

In the United States Bankruptcy Court

for the Northern District of Iowa

RANDALL LEO KELCHEN
JANICE G. KELCHEN

Debtor(s).

Bankruptcy No. 95-11471KC

Chapter 7

ORDER RE APPLICATION FOR ALLOWANCE OF ATTORNEY'S FEES AND EXPENSES AND OBJECTION THERETO

On March 22, 1996, the above-captioned matter came on for hearing pursuant to assignment on an Application for Allowance of Attorney's Fees and Expenses by Attorney Joseph Peiffer, the former attorney-of-record for Debtors. Debtors Randall and Janice Kelchen filed an objection to the attorney's fees request and appeared without counsel. The parties presented evidence at the time of hearing after which the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B).

STATEMENT OF THE CASE

Attorney Joseph Peiffer makes application for interim compensation and reimbursement of expenses incurred as former attorney for Debtors in the amount of \$1,216 in attorney's fees and \$99.93 in expenses. Debtors object asserting that they have already paid Mr. Peiffer the sum of \$3,000 and feel that they have paid him sufficient fees for the work which he performed.

The file and evidence establish that Debtors filed a Chapter 7 Bankruptcy Petition on August 8, 1995. Debtors live in Manchester, Iowa and their income is partly derived from a farming operation. Debtors hired Mr. Peiffer to represent them in their bankruptcy case. The record reflects that Mr. Peiffer conducted substantial prepetition financial counseling with Debtors. In a letter written August 7, 1995, admitted into evidence as Exhibit "1", Mr. Peiffer, at great length, advised Debtors that in his professional opinion a Chapter 13 Petition would be preferable to a Chapter 7 Petition for various reasons. It appears that the primary reason involved obligations owed to FmHA. Additional concerns involved growing crops. Nevertheless, Debtors chose to file a straight Chapter 7 bankruptcy and Mr. Peiffer acknowledged that he would represent them in this Chapter 7 case.

The fee arrangement between the parties is also set out in the letter of August 7, as reflected in Exhibit "1", in the last two paragraphs of Page 2. These two paragraphs state:

We have spoken about fees in the past. I have told you that from the \$3,000 retainer that you are paying me, I will pay in full the bill that you have run up to date. In addition, I will hold the rest of it utilizing \$160.00 for your filing fee and the balance to cover the rest of your bankruptcy. When I say the rest of your bankruptcy, that means a traditional chapter 7 bankruptcy without objections to dischargeability, objections to exemptions, requests to take depositions and without me spending time negotiating with Farmers Home Administration or other creditors regarding the issues which may present themselves in your bankruptcy.

I cannot give you a cap on fees which include all potential things which could go wrong in your bankruptcy. This is because I do not know which creditors may cause problems and how much trouble they may cause. In the event that a creditor objects to your exemptions, a creditor seeks to have your deposition taken, or a creditor objects either to your discharge or the discharge of the indebtedness owed to it, you will incur additional charges. These will be at my standard hourly rate of \$140.00 per hour.

Mr. Peiffer represented Debtors in their Chapter 7 filing. Eventually, difficulty occurred in the relationship between Mr. Peiffer and Debtors. Debtors retained another attorney and Mr. Peiffer withdrew as counsel in October of 1995. These occurrences are reflected in Debtors' Exhibit "A" which is a letter to Debtors from Mr. Peiffer dated October 10, 1995.

On January 29, 1996, Mr. Peiffer filed the Application for Compensation and Reimbursement of Expenses herein. The Application seeks compensation for professional services rendered in the amount of \$1,216 and reimbursement of expenses in the amount of \$99.93 less the sum of \$67.72 which was previously paid by Debtors.

The initial arrangement between Mr. Peiffer and Debtors as evidenced in Exhibit "1" anticipated that Mr. Peiffer would take a \$3,000 retainer which was intended to cover much of the bankruptcy proceedings. Mr. Peiffer, however, also indicated that he anticipated potential problems with FmHA and with the growing crops because of Debtors' reluctance or unwillingness to file a Chapter 13. He stated in his letter to Debtors that if problems arose with FmHA or other creditors, additional fees could be incurred at his standard hourly rate of \$140 per hour. The Court assumes that this recitation from Exhibit "1" constitutes a general framework for the representation provided by Mr. Peiffer.

At the time of hearing, Attorney Peiffer withdrew his request for \$320 in fees which were generated on October 9, 1995 by Linda Merritt. These fees constituted four hours of research on the issue of whether a Trustee can avoid liens after abandoning the estate's interest in property. Thus, Mr. Peiffer requests payment of total fees, after deduction of \$320, of \$896.00 and total expenses, after deduction of the previous payment, of \$32.21. Attorney Peiffer presented evidence at the hearing, including the expert testimony of Attorney Tom McCuskey who practices bankruptcy law. Mr. McCuskey testified that the fees, as requested, are fair and reasonable.

CONCLUSIONS OF LAW

Mr. Peiffer's Application for Allowance of fees and expenses and Debtors' objection raise two separate questions for the court: (1) whether Mr. Peiffer is entitled to payment of fees and expenses arising from postpetition representation of Debtors beyond the \$3,000 retainer he has already received, and (2) whether these fees and expenses are payable from Debtors' bankruptcy estate under § 330(a). The Eighth Circuit and this Court have both stated that services rendered by debtors' counsel are compensable from the estate only if those services actually benefit the estate. In re Reed, 890 F.2d 104, 106 (8th Cir. 1989); In re Holden, 101 B.R. 573, 577 (Bankr. N.D. Iowa 1989). Services rendered by a debtor's attorney's which benefit the estate can include analyzing the debtor's financial condition, advising on whether to file for bankruptcy relief, preparing and filing the petition and schedules, and representing the debtor at the § 341 meeting. Holden, 101 B.R. at 576. Services rendered that benefit only the debtor personally and are not compensable from the estate include resisting objections to exemptions and resisting dischargeability proceedings. Id. at 577.

Thus some postconfirmation services by a debtor's counsel, those that benefit the estate, will be examined under § 330(a) and Rule 2016(a). In re Bradenburger, 145 B.R. 624, 631 (Bankr. D.S.D. 1992). Others that do not benefit the estate will be subject only to disclosure under § 329(b) and Rules 2016(b) and 2017. Id. Debtors will have the personal obligation to pay for postconfirmation services that are not recognized as compensable from the estate. Id.

Some courts have recently held that § 330(a) as amended by the Bankruptcy Reform Act of 1994 no longer provides a basis for an award of attorney fees from estate funds to the debtor's attorney in a Chapter 7 case. In re Fassinger, 191 B.R. 864, 865 (Bankr. D. Or. 1996); In re Friedland, 182 B.R. 576, 580 (Bankr. D. Colo. 1995); In re Kinnemore, 181 B.R. 520, 521 (Bankr. D. Id. 1995). This amended provision is applicable in this case. It is now apparent, however, that Congress inadvertently omitted reference to allowance of fees to debtors' attorneys in Chapter 7 in the Reform Act of 1994 and is in the process of correcting that error. S. 1559, 104th Cong., 2d Sess. § 4 (1996) ("Bankruptcy Technical Corrections Act of 1996"). Senate File 1559 was introduced by Senator Grassley on February 6, 1996 and was referred to the Senate Committee on the Judiciary. It would amend § 330(a)(1) by inserting ", or the debtor's attorney" after "1103". Id.

The Court has reviewed the request for attorney's fees prepared by Mr. Peiffer. In so doing, the Court has disregarded all time spent by Mr. Peiffer prior to September 13, 1995 as either occurring prior to, or as reasonably included in, the letter of understanding previously discussed in this ruling. Those services involved reaffirmation agreements which Mr. Peiffer's letter indicated were included in the base fee. As such, all services rendered prior to September 13, 1995 are

reasonably included in the \$3,000 fee which Debtors have already paid. Mr. Peiffer is not requesting payment from the estate of this amount, having already been paid by Debtors, and Debtors do not appear to dispute the legitimacy of these fees.

Commencing on September 18, 1995 and proceeding forward, a great majority of the time spent by Mr. Peiffer involves negotiations with FmHA or other creditors relating to the machinery and equipment and growing crops. Apparently, FmHA disputed the valuation and exemptibility of machinery and equipment. Debtors do dispute the necessity of these services and Mr. Peiffer appears to be requesting compensation for these services from the estate under § 330(a).

Cases such as Fassinger raise the question of whether a Chapter 7 debtor's attorney may now be compensated by the estate under any circumstances. The Court need not consider that question at this time. Even if Chapter 7 debtors' attorneys are considered entitled to fees under the Code, under Reed and Holden the services for which Mr. Peiffer is seeking compensation are not compensable from the estate. Such services appear to be an effort to resist FmHA's objections to exemptions which would benefit merely the Debtors, and not the estate. The Court holds that Mr. Peiffer is not entitled to compensation from the estate under § 330(a) because the services rendered after September 13, 1995 for which he seeks compensation did not benefit the estate.

This conclusion, however, does not affect Debtors' obligation, if any, to pay the remaining amounts due and owing to their attorney. See Holden, 101 B.R. at 577. Ruling that Mr. Peiffer is not entitled to payment from the bankruptcy estate does not mean that he is not entitled to payment of the outstanding balance of his bill. Id.; Bradenburger, 145 B.R. at 631.

Debtors' objection raises this second issue: whether Mr. Peiffer is entitled to payment of fees from Debtors for services rendered beyond the original \$3,000 retainer. The burden rests on the party requesting compensation for legal services to show the services rendered were reasonably necessary and the value thereof. Lundy, Butler & Lundy v. Bierman, 398 N.W.2d 212, 215 (Iowa App. 1986). The general rule is that an attorney may ordinarily recover fees only for services the attorney rendered to a client pursuant to an express or implied contract. In re Marriage of Meadows, 492 N.W.2d 656, 658 (Iowa 1992).

Any determination of attorney fees must include but is not limited to, a consideration of the amount of time spent; nature, extent and difficulty of the services; amount involved; responsibility assumed; results obtained; customary charges for similar services; and professional standing and experience of the attorney.

Lundy, Butler, 398 N.W.2d at 215.

The two paragraphs in Exhibit "1" constitute a sufficient contract upon which to find that Mr. Peiffer is entitled to recover fees from Debtors for services rendered. Considering the factors listed above, the Court concludes that Mr. Peiffer has met his burden to show the services rendered were reasonably necessary. He had anticipated problems with FmHA when he recommended Debtors file a Chapter 13 rather than Chapter 7 petition. He negotiated with FmHA on Debtors' behalf postpetition. Such negotiations were reasonably necessary to protect Debtors' interests in machinery and growing crops.

The Court concludes that Mr. Peiffer's services are compensable under the agreement of the parties found in Exhibit "1". Reviewing Mr. Peiffer's statement of fees, the Court concludes that the total number of billable hours for these services is 5.5 hours at an hourly rate of \$140. Thus, the total amount due and owing by Debtors is \$770 for time reasonably spent by Mr. Peiffer on Debtors' bankruptcy affairs above and beyond the original \$3,000 retainer. Additionally, counsel is entitled to an additional \$32.21 for out-of-pocket expenses which were legitimately accrued throughout the course of representation and are fair and reasonable.

WHEREFORE, the Application for Allowance of Attorney's Fees and Expenses filed by Attorney Joseph Peiffer is GRANTED IN PART and DENIED IN PART.

FURTHER, Attorney Joseph Peiffer is entitled to payment of fees by Debtors of \$770.00 and expenses of \$32.21.

FURTHER, these fees are not compensable by the bankruptcy estate under § 330(a).

FURTHER, judgment shall enter against Debtors Randall Leo Kelchen and Janice G. Kelchen and for Attorney Joseph Peiffer in the total amount of \$802.21

SO ORDERED this 29th day of March, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge