situations in which a claim or defense

1 is asserted without any evidentiary support or legal basis, or for improper purposes, such as to
2 harass or delay an opponent, or cause undue expense.” *In re Quinones*, 543 B.R. 638, 646 (Bankr.
3 N.D. Cal. 2015) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S. Ct. 2447,
4 110 L.Ed.2d 359 (1990)).

5 The Court finds that based upon the record before it, Rule 9011 sanctions are not
6 warranted.

7 As an initial matter, the Debtor took fairly prompt steps to correct and resolve the issues
8 pertaining to the disclosure and turnover of the Cash Withdrawal. The Debtor offered to remit
9 the full amount of the Cash Withdrawal at issue shortly after the complaint was filed, and before
10 the Turnover Motion was fully briefed. Further, the Debtor amended his schedules to disclose
11 the Cash Withdrawal.

12 Ultimately, the Court cannot find that the Debtor’s filings with respect to the Turnover
13 Motion, motion for summary judgment, or adversary complaint are facially frivolous or were
14 filed for an improper purpose. With respect to whether the filings were frivolous, the Court
15 cannot find that the filings at issue were baseless or completely without legal foundation. *In re*
16 *Marsch*, 36 F.3d at 830. There were property of the estate issues involved and there are no facts
17 in the record to indicate that the factual allegations or denials contained in the Debtor’s filings
18 were not likely to be supported by evidence. Moreover, given that the filings were responsive in
19 nature, given that the parties were engaged in settlement negotiations, and given that the Debtor
20 tendered a check in the full amount of the Cash Withdrawal after these responsive pleadings were
21 filed, and before any Court action was requested, the Court cannot find that the Debtor’s papers
22 were filed for an improper purpose.

23 **IV. Conclusion**

24 Based upon the foregoing, in consideration of the record before the Court and totality of
25 the circumstances in this case, it is the determination of the Court that sanctions are not warranted.
26 As such, and for good cause shown;

27 **IT IS HEREBY ORDERED** that the Application is denied.

28 **DATED AND SIGNED ABOVE.**

1 Notice to be sent through the Bankruptcy Noticing
2 Center (“BNC”) to the following:

3 Steve Aguiar
4 909 East 26th St
5 Yuma, AZ 85365

6 All Interested Parties

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8 Notice of Electronic Filing to be sent via email,
9 through the CM/ECF System, to ALL registered users, including:

10 Phil Hineman
11 Law Office of Phil Hineman
12 *Counsel for Debtor*

13 Jim D. Smith, Chapter 7 Trustee

14 U.S. Trustee, Office of the U.S. Trustee
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