In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	
WILBUR POLITE,	)	Adversary Proceeding
WARWESSE J. POLITE,	)	
(Chapter 13 Case Number 01-41632)	)	Number 02-4125
	)	
Debtors	)	
	)	
	)	
	)	
WILBUR POLITE,	)	
WARWESSE POLITE,	)	
	)	
Plaintiffs	)	
	)	
	)	
v.	)	
	)	
CITIFINANCIAL,	)	
formerly THE ASSOCIATES, INC.,	)	
	)	
Defendant	)	

ORDER AND NOTICE TO SHOW CAUSE

On September 20, 2002, Wilbur and Warwesse Polite ("Debtors") filed an Adversary Complaint against CitiFinancial, formerly The Associates, Inc., ("Defendant") alleging a "flagrant and willful violation" of the automatic stay provisions of 11 U.S.C. § 362

for the collection actions of Defendant's agent, Nationwide Credit, Inc. In their complaint, Debtors sought actual and punitive damages together with attorney's fees. On September 26, 2002, the Clerk of Bankruptcy Court issued a Summons and Notice of Conference Pursuant to Rule 16 for a status conference. The Summons and Notice was served and Debtors' counsel filed a Certificate of Service on October 1. On October 30, 2002, Defendant's counsel, Morris, Schneider & Prior, L.L.C. ("Morris, Schneider"), filed an Answer to the complaint and served it on Debtors' counsel.

When the Rule 16 conference was convened on November 20, 2002, Morris, Schneider failed to appear on behalf of Defendant. Debtors' counsel outlined the nature of the complaint and the Court reviewed the Answer that had been filed by Morris, Schneider. In addition to general denials of specific paragraphs of the Complaint, Defendant's answer asserted a number of "affirmative defenses" as follows: (1) Failure to "state a cause of action, or claim against this Defendant;" (2) "[I]nsufficiency of process and insufficiency of service of process;" (3) "Defendant CitiFinancial asserts it has not acted in bad faith, been stubbornly litigious nor caused Plaintiffs unnecessary trouble or expense;" (4) "Defendant CitiFinancial asserts there was no intentional willful violation, misconduct, malice, fraud, wantonness, oppression . . . to warrant an award of damages and attorneys fees;" (5) "Plaintiffs should not be able to seek equity from this Court because of the doctrine of unclean hands;" (6) "[T]hat any alleged loss, damages and/or injuries, if any, allegedly incurred and/or sustained by Plaintiffs herein resulted solely and proximately from the acts and omissions of parties,

entities or persons other than Defendant CitiFinancial and from sources or causes other than those alleged." Finding some of the defenses pled by Defendant frivolous and because there was no appearance by the Defendant, no request to be excused from the hearing, no designation of local counsel, and no motion for a continuance, I directed Debtors' counsel to draft an order striking the affirmative defenses and ordering the Defendant to show cause why the entire answer, essentially a general denial, should not be stricken for counsel's failure to appear.

Debtors' counsel waited over two months to submit that order. He explained the delay at a subsequent hearing by stating that, in an effort to resolve all issues in the underlying case, he had made numerous efforts to reach Morris, Schneider in order to apprise them of the Court's ruling, as a professional courtesy, and to afford Defendant's counsel the opportunity to seek some relief from that pending order. When he received no response and was met with total lack of cooperation from Morris, Schneider, Debtors' counsel submitted the order and it was signed on February 3, and entered on February 4, 2003.

On February 12, 2003, Larry W. Johnson, an attorney with Morris, Schneider, filed a Motion for Reconsideration. The motion acknowledges receipt of a copy of the Complaint and Summons and the Notice of the Rule 16 conference and that an answer was filed on October 30, 2002. *Defendant's Motion for Reconsideration*, ¶2-3. Mr. Johnson explained in his motion, however, that Defendant's answer was filed by Laura A. Grifka,

an associate who left the employment of the firm between the time of the October 30 answer and the November 20 hearing date. *Id.* at ¶3-4. He asserted that he had no knowledge of the Rule 16 conference and that if he had prior notice of that conference he would have appeared. *Id.* at ¶5-6. Mr. Johnson asserted that he left voicemail messages for Debtors' counsel, but received no response. *Id.* at ¶7. The motion contends that there "exists evidence of mistake, inadvertence and excusable neglect on Defendant's part" such that this Court can reconsider the Order striking the affirmative defenses. *Id.* at ¶9. Some, but not all, of the assertions in the motion are supported by the affidavit of Larry W. Johnson. In particular, he asserted in the affidavit that he personally had no knowledge of the Rule 16 conference, that if he had such notice he would have appeared, and that he had made unsuccessful efforts to reach Debtors' counsel. *Affidavit of Larry W. Johnson*, ¶4-6.

Having reviewed Defendant's Motion for Reconsideration, this Court issued an Order and Notice of Hearing, scheduled for April 30, 2003, in order to further consider the motion. That Order was signed by the undersigned and contained the following language in a prominent location: "IT IS HEREBY ORDERED that Atty. Larry W. Johnson shall appear at the above stated **TIME AND PLACE.**"

When the Motion for Reconsideration was called for a hearing on April 30, 2003, Debtors' counsel was present, but Mr. Johnson was not. By that time, Morris, Schneider had retained local counsel known to this Court to be highly qualified, competent,

and diligent. Local counsel began to present his arguments to the Court as to why the previous Order should be reconsidered and set aside, but was interrupted by the Court to inquire as to the whereabouts of Mr. Johnson. Local counsel was unable to explain why Mr. Johnson was not present. Further, the Court received no request from Mr. Johnson prior to the hearing or since, that he be excused from appearing as he was ordered to do by the April 7, 2003, Order and Notice of Hearing.

In the hearing, the Court expressed its view as to the frivolous nature and possible bad faith of some, if not all, of the affirmative defenses asserted by the Defendant. In particular, the first defense that Debtors failed "to state a cause of action, or claim against this Defendant" is specious. A court may not dismiss the complaint for failure to state a cause of action, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

Debtors' complaint asserts that the unlawful collection efforts have been prosecuted by Nationwide Credit as an agent or assignee of the Defendant. While Defendant might prove, after a full evidentiary trial, that it is not guilty of a violation of 11 U.S.C. § 362, it is absurd to have pled, even given the agency allegation, that the complaint fails to state a cause of action. Clearly, this Court, given the proper evidentiary showing, could make an award of damages against the Defendant for the actions of its agent that were in violation of

the automatic stay. In short, this is a bankruptcy court, this is a bankruptcy case and the provisions of the automatic stay, § 362, are intended to protect Debtors against the very same post-petition collection activities that are complained of here.

There also does not appear to be any defect in the service of process as asserted in the second defense and Johnson acknowledges receipt of the complaint and summons. The third, fourth, fifth and sixth defenses are all argumentative and conclusory as they relate to evidentiary matters. None of them are within the scope of affirmative defenses which are to be specially pled under Bankruptcy Rule 7008(a); Fed R. Civ. P. 8(c).

The initial inclusion of most, if not all, of these "affirmative defenses" was imprudent when the answer was filed; to seek reconsideration of the February 3 Order in order to restore those defenses, in their entirety, raises questions as to whether a violation of Federal Rule of Bankruptcy Procedure 9011 has occurred. Mr. Johnson's failure to personally appear in response to this Court's specific order to articulate why his motion should be granted is potentially contemptuous, and violative of the American Bar Association's Model Rules of Professional Conduct. IT IS THEREFORE ORDERED that Larry W. Johnson, personally, and the firm of Morris, Schneider & Prior, L.L.C. be and appear before this Court on

Friday, July 18, 2003

at 10:00 o'clock a.m.
Bankruptcy Courtroom #228
United States Courthouse
125 Bull Street
Savannah, Georgia

to show cause why:

(1) Mr. Johnson and/or Morris, Schneider should not be disciplined under the provisions of Southern District of Georgia Local Rule 83.5 for failure to abide by the American Bar Association Rules of Professional Conduct 1.1 (requiring "thoroughness and preparation"), 1.3 (requiring "diligence and promptness"), 3.1 (requiring "meritorious claims and contentions"), and 5.1.(governing "responsibilities of a partner or supervisory lawyer").

(2) Mr. Johnson should not be held in contempt of this Court's order for his failure to appear, as specifically ordered on April 7, 2003.

(3) Sanctions under Federal Rule of Bankruptcy Procedure 9011 should not be imposed for Mr. Johnson's and Morris, Schneider's behavior in this case.

The clerk will serve a copy of this Order and Notice:

1) upon Larry W. Johnson individually,

2) addressed to the attention of the managing partner of Morris, Schneider & Prior, L.L.C.,

3) addressed to the managing agent or other agent authorized to accept service on behalf of Defendant CitiFinancial, and

4) all other persons entitled to service of pleadings in the adversary complaint.

At the same date and time, the Court will consider Debtors' Voluntary Dismissal of Adversary Complaint reserving, however, jurisdiction to make findings or recommendations concerning counsel's conduct.

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Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13th day of June, 2003.