

FILED *elm P.I.F.*
IN CLERKS OFFICE
U.S. DISTRICT COURT, E.D. N.Y.

★ JUL 29 1998 ★

ORDER

In re Alan Glassberg, 96 CV 1802

This is an appeal under 28 U.S.C. § 158(a) of two orders issued in an adversary proceeding in the Bankruptcy Court, (Hall, J.). One struck all of the affirmative defenses of defendant-appellant Azores Maritime Co., S.A. ("Azores"), dismissed all of Azores's counterclaims, and awarded costs and attorney's fees as a sanction against Azores. A later order set the amount of the sanction at \$2,445.45.

The appeal of the order striking Azores's affirmative defenses and dismissing its counterclaims is dismissed as untimely because it was not filed, as required by Bankruptcy Rule 8002(a), within 10 days of the entry of the order. The appeal of the order imposing sanctions is, however, timely, *see In re Fugazy Express, Inc.*, 982 F.2d 769, 774-76 (2d Cir. 1992), and, for the reasons set forth below, is meritorious.

"[D]ue process requires that courts provide notice and opportunity to be heard before imposing any kind of sanctions." *Ames Dep't Stores, Inc. v. Zayre Cent. Corp.*, 76 F.3d 66, 70 (2d Cir. 1996). This requirement applies with equal force to sanctions imposed pursuant to Bankruptcy Rule 9011. *In re Moses Stein*, 127 F.3d 292, 294 (2d Cir. 1997). On oral argument before Bankruptcy Judge Hall, plaintiff-appellee Alan Glassberg ("Glassberg") sought to bring a motion for sanctions against Azores. The court rejected Glassberg's request to move for sanctions at that time, commenting that it was "not going to deal with [sanctions.] We are going to deal with what is on today's calender, which is a motion to strike the answer and dismiss the counterclaims." Nonetheless, Bankruptcy Judge Hall in fact ordered sanctions. In so doing, the court failed to provide Azores with notice and an opportunity to respond. Therefore, the award of attorney's fees and costs in the amount of \$2,445.45 as a sanction must be reversed. Moreover, review of the grounds for awarding sanctions reveals that, while Bankruptcy Judge Hall had a sound basis for his rulings on the merits, the imposition of sanctions was not well-founded. The orders granting sanctions are therefore reversed.

Finally, Glassberg moves in this court for additional sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against Azores on the ground that the present appeal is frivolous. Rule 11(c)(1)(A), however, specifies that "[a] motion for sanctions under this rule shall be made separately from other motions or requests" Since Glassberg did not make a separate motion for additional sanctions, his request is denied. Moreover, since the appeal of the sanction orders has been granted, the appeal cannot be seen as frivolous.

SO ORDERED.

Nina Gershon

NINA GERSHON

United States District Judge

**Dated: Brooklyn, New York
July 27, 1998**

(Handwritten mark)