UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 13
	)	
	)	
ROSCO EUGENE FAIRCHILD,	)	CASE NO. 05-63238
	)	
Debtor.	)	JUDGE RUSS KENDIG
	)	
	)	
	)	**MEMORANDUM OF DECISION**
	)	

This matter is before the court upon a motion by Toby Rosen, the Chapter 13 trustee ("Trustee"), for sanctions against debtor's attorney and debtor's attorney's motion to pay attorney compensation. For reasons that follow, the Trustee's motion is **DENIED** and debtor's attorney's motion is **GRANTED IN PART** and **DENIED IN PART**.

I. JURISDICTION AND VENUE

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1408.

II. BACKGROUND

Rosco Eugene Fairchild ("Debtor") has filed two Chapter 13 bankruptcy petitions in this court in one year. Debtor's attorney of record in both cases is Deborah Mack ("Mack"). A brief review of each case is necessary to identify the reasons for the court's decision.

A. Debtor's Previous Case – 05-60023

Debtor's first case was filed on January 4, 2005, and the confirmation hearing was scheduled for March 9, 2005. Debtor disclosed an interest in his residence and valued the property at $65,000. The residence is subject to a first mortgage of $71,110 and a second mortgage of $13,782, and CitiFinancial holds both mortgages. The proposed Chapter 13 plan provided monthly payments of $1,054 by wage withholding and payment of the first mortgage

from Chapter 13 plan funds. The second mortgage was to be avoided and paid as an unsecured claim. The Trustee obtained an appraisal of Debtor's residence and the appraisal was filed on February 7, 2005.[1] The residence appraised at $89,900 based upon the characteristics of the home and the local economy. See case 05-60023, Dkt. #11.

On February 10, 2005, CitiFinancial objected to Debtor's proposed plan based upon the value of Debtor's residence. CitiFinancial argued that Debtor was required to pay the second mortgage in full because it was at least partially secured, and could not avoid or cram down the mortgage through the confirmation process. In support of its objection CitiFinancial attached an appraisal which valued Debtor's residence at $90,000. See case 05-60023, Dkt. #15. The Trustee also objected to confirmation based upon feasibility of the proposed plan.

Neither Debtor nor Mack appeared for the confirmation hearing on March 9, 2005. The court sustained both objections and entered an order which allowed Debtor twenty days to file an amended plan addressing both objections. Debtor failed to file an amended Chapter 13 plan and the case was dismissed on April 6, 2005. Because Debtor's plan was never confirmed, the Trustee did not make any distributions to creditors. The Trustee's final report and account indicates that $2,781.62 was refunded to Debtor when the case was closed.

B. Debtor's Current Case – 05-63238

Debtor filed the present case on July 7, 2005. The schedules accompanying the petition are identical to those filed six months earlier, with the exception of minor changes to income and expenses on Schedules I and J, and apparent errors in the reporting of annual income for 2003 and 2004.[2] Debtor proposed a monthly payment of $1,110, the first mortgage paid inside the plan, and the second mortgage avoided and paid as unsecured. On June 17, 2005, the Trustee filed a Notice of Appraisal and attached a copy of the appraisal that had been performed previously. See case 05-63238, Dkt. #12. The meeting of creditors was held and concluded on July 11, 2005, and was attended by Debtor and Mack.

On July 25, 2005, Mack filed a Motion to Avoid Lien, stating that "the auditors (sic) appraisal states that the fair market value is $65,000.00." The motion did not contain any supporting documentation. CitiFinancial did not respond to the motion, and despite the lack of objection, Mack never submitted an order granting Debtor's motion to avoid the lien.

On November 29, 2005, the Trustee filed a motion for sanctions against Mack. The Trustee did not identify the relevant statute or rule under which sanctions were requested, but stated that sanctions should be imposed because of the "unreasonable delay and expense caused

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1 The Trustee routinely hires an appraiser to value real properties in Chapter 13 cases which propose less than one hundred percent payment to unsecured creditors. Debtor proposed a ten percent payment to unsecured creditors.

2 The Statement of Financial Affairs filed in case 05-60023 lists Debtor's annual income as $28,000 in 2002, $31,000 in 2003, and $30,680 in 2004. The Statement of Financial Affairs filed in case 05-63238 lists Debtor's 2004 income as $34,369 and 2003 income as $28,000.

by [Mack's] actions and omissions in relation to the case at hand and in the prior case." On November 30, 2005, Mack withdrew the motion to avoid lien and on December 12, 2005, she responded to the motion for sanctions and requested a hearing.

The court heard arguments from the Trustee and Mack on December 21, 2005 and again on January 18, 2006. The Trustee alleged that sanctions were appropriate under Rule 9011 due to the expense and delay thrust upon Debtor's unsecured creditors. The Trustee reasoned that if Mack had appeared at the confirmation hearing in the first case, issues regarding the second mortgage could have been handled expeditiously because appraisals filed in the docket and served upon Mack showed that the mortgage could not be avoided. Instead, even after the second case was filed, the motion to avoid the second mortgage languished unopposed for more than four months while Mack did nothing to prosecute the motion. At the time of the hearing in January, the Trustee was holding slightly more than $5,000 which had not been distributed to Debtor's unsecured creditors. The Trustee stated that Mack needed to file an amended plan and updated schedules of income and expenses in order for the plan to be confirmed.

Mack responded that she never filed an amended plan in Debtor's first case because Debtor failed to return phone calls and did not come into the office to sign a new plan. In the second case, Mack characterized her action in filing the motion to avoid lien as a "miscommunication." (Hearing record at 2:18:36). Mack stated that her notes from the first case indicated that the second mortgage could not be stripped. However, she filed the motion to avoid anyway, because she had notes from the Section 341 meeting in the second case that indicated that the Trustee was waiting on the second mortgage to be avoided. Mack admitted that she didn't know "why or what that meant and it just wasn't logical, but we did it because that was our understanding from the second 341." (Hearing record at 2:18:45). Mack theorized that that old estimate of the value of Debtor's residence "popped up," (Hearing record at 2:18:56), and this somehow contributed to her filing the motion to avoid the mortgage in the face of evidence proving that the mortgage was fully secured. Mack stated that she did not withdraw the motion to avoid because she was just waiting on the court to deny it. On January 20, 2006, Mack filed amended Schedules I and J and an amended plan on behalf of Debtor.

The Trustee asks this court to reduce Mack's fee to zero and to require Mack to pay two thousand five hundred dollars ($2,500) into Debtor's plan because of the unreasonable delay and expense caused by Mack's errors and omissions in both cases. After reviewing the relevant Bankruptcy Code and Rule provisions, this court concludes that sanctions in the form of a plan contribution from Mack cannot be imposed. However, due to the errors and omissions committed by Mack in this case, her fee shall be reduced.

III. DISCUSSION

A. Failure to Appear for Confirmation Hearing in Prior Case

Mack failed to appear for the confirmation hearing in case 05-60023 and provided neither explanation nor advance notice of her intent not to appear. The trustee does not seek sanctions based upon that failure, but such conduct can result in sanctions. Columbus Bar Assn. v. Ginther, 108 Ohio St.3d 48, 52 (Ohio 2006); Disciplinary Counsel v. Brown, 90 Ohio St.3d 273, 275 (Ohio 2000). While the court can consider the history of the prior case in evaluating the sanctionability of conduct in the present case, it cannot sanction Mack based upon the prior case conduct.

B. Federal Rule of Bankruptcy Procedure 9011

The Supreme Court has endorsed the federal courts' inherent authority to impose sanctions, including an award of attorney fees, against attorneys who appear before them. Chambers v. NASCO, Inc., 501 U.S. 32, 44-5 (1991). In addition to these inherent powers, the Bankruptcy Code and Federal Rules of Bankruptcy Procedure grant a bankruptcy court statutory authority to deny compensation and sanction conduct. Mapother & Mapother, P.S.C. v. Cooper (In re Downs), 103 F.3d 472, 479 (6th Cir. 1996); Knowles Bldg. Co. v. Zinni (In re Zinni, 261 B.R. 196, 203 (B.A.P. 6th Cir.). See also, Fed. R. Bankr. P. 9011. Bankruptcy Rule 9011 provides, in pertinent part:

> By presenting to the court (by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . .the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

Fed. R. Bankr. P. 9011(b)(3). The rule thus imposes a continuing duty on the moving party to dismiss or withdraw a pleading if he learns or has reason to learn that he will not be able to introduce evidence sufficient to support his burden. The test for imposing Rule 9011 sanctions is whether the attorney's conduct was reasonable under the circumstances. Hartleip v. McNeilab, Inc., 83 F.3d 767, 778 (6th Cir. 1996). The rule's language of "reasonable investigation" requires the attorney to inquire into the pleading's legal and factual bases before he presents it to the court, see Fed. R. Bankr. P. 9011(b)(2)-(3), and the attorney's actions must be objectively reasonable at the time they are taken. Silverman v. Mutual Trust Life Ins. Co. (In re Big Rapids Mall Assocs.), 98 F.3d 926, 930 (6th Cir. 1996). The inquiry focuses on whether a reasonable attorney in like circumstances would have believed his actions were factually or legally justified. See Cox v. Saunders, (In re Sargent), 136 F.3d 349, 352 (4th Cir. 1998). The motion does not

have to be successful, but at least well founded. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 553 (1991).

Signing or advocating a paper that violates the standards set forth in Rule 9011(b) may result in the imposition of sanctions, either upon motion of a party or on the court's own initiative. Fed. R. Bankr. P. 9011(c). In the case of sanctions sought by an opposing party, the rule provides a safe harbor for the offending party. The motion for sanctions must be made separately, must specifically describe the offending conduct, and must be served formally in accord with Rule 7004. Fed. R. Bankr. P. 9011(c)(1)(A). The motion may not be filed with the court unless the offending paper is not withdrawn or corrected within twenty-one days after service of the motion for sanctions. See Fed. R. Bankr. P. 9011(c)(1)(A). The moving party must prove, by way of evidence at a hearing or other facts in the record, that the requirements of safe harbor were met. If the unambiguous requirements of the statute are not met, the court may not award sanctions under Rule 9011(c)(1)(A). In re M.A.S. Realty Corp., 326 B.R. 31, 42 (Bankr. D. Mass. 2005).

There is no evidence before the court which indicates that the Trustee complied with the procedural requirements of Rule 9011(c)(1)(A). The motion was filed on November 29, 2005 without any supporting documentation. Even though the motion provides a timeline of asserted errors, it does not indicate that the Trustee served the motion on Mack in a manner sufficient to provide the safe harbor required by Rule 9011(c)(1)(A). Accordingly, the court may not impose the sanctions sought by the Trustee.

Procedural issues aside, however, Mack did not fulfill her obligations to her client. The appropriate response is a reduction in the fee that she will be paid for representing Debtor in this case.

C. Reasonable Compensation and Competent Representation

Section 329 governs compensation paid to a debtor's attorney, and requires the attorney to file a statement of compensation paid or agreed to be paid in connection with the bankruptcy case. See 11 U.S.C. § 329(a). If the compensation exceeds the reasonable value of services, the court may order the return of any excessive payment to the bankruptcy estate. 11 U.S.C. § 329(b). The court may not allow compensation for unnecessary duplication of services, for services not reasonably likely to benefit the debtor's estate, or for services that were not necessary to the administration of the case. 11 U.S.C. § 330(a)(4)(A). In a Chapter 13 case, reasonable compensation is based upon a consideration of the benefit and necessity of such services to the debtor. See 11 U.S.C. § 330(a)(4)(B).

In the present case, Mack filed a Disclosure of Compensation which revealed that she was not paid any fees in advance of filing the second case.[3] She now seeks fees of $1,250 by

[3] The Disclosure of Compensation filed in case 05-60023, however, reveals that Mack received $175 prior to filing Debtor's first Chapter 13 case. A side-by-side review of the schedules filed in both case reveals that they are identical except for 1) changes to income and expenses on Schedules I and J, and 2) the discrepancies in

way of a motion for compensation.[4] While the fee sought is within the presumptive fee range awarded for Chapter 13 cases filed in this court[5], a lesser fee will be awarded because Mack failed to fulfill her professional obligations to her client and to this court.

An attorney licensed under the laws of Ohio owes her clients the duty to adequately prepare for a legal matter entrusted to her, as set forth in Canon Six of the Code of Professional Responsibility (Ohio 2002). See Code of. Prof. Resp., EC-6-1, DR 6-101(A)(2). The counseling of a client in financial matters is a serious matter that deserves the attention of a qualified attorney. See Columbus Bar Assn. v. Flanagan, 77 Ohio St.3d 381, 383 (Ohio 1997). The Ohio Supreme Court has repeatedly stated that if an attorney cannot or will not give a legal matter the necessary attention she violates the disciplinary rules. See Flanagan, 77 Ohio St.3d at 383; Columbus Bar Assn. v. Foster, 92 Ohio St.3d 411, 412 (Ohio 2001) (violation of DR 6-101(A)(2) where attorney failed to timely file appropriate documents); Columbus Bar Assn. v. Brooks, 87 Ohio St.3d 344, 346 (Ohio 1999) (factually unsupported motion for summary judgment violated DR 6-101(A)(2)); Cuyahoga Cty. Bar Assn. v. Kelley, 105 Ohio St.3d 55, 56-7 (Ohio 2004) (disciplinary action appropriate where attorney mishandled clients' bankruptcy case to their detriment); Cleveland Bar Assn. v. Freeman, 95 Ohio St.3d 117, 119 (Ohio 2002) (disciplinary action appropriate where attorney failed to adequately prepare for a bankruptcy adversary proceeding).

DR 6-101 sets forth the fundamental principle that an attorney should act competently. "Competent representation of one's client is part of an attorney's ethical responsibility to his or her client; failure to act competently willfully *or* habitually, such as by the failure to use reasonable diligent and his or her best judgment and skill in the application of one's learning, is a breach of the attorney's fiduciary duty to the client." In re Wilde Horse Enterprises, Inc., 136 B.R. 830, 844 (Bankr. C.D. Cal. 1991) (emphasis in original). Moreover, incompetence impedes prompt administration of the bankruptcy estate and equitable distribution of assets. If services are incompetently performed and have no value, then such services cannot be compensated. In re Wilde Horse Enterprises, Inc., 136 B.R. 830, 844.

Mack represented Debtor in his previous case and, by her own admission at the hearing on December 21, knew that the value of Debtor's real property would not factually support a motion to avoid the second lien. In fact, she characterized filing the motion to avoid the lien as "illogical," something she did because the "old estimate popped up." The motion contained an assertion that the fair market value according to an auditor's appraisal was $65,000, but there was no supporting documentation attached to the motion. At the time Mack filed the motion, the

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reported 2003 and 2004 income identified in fn 2, *supra*. Therefore, though Mack did not receive any additional fee for filing the second petition, it was substantially the same information that was filed five months earlier.

4 The motion requests $1,250 in fees, and states only that "[t]he Chapter 13 plan was confirmed on February 16, 2006. We are requesting that the balance of Attorney fees of $1,250.00 be paid through the Chapter 13 plan because the trustee received requested documents." The motion seeks $1,250, while the Disclosure of Compensation filed with Debtor's second petition sought total compensation of $1,750.

5 See Administrative Order 04-02, Procedure for Allowance of Attorney Fees in Chapter Cases Filed on and After September 1, 2004.

in the Debtor's first case on February 7, 2005, and another filed in Debtor's second case on June 17, 2005. Mack also would have received Citifinancial's objection to confirmation in case 05-60023, and that objection was supported by an appraisal valuing the property at $90,000. Even if Mack could support the motion based upon the county auditor's records, she did not do so. She simply abandoned the motion while the case ground on and Debtor's payments piled up, all to the detriment of others. After the motion was filed, Mack did nothing for four months, prompting the Chapter 13 trustee to file a motion for sanctions and a motion to deny for lack of prosecution. Therefore, valueless services were provided and the administration of Debtor's case has been unnecessarily delayed. Mack should not be compensated for valueless services provided value to Debtor.

Other courts have disallowed all fees when an attorney provided less than competent representation. See In re Damon, 40 B.R. 367, 376-8 (Bankr. S.D.N.Y. (1984) (no fee allowed where attorney violated ethical standards and breached fiduciary duties) ; In re LaFrance, 311 B.R. 1, 25 (Bankr. D. Mass. 2004) (no fee where service was provided poorly or not at all, regardless of the validity of the excuse offered). Denial of all fees is not appropriate in this case, because Debtor's plan was eventually confirmed. Nonetheless, Mack carelessly handled matters critical to confirmation of Debtor's plan[6] and neglected the improperly filed motion for four months. Certain tasks recur with frequency in bankruptcy, but that frequency does not give the attorney a license to be careless or inattentive to her client's case. As another court aptly stated, "the legal process is not, as defined by Ambrose Bierce, a meatgrinder with the lawyer turning the handle." In re Damon, 40 B.R. 367, 378.

Accordingly, Mack is granted reduced compensation of $625.00, to be paid from the proceeds of Debtor's Chapter 13 plan.

An appropriate order shall enter.

/s/ Russ Kendig MAR 3 0 2006

U.S. Bankruptcy Judge
Russ Kendig

[6] In addition to filing the improper motion to avoid lien in case 05-63283, Mack failed to appear for the confirmation hearing in case 05-60023.

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