

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:07-bk-06622-ABB
Chapter 13

DONALD C. BRADY,

Debtor.

ORDER

This matter came before the Court on the Motion for Disgorgement of Attorney's Fees Paid to William Reed, Esquire (Doc. No. 19) ("Motion for Disgorgement") filed by Donald C. Brady, the Debtor herein ("Debtor"), and the Motion to Dismiss Debtor's Motion for Disgorgement of Attorney's Fees (Doc. No. 21) ("Motion to Dismiss") filed by William M. Reed of Reed & Archer, LLC, a/k/a Reed and Archer, LLC (collectively, "Reed"). An evidentiary hearing was held on April 15, 2008, at which the Debtor, Debtor's bankruptcy counsel Joel L. Gross, Esquire ("Gross"), the Chapter 13 Trustee, and Reed appeared.

The Debtor filed this Chapter 13 case on December 19, 2007 (Doc. No. 1) with the assistance of Gross. Gross has represented the Debtor as his counsel of record throughout the Chapter 13 proceedings.

The Debtor, prepetition, met with Reed regarding Chapter 13 bankruptcy representation. He and Reed executed a Legal Fee Agreement on July 16, 2007 ("Agreement"), which provides, in part, Reed would prepare and file a Chapter 13 petition, prepare and file a plan, and represent the Debtor through plan confirmation.¹ Legal services were to be billed at the hourly rate of \$225.00, with fees to increase in exceptional circumstances.² The Agreement required a "non-refundable" "initial retainer" of \$3,000.00:

The initial retainer for the services listed in paragraph one is \$3000.00. The client understands that this initial

payment is non-refundable. Even if the Law Firm's services are terminated, this initial payment of \$3,000.00 will not be returned to the client. If other services are required in addition to the services listed in paragraph one, then the client will be billed at \$225.00 per hour for any additional work. The bill for these additional hours rendered will be due upon receipt.³

The Debtor paid Reed \$3,000.00 in cash on July 16, 2007.⁴

Reed's services from June 27, 2007 through August 26, 2007 included: two conferences between the Debtor and counsel; one conference between the Debtor and a paralegal; review and revision of a bankruptcy petition; compilation of a list of items needed for analysis; correspondence to the Debtor dated August 2, 2007 from an assistant requesting documentation; correspondence to the Debtor dated August 23, 2007 from an assistant informing him he was "in breach" of the Agreement and requesting instructions from the Debtor; and preparation of correspondence regarding termination of representation.⁵

Reed did not complete the Debtor's bankruptcy papers or institute a bankruptcy case for the Debtor. A dispute arose between the Debtor and Reed, the facts of which are highly contested and unclear. The Debtor, as a result of the dispute, terminated Reed's employment and retained Gross. No retainer funds have been returned to the Debtor.

The Debtor seeks disgorgement of \$3,000.00 from Reed. Reed asserts the Motion for Disgorgement should be stricken on a variety of grounds: (i) the funds do not constitute property of the estate; (ii) the funds are non-refundable; (iii) personal jurisdiction over Reed is lacking in that the firm is not a creditor; (iv) Section 1303 of the Bankruptcy Code does not authorize the filing of a disgorgement motion;

³ Id. at ¶ 6.

⁴ Doc. No. 21, Reed's Exh. H.

⁵ Doc. No. 21, Reed's Exhs. B, C, and D. Preparation of a termination letter was billed, but no termination letter was provided.

¹ Doc. No. 21, Reed's Exh. A.

² Id. at ¶ 4.

and (v) the doctrines of abstention, res judicata, and comity bar the relief sought by the Debtor. Reed has established no basis for striking the Motion for Disgorgement. His Motion to Strike is due to be denied.

Reed asserts the retainer was earned by his firm and is non-refundable. Reed presented an invoice dated April 1, 2008 setting forth total charges of \$1,287.50 for services performed from June 27, 2007 through August 26, 2007.⁶ The total charges consist of attorney time of 4.5 hours billed at the hourly rate of \$250.00 and paralegal time of 2.5 hours billed at the hourly rate of \$65.00.

The hourly rate of \$250.00 charged in the invoice exceeds the hourly rate of \$225.00 agreed to by the Debtor in the Agreement. No exceptional circumstances existed warranting a fee increase. The Agreement does not provide for the charging of non-legal and/or clerical services.

The invoice's billing entry for July 18, 2007 sets forth a charge of \$800.00 for 3.2 attorney hours for: "Review and revision of bankruptcy petition. Compile list of additional items needed for analysis and chapter 13 plan. Prepared IEMA."⁷ The time entry is excessive and not credible. Reed had virtually none of the Debtor's information and documentation on July 18, 2007 necessary for preparation of the Debtor's bankruptcy papers, as established by Reed's letter of August 2, 2007 to the Debtor. The August 2, 2007 letter requests a multitude of basic information and documentation from the Debtor including tax returns, income and employment history, expenses, personal property inventory, titles, financial statements, and previous addresses. The letter states: "Until this documentation is received I will be unable to file your petition."

The invoice further lacks credibility based upon the timing of its issuance. The final time entry is August 26, 2007, but the invoice was not issued until April 1, 2007—the date on which Reed filed its Motion to Dismiss.

Section 329 of the Bankruptcy Code requires the disclosure of attorney's fees paid within one year before the petition date "for

services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." 11 U.S.C. Section 329(a) (2007). Subsection (b) requires such fees be reasonable and authorizes disgorgement when they are not:

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate . . .

(2) the entity that made the payment.

11 U.S.C. § 329(b).

The reasonableness of attorney fees and costs is determined by an examination of the criteria enunciated in In the Matter of First Colonial Corp. of Am.⁸ and Johnson v. Georgia Highway Express, Inc.⁹ First Colonial states:

In order to establish an objective basis for determining the amount of compensation that is reasonable for an attorney's services, and to make meaningful review of that determination possible on appeal, we held in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 717-19, that a

⁸ In the Matter of First Colonial Corp. of Am., 544 F.2d 1291 (5th Cir. 1977).

⁹ Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The twelve Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; (12) awards in similar cases. Johnson at 717-19.

⁶ Doc. No. 21, Reed's Exh. D.

⁷ Id.

district court must consider the following twelve factors in awarding attorneys' fees . . .

First Colonial at 1299.

Reed, as established by the invoice, did not fully earn the \$3,000.00 retainer. The hourly rate charged exceeds the rate agreed to by the Debtor and the charges exceed the reasonable value of the services performed. After consideration of the First Colonial and Johnson factors and all of the facts and circumstances of this case, the reasonable number of hours and rates for the services performed by Reed are 2.9 hours at an hourly rate of \$225.00 and 2.5 hours at an hourly rate of \$65.00, for total fees of \$815.00.

The amount of \$2,185.00 is due to be disgorged by Reed to the Chapter 13 Trustee pursuant to 11 U.S.C. Sections 329(b) and 105(a).

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that Reed's Motion to Dismiss (Doc. No. 21) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED AND DECREED that the Debtor's Motion for Disgorgement (Doc. No. 19) is hereby **GRANTED**; and it is further

ORDERED, ADJUDGED AND DECREED that Reed & Archer, LLC, a/k/a Reed and Archer, LLC, shall remit the sum of \$2,185.00 to Laurie K. Weatherford, Chapter 13 Trustee, within fourteen (14) days of the entry of this Order; and it is further

ORDERED, ADJUDGED and DECREED that should Reed & Archer, LLC, a/k/a Reed and Archer, LLC, fail to comply with the provisions of this Order, additional sanctions may be awarded.

Dated this 18th day of April, 2008.

/s/Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge