UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

In re: JOCK WEST Debtor	BK No: 10-14653 Chapter 7
M2MULTIHULL, LLC, Plaintiff	A.P. No. 11-01021
v.	Not For Publication
JOCK WEST, SHOWTIME, LLC, and SHOWTIME OF NEWPORT, LLC, Defendants.	

MEMORANDUM AND ORDER GRANTING
MOTION FOR THE IMPOSITION OF SANCTIONS
(this relates to Doc. #259)

Defendant Jock West ("West"), the debtor in this case, moves for the imposition of sanctions against attorney Michael A. Kelly, counsel for Plaintiff M2Multihull, LLC ("M2M"). *See* Motion for the Imposition of Sanctions against Attorney Michael A. Kelly ("Sanctions Motion") (Doc. # 259). Not surprising, M2M objects. The Court heard argument on the Sanctions Motion on October 16, 2013. After consideration of the parties' memoranda and the oral arguments, the Court ruled from the bench that sanctions are warranted and advised the parties that a written decision setting forth the Court's findings of fact and conclusions of law would follow the bench ruling. The following constitutes such findings and legal conclusions.

Jurisdiction

The Court has jurisdiction over this matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a).[1] The adversary proceeding underlying this motion is a core proceeding in accordance

[1] All cases arising under Title 11 of the United States Code are referred automatically to this bankruptcy court by the United States District Court for the District of Rhode Island. *See* DRI LR Gen 109(a).

with 28 U.S.C. § 157(b)(2)(I). The Court has the authority to impose sanctions pursuant to Fed. R. Bankr. P. 9011, 11 U.S.C. § 105, 28 U.S.C. § 1927, and the Court's inherent power.[2]

Procedural History

The following additional filings by the parties in this Court and the United States District Court for the District of Rhode Island ("RI District Court") and the outcome of such filings are relevant to the Sanctions Motion:

• February 28, 2012 – With leave of the Court, M2M filed its second amended complaint objecting to the discharge of West. *See* Doc. #197.

• May 11, 2012 – West moved to dismiss the second amended complaint. *See* Doc. #200.

• June 8, 2012 – M2M objected to the motion to dismiss. *See* Doc. #204.

• August 16, 2012 – The Court held a hearing on the motion to dismiss. That same day, the Court entered an order granting the motion to dismiss and entered judgment against M2M and in favor of West. *See* Doc. ## 227 and 228 (collectively the "Dismissal Order and Judgment").

• August 29, 2012 – M2M filed a notice of appeal, averring that it was appealing "the Order and Judgment . . . entered in this adversary proceeding on the 16th day of August, 2012." *See* Doc. #233. That same day, M2M filed an election to proceed with its appeal before the RI District Court. *See* Doc. #234.

• February 26, 2013 – While its appeal was pending in the RI District Court, M2M filed in this Court a motion seeking leave to file a third amended complaint ("Motion to Amend"). *See* Doc. #249. Nowhere in its Motion to Amend did M2M reference the pending appeal.

• February 27, 2013 – West objected to the Motion to Amend, arguing that because judgment

[2] Unless otherwise specified, references to the "Rules" are to the Federal Rules of Bankruptcy Procedure.

had been entered and the appeal had been taken M2M's motion was not well-grounded in law, was frivolous, and was cause for imposition of sanctions. *See* Doc. #252.

• April 2, 2013 – The Court denied M2M's Motion to Amend without prejudice for lack of jurisdiction in light of the pending appeal of the Dismissal Order and Judgment. *See* Doc. #255.

• July 15, 2013 – The RI District Court entered an order affirming this Court's Dismissal Order and Judgment. *See* Doc. #265. M2M did not appeal from the RI District Court's order.

• July 31, 2013 – M2M filed a renewed motion for leave to file a third amended complaint ("Renewed Motion to Amend"), attaching as Exhibit B the RI District Court's order affirming the Dismissal Order and Judgment and arguing that based on the RI District Court's order "jurisdiction has once again been vested in this Court." *See* Doc. #257.

• August 5, 2013 – Counsel for West sent Attorney Kelly a letter enclosing a copy of the Sanctions Motion, requesting that Attorney Kelly withdraw the Renewed Motion to Amend, and stating that if he did not do so the Sanctions Motion would be filed on or after August 29, 2013. *See* Sanctions Motion, Exhibit A.

• August 19, 2013 – West objected to the Renewed Motion to Amend, reiterating that because the second amended complaint was dismissed and judgment was entered against M2M, the Renewed Motion to Amend was not well-grounded in law, was frivolous, and was cause for imposition of sanctions. *See* Doc. #258.

• August 30, 2013 – West filed the Sanctions Motion. *See* Doc. #259.

• September 10, 2013 – The Court denied M2M's Renewed Motion to Amend. *See* Doc. #260.

• September 13, 2013 – M2M objected to the Sanctions Motion ("Objection"). *See* Doc. #262.

• September 17, 2013 – This Court docketed in this adversary proceeding the July 15, 2013

RI District Court order affirming this Court's Dismissal Order and Judgment. *See* Doc. #265.[3]

Discussion

West's Sanctions Motion seeks sanctions against Attorney Kelly based solely on the filing of M2M's Renewed Motion to Amend. Accordingly, the Court will only address the filing of that particular motion in determining whether sanctions should be imposed.

I. The Parties' Positions

West contends that M2M's Renewed Motion to Amend violates Rule 9011 because it was not well-grounded in law. In fact, West maintains that the law is "crystal clear in this Circuit" that this Court did not have the power to grant M2M leave to amend its second amended complaint after that complaint was dismissed and judgment had entered against M2M in favor of West. *See* Sanctions Motion at 1.[4] West emphasizes that Attorney Kelly "was specifically put on notice" of the law in West's earlier objection to M2M's first Motion to Amend, which the Court denied without prejudice because the appeal was pending. *See id.* at 2. West asserts that he has satisfied the "advance warning requirement" of Rule 9011(c)(1)(A) by forwarding the August 5, 2013 letter to Attorney Kelly. *See id* at note 2. Therefore, West presses for sanctions to be imposed against Attorney Kelly for what West characterizes as the filing of the "frivolous and vexatious" Renewed

[3] Also, on September 20, 2013, M2M filed a motion asking the Court to reconsider its denial of the Renewed Motion to Amend; on September 23, 2013, West objected to the motion to reconsider; and on October 11, 2013, the Court denied the motion to reconsider. *See* Doc. ##270, 271, 274.

[4] Although not explicitly stated, West appears to rely on subdivision (b)(2) of Rule 9011 in asserting a violation of the rule by the filing of the Renewed Motion to Amend. Rule 9011(b) states, in relevant part, that by presenting a motion to the court an attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (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 a new law . . . ." The Sanctions Motion does not state a basis for a violation of any other provision of Rule 9011(b). Subdivision (c) of Rule 9011 provides that if the court determines that subdivision (b) has been violated it may "impose an appropriate sanction upon the attorney, law firms, or parties that have violated subdivision (b) or are responsible for the violation."

Motion to Amend. *See id* at 3.

M2M's Objection, rather than presenting an argument why the Renewed Motion to Amend was well-grounded in law and not frivolous, merely referred the Court to the Renewed Motion to Amend and to *Mirpuri v. ACT Mfg., Inc.*, 212 F.3d 624, 628-30 (1st Cir. 2000). *See* Objection at 1. First, as the Court noted in its Memorandum and Order denying M2M's Renewed Motion to Amend, that motion merely "recite[d] the well-known standard of Federal Civil Rule 15 . . . that leave to amend is to be freely given when justice so requires, but it ignore[d] the threshold issue that for leave to be given to amend a complaint there must be a complaint pending to amend." *See* Doc. #260, n.1. And second, M2M and Attorney Kelly misunderstand how *Mirpuri* applies to the matter at hand.

II. Application of the Law

West is correct that the law applicable to the Renewed Motion to Amend is abundantly clear in the First Circuit. In denying that motion, the Court held that after the dismissal of the second amended complaint and the entry of judgment in favor of West, the Court lacked the power to grant a motion to amend the complaint unless post-judgment relief, such as under Rule 9024, had been granted. *See* Doc. #260 at 2 (*citing Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 389 (1st Cir. 1994), *cert. denied*, 513 U.S. 1015 (1994)). The holding of *Acevedo-Villalobos* on this issue has been repeatedly confirmed as the law in this Circuit. *See Fisher v. Kadant, Inc.*, 589 F.3d 505, 508-09 (1st Cir. 2009); *Mirpuri*, 212 F.3d at 627-29. M2M did not seek any such post-judgment relief following this Court's entry of the Dismissal Order and Judgment. Instead, M2M sought appellate review by the RI District Court, which affirmed this Court's Dismissal Order and Judgment. *See* Doc. #265.

M2M, at its peril, chose to overlook this threshold issue in its Renewed Motion to Amend (filed two weeks *after* the RI District Court affirmed the Dismissal Order and Judgment), focusing with "tunnel vision" on the general standard under Rule 7015 (incorporating Fed. R. Civ. P. 15). The entirety of M2M's argument regarding the posture of this adversary proceeding post-appeal was that "[b]ased upon the U.S. District Court – District of Rhode Island's recent decision pertaining to this matter, jurisdiction has once again been vested in this Court." *See* Renewed Motion to Amend at 1. But this statement blatantly disregards the fact that the RI District Court *affirmed*, not vacated, the Dismissal Order and Judgment. Only if the RI District Court had vacated the Dismissal Order and Judgment would M2M's second amended complaint have been resurrected. Because the RI District Court affirmed that judgment, M2M's second amended complaint remained a "dead letter." *See Fisher*, 589 F.3d at 509.

Finally, with respect to M2M's reference to *Mirpuri* in both its Objection and in oral argument, the Court is at a loss to understand how that case could be interpreted as support for M2M's contention that the Renewed Motion to Amend was well-grounded in law. Ironically, the losing plaintiffs' argument in the *Mirpuri* case so closely resembles M2M's arguments in this case that Attorney Kelly should have known that the Renewed Motion to Amend was frivolous and its filing unreasonable. *See Mirpuri*, 212 F.3d at 628 (stating that plaintiffs' argument for leave to amend "suffers from tunnel vision" in that "it overlooks the district court's determination that, at the time the plaintiffs filed their motion, a final judgment already had been entered"). The only actual issue in controversy in *Mirpuri* was whether a final judgment had in fact been entered. *See id*. In this proceeding that cannot be disputed.[5] The Dismissal Order and Judgment against M2M

[5] During the hearing, Attorney Kelly cited *Mirpuri*, quoting that "a final judgment occurs where . . . an action is

was entered on August 16, 2012, and M2M appealed from that judgment less than two weeks later. *See* Doc. ## 227, 228 and 233. Therefore, final judgment entered long before M2M's Renewed Motion to Amend, M2M was aware of the finality of the judgment, and M2M's reliance on *Mirpuri* in objection to the Sanctions Motion is sorely misplaced.

The Court finds that the Renewed Motion to Amend was not grounded in law and was unquestionably frivolous. Its filing caused both West and the Court to unnecessarily expend time and resources addressing this baseless motion.

III. Standards for Imposing Sanctions

In determining whether to impose sanctions against Attorney Kelly based on the filing of the Renewed Motion to Amend, the Court is guided by Rule 9011 and pertinent First Circuit case law directly addressing the issue.[6] Like Fed. R. Civ. P. 11, Rule 9011 "emphasizes responsible behavior on the part of litigators," *see In re D.C. Sullivan Co., Inc.*, 843 F.2d 596, 598 (1st Cir. 1988), and the Court expects no less from counsel appearing in this Court. Those rules "require an attorney to conduct himself in a manner bespeaking reasonable professionalism and consistent with the orderly function of the judicial system. Subjective good faith is not the issue; generally, Rule 9011 demands that counsel's actions comport with an objective standard of lawyerly

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dismissed, leave to amend is explicitly denied, and the order is embodied in a separate document." *Id*. at 629. He asserts this did not occur in this proceeding. But what Attorney Kelly elects to ignore is that, in this proceeding, he did not file a motion or by any other means seek leave to amend the second amended complaint before this Court entered its Dismissal Order and Judgment on August 16, 2012. Therefore, that quotation from *Mirpuri* is inapposite. Rather, it is the next sentence of *Mirpuri* that governs the issue presently before the Court: "Because final judgment entered in this case on June 1, 1999, the district court correctly perceived that it lacked jurisdiction to permit the filing of an amended complaint on June 28." *Id.* So too, in this adversary proceeding before this Court, because final judgment entered on August 16, 2012, the Court appropriately ruled – both on April 2, 2013, in denying the first Motion to Amend and again on September 10, 2013, in denying the Renewed Motion to Amend – that it lacked jurisdiction to permit the filing of an amended complaint.

[6] Rule 9011(c)(3) states: "When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed."

performance," and Rule 9011 prohibits "the offering of frivolous arguments." *Id*. at 598-99. To support a finding of violation of the Rule, "some degree of fault is required, but the fault need not be a wicked or subjectively reckless state of mind; rather, an individual must, at the very least, be culpably careless to commit a violation." *Roger Edwards, LLC v. Fiddes & Son, Ltd*, 437 F.3d 140, 142 (1st Cir. 2006) (*citing Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 39 (1st Cir. 2005)).[7]

The Court concludes that Attorney Kelly has presented no remotely persuasive argument that there was any basis in the law for the filing of the Renewed Motion to Amend.[8] Given the well-defined state of the law in the First Circuit, as well as the warning provided to Attorney Kelly by West's objection to the first Motion to Amend and the subsequent August 5, 2013 letter from West's counsel that the Renewed Motion to Amend was not well-grounded in the law and sanctions would be sought unless it was withdrawn, the Court finds that Attorney Kelly was "culpably careless" in filing the Renewed Motion to Amend and unreasonable in his refusal to

[7] Attorney Kelly asserts that sanctions are not warranted because the Renewed Motion to Amend was not filed in bad faith. But as explained above, the Court need not find bad faith to find a violation of Rule 9011.

[8] Attorney Kelly put forward two additional arguments at the hearing that also miss the mark. First, he argued that at the August 16, 2012 hearing before this Court on West's motion to dismiss the complaint (which motion ultimately was granted by the entry of the Dismissal Order and Judgment), he did not have the opportunity to request leave to amend the second amended complaint because the hearing was too short. The Court notes that Attorney Kelly could have sought leave to amend that complaint any time prior to that hearing, during the hearing or even after the hearing by moving to reconsider the Court's decision on the motion to dismiss. Yet Attorney Kelly did none of those things. Instead, he elected to appeal the Dismissal Order and Judgment to the RI District Court, knowing full well that this Court had entered a *final* judgment. Second, Attorney Kelly argued that because this Court on April 2, 2013 denied the first Motion to Amend "without prejudice," while M2M's appeal was pending in the RI District Court, he was free to file another motion to amend after the RI District Court had ruled on the appeal, regardless of the outcome of the appeal. This argument is meritless. The Court denied the first Motion to Amend because the Court lacked jurisdiction to rule on the motion while the appeal was pending. The Court's denial was "without prejudice" merely because, if the appeal was successful and the Dismissal Order and Judgment was vacated, the second amended complaint would spring to life again and this Court would have jurisdiction to consider on the merits a motion to amend the second amended complaint. On the contrary, the Dismissal Order and Judgment was not vacated; it was affirmed, and thereby it was entirely unreasonable for Attorney Kelly to view the "without prejudice" denial of the first Motion to Amend as a license to file yet another motion to amend a complaint that remained "a dead letter." *See Fisher*, 589 F.3d at 509.

withdraw the motion.

In summary, the Court concludes that Attorney Kelly's filing of and refusal to withdraw the Renewed Motion to Amend violated Rule 9011 because the legal contentions set forth in the motion, after the RI District Court *affirmed* the Dismissal Order and Judgment, were not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law." Rule 9011(b)(2). To redress the violation the imposition of sanctions against Attorney Kelly is appropriate "to deter repetition of such conduct or comparable conduct by others similarly situated." *See* Rule 9011(c)(2).[9]

Just what such sanction should be imposed was not addressed in the Sanctions Motion. In response to the Court's inquiry of the parties at the hearing, counsel for West agreed that reimbursement of West's reasonable attorneys' fees and costs resulting from the Renewed Motion to Amend would be an appropriate sanction. On the other hand, Attorney Kelly argued that no sanctions should be imposed based on his substantive arguments and his assertion that deterrence is not necessary because in more than 30 years of practice he has never before been sanctioned. The Court disagrees. At the expense of West, Attorney Kelly's refusal to withdraw that frivolous motion was unjustified. As is permitted under Rule 9011(c), the Court believes that a fitting and adequate sanction is the payment by Attorney Kelly of the reasonable attorneys' fees and other

[9] Rule 9011(c)(2) states: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Subparagraph (A) prohibits monetary sanctions against a represented party for a violation of subdivision (b)(2), but it is clear that attorneys and law firms may be monetarily sanctioned for such a violation. *See* 10 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 9011.07 (16th ed. 2012). Subparagraph (B) concerning the award of sanctions on a court's own initiative is inapplicable as the sanction request was initiated by West.

expenses incurred by West "as a direct result of this violation." *See* Rule 9011(c)(2).

Conclusion

The Sanctions Motion is GRANTED. The Sanctions Motion as filed does not permit the Court to assess the amount of reasonable attorneys' fees to award West in connection with the Renewed Motion To Amend. Hence, West shall submit an itemized statement of his reasonable attorneys' fees and any specific costs incurred relating to the Renewed Motion to Amend by November 29, 2013. Attorney Kelly shall have 14 days from the submission of such fee statement to file an objection if he so choses, but any such objection must set forth the precise grounds for his objection (other than a general objection to the award of sanctions which the Court takes note of now), including any objectionable specific fee entries or costs.[10]

Dated: October 30, 2013

By the Court,

Diane Finkle 10/30/2013

Diane Finkle
U.S. Bankruptcy Judge

[10] Rule 9011(c)(1)(A) states in relevant part: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." The Court does not find any such exceptional circumstances here, therefore, Attorney Kelly and the law firm by which he is employed shall be held jointly responsible for the violation found and the sanctions to be imposed by the Court.