

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 13
KEITH JEANES)
JO ELLEN JEANES,) Bankruptcy No. 01-00760
)
Debtors.)

**ORDER RE MOTION FOR EVIDENTIARY HEARING
AND MOTION TO RECONSIDER**

Attorney John W. Hofmeyer III has filed a Motion for Evidentiary Hearing on Sanctions and Motion to Reconsider. These requests relate to this Court's Order re Application for Compensation by Debtors' Attorney filed June 17, 2004. The Court has considered the matters set out in the motions and concludes that further hearing is unnecessary.

MOTION FOR EVIDENTIARY HEARING ON SANCTIONS

Attorney Hofmeyer argues that he had insufficient notice to prepare for a hearing on sanctions as no party had requested sanctions. As authority for this position, he cites In re DeLaughter, 213 B.R. 839 (B.A.P. 8th Cir. 1997), for the proposition that before sanctions are imposed, the attorney is entitled to notice of hearing thereon. That case is not on point as it concerns sanctions imposed under Rule 9011.

This Court based its order requiring Attorney Hofmeyer to disgorge fees on § 329(a) and Rule 2016 which require fee disclosure. "An attorney has no absolute right to an award of compensation." In re Clark, 223 F.3d 859, 863 (8th Cir. 2000). In Clark, the attorney argued that the hearing concerned only the amount of legal fees that remained due, not the propriety of attorney fees in general, and thus he had no notice that fees could be fully denied. Id. at 862-63. The court noted that the attorney failed to support his contention that fee disgorgement was not discussed at the hearings. To the contrary, the bankruptcy court referenced fee documents previously filed with the court. Id. at 863. The Bankruptcy Appellate Panel found the attorney was given ample opportunity to be heard. Id. Further, the decision denying the award of fees and requiring disgorgment of fees was not an abuse of the court's broad discretion. Id. at 864. In a separate discussion, the court considered the sufficiency of notice that sanctions under § 105(a) were being considered, and

affirmed an award of \$4,759 in sanctions representing the trustee's attorney fees and expenses. Id. at 864-65.

The Court concludes that Attorney Hofmeyer had sufficient notice that his entire attorney fee award was subject to scrutiny. Trustee's Objection referenced his previous fee applications and payments of fees, noting discrepancies in Mr. Hofmeyer's final application for fees compared to previous applications as well as his attempts to collect fees without approval of the Court. At the hearing, the Court directly notified Mr. Hofmeyer that his fees were subject to disgorgement. Between the time of hearing, May 26, and the date of the ruling, June 17, Mr. Hofmeyer made no attempt to assert any argument against disgorgement. The Court concludes that Mr. Hofmeyer had sufficient notice that the entire amount of fees he requested in this case was subject to scrutiny.

MOTION TO RECONSIDER

Attorney Hofmeyer does not set out grounds for reconsideration of the Court's June 17, 2004 Order. The court assumes he is requesting relief under Fed. R. Civ. P. 59(e), made applicable in Bankruptcy through Fed. R. Bankr. P. 9023. Rule 59(e) and Bankruptcy Rule 9023 are not vehicles for presenting evidence and argument which could have been presented at the original hearing. In re See, 301 B.R. 554, 555 (Bankr. N.D. Iowa 2003).

Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence. Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.

Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs., 141 F.3d 1284, 1286 (8th Cir. 1998) (citations omitted); DeWit v. Firststar Corp., 904 F. Supp. 1476, 1495 (N.D. Iowa 1995). Arguments and evidence which could have been presented earlier in the proceedings cannot be presented in a Rule 59(e) motion. Peters v. General Serv. Bureau, Inc., 277 F.3d 1051, 1057 (8th Cir. 2002).

In his Motion to Reconsider, Mr. Hofmeyer asserts there were good faith mistakes in preparation of his billings. He denies any bad faith or willful failure to disclose and admits his inexperience regarding Chapter 13 cases. Mr. Hofmeyer

requests an opportunity for his bookkeeper to explain the good faith mistakes made regarding the billing in this case.

The hearing scheduled for and held on May 26, 2004 was Mr. Hofmeyer's opportunity to present any and all evidence concerning his fees. He had sufficient notice of the hearing, but did not call his bookkeeper as a witness. He has no right to present additional evidence on a motion to reconsider. The time to do so was at the May 26 hearing.

WHEREFORE, Attorney John Hofmeyer's Motion for Evidentiary Hearing on Sanctions is DENIED.

FURTHER, Attorney John Hofmeyer's Motion to Reconsider is DENIED.

SO ORDERED this 12th day of July, 2004.



PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE