UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
NEW HAVEN DIVISION

In re: ANTHEA MENDEZ, *Debtor*	Case No.: 16-20134 (AMN) Chapter 11
JPMORGAN CHASE BANK N.A., *Plaintiff* v. ANTHEA MENDEZ, *Defendant*	Adv. Pro. No. 16-02054 (AMN) Re: AP-ECF No. 28

APPEARANCES

Brian D. Rich, Esq. Michael S. Wrona, Esq. Halloran & Sage, LLP One Goodwin Square 225 Asylum Street Hartford, CT 06103	Counsel for the Plaintiff
Byron Paul Yost, Esq. Law Offices of Byron Paul Yost 50 Washington Street, 4th Floor Norwalk, CT 06854	Counsel for the Defendant

ORDER DENYING MOTION FOR AN AWARD OF COSTS AND FEES

Before the court is a motion filed by the debtor, Anthea Mendez ("Ms. Mendez"), seeking an award of legal fees of $ 24,550.00 and costs of $ 253.48 against the plaintiff, JPMorgan Chase Bank, N.A. ("JPMorgan"). AP-ECF No. 28.[1] This motion was filed after JPMorgan voluntarily sought dismissal of its adversary complaint with prejudice. *See*, AP-ECF No. 22. Ms. Mendez asserts that she is entitled to an award of her legal fees

[1] References to the docket of the chapter 11 case appear in the following form: "ECF No. ___." References to the docket of this adversary proceeding appear in the following form: "AP-ECF No. ___."

and costs because the adversary complaint was "obviously defective" and "was filed to further some scheme developed by JPMorgan." AP-ECF No. 28, P. 3-4. After consideration of the parties' arguments and for the reasons that follow, the motion is denied.

I. RELEVANT PROCEDURAL BACKGROUND

On June 20, 2016, JPMorgan filed an adversary complaint against Ms. Mendez objecting to Ms. Mendez's receipt of a discharge pursuant to 11 U.S.C. § 727(a)(4)(B). AP-ECF No. 1. The complaint alleged that Ms. Mendez presented or used a false claim when she reported on Schedule E/F (Unsecured Creditors) a claim owed to Rome McGuigan of $ 695,000.00. AP-ECF No. 1. On January 5, 2017, prior to the filing of Ms. Mendez's answer, JPMorgan filed a motion to dismiss the case with prejudice and without costs pursuant to Fed.R.Bankr.P. 7041 and D.Conn. LBR 7041-1(a) and (b). AP-ECF No. 22. Ms. Mendez objected to the dismissal to the extent that JPMorgan sought the dismissal without costs. AP-ECF No. 23. Ms. Mendez, subsequently, filed the instant motion seeking an award of her legal fees and costs. AP-ECF No. 28. The motion presented three arguments as to why Ms. Mendez is entitled to an award, including:

1) that the provisions of 11 U.S.C. § 523(d) for legal fees and costs to be awarded to a debtor who receives a discharge of a debt that was the subject of a complaint seeking a determination of dischargeability under § 523(a) should apply to a debtor who successfully defends a complaint objecting to a debtor's discharge under § 727;
2) that JPMorgan violated Fed.R.Civ.P. 11, made applicable in adversary proceedings by Fed.R.Bankr.P. 9011, by filing a complaint that was "obviously

defective," lacked a good faith basis in law or fact, and was part of a scheme to harass the debtor; and

3) that it would be patently unjust to cause the debtor to bear her own costs regarding this adversary proceeding.

JPMorgan objected that Ms. Mendez lacked a legal basis for an award of fees, that its complaint was substantially justified, that no Fed.R.Civ.P. 11 violation occurred and that Ms. Mendez's motion failed to comply procedurally with Fed.R.Civ.P. 11. *See* AP-ECF No. 29 and 34. After a hearing held on April 25, 2017, the court dismissed the adversary proceeding but retained jurisdiction to consider Ms. Mendez's motion for fees and costs. AP-ECF No. 30. On September 27, 2017, the court, upon the request of Ms. Mendez, dismissed her underlying chapter 11 bankruptcy proceeding but retained jurisdiction in this adversary relating to the motion for fees and costs and took the motion under advisement. *See* AP-ECF Docket Entry dated 9/28/2017.

II. APPLICABLE LAW

Pursuant to 11 U.S.C. § 727(c)(1), the trustee, a creditor, or the United States Trustee may object to the granting of a discharge under subsection (a) of § 727. Fed.R.Bankr.P. 7041 requires that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States Trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper. Fed.R.Bankr.P. 7041. Requiring notice and a hearing for dismissal of a complaint objecting to a discharge reduces the risk that the plaintiff may have been induced to dismiss by an advantage

given or promised by the debtor or someone acting in the debtor's interest. 10-7041 *Collier on Bankruptcy* ¶ 7041.01 (16th).

"Under the American Rule, absent statutory authorization or an established contrary exception, each party bears its own attorney's fees." *Viera v. City of New York*, No. 15 CIV. 5430 (PGG), 2017 WL 1011497, at *7, 2017 U.S. Dist. LEXIS 37190, at *18 (S.D.N.Y. Mar. 15, 2017)(*citing Colombrito v. Kelly*, 764 F.2d 122, 133 (2d Cir. 1985)). Fed.R.Civ.P. 41(a)(2), and its counterpart Fed.R.Bankr.P. 7041, is one possible exception that allows a court to impose attorney's fees and costs if the court determines such an award is a condition or term the court deems proper. In *Colombrito v. Kelly*, the United States Court of Appeals for the Second Circuit found that, "[f]ee awards are often made when a plaintiff dismisses a suit without prejudice under Rule 41(a)(2)." *Colombrito*, 764 F.2d at 133. "The purpose of such awards is generally to reimburse the defendant for the litigation costs incurred, in view of the risk (often the certainty) faced by the defendant that the same suit will be refiled and will impose duplicative expenses upon him." *Id.* (citing cases). "In contrast, when a lawsuit is voluntarily dismissed with prejudice under Fed.R.Civ.P. 41(a)(2), attorney's fees have almost never been awarded." *Id.* at 133-34.

Courts within the Second Circuit appear to decline to award attorney's fees without a showing of bad faith or vexatiousness on the part of the party moving for dismissal. *See Hinfin Realty Corp. v. Pittston Co.*, No. 00-CV-4285(JS), 2014 WL 1653209, at *2, 2014 U.S. Dist. LEXIS 56661, at *3 (E.D.N.Y. April 23, 2014)("[court] previously rejected any contention that Plaintiffs acted in bad faith"); *Cont'l Ins. Co. v. Morrison Exp. Corp., Ltd.*, No. 06-CV-2408(FB)(RML), 2009 WL 1269701, at *2; 2009 U.S. Dist. LEXIS 38727, at *5 (E.D.N.Y. May 7, 2009)(court finds there was no showing of either bad faith or

vexatiousness); *BD ex rel. Doe v. DeBuono*, 193 F.R.D. 117, 125 (S.D.N.Y. 2000) (award of attorney's fees denied due to lack of showing of bad faith or vexatiousness); *In re Shavit*, 197 B.R. 763, 771 (Bankr.S.D.N.Y. 1996) (refusing to award fees and costs after a Rule 41(a)(2) dismissal absent evidence plaintiff commenced or conducted action in "bad faith or for an improper purpose"); *but see, Mercer Tool Corp. v. Friedr. Dick GmbH*, 179 F.R.D. 391, 396 (E.D.N.Y.1998) (awarding fees despite not finding bad faith or vexatiousness). Courts have "held that the showing necessary for an award of attorneys' fees in connection with a voluntary dismissal with prejudice [ ] is extremely high." *Beer v. John Hancock Life Ins. Co.*, 211 F.R.D. 67, 69 (N.D.N.Y. 2002)(*citing Colombrito*, 764 F.2d at 134-35). "The bad faith exception permits an award [of fees] upon a showing that the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons. Neither meritlessness alone, nor improper motives alone, will suffice." *Viera*, 2017 WL 1011497, at *7 (*quoting Colombrito*, 764 F.2d at 133).

A statutory exception to the American Rule exists in the provisions of 11 U.S.C. § 523(d), that provides, in relevant part:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.
> 11 U.S.C. § 523(d).

One of the purposes behind § 523(d) is to reduce the threat of litigation over the discharge exceptions of § 523(a)(2) and the attendant costs of litigation that could induce debtors to settle objectively weak cases. 4-523 *Collier on Bankruptcy* ¶ *523.08* (16th).

"Unlike 11 U.S.C. § 523(d), § 727 of the Bankruptcy Code does not provide for an award of attorney fees to a debtor who prevails in defense of an objection to discharge." *Ameriprise Fin. Servs. v. Oristian (In re Oristian),* Docket No. 12-0760PM, 2013 WL 5442365, at *2, 2013 Bankr. LEXIS 4075, at *6 (Bankr.D.Md. Sep. 30, 2013); *Cf. Tuloil, Inc. v. Shahid (In re Shahid)*, 254 B.R. 40, 43 (B.A.P. 10th Cir. 2000) ("§ 727 does not provide a statutory basis for an award of attorney's fees. Nor is there a basis in the rules").

A court may also award fees and costs as a sanction pursuant to Fed.R.Bankr.P. 9011. A party seeking sanctions for a violation of Fed.R.Bankr.P. 9011, must file a motion in compliance with Fed.R.Bankr.P. 9011(c)(1)(A). Subsection (c)(1)(A) of Fed.R.Bankr.P. 9011 requires that:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.
> Fed.R.Bankr.P. 9011(c)(1)(A).

A party filing a sanctions motion must comply with the safe harbor provision of Fed.R.Bank.P. 9011(c)(1)(A) which requires that the party seeking sanctions first serve the motion upon the offending party, giving the offending party twenty-one (21) days to withdraw or correct the challenged pleading. Fed.R.Bankr.P. 9011(c)(1)(A). After twenty-one (21) days, in the absence of withdrawal or correction, a party seeking sanctions may file its motion with the court. Fed.R.Bankr.P. 9011(c)(1)(A); *See, Toscano v. Toscano (In re Toscano)*, No. 14-70200 (AST), 2017 WL 4990287, at *10, 2017 Bankr. LEXIS 3731, at *27-28 (Bankr.E.D.N.Y. Oct. 26, 2017) ("As [defendant] has failed to procedurally comply with Rule 9011, his request for sanctions is denied").

As provided in Fed.R.Bankr.P. 9011(c)(1)(A), sanctions may be warranted when a party, or its counsel, violates a provision of subsection (b) of Fed.R.Bankr.P. 9011. That subsection provides, in relevant part, that:

> [B]y signing, filing, submitting, or later advocating [ ] a petition, 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,--
>
> (1) 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;
>
> (2) 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;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
> Fed.R.Bank.P. 9011(b).

"Rule 9011, like its counterpart Federal Rule of Civil Procedure 11, plays an important role in maintaining the professionalism of the bar and the integrity of court processes." *In re Obasi*, No. 10-10494 SHL, 2011 WL 6336153, at *8, 2011 Bankr. LEXIS 5011, at *28 (Bankr.S.D.N.Y. Dec. 19, 2011). "In the Second Circuit, the substantive standard for imposing Bankruptcy Rule 9011 sanctions when initiated by a party's motion is one of objective unreasonableness." *In re Belmonte*, 524 B.R. 17, 30 (Bankr.E.D.N.Y. 2015)(*citing In re Pennie & Edmonds LLP*, 323 F.3d 86, 90 (2d Cir. 2003)). "In order for sanctions to be supported under this test, it must be clear that the motion made has no chance of success under the existing circumstances." *Heritage Realty Assocs. Corp. v. First Citizen's Bank (In re Heritage Realty Assocs. Corp.)*, Docket No. 15-01183-cec, 2016 WL 3245344, at *3, 2016 Bankr. LEXIS 2192, at *10 (Bankr.E.D.N.Y. June 2, 2016)(*quoting In re Gorshtein*, 285 B.R. 118, 125 (Bankr.S.D.N.Y. 2002)).

III. DISCUSSION

Ms. Mendez requests this court recognize an exception to the American Rule that each party pay his or her own litigation fees and costs, and award her the fees and costs incurred in connection with her defense of this adversary proceeding. Despite the lack of a specific reference to Fed.R.Bankr.P. 7041 or Fed.R.Civ.P. 41(a)(2), the court interprets Ms. Mendez's motion as requesting the court exercise its discretion and equitable powers in determining the terms and conditions of dismissal to include an award of fees. The court is unpersuaded that the circumstances of this case warrant such exercise.

First, one of the purposes served by an award of fees and costs to a prevailing party under Rule 41(a)(2) is to compensate for the possible risk of re-litigation of the issues. *See Colombrito*, 764 F.2d at 133. Here, there is a minimal risk of re-litigation. Ms. Mendez's underlying chapter 11 bankruptcy case has been dismissed; rendering the question of whether or not she is entitled to a discharge moot. Further, JPMorgan sought and received dismissal of this adversary proceeding *with prejudice*. Accordingly, the court finds that an award of fees and costs to compensate for the risk of re-litigation is unnecessary under these circumstances.

Second, the court rejects that Ms. Mendez is entitled to an award based upon a showing of bad faith. In her motion, Ms. Mendez made unsubstantiated allegations that the filing of the complaint was part of a scheme by JPMorgan. *See* ECF No. 28, p. 4 ("One can only presume the complaint in this case was filed to further some scheme developed by JPMorgan Chase to frustrate a reinstatement and to be allowed to complete a foreclosure upon Debtor's home"). The court declines to adopt Ms. Mendez's beliefs and exercise its discretion to award fees where there is no evidence of bad faith,

vexatiousness, or improper motive by JPMorgan. The court notes that Ms. Mendez has failed to point to any pattern by JPMorgan of asserting claims and then dismissing them or any abuse of the judicial system that would warrant an award pursuant to Rule 41(a)(2).[2]

Additionally, the court declines to find that the adversary complaint was so lacking in merit as to rise to the level of bad faith. If Ms. Mendez had a good faith argument that the complaint failed to state a claim, she could have filed a motion seeking dismissal pursuant to Fed.R.Civ.P. 12(b)(6) or a motion for sanctions pursuant to Fed.R.Civ.P. 11, and its counterpart Fed.R.Bankr.P. 9011. Neither action was taken during the six months the case was pending prior to JPMorgan's voluntary dismissal.

"[T]he Second Circuit requires 'clear evidence that the challenged actions are entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes' before affirming an award of fees under the bad-faith exception." *Gordon v. Kaleida Health*, Docket No. 08-CV-950S, 2012 U.S. Dist. LEXIS 75926, at *8 (W.D.N.Y. May 29, 2012)(*quoting Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000)). Here, the record of this case and the unsupported allegations in Ms. Mendez's motion are insufficient for the court to conclude the adversary complaint was so lacking in merit that it rose to the level of bad faith. Accordingly, Ms. Mendez failed to meet the showing necessary for an award of fees pursuant to Rule 41(a)(2).

The court considered Ms. Mendez's request that § 523(d) be applied to this adversary complaint seeking relief pursuant to § 727 but is unpersuaded there is a basis in law for such relief. Section 727 does not contain a provision awarding a prevailing

[2] The court is aware of the parties' contentious litigation before the state court. But, this decision is based, as it must be, on the record before this court.

party fees and costs. Nothing in the text of § 523 or § 727 indicates an intent that § 523(d) apply to a § 727 proceeding. In the absence of a clear and unambiguous statutory directive, the court declines to create an exception to the American Rule as requested by Ms. Mendez. Further, the court finds the applicability of § 523(d) dubious, at best. The plain terms of § 523(d) make clear that it applies when a debtor receives a discharge of a consumer debt that is the subject of a non-dischargeability complaint. Here, Ms. Mendez has not received a discharge of any debt, and will not receive a discharge because the underlying chapter 11 case was dismissed. Thus, the court remains unpersuaded that Ms. Mendez is entitled to any relief pursuant to § 523(d). Accordingly, on this basis, the court denies Ms. Mendez's motion for attorney's fees and costs.

To the extent that Ms. Mendez relies upon Rule 9011 as a basis for an award of attorney's fees and costs, the request is denied. Ms. Mendez failed to comply with Fed.R.Bank.P. 9011's safe harbor provision requiring that she serve a copy of her motion on JPMorgan before filing it with the court. The failure to comply with the procedural requirements of Fed.R.Bank.P. 9011, or its counterpart Rule 11, is a sufficient ground for denial of the motion. *In re Toscano*, 2017 WL 4990287, at *10, 2017 Bankr. LEXIS 3731, at *27-28; *Adams v. New York State Education Dept.*, 2010 U.S. Dist. LEXIS 129510, at *26-27 (S.D.N.Y. Dec. 8, 2010); *see, e.g., Star Mark Management v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.,* 682 F.3d 170, 175 (2d Cir. 2012)("The safe-harbor provision is a strict procedural requirement")*; Rojas v. Schkoda*, 319 F. App'x 43, 44 (2d Cir. 2009) (Affirming denial of Rule 11 sanction because defendant "did not comply with the 'safe harbor' provision"). For this reason alone, and without the need to consider the merits of Ms. Mendez's allegation that the complaint was obviously defective – beyond

the court's earlier analysis under Rule 41(a)(2) – the court must deny the motion for attorney's fees and costs as a sanction pursuant to Rule 9011.[3]

IV. CONCLUSION

Ms. Mendez's motion for fees and costs fails to provide an adequate basis in law or fact for the court to grant the requested relief. Accordingly, the motion, AP-ECF No. 28, is DENIED.

Dated on January 22, 2018, at New Haven, Connecticut.

[3] Additionally, the court notes that Ms. Mendez's motion for fees and costs, loosely filed pursuant to Fed.R.Bankr.P. 9011, was filed after JPMorgan had requested the adversary case be dismissed, with prejudice, and therefore, no remedial purpose would be served by entertaining a sanctions motion. *See In re GSC Group, Inc.*, 502 B.R. 673, 754 (Bankr.S.D.N.Y. 2013) ("a sanction imposed for a violation of Bankruptcy Rule 9011 should be limited to what is sufficient to prevent or deter similar conduct").