

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DUANE F. STEIN and
RITA M. STEIN

Debtor(s).

Bankruptcy No. 92-31609XF

Chapter 11

ORDER RE: MOTION TO ALTER OR AMEND JUDGMENT

The law firm of Childers & Fiegen, P.C. (firm), debtors' former counsel, moves the court to alter or to amend its judgment regarding the allowance and payment of professional fees. Debtors Duane and Rita Stein resist. Hearing on the motion was held March 20, 1996 in Cedar Rapids. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The motion is made under Fed.R.Bankr.P. 9023 incorporating Fed.R.Civ.P. 59.

The court entered an order on December 20, 1995 permitting firm's withdrawal as debtors' counsel. Firm applied for professional fees and costs, and debtors objected. Telephonic hearing was held on the fee application. Duane Stein appeared pro se. Dan Childers appeared for firm. The parties presented argument, but no evidence was introduced. On February 26, 1996, the court filed an order allowing some, but not all, of the fees requested. The total allowance of fees and costs was \$11,127.73.

Firm held a retainer of \$8,308.15. Mr. Stein had argued at the hearing that he should have a refund of the retainer so that he could hire new counsel. He represented to the court that an attorney he had talked to had requested a retainer of \$10,000.00 and that he could not pay it without the return of firm's retainer. Mr. Childers contended that Steins had other assets to pay such a retainer--crops from 1995. The court found that Steins needed at least some refund in order to pay new counsel when hired, and it ordered firm to hold \$3,532.46 for that purpose. Firm was permitted to apply the remaining \$4,775.69 to its fee and cost allowance.

On March 8, firm filed its motion to alter or amend. It raises three issues. The first issue involves the ability of the debtors to pay a retainer to new counsel without the need to resort to a return of part of the retainer paid to Childers & Fiegen, P.C. During the previous phone hearing on fees, Duane Stein argued that although he could raise some of the money that might be needed for a retainer for new counsel, he could not raise it all and still have money to put in a crop in 1996. Firm had argued that there were sufficient resources in the form of 1995 crops which could be used. Neither party offered evidence, just argument. Firm asked the court to look at monthly reports. The court had done so, but the most recent did not show inventory of any non-cash asset. The court entered its order based solely on Duane Stein's assertion that he needed the money because his assets were not sufficient to pay a \$10,000.00 retainer to new counsel and put in a crop.

At the hearing on March 20, I permitted introduction of evidence on the issue of ability to pay. Duane Stein testified and was cross-examined. The testimony revealed that Steins have \$5,000.00 in cash, 1,700 bushels of soybeans valued at approximately \$11,390.00 and 1,500 bushels of beans valued at approximately \$5,250.00. These values total \$21,640.00. Steins plan to farm their 50 acres of farm ground. Duane Stein estimates at \$10,000.00 the costs of planting, caring for, harvesting and delivering a 1996 crop. This seems high, but there is no contradictory evidence. Subtracting the projected costs of a 1996 crop, leaves \$11,640.00 in current assets. Mrs. Stein works. She takes home \$663.00 every two weeks. The couple do not make mortgage or adequate protections payments relating to maintaining a home. Mr. Stein testified that he has found no one to represent them, although a lawyer in Sioux City might take the case after the debtors have tried their adversary complaint against the Internal Revenue Service and the Iowa Department of Revenue.

That proceeding is scheduled for trial on April 17. Based on the additional evidence, I find that debtors have sufficient funds to plant, care for, harvest and deliver a 1996 crop and still pay a retainer to any newly retained counsel. I allowed firm reasonable professional fees for the work done and ordered a holdback of part of the retainer solely to enable the debtors to obtain new counsel. Debtors' inability to obtain counsel is not based on the lack of funds for a retainer. Firm, having earned the fee allowed, should now be paid to the full extent of its retainer. The court will, therefore, amend its prior order to permit application of its retainer in the full amount of \$8,308.15.

Based on additional evidence permitted by the court, the motion to alter or amend judgment will be granted. In light of this amendment to its prior order, the other issues raised by firm are moot.

IT IS ORDERED that the motion to alter or amend judgment is granted. The court's judgment of February 28, 1996 shall be amended to read as follows:

IT IS ORDERED that Childers & Fiegen, P.C. is allowed \$9,884.50 as professional compensation under 11 U.S.C. § 330(a)(1)(A) and \$1,243.23 as reimbursement for expenses under 11 U.S.C. § 330(a)(1)(B).

IT IS FURTHER ORDERED that Childers & Fiegen, P.C. may apply the retainer of \$8,308.15 to satisfy in part the award for fees and expenses. Childers & Fiegen, P.C. shall recover the balance pursuant to any confirmed plan, upon dismissal of the case or upon further order of this court.

SO ORDERED THIS 26th DAY OF MARCH 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to: Debtors, Dan Childers, 2002 List, Steven Sandblon and U.S. Trustee.