

No. 15-CV-557

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Senior Judge Wiley Y. Daniel

IN RE STEVEN E. MUTH,

Debtor.

STEVEN E. MUTH,

Appellant,

v.

KIMBERLY KROHN,

Appellee.

APPELLANT'S REPLY BRIEF

INTRODUCTION

The Bankruptcy Court lacks the power to impose the punitive sanctions levied in this case, and, even if it did have power, the necessary procedural safeguards for such sanctions were not provided, so the sanctions must be vacated. Ms. Krohn argues that a) these issues cannot be raised on appeal because they have already been considered and decided on by the Tenth Circuit, b) the bankruptcy court did have power to issue sanctions, and c) the lack of procedural safeguards is inconsequential because it was already clear to the court that Mr. Muth could afford

to pay sanctions, and apparently examination of ability to pay is the only procedural safeguard that could apply here.¹ These arguments are addressed, in turn, below.

ARGUMENT

A. The Tenth Circuit Did Not and Could Not Consider These Arguments

The Tenth Circuit did not, and could not, consider arguments concerning the Bankruptcy Court's power to issue punitive sanctions and the necessary procedural safeguards, because the decision regarding sanctions did not exist at the time. The relevant sanctions were issued on March 15, 2015, nearly one year after the Tenth Circuit's ruling on May 2, 2014. While the Bankruptcy Court did indicate in the order that was appealed to the Tenth Circuit that there was a chance it would impose attorney fees, it did not actually issue sanctions, and it did not define the nature of the sanctions that it "may" issue. Findings of Fact and Conclusions of Law and Order, p. 14. Thus, there was no decision on sanctions that could be appealed. This is Mr. Muth's first opportunity to raise issues regarding punitive sanctions and procedural safeguards, and, therefore, the issues are properly before this Court.

Ms. Kohn further argues that Mr. Muth was required to have raised these issues before the Bankruptcy Court in its sanctions hearing, and this Court may not now give them consideration for the first time on appeal. These issues are purely legal questions, however, and it is within the discretion of the reviewing court "to determine an issue raised for the first time on appeal if it is a pure matter of law and its proper resolution is certain." *United States v. Lyons*, 510 F.3d 1225, 1238 (10th Cir. 2007). Keeping in mind that Mr. Muth was not represented by an attorney during the proceedings below, and in light of the legal nature of these issues and their

¹ Ms. Krohn also argues that because Mr. Muth did not file a transcript with this Court he cannot argue that the facts do not support the award of sanctions. To the contrary, Mr. Muth complied in full with all that is required by Rule 8009 of the Federal Rules of Bankruptcy Procedure, and all issues raised herein are properly before this Court.

certain resolution on appeal, it would be more than appropriate for this Court to do so in the case at bar.

B. The Bankruptcy Court Lacks Power to Impose Punitive Sanctions

The difference between punitive and compensatory sanctions is at times intractable, but it is no more or less than the difference between civil contempt and criminal contempt orders, which is similarly revealed by the underlying purpose of the order. The major factor in determining whether a contempt is civil or criminal (and, correlatively, whether a sanction qualifies as compensatory or punitive) is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed: the purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant, and the purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. Similarly, if it is for compensation, the punishment is remedial, and for the benefit of the complainant. But if it is for retribution, the sentence is punitive, to vindicate the authority of the court.

Helpfully, Colorado statutes label sanctions as “remedial” or “punitive.” See C.R.C.P. 107. “Punitive” sanctions involve “[p]unishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.” C.R.C.P. 107(a)(4). “Remedial” sanctions are “[s]anctions imposed to force compliance with a lawful order or to compel performance of an act within the person’s power or present ability to perform.” C.R.C.P. 107(a)(5). Proceedings that involve a remedial purpose are compensatory, while those designed to “vindicate the dignity of the court by punishing the contemnor” punitive. *People v. Barron*, 677 P.2d 1370, 1372 n. 2 (Colo.1984) (citations omitted).

The sanctions in this case are revealed to be punitive by the purpose of their imposition. The Bankruptcy Court clearly was punishing Mr. Muth to vindicate the authority of the court, rather than to force compliance or performance. The Bankruptcy Court clearly declared that the purpose of the sanctions was to vindicate the court from Mr. Muth's "bad-faith" filing as "a veteran *pro-se* litigant." Findings of Fact and Conclusions of Law for Hearing on Attorney Fees, P. 1. There is nothing that Mr. Muth could do to come into compliance with any order of the court or otherwise perform any required act. The purpose of the sanctions was strictly to vindicate the authority of the court in the face of what it found to be an unjustified filing by someone who should know better. In other words, these were punitive sanctions.

Mr. Muth's argument that the bankruptcy court had no power to issue such sanctions remains compelling notwithstanding Ms. Kohn's arguments to the contrary. In *Jones v. Bank of Santa Fe*, the Tenth Circuit stated as follows: "The power to maintain order and confine improper behavior in its own proceedings seems a necessary adjunct to any tribunal charged by law with the adjudication of disputes. We should not lightly infer its absence, and we see no reason to do so here." 40 F.3d 1084, 1089 (10th Cir. 1994).

The appeals court determined that the inherent powers under 11 U.S.C. § 105(a) provide that the bankruptcy "court may issue any order ... necessary or appropriate to carry out the provisions of this title" and that nothing "preclude[s] the court from, *sua sponte*, taking any action or making any determination necessary or appropriate ... to *prevent* an abuse of process." *Id.* (emphasis added). The Circuit Court considered whether the Bankruptcy Court's inherent powers include the authority to impose compensatory, not punitive, sanctions on a non-party. The Tenth Circuit did nothing more than recognize a bankruptcy court's authority to issue civil

contempt orders and compensatory sanctions. It did not, as Ms. Kohn suggests, recognize a bankruptcy court's authority to issue punitive sanctions.

That appears to be an open question in the Tenth Circuit, and until that question is answered, this Court should follow the persuasive authority of the sister circuits that have ruled on this issue. *See Price v. Lehtinen*, 564 F.3d 1052, 1059 (9th Cir. 2009) (bankruptcy court lacks inherent authority to impose punitive sanctions, in part because it cannot provide the due process protections to which a criminal defendant is entitled, such as jury trial).

C. The Sanctions Award Lacked Basic, Necessary Procedural Safeguards

Ms. Kohn argues that Mr. Muth's ability to pay is apparent from the record, and, therefore, the requisite procedural safeguards are satisfied:

Though Ms. Krohn does not agree such a finding was necessary, it could have easily been included in the hearing below and in the judge's findings if Mr. Muth had raised the issue there. Since his Chapter 11 Bankruptcy had only recently been dismissed, there were ample records available to the parties and the Court concerning his ability to pay sanctions over time.”

Response Brief, p. 7.

While it may appear self-evident to Ms. Kohn that Mr. Muth is able to make particular payment, the reality is that the Bankruptcy Court made no actual finding as to Mr. Muth's ability to pay, and that, rather than what a particular claimant believes should be obvious, is the safeguard that applies. A court must make an actual determination to satisfy the procedural requirements of punitive sanctions. Contrariwise, the court did not do so in this case, and the sanctions must be vacated *vel non*.

Moreover, Ms. Kohn completely disregards a second, and equally applicable, procedural requirement essential to the issuance of punitive sanctions: the award must be the minimum

amount necessary to deter undesirable behavior. The Bankruptcy Court made no examination in this regard, as its findings clearly show. Nor were there any other procedures put into place that would ensure a fair sanction. Without adequate and necessary procedural safeguards, the punitive sanctions cannot stand.

CONCLUSION

For the foregoing reasons, Mr. Muth respectfully requests that this Court vacate the entry of judgment and award of attorney fees and costs.

Respectfully submitted,



Seth Kretzer

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CERTIFICATE OF SERVICE

I certify that this document was served on all counsel of record by filing on the ECF system on this 23rd day of September 2015.



Seth Kretzer

