

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CHAPTER 13
	)	
SCOTT NICHALOS VITAGLIANO	)	CASE NO. 03-66142
AND MELANIE SUE VITAGLIANO,	)	
	)	JUDGE RUSS KENDIG
Debtors.	)	
	)	<b>MEMORANDUM OF OPINION</b>
	)	<b>(NOT INTENDED FOR</b>
	)	<b>PUBLICATION)</b>

Before the court is the Application for Compensation filed by Debtors' counsel, Donald M. Miller (hereafter "Attorney"), on September 13, 2007. Attorney reopened the case on September 7, 2007 in order to file the supplemental request for compensation. Debtors filed a response on September 28, 2007. A hearing was held on October 10, 2007. Attorney attended the hearing; Debtors did not appear.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334 and the general order of reference entered in this district on July 16, 1984. Venue in this district and division is proper pursuant to 28 U.S.C. § 1409. The following constitutes the court's findings of fact and conclusions of law under Federal Rule of Bankruptcy Procedure 7052.

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the court.

**FACTS**

Debtors filed a chapter 13 petition on November 12, 2003 and were represented by Attorney. Included in the initial filing was the "Disclosure of Compensation of Attorney for Debtor(s)" ("2016(b) disclosure"). It indicates a fee of \$1,250.00 for Attorney's legal services. It is signed by Attorney and does not require debtors' signatures. According to the disclosure, counsel received \$50.00 prior to filing the case, in addition to the \$194.00 filing fee. The remainder of the fees were to be paid through the plan.

In addition to the 2016(b) disclosure, at the request of the court, Attorney also filed a copy of his "Fee Engagement Agreement for Chapter 13 Proceeding." The document was executed on November 11, 2003 and is signed by both debtors and Attorney. The fee agreement contains a list of services included for the agreed-upon flat fee (presumably the \$1,250.00), as well as a non-exclusive list of services which may be requested but not covered. The document contains the further notice in bold:

ATTORNEY reserves the right to file a Fee Application  
which will supplant the foregoing.

The fee for any additional services is not disclosed.

Attorney was paid \$1,200.00 through the plan, plus the \$50.00 paid prior to the filing, for a total of \$1,250.00. Debtors received a discharge on March 12, 2007 and the case closed on March 16, 2007. Attorney filed a motion to reopen the case on September 7, 2007 and the motion was granted on September 11, 2007. On September 13, 2007, Attorney filed an application for compensation seeking allowance of \$2,915.00 to be paid directly by debtors.<sup>1</sup> This represents 23.8 hours of work at \$225.00 per hour.

Debtors objected to the supplemental fee application on September 28, 2007. Debtors indicate surprise at the additional charges and object to the timing of the fee application. The response provides, in part:

It would have been nice to have been told up front that at the end of the 3 years we may owe more money to Donald Miller . . . . Donald Millers (sic) last service date for us was 07-16-06, and we were discharged on 03-12-07. It took 8 months from last service date till discharged date, and he didn't send or file a bill for us owing more. Now we are 6 Months after discharge and we get papers saying we owe him \$2,915.00 for services . . . . It would have been different if we would have been told that we may have more fees at the end of our Chapter 13, but we were not aware of this.

Attorney does not deny that Debtors were not sent any statements prior to the filing of the fee application.

### LAW AND ANALYSIS

The issue in this case is not about the competency of Attorney. No objections have been raised as to the quality of the services rendered. Rather, the issues are twofold: whether the delayed filing of the application impacts an award of compensation and whether the fees are reasonable.

Upon review of the facts, several timing issues are of concern to the court. First, it was filed after reopening the case and nearly six months after discharge. Second, it is undisputed that Debtors did not receive any statements or invoices from Attorney until served with a copy of the fee application.

Fee applications are governed by Federal Rule of Bankruptcy Procedure 2016 and Local Bankruptcy Rule 2016-1, as well as General Order 93-1. Simply, supplemental requests for fees must be made by application and are approved by the court. In reviewing a similar fact pattern, the Bankruptcy Court for the Eastern District of Wisconsin stated that "[l]ogic dictates that such a [fee] disclosure must be made before

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<sup>1</sup> The fee application states that the reasonable value of the services provided was \$5,355.00. has deducted \$1,250.00 (the \$50.00 paid prior to the filing and the \$1,200.00 paid through the plan), plus discounted the fee application by \$1,190.00.

the case is closed to be effective.” In re Reed, 2007 WL 2099331 (Bankr. E.D. Wis. 2007) (unpublished). In Reed, after the case was closed, debtor’s counsel filed an amended 2016(b) statement disclosing \$2,358.75 in unpaid fees. Thereafter, the United States Trustee filed a motion to reopen the case<sup>2</sup> and maintained that the fees had been discharged.

The court pointed out that the fee application review process provides an opportunity for parties to object to the requested fees through Rule 2002, as well as permits a court to determine the reasonableness of the fees in accordance with 11 U.S.C. § 329. Reed at \*1. The court, also relying on In re Hanson, 223 B.R. 775 (Bankr. D. Or. 1998), concluded:

It is not appropriate for the Debtors’ counsel to come in after the case has been closed to disclose pre-discharge fees that were not mentioned prior to the discharge. Sections 329 and 330 evidence the important role of the Court in the regulation of debtors’ counsel fees in bankruptcy cases. These provisions are circumvented by disclosing fees after the case has been closed, and such a disclosure ignores the authority of the Court to review the reasonableness of the fees, and the right of the trustee, U.S. Trustee and other parties in interest to object to the fees.

Reed at \*2.

In Hanson, the court considered an attorney’s practice of sending, after clients were discharged, a congratulatory letter which included a demand for additional post-confirmation fees. Hanson at 777. The court found that a section 1328(a) discharge operates to discharge debtors of all “unsecured debts provided for by the plan.” Id. at 778 (citing 11 U.S.C. § 1328(a)). Pursuant to section 1322(a)(2), a plan must provide for payment in full “of all claims entitled to priority under section 507 of this title . . . .” Attorney’s fees are an administrative expense claim allowable under 11 U.S.C. § 503(b)(2), and administrative expenses claims for attorney’s fees are afforded priority in accordance with 11 U.S.C. § 507(a)(1).<sup>3</sup> Since the plan must afford full payment of priority administrative expense claims, it follows that such claims are “provided for by the plan” and therefore subject to discharge under 11 U.S.C. § 1328(a). See Hanson at 778; also see In re Ryder, 358 B.R. 794 (Bankr. N.D. Cal. 2005).

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<sup>2</sup> Apparently, counsel did not reopen the case. The court recognizes that even though a case may be administratively “closed,” the electronic filing process does not reject documents filed after closing. Although the Reed case does not specifically state this occurred, it does say the case was closed, then the amended 2016(b), and then the United Trustee moved to reopen the case.

<sup>3</sup> This case was filed prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005 and is therefore governed by the bankruptcy code prior to the amendment.

The facts in Ryder also involved an attempt by counsel to collect post-confirmation fees after discharge and closure of the case. The Ryder court, adopting the analysis set forth in Hanson, determined:

Because postconfirmation fees were treated as administrative expenses, the plan's provision for payment of administrative expenses included payment of those fees. In Hanson, the fees billed after the discharge were never submitted or approved by the court. Therefore as administrative expenses, the fees were discharged at the conclusion of the chapter 13 case under §1328(a).

(footnote omitted). Ryder at 798 (citing Hanson, 223 B.R. at 778).

From the above, it is clear that Attorney's failure to submit a fee application prior to Debtors' discharge is calamitous. To the extent he had a cognizable claim for fees, the claim was discharged.

The court notes that this result is compelled by the law, because equity is clearly on the side of Attorney. The records reveals Attorney's hard pursuit of issues for uncooperative clients. Debtors contested an arrearage resulting in additional legal work, yet in the end Debtors provided neither proof nor cooperation. Debtors failed to attend a hearing. These are among the matters that complicated Attorney's pursuit of the case for Debtors.

As a final comment, the court points out that Attorney had ample time to file a fee application prior to the discharge. According to the itemization in the fee application, the last services he provided were dated July 2006. The trustee issued the order releasing Debtors from further payments on December 14, 2006 and filed her final report on January 30, 2007. The discharge was entered on March 12, 2007, clearly leaving approximately eight months after the last service to file a fee application.

### CONCLUSION

Counsel must submit timely fee applications. In this case, Attorney's untimeliness is fatal to the fee application. The court finds that the fees sought by Attorney would have qualified as priority administrative expense claims which were provided for in the plan. In accordance with 11 U.S.C. §1328(a), claims provided for in the plan are subject to discharge. The court will therefore not approve the fees and the fee application is denied.

An order will be issued immediately.

/s/ Russ Kendig  
RUSS KENDIG  
U.S. BANKRUPTCY JUDGE

NOV - 2 2007

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