

ORDERED.

Dated: July 20, 2021

  
Caryl E. Delano  
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re:

Case No. 2:15-bk-04241-FMD  
Chapter 7

Benjamin H. Yormak,

Debtor.

**ORDER GRANTING MOTIONS TO COMPEL DEBTOR  
TO PAY EXPERT WITNESS FEE FOR RICHARD A. GREENBERG**  
**[Doc. Nos. 814 and 897]**

THIS CASE came before the Court without a hearing to consider the *Motion to Compel Debtor [to] Pay Expert Richard Greenberg Pursuant to Fed. R. Civ. P., Rule 26(b)(4)(E)* filed by Claimant Steven R. Yormak ("Claimant's Motion to Compel"),<sup>1</sup> and the *Motion to Compel Debtor to Pay Expert Witness Fee for Richard A. Greenberg* filed by Mr. Greenberg (the "Greenberg Motion to Compel"),<sup>2</sup> together referred to as the "Motions to Compel." In ruling on the Motions to Compel, the Court has considered

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<sup>1</sup> Doc. No. 814.

<sup>2</sup> Doc. No. 897.

Debtor's response to Claimant's Motion to Compel<sup>3</sup> and Claimant's reply to Debtor's response.<sup>4</sup>

## **I. BACKGROUND**

On April 24, 2015, Debtor filed a petition under Chapter 13 of the Bankruptcy Code, and on September 1, 2016, the Chapter 13 case was converted to a case under Chapter 7. On December 29, 2016, Steven R. Yormak ("Claimant") filed Claim No. 4-2 (the "Claim") in an amount exceeding \$1,095,275.00. The Claim was based on "services performed" under Consulting Agreements with Debtor. Debtor objected to the Claim (the "Objection"), asserting that the Consulting Agreements were unenforceable because they provided for Claimant's unlicensed practice of law (the "UPL Issue").

On April 10, 2020, while the parties were litigating Debtor's objection to the Claim, Claimant filed the expert report of Richard A. Greenberg on the UPL Issue.<sup>5</sup> Shortly thereafter, Debtor filed a Notice of Deposition and an Amended Notice of Deposition of Mr. Greenberg,<sup>6</sup> and deposed Mr. Greenberg on May 18, 2020.

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<sup>3</sup> Doc. No. 823.

<sup>4</sup> Doc. No. 832.

<sup>5</sup> Doc. No. 728.

<sup>6</sup> Doc. Nos. 743, 755.

On June 19, 2020, Debtor filed a *Motion to Bar Creditor's Proposed Expert Witness and Other Relief* (the "Motion to Bar Expert").<sup>7</sup> On July 10, 2020, Claimant filed a response to the Motion to Bar Expert.<sup>8</sup>

On July 13, 2020, Claimant filed Claimant's Motion to Compel, asking the Court to compel Debtor to pay Mr. Greenberg \$7,515.00 for his time spent "relating to debtor subpoena(s) and attendance at deposition."<sup>9</sup>

At the Court's direction,<sup>10</sup> Debtor responded to Claimant's Motion to Compel, primarily asserting (a) that Mr. Greenberg's expert report did not contain the information required by Fed. R. Civ. P. 26(a)(2)(B) and the *Daubert* standard; (b) that the expert report was authored or substantially influenced by Claimant; (c) that Claimant obstructed Mr. Greenberg's testimony at the deposition; and (d) that the subject matter of Mr. Greenberg's opinion (the UPL Issue) is within the province of the Court.<sup>11</sup> Claimant filed a reply to Debtor's response.<sup>12</sup>

On February 3, 2021, the Court entered an order on the parties' motions for summary judgments on the UPL Issue (the "SJ Order").<sup>13</sup> The Court denied Claimant's motion for summary judgment, granted Debtor's cross-motion for

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<sup>7</sup> Doc. No. 794.

<sup>8</sup> Doc. No. 813.

<sup>9</sup> Doc. No. 814, p. 1.

<sup>10</sup> Doc. No. 816.

<sup>11</sup> Doc. No. 823.

<sup>12</sup> Doc. No. 832.

<sup>13</sup> Doc. No. 851.

summary judgment, and disallowed Claimant's Claim, finding (a) that the Consulting Agreements were unenforceable as providing for the unlicensed practice of law, and (b) that Claimant's activities under the Consulting Agreements constituted the unlicensed practice of law. In making its ruling, the Court noted Mr. Greenberg's qualifications and expressly stated that it had considered his opinion, but that the factual issues regarding the unlicensed practice of law were matters for the Court to decide. The Court denied Debtor's Motion to Bar Expert.<sup>14</sup>

On May 18, 2021, Mr. Greenberg filed the Greenberg Motion to Compel.<sup>15</sup> The attached invoice reflects that, between April 15, 2020 and May 29, 2020, Mr. Greenberg spent a total of 16.7 hours related to Debtor's discovery at the rate of \$450.00 per hour, for a total charge of \$7,515.00. Mr. Greenberg's most significant time entries were the time expended compiling documents in response to Debtor's request to produce (3 hours), preparing for his May 18, 2020 deposition (5.5 hours), attending the deposition (5.1 hours), and reviewing the deposition transcript and preparing an errata sheet (1.2 hours).

Mr. Greenberg contends that he billed Debtor for his services in responding to discovery and preparing for and attending the deposition, and that Debtor has not paid the bill.<sup>16</sup> Although Debtor did not respond to the Greenberg Motion to Compel,

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<sup>14</sup> Doc. No. 851, pp. 36-37, 49.

<sup>15</sup> Doc. No. 897, Ex. A.

<sup>16</sup> Doc. No. 897, ¶¶ 2-4.

in making this ruling, the Court has considered Debtor's response to Claimant's Motion to Compel as well as Claimant's reply to the response.

## II. ANALYSIS

Fed. R. Civ. P. 26 applies in bankruptcy adversary proceedings and contested matters.<sup>17</sup> Under Rule 26(b)(4)(A), a party may take the deposition of any person who has been identified as an expert and whose opinion may be presented at trial. Under Rule 26(b)(4)(E), absent manifest injustice, the Court must require a party seeking discovery from an expert to pay the expert a reasonable fee for responding to discovery under Rule 26(b)(4)(A).<sup>18</sup> The goal of Rule 26(b)(4)(E) is to "calibrate expert fees so that the party seeking discovery will not be hampered by unreasonably high fees which prevent feasible discovery, without placing an undue burden on efforts to hire quality experts."<sup>19</sup>

Rule 26(b)(4)(E) is "mandatory in the sense that the court may not entirely refuse to direct payment," but it is up to the court to determine the reasonableness of the fee requested.<sup>20</sup> "Ultimately, it is in the court's discretion to set an amount for payment that it deems reasonable."<sup>21</sup>

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<sup>17</sup> Fed. R. Bankr. P. 7026, 9014(c).

<sup>18</sup> Fed. R. Civ. P. 26(b)(4)(E).

<sup>19</sup> *United States v. 1.604 Acres of Land*, 275 F.R.D. 234, 235 (E.D. Va. 2011) (citing *Fleming v. United States*, 205 F.R.D. 188, 189 (W.D. Va. 2000)).

<sup>20</sup> *Jalowsky v. Provident Life and Accident Insurance Co.*, 336 F.R.D. 452, 454 (D. Ariz. 2020) (quoting 8A Fed. Prac. & Proc. Civ. § 2034 (3d ed.)).

<sup>21</sup> *United States v. 1.604 Acres of Land*, 275 F.R.D. at 235 (citing *Fleming v. United States*, 205 F.R.D. at 189).

Here, Claimant identified Mr. Greenberg as his expert witness on the UPL Issue and filed his report while the parties were preparing for trial on Debtor's Objection to Claimant's Claim. Debtor deposed Mr. Greenberg and requested documents from him under Rule 26(b)(4)(A).

Claimant later submitted Mr. Greenberg's report in connection with the parties' summary judgment motions. The Court reviewed Mr. Greenberg's qualifications, including his more than 30 years as a licensed attorney, his concentration in the areas of professional responsibility and professional licensure, and his representation of attorneys in grievance matters before The Florida Bar. Although the Court decided all factual disputes regarding the UPL Issue, it did not exclude Mr. Greenberg's report and took his opinion into consideration in the SJ Order.

In determining the reasonableness of Mr. Greenberg's fee for his time spent responding to Debtor's discovery requests, the Court has considered Mr. Greenberg's expertise, the hourly rates charged by attorneys of comparable experience, the quantity and condition of the documents related to the UPL Issue,<sup>22</sup> and the overall contentious nature of the litigation. Based on these considerations,<sup>23</sup>

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<sup>22</sup> For example, *see* Doc. No. 798 (Claimant's motion for summary judgment), Doc. No. 818 (Debtor's motion for summary judgment), and Doc. No. 851 (the SJ Order).

<sup>23</sup> *See Jalowsky v. Provident Life and Accident Insurance Co.*, 336 F.R.D. at 454, for a list of factors that courts have used in determining the reasonableness of expert's fees.

the Court determines that (a) 16.7 hours, as reflected in Mr. Greenberg's invoice, is a reasonable expenditure of time, and (b) \$450.00 per hour is a reasonable hourly rate, also as reflected in Mr. Greenberg's invoice, for Mr. Greenberg to complete the document production and attend the deposition. Consequently, Debtor is required to pay Mr. Greenberg's fee for responding to his discovery under Rule 26(b)(4)(E).

Accordingly, it is

**ORDERED** that Claimant's *Motion to Compel Debtor [to] Pay Expert Richard Greenberg Pursuant to Fed. R. Civ. P., Rule 26(b)(4)(E)* (Doc. No. 814) and Richard A. Greenberg's *Motion to Compel Debtor to Pay Expert Witness Fee for Richard A. Greenberg* (Doc. No. 897) are GRANTED, and Debtor, Benjamin H. Yormak, is directed to pay Richard A. Greenberg his fee of \$7,515.00 within thirty (30) days of this Order.

The Clerk's office is directed to serve a copy of this Order on interested parties via CM/ECF.