Charles M. Walker
U.S. Bankruptcy Judge
Dated: 10/11/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)	
	)	Case No: 3:16-bk-08631
Gayle H. Bagsby,	)	Chapter 13
aka Sharon Gayle Bagsby,	)	
	)	
Debtor.	)	
_____	)	
	)	
IN RE:	)	Case No: 3:18-bk-01762
Gayle H. Bagsby,	)	Chapter 13
aka Estate of Gayle H. Bagsby,	)	
	)	
Debtor.	)	
_____	)	
	)	
IN RE:	)	
	)	Case No: 3:19-bk-01810
Gayle H. Bagsby,	)	Chapter 13
aka Estate of Gayle H. Bagsby	)	
Debtor.	)	
_____	)	

ORDER DENYING RELIEF REQUESTED IN NOTICE OF SETTLEMENT ON APPEAL AND JOINT MOTION FOR INDICATIVE RULING TO EFFECT TERMS OF SETTLEMENT

This matter is before the Court on the joint motion of E. Covington Johnston and the Chapter 13 Trustee, Henry Hildebrand, III, pursuant to Rule 62.1 of the Federal Rules of Civil Procedure and Rule 8008 of the Federal Rules of Bankruptcy Procedure, requesting that this Court indicate that it will accept the limited remand from the Bankruptcy Appellate Panel and vacate the *Order Granting Motion to Dismiss, Denying Request to Voluntarily Dismiss, and*

Granting Motion to Impose Sanctions ("Order") entered in these three cases on July 2, 2019. FED. R. CIV. P. 62.1, FED. R. BANKR. P. 8008, ECF 29.[1]

Federal Rule of Civil Procedure 62.1

Federal Rule of Civil Procedure 62.1[2] provides a mechanism by which parties can seek relief in a lower court while an appeal is pending. Here, the appeal involves sanctions brought *sua sponte* against a debtor's attorney, Mr. E. Covington Johnston, for his actions in filing two cases on behalf of a decedent as a Chapter 13 debtor. FED. R. CIV. P. 62.1. The motion before the Court seeks an indicative ruling and asks for this Court to consider a settlement, approval of which would involve vacating a previous Order of this Court.

When faced with a motion for an indicative ruling for relief that is barred by a pending appeal, the court has three options: (1) defer considering the motion; (2) deny the motion; or (3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue. *See* FED. R. BANKR. P. 8008(a)(1)–(3).

Here, the Rule 62.1 motion seeks to have this Court vacate its previous Order imposing sanctions and containing findings against Mr. Johnston. The motion states that the Chapter 13 Trustee and Mr. Johnston have settled the matter through mediation pursuant to Sixth Circuit Rule 33. 28 U.S.C.A., CTA6 Rule 33. No further information regarding the terms of the settlement is provided, and more importantly, no indication or citation as to the basis for the relief requested.

[1] All references to the docket by ECF designation refer to case 3:19-bk-01810.
[2] Made applicable here via Federal Rule of Bankruptcy Procedure 8008. All references to "Rule" refer to the Federal Rules of Civil Procedure unless otherwise noted.

Rule 62.1 does not provide for relief itself; rather, it provides the Court with authority to entertain a motion for relief. *See Estate of Hickman v. Moore*, Nos. 3:09-CV-69, 3:09-CV-102, 2011 WL 4860040, at *2 (E.D. Tenn. Oct. 13, 2011), *aff'd*, 502 F. App'x 459 (6th Cir. Oct. 15, 2012). In other words, Rule 62.1 operates to open the doors of this, the lower Court, to consider a motion that affects an appeal. It does not provide for any further relief. Once the doors are open, this Court is authorized to consider a request for relief under applicable law and rules. This motion offered no rule, statute, or fact that would provide a foundation for relief outside the settlement brokered between the movants.

Counsel for Mr. Johnston presented the terms of the settlement obtained through mediation as follows: Mr. Johnston would fulfill all requirements of the sanctions imposed upon him by this Court and in exchange, the Order – containing findings against Mr. Johnston that provide the basis for the sanctions – would be vacated. This proposition presents several problems, none of which are resolved in favor of the movants.

Jurisdiction and Standing

Jurisdiction is proper before this court pursuant to 28 U.S.C. § 1334. This matter follows a proceeding pursuant to 28 U.S.C. § 157(b), and venue is proper under 28 U.S.C. §§ 1408 and 1409.

Prior to considering the merits of a request for relief, the Court determines jurisdiction and standing, respectively. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 118 S. Ct. 1003, 1013, 140 L. Ed. 2d 210 (1998). As noted, jurisdiction is not at issue here. Standing, on the other hand, is of paramount consideration.

The facts of this case are unique in comparison to those which usually comprise appellate mediation, in that typically settled cases have two parties. In such cases of discipline via

Rule 11, the appellant is generally the sanctioned party and the appellee is the party that moved for sanctions.[3] *See* FED. R. CIV. P. 11. Here, as with most sanctions issued *sua sponte*, attorney appeals do not have appellees. *See* Carla R. Pasquale, *Scolded: Can an Attorney Appeal a District Court's Order Finding Professional Misconduct?* 77 FORDHAM L. REV. 219, 238 (2008). This begs the question: who are the parties for purposes of settlement on appeal? Specifically, here: what standing does the Chapter 13 Trustee have to negotiate a settlement regarding an appeal of sanctions imposed on a *sua sponte* basis in an attorney disciplinary matter?

The Chapter 13 Trustee's Standing

The Trustee's standing as an appellee in the appeal pending before the Sixth Circuit Bankruptcy Appellate Panel is not an issue for this Court. The Trustee's standing to bring the Rule 62.1 motion based on a settlement involving an order of this Court is, however, and must be addressed when considering this motion. The Court must decide if the basis asserted for the relief requested is brought by the party entitled to that relief. *See Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 343 (1975). The Trustee's standing is derived from his actions in this Court that relate to the matters on appeal, and the requisite connection between his actions and the issues on appeal does not exist; therefore, he is not a party with standing to settle the relevant matters and not a proper party to seek the relief requested in this motion.

First, the Trustee did not seek sanctions against Mr. Johnston at any time or in any case before this Court. Had the Trustee moved for sanctions against Mr. Johnston, or even sought

[3] Case trustees (almost always Chapter 7) typically participate on appeal when they file the motion against the debtor for sanctions or are an adverse party in some other capacity. *See Quesada v. Banco Bilbao Vizcaya-P.R. (In re Elac Food Corp.)*, 226 B.R. 320 (D.P.R. 1998) (creditor's complaint contained claim against trustee in his official capacity); *see also Misty Mountain, L.C. v. United States Trustee (In re Misty Mountain, L.C.)*, 270 B.R. 53 (W.D. Va. 2001) (Chapter 7 trustee was an appellee—on behalf of the creditors—because he objected to the motion for voluntary dismissal).

joinder in the Rule to Show Cause, he may have been the correct party to negotiate a settlement, but his failure to do so precludes him from participating as an aggrieved party or one that stands adversely to Mr. Johnston. *See Kaplan v. DaimlerChrysler*, 331 F.3d 1251, 1254 (11th Cir. 2003). Although that court did not need to reach the issue of standing, it found that "Rule 11 [sanctions brought *sua sponte*] does not provide for anyone to advocate for the sanctions-issuing judge on appeal." While attorney sanctions may be settled on appeal when there is an adversary that moved for such sanctions, there is no opposing party to act as an appellee when the sanctions have been issued *sua sponte*. *See Williams v. United States (In re Williams)*, 156 F.3d 86 (1st Cir. 1998).

Moreover, prior to the settlement, Mr. Johnston did not treat any party as an appellee and the Trustee did not act as appellee. Appellate Rule 6 requires that the appellant serve the appellee with "issues presented on appeal and designation of the record to be certified." FED. R. APP. P. 6(b)(B)(i). There is no evidence that Mr. Johnston served any party in fulfillment of this requirement. Generally, a "party in interest"[4] will be afforded appellate standing; however, Rule 2002(a)(3) delimits standing to a "person aggrieved" on appeal of a bankruptcy proceeding. *See In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987) citing Collier ¶ 8001.05, at 8001–11; *see also Nguyen v. Golden* (*In re Pham*), BAP No. CC-17-1000-LSTa, 2017 WL 5148452 (B.A.P. 9th Cir. Nov. 6, 2017) (holding that Nguyen had standing to appeal the bankruptcy court's order as the sanctioned party and the case trustee's participation in the appeal was appropriate as the moving party). Status as a "person aggrieved" requires that the party be directly and adversely

[4] "Party in interest" is defined as "party who has standing to be heard by the court in a matter to be decided in the bankruptcy case. The debtor, the U.S. trustee or bankruptcy administrator, the case trustee and creditors are parties in interest for most matters." *See* Bankruptcy Basics Glossary, *Party in Interest*, U.S. CTS.

affected pecuniarily by an order of the bankruptcy court. *See Fondiller v. Robertson (In re Fondiller),* 707 F.2d 441, 442 (9th Cir. 1983).

The Trustee had no interest in Mr. Johnston's sanctions until this motion, let alone a direct and adverse pecuniary effect. Status as a "person aggrieved" requires that the party be directly and adversely affected in a pecuniary manner by an order of the bankruptcy court. *See Fondiller,* 707 F.2d at 442. He did not file anything seeking or joining a request for sanctions against Mr. Johnston. He did not file any designation to the record on appeal. He did not act as an appellee or an adverse party until mediation. The Trustee does not get a second bite at the apple. He missed the opportunity to move for sanctions against Mr. Johnston in the first place and is not in a position now to negotiate a settlement impacting the imposed sanctions.

Although the appeal is of an Order that, among other things, grants the Trustee's motion to dismiss in the fifth case, nothing in the Order regarding the issues on appeal and the sanctioning of Mr. Johnston is related to the Trustee's actions in the fifth case. Mr. Johnston was sanctioned for his behavior in the first two cases. The Trustee neither sought nor brought any action against Mr. Johnston in those cases, and cannot now assert standing after the Court, *sua sponte,* ordered sanctions to address Mr. Johnston's conduct. The time has long since passed for the Trustee's involvement as far as Mr. Johnston's sanctionable behavior in the first two cases.

The Trustee is not an aggrieved party, does not stand adversely to Mr. Johnston in these proceedings, and does not have standing to broker a settlement of sanctions imposed *sua sponte*.

Secondly, the Trustee is not an aggrieved party such that he derives standing from the appellant's issues on appeal. On appeal, Mr. Johnston brings two primary issues regarding his sanctions, (1) notice and (2) severity.

Notice. Mr. Johnston contends that this Court did not provide notice in reopening the first two bankruptcy cases and this failure denies him due process and sanctions are improper in those cases. This issue does not mention or involve the Trustee at any point.

The Supreme Court has routinely held that federal courts retain jurisdiction over sanctions despite the closure of prior litigation, in distinguishing that:

> [I]t is well established that a federal court may consider collateral issues after an action is no longer pending . . . . [L]ike the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395-96, 110 S. Ct. 2447, 2455-56, 110 L. Ed. 2d 359 (1990). This Circuit has provided significant guidance on notice requirements, *see Scherer v. JP Morgan Chase & Co.*, 508 F. App'x 429 (6th Cir. Dec. 11, 2012), and the notification that Mr. Johnston would be facing the Court to attest to his behavior in the two closed cases was sufficient and provides fully for his due process rights. The cases were identified in the order setting the hearing. ECF 21. The reopening took place prior to the evidentiary hearing,[5] and Mr. Johnston raised no issue at the time of the hearing. His proffer of evidence contained exhibits comprised of documents he retained in his representation of the decedent debtor in those cases. The Trustee had no hand in the reopening of those cases. In fact, the Trustee stated on the record in this hearing that he had no interest and no necessity to reopen the cases because he was satisfied with their dismissal and closing at the time it occurred.

Mr. Johnston also cites a lack of notice regarding the *sua sponte* Rule to Show Cause. The notice requirement of a court's intent to exercise inherent power is determined by the ability of the

[5] The reopening of the cases was an administrative action to permit the transfer of the case from Judge Harrison to Judge Walker for purposes of the hearing.

sanctioned party to ascertain in advance exactly what conduct is alleged to be sanctionable, and that they have been accused of acting in bad faith." *Miller v. Cardinale (In re Deville)*, 361 F.3d 539 (9th Cir. 2004); *Jones v. Illinois Cent. R.R. Co.*, 617 F.3d 843, 856 (6th Cir. 2010) (stating that the court must order counsel to show cause as to why conduct described in the order has not engaged in any violations, ethical or otherwise). The Ninth Circuit affirmed its BAP holding that "the appellants had adequate notice that the court's inherent authority was implicated because the orders to show cause described in detail the sanctionable conduct and addressed lack of good faith and appellants' manipulation of the bankruptcy system to frustrate a state court trial." *In re Nguyen*, 2017 WL 5148452, at *5. Here, the sufficiency of the notice of the reopening of the old cases and *sua sponte* Rule to Show Cause do not stem from the Trustee or his actions. Nor is the Trustee impacted by an appeal of the ruling based on due process considerations.

Severity of Sanctions. Mr. Johnston also appeals the imposition of sanctions by this Court as to severity. Adjudicators have typically followed the principle that a sanction's severity must correspond to the gravity of the attorney's wrongdoing and used "how negatively the attorney's professional misconduct affected the integrity of the judicial system" as a surrogate measure. Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1440 (2004).

The Sixth Circuit has time and again held that judges are granted significant discretion in the issuance of sanctions. *See, e.g., Gettys v. Law Firm of O'Hara, Ruberg, Osborne & Taylor (In re Jackson)*, 875 F.2d 1224, 1229 (6th Cir. 1989) (stating that the bankruptcy court has wide discretion in selecting the appropriate sanction(s)); *see also* Steve Delchin, *Sixth Circuit Not Hesitating to Sanction Attorneys for Wrongful Conduct*, SIXTH CIR. APP. BLOG (July 1, 2013),

https://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-not-hesitating-to-sanction-attorneys-for-wrongful-conduct/.

This Circuit has acknowledged two goals in issuing sanctions: deterrence and compensation. *Dean v. Lane (In re Lane)*, 604 B.R. 23, 34 (B.A.P. 6th Cir. 2019) (proffering that the primary goal is deterrence). The *Lane* court further provided that the court should impose the least severe sanction that is likely to deter. *See id*. Here, this Court, after hearing from Mr. Johnston himself regarding his actions as the attorney for a decedent as a Chapter 13 debtor, imposed sanctions with the goals of deterrence and rehabilitation. The Trustee had no part in the sanctions imposed, offered no guidance or suggestion to the Court regarding the sanctions, and did not oppose the sanctions when they were ordered. He, therefore, does not gain standing from this issue on appeal.

Federal Rule of Civil Procedure 60

Despite the Rule 62.1 motion's failure to assert any basis in law or fact for the relief requested, and in an abundance of caution and the interest of judicial economy, I will alternatively consider a possibility that a request for relief under Rule 60 may be contained within the Rule 62.1 motion. I will do so because the motion states that the relief requested will *result* in an order vacating the previous Order of this Court that is the subject on appeal. I reiterate, nowhere in the Rule 62.1 motion do the parties assert any other mechanism of law for relief, which is why I have had to deem this a possible Rule 60 request based solely on my alternative interpretation of the motion.

The standing issue as referenced above remains in this analysis since the Trustee is a joint movant. Even if the Trustee had standing as a movant to seek relief under Rule 60(b) to vacate the Order, none of the grounds provided in that rule are applicable. Rule 60(b)(1), (2), (3), (4) or

(5) are not relevant here. As to Rule 60(b)(6), the catch-all regarding justified relief, no facts or justification have been asserted that can sustain such extraordinary relief. The Court cannot fill in the blanks for purposes of Rule 60 relief. It is extraordinary and garners a very high standard of pleading. The motion does not contain anything that even approaches such a standard, and counsel for Mr. Johnston admitted on the record in this hearing that they were not seeking Rule 60 relief because they didn't feel they could.

Conclusion

The Trustee and Mr. Johnston, as joint movants, have failed to support their request for relief under Rule 62.1 with any suitable basis for relief. The settlement obtained through mediation is not appropriate given the *sua sponte* nature of the issues on appeal and the Trustee's lack of standing thereto, as well as the lack of basis for any alternative relief derived from a broad and generous interpretation of the Rule 62.1 motion.

Therefore, IT IS HEREBY ORDERED that any relief sought in the *Notice of Settlement on Appeal and Joint Motion for Indicative Ruling to Effect Terms of Settlement* is DENIED.

THIS ORDER WAS SIGNED AND ENTERED ELECTRONICALLY AS INDICATED AT THE TOP OF THE FIRST PAGE

This Order has been electronically signed. The Judge's signature and Court's seal appear at the top of the first page.
United States Bankruptcy Court.