

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

_____)	
In re)	CASE NO. 01-17176-BKC-RAM
MARIA M. AYALA,)	CHAPTER 7
Debtor.)	
_____)	

**ORDER FINDING DEBTOR’S COUNSEL
IN CONTEMPT AND IMPOSING SANCTIONS**

The Court conducted a hearing on January 14, 2002 on the Trustee’s Motion for Sanctions Against Debtor’s Counsel, Timothy Kingcade, and for Order Compelling Compliance with Court Order Dated October 4, 2001 (the “Motion for Sanctions”). At the hearing, the Debtor testified and factual statements and legal argument were presented by Trustee, Deborah Menotte (“Trustee”) and attorney Diane Cue. Ms. Cue is an attorney employed at Kingcade & Garcia, P.A. (“Kingcade & Garcia”), and appeared on behalf of her firm and Mr. Timothy Kingcade, individually, the respondents to the Motion for Sanctions. Kingcade & Garcia represented the Debtor in this case, Maria Ayala (the “Debtor”). For the reasons stated on the record and as more fully explained below, the Motion for Sanctions is granted.

FACTUAL AND PROCEDURAL BACKGROUND

Although the debtor filed the instant chapter 7 ‘no asset’ bankruptcy case on July 2, 2001 (the “Petition Date”), the pertinent history of these proceedings begins sometime earlier. Prior to the Petition Date, the Debtor and Kingcade & Garcia entered into a retainer agreement (the

“Agreement”) under which Kingcade & Garcia agreed to represent the Debtor in her bankruptcy case for \$400.00. By the express terms of the Agreement, the scope of the representation was limited to the preparation of the petition and attendance at the 11 U.S.C. §341 first meeting of creditors. Thereafter, Kingcade & Garcia filed the Debtor’s July 2nd bankruptcy petition and a section 341 meeting was set for August 8, 2001 (the “First 341”). The Debtor did not appear at the First 341 and the case was subsequently dismissed by the Court on September 10, 2001.

On September 18, 2001, the Debtor filed a *pro se* Motion to Vacate Dismissal Order (“Motion to Vacate”) stating that she had been unable to appear at the First 341 because she had undergone surgery two days earlier. Further, the Motion to Vacate states that Kingcade & Garcia had knowledge of this fact prior to August 8, 2001, the date of the First 341. On October 4, 2001, on notice to the Trustee, the Debtor and Kingcade & Garcia, the Court held a hearing on the Motion to Vacate and heard testimony by the Debtor and the Trustee. Although Sandra Garcia, an attorney employed at Kingcade & Garcia, was present at the October 4th hearing, Ms. Garcia was not the attorney from the firm with responsibility for this case and she provided the Court with no insight as to her firm’s representation of the Debtor.

After consideration of the record, including the testimony of the Debtor and the Trustee, the Court announced certain findings and conclusions on the record at the October 4th hearing, including the following: First, Kingcade & Garcia did not adequately communicate with the Debtor regarding her medical condition and the need to reschedule the First 341. Second, Kingcade & Garcia did not properly communicate with the Trustee regarding the Debtor’s need to reschedule the First 341. Moreover, compounding the problem, after the First 341, Kingcade & Garcia did not respond to the Trustee’s attempts to consensually reschedule the meeting of creditors. As a result, the Trustee filed

a motion to dismiss which was granted by the Court's September 10, 2001 dismissal order. Finally, Kingcade & Garcia demanded that the Debtor pay an additional \$200 fee as a condition to filing a motion to vacate dismissal even though the dismissal arose from their failure to properly communicate with their client and with the Trustee. The Debtor did not have \$200 to pay Kingcade & Garcia, which resulted in the *pro se* filing of the Motion to Vacate. Based on these findings and conclusions, the Court entered an Order on October 4, 2001 vacating dismissal and ordering Kingcade & Garcia to refund to the Debtor \$150.00 (the "October 4th Order"). The October 4th Order further directed the Clerk of the Court to set a new 341 meeting. If Kingcade & Garcia had paid the \$150 as ordered and appeared at the rescheduled 341 meeting, there would be no further issue. But that is not what happened.

The reset 341 meeting was scheduled for November 15, 2001 (the "Second 341"). At the Second 341, after questioning the Debtor, the Trustee discovered that Kingcade & Garcia did not return \$150 to the Debtor as ordered by this Court. Instead, as detailed in the Motion for Sanctions, Kingcade & Garcia induced the Debtor to sign a document 'waiving' her right to the return of these monies. At the Second 341, the Debtor told the Trustee that she signed the waiver because Timothy Kingcade, a name partner of Kingcade & Garcia, told her that if she did not do so, no one from his office would represent her at the Second 341. The Debtor felt that she had no other option than to sign the waiver.

DISCUSSION

In the Motion for Sanctions, the Trustee argues that Mr. Kingcade's coercive and intimidating conduct in obtaining a waiver of the sanction was a deliberate attempt to ignore the

specific requirements of the October 4th Order. In the Response of Timothy S. Kingcade to Trustee's Motion for Sanctions Against Debtor's Counsel (the "Response to Motion for Sanctions") and at the hearing conducted on the Motion for Sanctions on January 14, 2002, Kingcade & Garcia claimed that Mr. Kingcade never coerced or otherwise improperly influenced the Debtor to waive her right to relief under the October 4th Order. Mr. Kingcade simply believed that it made more sense to ask the Debtor to waive the right to receive the \$150.00 in exchange for his appearance at the Second 341 rather than to pay it back to the Debtor and then have her return to him at least that amount, if not more, to continue representing her in the case. Thus, Mr. Kingcade claims essentially that practical concerns dictated the offsetting of these amounts with neither party paying new money to the other.

There are two glaring problems with Mr. Kingcade's position. First, the Court ordered Kingcade & Garcia to pay \$150 to the Debtor. Mr. Kingcade was obligated to either seek reconsideration of the Order or make the payment. He did not have the authority to decide that his court ordered obligation to pay the Debtor could be waived or offset. Second, he had no basis to charge the debtor more money to attend the Second 341. If Mr. Kingcade had attended the October 4th hearing, talked to his associate who was there or read the transcript of the hearing, he could not have reasonably concluded that he could ask for an additional fee to attend the Second 341. The Court specifically found "that the Trustee would have rescheduled [the 341 meeting] if there had been some responsiveness from debtor's counsel." Transcript of October 4, 2001 Hearing, p. 13. The Court granted the Debtor's *pro se* Motion to Vacate, sanctioned Kingcade & Garcia \$150.00 for their failure to adequately represent the Debtor, and said to the Debtor, "I'm going to grant the motion [and] reinstate the case. There will be another 341. You're all set." Id. Having been

sanctioned for not preventing the dismissal, it is mind boggling to understand how counsel could have believed it appropriate to charge the Debtor more money to attend the Second 341!

Mr. Kingcade did not appear at the January 14th hearing. Diane Cue appeared on his behalf, and on behalf of Kingcade & Garcia. In an attempt to defend Kingcade & Garcia's actions, Ms. Cue began with an explanation of the background of the case, including her personal interaction with the Debtor and the Trustee. Ms. Cue's testimony just made matters worse. Ms. Cue stated that she attempted to contact the Trustee by telephone on numerous occasions regarding the Debtor's illness, and spoke to either 'someone from [the Trustee's] office' or the Trustee's 'assistant'. In response and in direct contradiction to Ms. Cue's statements, the Trustee stated that this was not possible since she did not have any person answering her phone during the days that Ms. Cue claimed she spoke to someone from the Trustee's office.¹

After evaluating the conflicting testimony of the Trustee and Ms. Cue regarding telephone calls allegedly made by Ms. Cue to the Trustee's office, the Court finds the testimony of the Trustee to be credible and the testimony of Ms. Cue not to be credible. By providing false testimony, Ms. Cue is found to be in contempt of this Court. See Virgin Islands Housing Authority v. David, 823 F.2d 764 (3d Cir. 1987) (attorney's false statements in court are punishable by contempt). Specifically, the Court finds that Ms. Cue was not truthful in testifying that she spoke to someone at the Trustee's office. The Court reiterates its findings in the October 4th Order: the office of

¹The Trustee testified that she (1) works from an office in her home, and (2) does have an assistant that comes to do minor bookkeeping work on occasion, but that the assistant was not working on the day that Ms. Cue said she called. Moreover, the Trustee stated that rarely, if ever, does the assistant answer the Trustee's telephone. Simply put, the Trustee was certain that there was no one other than herself who could have answered the telephone at the times Ms. Cue claims to have spoken to an "assistant."

Kingcade & Garcia, and more specifically Ms. Diane Cue, did not properly represent the Debtor in connection with the postponement and rescheduling of the First 341, specifically by failing to properly prevent the dismissal of the case by not staying in sufficient contact with the Trustee.

Further, the Court finds that Mr. Kingcade willfully disobeyed this Court's October 4th Order. As argued by the Trustee and supported by testimony at the January 14th hearing, Mr. Kingcade "bullied" (for lack of a better word), the Debtor into signing a waiver of her right to receive the Court ordered refund. Mr. Kingcade acted wrongly and contemptuously in engaging in this intimidating behavior. Moreover, no party has the independent right to waive relief granted by court order. The October 4th Order is an Order of the Court and is not something to be trifled with. Respect for the Court by obedience to judicial orders is an unquestioned paramount policy of the American judicial system. See Citizens Concerned About Our Children v. School Board of Broward County, Florida, 193 F.3d 1285, 1292 (11th Cir. 1999) *citing* W.R. Grace & Co. V. Local Union 759, et al., 103 S.Ct. 2177, 2183 (1983).

A court may hold a party in civil contempt for failure to comply with a court order where (1) the order is clear and unambiguous; (2) proof of noncompliance is clear and convincing; and (3) the contemnor has not been reasonably diligent in accomplishing what was ordered. See In re Shore, 193 B.R. 698 (S.D.Fla. 1996); In re Stockbridge Funding Corp., 158 B.R. 914 (S.D.N.Y. 1993); Keegan v. Lawrence, 778 F.Supp. 523 (S.D.Fla. 1991); In re Spanish River Plaza Realty Co., Ltd., 155 B.R. 249 (Bankr. S.D.Fla. 1993). In this case, the evidence is clear. Mr. Kingcade, without justification, wilfully violated this Court's October 4th Order. Therefore, Mr. Kingcade and his firm, Kingcade & Garcia, are found to be in contempt of this Court.

APPROPRIATE SANCTIONS

Civil contempt is a remedial sanction and has two purposes: to obtain compliance with a court order and to compensate for damages arising from the noncompliance. See Spanish River, 155 B.R. at 253. Upon a finding that a party is in civil contempt, proper remedies include the imposition of “a fine payable to the complainant in compensation for damages sustained as a result of the contumacious conduct.” Id. at 254 (citing cases).

A. Debtor’s Actual Damages

The Court awards \$2,800 in damages to the Debtor, finding Kingcade & Garcia, Mr. Kingcade and Ms. Cue jointly and severally liable. This amount is derived from the Court’s finding that the Debtor spent at least 12 hours as a result of Mr. Kingcade and Ms. Cue’s improper conduct. This conclusion was based not only on the actual time spent on each extra hearing or meeting forced upon the Debtor, but the total amount of time that the Debtor had to expend to proceed properly in her bankruptcy case. Therefore, the value of her loss includes not only the duration of the court hearings pertaining to the instant case, but also the time waiting in Court for her hearing to be heard and travel time between her job or home and the courthouse or the offices of Kingcade & Garcia. The time includes but is not limited to the following:

(1) Time spent by the Debtor attempting to provide supporting documentation for her hospital stay as requested from her by Ms. Cue.

(2) Time spent by the Debtor preparing the Motion to Vacate Dismissal filed on September 18, 2001.

(3) Time spent by the Debtor appearing in Court on October 4, 2001, on the Motion to Vacate Dismissal.

(4) Time spent by the Debtor at the office of Kingcade & Garcia, negotiating the terms of counsel's future services which culminated in the "waiver" of the relief granted in the October 4th Order.

(5) Time spent by the Debtor appearing in Court on January 14, 2002, pursuant to the Trustee's Motion for Sanctions.

Given the nature of the wrong, the Court finds the value of the Debtor's time in the instant case to be no less than that of Mr. Kingcade and Ms. Cue. A reasonable hourly rate for bankruptcy practitioners in the Southern District of Florida rests in the general range of \$200.00. Therefore, the total amount of actual damages for time expended by the Debtor as a result of Mr. Kingcade and Ms. Cue's improper behavior is found to be \$2,400.00. Moreover, the Court further finds that the Debtor is entitled to a return of the \$400.00 paid to Kingcade & Garcia in expectation of proper representation regarding her bankruptcy case. This expectation was in no way realized and the Court finds that Kingcade & Garcia should disgorge the entire fee. Cf. In re Jackson, 205 B.R. 344 (Bankr. S.D.Fla. 1997).

B. Trustee's Actual Damages

The Court awards \$2,389.75 in damages to the Trustee, finding Kingcade & Garcia, Mr. Kingcade and Ms. Cue jointly and severally liable. Without the diligent efforts of the Trustee defending the Debtor's right to proper representation, none of the wrongdoing giving rise to the October 4th Order nor the conduct giving rise to the contempt set forth in this Order would have come to light. As such, and in furtherance of this Court's goal to compensate parties for time and effort spent due to the contemnor's noncompliance, the Court awards sanctions in the amount of the costs and fees of the Trustee related to the October 4th Order and this Order. In contemplation of this

Order and as directed on the record at the January 14th hearing, on January 22, 2002, the Trustee submitted a Notice of Filing Trustee's Time and Expenses. Included therein is a detailed description of the 11.75 hours expended by the Trustee in this matter and a calculation of \$2,026.25 in fees based on an hourly rate of \$175.00 per hour. The Court *sua sponte* finds this hourly rate to be unreasonably low for the Trustee's services in the instant case, and is therefore increasing the rate to \$200.00 per hour, resulting in total damages payable to the Trustee in the amount of \$2,350.00. In addition, the Trustee incurred and documented \$39.75 in expenses, for a total of \$2,389.75 in fees and expenses. The Court finds that the Trustee performed valuable services to the Debtor and the Court in diligently pursuing these matters and finds that the reasonable value of these services should be paid by the contemnors as part of the sanctions arising from their contempt.

C. Coercive Sanctions

Rule 2016(b), Fed.R.Bank.P., implements 11 U.S.C. §329 by requiring attorneys to file statements of compensation paid or agreed to be paid in connection with a bankruptcy case within 15 days after the order for relief. In addition, that rule obligates attorneys to file a supplemental statement within 15 days after any payment or agreement not previously disclosed.

Mr. Kingcade filed a Disclosure of Compensation when the Petition was filed. He did not file the required supplement when he "charged" the debtor an additional \$150 to attend the Second 341 by coercing her waiver of the \$150 refund required by the October 4th Order. Although Mr. Kingcade's failure to comply with the supplemental disclosure requirements of Rule 2016(b) is obviously not the primary focus of this Order, strict compliance with this rule is critical to assure that there will be no future problems in the way Kingcade & Garcia charge clients, particularly when the firm provides services that may or may not justify additional fees under the original fee

agreement.

Therefore, to implement this Order and as appropriate coercive sanctions upon a finding of civil contempt, the Court finds it necessary to place further requirements on the continued practice of law by Mr. Kingcade, Ms. Cue and their firm. These requirements shall be lifted for cause, if, after motion and a hearing, the Court determines that the additional requirements are no longer necessary to ensure appropriate conduct by the contemnors. This Court will under no circumstances consider lifting these requirements within 6 months of the date of this Order. The requirements are as follows:

1. Upon the filing of a bankruptcy case under any chapter in which Kingcade & Garcia represents the debtor, counsel shall attach a copy of the retainer agreement upon which the representation is based to the firm's Rule 2016(b) Disclosure of Compensation.

2. If at any point during the course of a bankruptcy case in which Kingcade & Garcia represent the debtor, counsel is obligated to file a supplemental Rule 2016 statement, that supplemental statement shall include facts demonstrating that the services for which the firm charged additional fees were necessary and were outside of the scope of the original retention agreement.

3. In addition to these filing requirements and as a further necessary and appropriate sanction, Mr. Kingcade and Ms. Cue shall each complete not less than 2 (two) hours of Continuing Legal Education in the area of ethics within 90 days of the entry of this Order, and shall file a Notice of Compliance evidencing the completion of this Court ordered extra CLE requirement.

D. Consequences of Further Misconduct

As is evident by the findings in this Order, the Court is very troubled by the conduct of Mr.

Kingcade and Ms. Cue in this case. Therefore, the Court expects strict compliance with this Order and the avoidance of any further incidents in which clients are mistreated. If Kingcade & Garcia, Mr. Kingcade or Ms. Cue fail to comply with this Order or if any judge on this Court finds that Mr. Kingcade, Ms. Cue or any other attorney at Kingcade & Garcia improperly charges or coerces fees from debtors in any future cases, in addition to sanctions appropriate independent of this Order, this Court shall issue an Order to Show Cause under Rule 2090-2(B) of the Local Rules for the United States Bankruptcy Court for the Southern District of Florida, requiring Kingcade & Garcia, Mr. Kingcade and/or Ms. Cue to show cause why they should not be barred from the future practice of bankruptcy law before this Court.

RULES REGULATING THE FLORIDA BAR

Although it is outside of the province of this Court to make determinations as to whether a party is in violation of the Rules Regulating the Florida Bar, the misconduct in this case certainly seems to implicate certain rules. For example, Rule 4-1.4(b) provides as follows:

Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Even more applicable may be Rule 4-1.5(a) which provides as follows:

Illegal, Prohibited, or Clearly Excessive Fees. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee A fee is clearly excessive when:
(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client

Each of these rules prohibits conduct which may include the conduct engaged in by Mr. Kingcade during the period of his representation of the Debtor. The Court has found that not only

did Mr. Kingcade fail to explain to his client the full extent of the October 4th Order awarding the return of \$150.00 to the Debtor, but he affirmatively and intentionally misrepresented his authority as Debtor's counsel in coercing the Debtor to waive what was hers by direction of the Court.

CONCLUSION

The Court finds the business of this Order to be distasteful, but necessary. The behavior of both Mr. Kingcade and Ms. Cue demands the Court to involve itself in what should be dealings solely between attorneys and their clients. The Court does not believe that such behavior is endemic to the bankruptcy bar in the Southern District of Florida, but where found, it must be cured. On a further note, and worth repeating, the efforts of Deborah Menotte, Trustee, are commended.

No matter how small the case, no matter how small the fee, counsel for debtors must represent clients ethically and diligently. Counsel for the Debtor in this case failed to fulfill these fundamental obligations and compounded the problem by wilfully violating an Order of this Court. A finding of contempt and the imposition of sanctions is the necessary and justified result. It is therefore - -

ORDERED as follows:

1. The Motion for Sanctions is **GRANTED**.
2. Kingcade & Garcia, Mr. Kingcade and Ms. Cue are found to be in contempt of this Court.
3. The Court awards \$2,800.00 in damages to the Debtor, finding Kingcade & Garcia, Mr. Kingcade and Ms. Cue jointly and severally liable.
4. The Court awards \$2,389.75 in damages to the Deborah Menotte, Trustee, finding

Kingcade & Garcia, Mr. Kingcade and Ms. Cue jointly and severally liable.

5. Mr. Kingcade and Ms. Cue shall each complete not less than 2 (two) hours of Continuing Legal Education in the area of ethics within 90 days of the entry of this Order, and shall file a Notice of Compliance evidencing the completion of this Court ordered extra CLE requirement.

6. Kingcade & Garcia, Mr. Kingcade and Ms. Cue shall comply with the additional disclosure requirements imposed as part of the coercive sanctions provided in this Order.

ORDERED in the Southern District of Florida this 5th day of June, 2002.

ROBERT A. MARK
Chief United States Bankruptcy Judge