

#2512

signed Feb. 4, 2000

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

CURTIS DALE McKALE,

DEBTOR.

CASE NO. 99-42198-13

CHAPTER 13

DAUER IMPLEMENT COMPANY, INC.,

PLAINTIFF,

v.

ADV. NO. 99-7135

**CURTIS DALE McKALE,
JAN HAMILTON, Chapter 13 Trustee,**

DEFENDANTS.

ORDER ON MOTION TO DISMISS AND MOTION FOR SANCTIONS

This proceeding is before the Court on the defendant-debtor's motion to dismiss and motion for sanctions pursuant to Fed. R. Bankr. P. 9011. The debtor appears by counsel Fred W. Schwinn. Plaintiff Dauer Implement Company, Inc., appears by counsel Daniel K. Diederich. Although the plaintiff named Chapter 13 Trustee Jan Hamilton as a defendant, it sought no relief against him, and he has not appeared. The Court has reviewed the relevant pleadings and is now ready to rule.

The plaintiff commenced this proceeding by filing a complaint seeking a determination pursuant to 11 U.S.C.A. §523(a)(2)(A) that the debtor's obligation to it is nondischargeable. In lieu of an answer, the debtor filed a combined motion to dismiss for failure to state a claim and motion for

sanctions pursuant to Rule 9011. The plaintiff responded by filing an objection to the motion for sanctions and a notice of dismissal “of the above case pursuant to Bankruptcy Rule 9011.”

Rule 9011 was amended in 1997 in a number of ways that are relevant here. The Rule now provides that a motion for sanctions for violating the Rule must be made separately from other motions or requests and served as provided in Rule 7004. *See* Fed. R. Bankr. P. 9011(c)(1)(A). The debtor’s sanctions motion is improper because it is combined with his motion to dismiss. Since he seeks sanctions against the plaintiff, not its attorney, service under Rule 7004 would have to be made on the plaintiff itself, not on its attorney. The debtor filed the motion with the Court on the same day that he served it by mail on the plaintiff’s attorney. This is also improper under the Rule. These defects preclude awarding any sanctions based on the motion.

Furthermore, Rule 9011(c)(1)(A) now provides: “The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion . . . , the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.” Citing Rule 9011, the plaintiff filed its notice of dismissal six days after the debtor filed his sanctions motion, thus seeking the protection of this so-called “safe harbor” provision. So long as the notice of dismissal is effective, it would also preclude awarding any sanctions to the debtor. The effect of the notice of dismissal is governed by two other Rules. With an exception not applicable here, Bankruptcy Rule 7041 makes Civil Rule 41 applicable to adversary proceedings. With three exceptions not applicable here, Rule 41(a)(1) provides that: “[A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.” The debtor’s motion to dismiss

is neither an answer nor a motion for summary judgment, so it did not terminate the plaintiff's right to dismiss this proceeding. *See* 9 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Pro.: Civil 2d* §2363 at 259 (1995). Similarly, a motion for sanctions, especially one that was defective, would not terminate that right.

For these reasons, the debtor's motion for sanctions is denied. In light of the plaintiff's notice of dismissal, the debtor's motion to dismiss is moot. The Court notes that the plaintiff did not serve its notice of dismissal on the chapter 13 trustee. However, a notice of voluntary dismissal is effective the moment it is filed with the clerk, although it is supposed to be served on all other parties. *See* 9 Wright & Miller, *Civil 2d* §2363 at 266. This order will be served on the trustee and thus notify him of the dismissal of the case.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of February, 2000.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE