

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
DANIEL W. OLSON,) CASE NO. BK94-80157
) CH. 7
DEBTOR(S)) Filing No. 29, 31

MEMORANDUM

Hearing was held on January 23, 1995, on an Application for Fees filed by Radley Clemens and Objection by Thomas Stalnaker, Trustee.. Appearing on behalf of debtor was Radley Clemens of Omaha, Nebraska. Appearing on behalf of the Trustee was Thomas Stalnaker of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Background

Radley Clemens, the attorney for the debtor, has filed an application for attorney fees in the Chapter 7 bankruptcy case of Daniel W. Olson in the amount of \$1761.00 for 18.02 hours of work. The Chapter 7 Trustee, Thomas Stalnaker, has objected to the application on three grounds: (1) Mr. Clemens filed an attorney's lien in litigation that is taking place outside of the bankruptcy court. Such filing is a violation of the automatic stay and he should, therefore, be prohibited from receiving any fees until such time as the lien is released; (2) Mr. Clemens is requesting fees for services performed prepetition; and (3) Mr. Clemens is requesting fees for time spent on a cause of action owned by the estate that was handled by the trustee, and the trustee at no time approved or requested any assistance from the debtor or counsel for the debtor.

Facts

The debtor filed for Chapter 7 bankruptcy relief on February 2, 1994. In his bankruptcy schedules, the debtor stated that he was a party to a lawsuit in federal district court (the lawsuit) and that the debtor filed the lawsuit to recover damages for false credit reporting. The debtor listed the value of the lawsuit as "unknown" and claimed the recovery from the lawsuit as exempt. During other proceedings before this Court, the debtor has variously suggested that the value of the lawsuit is \$840.00 or \$500.00.

In his fee application, Mr. Clemens seeks reimbursement for 18.02 total hours of work. None of the 18.02 hours was billed for work performed in the actual bankruptcy case. The disclosure of

attorney fees for the bankruptcy case, which is attached to the debtor's bankruptcy schedules, states that the total dollar amount of attorney fees charged for the Chapter 7 case was \$500.00, of which \$30.00 was paid prepetition. The remaining fee of \$470.00 is not listed on the fee application under consideration, and the Court does not know if the \$470.00 has been paid or not. Of the total hours billed, 11.82 hours of the 18.02 are for prepetition services. Mr. Clemens has filed a proof of claim in the debtor's case in the amount of \$1,761.00, which is a claim for all prepetition and post-petition fees contained in the fee application.

After the bankruptcy petition was filed, the trustee took over the lawsuit and began to negotiate a settlement with the defendants. The trustee gave notice to the debtor and the debtor's attorney that the lawsuit was property of the estate and that the trustee was going to pursue the action on behalf of the bankruptcy estate. The trustee did not engage Mr. Clemens's services as special counsel or request Mr. Clemens to in any manner assist with the lawsuit.

Even though Mr. Clemens was not employed as special counsel, the fees incurred post petition as shown on Mr. Clemens's application are for time spent on discovery for the lawsuit, including 4.23 hours which was incurred after the trustee and defense counsel to the lawsuit filed a motion in the trial court to delay discovery while a settlement offer was pending. Eventually, this settlement offer was accepted, and the trustee recovered \$2,000 on behalf of the estate.

During the pendency of the settlement negotiations and after the petition for relief was filed, Mr. Clemens filed an attorney's lien on the proceeds from the lawsuit in the trial court in the amount of \$1646.00, which was the total amount of pre- and post-petition attorney fees accumulated up to that time. Notice of the attorney's lien was filed with the bankruptcy court on August 4, 1994 (filing no. 21).

Mr. Clemens takes the position that he is entitled to the attorney fees requested in the application because his efforts to assist the debtor with the discovery requests helped increase the dollar amount of the recovery to the estate. Mr. Clemens claims that the original value of the lawsuit was \$500.00 and that the total value of the lawsuit was originally exempt. Mr. Clemens believes that because the lawsuit was claimed as exempt, the trustee was not entitled to exclude him from the lawsuit and settlement negotiations.

Decision

Mr. Clemens's fee application is disallowed in its entirety as an administrative expense claim of the estate.

Discussion

(1) The Attorney's Lien

11 U.S.C. § 362(a)(4) stays "all entities" from acts to create any lien against property of the estate. Thus, actions taken in violation of the automatic stay are void and without legal effect. 48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.), 835 F.2d 427, 431 (2d Cir. 1987), cert. denied, 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1988); In re Ward, 837 F.2d 124, 126 (3d Cir. 1988); In re Raymark Indus., Inc., 973 F.2d 1125, 1132 (3rd Cir. 1992); Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992); Interstate Commerce Comm'n v. Holmes Transp., Inc., 931 F.2d 984, 987-88 (1st Cir. 1991); but see Bronson v. United States, 1995 WL 29850 (Fed. Cir. 1995) (holding that a violation of the automatic stay is not void per se, but is avoidable).

The attorney's lien filed by Mr. Clemens in the trial court after the Chapter 7 petition was filed is a violation of the automatic stay. Therefore, the lien is void.

(2) Fees for Prepetition Services

Prepetition services are not entitled to be treated as an administrative expense under 11 U.S.C. § 503(b)(1). Mr. Clemens has filed a proof of claim in this case for these services, and he is, therefore, entitled to distribution from the estate as a general unsecured creditor. In addition, these fees all relate to the lawsuit in district court and these fees were not performed in connection with or done in the contemplation of this bankruptcy case. The fact that the lawsuit eventually became property of the estate is not relevant. No reimbursement for an administrative expense is allowed for fees incurred before the bankruptcy petition date. The total amount of work performed prepetition was approximately 11.82 hours or \$1,182 of the total \$1,761.00 fee.

(3) Fees for Post-petition Work on Lawsuit

The remainder of time on Mr. Clemens's fee application is approximately 6.2 hours, and all of that time was spent on activities related to the lawsuit, and not directly on the bankruptcy case. Of post-petition services performed, Mr. Clemens is entitled to be reimbursed for attorney fees as an administrative expense claim holder only if those services were performed for the benefit of the estate. 11 U.S.C. § 503(b)(1); In re Reed, 890 F.2d 104 (8th Cir. 1989).

The Chapter 7 trustee has the absolute right to collect and reduce to money the property of the estate. 11 U.S.C. § 704(1). In this case, the property of the estate included the debtor's interest in the lawsuit. 11 U.S.C. § 541(a).

The work performed by Mr. Clemens in conjunction with discovery for the lawsuit did not increase the value of this asset. This Court has already held in a previous hearing that Mr. Clemens's efforts did not increase the value of the recovery in the lawsuit. On August 8, 1994, the Court ruled on the trustee's objection to the debtor's claimed exemption in the lawsuit and made the following findings of fact:

[T]he debtor has not engaged in any conduct which could have increased the value of this lawsuit. The debtor stated that he has complied with the defendant's requests for discovery by producing medical records, but compliance with discovery requests does not increase the fair market value of the lawsuit because the actual value of the cause of action is no more than it was before discovery was initiated.

Order, BK94-80157, August 8, 1994, at 4-5.

Mr. Clemens has raised the identical argument in this proceeding and is taking the position that the original value of the lawsuit was only \$500.00, but because of his efforts to comply with the discovery requests, the value of the lawsuit to the estate increase to \$2,000.00. Not only did this Court previously find that the debtor's efforts to comply with discovery did not increase the value of the lawsuit, but this Court also found in the August 8, 1994 Order that the \$500.00 value that Mr. Clemens and the debtor assigned to the lawsuit was not substantiated by the debtor and was, therefore, not an accurate statement of the value of the lawsuit. Order, BK94-80157, August 8, 1994, at 4. Mr. Clemens's argument that his efforts increased the value of the lawsuit is disingenuous because it was Mr. Clemens who asserted that the value of the lawsuit was low so that his client, the debtor, could claim the entire lawsuit and the proceeds as exempt. It was the trustee who argued and proved that the value of the lawsuit was higher than \$500.00.

Of the 6.2 hours spent post petition on the lawsuit, Mr. Clemens spent 4.3 of those hours performing discovery after the trustee, plaintiff, and the defendants filed a joint motion for extension of progression order to delay discovery in the lawsuit because a settlement offer, which was eventually accepted, was being considered. Once the parties reached a settlement and delayed further discovery, there was no reason for Mr. Clemens to continue with discovery and to continue billing for discovery performed in the lawsuit. Not only was Mr. Clemens not authorized to even be working on the lawsuit, but in addition, this activity was unnecessary and could have potentially injured the estate. The estate could have been injured because Mr. Clemens is seeking reimbursement for activities that were useless to the bankruptcy

estate and because Mr. Clemens was so oblivious to the trustee's work on the case that his conflicting activity could have caused an interference with the settlement process.

On Mr. Clemens's fee application, 1.90 hours remain. This time was spent reviewing interrogatories sent to the debtor in conjunction with the lawsuit, sending a letter to the client, calling the client and reviewing interrogatories with the client. There is absolutely no evidence that the settlement offer was contingent on the discovery material provided by the debtor.

To the extent Mr. Clemens advised the debtor on how to answer interrogatories, Mr. Clemens provided a service to the debtor, not to the estate. The debtor has a duty to the bankruptcy court to fully cooperate with the trustee and a general duty to adhere to the rules on discovery, with or without an attorney. Therefore, the debtor and Mr. Clemens did not increase the value of the lawsuit by providing discovery because the debtor was already bound by law to provide complete disclosure. If a debtor wants to hire an attorney to clarify a discovery request, then that employment is between the debtor and the attorney, and is of no importance or benefit to the bankruptcy estate because the estate was already entitled to the debtor's full cooperation.

Mr. Clemens admitted that the trustee excluded him from the lawsuit and did not want his help in the lawsuit. Therefore, Mr. Clemens knew or should have known during this entire bankruptcy case that he had no business interfering in the lawsuit. Mr. Clemens's argument that he had a right to continue to work on the lawsuit because the lawsuit was claimed as exempt is without merit because the lawsuit was not, in fact, exempt. Because Mr. Clemens was not authorized by the trustee to work on the lawsuit, this Court will not allow reimbursement to Mr. Clemens for fees incurred while providing post-petition representation to the debtor that did not benefit the bankruptcy estate and was not authorized by the trustee.

Conclusion

A. No amount is allowed Mr. Clemens as an administrative expense.

B. Mr. Clemens may amend his claim to show only prepetition services. Such amended claim shall be filed and served on the trustee within thirty days.

C. Mr. Clemens shall release the attorney fee lien in the Federal District court case and file and serve on the trustee a notice of such release.

D. If the attorney lien is released and the amended claim is timely filed, the trustee may object to the amended claim within

twenty days after receiving notice of the lien release. If no objection is filed, the claim for prepetition fees shall be deemed allowed.

E. If Mr. Clemens fails to timely amend the claim and release the attorney lien, his claim shall be deemed disallowed in total and the trustee may request a specific order regarding the voidness of the lien.

Separate journal entry shall be filed.

DATED: March 7, 1995

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

STALNAKER, THOMAS 393-2374

Copies mailed by the Court to:

Radley Clemens, 6404 N. 91 Plaza, Omaha, NE 68134
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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DANIEL W. OLSON,)	CASE NO. BK94-80157
)	A
<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 29, 31
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: March 7, 1995
<u>Defendant(s)</u>)	HEARING DATE: January
)	23, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Application for Fees filed by Radley Clemens and Objection by Thomas Stalnaker, Trustee.

APPEARANCES

Radley Clemens, Attorney for debtor
Thomas Stalnaker, Trustee

IT IS ORDERED:

Mr. Clemens's fee application is denied as an administrative expense. See memorandum of this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
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