United States Bankruptcy Court
Northern District of Ohio

In re:
Minnie M Bowers Smith
James Smith
Debtors

Case No. 13-17204-pmc
Chapter 11

CERTIFICATE OF NOTICE

District/off: 0647-1 User: ejone Page 1 of 1 Date Rcvd: Oct 05, 2016
Form ID: pdf977 Total Noticed: 5

Notice by first class mail was sent to the following persons/entities by the Bankruptcy Noticing Center on Oct 07, 2016.

db/db +Minnie M Bowers Smith, James Smith, 1 Bratenhal Pl. Apt 502, Bratenhal, OH 44108-1153
aty +Ronald Henderson, 6105 PARKLAND BLVD, MAYFIELD HTS, OH 44124-4258
cr +Ohio Department of Taxation, c/o Ohio Attorney General, 615 West Superior Ave., Ste. 1100, Cleveland, Oh 44113-1897

Notice by electronic transmission was sent to the following persons/entities by the Bankruptcy Noticing Center.

ust +E-mail/Text: ustpregion09.cl.ecf@usdoj.gov Oct 05 2016 22:38:28 United States Trustee, Suite 441, H.M Metzenbaum U.S. Courthouse, 201 Superior Avenue, Cleveland, Oh 44114-1234
cr +E-mail/PDF: acg.acg.ebn@americaninfosource.com Oct 05 2016 22:34:57 Capital One Auto Finance, c/o Ascension Capital Group, P.O. Box 201347, Arlington, TX 76006-1347

TOTAL: 2

***** BYPASSED RECIPIENTS (undeliverable, * duplicate) *****
cr IRS

TOTALS: 1, * 0, ## 0

Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
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I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 309): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Oct 07, 2016 Signature: /s/Joseph Speetjens

CM/ECF NOTICE OF ELECTRONIC FILING

The following persons/entities were sent notice through the court's CM/ECF electronic mail (Email) system on October 5, 2016 at the address(es) listed below:

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TOTAL: 15

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 13-17204
	)	
MINNIE M. BOWERS SMITH and JAMES SMITH,	)	Chapter 11
	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**MEMORANDUM OF OPINION**
	)	**RE FEE APPLICATION**

Two years after the debtors Minnie Bowers Smith, M.D. and her husband James Smith[1] filed their individual chapter 11 case the Court dismissed it for cause based on a finding that Dr. Bowers--the only wage earner--failed to set aside any monies to fund her plan, having instead used her considerable monthly income to pay for personal and family travel, improvements to her rented condominium, and repairs to her late mother's home.[2] Attorney Ronald Henderson, who served as counsel for Dr. Bowers and her husband, filed a fee application after the case was dismissed.

In this ever-contentious case, the application is opposed to different degrees by the United States Trustee, creditor the United States of America through its agency the Internal

[1] Mr. Smith died shortly before the Court dismissed the case. For ease of reading, the Court will refer to the debtor in the singular and will use her preferred name, which is Dr. Bowers.

[2] Docket 184, 185.

Revenue Service (IRS)[3], and Dr. Bowers, now represented by different counsel.[4] Dr. Bowers contends that Mr. Henderson is not entitled to any fee award because they did not have a written fee agreement. If he is entitled to fees, Dr. Bowers posits that the award can only be against the former chapter 11 estate (insolvent when the case was dismissed and non-existent now), and not against her individually as the former debtor. She also challenges the amount of fees requested, a position with which the UST agrees to some extent.[5]

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(O), and it is within the Court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 564 U.S. 462 (2011) and its progeny.

Under Sixth Circuit law, the Court has jurisdiction to rule on a fee application even where, as here, the underlying case has been dismissed without a reservation of jurisdiction over

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[3] Although the IRS objected to the fees sought, it acknowledges that it no longer has a direct economic stake in the outcome of this matter, which raises an issue as to the IRS's standing. The IRS argues it has standing because, as a creditor in thousands of chapter 11 cases annually, it has an interest in how this Court will rule. Docket 224 at 1. The Court does not need to resolve this question because Dr. Bowers, who unquestionably has standing, raised essentially the same concerns as did the IRS.

[4] Docket 190, 193, 194, 196, 197, 198, 199, 208, 209, 210, 211, 212, 213, 214, 217, 219, 221 and 224.

[5] The Court heard this matter, resolved some issues, and then adjourned it for supplemental objections to be filed. No party requested an evidentiary hearing. A review of the filings shows that some parties shifted positions as the dispute progressed. The Court here is addressing only the final positions taken by the parties. Also, the Court is not addressing any of the "I said/You said" arguments raised by any party because they are not germane to the legal issues.

this issue. *Dery v. Cumberland Cas. & Sur. Co. (In re 5900 Assocs., Inc.)*, 468 F.3d 326, 330 (6th Cir. 2006).[6]

LAW

A Court order issued under Bankruptcy Code § 327 approved Mr. Henderson's second amended application to represent the debtor in her chapter 11 case at the hourly rate of $325.00.[7] Mr. Henderson now applies under Bankruptcy Code § 330 for $79,157.06 in fees and $630.79 in costs for the time period from September 13, 2013 to October 26, 2015.

Section 330 provides that the Court may award reasonable compensation to Mr. Henderson for actual, necessary services he rendered to the debtor together with actual, necessary costs. 11 U.S.C. § 330(a)(1). In the Sixth Circuit, compensation is determined using the lodestar analysis, which multiplies the reasonable hourly rate by the number of hours reasonably expended to determine the reasonable fee. *In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991). In arriving at the rate and hours, the Court is to consider such factors as whether the services were necessary to the administration of the case or beneficial toward completion of the case, the applicant's skill in the field, and whether the time spent was proportionate to the task. 11 U.S.C. § 330(a)(3). The Court may not award compensation for services not reasonably

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[6] In *Dery*, the Sixth Circuit held that a bankruptcy court retains jurisdiction over post-dismissal fee applications and that fee awards under 11 U.S.C. § 330 are not limited to fees payable from a bankruptcy estate. 468 F.3d at 330. Any suggestion that this Court should limit *Dery*'s holding based on the unusual facts it addressed is unwarranted in light of the clear language used by the Circuit. Some objectors discuss *In re Sweports, Ltd.*, 777 F.3d 364 (7th Cir. 2015) in their briefs; however, that case is factually distinguishable and is not the law of this Circuit.

[7] Docket 45.

likely to benefit the estate or unnecessary to the administration of the case. 11 U.S.C. § 330(a)(4)(A)(ii) (with exceptions not applicable here).

Mr. Henderson supported the application with time records identifying the date, amount of time, and activity for each event. No party objects to the format of the application, the request for costs, or the hourly rate.

DISCUSSION

A.

Because the property of the chapter 11 estate revested in the debtor upon dismissal of the case, Mr. Henderson now seeks an award against Dr. Bowers individually. *See* 11 U.S.C. § 349(b)(3) (providing that property of the estate revests in the entity in which it was vested immediately before the filing unless the Court orders otherwise). Dr. Bowers posits that Mr. Henderson served only as counsel for the debtor in possession, rather than as counsel for the debtor, from which she concludes that fees can only be awarded against the non-existent chapter 11 estate.[8]

This argument lacks merit because there is no meaningful distinction between the debtor and the debtor in possession in this context. This point is highlighted by reference to *Cle-Ware Indus., Inc. v. Sokolsky (In re Cle-Ware Indus., Inc.)*, 493 F.2d 863 (6th Cir. 1974), which discussed the propriety of treating a debtor and a debtor in possession as separate and distinct entities for the purposes of appointing separate counsel under Chapter XI of the Bankruptcy Act. In that decision, the Sixth Circuit noted that the correct practice, except for cases in which there is an actual or potential conflict of interest, is for counsel to represent both the debtor and the

[8] Dr. Bowers did not offer any evidence in support of this point, either by affidavit or otherwise. The UST declined to take a position. Docket 221.

debtor in possession and for the Court to fix one fee to cover all the services. *Id.* at 870-71. The Circuit, in holding that the bankruptcy court erred in appointing separate counsel to represent the debtor and the debtor in possession, noted that:

> unless there is a receiver or trustee, the debtor automatically becomes a debtor in possession. The debtor and debtor in possession are treated as separate and distinct entities.
>
> 'But the debtor does not cease to exist as such when he files his petition for arrangement and spontaneously becomes a debtor in possession. The two entities exist side by side until the conclusion of the proceeding. The debtor in possession may be authorized to operate the business and manage the property of the debtor (§ 343), and may be authorized to borrow money, etc. and issue certificates of indebtedness therefor (§ 344), or to lease or sell the property of the debtor (§ 313(2)); but it is the debtor who proposes the arrangement (§ 323), is examined at the meeting of creditors (§ 336(3)), and makes the deposit necessary to effectuate the arrangement (§ 337(2); § 362(2)).
>
> Thus the attorney retained to file the petition usually acts in two capacities, concurrently representing the debtor in effecting an arrangement and the debtor in possession in the exercise of the powers of the bankruptcy trustee and in all things in connection with the conduct of the business.

Id. at 870 (quoting Herzog, Bankruptcy Law-Modern Trends, 37 Ref. J. 110-12 (1963)).

The Circuit went on to hold that :

> This court strongly disapproves the practice of appointing separate counsel as attorney for the debtor-in-possession and at the same time compensating another attorney at the expense of the bankruptcy estate in his capacity as counsel for the debtor for services rendered after the filing of the petition for a plan of arrangement. Hereafter, we will not approve this procedure as a general practice in the Sixth Circuit. Only in exceptional circumstances, which we do not foresee, will this procedure be allowed by this court. The debtor and debtor-in-possession is one and the same person, although 'wearing two hats'. We see no valid reason why, as a general rule, his legal representation in both capacities should not be limited to one attorney or one set of attorneys. In the ordinary situation, as in the instant case, there is

> no actual or potential conflict of interest requiring or justifying payment for services of separate attorneys.

Id. at 871. While *Cle-Ware* was decided under the Bankruptcy Act, the treatment of the debtor as debtor in possession remains basically the same under the Bankruptcy Code. *See* 11 U.S.C. § 101(13) (providing that the debtor is the person concerning whom the case has been commenced) and § 1101(1) (providing that the debtor is the debtor in possession except when a trustee is serving in the case). Here, Dr. Bowers filed the case, making her the debtor, and as debtor she then became the debtor in possession.

No objector presented evidence of a conflict of interest that would have required appointment of separate counsel. Additionally, all of Mr. Henderson's services were (with the exceptions discussed below) for the benefit of the estate or necessary to administer the case. Therefore, following *Cle-Ware's* line of reasoning, under the facts of this case Mr. Henderson served as counsel for the debtor individually *and* as debtor in possession and he is entitled to compensation for the services he rendered in both capacities.

Dr. Bowers also argues that an award against her is not appropriate because Mr. Henderson did not have a written contract with her. Although a written fee agreement is certainly the better practice, Ohio law does not preclude an attorney from being compensated in the absence of such a writing. *See Michael P. Harvey Co., L.P.A. v. Ravida*, 972 N.E. 2d 1087 (Ohio Ct. App. 2012); *see also* OHIO RULE OF PROF. COND. 1.5(b) (stating that the nature and scope of a representation and the basis or rate of the fee must be communicated to the client "preferably in writing"). Without a doubt, Dr. Bowers retained Mr. Henderson to act as her chapter 11 counsel, signing the bankruptcy petition and paying him at least $5,000.00 as a retainer. The order authorizing Mr. Henderson's employment, which was served on Dr. Bowers,

sets out the terms of his employment including his hourly rate and the services to be provided.[9] And his amended disclosure of compensation states that he was to be paid by the debtor with the amount being fixed by the Court upon application.[10] At no time before dismissal (or after) did the debtor come forward at a hearing or otherwise to question or contradict these terms. The Court concludes that Mr. Henderson performed these services at Dr. Bowers's request and for her benefit, as a result of which he is entitled to a reasonable fee.

Finally, Dr. Bowers contends that the fees should be disallowed because an agreement between a debt relief agency and an assisted person must be in writing. *See* 11 U.S.C. § 528(a) (setting forth various requirements for debt relief agencies that provide bankruptcy assistance services to assisted persons). That provision does not apply here, however, because the debtor did not come within the definition of an "assisted person." *See* 11 U.S.C. § 101(3) (defining the term "assisted person" as "any person whose debts consist primarily of consumer debts"). In this case, Dr. Bowers's schedules establish that her debts were primarily income taxes, and those are not consumer debts. *See Internal Revenue Serv. v. Westberry (In re Westberry)*, 215 F.3d 589, 591 (6th Cir. 2000) (concluding that income tax debts are not consumer debts for purposes of the chapter 13 co-debtor stay because "consumer debt is incurred for personal or household purposes . . . while taxes are incurred for a public purpose.").

B.

If Mr. Henderson is not barred from receiving fees, then Dr. Bowers, now joined in part by the UST, argues that Mr. Henderson should not be compensated for certain of his services.

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[9] Docket 45.

[10] *See* docket 29 at ¶ 2.

1. Time Spent Pre-Petition

Dr. Bowers objects to $1,815.00 in time billed before Mr. Henderson filed this case; Mr. Henderson describes these as tax services undertaken for Dr. Bowers to restore her to "financial viability" before filing the bankruptcy.[11] Mr. Henderson was required to disclose any claim for prepetition services in connection with his retention as debtor's counsel, and this Court would have required him to waive any claim as a condition of his retention. *See* FED. R. BANKR. P. 2014 (a).[12] Mr. Henderson did not make the required disclosure–in fact, his affidavit and amended affidavit in support of retention state that he is not a creditor.[13] Given that failure, this objection is sustained.[14]

2. Fees Related to Amos Mashua, CPA

The application seeks $5,070.00 in fees related to the possibility that CPA Amos Mashua would testify at trial on behalf of the debtor. Dr. Bowers and the UST argue that these services were of no benefit to the estate because the Court granted a motion to strike Mr. Mashua from the list of trial witnesses. Mr. Henderson counters that the time was necessary and beneficial to

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[11] Docket 213 at 3.

[12] A prepetition claim for fees could have potentially disqualified Mr. Henderson from serving as debtor's counsel. *See* 11 U.S.C. § 327(a) (requiring a professional to be a disinterested person); and 11 U.S.C. § 101(14) (defining the term disinterested person to mean a person that is not a creditor). Resolving this issue by requiring a waiver is standard practice in this district.

[13] Docket 27 and 39.

[14] Compensation for the services set forth in the following entries in the amount of $1815.00 is disallowed: September 13, 2013; September 15, 2013; September 16, 2013 (both entries); September 23, 2013; September 25, 2013; and October 10, 2013.

the debtor and should only be reduced by $1,885.00. Based on the order excluding Mr. Mashua as a witness,[15] the fees are disallowed in their entirety.[16]

3. Fees Related to the Substance and Timing of Mr. Henderson's Application to be Employed as Counsel

Dr. Bowers objects to the amount of time spent by Mr. Henderson in connection with obtaining Court approval for his employment. Mr. Henderson does not seem to have responded directly to this objection. The Court finds that the amount of time spent was higher than it should have been mostly because there were problems with the fee rates Mr. Henderson proposed–specifically, that he would bill at one rate for tax work and another rate for bankruptcy work when, given the facts of the case, there did not seem to be a clear way to differentiate between the two kinds of legal services.[17] Accordingly, the Court sustains the objection in part and reduces the fees attributable to this work by $650.00.[18]

Dr. Bowers also objects to the general time Mr. Henderson spent working on the case after filing and before he filed his second amended application to be employed on January 29, 2014 because the order approving his employment did not specify that it was entered *nunc pro tunc.* Mr. Henderson did not respond to this argument. If counsel wants to be compensated for

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[15] Docket 138.

[16] See the entries of May 1, 2015 (first entry); May 13, 2015; May 14, 2015 (first entry); May 19, 2015; May 20, 2015 (first and fourth entry); May 23, 2015; May 27, 2015; May 28, 2015; and June 29, 2015.

[17] The Court raised this issue *sua sponte.*

[18] The entries of January 14, 2014 (first entry); January 16, 2014; and January 28, 2014 (second entry) are disallowed for a total of $650.00.

time spent before employment is approved, it is counsel's responsibility to ask that the employment order be entered as of the earlier date. Because Mr. Henderson did not do so, this objection is sustained and the fees are reduced by $10,931.19.[19]

4. Fees Related to the Adversary Proceeding Brought Against the IRS and the Debtor's Objection to the IRS Claim

Dr. Bowers argues that the work done on the adversary proceeding and the claim objection was not reasonably likely to benefit the estate, and as a result, the fees should be reduced. Part of this objection relates to the Amos Mashua fees which the Court already addressed. The balance of the objection is that the debtor did not benefit from the action against the IRS, as seen by the fact that Dr. Bowers gave up on the challenge to the IRS's position just before the trial on that issue.

Mr. Henderson responds that the IRS issue was essentially the reason the debtors filed this case after the IRS garnished Dr. Bowers's salary at the Cleveland Clinic. He contends further that the time spent on the issues was reasonable and necessary, focusing in particular on the express concession the debtor won from the IRS that the collection statute for 2001 had

[19] The debtor requested disallowance of a total of $11,581.19 in fees for all services rendered from October 11, 2013 through January 28, 2014, focusing on the date the second amended application was filed rather the date on which the application was granted. The Court will, therefore, do the same. The total amount disallowed is less than the debtor requested because $650.00 of the time was disallowed in connection with the debtor's objection to the time spent obtaining approval of Mr. Henderson's employment. The following entries are disallowed: October 11, 2013 (both entries); October 18, 2013; October 29, 2013; October 30, 2013; November 1, 2013; November 27, 2017 (both entries); November 29, 2013 (both entries); December 16, 2013; December 23, 2016 (both entries); January 6, 2014; January 9, 2014; January 14, 2014 (second entry); January 15, 2014; January 17, 2014; January 21, 2014; January 22, 2014; and January 28, 2014 (first entry).

expired. He offers to compromise the dispute by reducing his fees attributable to the adversary proceeding from $22,298.25 to $15,608.78 or a total of $6,689.47.[20]

While the Court agrees that Mr. Henderson should have spent less time on the adversary proceeding and the claims objection than he did, the offer that he makes reflects that fact. Additionally, while the IRS ultimately prevailed on these issues, it was not on the merits: the immediate reason the IRS prevailed is because, when Dr. Bowers's husband James Smith died just a few days before the trial, Dr. Bowers elected not to go forward.

This objection is, therefore, sustained in part. Although the objection is sustained as to $6,689.47 of the fees requested, no reduction in the fee award is required as fees in the amount of $7,193.69 relating to the adversary proceeding were previously disallowed because they were rendered before Mr. Henderson filed his second amended application to be employed.[21]

In addition to finding that each deduction discussed is appropriate, the Court finds that the overall fee awarded is reasonable compensation for the services Mr. Henderson rendered.

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[20] Docket 213 at 3. This reduction results in the allowance of fees for 48.02 hours of services.

[21] *See* the entries of October 30, 2013 ($2,600.00); November 27, 2013 (second entry) ($552.50); January 6, 2014 ($260.00); January 9, 2014 ($552.50); January 17, 2014 ($390.00); January 21, 2014 ($856.19); January 22, 2014 ($1,495.00); and January 28, 2014 (first entry) ($487.50).

CONCLUSION

The objections are sustained in part and denied in part, resulting in Mr. Henderson being awarded $60,690.87 in fees and $630.79 in costs against Minnie Bowers Smith, M.D. Any further action regarding collecting these fees is to take place in state court. The Court will enter a separate order to reflect this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge