

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

IN RE: EDWARD LEE BLALOCK, Debtor

**No. 5:12-bk-71200
Ch. 13 (dismissed)**

EDWARD LEE BLALOCK

PLAINTIFF

v.

5:12-ap-7057

**CLAUDETTE BLALOCK and
JOHNNIE RHOADS**

DEFENDANTS

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court is a *Motion For Partial Summary Judgment* filed by separate defendant Claudette Blalock on January 17, 2013; an *Opposition to Motion For Summary Judgment, Countermotion For Sanctions and Brief in Support Thereof* filed by the plaintiff on January 30, 2013;¹ and a *Defendant's Reply to Plaintiff's Response, "Opposition to Motion For Summary Judgment"* filed by Claudette Blalock on February 1, 2013. For the reasons stated below, the Court denies Claudette Blalock's motion for partial summary judgment.

The debtor filed a chapter 13 voluntary petition on March 26, 2012, and filed his initial complaint against Claudette Blalock and Johnnie Rhoads on May 31, 2012. Claudette Blalock filed an answer to the complaint on June 21, 2012, and, five days later, on June 26, filed a pleading titled *Counterclaim*. On November 20, 2012, on the debtor's motion

¹ The title of the debtor's response references a countermotion for sanctions. In the debtor's argument section of the response, the debtor states that Claudette Blalock's motion "is a violation of Rule 11." Finally, in the debtor's prayer for relief, he asks the Court to deny Claudette Blalock's motion for summary judgment and to award him "sanctions for having to reply to this frivolous motion." Federal Rule of Bankruptcy Procedure 9011 states clearly that "[a] motion for sanctions under this rule shall be made separately from other motions or requests" Fed. R. Bankr. P. 9011(c)(1)(A). To the extent the debtor is requesting sanctions under Rule 9011, that request is denied.

and after a hearing, the Court entered its order dismissing the debtor's underlying bankruptcy case. On the same day, the Court issued its order to show cause why the adversary proceeding should not be dismissed as moot. The debtor appeared at the show cause hearing; neither defendant appeared. After hearing argument, the Court withdrew its order to show cause and found that the adversary proceeding could properly proceed before the Court. On December 3, 2012, the debtor filed an *Adendum/Correction* [sic] to *Filed Complaint*. On December 7, 2012, Claudette Blalock filed a *Motion to Dismiss Under Rule 12(b)(6)*, which the Court subsequently denied on December 12, 2012. On December 16, 2012, Claudette Blalock filed her *Answer to Amended Complaint*, after which the Court set the complaint and answer for trial on April 8, 2013.² Claudette Blalock filed her motion for partial summary judgment on January 17, 2013.

Federal Rule of Bankruptcy Procedure 7056 provides that Federal Rule of Civil Procedure 56 applies in adversary proceedings. Rule 56 states that summary judgment shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden is on the moving party to establish the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Canal Ins. Co. v. ML & S Trucking, Inc.*, No. 2:10-CV-02041, 2011 WL 2666824, at *1 (D.W.D. Ark. July 6, 2011); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing to former Fed. R. Civ. P. 56(c)). The burden then shifts to the non-moving party, who must show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). The non-moving party is not required to present a defense to an insufficient presentation of facts by the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161

² Although Johnnie Rhoads is a named defendant in the debtor's complaint, the docket does not reflect that Ms. Rhoads was served with a summons and complaint, or that Ms. Rhoads entered an appearance by filing an answer or other responsive pleading. More than 120 days have passed since the complaint was filed. *See* Fed. R. Bankr. P. 7004, incorporating Fed. R. Civ. P. 4(m).

(1970) (quoting 6 J. Moore, Fed. Prac. 56.22(2), pp. 2824-25 (2d ed. 1966)). However, if the non-moving party fails to address the movant's assertion of fact, the court may consider the fact undisputed. Fed. R. Civ. P. 56(e)(2). When ruling on a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party and allow that party the benefit of all reasonable inferences to be drawn from the evidence. *Canada v. Union Electric Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1997); *Ferguson v. Cape Girardeau Cty.*, 88 F.3d 647, 650 (8th Cir. 1996).

The gist of the debtor's complaint is that the defendants violated the automatic stay provided by 11 U.S.C. § 362 when attorney Johnnie Rhoads filed a *Motion For Incarceration of Defendant* on behalf of Claudette Blalock in the Circuit Court of Washington County during the pendency of the debtor's bankruptcy. Claudette Blalock's argument in both her answer and her motion for summary judgment is that filing the motion for incarceration was not a violation of that automatic stay because it was in the nature of a criminal contempt proceeding that was excepted from the automatic stay under § 362(b). The relevant documents related to the motion for partial summary judgment are (1) the state court order dated March 1, 2012, finding the debtor in contempt; (2) the *Motion For Incarceration of Defendant* filed by Claudette Blalock on April 13, 2012; and (3) the transcript of the state court proceedings [transcript] held on June 1, 2012, related to Claudette Blalock's motion for incarceration and a separate motion filed by the debtor.

A review of the state court order shows that the court found the debtor "in contempt for failing to pay child support, alimony and failing to pay \$300.00 per month to the Plaintiff [Claudette Blalock] from the Las Vegas house." The court ordered the debtor "incarcerated in the Washington County jail for 30 days. *That said incarceration shall be suspended on condition that* on or before March 10, 2012, the Defendant shall make

payment to the Plaintiff in the amount of \$5,072.00.”³ The court also conditioned the suspension of incarceration on the debtor increasing his support payments each month until the arrearage was paid in full. If the debtor failed to pay as ordered, “the Court will issue a body attachment for the Defendant *upon the filing of a verified petition* by the Plaintiff alleging that said funds have not been paid.” According to the transcript, Ms. Rhoads told the judge that the debtor did make the \$5,072.00 payment but “then he failed to continue to make the payments pursuant to the Order. We’re asking that he be incarcerated for thirty days.”

After hearing the parties’ arguments relating to the motion for incarceration, the state court stated the following, which this Court finds instructive:

It’s clear in this Court’s mind that the initial contempt finding was based on a civil contempt action filed as a result of failure to make payments, it’s coercive in nature. I did find that Mr. Blalock was in contempt and I sentenced him to thirty days, suspended on the condition that he make certain payments. Some of which he has made and some of which he has not. If he didn’t, a Body Attachment was to issue, and so the issue before the Court is that now can I convert this to a criminal contempt despite the fact that it was originally a civil contempt based upon the fact that the Order for Body Attachment is the law of the case, and that is certainly an excellent argument.

. . . .

And so it is this Court’s firm belief that it would be proper for Judge Barry, the Bankruptcy Court, to assist in defining the scope of the proceedings which can continue in State Court, specifically whether or not the Motions filed by Ms. Blalock can be heard as a civil contempt matter, a criminal contempt matter, or

The state court entered its order on June 4, 2012, continuing all matters before it and reserving all issues “pending direction of the Bankruptcy Court as to the nature and scope of the actions this Court may take, specifically, in regard to civil contempt for failure to

³ The emphasis in this quote and the next quote was added by the bankruptcy court.

comply with domestic support obligations.”⁴

Based on the statements by the state court and the law of the state of Arkansas, the Court finds that the initial order for contempt by the state court dated March 1, 2012, is an order for civil contempt. The contempt order was issued based on the debtor’s failure to make payments and, according to the state court, was coercive in nature. *See Conlee v. Conlee*, 257 S.W.3d 543, 550 (Ark. 2007); *see also Stillely v. Fort Smith Sch. Dist.*, 238 S.W.3d 902, 910 (Ark. 2006). The *Conlee* court stated that “[b]ecause civil contempt is designed to coerce compliance with the court’s order, the contemnor may free himself or herself by complying with the order. This is the source of the familiar saying that civil contemnors ‘carry the keys of their prison in their own pockets.’ Criminal contempt, by contrast, carries an unconditional penalty, and the contempt cannot be purged.” *Conlee*, 257 S.W.3d at 550 (citations omitted). The state court order stated specifically that the incarceration shall be suspended on condition that the debtor made certain payments. In the event the payments were not made, the state court would *then* issue a body attachment. The contempt order filed on March 1 was coercive and, thus, civil in nature. However, to the extent a body attachment could issue, the same order for civil contempt may also be considered an order for criminal contempt. *See In re Storozhenko*, 459 B.R. 697, 702 (Bankr. E.D. Mich. 2011) (stating that a single contempt order may contain both criminal and civil sanctions which are severable). The state court recognized this when it

⁴ The state court asked the parties to file its order with the bankruptcy court. However, to this Court’s knowledge, neither party complied with the court’s request and this Court only became aware of the state court’s request for direction from the bankruptcy court on January 30, 2013, when the debtor filed his response to the motion for summary judgment and attached a copy of the transcript. The state court provided this Court a copy of the state court’s June 4, 2012 order on February 5, 2013.

Because the debtor’s bankruptcy case was dismissed on November 20, 2012, the automatic stay no longer exists and the state court is free to proceed with the motions currently before it. The sole issue before the bankruptcy court is whether Claudette Blalock violated the automatic stay when she filed her motion for incarceration and, if so, the resulting damages suffered by the debtor, if any.

discussed conversion of the civil contempt order to criminal contempt and stated “the fact that the Order for Body Attachment is the law of the case.”

The debtor filed for bankruptcy protection on March 26, 2012, less than a month after the state court issued its order of contempt. On March 10, prior to filing, the debtor paid Claudette Blalock \$5,072.00. Because the contempt order entered March 1 was for civil contempt initially, the order was stayed upon the entry of the order for relief on March 26 in the debtor’s bankruptcy case. *See Hutchins v. Hutchins*, 954 S.W.2d 249, 249 (Ark. 1997). However, because the state court order for contempt references both civil contempt and criminal contempt, the civil contempt order may have become a criminal contempt order upon the filing of a verified petition by Claudette Blalock and the issuance of a body attachment by the state court.

The motion for incarceration that was filed by Claudette Blalock consists of five paragraphs. The motion states, in its entirety:

Comes now the Plaintiff, Claudette Blalock, and for her Motion states as follows:

1. That this court has jurisdiction over the parties and subject matter of this action.
2. That on February 24, 2012, this court found the defendant in willful contempt and ordered him incarcerated for 30 days in Washington County jail--said sentence was suspended upon the condition that defendant continues to pay his child support and alimony payments as ordered and an additional \$500 per month towards arrearages for same.
3. That the defendant has failed and refused to pay child support, spousal support, payment of the plaintiff’s portion of the mortgage receivable and on the credit cards as order by the court. In addition, he has failed to pay the \$500.00 attorney fee ordered by the court.
4. That the defendant is currently in arrears in the amount of \$7,100.00 in all of the above except credit card payments of which he has paid nothing.

5. That the defendant should be ordered to pay attorneys fees again.

Wherefore, Plaintiff prays for the above relief requested.

The motion is signed by Claudette Blalock's attorney, Johnnie Emberton Rhoads and includes a certificate of service. The motion contains the allegation that the funds have not been paid, as required by the state court's contempt order; however, the motion is not verified as ordered by the state court.⁵ Without the required verification, the Court finds that the motion does not comply with the provisions of the state court's order of contempt for the issuance of a body attachment. Because the automatic stay was in effect when the motion for incarceration was filed, Ms. Blalock may have violated the automatic stay by filing the unverified petition. Without limiting Claudette Blalock's opportunity to introduce additional evidence to demonstrate compliance with the state court's order, the Court must deny Claudette Blalock's motion for partial summary judgment at this time; the filing of a verified petition is a material fact in this case.

In the event the Court is provided sufficient evidence to establish that the motion for incarceration satisfied the state court's order for contempt as a verified petition, the Court must then determine whether the motion seeks criminal contempt sanctions, civil contempt sanctions, or both. *In re Storozhenko*, 459 B.R. at 704-05. If the motion relates solely to the issuance of a body attachment for violation of the state court order--criminal contempt components--it would most likely not violate the automatic stay. *See, e.g., In*

⁵ In Arkansas, in certain instances verification means something more than an attorney signature on a pleading. *Solis v. State*, 269 S.W.3d 352, 355 (Ark. 2007). Arkansas Rule of Civil Procedure 11 provides that every pleading shall be signed by at least one attorney of record. Ark. R. Civ. P. 11(a). The rule further states that unless "otherwise specifically provided by rule or statute, pleadings need not be verified." *Id.* However, in this instance, the state court specifically stated that the court would enter a body attachment upon the filing of a *verified* petition by Claudette Blalock. Verification is defined as "[a] formal declaration made in the presence of an authorized officer, such as a notary public, or . . . under oath but not in the presence of such an officer, whereby one swears to the truth of the statements in the document." *Solis*, 269 S.W.3d at 355 (quoting *Shaw v. State*, 211 S.W.3d 506, 507-08 (Ark. 2005)). Such a verification does not appear on Claudette Blalock's motion for incarceration.

re Campbell, 185 B.R. 628, 631 (Bankr. S.D. Fla. 1995) (stating in dicta in a domestic relations case that movant may seek finding of criminal contempt that would not be subject to automatic stay); *In re Schake*, 154 B.R. 270, 274 (Bankr. D. Neb. 1993) (expressing disagreement with narrow construction of § 362(b)(1) that would only permit the exception for formal criminal litigation). On the other hand, if the motion seeks civil remedies in the form of a private right of action, such as the collection of fees, the motion may be violative of the automatic stay. See, e.g. *In re Storozhenko*, 459 B.R. at 705 (stating if the initiated proceeding is a civil contempt proceeding, movant would not have protection of “criminal action or proceeding” exception to automatic stay); *NLRB v. Sawulski*, 158 B.R. 971, 978 (E.D. Mich. 1993) (recognizing Sixth Circuit public policy test that requires court to distinguish between proceedings that adjudicate private rights and those that effectuate public policy; only public policy proceedings are excepted from stay).

Claudette Blalock’s motion for incarceration alleges that the funds that were ordered by the state court to be paid have not been paid. Paragraphs two, three, and four each relate to the nonpayment of the court ordered fees. However, paragraph five--“That the defendant should be ordered to pay attorneys fees again.”--is ambiguous. For instance, the paragraph could reference either attorney fees that were previously ordered to be paid in the state court’s March 1 order or attorney fees for additional services that were provided to Claudette Blalock after the March 1 order. Regardless, in her *Statement of Undisputed Facts in Support of Motion For Summary Judgment*, Claudette Blalock alleges that “[n]owhere in said Motion For Incarceration does Claudette Blalock pray for payment of amounts owed by the Debtor.” Paragraph five appears to contradict that statement. To the extent paragraph five is an attempt to enforce the civil contempt sanctions, the automatic stay may have been violated. Although the debtor did not dispute this stated “fact,” pursuant to Federal Rule of Civil Procedure 56(e)(1), the Court will allow Claudette Blalock to properly support or address the apparent contradiction between her alleged undisputed fact and her motion for incarceration at trial to clarify paragraph five’s purpose.

For the reasons stated above, the Court denies Claudette Blalock's motion for partial summary judgment. A trial on the merits of the debtor's complaint will be heard on the afternoon of April 8, 2013. The Court has allowed up to four hours for the trial.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Ben Barry". The signature is written in a cursive style and is positioned above a horizontal line.

Ben Barry
United States Bankruptcy Judge
Dated: 02/11/2013

cc: The Honorable Cristi Beaumont, Circuit Court, Washington County, Arkansas
Samantha Sizemore Verneti, attorney for Claudette Blalock
Edward Lee Blalock