UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 13
VINCENT W. MICHELS,)
) Bankruptcy No. 01-01415
Debtor.)
)

)
IN RE:) Chapter 12
)
VINCENT W. MICHELS,) Bankruptcy No. 03-00316
)
Debtor.)

ORDER RE FINAL APPLICATION FOR COMPENSATION OF ATTORNEY'S FEES AND EXPENSES

This matter came before the undersigned on April 22, 2004. Attorneys Thomas Fiegen and John Daufeldt appeared for Fiegen Law Firm (the "Law Firm"), Debtor's attorneys. Carol Dunbar appeared as Chapter 12 and Chapter 13 Trustee. John Schmillen represented the U.S. Trustee. After the hearing, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

Fiegen Law Firm filed a final application for compensation of attorney fees and expenses incurred in connection with Vincent Michels' Chapter 13 and Chapter 12 cases. The application states the Law Firm seeks fees and expenses totaling $40,428.49. The Chapter 12/13 Trustee and the U.S. Trustee filed objections.

FINDINGS OF FACT

The Law Firm has represented Debtor Vincent Michels since March 2001. Debtor filed a Chapter 13 case on April 23, 2001, No. 01-01415. After an appeal regarding the secured claim of Maynard Savings Bank, In re Michels, 286 B.R. 684 (B.A.P. 8th Cir. 2002), this case was dismissed on January 9, 2003. Debtor filed a Chapter 12 case on February 5, 2003, No. 03- 00316. This Court denied confirmation of Debtor's plan and dismissed the case on September 19, 2003. In re Michels, 301 B.R. 9 (Bankr. N.D. Iowa 2003). On Debtor's appeal of the dismissal order, the Bankruptcy Appellate Panel entered its order of affirmance on March 16, 2004. In re Michels, 305 B.R. 868 (B.A.P. 8th Cir. 2004).

After dismissal of the Chapter 12 case in September 2003, the Court entered an order requiring the Law Firm to file a final application for compensation and accounting of fees received regarding the Chapter 13 case, an explanation of the retainer disclosed in the Chapter 12 application to employ the Law Firm, and an itemization of fees and expenses in the Chapter 12 case. The Court ruled on December 15, 2003 that it has jurisdiction to consider allowance and payment of compensation to the Law Firm in both the Chapter 13 and Chapter 12 cases. In re Michels, No. 01-01415, No. 03-00316, slip op. at 3 (Bankr. N.D. Iowa Dec. 15, 2003). The Court also ordered the Law Firm to disgorge $8,491.82 which it drew

from Debtor's retainer without Court approval. Final consideration of allowance of compensation in both cases was held in abeyance pending the outcome of the appeal of dismissal of the Chapter 12 case. The Law Firm filed its Final Application for Compensation of Attorney's Fees and Expenses relating to both the Chapter 13 and Chapter 12 cases on March 23, 2004.

Trustee filed an objection. She states she has filed final reports in both cases and no funds remain for distribution. The only creditors paid by Trustee were an appraiser, accountants and Debtor's counsel. Trustee notes the Application shows a paralegal or attorney billing for secretarial or ministerial work. She also notes that the Application does not appear to account for $13,954 paid to the Law Firm through the plan or the retainer the Law Firm received in the first Chapter 13 case.

U.S. Trustee filed an objection. He states the Law Firm must demonstrate it exercised reasonable billing judgment and the compensation is reasonable in light of results obtained in the two cases.

The Law Firm's final application for compensation requests total fees and expenses of $40,428.49. The application states this includes amounts for which the Law Firm previously filed applications for compensation plus an additional $10,999.19 of fees and expenses from October 1, 2003 through March 15, 2004. The Court notes that the amount
currently requested does not correlate with amounts previously requested and discussed in the December 15, 2003 Order, which stated, in pertinent part:

> [T]otal fees are requested for representing Debtor in both the Chapter 13 and Chapter 12 cases of
> $48,279.06. Of this amount, Fiegen has received a total of $17,904, plus $8,491.82 Fiegen paid itself from the January 2003 retainer.

In re Michels, No. 03-00316, 01-01415, slip op. at 3 (Bankr.
N.D. Iowa Dec. 15, 2003). During the hearing, the Court made an effort to clarify with the Law Firm the exact amount of fees requested, approved, and paid. The Court has also thoroughly reviewed the record and related filings in both of Debtor's cases, and makes the following findings:

1. The Law Firm requests total fees and expenses for both the Chapter 13 and Chapter 12 cases of
$59,289.48. The Chapter 13 request totals
$26,084.44 for fees and expenses arising between March 1, 2001 and January 31, 2003. The Chapter 12 request totals $33,205.04 for fees and expenses arising between February 1, 2003 and March 15, 2004.

2. To date, the Court has approved fees and expenses of
$17,473 in the Chapter 13 case, of which $936 remains unpaid. No compensation has been approved in the Chapter 12 case.

3. The Law Firm has received total payments of $16,537.

4. Pursuant to this Court's order of disgorgement, the Law Firm holds $8,510.14 in its trust account constituting the remainder of Debtor's retainer.

As further background, the Court notes that Debtor was solvent at the time he filed his first bankruptcy petition on April 23, 2001. At that time, he held unencumbered property which, if liquidated in a Chapter 7 case, could have paid all creditors in full. Maynard Savings Bank, Debtor's most significant secured creditor, was substantially oversecured. As the U.S. Trustee pointed out at the hearing, these cases were essentially all about head-butting between Debtor and the Bank. Attorney Schmillen stated at the hearing that the handwriting was on the wall early on that any reorganization was not going to go.

In the more than three years since the first filing, Debtor has not paid anything to unsecured creditors. He has paid accountants through his bankruptcy cases to prepare delinquent tax returns, finding he has substantial debt to taxing authorities. The taxing authorities have received some tax refund money and Debtor continues to owe back taxes of approximately $56,000. The Law Firm and an appraiser have also been paid. The Bank received some grain checks and $11,000 to $12,000 from rent from Shooky's Bar during the Chapter 13 case. It received approximately $10,500 in rents and $15,000 in adequate protection payments during the Chapter 12 case. Trustee refunded approximately $5,260 to Debtor when the Chapter 13 case was dismissed.

At the hearing, upon questioning by the Court, Attorney Fiegen conceded that Debtor would often refuse to take the Law Firm's advice. Instead, Debtor would demand contrary actions which the Law Firm implemented despite its advice and against its better judgment. In the end, Debtor was unable to propose a successful plan of reorganization and both cases were dismissed with no payment to unsecured creditors and with the automatic stay enduring for three years.

REASONABLE ATTORNEY FEES

The Court has had too many opportunities in the recent past to examine attorney fees charged by this law firm in reorganization cases. Many of its previous pronouncements are applicable to this case. For example, in In re Nilges, 301 B.R. 321 (Bankr. N.D. Iowa 2003), this Court disallowed $4,000 of an additional $7,714 requested by Fiegen Law Firm in a Chapter 12 case. It stated as follows:

> The bankruptcy court has broad power and discretion to award or deny attorney fees and a duty to examine them for reasonableness. In re Clark, 223 F.3d 859, 863 (8th Cir. 2000). The burden is on the attorney to prove that the proposed compensation is reasonable. Id. A court may award debtor's attorney compensation only for actual and necessary services. In re Kohl, 95 F.3d 713, 714 (8th Cir. 1996). Section 330(a)(4)(B) provides that in a chapter 12 or chapter 13 case in which the debtor is an individual, the court may award reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in § 330(a). See In re Digman, No. 98-00220- C, slip op. at 2 (Bankr. N.D. Iowa Aug. 17, 1998).

Section 330 governs allowance of attorney fees and permits the court, on its own motion or on the motion of a party in interest, to award compensation that is less than the amount requested. In re Peterson, 251 B.R. 359, 363 (B.A.P. 8th Cir. 2000).

> We have consistently held that the lodestar method, calculated by multiplying the reasonable hourly rate by the reasonable number of hours required to represent the debtor in the case, is the appropriate approach for determining reasonable compensation under § 330. To determine the reasonable rates and hours, § 330(a)(3)(A) directs courts to consider factors including:
> --the time spent;
> --the rates charged;
> --the necessity of the services for administration of the case;
> --the reasonableness of the amount of time spent in light of the complexity, importance and nature of the problem, issue or task addressed; and
> --the reasonableness of the requested compensation compared to the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

Id. at 363-64 (citations omitted); see also In re Apex Oil Co., 960 F.2d 728, 732 (8th Cir. 1992) (adopting lodestar approach). In making this determination, the court must take into consideration whether the professional exercised reasonable billing judgment. In re Mednet, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000). Time spent "handholding" or reassuring debtors, or on matters

> which do not require attorney services, are simply not compensable at an attorney's regular hourly rates. In re Stromberg, 161 B.R. 510, 519 (Bankr. D. Colo. 1993).
>
> Counsel has a duty to supervise clients' conduct for compliance with the Bankruptcy Code. In re Kloubec, 251 B.R. 861, 866 (Bankr. N.D. Iowa 2000).
> As a professional, an attorney must instruct the debtor on appropriate conduct and must develop client control. In re Berg, 268 B.R. 250, 262 (Bankr. D. Mont. 2001). "To foster such client control, an attorney must be: . . . knowledgeable about the parameters and limits of available alternatives and remedies, and unwilling to allow a client to direct or dictate the progress or activity in a case, if such activity is inconsistent with the requirements of the law." Id.
>
> The Law Firm points out that any fees approved will be paid by Debtors directly, not from the bankruptcy estate. It is important to note that only the amount allowed by the court is collectible by the Law Firm. In re Gantz, 209 B.R. 999, 1002 (B.A.P. 10th Cir. 1997). Attorney fees may be paid to a debtor's counsel only if approved by the Court. In re Wyant, 217 B.R. 585, 588 (Bankr. D. Neb.
> 1998). Fees are (1) disallowed, (2) allowed as an administrative expense to be paid from the estate, or (3) allowed but must be paid by the debtor directly, not from the estate. Gantz, 209 B.R. at 1003. Absent court approval, neither the debtor nor the estate is ever liable. Id.

Nilges, 301 B.R. at 324-25.

WITHDRAWAL OF RETAINER WITHOUT APPROVAL

The Court also continues to be concerned by the Law Firm's withdrawal of Debtor's retainer from its trust account without Court approval. In its order

filed December 15, 2003, the Court ordered the Law Firm to disgorge approximately $8,500 which it paid itself from Debtor's retainer to be replaced in its trust account pending further orders of the Court. The Court discussed this withdrawal with Attorney Fiegen at the hearing herein. The Law Firm agrees that after dismissal of the Chapter 13 case, it received payment from Debtor's retainer without Court approval. The Court finds that after the Chapter 12 petition was filed, the Law Firm had an unsecured claim against Debtor for unpaid fees and expenses from the Chapter 13 case. It was after the Chapter 12 petition was filed that the Law Firm took the payment from its trust account without Court approval.

Drawing down from a retainer without court approval is sanctionable. "It is well settled that disgorgement of fees is an appropriate sanction for failure to comply with the disclosure requirements of section 329 and Rule 2016." In re Redding, 263 B.R. 874, 880 (B.A.P. 8th Cir. 2001). See, e.g., In re Independent Engineering Co., 197 F.3d 13, 17 (1st Cir.1999) (no error in denying all fees upon failure to disclose draws on retainer despite the assertion that the retainer was not estate property). For example, in In re Birky, 296 B.R. 480, 483-84 (Bankr. C.D. Ill., 2003), the court stated it has the authority to reduce the attorney's compensation as a sanction for improper disclosure of the application of the retainer fee and direct payments from the debtors prior to required court approval. The court allowed compensation of $16,000, rather than $29,944.35 requested, after deducting the amount the attorney had applied to attorney fees prior to court approval, and further reductions. Id.

CONCLUSIONS

The Court concludes that the Law Firm failed to properly supervise Debtor's conduct. In so doing, it provided legal services as directed or dictated by Debtor which were inconsistent with the policies and purposes of the Bankruptcy Code. It was unreasonable for the Law Firm to provide legal services to Debtor in proposing unconfirmable plans in the Chapter 13 case and to further file the subsequent Chapter 12 case with a proposed plan which was no better than the Chapter 13 plans and was unconfirmable on its face. And, during the three years of the automatic stay, Debtor has held sufficient unencumbered, nonexempt property with which he could have paid his creditors in full. By facilitating Debtor's unrealistic attempts to retain his property and avoid paying creditors, the Law Firm has failed to exercise reasonable billing judgment as required under § 330 of the Bankruptcy Code.

The Law Firm is not entitled to an administrative expense claim in Debtor's two cases. As both cases are dismissed and no money remains for distribution, no further compensation can be paid to the Law Firm from the bankruptcy estates. Any further allowed compensation to the Law Firm for representation of Debtor in these two cases must be paid by Debtor directly.

The Court does not doubt that Fiegen Law Firm has invested a great deal of time in representing Debtor. As discussed above, however, a significant portion of the Law Firm's fees and expenses are not reasonable or allowable under the Bankruptcy Code. The Court previously approved and allowed payment to the Law Firm in the amount of $17,473, of which $16,537 has been paid. The Law Firm may

now disburse to itself the further amount of $8,510.14 which it holds in its trust account constituting the remainder of Debtor's retainer.

All other fees and expenses requested by the Law Firm for representing Debtor in these two bankruptcy cases are disallowed. The Court disallows $8,500 as a sanction for the Law Firm's withdrawal of this approximate amount from Debtor's retainer without Court approval. The remainder of the total fees and expenses requested are disallowed as unreasonable and are not collectible from Debtor or any other entity.

WHEREFORE, the Final Application for Compensation of Attorney's Fees and Expenses by Fiegen Law Firm, P.C. is GRANTED IN PART and DENIED IN PART.

FURTHER, the Law Firm may disburse to itself the amount of $8,510.14 which it holds in its trust account constituting the remainder of Debtor's retainer.

FURTHER, all other compensation for attorney's fees and expenses is disallowed and not collectible from Debtor or any other entity.

SO ORDERED this 10th day of May, 2004.

PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE