

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In Re: CLARE CREEK (LEDUFF) KELSEY,
Debtor,

Chapter 7 Case
#94-10415

CLARE CREEK (LEDUFF) KELSEY,
Plaintiff,

v.

Adversary Proceeding
#00-1034

GREAT LAKES HIGHER EDUCATION
CORPORATION; A.M. MILLER; USA GROUP
GUARANTEE SERVICES, INC.; STUDENT
SERVICES, INC.; GRADUATE LOAN CENTER;
ZWICKER AND ASSOCIATES, P.C; NEVADA
DEPARTMENT OF EDUCATION; VAN RU
CREDIT CORP.; NCO FINANCIAL SYSTEMS,
INC.; DIVERSIFIED COLLECTION SERVICES,
INC.; CITIBANK (SOUTH DAKOTA), N.A.;
AMAN COLLECTION SERVICE, INC.; THE ED
FUND/CALIFORNIA STUDENT AID
COMMISSION; AMERITRUST OF
CLEVELAND; CITIBANK NY STATE;
MELLON BANK MARYLAND; MELLON BANK
NA; PHILADELPHIA HIGHER EDUCATION
ASSISTANCE ADMINISTRATION; STUDENT
LOAN MARKETING ASSOC. and KEYBANK USA
Defendants/Respondents.

*Appearances: John Thrasher, Esq.
Montpelier, VT
Attorney for Plaintiff*

*Gregory A. Weimer, Esq.
Little, Cicchetti & Conrad
Burlington, VT
Attorney for TERI*

*Gary L. Franklin, Esq.
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Attorney for ECMC*

**MEMORANDUM OF DECISION
DENYING PLAINTIFF'S MOTION FOR SANCTIONS UNDER RULE 9011**

The matter before the Court is the Plaintiff's Motion for Sanctions Under Rule 9011 [Dkt. #159-1] served February 27, 2001 and filed March 21, 2001. The plaintiff, Clare Creek (LeDuff) Kelsey, seeks a substantial sanction award against defense counsel and their firms by contending that defense counsel have "violated the letter and the spirit of [Rule 9011] and professional ethics" based upon the following:

- a) filing or advocating a written motion or other paper for an improper purpose in violation of Rule 9011(b)(1);
- b) filing or advocating a written motion or other paper based on an unwarranted legal contention in violation of Rule 9011(b)(2);
- c) without factual inquiry, filing or advocating a written motion or other paper based on an allegations or factual contentions (sic) which lacked evidentiary support, in violation of Rule 9011(b)(3); and
- d) making factual contentions which are unwarranted by the evidence and which were not specifically identified as based on a lack of information or belief, in violation of Rule 9011(b)(4).

On March 29, 2001, the Court entered an Order deferring a ruling on the motion for sanctions until after the trial. Plaintiff has failed to comply with the procedural requirements of Rule 9011. The Court finds that the plaintiff's motion is without an adequate legal or factual basis and therefore denies the motion.

DISCUSSION

Bankruptcy Rule 9011 provides in pertinent part:

- (b) **REPRESENTATIONS TO THE COURT.** By presenting to the court ... a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the persons'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; and
 - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
- (c) **SANCTIONS.** If, after notice and a reasonable opportunity to respond, 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 subsection (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... (emphasis added).

The Court finds that the request for sanctions lacks adequate legal and factual support. First, the plaintiff claims that defense counsel were remiss in advocating in favor of their clients' refusal to grant the plaintiff an administrative discharge upon presentation of two completed Disability Certificates. The argument fails because plaintiff never stated a cause of action for an administrative discharge under the Higher Education Act or any federal regulation. *See* 34 CFR 682.402(c)(2) and never plead a cause of action for breach of contract under the loan agreements. Moreover, the circumstances surrounding the submission of these two certificates were hotly disputed at trial with the plaintiff acknowledging that her employment seeking activities may have been inconsistent with the terms of the certificates and that her psychiatrist was hesitant to execute the certificates.

Second, the plaintiff also claims that defense counsel acted improperly by referring to certain papers, in their Joint Trial Brief, which were provided to them by plaintiff's counsel in discovery. Although the plaintiff did not have a motion pending before this Court requesting that the papers be suppressed, she asserts that defense counsel nonetheless should have withheld any reference to the subject document, which was material to their defense, in their pretrial brief. Since the plaintiff provided the subject document to defendants in discovery and did not promptly file a motion with this Court seeking its suppression or return, it is this Court's view that the counsel cannot be faulted for including these documents in the record. It should also be noted that when plaintiff's counsel eventually did file a motion to suppress these documents, the motion was denied on the grounds of waiver. Once the suppression motion was filed, it was, of course, too late for defense counsel to "unring the bell." The Court finds that defense counsel did not act improperly in referring to the handwritten notes and no prejudice resulted to plaintiff's case that can be attributed to the conduct of defense counsel in this regard.

Next, the plaintiff argues that these handwritten notes should not have been asserted in opposition to the plaintiff's summary judgment motion because the notes contradicted prior deposition testimony of the

debtor and the defendants had not yet deposed the plaintiff concerning the document. The defendants assert that portions of the notes were written in the present tense and may be reasonably construed as prospectively designing various future employment and living arrangements that she would later rely upon in an undue hardship claim in order to defraud creditors. On its face, the subject handwritten document provided a reasonable factual basis for raising a potential fraud defense. Moreover, the plaintiff fails to direct this Court to case law that requires a party to take a deposition before asserting the meaning or significance of a writing. It should also be noted that due to the subsequent spoliation of the subject notes by the plaintiff, defendants were denied “a reasonable opportunity for further investigation or discovery” regarding their assertion of fraud. *See* Rule 9011(b)(3). Accordingly, the defendants’ claim of fraud based upon these handwritten notes was not so lacking in law or fact as to warrant a sanction under Rule 9011.

Furthermore, the Court finds nothing unethical or improper in the defendants’ emphasis on the handwritten notes as a defense to the plaintiff’s undue hardship claim. A significant credibility issue was raised by these handwritten documents. The matter was subject to lengthy examination and cross examination at trial and required considerable scrutiny and careful analysis by the Court in resolving the dispute. While this Court can readily understand plaintiff’s desire after-the-fact that her handwritten notes should have remained undisclosed or unnoticed by the defense, neither the circumstances of their disclosure nor their ultimate use by defense counsel persuade this Court that there are grounds for Rule 9011 sanctions against the defendants’ counsel in this case.

The request for relief is also procedurally defective. As set forth above, Rule 9011 prohibits a party from filing a request for sanctions with the Court until 21 days after the opponent has been served with the motion for sanctions. This so-called “safe harbor” provision is a mandatory procedural prerequisite for seeking sanctions under the rule and sanctions imposed without compliance with this provision are subject to reversal. *See Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320 (2nd Cir. 1995); *Photo Circuits Corp. v. Marathon Agents, Inc.*, 162 FRD 449 (E.D.N.Y. 1995); *see also In re Coones Ranch*, 7 F.3d 740 (8th Cir. 1993)(law interpreting Rule 11 is applicable to Rule 9011 cases).

In this matter, the plaintiff has failed to comply with the Rule 9011 safe harbor provision before filing the subject Motion for Sanctions. The motion was served by U.S. mail on February 27, 2001. It was filed on March 21, 2001. Bankruptcy Rule 9006(f) explains the computation of time limits and provides:

When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

When a party elects to serve a motion for sanctions by mail, it must allow an additional three days for a response before filing the motion with the court. The party is required to determine the filing date by first calculating the original 21 day period prescribed by Rule 9011 and then add three additional days to the prescribed period, pursuant to Rule 9006, when utilizing service by mail. *See Morrone v. Gunderson*, 169 FRD 168, 170, fn. 1 (M.D. Fla. 1996)(a party seeking Rule 11 sanctions must include additional 3 days for response time when serving motion by mail). Since compliance with this safe harbor requirement is mandatory in this Circuit, *see Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320 (2nd Cir. 1995), an award of sanctions would be impermissible under the circumstances. In light of the need for compliance with the procedural safeguards of the safe harbor provision before the imposition of sanctions, this Court requires strict compliance with Rule 9011, including the additional time for response after service by mail as prescribed by Bankruptcy Rule 9006, in the interests of due process, judicial economy and fundamental fairness as a prerequisite to the awarding of sanctions. The Court has considered the remaining matters asserted in the motion for sanctions and finds them to be unpersuasive.

Based on the foregoing, the plaintiff's motion for sanctions is denied.

October 23, 2001
Rutland, Vermont

/s/ Colleen A. Brown
Colleen A. Brown
United States Bankruptcy Judge