

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
32 NOV 22 PM 12:03
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 99-17499
)
TRIANGLE DEVELOPMENT, INC.,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

On October 23, 2002, this Court held attorney Joan Kodish in civil contempt for failing to comply with a May 22, 2002 Order that directed her to disgorge a \$10,000.00 retainer and deposit it with the Clerk of the Bankruptcy Court (the May Order is referred to here as the “Disgorgement Order”). (Docket 195). Before imposing sanctions to coerce compliance with the Disgorgement Order, the Court gave Ms. Kodish one final opportunity to either pay the funds in full or propose a payment plan supported by financial information. (Docket 216, 217).

THE POSITIONS OF THE PARTIES

Ms. Kodish filed the required financial documents and proposes paying \$500.00 a month until the \$10,000.00 is paid in full.¹ She states that she will file updated financial documents quarterly. The United States Trustee (“UST”) argues that Ms. Kodish’s financial information shows she paid \$11,800.00 to two creditors in October 2002 without disclosing where the money came from. He suggests that the unidentified source could be tapped to comply in full with the

¹ She actually proposes paying “at least” \$500.00 a month. The Court assumes this is a proposal to pay this amount unless her financial circumstances improve, in which case she will pay more. For simplicity, this Opinion just refers to the \$500.00 that is being offered at the moment.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

Disgorgement Order. Alternatively, if a payment plan is necessary, he urges that the monthly amount be set at \$1,500.00 in light of Ms. Kodish's gross monthly income. He also asks that Ms. Kodish's obligation be secured by a lien either on her car or on attorney fees to be paid to her by the Chapter 13 Trustee to guarantee the payments will be made. (Docket 221, 222, 224).

THE RECOUPMENT/SETOFF ARGUMENT

On November 15, 2002, the Court held an evidentiary hearing to consider Ms. Kodish's payment proposal and the UST's objection. Ms. Kodish attempted to raise a new issue at that time, namely that she should not be required to comply with the Disgorgement Order because of the doctrines of recoupment and setoff. Under her theory, if she pays the \$10,000.00 into the Clerk's office, it will in turn be paid over to A&A Quality Paving ("A&A") because that entity paid the retainer. For factual support, she relies on her Disclosure of Compensation of Attorney for Debtor filed September 28, 1999 which states "The source of compensation paid to me [for services rendered or to be rendered on the debtor's behalf] was . . . A&A Quality Paving, which is owned by the debtor's CEO [Alfred Edwards]." (Docket 1). Ms. Kodish argues that A&A owes her more than \$10,000.00, that the \$10,000.00 she is to pay to the Clerk should be setoff against the debt owed to her by A&A, and the Disgorgement Order will then be satisfied without her making any payments. She cited four cases at the hearing, but did not provide a legal analysis of the recoupment/setoff law.² The UST objected to this new argument both on the grounds of unfair surprise and on the merits.

² The cases are *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995); *Henderson v. Kisseberth (In re Kisseberth)*, 273 F.3d 714 (6th Cir. 2001); *Baker v. National City Bank of Cleveland*, 511 F.2d 1016 (6th Cir. 1975); and *Sheehan v. Wiener (In re Wiener)*, 228 B.R. 647 (Bankr. N.D. Ohio 1998).

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

Ms. Kodish's reasoning is flawed on multiple levels which the Court will address only briefly due to the manner in which it was raised. First, although Ms. Kodish claims that she timely raised the issue because it first came up the night before hearing, the cases that she cites were decided from 1975 through 2001. An argument based on these cases was available well before the hearing and raising it at the hearing amounts to unfair surprise to the UST.³ To be timely, the argument should have been raised at one of the hearings that led up to the Disgorgement Order. Ms. Kodish did not do so and did not appeal from the Disgorgement Order. The argument is not, therefore, properly before the Court. Second, even if the argument is considered, it is far from clear that the facts are as Ms. Kodish asserts, with A&A receiving the disgorged \$10,000.00. After Ms. Kodish filed the Disclosure that she cites, she filed a Supplemental Disclosure in which she states that the \$10,000.00 came from the "majority of the shareholders at Triangle Development, Inc.". (Docket 12). Testimony at other hearings suggested that the \$10,000.00 retainer came from individuals who are involved with an entity referred to as the Edwards Family Trust. The source of the funds has not, therefore, been established nor has the Court determined to whom the \$10,000.00 should go. Third, Ms. Kodish's obligation to pay the \$10,000.00 comes from the Disgorgement Order. Recoupment and setoff are irrelevant to compliance with the Court's Order under the facts of this case.

ISSUE

The issue is whether the Court should approve the payment plan proposed by Ms. Kodish based on the evidence presented at the hearing.

³ See the October 23, 2002 Memorandum of Opinion on the subject of Ms. Kodish raising issues in an untimely fashion.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

FACTS

Ms. Kodish was the only witness at the hearing. These findings of fact are based on her testimony and the exhibits.

The \$11,800.00 Payment to Creditors

In October 2002, Ms. Kodish paid \$11,800.00 to two creditors at a time when she knew she had not complied with the Disgorgement Order. She testified about the source of those funds, stating that at some point in the past, she referred a personal injury case to attorney Fred Wendel. In September 2002, he settled that case and sent Ms. Kodish \$12,000.00 as her fee. She did not know the payment was coming, as she apparently did not perform services in that case. She used the fee to pay \$10,000.00 restitution to Schloss Paving Company in exchange for which the state prosecutor nollied the criminal charges pending against her.⁴ Ms. Kodish used an additional \$1,200.00 to refund fees to a client as ordered by another bankruptcy judge. She did not explain why she decided to make these payments rather than honor the Disgorgement Order. Ms. Kodish testified without contradiction that she does not have any other cases out on referral and so does not expect to receive any similar fees that she could devote to comply immediately and in full with the Disgorgement Order.

Ms. Kodish's Income in 2000, 2001, and 2002

Ms. Kodish testified that in calendar year 2000 she had \$55,076.00 in gross income from her law practice. In 2001, her gross income increased to \$83,987.00, with a monthly gross income of about \$6,900.00. In 2002, her client base has about doubled and her expenses have

⁴ See discussion of the criminal charges in the October 23, 2002 Memorandum of Opinion.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

gone down. Her husband has steady employment and contributes to household expenses. Their estimated gross monthly joint household income is \$18,485.66. Ms. Kodish estimates her net monthly income from her law practice at \$2,316.00, from which she proposes to pay \$500.00 a month to the Clerk. Her household budget supports this number as approximately the amount of her joint household monthly disposable income after expenses.

The UST questions the adequacy of this payment proposal in light of Ms. Kodish's monthly joint household gross income of \$18,485.66. He argues that the gross income number is a more reliable predictor of Ms. Kodish's ability to pay than the net income number because the net number reflects Ms. Kodish's discretionary disbursements. In the past, the UST contends, she has imprudently used that discretion to transfer about \$100,000.00 to A&A as well as to pay other expenses while ignoring the Disgorgement Order.

Ms. Kodish explained that some of the \$100,000.00 she transferred to A&A did not come from her business income but rather from money that she borrowed. She does not intend to make any further transfers along these lines. For purposes of deciding the present issue only, the Court accepts the explanation that at least some of the \$100,000.00 came from other sources.

If the Court were to start with Ms. Kodish's gross income number in determining the amount that Ms. Kodish can presently pay per month, that number would still have to be reduced by legitimate expenses in order to arrive at a net number. Ms. Kodish set out her expenses and the UST has not identified any particular budget item that should be disallowed in this calculation. The Court will, therefore, use Ms. Kodish's net income number in this analysis.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

DISCUSSION

The fundamental question is whether Ms. Kodish's \$500.00 a month proposal represents a good faith estimate of what she can reasonably pay to satisfy the Disgorgement Order. In answering this question, the Court notes that Ms. Kodish's credibility on this issue is shaky because her testimony about her finances has been both incomplete and inconsistent. For example, at the October hearing she took the position that she was financially unable to pay all or any part of the Disgorgement Order due to her financial condition. One month later, she admits that she can pay at least \$500.00 per month. She also could have paid the Disgorgement Order in full in October 2002 by choosing to apply the Wendel fee to it. Along these same lines, she testified in October that her net income for the period from the end of May 2002 through September 2002 totaled \$3,000.00 to \$4,000.00. Her testimony at the November hearing was that her net monthly income is \$2,316.00, meaning that her May through September income would have been closer to \$9,200.00. Additionally, Ms. Kodish still has not taken direct responsibility for her actions in failing to honor the Disgorgement Order, leaving the Court to wonder how sincere her commitment to make these payments really is.

Despite these misgivings, the Court believes that the point is to coerce compliance with the Disgorgement Order, not to extract the last dollar from Ms. Kodish's budget. The Court will, therefore, order Ms. Kodish's payment proposal into effect, as follows:

(1) Ms. Kodish is to pay \$500.00 to the Clerk of the United States Bankruptcy Court, Northern District of Ohio, at Cleveland on the first of every month beginning December 1, 2002. If the first of the month falls on a weekend or holiday, the payment is to be made on the next business day.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

(2) Starting on January 2, 2003 and on the first day of each calendar quarter after that, Ms. Kodish is to file updated financial information under oath, including a detailed financial statement of her income and expenses, both business and personal; a detailed statement of her assets and liabilities; and a detailed budget for her office and home. If the filing day falls on a weekend or a holiday, the filing is to be made on the next business day.

Ms. Kodish has a significant history of ignoring the Disgorgement Order. The Court has found her in contempt for that conduct. It is, therefore, appropriate to impose sanctions to insure that Ms. Kodish now complies with the payment plan that she herself proposes. If, therefore, Ms. Kodish does not make any payment when due or does not file any document when due, she will be sanctioned \$50.00 per day for each day that the payment is late or the document is unfiled. This amount is reasonable because her budget contains certain discretionary items that can be reduced or eliminated if it is necessary to pay the sanctions. *See, for example*, amounts for health clubs, cable TV, personal care, charitable contributions, and credit cards.

The UST asks that Ms. Kodish be required to provide security to guarantee her payments. He did not explain how such a secured transaction would be structured. In any event, the Court does not intend to enter into a secured transaction with Ms. Kodish. Her duty to comply with Court orders does not stem from a debtor-creditor relationship; it comes from her professional responsibility as an officer of the Court. An attorney who does not comply with her professional responsibilities is subject to losing her privileges to practice before this Court, among other sanctions.

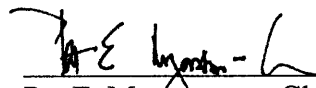
THIS OPINION IS NOT INTENDED
FOR PUBLICATION

CONCLUSION

The Court will order into effect the payment plan proposed by Joan Kodish to comply with the Disgorgement Order. In light of Ms. Kodish's failure to honor the Disgorgement Order to date, if any payment is not timely made or any document is not timely filed the Court will impose a sanction of an additional \$50.00 a day until the delinquency is cured. Should that sanction still not result in compliance, the Court will consider other alternatives.

A separate Order will be entered reflecting this decision.

Date: 22 Nov 2002



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Alexander Jurczenko, Esq.
Dean Wyman, Esq.
Joan Kodish, Esq.

By: Joyce L. Gordon, Secretary

Date: 11/22/02