In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

JIMMIE HARRISON MCKIBBIN and
JANET COLLEEN MCKIBBIN
Debtor(s).

Bankruptcy No. X-85-02156S

Chapter 7

GEORGE R. REMER
Plaintiff(s)

vs.

JIMMIE HARRISON MCKIBBIN and
JANET COLLEEN MCKIBBIN
Defendant(s)

Adversary No. L-90-0021S

RULING RE: Plaintiff's Complaint for Attorney Fees

This matter is before the Court on the complaint of plaintiff, attorney George Remer ("Mr. Remer"), seeking payment of attorney's fees from defendants, Jimmie and Janet McKibbin ("the McKibbins"). Mr. Remer filed this complaint in the Iowa District Court for Plymouth County requesting payment of fees for services he provided in the McKibbin's Chapter 11 bankruptcy. The McKibbins removed the matter to this Court pursuant to 28 U.S.C. § 1452(A). Both parties have filed motions for summary judgment on this fee dispute. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following opinion granting the McKibbins' motion for summary judgment constitutes this Court's findings of fact, conclusions of law, and order, pursuant to Fed.R.Bankr.P. 7052.

Findings of Fact

The facts are undisputed. The McKibbins filed for relief under Chapter 7 of the Bankruptcy Code on October 15, 1985. The McKibbins were originally represented in the bankruptcy by attorney Duane E. Hoffmeyer. On April 24, 1987, the McKibbins converted their case from Chapter 7 to Chapter 11. At about the same time, attorney George Remer began representing the debtor. Mr. Remer performed substantial work during the pendency of the Chapter 11 which resulted in a confirmed plan of reorganization for the McKibbins. The plan was substantially consummated and the case closed on March 2, 1989.

Mr. Remer never applied for appointment as counsel for the debtor-in-possession. Hence, the Court never approved his employment as attorney for the debtors. Likewise, Mr. Remer never applied for or received compensation for his services. There was no disclosure of compensation filed and the Court has no information upon which to make any decision as to whether Mr. Remer received any retainer at the time he was employed by the McKibbins.

On September 1, 1989, Mr. Remer filed a suit against the McKibbins in the Iowa District Court for Plymouth County seeking $20,794.82 in attorneys fees, plus interest, for services he rendered during the McKibbins' Chapter 11 bankruptcy. The McKibbins removed this matter to this Court pursuant to 28 U.S.C. 1452(A) and requested this Court to reopen their Chapter 11 bankruptcy.

After the case was removed and reopened in this Court, the McKibbins filed a motion for summary judgment on Mr. Remer's suit for attorney's fees. Mr. Remer countered by filing his own motion for summary judgment. Mr. Remer also filed a motion requesting that the Honorable William L. Edmonds, United States Bankruptcy Judge for the Northern District of Iowa, recuse himself from this matter. Judge Edmonds noted that Mr. Remer's allegations of prejudice in the recusal motion were unfounded, but nevertheless honored Mr. Remer's request for recusal. Judge Edmonds removed himself from the case, and transferred the file to the undersigned bankruptcy judge.

A hearing was held on the motions for summary judgment on January 7, 1991. The McKibbins argued that Mr. Remer's request for compensation could not be granted because he failed to abide by the prerequisites for compensation under the Bankruptcy Code and Rules. Mr. Remer asserted that he provided substantial and valuable services in the McKibbins' Chapter 11 proceeding that entitle him to the reasonable fees he has requested. At the hearing on the motion for summary judgment, Mr. Remer also indicated that if compensation could not be awarded to him because he had not been appointed and his fees approved, that he is now requesting the Court enter an order approving his appointment as attorney for debtor-in-possession.

Conclusions of Law

In order for any party to prevail on its motion for summary judgment that party must satisfy Fed.R.Bankr.P. 7056, which incorporates Fed.R.Civ.P. 56. Under Rule 56 summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with-affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to relief as a matter of law." Fed.R.Civ.P. 56(c). This rule essentially provides a two-step analysis. Thomas v. United Parcel Service, Inc., 890 F.2d 909, 914 (7th Cir. 1989) (citations omitted). First, a moving party must demonstrate that there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986); Thomas, 890 F.2d at 914. Then, the moving party must demonstrate that on those undisputed facts, they are entitled to relief as a matter of law. Thomas, 890 F.2d at 914.

The Eighth Circuit Court of Appeals has emphasized, however, that in order for a party to prevail on a motion for summary judgment, that party must establish the right to a judgment with such clarity that there is no room for controversy. Bufford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984). Yet, the mere existence of a factual dispute is insufficient alone to bar summary judgment unless the factual dispute is outcome determinative under that prevailing law. Holloway v. Pigman, 884 F.2d 365, 366 (8th Cir. 1989). Here, the parties contend that there is no dispute as to material facts which could be outcome determinative. This Court

agrees with the parties and finds that there is no genuine issue of material fact. Hence, entitlement to summary judgment in this matter hinges on whether any party can demonstrate that it is entitled to judgment as a matter of law.

This Court must decide whether the law entitles Mr. Remer to compensation for his representation of the McKibbins in their Chapter 11 proceeding. Under the Bankruptcy Code and Rules an attorney for debtor or debtor-in-possession must satisfy specific requirements in order to receive compensation. Section 327(a) of the Bankruptcy Code requires Court approval for the debtor in possession to employ an attorney. The method for obtaining that approval is found in Fed.R.Bankr.P. 2014(a). Section 329(a) provides that:

> any attorney representing a debtor in a case under this Title . . . shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

The Bankruptcy Rules provide specific guidelines for the contents of the disclosure required under § 329. Fed.R.Bankr.P. 2016(b). The Court may award compensation to the attorney for the debtor-in-possession only after the above sections are complied with and creditors are provided notice and hearing on the compensation. 11 U.S.C. § 330(a).

The United States Bankruptcy Court for the Southern District of Iowa has done an extensive analysis of these compensation provisions in In re Independent Sales Corp., 73 B.R. 772 (Bankr. S.D. Iowa 1987). In Independent Sales

Corp. the court noted that:

> Eighth Circuit case law, which governs this district, clearly instructs those who seek compensation for representing a Chapter 11 debtor. An attorney hired to represent a debtor-in-possession must give notice to creditors and receive Court approval prior to being compensated by the estate. 11 U.S.C. § 330; Bankruptcy Rule 2016. Without such approval, ordinarily subsequent applications for fees should be denied and funds received should be ordered returned to the estate.

73 B.R. at 775 (quoting Lavender v. Wood, 785 F.2d 247, 248 (8th Cir. 1986). This Court agrees with Judge Jackwig's observation that "the law of the Eighth Circuit clearly instructs those who seek compensation for representing a Chapter 11 debtor." Those instructions unequivocally state that an attorney representing a debtor-in-possession must give notice to creditors and receive Court approval prior to receiving any compensation.

Other courts have elaborated further on this requirement of notice and approval. In In re Grabill Corp., 113 B.R. 966, 971 (Bankr. N.D. Ill. 1990), the court observed:

> A debtor-in-possession's choice of counsel is subject to court approval. In re Prime Foods of St. Croix, Inc., 80 B.R. 758, 760 (D.V.I. 1987). Some courts have taken the position that work is virtually done on a pro bono basis until an order is obtained employing counsel. In re Mahoney, Trocki & Associates, Inc., 54 B.R. 823 (Bankr. S.D. Cal. 1985). Colliers summarizing the law in this area states [that] when there is no compliance with the Code or Rules, a professional may forfeit his right to compensation. The services . . . must have been performed pursuant to appropriate authority under the Code and accordance with an order of the court. Otherwise, the person rendering services may be an officious intermeddler or a gratuitous volunteer . . . even though valuable services were rendered in good faith. 2 Collier on Bankruptcy, ¶ 327.02 at 327.7 (15th ed. 1989) . . . . Noncompliance with § 327(a) and Bankruptcy Rule 2014(a) generally leads to forfeiture of compensation even to professionals who furnish valuable services to the estate. In re Yeisley, 64 B.R. 360 (Bankr. S.D. Tex. 1986).

113 B.R. 966. Hence, it is well-settled that in order to receive compensation an attorney must be approved by a court order entered prior to the request for compensation.

The only exception to these detailed requirements for compensation is that in limited circumstances a debtor may apply for an order nunc pro tunc authorizing compensation. Lavender v. Wood, 785 F.2d at 248. Courts have devised a number of tests to determine when nunc pro tunc orders are appropriate. However, no motion for nunc pro tunc appointment has even been filed by Mr. Remer in this case. Although Mr. Remer did make an oral request for appointment at the hearing on the motion for summary judgment, the Court will take no action on that motion at this time. If Mr. Remer wishes to seek nunc pro tunc appointment, there must be an appropriate application filed, notice to all creditors and parties in interest, and a hearing as to whether Mr. Remer would qualify for nunc pro tunc appointment under the various tests articulated in the Court decision interpreting this issue. It should be emphasized, however, that the Court is making no determination on the issue of whether Mr. Remer can even apply for nunc pro tunc appointment at this late date, or if an application is made, whether it will be granted.

On the basis of the record before the Court at this time, Mr. Remer has not satisfied any of the requirements of the Bankruptcy Code for compensation of counsel. Since there has been no award of attorney's fees to Mr. Remer, he cannot prevail in any claim against the debtors in the pending adversary complaint.

Consequently, the debtors motion for summary judgment should be granted on the basis of the undisputed facts before the Court.

This Court acknowledges that Mr. Remer presents a sympathetic case. There is no question that he performed substantial work which resulted in a confirmed plan of reorganization that benefitted the debtor and creditors alike. This Court again shares the feeling of the Grabill court that denying compensation in such cases is "a most unpleasant duty." 113 B.R. at 972. This Court, however, also joins the Grabill court in declining "to substitute its own views for the congressional policy establishing high fiduciary standards for employment of professionals representing debtors-in-possession." 113 B.R. at 972. Mr. Remer's failure to obtain approval for-his employment at the beginning of his

representation of the McKibbins and his failure to obtain an order authorizing the payment of compensation, leaves the Court with no option other than to grant the defendants' motion for summary judgment. The failure of Mr. Remer to apply for appointment as attorney for the debtor-in-possession and his failure to obtain an order authorizing compensation, results in his having no legally recognizable claim against the debtors for any attorney's fees generated by his work during debtors' Chapter 11 case. Moreover, to this point, Mr. Remer has failed to file a proper application requesting a nunc pro tunc appointment and compensation. Therefore, this Court currently has no other option than to deny Mr. Remer's motion for summary judgment and to grant the McKibbins' motion for summary judgment.

ORDER

IT IS THEREFORE ORDERED that the motion for summary judgment of Jimmie and Janet McKibbin is granted. The complaint filed by George R. Remer is dismissed.

IT IS FURTHER ORDERED that the motion for summary judgment filed by George R. Remer is denied.

DONE AND ORDERED this 11th day of February, 1991.

Michael J. Melloy
Chief Bankruptcy Judge

In the United States District Court

for the Northern District of Iowa

Western Division

JIMMIE HARRISON MCKIBBIN and
JANET COLLEEN MCKIBBIN
Debtors.

No. C 91-4038

GEORGE R. REMER
Plaintiff

vs.

JIMMIE HARRISON MCKIBBIN and
JANET COLLEEN MCKIBBIN
Defendants

ORDER

This matter comes before the Court pursuant to Plaintiff's appeal of the Bankruptcy Court order. After careful review of the file and its contents, this matter is remanded to the Bankruptcy Court.

It is important to note that this matter is not remanded because this Court disagrees with the Bankruptcy Court decision. This Court will assume, without deciding, that the Bankruptcy Court opinion is correct. See Lavender v. Wood Law Firm, 785 F.2d 247 (8th Cir. 1986). This matter is remanded to give Plaintiff the opportunity to file for nunc pro tunc appointment as attorney. The Court is of the present opinion that the appellant has an uphill battle to persuade the Court

that the

Bankruptcy Judge's ruling is in error and that a ruling could conceivably bar a later request for a nunc pro tunc order. If on remand the Plaintiff chooses not to file for this appointment within thirty (30) days, the Court will then consider the merits of his appeal, in which he was denied attorney's fees.

IT IS SO ORDERED.

December 17, 1991.

Donald E. O'Brien, Chief Judge
UNITED STATES DISTRICT COURT