UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
Lexington Division

IN RE:	:	
	:	**Chapter 7**
B. J. BROWN SHEET METAL, INC.	:	**Case No: 08-53321**
	:	**Judge Joseph M. Scott**
Debtor	:	
_____	:	
	:	
LAGCO, INC.,	:	
	:	
Plaintiff,	:	
	:	**Adversary Proceeding**
vs:	:	**No: 10-5113**
	:	
JOHNNY M. BROWN, et al.,	:	
	:	
Defendants.	:	
_____	:	

ORDER OVERRULING MOTION TO ALTER, AMEND OR VACATE

This matter is before the Court on the Motion to Alter, Amend or Vacate ("Motion to Amend") (Doc. 63) filed on March 23, 2011, by Matthew B. Bunch ("Mr. Bunch'). Mr. Bunch is not a party to this adversary proceeding.

Upon the Court's Order (Doc. 70), Mr. Bunch supplemented the record by filing a Brief in Support of Motion to Alter, Amend or Vacate ("Brief") (Doc. 72), the Affidavit of Matthew B. Bunch (Doc. 73), and the Affidavit of W. Thomas Bunch II (Doc. 74). At a hearing held on March 19, 2011, without further comment or argument, Mr. Bunch submitted the matter for a determination on the record.

In the Motion to Amend Mr. Bunch requests the Court amend the Order Overruling Motion for Sanctions Pursuant to Bankruptcy Rule 9011 ("Sanctions Order") (Doc. 59) entered on March 21, 2011. Mr. Bunch objects to a statement made in the Sanctions Order as follows: "This total lack of professionalism on the parts of [Michael] Gartland and

Matthew Bunch is astounding." (Order Overruling Sanctions Motion at 7). The language in the Sanctions Order immediately preceding that sentence is as follows:

> In his attempts not to violate Rule 9011's requirement to investigate before filing the Complaint, Mr. Cave also sent a letter to Mr. Gartland inquiring whether Mr. Gartland had any evidence that Mr. Barnes or Trustee Palmer had any actual knowledge or notice of Ms. Simmerman's bankruptcy prior to July 20, 2009. Mr. Gartland did not produce any evidence. What Mr. Cave did receive was an email from another of Ms. Simmerman's attorneys, Matthew Bunch, warning him not to sue Ms. Simmerman. Since the response came from a different attorney, Mr. Cave inquired of Matthew Bunch the same question and received no answer from Matthew Bunch. Rather, he again received a threat, this time from Mr. Gartland, indicating that Matthew Bunch and Mr. Gartland were flipping a coin to see which attorney would file the motion for sanctions against Mr. Cave. This total lack of professionalism on the parts of Mr. Gartland *and Matthew Bunch* is astounding.

(Sanctions Order at 7 (emphasis added)). Mr. Bunch requests that the Court remove the words "and Matthew Bunch" from the last sentence of the above quote. The evidence in the record upon which the Court based the above statements were various emails between the attorneys, including one from Mr. Gartland to Mr. Cave and Mr. Bunch which stated: "Matt and I are flipping a coin as to which one of us will seek sanctions against you, personally, if you sue [Ms. Simmerman]." (Lagco's Objection & Response to Motion for Sanctions ("Objection"), Doc. 28, Ex. L).

In his Affidavit Mr. Bunch states that he referred bankruptcy client and defendant, Tammy Brown Simmerman, and defendants, John Brown and Bonnie Brown (collectively, the "Browns"), to Mr. Gartland for representation in this adversary proceeding. The reason for the referral was that Mr. Bunch wanted to avoid the appearance of a conflict of interest if his firm, Bunch & Brock, represented Ms. Simmerman and the Browns. Mr. Bunch states that he, Mr. Gartland, and W. Thomas Bunch II ("Thomas Bunch") met for a business lunch to discuss the main bankruptcy case

histories and multiple legal issues, including a potential violation of the discharge injunction. During that lunch, Mr. Gartland asked whether Bunch & Brock wanted to represent Ms. Simmerman, and Mr. Bunch refused because of the potential conflict of interest. According to Mr. Bunch, Mr. Gartland then made a comment about Bunch & Brock taking back representation of Ms. Simmerman by flipping a coin. Mr. Bunch states in his Affidavit that he never said he would flip a coin and never did flip a coin in response to Mr. Gartland's suggestion. Mr. Bunch states that he never expected Mr. Gartland to publish anything about Mr. Gartland's statements in an email to Mr. Cave and that Mr. Bunch had nothing to do with publishing the email. According to Mr. Bunch, he was merely a recipient of the email.

Mr. Bunch also provided the Affidavit of W. Thomas Bunch II. In his Affidavit Thomas Bunch confirms the statements made in Mr. Bunch's Affidavit except Thomas Bunch states that he remembers Mr. Gartland saying "something to the effect of 'Come on, don't you think this is a good Rule 11 motion? Let's flip a coin.'" (Aff. of W. Thomas Bunch II ¶ 2). Thomas Bunch states that Mr. Bunch never agreed to flip a coin.

Issues and Discussion

I. Whether Mr. Bunch Had an Opportunity to Correct the Record.

Mr. Bunch argues that he has been denied due process and has never been granted the ability to refute the veracity of the "charge." (Motion to Amend at 2). We take this to mean that Mr. Bunch was never given the opportunity, prior to entry of our Sanctions Order, to refute the coin flipping incident. As noted above, Mr. Bunch is not a party to nor is he attorney of record for the Browns or Ms. Simmerman in this adversary proceeding. However, the record reflects that he was served with copies of several of

the documents relating to the Motion for Sanctions Pursuant to Bankruptcy Rule 9011 ("Motion for Sanctions") (Doc. 24) that was filed by Mr. Gartland against Mr. Cave. Most significantly, the record clearly reflects that Mr. Bunch was served with a copy of the Objection and Exhibits (Docs. 29-33) filed by Mr. Cave in response to the Motion for Sanctions. That Objection clearly references the coin flipping incident and the email is attached as an exhibit to the Objection. (Objection at 13 & Ex. L). As such, Mr. Bunch was aware that the email regarding the coin flipping incident was in the Court's record. Mr. Bunch had ample opportunity to file any affidavit or document prior to entry of the Sanctions Order correcting the record and chose not to do so.

II. Whether Mr. Bunch Has Standing to Bring the Motion to Amend.

Since Mr. Bunch is not a party to this adversary proceeding, we must determine whether he has standing to bring the Motion to Amend. Based on the analysis of the Federal Rules of Civil Procedure and case law discussed below, we determine that Mr. Bunch does not have standing to bring the Motion to Amend.

A. *Standing Analysis under Federal Rules of Civil Procedure.*

Federal Rules of Civil Procedure 59(e) and 60[1] permit a party to alter, amend or vacate a judgment or order under certain circumstances. Those Rules generally do not apply to a nonparty. *See* FED. R. CIV. P. 60 ("On motion and just terms, the court may relieve *a party* or its legal representative[2] from a final judgment, order, or proceeding. . . .") (emphasis added); *Simpson v. Columbus S. Power Co.*, No. 99-3250, 2000 WL

[1]Federal Rules of Civil Procedure 59(e) and 60 are made applicable to bankruptcy cases by Federal Rules of Bankruptcy Procedure 9023 and 9024, respectively.

[2]"[L]egal representative" as used in Federal Rule of Civil Procedure 60 does not refer to a party's attorney. *Heyman v. M.L. Marketing Co.*, 116 F.3d 91, 95 (4th Cir. 1997) (attorneys are not "legal representatives" for purposes of Rule 60(b)) (citing additional cases). Even if "legal representative" did refer to a party's attorney, Matthew Bunch is not the attorney for any party in this adversary proceeding.

420679, *2 (6th Cir. Apr. 11, 2000) (noting the district court's denial of a Rule 59(e) motion, on the ground that a "nonparty . . . did not have standing to bring a Rule 59 motion to amend the judgment."). *But see In re NanoLume, Inc.*, No. 08-80663C-7D, 2009 WL 3614787, *2 (Bankr. M.D.N.C. Oct. 6, 2009) (citing a line of cases that have found that nonparties have standing to file a Rule 60(b) motion (i) if the judgment is procured by fraud and directly affects the nonparty's interest; (ii) if the judgment has a direct and pecuniary effect on the nonparty's interest, or (iii) if the nonparty is sufficiently connected and identified in the case, then there is an exceeding narrow exception that permits such nonparty to proceed under Rule 60(b)).

There is no assertion by Mr. Bunch that the judgment was procured by fraud or that Mr. Bunch is sufficiently connected and identified in the case to be able to proceed under Rule 60(b). Mr. Bunch has, however, asserted that a court's statement finding an attorney's conduct unprofessional is a sanction and may affect that attorney's livelihood. The Sixth Circuit has not determined that a mere statement in a court's order as to an attorney's misconduct constitutes a sanction. *See United States v. Barnett (In re Harris)*, 51 Fed. App'x 952, 956 (6th Cir. 2002).

> A number of courts have considered whether a district court's statements regarding counsel's performance can constitute a sanction where no fine, service, or other such penalty is imposed. Those courts are in agreement that mere criticism of an attorney's conduct, without more, does not constitute a sanction and thus is not appealable.
> . . .
> This court has not yet addressed the extent to which a district court's written order can constitute a sanction.

Barnett, 51 Fed. App'x at 955-56 (citing cases). Based on this and other Sixth Circuit precedent discussed in more detail below, we find that our assessment and "mere criticism" of Mr. Bunch's conduct in this case does not rise to the level of a sanction.

Further, Mr. Bunch has not provided the Court with any evidence that the Court's statement has had a direct pecuniary effect on his livelihood or provided evidence that it might have an effect in the future. As such, he has failed to meet his burden with respect to the Motion to Amend pursuant to Federal Rules of Civil Procedure 59(e) and 60.

B. *Standing Analysis under Right of Nonparty to Appeal.*

The court in *In re NanoLume* also identified courts that have determined that a nonparty has standing to file a Rule 60(b) motion if that nonparty has standing to file an appeal. *In re NanoLume*, 2009 WL 3614787, *2 (citing *Cedar Island Builders, Inc. v. South Cnty. Sand & Gravel Co.*, 151 B.R. 298, 301 (D.R.I. 1993) ("A district court faced with a motion by a nonparty to vacate a judgment should apply the same standards it would apply in deciding whether a nonparty has standing to challenge a judgment on appeal.") (additional citations omitted).

"In general, a non-party cannot appeal an adverse judgment or attack a consent decree. Only parties to a lawsuit have standing to appeal. In order for a non-party to challenge a consent decree, he must intervene." *U.S. v. Nozik*, 149 F.3d 1185, 1998 WL 381345, *2 (6th Cir. June 25, 1998) (unpublished table decision) (citing *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S. Ct. 586, 98 L. Ed. 2d 629 (1988); *Karcher v. May*, 484 U.S. 72, 77, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987)). However, with respect to bankruptcy cases, the Sixth Circuit has stated:

> To appeal from an order of the bankruptcy court, appellants must have been directly and adversely affected pecuniarily by the order. This principle, also known as the "person aggrieved" doctrine, limits standing to persons with a financial stake in the bankruptcy court's order. Only when the order directly diminishes a person's property, increases his burdens, or impairs his rights will he have standing to appeal.
> . . .

> Whether an appellant is a person aggrieved is a question of fact for the . . . court.

Fidelity Bank Nat'l Assoc. v. M.M. Group, Inc., 77 F.3d 880, 882 (6th Cir. 1996) (internal quotations and citations omitted). In *Fidelity Bank National Association,* the appellants argued that the district court order aggrieved them by subjecting them to possible future litigation related to a fraudulent transfer claim. In response, the Sixth Circuit stated: "However, [appellants] put forth no evidence that there is a likelihood that they will be subject to future litigation. Moreover, this interest is remote and consequential rather than direct and immediate, and thus insufficient to confer standing." *Id.* at 883. Similarly, as noted above Mr. Bunch has failed to provide any evidence to support a finding that the Sanctions Order will directly diminished his property, increase his burdens or impair his rights. The only statements provided by Mr. Bunch relate to vague, "remote and consequential" effects that might happen.

C. *Standing Analysis under "Sanctioned" Attorney's Right to Appeal*.

Mr. Bunch asserts that "the issue of whether an attorney has standing to file an appeal from an order imposing sanctions for 'unprofessional conduct' is a matter of first impression for the Sixth Circuit." (Brief at 2); *but see Grant v. Metro. Gov't of Nashville & Davidson Cnty., Tenn. (In re Metro. Gov't of Nashville & Davidson Cnty., Tenn.)*, 606 F.3d 855 (6th Cir. 2010) and *United States v. Barnett (In re Harris)*, 51 Fed. App'x 952 (6th Cir. 2002).

> To demonstrate standing [on appeal], a[n] [attorney] must satisfy three criteria. First, the [attorney] must allege that she has suffered, or will imminently suffer, an injury. Second, the [attorney] must demonstrate a causal relationship between the injury and the challenged conduct. Third, the [attorney] must demonstrate that a favorable federal court decision is likely to redress the injury.

Barnett, 51 Fed. App'x at 955 (internal quotations and citations omitted).

In *Grant,* the district court discussed evidence and incidents of alleged prejudicial behavior by defendant/appellant's counsel in the district court's order granting plaintiffs a new trial. Rejecting appellant's contention that the Sixth Circuit had "jurisdiction to consider [appellant's] appeal by means of reviewing the district court's purported finding of alleged attorney misconduct," *Grant,* 606 F.3d at 863, the Sixth Circuit stated:

> In some circuits, a "particularized finding of misconduct" by a district court constitutes enough of an injury to make that finding appealable. *See United States v. Barnett (In re Harris)*, 51 Fed. App'x. 952, 956 (6th Cir. 2002) (citing cases). This circuit, however, has never reached such a conclusion, *See id.* at 956-57 (explaining that "[t]his court has not yet addressed the extent to which a district court's written order can constitute a sanction" that would create an injury sufficient to provide standing to appeal).
>
> Moreover, the circuits vary in how they apply this rule. *See, e.g., Bowers v. NCAA,* 475 F.3d 524, 542-44 (3d Cir. 2007) (holding that attorneys whose behavior was declared sanctionable could appeal despite not receiving "any additional monetary or disciplinary sanctions . . . beyond factual findings and language in the actual order that the conduct of those attorneys merited sanctions"); *Butler v. Biocore Med. Techs., Inc.,* 348 F.3d 1163, 1166, 1168-69 (10th Cir. 2003) (allowing attorneys to appeal orders that "directly aggrieve them"); *Williams v. United States (In re Williams),* 156 F.3d 86, 90-93 (1st Cir. 1998) (allowing attorneys to appeal orders criticizing their conduct only where the district court identified the criticism as a reprimand or a sanction); *Walker v. City of Mesquite,* 129 F.3d 831, 832-33 (5th Cir. 1997) (allowing an appeal from a district court's order reprimanding an attorney for misconduct despite the lack of a fine or other punishment); *Clark Equip. Co. v. Lift Parts Mfg. Co.,* 972 F.2d 817, 820 (7th Cir. 1992) (rejecting an attorney's attempt to appeal a district court order that was critical of his conduct where he could not show that he suffered any monetary harm from the criticism).
>
> [Appellant] offers no argument for *why* we should set a new precedent by declaring that an attorney who is sanctioned or, as in this case, who is found to have prejudiced a trial based on improper conduct, suffers an appealable injury. It also fails to make any argument about why, if we do establish such a precedent, we should adopt the most lenient standard available.

Grant, 606 F.3d at 861-62 (emphasis in original). The Sixth Circuit went on to find persuasive the reasoning in its unpublished decision in *Barnett*. *Id.* at 862.

In *Barnett*, the district court entered an order granting a criminal defendant a new trial based on the asserted misconduct of the federal prosecutor. *Barnett*, 51 Fed. App'x at 955. The district court had also discussed the prosecutor's misconduct at the trial, *Id*. at 953-55, and sent a letter to the Department of Justice suggesting an investigation into the federal prosecutor's possible misconduct. *Id.* at 957. The Department of Justice found no misconduct on the part of the federal prosecutor. *Id.* After the new trial, the prosecutor appealed the order granting the new trial on the basis of her misconduct arguing "that the district court's findings as to her conduct constitute an appealable sanction." *Id*. at 955. The Sixth Circuit stated that the prosecutor had failed to demonstrate that the district court had made a finding of professional misconduct on the prosecutor's part and that the record was clear that the district court statements were "intended only to address [the prosecutor's] conduct in the context of [the district court's] legal conclusions." *Id.* at 957. The Sixth Circuit found that the "district court's assessment of [the prosecutor's] conduct in the context of its Order Granting a New Trial does not constitute an appealable sanction, [the prosecutor] has failed to demonstrate an injury for the purpose of standing." *Id.* at 957.

Both *Grant* and *Barnett* involve appeals in cases where the conduct of a party's attorney was described as unprofessional by the district court. In both cases, the attorney or the party appealed the district court's statements of the attorney misconduct. The Sixth Circuit determined that neither the attorney in *Barnett* nor the party in *Grant* had standing to pursue the appeal. Although these cases involve attorneys representing

parties in those cases, they are applicable to the case before this Court for an analysis of what the Sixth Circuit is likely to do in the situation where a nonparty attorney appeals a statement regarding the attorney's lack of professionalism.

In the case before this Court, we made an assessment as to Mr. Bunch's lack of professionalism based on our review of the evidence in the record. No monetary sanctions were awarded, and no letter was sent to any agency to investigate Mr. Bunch's actions. Certainly, if the prosecutor in *Barnett* had no standing to appeal nonmonetary sanctions where the district court orally commented on her misconduct during the trial, a letter was sent to the Department of Justice, and an order granting a new trial was based on her misconduct, Mr. Bunch has no standing to appeal a statement based on our assessment as to his and Mr. Gartland's conduct. As in *Barnett* and *Grant*, we never formally sanctioned Mr. Bunch. Instead, we relied on our assessment that the actions of Mr. Gartland and Mr. Bunch as reflected in the various emails supported our conclusion that Mr. Cave had taken every precaution prior to filing this adversary action against Ms. Simmerman and that sanctions under Federal Rule of Bankruptcy Procedure 9011 were inappropriate against Mr. Cave. *See Grant*, 606 F.3d at 862.

We found only one case that involved this same situation where an attorney not representing a party to a lawsuit moved the court to amend an order stating that the nonparty attorney, as well as the attorney representing the party, engaged in unethical conduct. *See Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316 (Fed. Cir. 2007). In *Nisus,* the Federal Circuit stated:

> Critical comments, such as in an opinion of the court addressed to the issues in the underlying case, are not directed at and do not alter the legal rights of the nonparty. We recognize that critical comments by a court may adversely affect a third party's reputation. But the fact that a

> statement made by a court may have incidental effects on the reputations of nonparties does not convert the court's statement into a decision from which anyone who is criticized by the court may pursue an appeal.
> . . .
> The court's comments about [appellant] were simply subsidiary findings made in support of the court's ultimate findings and legal conclusions . . . . At no point did the district court purport to affect the legal rights or obligations of [appellant]. Without the exercise of the sanctioning power, a finding of inequitable conduct is insufficient to confer appellate jurisdiction over an appeal by the aggrieved attorney.

Nisus, 497 F.3d at 1319, 1321.

For the reasons stated above, Mr. Bunch has not suffered an injury and, therefore, does not have standing to appeal our assessment of his conduct.

III. Whether Mr. Bunch Can Intervene.

Mr. Bunch mentions intervening in the *Lagco v. Brown* adversary proceeding to establish standing under Federal Rules of Civil Procedure 59(e) or 60. Mr. Bunch does not provide a cite to the rule under which he intends to intervene.[3] He does not provide any discussion of whether he is attempting to intervene by right or by permission. Nor does he bother to address the factors necessary for a party to intervene as of right or permissively.

In the Sixth Circuit, to intervene as of right in an action, an applicant must show:

> 1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not

[3] *See* FED. R. BANKR. P. 7024 providing that FED. R. CIV. P. 24 applies in adversary proceedings. Federal Rule of Civil Procedure 24 provides:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
> **(1)** is given an unconditional right to intervene by a federal statute; or
> **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
> **(b) Permissive Intervention.**
> **(1)** ***In General.*** On timely motion, the court may permit anyone to intervene who:
> **(A)** is given a conditional right to intervene by a federal statute; or
> **(B)** has a claim or defense that shares with the main action a common question of law or fact.

> adequately represent the applicant's interest. Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention under the Rule.

Blount-Hill v. Zelman, 636 F.3d 278, 283 (6th Cir. 2011) (citations omitted). Mr. Bunch does not possess a substantial legal interest in this case. To demonstrate a substantial legal interest in the case, one must show that the outcome of the lawsuit will impact him. *See Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d, 775, 783 (6th Cir. 2007) (where intervenors lacked a substantial legal interest in the outcome of the case, the district court's denial of motion to intervene as of right was affirmed). Mr. Bunch has no interest in the outcome of this adversary proceeding as to whether plaintiff Lagco, Inc., or defendants, Ms. Simmerman and the Browns, prevail in this adversary proceeding. His only interest is in having the Sanctions Order amended to remove his name from that order. Mr. Bunch has no right to intervene in this adversary proceeding.

With respect to permissive intervention, Mr. Bunch has not argued, nor does he meet the requirements of Federal Rule 24(b) that he has (i) a conditional right to intervene by a federal statute, or (ii) that he has a claim or defense that shares a common question of law or fact with the adversary proceeding. As such, Mr. Bunch cannot permissively intervene in this adversary proceeding.

The Conclusion

Mr. Bunch does not have standing to bring the Motion to Amend the Order Overruling Motion for Sanctions nor the ability to intervene in this adversary proceeding.

IT IS HEREBY ORDERED that the Motion to Amend is **OVERRULED**.

Copy to:
Matthew B. Bunch, Esq. (to be served on all interested parties)
Michael Gartland, Esq.
Stanton Cave, Esq.

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The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
Joseph M. Scott, Jr.
Bankruptcy Judge
Dated: Tuesday, May 31, 2011
(jms)
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