

THIS OPINION IS NOT INTENDED  
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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
-12142-10  
MAY 10 2001  
CLERK OF COURT

In re: ) Case No. 01-12142  
)  
JAMES C. GARRETT, ) Chapter 7  
)  
) Judge Pat E. Morgenstern-Clarren  
Debtor. )  
) **MEMORANDUM OF OPINION**

Attorney Thomas Pavlik represented the Debtor James Garrett in the captioned case. The United States Trustee filed a motion, as supplemented, to review Mr. Pavlik's compensation and disgorge fees. (Docket 35, 37, 45, 48). Mr. Pavlik opposed the motion. (Docket 39, 46). The Court held an evidentiary hearing on the motion on March 20, 2002. The United States Trustee presented his case through the testimony of Mr. Pavlik, Chapter 7 Trustee David Simon, the Debtor, and the Debtor's wife, Reta Garrett, together with exhibits. Mr. Pavlik presented his case through cross-examination. The parties agreed that the Court would take judicial notice of the file in *In re Clarke*, Case No. 97-17835.

I.

The Court has jurisdiction under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This dispute is a core proceeding under 28 U.S.C. § 157(b)(2).

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II.

The parties agree on these facts:

Mr. Garrett filed a Chapter 13 case in 2001. Prepetition, James Garrett owed approximately \$70,000.00 to his ex-wife Bonnie Jean Garrett for alimony as a result of a 1995 order entered by an Arkansas domestic relations court. James Garrett and his wife Reta Garrett consulted attorney Ed Heben about this long-standing debt which Mr. Garrett felt he should not have to pay. Mr. Heben advised them and also suggested they consult with Thomas Pavlik. They agreed to do so and Mr. Pavlik joined the meeting. At that time, they discussed the problem and considered whether Mr. Garrett should file for protection under the bankruptcy laws. Mr. Pavlik then did some legal work, which appears to have included drafting papers, contacting Bonnie Jean Garrett's attorney, and discussing the issues with the Garretts. By check dated November 2, 2000, drawn on the Garretts' joint account,<sup>1</sup> Mr. Pavlik received \$400.00 for fees.

On March 14, 2001, faced with Bonnie Jean Garrett's efforts to garnish Mr. Garrett's wages, Mr. Garrett asked Mr. Pavlik to file a Chapter 13 case on an emergency basis and he did so. The filing included these items:

1. A Statement of Financial Affairs, prepared by Mr. Pavlik and signed by Mr. Garrett, which includes the representation that Mr. Garrett paid Mr. Pavlik \$950.00 on "March, 2001" for bankruptcy related services (UST Exh. 3-22); and
2. A Disclosure of Compensation of Attorney for Debtor signed by Mr. Pavlik which

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<sup>1</sup> The Garretts have a joint checking account. Mr. Garrett gives his paycheck to Mrs. Garrett who pays the bills and otherwise handles the finances.

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states that he received \$950.00 from the Debtor before the case was filed. (UST Exh. 3-25).

Postpetition, by check dated March 21, 2001 drawn on the Garretts' joint account, Mr. Pavlik received \$1,800.00 in legal fees.

**III.**

The significant factual dispute centers on the fee agreement, specifically:

- (1) whether Mr. Pavlik represented both Mr. and Mrs. Garrett or just Mr. Garrett;
- (2) what issues Mr. Pavlik was retained to address; and
- (3) how much Mr. Pavlik said he would charge for those services.

At no time did Mr. Pavlik advise the Garretts as to his hourly rate or enter into a written fee agreement with either one of them. If there had been a written agreement, much of this dispute would never have arisen as the agreement would have identified the client, the services to be rendered, and the agreed-upon charges for those services.

On these issues, the Garretts both testified that Mr. Heben was representing their interests on the Arkansas domestic relations matter when Mr. Pavlik was brought in to advise Mr. Garrett on bankruptcy options. They also testified that Mr. Pavlik told them that the fee would be between \$2,200.00 and \$2,500.00 for a bankruptcy filing. When Mr. Garrett decided initially not to go forward with that filing, Mr. Pavlik billed them \$400.00 for his preliminary work. On March 14, 2001, when Mr. Garrett decided to file, Mr. Pavlik advised him that the total fee would be \$2,200.00, of which \$400.00 had been paid, leaving a balance of \$1,800.00. Mr. Garrett delivered the \$1,800.00 check to Mr. Pavlik on March 21, 2001, or within a day or two after that.

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In his written opposition to the motion, Mr. Pavlik argued that he represented both Mr. and Mrs. Garrett on a domestic relations matter before he was retained to represent Mr. Garrett in the bankruptcy. He claimed that the Garretts, jointly, owed him \$1,618.75 for the domestic relations work at the time they gave him the \$1,800.00 check *prepetition*. He stated further that he “agreed to essentially accept ½ of the amount owed on the Domestic Representation (Mrs. Garrett’s portion) and waive the balance that would have been due from the Debtor.” *See* Reply (Docket 39 at 2). Under this view, Mr. Pavlik applied about \$800.00 of the check to the domestic relations bill and the balance to the bankruptcy fee, which he feels explains and supports the statement in the Disclosure of Compensation that he received \$950.00 for the bankruptcy fee.

**IV.**

Having considered all of the evidence and observed the witnesses at the hearing, the Court makes these additional findings of fact and conclusions of law:

**1. Mr. Pavlik was retained to represent Mr. Garrett, not both of the Garretts.**

Mr. Garrett alone owed money to Bonnie Jean Garrett. He was also the one who was subject to orders of the Arkansas state court with jurisdiction over the domestic relations matter. While Reta Garrett was involved and concerned, the person who sought legal representation was Mr. Garrett. Mr. Garrett, therefore, was Mr. Pavlik’s client.

**2. Mr. Garrett retained Mr. Pavlik to assist him with resolving the debt owed to Bonnie Jean Garrett, which he wanted to avoid.**

Mr. Garrett appears to have proceeded on three legal fronts: first, to get relief from the Arkansas orders; second, to negotiate with Bonnie Jean Garrett’s attorneys to reach a

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compromise on the alimony issues; and third, to prepare for a bankruptcy filing if need be. Mr. Pavlik's role included negotiating with her lawyer in lieu of a bankruptcy filing, but with the possibility of a filing in mind. Although Mr. Pavlik stated that he had been retained on a domestic relations matter, Mr. Garrett already had Mr. Heben representing him on issues relating to altering or avoiding the Arkansas orders. Mr. Pavlik's expertise and involvement related to the debtor-creditor relationship between Mr. Garrett and Bonnie Jean Garrett under the existing Arkansas orders.

**3. The Garretts did not owe Mr. Pavlik \$1,618.75 prepetition for domestic relations work.**

As found above, Mr. Pavlik represented only Mr. Garrett and that was with respect to the bankruptcy aspect of the Bonnie Jean Garrett debt. He did not introduce into evidence any bill for \$1,618.75 or any firm ledger or other documents supporting this amount.

**4. As the Garretts did not owe Mr. Pavlik \$1,618.75 for a prepetition domestic relations bill, the \$1,800.00 check did not relate to any such bill and could not have been applied to pay Mrs. Garrett's portion of such a bill.**

**5. Mr. Pavlik charged Mr. Garrett a total of \$2,200.00 for the bankruptcy work, of which \$400.00 was paid in November 2, 2000. The balance of \$1,800.00 was paid postpetition.**

In the absence of a fee agreement or written receipts for the payments, the Court has looked to the checks introduced into evidence and the consistency of those checks with the parties' versions of events. Those checks are consistent with the Garretts' testimony and inconsistent with Mr. Pavlik's brief and arguments at the hearing. Also, the numbers do not add

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up in Mr. Pavlik's rendition which allocates half of the \$1800.00 check to Mrs. Garrett's part of the "domestic relations bill." Half of \$1,618.75 is \$809.75 which added to the \$950.00 allegedly paid for the bankruptcy adds up to \$1,759.37. The postpetition check was for \$1,800.00.

**6. The Disclosure of Compensation of Attorney for Debtor is materially inaccurate.**

The disclosure states that Mr. Pavlik agreed to accept \$950.00 for his bankruptcy services and that he had received this amount from the Debtor before the bankruptcy filing. As found above, he actually agreed to accept \$2,200.00. Mr. Pavlik credited Mr. Garrett with the \$400.00 payment made earlier and did not receive the \$1,800.00 balance until several days after the filing.

**7. A lawyer who fails to comply with the Bankruptcy Code disclosure requirements is subject to having all fees disallowed.**

Bankruptcy Code § 329 requires a debtor's attorney to disclose his bankruptcy compensation:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, 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. § 329(a). Bankruptcy Rule 2016, which implements § 329, provides:

(b) *Disclosure of Compensation Paid or Promised to Attorney for Debtor.* Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at any other time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity . . . A supplemental statement shall be filed and transmitted to the United States trustee

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within 15 days after any payment or agreement not previously disclosed.

FED. R. BANKR. P. 2016(b). “Compliance with § 329 and Rule 2016 is ‘crucial to the administration and disposition of cases before the bankruptcy courts’.” *In re Campbell*, 259 B.R. 615, 626 (Bankr. N.D. Ohio 2001) (quoting *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 480 (6th Cir. 1996)). “Section 329 and Rule 2016 are fundamentally rooted in the fiduciary relationship between attorneys and the courts. *In re Downs*, 103 F.3d at 480. Bankruptcy courts have the inherent power to sanction an attorney for a breach of this fiduciary obligation. *In re Downs*, 103 F.3d at 478.” *In re Campbell*, 259 B.R. at 627.

**8. Mr. Pavlik’s failure to comply with the requirements of § 329 and Rule 2016 warrants denial of all fees.**

The “‘failure of counsel to obey the mandate of § 329 and Rule 2016 concerning disclosure . . . is a basis for entry of an order denying compensation and requiring the return of sums already paid’.” *In re Downs*, 103 F.3d at 477 (quoting *In re Chaple Gate Apartments, Ltd.*, 64 B.R. 569, 575 (Bankr. N.D. Tex. 1986)). The sanction imposed must “be commensurate with the egregiousness of the conduct” and will depend on the particular facts of the case. *In re Downs*, 103 F.3d at 478-480. If, however, the failure to disclose is willful, a bankruptcy court must deny all compensation. *In re Downs*, 103 F.3d at 479-80.

*In re Campbell*, 259 B.R. at 628. Mr. Pavlik is an experienced bankruptcy attorney who appears frequently in this Court and is familiar with the bankruptcy laws and Court orders regarding fees. *See In re Clarke*, Case No. 97-17835 (transcript of hearing held July 13, 2000 on Mr. Pavlik’s fee application, opposed by the United States Trustee based on disclosure issues). (Docket 38). In the *Clarke* case, decided before Mr. Pavlik undertook Mr. Garrett’s representation, the Court advised Mr. Pavlik:

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There are unfortunately too many errors to consider them to be simple negligence and to excuse them for that reason. The Court is responsible for thousands of Chapter 13 cases and relies to an enormous extent on the integrity of counsel and the integrity of counsel's bookkeeping systems in awarding fees. And that reliance is reasonable because it is counsel who has the ability to track the intake of fees and to make the appropriate representations to the Court as to the amount of those fees and the manner in which they have been paid or will be paid.

(Tr. 42-43). Under the facts of this case, and given the specific notice to Mr. Pavlik more than a year ago that his bookkeeping procedures were inadequate and his disclosures problematic, the Court finds that the failure to disclose is willful. And even were it not willful, the facts warrant denial of fees and disgorgement based on the failure to maintain records supporting fees charged and payments received.

The United States Trustee asks that the \$1,800.00 paid postpetition be returned to Mr. Garrett because the Chapter 7 case was dismissed, with the Court retaining jurisdiction over this issue. Given the dismissal, this is the appropriate disposition of the funds. In ordering this return, however, the Court is by no means endorsing the manner in which Mr. Garrett conducted himself in these proceedings, including his prepetition transfer of his house in an attempt to put it beyond the reach of his ex-wife and his admission in Court that he did not schedule all of his creditors because he intended to pay some of them outside of the bankruptcy proceedings, again to the detriment of his ex-wife and possibly other creditors. Nevertheless, given that the case has been dismissed, the appropriate disposition is for the funds to be returned to Mr. Garrett.

Finally, the Court notes that Mr. Pavlik did perform some legal services for Mr. Garrett and it is unfortunate that he cannot be compensated. Entering into detailed fee agreements,



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maintaining contemporaneous accounting records, and accurately filling out the disclosure forms are the best way to insure that this situation does not recur.

V.

For the reasons stated, the United States Trustee's Motion is granted and Thomas Pavlik is ordered to disgorge \$1,800.00 by payment of that amount to the Debtor James Garrett.

A separate order will be entered reflecting this decision.

Date: 27 Mar 2002

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Thomas Pavlik Esq.  
Scott Scharf, Esq.  
Dean Wyman, Esq.

By: Joyce L. Gordon Secretary

Date: 3/27/02

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
MAR 27 2012  
CLERK OF COURT  
COURT HOUSE  
COLUMBUS, OHIO

In re: ) Case No. 01-12142  
)  
JAMES C. GARRETT, ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the Memorandum of Opinion issued this date, the United States Trustee's Motion to Review Compensation and to Disgorge Fees is granted. (Docket 35).

Attorney Thomas Pavlik is ordered to refund \$1,800.00 to the Debtor.

IT IS SO ORDERED.

Date: 27 Mar 2012 Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Thomas Pavlik, Esq.  
Scott Scharf, Esq.  
Dean Wyman, Esq.

By: Joyce L. Gordon, Secretary  
Date: 3/27/12