2005 BNH 15 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Edward L. Brownell,
Debtor

Bk. No. 05-10602-JMD
Chapter 13

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MEMORANDUM OPINION

I. INTRODUCTION

On May 11, 2005, the Court held a preliminary hearing on a Motion for Relief from the Automatic Stay (Doc. No. 13) (the "Motion") filed by Citizens Bank New Hampshire (the "Bank"). At the hearing, the parties agreed to continue the hearing to June 15, 2005, subject to the Debtor making one adequate protection payment to the Bank in the amount of $765.00 (the "Payment") on or before May 17, 2005. The agreement was incorporated into a Court order dated May 11, 2005 (Doc. No. 17) (the "Order"), which also provided for the Court to grant the Motion under the provisions of LBR 9071-1(a) if the Payment was not made. On May 18, 2005, counsel for the Bank filed an affidavit under LBR 9071-1(a) stating the Payment had not been

received by May 17, 2005 (Doc. No. 20) (the "Affidavit").

The Debtor filed an objection to the Affidavit (Doc. No. 21) (the "Objection") on May 19, 2005, indicating the Payment was hand delivered to counsel for the Bank on May 19, 2005. Attached to the Objection was a copy of a check dated May 18, 2005, drawn on the client trust account of counsel for the Debtor. Counsel for the Bank filed a response to the Objection (Doc. No. 22) (the "Response") indicating that, as of the time of filing of the response, no check had been received, but a telephone call had been received indicating that a payment would be delivered by the end of the business day on May 19, 2005.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

LBR 9071-1(a) (the "Local Rule") provides:

> A stipulation, judgment, or stipulated order filed and entered by the Court containing conditional terms, including automatic dismissal, conversion, or relief from stay, is not itself self-executing. The moving party must submit an affidavit stating that the conditions have or have not been met and a proposed order granting the appropriate relief to be entered by the Court two (2) business days after filing and mailing a copy of the same to all opposing parties.

The purpose of the Local Rule is to permit prompt enforcement of Court orders and Court approved stipulations without need for further hearing. However, the Local Rule establishes a condition to obtaining such prompt relief, namely the filing of an affidavit. An affidavit is a declaration of facts written down and sworn to by the declarant before an officer authorized to

administer oaths. See Black's Law Dictionary 62 (8th ed. 1999); Garner, Modern Legal Usage 35 (1995). As a sworn declaration of facts, the affidavit establishes an evidentiary record for the relief requested by the moving party. Fed. R. Evid. 603. As such, the affidavit must be signed by a declarant who has personal knowledge of the facts set forth and, therefore, is competent to testify to the facts contained in an affidavit. Fed. R. Evid. 601 and 602; c.f. U. S. v. Kayne, 90 F.3d 7, 12 (1st Cir. 1996) (the foundation for admission of a business record under Fed. R. Evid. 803(6) requires both the testimony of a qualified custodial witness and a showing that the declarant was a person with knowledge acting in the course of regularly conducted business activity).

The Local Rule does not eliminate the need of the moving party to provide an evidentiary record to obtain the relief it is seeking; it simply provides a stream-lined procedure to obtain relief. The Local Rule provides an expedited means for the moving party to establish the limited evidentiary record necessary for the relief sought. The Court cannot and will not grant relief without an adequate evidentiary record that the adequate protection payments have not been made. Furthermore, the Local Rule does not eliminate the need for an evidentiary record. Instead, it provides a method for the moving party to create the evidentiary record without a hearing. As with sworn testimony, an affidavit must be signed under oath under the pains and penalties of perjury.

In this case, the Affidavit was signed by counsel for the Bank, which was appropriate because the adequate protection order directed that the payment be delivered to his office.[1]

[1] If the adequate protection order directed payment be made directly to the Bank, then an officer or employee of the Bank, rather than counsel, would need to sign the affidavit to satisfy Fed. R. Evid. 601 and 602.

However, the Affidavit, despite its title did not comply with the Local Rule. It was in the nature of a pleading, not a sworn statement signed under the pains and penalties of perjury or under oath. Although titled as an "Affidavit of Noncompliance," it was not signed under oath before an officer authorized to administer oaths. Accordingly, it may constitute argument, but it is not evidence. See Fed. R. Evid. 603. The fact that the Affidavit was signed by an attorney of record subject to the provisions of Fed. R. Bankr. P. 9011 does not change the character of the document. All pleadings filed by attorneys are subject to Fed. R. Bankr. P. 9011, but pleadings are not evidence. Therefore, the Affidavit does not establish any record of noncompliance with the Order as required by the Local Rule.[2] Since the Affidavit does not comply with the requirements of the Local Rule and does not establish any factual record, the Court need not concern itself with the arguments raised by the Bank or the Debtor.

III. CONCLUSION

For the reasons discussed above, the Court shall enter a separate order denying the relief requested in the Affidavit.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

[2] The Court also notes that the Objection is not verified under oath or accompanied by an affidavit. Therefore, the copy of the check included in the Objection is not evidence, but is merely part of the arguments raised by the Debtor in the Objection itself.

ENTERED at Manchester, New Hampshire.

Date: May 24, 2005

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge