

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 05-20361
)
RHONDA L. DUKES and) Chapter 13
RODNEY J. DUKES, SR.,)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**
) (NOT FOR COMMERCIAL PUBLICATION)

The chapter 13 trustee filed an amended motion under 11 U.S.C. § 329(b) for an order requiring Cynthia Smith, the debtors' counsel, to disgorge \$500.00 of her \$1,200.00 fee. The crux of the motion is that counsel (1) failed to carry out her responsibilities diligently, thus making the fee charged excessive; and (2) did not fully disclose her compensation. Counsel objected and the court held an evidentiary hearing.¹ For the reasons stated below, the motion is denied in part and granted in part.

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)(A).²

¹ Docket 94, 96, 98.

² In the court's view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

APPLICABLE LAW³

The bankruptcy code and the bankruptcy rules have provisions regulating fees that are paid to professionals. *See* 11 U.S.C. §§ 329, 330; FED. R. BANKR. P. 2016, 2017. These provisions “are designed to protect both creditors and the debtor against overreaching attorneys.” *Henderson v. Kisseberth (In re Kisseberth)*, 273 F.3d 714, 721 (6th Cir. 2001). Two major themes underlying the provisions are that all fee arrangements must be disclosed and any fees awarded must be reasonable. With respect to disclosure, an attorney representing a debtor is required to disclose the amount of compensation paid, or to be paid, within 15 days after the petition is filed. 11 U.S.C. § 329(a); FED. R. BANKR. P. 2016(b). The code provides further that:

If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive. . . .

11 U.S.C. § 329(b); *see also* FED. R. BANKR. P. 2017(a). Courts have broad discretion to deny all compensation to an attorney who fails to disclose fees. *In re Kisseberth*, 273 F.3d at 718–19. Where disclosure is accurate, a court may still reduce the compensation awarded if the amount charged is excessive given the services rendered. *See, for example, Thomas v. Robinson (In re Robinson)*, 189 F. App’x 371 (6th Cir. 2006).

THE POSITIONS OF THE PARTIES

The chapter 13 trustee argues that Attorney Cynthia Smith repeatedly failed to take timely actions to represent the debtors. Specifically, he raises Attorney Smith’s failure to submit a proposed order reinstating the case after the debtors’ motion to reinstate was granted, twice.

³ The debtors’ bankruptcy case was filed before October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The citations, therefore, are to the bankruptcy code as it existed before that date.

The trustee contends that the debtors ultimately filed a second case with new counsel and had to pay additional legal fees, showing that they were harmed by the omission. He also contends that Attorney Smith received \$400.00 more from the debtors than she disclosed.

Attorney Smith responds that the debtors did not cooperate, changed their minds, and gave her conflicting instructions, and that these problems explain why she represented them in the manner that she did. She also argues that she submitted the proposed order as required, but the submission was unsuccessful because she sent it to an incorrect email address. Finally, Attorney Smith denies receiving more fees than she disclosed.

FACTS

I.

The court held an evidentiary hearing on June 7, 2007. The chapter 13 trustee presented his case through exhibits and cross-examination. Attorney Smith presented her case through the testimony of Leroy Armstrong, one of her employees.

The following findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witness. "In doing so, the Court considered the witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference

to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.’

United States v. Trogdon (In re Trogdon), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990)

(discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

II.

The debtors retained Attorney Cynthia Smith to represent them in their bankruptcy filing. Attorney Smith filed their chapter 13 case on July 15, 2005. That same day, she filed a disclosure of compensation under bankruptcy rule 2016(b) stating that she received \$1,200.00 prepetition from the debtors as payment in full of her fees.⁴ Administrative Order 03-6, applicable to cases filed in Cleveland during this time period, governs the award of fees to counsel for chapter 13 debtors. The order requires an attorney filing a chapter 13 case to file an executed copy of the Rights and Responsibilities of Chapter 13 Debtors and their Attorneys⁵ when the petition is filed. If the Rights and Responsibilities is filed, and if the fee arrangement calls for the debtor to pay \$1,200.00 or less, then fees may be awarded in the confirmation order without filing a fee application. If the executed copy is not filed, fees are only awarded on formal application under bankruptcy rule 2016(a) and the court’s guidelines. *Id.* ¶ 2. Attorney Smith did not timely file the Rights and Responsibilities.

Each chapter 13 debtor must also file a chapter 13 plan, statements, and schedules within fifteen days after the case is filed. *See* FED. R. BANKR. P. 1007(c) and 3015(b). When these debtors did not do so, the court issued an order on counsel to appear and show cause regarding

⁴ Docket 2.

⁵ This document is attached to Administrative Order 03-6.

the failure.⁶ The documents were still not filed at the time of the show cause hearing and the court adjourned the hearing to permit counsel additional time to address the issue. The documents were then filed and the court concluded the show cause order.⁷

A confirmation hearing was held on October 11, 2005. The debtors had not provided all required information and had not resolved objections to confirmation, so the court adjourned the hearing to October 25, 2005. Attorney Smith did not appear at the adjourned hearing,⁸ the problems remained, and the court dismissed the case for lack of prosecution. This bench ruling was memorialized in an order entered November 14, 2005.⁹

To facilitate the administration of chapter 13 cases, the bankruptcy judges in Cleveland permit debtors to file motions to reinstate cases that have been dismissed if the motion is filed within 30 days after dismissal and the issues that resulted in dismissal have been addressed.¹⁰ Using this procedure, on November 24, 2005, Attorney Smith filed a motion to reinstate.¹¹ On November 28, 2005, the clerk's office sent Attorney Smith a standard deficiency notice advising her that the motion and hearing notice had to be served on all creditors.¹² Counsel did not address the deficiency.

⁶ Docket 6.

⁷ Docket 11, 12, and 13.

⁸ Chapter 13 Trustee exh. 2 ¶ 2.

⁹ Docket 41.

¹⁰ See Memorandum from Judge Pat E. Morgenstern-Clarren to All Chapter 13 Practitioners (July 16, 1996), *available at* www.ohnb.uscourts.gov.

¹¹ Docket 43.

¹² Docket 46.

On December 16, 2005, Attorney Smith filed a document titled Motion for Emergency Hearing on Debtors['] Motion to Reinstate Chapter 13 Case, without Proper Service.¹³ The clerk's office again sent a deficiency notice, referring counsel to the earlier deficiency and advising that corrective action had to be taken to serve the motion on all creditors.¹⁴ Counsel did not respond. The chapter 13 trustee's office objected to the motion and provided written notice to creditors that a hearing would be held on January 17, 2006.¹⁵ At that hearing, the court overruled the objection and granted the motion.¹⁶ Attorney Smith was aware that it was her responsibility to email a proposed order to the court on this routine motion. She did not, however, do so.

On March 31, 2006, the chapter 13 trustee moved to vacate the bench ruling, pointing out that debtors' counsel had not submitted a proposed order and the case was in limbo.¹⁷ Because Attorney Smith did not file anything in opposition, the motion was granted without a hearing.¹⁸

On April 27, 2006, Attorney Smith filed another motion to reinstate the case and vacate the order of dismissal.¹⁹ At the May 16, 2006 hearing, the court granted that motion, as amended.²⁰ Confirmation was scheduled to be held on June 27, 2006. As of that date, however,

¹³ Docket 48.

¹⁴ Docket 51.

¹⁵ Docket 52, 53.

¹⁶ Docket entry for 1/17/06.

¹⁷ Docket 54.

¹⁸ Docket entry for 4/25/06.

¹⁹ Docket 59.

²⁰ Docket entry for 5/16/06.

counsel still had not appropriately submitted a proposed order, the case had not been reinstated, and the court found the confirmation issue to be moot because a confirmation hearing cannot be held on a dismissed case.²¹

On August 17, 2006, the chapter 13 trustee filed a motion to disgorge fees, stating that Attorney Smith had not filed the Rights and Responsibilities and that she should, therefore, be required to file a fee application or disgorge her fees.²² Attorney Smith responded by filing a Rights and Responsibilities that was signed by Rhonda Dukes, only, and not by Rodney Dukes.²³ At the hearing, the trustee withdrew his motion.

On September 19, 2006, with an order reinstating the case still not on the docket, the trustee moved to vacate the May 16, 2006 bench ruling reinstating the case.²⁴ Attorney Smith did not file anything in opposition to the motion. On October 24, 2006, the motion was partly held and adjourned to November 7, 2006. By the time of the adjourned hearing, it had been about fourteen months since the case was filed, about ten months since the case had been dismissed, and about eight months since the court granted the first motion to reinstate from the bench. Despite this time lag, Attorney Smith still had not properly submitted an order reflecting the bench ruling reinstating the case. Additionally, no plan had been confirmed and no creditor had been paid. The court, therefore, granted the unopposed motion to vacate the bench ruling that had reinstated the case for the second time.²⁵

²¹ Docket entry to 6/27/06.

²² Docket 68.

²³ Docket 72.

²⁴ Docket 75.

²⁵ Docket 77.

The debtors filed another chapter 13 case on December 26, 2006 through different counsel.²⁶ On January 18, 2007, the trustee filed a motion to disgorge fees. It is that motion, as amended, that is at issue here.

DISCUSSION

I. Did Attorney Smith Fully Disclose Her Fee?

There was no evidence presented that Attorney Smith received more than the \$1,200.00 that she disclosed in her rule 2016 statement. That part of the trustee's motion is, therefore, denied.

II. Is the \$1,200.00 Fee Excessive?

Administrative Order 03-6 provides debtor's counsel with two basic options: (1) enter into and timely file with the court the Rights and Responsibilities, and be awarded fees as provided in that document without the necessity of filing a formal fee application; or (2) file a fee application under the traditional lodestar format. *See Boddy v. United States Bankruptcy Court (In re Boddy)*, 950 F.2d 334 (6th Cir. 1991). The fact pattern at hand is a hybrid of those alternatives. Attorney Smith filed, albeit untimely, a Rights and Responsibilities signed by only one of the two debtors. She did not file a fee application. Neither did she provide detailed billing information at the evidentiary hearing. The chapter 13 trustee now asks that she be required to disgorge \$500.00 of the fees received on the ground that the services rendered do not warrant a \$1,200.00 fee.

The evidence presented at the hearing was that paralegal Leroy Armstrong spent considerable time on the phone with both debtors, separately and together, and that the debtors at times gave conflicting information and instructions to Mr. Armstrong and Attorney Smith. Mr.

²⁶ Case no. 06-16479.

Armstrong also testified that he tried to submit the proposed order granting the first motion to reinstate, but sent it to the wrong email address more than once and then had problems with Attorney Smith's computer system. He never did send the order to the correct address. He said that Attorney Smith had similar troubles. Additionally, he suggested that at some point the debtors decided that they did not want to reinstate their case.

The court notes that the correct email address for submitting proposed orders is publicly available on the court's web site and has been for several years. *See* Northern District of Ohio - U.S. Bankruptcy Court, www.ohnb.uscourts.gov (select "Judges' Information-Order Submission"). There is no legitimate reason why a proposed order should be repeatedly sent to the wrong email address, any more than it would be reasonable for an attorney to repeatedly direct regular U.S. mail to the court's former address at Key Tower. Additionally, Mr. Armstrong provided conflicting and confusing testimony as to the dates on which he tried to email the proposed order. Although Mr. Armstrong said he made several efforts to comply, the court notes that in Attorney Smith's amended motion to reinstate the case, she only identified one attempt to provide the order, that effort being made on March 16, 2006, almost two months after the first bench ruling in her clients' favor. Based on these inconsistencies, the court does not find Mr. Armstrong's testimony to be a satisfactory explanation for why the proposed order was not submitted.


Mr. Armstrong also offered as an excuse that counsel did not submit the required order because the debtors changed their minds at some point about reinstating the case. This does not help Attorney Smith's case, either. If a debtor changes his or her mind about reinstating a case, the proper procedure is to file a notice that the motion is withdrawn, not to ignore the issue.

The court concludes that Attorney Smith did not properly pursue the motion to reinstate the case or present the proposed order in the required fashion. The fee charged is, therefore, excessive and should be reduced.

Although the fee charged is not a reasonable fee for the services rendered here, counsel did provide certain services that should be compensated, including filing schedules, statements, and a plan, and consulting with the debtors. The court cannot, however, tell how many hours Attorney Smith devoted to these tasks because she did not file a fee application or testify as to the amount of time spent on these tasks. Without that, the court must either deny all compensation for lack of evidence or rely instead on its own experience in reviewing chapter 13 fees over the last twelve years. The court finds that the latter is the better course. Based on that experience, the court finds that five hours is the reasonable amount of time for the productive activity undertaken by counsel. Counsel identified her hourly rate as \$150.00 in the Rights and Responsibilities. The reasonable fee is, therefore, 5 times \$150.00, or \$750.00. As Attorney Smith received \$1,200.00, counsel is ordered to disgorge \$450.00.

CONCLUSION

For the reasons stated, the chapter 13 trustee's motion is denied in part and granted in part, and Attorney Cynthia Smith is ordered to pay \$450.00 to the trustee for payment to the debtors. A separate order will be entered reflecting this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

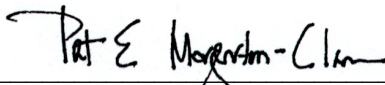
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 05-20361
)
RHONDA L. DUKES and) Chapter 13
RODNEY J. DUKES, SR.,)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**
) (NOT FOR COMMERCIAL PUBLICATION)

For the reasons stated in the memorandum of opinion entered this same date, the amended motion of the chapter 13 trustee under 11 U.S.C. § 329(b) for an order requiring Cynthia Smith, the debtors' counsel, to disgorge fees is granted in part and denied in part. (Docket 94, 96, 98). As Ms. Smith was paid \$1,200.00 for her services and the reasonable fee for those services is \$750.00, Ms. Smith is required to disgorge \$450.00 to the trustee for payment to the debtors.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge