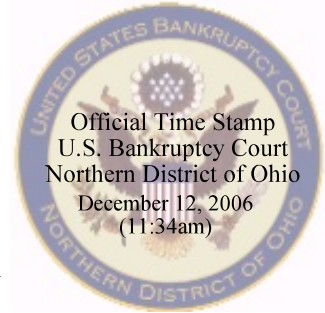


THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 05-19361  
 )  
ARTHUR BOYD, JR., ) Chapter 7  
 )  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **MEMORANDUM OF OPINION**

The chapter 7 trustee Mary Ann Rabin objected to proofs of claim 6 and 9 filed by Edward Rhodes, Jr.<sup>1</sup> Mr. Rhodes responded to the objection<sup>2</sup> and filed proofs of claim 10 and 11 as amendments. For the reasons stated below, claim 10 is disallowed and claim 11 is allowed.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

**BACKGROUND**

On June 28, 2005, creditors filed an involuntary chapter 7 case against Arthur Boyd. After notice and a hearing, the court entered an order on August 4, 2005, granting relief against the debtor.

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<sup>1</sup> Docket 146.

<sup>2</sup> Docket 157.

At the time the bankruptcy case was filed, Arthur Boyd had a lawsuit pending in state court against First Merit Bank, among others. He had hired Edward Rhodes to assist with the litigation as a banking consultant. The proofs of claim filed by Edward Rhodes relate to consulting services he provided to the debtor both prepetition and postpetition at a rate of \$500.00 per hour. These are the claims:

Claim 6 (filed March 10, 2006) - \$1,266,747.00 for services rendered from January 2004 to December 31, 2005

Claim 9 (Amends claim 6; filed July 21, 2006) - \$1,506,747.00 for services rendered from January 2004 to June 30, 2006

Claim 10 (Amends claim 9; filed October 26, 2006) - \$946,747.00 for services rendered from January 2004 through August 4, 2005

Claim 11 (Also amends claim 9; filed October 26, 2006) - \$866,747.00 for services rendered from January 2004 through June 28, 2005

The court held an evidentiary hearing on the claims objection on December 1, 2006. At that time, Mr. Rhodes clarified two points: (1) he acknowledged that he was not retained as a professional by the chapter 7 trustee and so cannot recover for services rendered after August 4, 2005;<sup>3</sup> and (2) he is pursuing only these claims: \$866,747.00 for services rendered from January 2004 through June 28, 2005<sup>4</sup> and an additional \$80,000.00 for services rendered during the so-called “gap period” between June 28, 2005 (when the involuntary petition was filed) and August 4, 2005 (when the court granted chapter 7 relief).<sup>5</sup>

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<sup>3</sup> See 11 U.S.C. §§ 327, 330.

<sup>4</sup> This is stated in claim 11.

<sup>5</sup> This is what Mr. Rhodes intended when he filed claim 10. In other words, he means claim 10 to be for the difference between the \$946,747.00 stated as the claim in 10 and the \$866,747.00 stated in claim 11, for a gap claim of \$80,000.00.

### **THE POSITIONS OF THE PARTIES**

The trustee objects to the claims on the grounds that (1) Mr. Rhodes did not have a written employment contract with the debtor; (2) the claims are for an extraordinary number of hours and are not supported by a detail of the work performed or the results achieved; (3) the \$500.00 per hour rate claimed is excessive; (4) the debtor did not make any payments against the invoices; and (5) certain of the work performed cannot be compensated because it constituted the unauthorized practice of law.

Mr. Rhodes contends that (1) he does not need a written contract to prove his claims; (2) he worked all of the hours claimed; (3) he did not engage in the unauthorized practice of law but only revised and typed certain legal documents to assist the debtor, (4) the debtor did not pay any invoices because payment was only due out of recovery from the state court lawsuit; and (5) the \$500.00 an hour is the going rate for similar services in the Washington, D.C. area where he lives.<sup>6</sup>

### **THE BURDEN OF PROOF**

A proof of claim is deemed allowed unless a party in interest objects to it. 11 U.S.C. § 502(a). The chapter 7 trustee is a party in interest with standing to object. 11 U.S.C. § 704(a)(5). On objection, a proof of claim filed in accordance with the bankruptcy rules is prima facie evidence that the claim is valid and in the amount stated. *See* FED. R. BANKR. P. 3001(f). The objecting party must produce evidence which rebuts the prima facie validity of the claim. *See In re Kemmer*, 315 B.R. 706, 713 (Bankr. E.D. Tenn. 2004). If the objector rebuts the

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<sup>6</sup> He also argued that by questioning his claims, the trustee was slandering him for her own purposes, a contention that is irrelevant to the claims issue and will not be addressed further in this opinion.

validity of the claim, the burden reverts to the claimant to prove his claim by a preponderance of the evidence. *Id. Compare Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15 (2000) (holding that when the substantive law creating a tax obligation puts the burden of proof on the taxpayer, the burden of proof remains with the taxpayer in the proof of claim context).

### **FACTS AND DISCUSSION**

The proofs of claim filed by Edward Rhodes were timely filed, filled out in full on the appropriate official form, and had a summary of hours attached. *See* FED. R. BANKR. P. 3001(a) (regarding form and content of a proof of claim). They are, therefore, prima facie evidence that the claims are valid and in the amount stated. FED. R. BANKR. P. 3001(f). The burden then shifted to the trustee to rebut the prima facie case.

The trustee elicited this testimony: Mr. Rhodes did not have a written agreement with the debtor. They agreed verbally that Mr. Rhodes would serve as a consultant to the debtor on banking issues in the state court case at a rate of \$500.00 per hour. This is the going rate in Washington, D. C. for a consultant with Mr. Rhodes's education (B.A. University of Virginia; M.B.A. Columbia) and background (he had banking and regulatory experience). They agreed that Mr. Rhodes would be paid only out of any proceeds from the state court lawsuit.

Mr. Rhodes sent these statements to the debtor:

November 15, 2004 - For the period of January 1, 2004 through September 30, 2004

537 hours at \$500.00/hour = \$268,500.00

\$361.90 travel expenses

The invoice does not itemize the date of the services, the nature of the services, or the travel expenses incurred.

January 10, 2005 - For the period of January 1, 2004 through December 31, 2004

This adds the months of October, November, and December 2004 to the first bill and asks for an additional 315 hours at \$500.00/hour = \$157,500.00, as well as \$747.00 in travel expenses.

Again, the invoice does not itemize the date of the services, the nature of the services, or the travel expenses incurred.

April 12, 2005 - For the period January 1, 2004 through March 31, 2005

This adds the months of January, February, and March 2005 and lists an additional 340 hours at \$500/hour = \$170,000.00

Again, there is no itemization.

July 31, 2005 - For the period January 1, 2004 through June 30, 2005

This adds the months of April, May, and June 2005 and lists an additional 540 hours at \$500.00/hour = \$270,000.00.

Again, there is no itemization.<sup>7</sup>

There are three basic ways in which professionals bill for their time: flat fee, contingency fee, and hourly rate fee. In a flat fee contract, as the name suggests, the professional is paid an agreed-upon fee for identified work, regardless of the number of hours expended or the results achieved. When a professional is retained on a contingency fee basis, he receives an agreed-upon percentage of the amount recovered by the client. There is no need to keep detailed time records in either a flat fee or contingency fee situation because the fees are established in advance. The third alternative is the hourly rate arrangement, where the professional is paid an agreed-upon hourly rate for services to be rendered. The evidence in this case establishes that the debtor and Mr. Rhodes agreed that Mr. Rhodes would be paid on an hourly rate (\$500.00/hr.) for the work called for by the contract.

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<sup>7</sup> Mr. Rhodes's binder at I, Subsection C.

In an hourly fee contract, the professional keeps time records because those records establish the basis for the fee. Time records generally consist of contemporaneous entries stating the date, amount of time expended, and the service performed. The trustee proved here that Mr. Rhodes did not present records with this information, which rebuts the prima facie case. The burden then shifted back to Mr. Rhodes to prove the services rendered by a preponderance of the evidence, which he did in part.

To support the work done, Mr. Rhodes presented a binder of what he termed his work product.<sup>8</sup> The documents fall into three basic categories: (1) background information prepared by Mr. Rhodes to be used in the state court lawsuit, such as identification of documents to be requested from opposing parties and third parties and lines of inquiry for depositions; (2) an expert report prepared by Mr. Rhodes to be used in the state court lawsuit; and (3) legal documents prepared by Mr. Rhodes for the debtor at the latter's request, both at times when the debtor was represented by counsel and times when he was not. Additionally, Mr. Rhodes testified that he spent time reviewing a number of the debtor's records before he agreed to accept the engagement. And in Mr. Rhodes's response to the objection, he also stated that he "spent a substantial number of hours conversing with Dr. Boyd via telephone, as we talked virtually every day, and continue to do so, sometimes for several hours per day."<sup>9</sup>

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<sup>8</sup> Although Mr. Rhodes did not offer this binder into evidence, he clearly intended it to support his claim and the trustee did not object to it. The court has, therefore, considered it.

<sup>9</sup> Docket 157, affidavit at 1 "Background."

The only specific objection made by the trustee is to the work performed from July 1, 2005 through August 1, 2005, which is the subject of claim 10.<sup>10</sup> The trustee objects that the work done during this time is outside the scope of the engagement. Specifically, the trustee argues that the documents presented to support the time spent are not within the purview of a banking consultant's assignment, but are instead legal documents that Mr. Rhodes should not have been preparing as a non-lawyer. These are the documents presented by Mr. Rhodes on this issue:

- (1) Answer and Counterclaim to Involuntary Petition (dated 7/14/05);
- (2) Motion to Dismiss Involuntary Petition Chapter 7 (undated);
- (3) Answer and Counterclaim to Involuntary Petition (dated 7/15/5) for Arthur Boyd's signature as a pro se debtor;
- (4) Motion to Compel Deposition [of representatives from First Merit Bank] (dated 7/26/05), for signature of Donald Murphy, as co-counsel for Arthur Boyd;
- (5) Motion to Compel Discovery (dated 8/1/05), again for attorney Murphy's signature, as co-counsel.

These documents raise a number of disturbing questions. They are drafted as documents intended for filing either in state court or in the bankruptcy court, they are purely legal documents, one of them is drafted for the debtor's signature when he is listed as proceeding pro se, and—perhaps most troubling of all—one of them is drafted for signature by an attorney who was supposed to be representing the debtor. Mr. Rhodes's explanation was that the debtor did rough drafts of these documents and sent them to Mr. Rhodes, who “cleaned up the language” and put them into the right format since the debtor is not skilled with computers. He described

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<sup>10</sup> Mr. Rhodes's binder at II, Subsection A.

his work on these documents as essentially secretarial. For purposes of this opinion only, the court accepts Mr. Rhodes's description of this work. The court finds, however, that he did not have a contract with the debtor to do secretarial work and that in any event secretarial work would not reasonably be compensated at anywhere near \$500.00 an hour. The time devoted to creating these documents is, therefore, disallowed. As this is the only support provided for the \$80,000.00 gap period claim, claim 10 is disallowed.

The court also notes that Mr. Rhodes testified that he continues to be in close contact with the debtor about this case. The banking issues that led the debtor to retain Mr. Rhodes have been resolved with the compromise of the state court litigation. In light of that, the court puts both Mr. Rhodes and the debtor on notice that, as a non-lawyer, Mr. Rhodes is not to advise the debtor as to the manner in which he should participate in his bankruptcy case.<sup>11</sup>

The trustee's objections to claim 11 are less specific. She testified that Mr. Rhodes's hourly rate is excessive by Cleveland area standards. She did not, however, present any evidence as to whether the rate is excessive in the Washington, D.C. area. The trustee also questioned whether it was reasonable for Mr. Rhodes to spend so many hours on a case that ultimately did not prove to have significant value. The court agrees that it is puzzling why Mr. Rhodes would

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<sup>11</sup> For example, Mr. Rhodes made this statement: "It is unconscionable that the Trustee has called for a hearing to judge the validity of my Creditor status yet refused to call for a hearing to examine the blatantly criminal actions of Petitioner/convicted felon Larry Jones and Compromise Party First Merit Bank that led to the filing of this Involuntary Case." *See* letter from Mr. Rhodes to court offered in support of his claim, dated November 27, 2006 at docket 160. This statement is identical to statements repeatedly made by the debtor. As a banking consultant, Mr. Rhodes is supposed to serve as an expert on banking issues, not legal issues. He may represent his own interest as a creditor, but he may not represent the debtor's interest or provide legal advice to the debtor without running afoul of the prohibition on the unauthorized practice of law.



commit so much time to this matter and why the debtor would not have provided parameters for the amount of work to be done. Nevertheless, that is not the legal issue. The trustee concedes that Mr. Rhodes did spend the time incurred and moreover, the trustee did not present evidence as to what *would* have been a reasonable number of hours. Those objections are, therefore, overruled and claim 11 is allowed as filed.

In sum, the court finds that Mr. Rhodes and the debtor had a verbal contract under which Mr. Rhodes was to provide consulting services on banking issues in connection with state court litigation. The court finds further that the parties agreed to an hourly rate of \$500.00 an hour and that Mr. Rhodes would be paid only if the state court lawsuit resulted in recovery in favor of the debtor. The trustee has now settled that lawsuit, which is the equivalent of a recovery in favor of the debtor, although the proceeds belong to the chapter 7 estate. Mr. Rhodes is, therefore, entitled to participate in any dividend payable from those proceeds in the amount allowed in this memorandum of opinion.

### **CONCLUSION**

For the reasons stated, the trustee's objection to claim 10 is sustained and the claim for amounts related to the gap period is disallowed. The trustee's objection to claim 11 is overruled and claim 11 is allowed as filed. The court will enter a separate order reflecting this decision.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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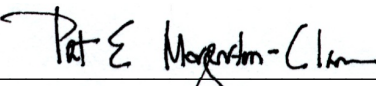
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In re: ) Case No. 05-19361  
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ARTHUR BOYD, JR., ) Chapter 7  
 )  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the chapter 7 trustee's objection to claim no. 10 filed by Edward Rhodes, Jr. is sustained and the claim is disallowed. The trustee's objection to claim no. 11 filed by Mr. Rhodes is overruled and claim no. 11 is allowed as filed.

IT IS SO ORDERED.

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge