

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:) Case No. 04-30532
)
Charles A. Winnick) Chapter 7
Amanda S. Winnick,)
)
Debtors.) JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION REGARDING MOTION TO REVIEW FEES AND SERVICES RENDERED BY BANKRUPTCY PETITION PREPARER

This matter is before the court on a Motion to Review Fees and Services Rendered by Bankruptcy Petition Preparer (the "Motion") filed by the United States Trustee ("UST"). [Doc. # 12]. The motion seeks an order directing former bankruptcy petition preparer Don Harris¹ ("Harris") to disgorge the fee he charged in this case, arguing that the fee was excessive and that Harris' collection of the fee violated Fed. R. Bankr. P. 1006(b)(3). An evidentiary hearing was held on May 14, 2004, and continued on November 15, 2004.

This court has jurisdiction over this Chapter 7 bankruptcy case under 28 U.S.C. §§ 1334 and 157 and the general order of reference entered in this district. The Motion is a contested matter and a core proceeding that this court may hear and determine under 28 U.S.C. § 157(b)(2)(A). This Memorandum of Decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this contested matter by Fed. R. Bankr. P. 9014 and 7052. Regardless of whether or not specifically referred to in this decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the Motion will be granted.

FINDINGS OF FACT

Charles and Amanda Winnick, Debtors in this case, filed a joint Chapter 7 petition on February 2,

¹ Harris has since passed a bar examination and has satisfied the requirements for admission to practice law in this court.

2004. Before filing, Debtors had contacted Harris in response to his ad in a newspaper

as a bankruptcy petition preparer. Harris informed them that his fee was \$450 to prepare a Chapter 7 petition and that an initial payment of \$250 was necessary in order for him to begin any work on the petition.

On January 22, 2004, Amanda Winnick met with Harris at an office in Tiffin, Ohio,² at which time she provided information for preparation of the petition and made the initial \$250 payment. On or about January 29, 2004, Debtors informed Harris of garnishment proceedings against them and that they were unable to pay the full amount of the court's filing fee at that time. Harris then provided them with a "bare bones" Chapter 7 petition together with an Application to Pay Filing Fee in Installments ("Application"), both of which were filed on February 2, 2004.

Debtors signed the Application and certified that they "[had] not paid any money or transferred any property to an attorney for services in connection with this case and that [they would] neither make any payment nor transfer any property for services in connection with this case until the filing fee is paid in full." Harris also signed the Application, certifying that he was a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that he prepared the document for compensation, and that he provided debtors with a copy of the document.³ The Application set forth a proposed schedule of four installment payments, and the court granted the Application. Debtors made timely installment payments with the final payment being made on February 23, 2004.

On February 12, 2004, before Debtors made their final installment payment on their filing fee, Charles Winnick returned to Harris' office. Mr. Winnick had recently received his income tax refund and paid the balance owed to Harris. According to Harris, Winnick told him at that time that he had "paid the court." Harris then released to Debtors the remaining documents that he had typed for them, including their bankruptcy schedules and Statement of Financial Affairs, as well as a Disclosure of Compensation of Bankruptcy Petition Preparer ("Disclosure of Compensation"). Both the Statement of Financial Affairs and the Disclosure of Compensation indicate that Debtors paid Harris \$450 for document preparation services.

² Harris has offices in both Sandusky and Tiffin, Ohio.

³ Harris testified that he was not aware at that time that Official Bankruptcy Form 3 (Application to Pay Filing Fee in Installments) had been amended in December, 2003, to include the following language in the bankruptcy petition preparers' certification: "I also certify that I will not accept money or any other property from the debtor before the filing fee is paid in full." And he did not include that language in the Application filed by Debtors.

In support of his fee, Harris testified that preparation of the documents by him was not a simple process and required meeting with Debtors several times. However, Debtors' bankruptcy

schedules show no real property, personal property totaling only \$4,503, one secured debt of \$1,200 and four unsecured creditors with such debt totaling only \$6,607.86. Most of the questions in Debtors' Statement of Financial Affairs are answered by checking the box for "none." Harris also testified that his overhead includes offices in Tiffin and Sandusky as well as being available for appointments in debtors' homes.

LAW AND ANALYSIS

Section 110 of the Bankruptcy Code provides a mechanism for court oversight of bankruptcy petition preparers in an attempt to "address the growing problem of bankruptcy [petition] preparers who abuse the system in the course of preparing documents for the debtors to file." *In re Alexander*, 284 B.R. 626, 630 (Bankr. N.D. Ohio 2002) (quoting 2 Lawrence P. King, *Collier on Bankruptcy* ¶ 110.LH (15th ed. 2001). There is no dispute that, at the time Debtors' petition was prepared, Harris was a non-attorney bankruptcy petition preparer as defined in 11 U.S.C. § 110(a)(1).⁴ With respect to a bankruptcy petition preparers' fees, § 110 authorizes the court to "disallow and order the immediate turnover to the bankruptcy trustee of any fee . . . found to be in excess of the value of services rendered for the documents prepared." 11 U.S.C. § 110(h)(2). Section 110(h)(2) also provides that an individual debtor may, under 11 U.S.C. § 522(b), exempt any funds so recovered. "[T]he person seeking fees has the burden of establishing that he or she is entitled to them once a question regarding their reasonableness has been raised." *Id.* at 634 (quoting *In re Kathy Froehlich*, 23 Fed. Appx. 572, 574, 2001 WL 1530594 (7th Cir. 2001).

This court addressed the reasonableness of fees charged by Harris in two previous cases. *See Alexander*, 284 B.R. 626; *In re Haney*, 284 B.R. 841 (Bankr. N.D. Ohio 2002). Although such determinations must be made on a case by case basis, *see Alexander*, 284 B.R. at 636, these cases are for the most part indistinguishable from this case. In *Alexander* and *Haney*, the court considered, as a starting point, the services that a bankruptcy petition preparer is legally permitted to provide. The court concluded that, given the Ohio Supreme Court's expansive definition of what constitutes the unauthorized practice of

⁴ "Bankruptcy petition preparer" is defined to mean "a person, other than an attorney or an employee of an attorney, who prepares for compensation a document for filing." 11 U.S.C. § 110(a)(1). "Document for filing" means "a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title." 11 U.S.C. § 110(a)(2).

law, such services are “limited to providing forms, providing limited information such as court location and filing fees, typing documents from information provided by debtors, compiling them in proper order and providing duplication services.” *Id.* at 635; *Haney*, 284

B.R. at 851. After considering, among other things, the range of fees (\$450 - \$925) charged by attorneys representing debtors in Chapter 7 cases in this court and the fact that such fees include significant services that a petition preparer cannot provide under either Ohio law or the Bankruptcy Code, such as counseling, legal strategy and analysis, exemption analysis and selection, contact with creditors, contact with the trustee, and appearance at the first meeting of creditors, the court found that the maximum value of the permitted services provided by Harris was \$200. In both *Alexander* and *Haney*, the schedules and statement of affairs showed the cases to be “the essence of routine,” as debtors had no real property, limited personal property, and debts that were not unusual in kind or number, and Harris offered no evidence supporting a fee greater than \$200. *Alexander*, 284 B.R. at 637; *Haney*, 284 B.R. at 853.

Similarly, in this case, Debtors’ schedules and statement of affairs show the case to be nothing but routine, reporting no real property, personal property totaling only \$4,503 and only five creditors with total debt of approximately \$7,800. In support of his \$450 fee, Harris offered evidence of his monthly overhead expenses, which includes \$972 per month in advertisement costs and office rent of \$420 per month, in addition to unspecified costs for the use of a 1-800 telephone service, office cleaning, landscaping, secretarial and accounting costs, and travel. The court finds that such expenses are irrelevant and do not support a finding that the value of the actual service provided by Harris to Debtors exceeds \$200. Section 110 is essentially a consumer protection statute. *Scott v. United States Trustee (In re Doser)*, 292 B.R. 652, 656 (D. Idaho 2003); *In re Gutierrez*, 248 B.R. 287, 297 (Bankr. W.D. Tex. 2000). The fee standard of § 110(h)(2) focuses on the nature and value of the typing services to debtors, not on the needs and overhead of the petition preparer in providing such services.

Harris also argues that his fee is not excessive in light of the fact that he had to meet with Debtors several times because they did not understand the bankruptcy forms. However, while Harris may provide the forms to Debtors and complete the forms from information supplied by them, he is not permitted to instruct them as to the meaning of the language or questions in the forms or advise or counsel them regarding the forms. He is entitled to compensation only for the services that he is legally permitted to perform.

Finally, Harris argues that he has collected fees of between \$450 to \$550 in other bankruptcy cases that have not been challenged by the UST. This argument has no merit. The facts and record in those cases are not before the court and cannot provide a basis upon which the court can make a determination in this case. *See Alexander*, 284 B.R. at 636 (rejecting a similar argument). The court finds no evidence in the record supporting a determination that the value of the services rendered by Harris to Debtors is greater than \$200.

While this court found in *Alexander* and *Haney* that \$200 represents the maximum value of a bankruptcy petition preparers' services for a routine Chapter 7 petition absent some factor adding additional value, in both those cases the court also found that the debtors received value from Harris' services in that the petition and schedules were complete and accurate and they ultimately received a discharge. By contrast, in this case, Debtors' schedules were not complete and they have not yet received a discharge. Debtors received and apparently spent their 2003 income tax refund after their petition was filed but they had failed to list the refund as an asset of the bankruptcy estate, notwithstanding the fact that they told Harris at their first meeting that they would be receiving the refund. As a result, the Chapter 7 Trustee filed an adversary complaint objecting to their discharge because they failed to turnover the tax refunds as property of the estate to the Chapter 7 Trustee. [*See Adv. Pro. No. 04-3105*]. Debtors have since obtained counsel. Although a stipulation has been filed in the adversary proceeding wherein the Chapter 7 Trustee agrees that Debtors will be entitled to a discharge if they repay to the Trustee the nonexempt portion of the refund by way of monthly payments, the last of which is due April 15, 2005, it remains to be seen whether Debtors will receive their discharge. And if Debtors do not receive a discharge in this case, their scheduled debts will never be subject to discharge under 11 U.S.C. § 523(a)(10). In this case, Debtors have received no or at best minimal value from the services rendered due to the failure to schedule the tax refund, justifying disgorgement of the fees paid to Harris.

Nevertheless, even if Debtors received some value from Harris' services, the UST requests disgorgement of the entire fee collected by him in light of Harris' violation of Fed. R. Bankr. P. 1006(b)(3). That rule provides as follows: "The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney *or any other person* who renders services to the debtor in connection with the case." Fed. R. Bankr. P. 1006(b)(3)(emphasis added).

There is no question that Harris knew the filing fee was not yet paid when he accepted the initial \$250 fee at his first meeting with Debtors. He then accepted payment of the balance of his fee on February 12, 2004, notwithstanding the fact that he had prepared the Application to Pay Filing Fee in Installments. Debtors' final installment payment of their filing fee was not paid until February 23, 2004, as set forth in the Application. Harris' clear violation of Rule 1006(b)(3) is an alternative

grounds for disgorgement of fees. *See In re Castorena*, 270 B.R. 504, 517 (Bankr. D. Idaho 2001); *In re Campanella*, 207 B.R. 435, 450 (Bankr. E.D. Pa. 1997); *In re Ali*, 230 B.R. 477, 483 (Bankr. E.D.N.Y. 1999). Based on the evidence, the court finds that Harris should be required to disgorge the entire fee received from Debtors in this case. *See Foulston v. Jones (In re Robinson)*, 162 B.R. 319, 326 (Bankr. D. Kan. 1993) (finding requirement to disgorge all fees was supported by defendants' actions in assisting the debtors in preparing applications to pay their filing fees in installments in violation of Rule 1006(b)(3)).

CONCLUSION

Based on the foregoing reasons and authorities, the court will grant the Motion and order Harris to turnover any fees collected from Debtors in this case. The fees must be turned over to the Chapter 7 panel trustee Patricia A. Kovacs with Debtors then being given time to claim an exemption in the amount turned over. A separate judgment and order in accordance with this Memorandum of Decision will be entered by the clerk.

Mary Ann Whipple
United States Bankruptcy Judge