

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

Case No. 6:03-bk-02488-ABB
Chapter 13

CLAYTON HACKNEY and
LINDA HACKNEY,

Debtors.

ORDER

This matter came before the Court on the Motion for Reconsideration of Order Dated June 15, 2006; Motion to Vacate Same and to Dismiss Chapter 13 Case (Doc. No. 247) ("Motion") filed by John Vernon Head, counsel ("Movant") for the Debtors Clayton Hackney and Linda Hackney (collectively, the "Debtors"). A hearing on the Motion was held on July 25, 2006 at which the Movant, the Debtors, counsel for Statewide Title Corporation ("State Wide"), and the Chapter 13 Trustee ("Trustee") appeared. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

Background Facts

The Debtors filed this joint Chapter 13 case with the assistance of Ezra Witsman ("Witsman") as their counsel. They paid Witsman \$1,500.00 at the onset of their case for bankruptcy services. Movant purchased Witsman's law practice and substituted as counsel for the Debtors in August 2003. Movant has represented the Debtors in their bankruptcy case and in various non-bankruptcy matters involving the Debtors individually and their business entities. The Debtors paid Movant \$2,000.00 for services he classified as "non-bankruptcy" matters post-petition.¹ Movant did not immediately disclose receipt of the

¹ Doc. No. 231 at ¶ 7. Movant presented undated billing statements for a state court matter captioned Rhonda Hackney v. Clayton Hackney and a federal court matter captioned T. Treverton v. Clayton Hackney with each showing a payment of \$1,000.00 by the Debtors (*see* Exhibit Nos. 5 and 7 accompanying Doc. No. 231). The dates of payment were not disclosed.

\$2,000.00 as required by the Bankruptcy Code and Rules.

The Debtors' Second Amended Plan ("Plan") was confirmed on August 3, 2004 (Doc. No. 151).² The Plan provides for payment in full of the allowed claim³ (Claim No. 13) of George Turner ("Turner"). Turner is their most significant creditor and his claim is secured by a mortgage on the Debtors' home. Turner's claim was extensively litigated.

The Debtors sought to refinance their home post-confirmation with their primary purpose being to pay Turner's claim in full. They intended to continue payment of their remaining Plan obligations. Movant arranged for the refinancing of the Debtors' home and assisted them throughout the refinancing process. Statewide was engaged as the closing agent. The closing took place on or about May 26, 2005. The Debtors appeared at the closing, but not Movant. The Debtors intended and expected Turner's claim to be paid in full from the refinancing proceeds.

Turner's \$153,184.82 claim was not paid in full from the refinancing proceeds because only \$143,184.82 was available for Claim No. 13 at closing. The \$10,000.00 shortfall was the result of the disbursement of \$10,000.00 to Movant from the refinance proceeds. Movant was not authorized by the Debtors or the Court to receive the funds. He did not disclose receipt of the funds in accordance with the Bankruptcy Code and Rules. The disbursement to Movant prevented the payoff of Turner's claim and defeated the purpose of the refinancing.

The refinancing payoff shortfall spawned additional and unnecessary litigation. Turner filed a Motion to Amend Order Modifying Confirmed Chapter 13 Plan Dated September 9, 2005 (Doc. No. 193) ("Motion to Amend") seeking to adjust the Plan to cover the difference between what he was paid through the refinancing and his actual claim balance. An evidentiary hearing on Turner's Motion to Amend was held on January 24, 2006 at which the Movant, Mrs. Hackney, the Trustee, Turner, Turner's counsel, and Charles Heywood Gordon, Turner's expert

² The Plan and confirmation order were subsequently modified (*see* Doc. Nos. 163, 191, 215, 216).

³ Turner's allowed claim includes amounts awarded to Turner for attorneys' fees incurred by him during the course of this case: (i) \$15,375.58 for Akerman Senterfitt fees; (ii) \$1,947.00 for McLeod & McLeod, P.A. fees; and (iii) \$6,400.00 for Becker & Poliakoff, P.A.

witness appeared. Turner and Gordon provided live testimony.

Turner filed a Supplemental Motion for Sanctions and Attorney Fees (Doc. No. 221) seeking payment of attorney fees of \$5,200.00 he allegedly incurred as a result of the payoff shortfall. Turner's fee request is due to be set for hearing.

The \$10,000.00 disbursement remained undisclosed by Movant. It was discovered during the hearing on January 24, 2006 by the Trustee through comparison of the initial HUD-1 Settlement Statement containing a payoff figure of \$153,184.82 for Turner and the check issued to Turner for \$143,184.82.⁴ The Trustee immediately sought disgorgement by Movant of the \$10,000.00 (Doc. No. 205). Movant, *after* the disgorgement motion was filed, filed fee applications (Doc. Nos. 231, 237) seeking payment of fees and costs in excess of \$34,000.00 and a motion to withdraw as counsel for the Debtors (Doc. No. 225). Movant alleges he is entitled to attorney's fees and costs for his representation of the Debtors in the bankruptcy and non-bankruptcy matters in addition to the \$3,500.00 initially paid by the Debtors. Movant contends he is entitled to retain as earned fees the \$12,000.00 paid to him by the Debtors.

An evidentiary hearing was conducted on the Trustee's disgorgement motion on March 10, 2006 at which the Trustee, Movant, and counsel for Turner appeared. The Debtors were not present. Documentary evidence was presented and the parties were provided seven days to submit further documentary evidence. An Order was entered on June 14, 2006 (Doc. No. 245) (the "June Order") directing Movant to disgorge \$12,000.00, consisting of the \$2,000.00 paid to him by the Debtors and the \$10,000.00 disbursement he received from the refinancing proceeds, to the Trustee within fourteen days of the entry of the Order, and sustaining the Trustee's objection to the Movant's fee applications. The Movant's motion to withdraw as counsel for the Debtors was granted.

⁴ Doc. Nos. 207 (*see* Line 104 "Payoff 1st Mtg to George Randall Turner") and 208 (Exhibit 2A). It appears two HUD-1 settlement statements were prepared and executed by the Debtors. The second statement showing the \$10,000.00 disbursement to Movant was never provided to the Trustee nor the Debtors.

Movant's Motion for Reconsideration

Movant filed his Motion on June 23, 2003 requesting: (i) the June Order be vacated and withdrawn; (ii) the Debtors' case be dismissed for their alleged failure to make monthly plan payments;⁵ and (iii) an evidentiary hearing be scheduled. Movant signed the Motion as "Former Attorney for Debtors" recognizing he is no longer counsel for the Debtors. Movant has no authority to seek dismissal of the Debtors' case and the dismissal request is without merit. The request is due to be denied.

The gravamen of Movant's request for reconsideration of the June Order is the Court's reliance on an unsworn letter sent by the Debtors to the Trustee via facsimile on or about January 31, 2006 (Doc. No. 236, Exh. A) (the "Letter")⁶ and the Debtors' failure to provide live testimony. Movant contends he was not afforded an opportunity to cross-examine the Debtors or an "opportunity to have witnesses heard either as to the propriety of the fees or the relationship of those matters to the bankruptcy."⁷

Movant's request for an evidentiary hearing was granted and an evidentiary hearing was conducted on July 25, 2006. Mrs. Hackney, Mr. Hackney, and Mary Manty, the Movant's assistant, provided live testimony.⁸ Movant conducted direct examinations of each witness and the Trustee cross-examined Mr. Hackney. Reconsideration of the June Order is appropriate to evaluate the evidence presented at the July 25, 2006 hearing.

⁵ The title of the Motion refers to dismissal of the Debtor "case" and the concluding wherefore clause seeks dismissal of the "plan." Movant asserts in Paragraph 15 "the Court should have found it did not have jurisdiction as the case should have been timely dismissed for non payment [*sic*] of regularly scheduled plan payments." The dismissal request is unfounded and the status of the Debtors' plan payments is irrelevant to the Order reconsideration issue.

⁶ The Letter was part of the record months before the Order was issued. The Trustee filed a Notice of Filing Copy of Correspondence from Debtor ("Notice") (Doc. No. 212) with a copy of the Letter attached upon receiving the correspondence from the Debtors. She sent copies of the Notice and the Letter to the Movant via first-class mail, postage prepaid, on January 31, 2006.

⁷ Motion at ¶ 15.

⁸ Movant issued a subpoena to an employee of Statewide Title. Statewide Title, through its counsel, moved to quash the subpoena for improper service. Movant's purpose in seeking testimony from the employee was not relevant to the Order. The motion to quash was granted. Transcript of 9/25/2006 hearing at pp. 3-6.

The testimony of the Debtors is consistent with and confirms the statements made by the Debtors in the Letter. The Debtors intended and expected Turner's claim would be paid in full from the refinancing proceeds.⁹ The amount received from the refinancing proceeds was less than they expected.¹⁰ The paperwork presented to them at the closing did not comport with their understanding of what the refinancing figures would be.¹¹ They were surprised and upset by the shortfall.¹² They questioned the closing amounts, but were not given a sufficient explanation.¹³ The Debtors did not authorize and were not aware of the \$10,000.00 disbursement made to Movant.¹⁴

The Movant presented no newly-discovered evidence, mistake, inadvertence, fraud, or any other reason for vacating the Court's June Order. The Movant was not entitled to the \$10,000.00 disbursement and he must disgorge those funds to the Trustee.

The Debtors confirmed in their testimony they paid \$2,000.00 to Movant post-petition for non-bankruptcy services and Movant had earned the fees. Movant had a statutory duty to disclose all payments made to him by the Debtors, including the \$2,000.00 payment. He failed to make such disclosure.

A court may award reasonable compensation for services rendered by counsel for a debtor. Reasonableness is determined by an examination of twelve criteria referred to as the Johnson factors.¹⁵ The fees of \$2,000.00 are reasonable based upon the testimony of the Debtors and the governing criteria in fee determinations. Movant, despite his failure to timely disclose receipt of the \$2,000.00, is allowed the fees of \$2,000.00. The portion of the June Order requiring Movant to disgorge the \$2,000.00 is due to be amended. All other provisions of June Order shall stand in full force in effect.

CONCLUSIONS OF LAW

Movant seeks reconsideration of the June Order presumably pursuant to Federal Rule of Civil Procedure 60. He cites no legal authority in his Motion. He contends the Order was entered in error because the Court relied upon the Letter and the Debtors did not provide testimony. Federal Rule of Civil Procedure 60, made applicable to bankruptcy proceeding through Federal Rule of Bankruptcy Procedure 9024, allows parties to seek relief from a judgment or order for: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b) (2005). Reconsideration of the June Order is appropriate to evaluate the testimony provided by the Debtors and Ms. Manty on June 25, 2006.

The testimony confirms evidence previously received by the Court. The Debtors intended to pay Turner's claim in full through the refinancing and were surprised when Turner's claim was not paid in full. The shortfall was caused by Movant receiving \$10,000.00 from the refinancing proceeds without the knowledge or authorization by the Debtors or the Court. Movant did not disclose his receipt of the \$10,000.00, or the \$2,000.00 payment made earlier by the Debtors. Movant had a statutory obligation to disclose receipt of these funds. His receipt of the \$10,000.00 only came to light through the evaluation of the initial HUD-1 Settlement Statement and the Turner disbursement check at the January 24, 2006 hearing.

Section 329(a) of the Bankruptcy Code governs a debtor's transactions with its attorney. Counsel representing a debtor "shall file with the court a statement of the compensation paid or agreed to be paid . . . and the source of such compensation." 11 U.S.C. § 329(a). Federal Rule of Bankruptcy Procedure 2016(b) requires: "Every attorney for a debtor . . . shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code . . ." Fed. R. Bankr. P. 2016(b). Movant was required to disclose his receipt of the \$2,000.00 payment from the Debtors and the \$10,000.00 disbursement from the refinancing proceeds pursuant to 11 U.S.C. § 329(a) and Federal Rule of Bankruptcy Procedure 2016(b).

⁹ Transcript of 9/25/2006 hearing at p. 19 ll. 17-25.

¹⁰ Id. at p. 21 ll. 1-10, p. 22 ll. 6-11.

¹¹ Id.

¹² Id.

¹³ Id. at 14-25.

¹⁴ Id. at pp. 23, 64.

¹⁵ The twelve criteria were enunciated in In the Matter of First Colonial Corp. of Am., 544 F.2d 1291, 1299 (5th Cir. 1977) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974).

Movant did not comply with the disclosure requirements. He disclosed his receipt of the funds only after Turner sought to amend the Plan and the Trustee filed her disgorgement motion. Movant's pleadings, actions, and statements reflect he does not sufficiently appreciate his duties as counsel for debtors. His admitted inexperience in bankruptcy matters is no excuse for his failure to comply with the Bankruptcy Code and the Rules. Movant has acted in his own self-interest to the detriment of the Debtors. He undermined the purpose of the refinancing. He caused additional and unnecessary litigation. His actions were diametrically opposed to the Debtors' objectives and instructions.

Section 330 of the Bankruptcy Code allows a court, after notice and a hearing, to award "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person." 11 U.S.C. § 330(a)(1) (2005). A court, *sua sponte* or on the motion of a party in interest, may "award compensation that is less than the amount of compensation requested." 11 U.S.C. § 330(a)(2). The reasonableness of attorney fees and costs is determined through an examination of the twelve criteria enunciated in In the Matter of First Colonial Corp. of Am., 544 F.2d 1291, 1299 (5th Cir. 1977) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974).¹⁶

The Court has determined, through an examination of all criteria relevant to fee awards and

¹⁶ In the Matter of First Colonial Corp. of America, 544 F.2d 1291 (5th Cir.1977) stating: "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 district court must consider the following twelve factors in awarding attorneys' fees . . ." First Colonial at 1299.

¹⁶ 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 714.

the testimony of the Debtors, a reasonable fee for the non-bankruptcy services provided by Debtor's counsel is \$2,000.00 pursuant to 11 U.S.C. § 330. Movant is entitled to retain the \$2,000.00 he was paid by the Debtors for non-bankruptcy services.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Motion for Reconsideration filed by John V. Head is hereby **GRANTED**; and it is further

ORDERED, ADJUDGED and DECREED that John V. Head is awarded \$2,000.00 for fees incurred in his representation of the Debtors in non-bankruptcy matters and he may retain the \$2,000.00 paid to him by the Debtors; and it is further

ORDERED, ADJUDGED and DECREED that the Order entered on June 15, 2006 is hereby amended to allow John V. Head to retain the \$2,000.00 paid to him by the Debtors; and it is further

ORDERED, ADJUDGED and DECREED that John V. Head is directed to disgorge the sum of \$10,000.00 to Laurie Weatherford, Chapter 13 Trustee, within fourteen (14) days of the entry of this Order. All other provisions of the Order entered on June 15, 2006 shall stand in full force in effect; and it is further

ORDERED, ADJUDGED and DECREED that should John V. Head fail to comply with the provisions of this Order, additional sanctions may be awarded.

Dated this 26th day of September, 2006.

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