

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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Description:	Order On [159-1] Motion To Reconsider of Order resulting from Hearing on Order to Show Cause [155-1] by Bernard R. Given II. Court's Order of 5/19/03 is upheld, and Bernard Given continues to be sanctioned \$100 for failure to appear at 5/5/03 stay hearing.	
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
TOMLIN FARMS LLC,
Debtor.

No. 11-03-10082 SL

**ORDER ON MOTION FOR RECONSIDERATION
OF ORDER RESULTING FROM HEARING ON
ORDER TO SHOW CAUSE**

This matter came before the Court on the motions of Bernard R. Given II to reconsider an order of this Court imposing a sanction for the failure of Mr. Given to appear at a previous telephonic hearing. The sanction order (doc 155) was filed on May 19, 2003 and entered or docketed on May 20, 2003. Mr. Given moved orally at the May 19 hearing for reconsideration of the order imposing the sanction, and followed with a written motion for reconsideration, docketed May 30 (doc 159). In the order imposing the sanction (doc 155), the Court granted that part of the oral motion which requested the reconsideration, and thus the Court has again considered the matter which resulted in the imposition of the sanction. For the reasons set forth below, however, the Court denies, reluctantly, that part of the motion which seeks a reversal of the imposition of the sanction.

The background of this matter begins with motions for stay relief filed by John Deere & Co. in February and March 2003 (doc 98 and 119). Mr. Given, as counsel for the debtor

in possession, negotiated a resolution of most of the issues raised by those motions. However, one motion had not been completely resolved and was still scheduled for a preliminary hearing calendared for May 5, 2003. Although counsel for John Deere and for the interested party Wells Fargo Bank New Mexico appeared at the preliminary hearing (Allan Wainwright and Gail Gottlieb respectively), Mr. Given did not. As it turned out, Mr. Given had thought that he had negotiated resolutions to all the matters at issue for the estate. The mistake was due in large part to the various requests for relief covering various items of property of the estate in the stay motions. The result was that although Mr. Given had received notice of the preliminary hearing on the stay motion still at issue (and presumably calendared the hearing in his office), he did not appear for this particular preliminary hearing. As is the Court's policy, the Court at the May 5 hearing set a hearing to consider an Order to Show Cause Why Debtor's Attorney Should Not Be Sanctioned for Failure to Appear (Doc. 145) and for a continued preliminary hearing on a Motion for Relief from Automatic Stay filed by Deere & Co.

At the May 19, 2003 hearing on the order to show cause and continued preliminary hearing, Mr. Given appeared, as did Mr. Allan Wainwright for John Deere & Co. and Ms. Gail

Gottlieb for Wells Fargo Bank New Mexico. Mr. Given represented at that hearing and in the later-filed motion that there were various John Deere & Co. stay motions and he had been confused about whether the hearing was still on the calendar or whether the matter had been settled. He also recited a series of serious consequences that would flow from the imposition of the sanction, including potentially higher malpractice rates and the necessity of disclosure of the sanction when seeking to appear in other districts. The other counsel also represented that they were not inconvenienced by Mr. Given's non-appearance, and joined Mr. Given in requesting that sanctions not be imposed. The Court then made oral findings of fact and conclusions of law on the record, finding that Mr. Given's failure to appear was a matter within his control, and that a sanction in the amount of \$100 was proper under the facts. The written motion for reconsideration amplified on portions of Mr. Given's oral presentation.

Having considered the arguments raised by Mr. Given, the finds that it is still appropriate to impose the sanction, despite the unusually extenuating circumstances presented by Mr. Given.

At the outset, the Court acknowledges that Mr. Given's failure to appear for the preliminary hearing caused little

disruption of the Court's docket or operations that morning, and that the failure to appear caused no harm to the client (the moving creditor agreed to a resetting of the preliminary hearing, waiving any applicable time limit from § 362(e)) or to any other party. The Court has also observed over the course of this chapter 11 case that Mr. Given has performed his duties as counsel attentively and successfully. The Court also accepts as true the statements of the other counsel that they were not inconvenienced by the failure to appear. And the Court takes as accurate Mr. Given's predictions of the serious consequences that will arise from the imposition of the sanction. (In so doing, the Court understands that the amount of the sanction, \$100, is not the problem so much as the mere fact of the imposition of the sanction.)

Nevertheless, this Court has found that the phenomenon of counsel and occasionally litigants ("parties") failing to appear for hearings is a recurring problem, often leading to the expenditure of additional resources by the Court, other counsel and other litigants. In consequence, the Court initiated a policy some time ago which in most cases calls for imposing a fine or sanction on a party who fails to appear without good cause. To that end the Court does not impose the sanction immediately, but issues an order to show cause why

the sanction should not be imposed, giving counsel the party the opportunity to pay the sanction without a further hearing, but also giving the party a setting at which the party can explain or contest the imposition of the sanction. The sanction is usually \$100, and does not increase if the party contests the imposition of the fine.¹ The purpose of the policy is to incentivize parties to ensure that they appear for hearings by taking such steps as ensuring that notices are received and timely processed, calendaring hearings, providing back-up notification systems, etc. The purpose is also to provide everyone a bright-line test against which to measure his or her behavior, and to make the test applicable to everyone as equally as possible.

It is against this background that Mr. Given has filed his motion for reconsideration. There is no question in the Court's mind that Mr. Given has been sufficiently incentivized never to miss another hearing before this Court, with or without the imposition of the \$100 fine, to say nothing of the consequences that he asserts will also follow. The Court is convinced that Mr. Given's assiduousness and professionalism

¹ Further background and details of the policy are at the Court's chambers website at www.nmcourt.fed.us; click on "General Information", "Judges and Staff", "Judge Starzynski's homepage", "Court Policies", and go from there.

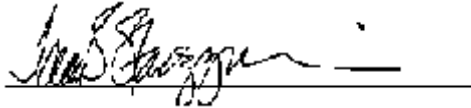
is such that it was entirely by mistake that he did not appear. Unfortunately, it was Mr. Given's mistake, inadvertent though it was, that put Mr. Given in this position. It was a matter within his control.

Were it not for the Court's policy and the paramount need to enforce the policy equally, the Court would not have imposed the sanction on Mr. Given after having heard his explanation. But if the Court does not apply the sanction to Mr. Given in these circumstances, then the Court can hardly apply the sanction to those parties who also fail to appear for hearings because they did not think they were required to attend, or because they forgot to calendar the hearing, or because an assistant who was the sole person tasked with receiving and dealing with notices did not come in to work one day, etc. In other words, ironically, were all failures to appear like this of Mr. Given, the Court would not have implemented this policy; but because there are others who with "more culpability" have failed to appear, the Court has developed its policy which has now ensnared Mr. Given.

Finally, in his written submission, Mr. Given stated that he would not seek a further reconsideration or an appeal of any disposition this Court makes of the motion for reconsideration. The Court has not taken that offer or waiver

into account in any way in making this decision, other than to now rule that Mr. Given is not precluded in any way from seeking reconsideration (although that is almost sure to be unsuccessful) or taking an appeal from this decision.

IT IS THEREFORE ORDERED that the Court's order of May 19, 2003 (doc 155) is upheld, and Bernard R. Given continues to be sanctioned \$100 for failure to appear at the May 5, 2003 stay hearing.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on August 1, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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