

In the United States Bankruptcy Court

for the Northern District of Iowa

JOHN F. CAREY and CHERYL A. CAREY
Debtors.

Bankruptcy No. L-89-00564W
Chapter 7

ORDER RE: FINAL REPORT

This matter was heard on January 12, 1994 on the Final Report and objections. Charles T. Mattson represented Debtors John and Cheryl Carey. John Schmillen represented the U.S. Trustee. Alice Koempel represented Creditor John Oliver (Oliver). Donna Lesyshen (Lesyshen), the former trustee and attorney for trustee, did not appear. The U.S. Trustee filed a final report as successor trustee in this case. Objections were filed by Creditor John Oliver and by Debtors. The matter was argued and taken under advisement.

Oliver purchased real estate from the bankruptcy estate. The purchase agreement provided that the trustee, Donna Lesyshen, would resolve any title defects and provide Oliver with a final abstract. A June 5, 1992 judgment and decree regarding Trustee's Complaint to Quiet Title quieted title in favor of Oliver and ordered Lesyshen to have the abstract continued and to "do all things reasonably necessary to address any objections to the merchantability of title."

Objections to title arose involving an access road to the property because Lesyshen failed to name all necessary defendants in the quiet title action. Oliver filed a Motion to Require Trustee to Perfect Title to Real Estate. On May 5, 1993, Judge William Edmonds entered an order authorizing Oliver to pursue the quiet title action on his own behalf and to seek reimbursement for attorney fees and expenses. The order retained jurisdiction to hear issues concerning Lesyshen's personal liability for those charges.

Oliver asserts that he incurred attorney fees of \$1,037.01 for services rendered by Attorney Alice T. Koempel in the action to quiet title. He requests that the Court allow these fees to be paid from the estate. Oliver also makes a claim of \$3,465.41 in attorney fees for extraordinary legal services. He asserts that these services, necessary to ensure marketable title of the real estate, were caused by Lesyshen's incompetence and gross neglect in her role as case trustee. Oliver claims that Lesyshen's conduct led to his attorney's fees of \$4,215.41, which is \$3,465.41 higher than the normal fees of \$750.00 for representing the Buyer and examining the abstract in this type of real estate transaction.

Oliver's objection to the final report requests that these attorney fees be paid from the estate. He further requests that Lesyshen be held personally liable for payment of any balance not paid from the bankruptcy estate.

Division II of Debtors' objection to the final report also addresses Oliver's attorney fees. Debtors assert that Oliver's requested extraordinary attorney fees are not payable from the estate but are the sole responsibility of Lesyshen.

The law provides that a bankruptcy trustee may be held personally liable for negligent as well as intentional or knowing violations of fiduciary duties enumerated in the Code. In re Charlestown Home Furnishing, 150 B.R. 226, 227 (Bankr. E.D. Mo. 1993); see 11 U.S.C. 704 (setting out duties of trustees). Trustees must act with reasonable care and due diligence in discharging their duties. In re Melenyzer, 140 B.R. 143, 154 (Bankr. W.D. Tex. 1992). The court must evaluate the actions of the trustee from the trustee's perspective in light of the information reasonably available at the time. Id. at 155.

A case analogous on its facts was decided by the Bankruptcy Court in Florida. In In re George Schumann Tire & Battery Co., 145 B.R. 104 (Bankr. M.D. Fla. 1992), the debtor sought damages against the case trustee and the bonding company. The trustee had refused to comply with the court's orders that the surplus in the estate, plus interest, be turned

over to the debtor. The Court held that liability may be imposed on the trustee in the form of damages against the trustee for the benefit of parties in interest injured by the trustee's conduct. Debtor was a party in interest who suffered damages from the trustee's breach of fiduciary duty. The court awarded judgment against both the trustee and the bonding company.

Here, Lesyshen failed to take steps necessary to deliver marketable title to Oliver. This constitutes a breach of her duties as case trustee. She also failed to comply with this Court's order of June 5, 1992. This Court concludes that Lesyshen should be held personally liable for attorney fees incurred by Oliver beyond the ordinary costs associated with such a real estate transaction. Oliver qualifies as a party in interest injured by this trustee's conduct.

Oliver requests payment of ordinary fees of \$1,037.01 in pursuing the quiet title action authorized by the Court. Oliver also requests extraordinary fees of \$3,465.41. The Court has independently examined these fees and determines them to be necessary and reasonable. The Court also notes that Attorney Lesyshen has not filed any objection to these fees. The Court finds this significant. It is the ultimate conclusion of this Court that these fees constitute damages arising from Lesyshen's breach of her duties as case trustee. The Court finds no basis to question the amount of fees claimed. Lesyshen is personally liable to Oliver for that amount.

WHEREFORE, John Oliver is entitled to payment of \$1,037.01 from the bankruptcy estate for reasonable attorney fees arising from pursuing the quiet title action authorized by the Court's Order filed May 5, 1993.

FURTHER, Donna Lesyshen, the former trustee in this case, is personally liable to John Oliver for extraordinary attorney fees of \$3,465.41.

FURTHER, the Court hereby authorizes any party in interest as defined by Federal Bankruptcy Rule 2010(b) to proceed against the blanket bond as defined in Federal Bankruptcy Rule 2010(a) as authorized by Federal Bankruptcy Rule 2010 and 11 U.S.C. 321 and 11 U.S.C. 322.

FURTHER, judgment shall enter accordingly.

SO ORDERED this 8th day of February, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge