

FILED & ENTERED

SEP 10 2012

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY castro DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

FARIDA A. ZAIDI, aka Farida Arifa Zaidi,
aka Farida Zaidi,

Debtor.

WARREN P. FELGER,

Plaintiff,

vs.

FARIDA A. ZAIDI,

Defendant.

Case No. 2:12-bk-15808-RK

Chapter 7

Adv. No. 2:12-ap-01234-RK

MEMORANDUM DECISION RE:
DEFENDANT'S MOTION FOR
SANCTIONS PURSUANT TO FED. R.
BANKR. P. 9011

On April 23, 2012, the court entered a Memorandum Decision and Judgment in favor of defendant, Farida Zaidi ("defendant" or "Zaidi"), following trial on plaintiff Warren P. Felger's ("plaintiff" or "Felger") complaint for nondischargeability of debt pursuant to 11 U.S.C. § 523(a)(2)(A). Zaidi filed this Motion for Sanctions (the "Motion"), requesting sanctions against plaintiff in the amount of \$29,932.59, representing the costs and fees associated with defending the adversary proceeding, plus an additional \$4,065.94, representing an amount paid to plaintiff by lyad Sabbah ("Sabbah").

1 In the Memorandum Decision and Judgment, the court reserved jurisdiction over
2 defendant's pending motion for sanctions. In the Memorandum Decision, the court
3 indicated that defendant's Motion should be granted pursuant to Federal Rule of
4 Bankruptcy Procedure 9011(b) because plaintiff's complaint lacked a reasonable basis in
5 fact and law, but requested the parties to submit supplemental briefing to address the
6 discretionary factors for imposing sanctions under that rule.

7 After receiving and considering the parties' supplemental briefing and arguments,
8 the court now rules on the motion.

9 The court reaffirms its ruling as stated in the Memorandum Decision Re:
10 Adversary Complaint that plaintiff's complaint lacked a reasonable basis in fact and law.
11 As stated in the Memorandum Decision, the state court's judgment on the fraudulent
12 misrepresentation claim in favor of Zaidi was a bar to any further action by Felger on the
13 same cause of action. Memorandum Decision at 17-23. Felger's cause of action based
14 on fraudulent misrepresentation was the same one as in the prior state court action. *Id.*,
15 at 18, *citing*, 7 Witkin, California Procedure, § 407 at 1042, *citing inter alia*, *Restatement*
16 *(Second) of Judgments*, §§ 17 and 19; *Slater v. Blackwood*, 15 Cal. 3d at 795; *Yellow*
17 *Creek Logging Corp. v. Dare*, 216 Cal. App. 2d at 55; 5 Witkin, *Summary of California*
18 *Law, Torts*, § 801 at 1158; California Civil Code, § 1572(1). Felger was thus not free to
19 assert a new theory based on the same cause of action. *Id.*

20 Rule 9011(b) expressly provides that if there is a violation under the rule,
21 sanctions are discretionary, and the court may impose sanctions. Fed. R. Bankr. P.
22 9011(b). In considering whether sanctions should be imposed and what sanction to
23 impose, the 1997 Advisory Committee note suggests various factors for a court to
24 consider, including the following: (1) whether the improper conduct was willful or
25 negligent; (2) whether it was part of a pattern of activity or an isolated event; (3) whether
26 it infected the entire pleading or only one particular count or defense; (4) whether the
27 person has engaged in similar conduct in other litigation; (5) whether it was intended to
28 injure; (6) what effect it had on the litigation process in time or expense; (7) whether the

1 responsible person is trained in the law; (8) what amount, given the financial resources of
2 the responsible person, is needed to deter that person from repetition in the same case;
3 and (9) the amount needed to deter similar activity by other litigants. 1997 Advisory
4 Committee Note to Fed. R. Bankr. P. 9011, *reprinted in* 10 Resnick and Sommer, *Collier*
5 *on Bankruptcy*, ¶ 9011.RH[4] at 9011-29–9011-30 (Rev. 16th ed. 2012). The court finds
6 that the existence of a number of these factors warrants the granting of the motion and
7 the imposition of sanctions against plaintiff.

8 The court finds that plaintiff's conduct was willful. As shown by the declaration of
9 Paul A. Moses, Felger was afforded an opportunity to withdraw the offending adversary
10 complaint under the safe harbor provisions of Rule 9011(c) and chose not to do so, and
11 instead sought a final judgment in this litigation by taking the case to trial. Plaintiff has
12 not articulated a reasonable basis why the principles of res judicata, or claim preclusion,
13 and collateral estoppel, or issue preclusion, based on the state court's judgment that
14 Zaidi did not make any fraudulent misrepresentation, did not bar him from relitigating the
15 issue in this adversary proceeding. In the court's memorandum decision, the court
16 provided a detailed analysis why the doctrines of res judicata and collateral estoppel bar
17 plaintiff's relitigation of his fraudulent misrepresentation claim. Memorandum Decision at
18 17-23, *citing inter alia*, *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir.
19 1992). Plaintiff's briefing in opposition to the sanctions motion does not reasonably
20 address the court's analysis; for example, according to plaintiff, "the issue of whether
21 defendant acted recklessly (as opposed to intentionally) was never litigated in the state
22 court" because the state court trial judge only found that Zaidi's alleged
23 misrepresentations were "not intentional," and thus, plaintiff in his view was free to litigate
24 a claim of "reckless misrepresentation" from the same transactional nucleus of facts
25 without addressing the legal authorities cited by the court in its analysis. See, e.g.,
26 Plaintiff's Supplemental Memorandum of Points and Authorities in Opposition to
27 Defendant's Motion for Sanctions, filed on or about July 24, 2012, at 4. There was no
28 reasonable basis in fact or law for plaintiff's position in litigating this case. Memorandum

1 Decision at 17-23, *citing inter alia*, *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d at 1320.
2 Plaintiff's claim for fraudulent misrepresentation to determine nondischargeability of debt
3 in this adversary proceeding constituted the same claim for fraudulent misrepresentation
4 as plaintiff brought in state court. Though plaintiff's theories of relief based on alleged
5 intent and recklessness on the part of Zaidi may have differed from those alleged
6 previously, he was free to assert both in the prior action and did not do so in that action
7 and cannot have a "do over" in this second action. Memorandum Decision at 23, *citing*
8 *Yellow Creek Logging Corp. v. Dare*, 216 Cal. App. 2d 50, 55 (1963) ("false
9 representations made recklessly and without regard for their truth in order to induce
10 action by another are the equivalent of misrepresentation knowingly and intentionally
11 uttered"), *quoted in* 5 Witkin, *Summary of California Law, Torts* § 801 at 1158 (10th ed.
12 2005 and 2010 Supp.).

13 Plaintiff's conduct was part of a pattern of activity concerning his representation of
14 Zaidi. Plaintiff has persisted in seeking to collect the judgment debt for his unpaid legal
15 fees against Zaidi in this bankruptcy case based on a fraudulent misrepresentation
16 theory, even though the state court determined that there was no fraudulent
17 misrepresentation by Zaidi regarding her nonpayment of his fees. In no uncertain terms,
18 Zaidi told plaintiff during the course of his legal representation that she could not afford
19 his escalating litigation fees, and plaintiff cannot seem to take no for an answer and has
20 continued to press for payment of the fees, even though the fees constitute a
21 dischargeable debt not excepted from discharge because he failed to prevail on his
22 fraudulent misrepresentation claim in state court. Plaintiff's conduct continued throughout
23 Zaidi's bankruptcy case, including his refusal to withdraw the adversary complaint, his
24 opposition to defendant's summary judgment motion and pursuing his complaint at trial.

25 Additionally, plaintiff's conduct infected the entire complaint. Plaintiff's adversary
26 action was based on a claim for fraudulent misrepresentation under 11 U.S.C. §
27 523(a)(2)(A), but he had previously lost an identical claim for fraudulent
28

1 misrepresentation on the same facts in state court. The entire complaint was thus
2 infected by plaintiff's conduct.

3 The court also finds that plaintiff's conduct was intended to injure. As discussed
4 previously, plaintiff has been relentless in his demands for payment, even though the
5 debt exceeds the amount recoverable by the clients, Sabbah and Zaidi, in the case which
6 plaintiff was retained as counsel and exceeds the amount that the clients could
7 reasonably pay as previously discussed in the court's memorandum decision.
8 Memorandum Decision at 2-7. Plaintiff persists in seeking to collect this debt on a theory
9 of fraudulent misrepresentation that had been previously rejected by the state court by
10 bringing a claim based on the same theory for nondischargeability of debt in this court.

11 The court also finds that plaintiff's conduct had a deleterious effect on the litigation
12 process in time and expense. Zaidi had to retain counsel to defend against plaintiff's
13 meritless nondischargeability claim which had to go to trial, resulting in consumption of
14 considerable time and expense to her.

15 The court also finds that plaintiff as the responsible person is trained in the law.
16 Plaintiff is trained in the law as an attorney licensed to practice law in the State of
17 California, and presumably knew or should have known that the state court's judgment on
18 his prior claim for fraudulent misrepresentation that Zaidi did not make a fraudulent
19 misrepresentation was a bar to his asserting another claim that she made such a
20 misrepresentation to her. Memorandum Decision at 23.

21 The final two factors stated above address the purpose of Rule 9011, which is to
22 deter bad conduct rather than compensate the injured party. Indeed, a sanction "shall be
23 limited to what is sufficient to deter repetition of such conduct or comparable conduct by
24 others similarly situated." Fed. R. Bankr. P. 9011(c)(2). There is a need for deterrence
25 here to restrain an overzealous attorney who persists in trying to collect his fee without a
26 reasonable basis in fact and law in bringing a claim in this court which had been
27 previously rejected by another court. Based on the financial circumstances of plaintiff set
28 forth in the papers and the other circumstances in this case, the court determines that the

1 monetary sanction that should be imposed here against plaintiff to deter him from
2 engaging in similar conduct by plaintiff in the future is \$25,000.

3 With regard to Zaidi's claim for the \$4,065.94 collected by plaintiff for Sabbah, the
4 court lacks jurisdiction over such claim. Zaidi lacks standing to assert such a claim
5 because the money was not paid over to Sabbah on his claim being handled by plaintiff,
6 and Sabbah is the real party in interest to pursue that money. *Veal v. American Home*
7 *Mortgage Servicing, Inc. (In re Veal)*, 450 B.R. 897, 907-908 (9th Cir. BAP 2011), *citing*
8 *inter alia*, Fed. R. Bankr. R. 7017 and Fed. R. Civ. P. 17. As such, this dispute is
9 between Sabbah and plaintiff, nondebtor parties, in a nonbankruptcy dispute. Thus, the
10 court should not exercise jurisdiction over such dispute which has no relation to Zaidi's
11 bankruptcy case. See 28 U.S.C. §§ 157(b) and 1334(b). Accordingly, the court denies
12 Zaidi's claim for the \$4,065.94 without prejudice for lack of standing and subject matter
13 jurisdiction.

14 This memorandum decision constitutes the court's findings of fact and conclusions
15 of law on the motion. The court will enter a separate final order granting the sanctions
16 motion in part in the amount of \$25,000, and denying in part as to Sabbah's claim of
17 \$4,065.94.

18 IT IS SO ORDERED.

19 ###

20
21
22
23 

24 DATED: September 10, 2012

25 United States Bankruptcy Judge
26
27
28

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SANCTIONS** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **September 4, 2012**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

James J Joseph (TR) bts@dgdk.com, jjoseph@ecf.epiqsystems.com

Paul A. Moses on behalf of Defendant Farida Zaidi pamoses@aol.com

United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Warren P Felger
726 W Barstow Ave Ste 106
Fresno, CA 93704

Farida A Zaidi
6213 Balcom
Encino, CA 91316

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below: