U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 05-14579

ORDER

The relief set forth on the following pages, for a total of 9 pages including this page, is hereby ORDERED.

FILED BY THE COURT
08/17/2007

US Bankruptcy Court Judge
District of South Carolina

Entered: 08/17/2007

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Gregory Eugene Carlson and Pamela Jean Carlson, Debtors.	C/A No. 05-14579-HB Chapter 13 **ORDER**

THIS MATTER came before the court for a continued hearing on July 10, 2007, pursuant to the Objection of the Chapter 13 Trustee, Wm. Keenan Stephenson, to fees claimed by debtors' counsel, John R. Cantrell, Jr. The disputed fees involve Cantrell's claim of $500 for representation of the debtors related to a motion to reconsider a stay lift and the negotiation of a resumption of payment agreement. The trustee objects to the allowance of any amount for these services of more than $350. After receipt and careful review of considerable pleadings and evidence, the court enters the following order sustaining the trustee's objection to the $150 contested portion of Cantrell's claim.

FINDINGS OF FACT

1. On December 21, 2006, counsel for a mortgage creditor filed an Affidavit of Default evidencing the debtors' default under a previously entered settlement order. As a result, the court entered an order granting modification of the automatic stay to the creditor.

2. On January 16, 2007, the debtors, by and through their attorney Cantrell, filed a Motion to Reconsider the order lifting the stay. The Motion alleges that the Affidavit of Default is "false." On January 22, creditor filed a response and provided information to Cantrell to support the facts set forth in its affidavit.

3. Thereafter Cantrell and counsel for the creditor entered into a proposed settlement which did not grant the Motion to Reconsider and did not reinstate the stay, but rather contained standard language providing that the trustee could resume payments on the mortgage arrearage through the chapter 13 plan and that creditor would not proceed with foreclosure for so long as the debtor complied with the terms of the resumption agreement and cured the missed payment referenced in the Affidavit of Default.

4. On May 16, 2007, Cantrell filed a Proof of Claim for $750 in attorney fees that checked the "replaces" box, indicating that it replaced the prior claim,[1] along with an Amended Disclosure of Compensation of Attorney for Debtor and Statement of Change indicating that:

> The attached Amended Disclosure of Attorney Compensation adds $750.00 to the amount originally charged to file the case. This additional amount is composed of a $250.00 flat fee for defense of a GMAC 362 motion and $500.00 in hourly fees for filing a Motion to Reconsider the Order Granting Relief from Stay regarding GMAC Mortgage and for negotiating the consent order allowing resumption of payments to GMAC. The extra fee also covers the preparation and filing of this document and the revised proof of claim form.

This explanation of the charge of $250 was different than in the prior claims and disclosures, which mentioned $200. No detail of hourly rates or time spent on the remaining "$500.00 in hourly fees" was included.

5. Cantrell did not file an Application for Compensation of a professional including time records and hourly rates.

6. The trustee objected to Cantrell's claim and Cantrell filed a response thereto asserting that Cantrell would prove that he was entitled to the disputed fee by time

[1] This replaced the claim filed on March 14, 2007 for $700. The trustee objected to this claim, prompting the hearing in this matter.

records. The response also asserted that the trustee was acting improperly and included a request that attorney fees and costs be assessed against the trustee.

7. Cantrell provided evidence to the court indicating 2.2 hours of actual time spent on tasks related to the filing of a Motion to Reconsider dating from the time the Affidavit of Default was filed through the date of the creditor's response to the Motion to Reconsider. This time covers charges through January 22, 2007. Cantrell asserted that this hourly time should be compensated at $250 per hour, which would equal more than his $500 claim.

8. Cantrell also presented evidence to the court that he did not have time log entries for the time period from January 23[2] through March 16, 2007, referred to by Cantrell as the "gap period," and therefore hourly time for that period is not included in his time logs or in the 2.2 hours. He explained in his Affidavit presented to the court in support of his claim that "[d]uring the gap period, I also negotiated with opposing counsel the cessation of a state court foreclosure action and an Order Allowing Resumption of Payments" and that the time for these services should be added to the hourly time submitted.

9. Cantrell provided a printout to the court evidencing approximately 128 e-mail transactions relating to this case between December 21, 2006 and March 16, 2007. Many of those transactions were NEF transmissions from the Bankruptcy Court or miscellaneous items. Cantrell prepared a summary thereof explaining that the printout contained substantive e-mails as follows: 32 e-mails to his client, 15 e-mails to creditor's counsel, and 35 e-mails received from others. Copies of the e-mails were presented into evidence. Of the 128 e-mail items, 46 took place during the "gap period" between

[2] Cantrell's Affidavit states that "although there is much activity from 1-22-07 to 3-16-07, there are no time log entries for those activities." The hourly time records do include January 22 entries, so the court began the "gap period" computation on January 23, 2007.

January 23 and March 16, 2007. All remaining e-mails occurred during the time period covered by the 2.2 hours of time reported by Cantrell through January 22. In the time records provided by Cantrell for the 2.2 hours, some e-mails were disclosed as consuming between 2 minutes and 4 minutes, while others were not mentioned at all, presumably because the e-mail itself was contained within a more comprehensive time entry.

10. Cantrell argued to the court that if each e-mail during the "gap period" was assigned a time value of 1/10 of an hour (6 minutes), by this method he would also have shown sufficient hours to justify more than the $500 in hourly fees at the rate of $250 per hour.

11. Counsel for the creditor testified at the July 11 hearing on the claim objection. She testified that she and her client routinely enter into agreements allowing resumption of payments through a chapter 13 plan after the stay has been lifted upon request and without the need for filing a motion of any sort via standard order traditionally acceptable to the court. She testified that Cantrell did not contact her in any way before the Motion to Reconsider was filed to discuss his allegation that the Affidavit of Default was false or to request consideration of a resumption agreement.

DISCUSSION AND CONCLUSIONS OF LAW

The applicant requests the amount of $500 for filing a Motion to Reconsider and negotiating a resumption of payment agreement, and the trustee asserts that this fee should be allowed at no more than $350. The trustee also asserts that counsel's fees should be disallowed or reduced because he failed to file a formal fee application for the amount in controversy.

Counsel for chapter 13 debtors in this district often file proof of claim forms for payment of attorney fees subject to the conditions described in In re Simmons, No. 06-01566-jw, slip op. at 3 (Bankr. D.S.C. Mar. 2, 2007). In other instances, a fee application is necessary. While the court agrees that the proofs of claim together with the Rule 2016 statements and amendments thereto filed by Cantrell were insufficient in form and substance to constitute a fee application and did not contain sufficient information to evaluate the claim, the subsequent development of the record before and at the hearing gave the court sufficient information to assess the validity of the contested portion of the claim. Therefore, requiring a fee application of Cantrell at this point would serve no purpose and will not be required on these facts.[3]

Cantrell has the burden of proof in this matter. Simmons found that despite the fact that a proof of claim form was used as a convenient method for asserting the claim, the fee applicant/claimant is nonetheless charged with the burden of proof at any hearing challenging the claim. Slip op. at 4. In this case Cantrell agreed at the hearing to follow Simmons on that point.[4] However, even if the burdens were analyzed differently, the burden of going forward with the evidence would have shifted to Cantrell on these facts.[5] The trustee pointed out the fact that there was insufficient and contradictory information

[3] The Simmons case did not conclusively require a fee application, but rather suggested that it is the better practice on facts such as these. In re Simmons, slip op. at 9. That case instead stated that the attorney must "offer evidence in support of the fee or otherwise meet his burden of proof in demonstrating that the requested fee is reasonable." Id. at 4-5. In that case the court stated, "Counsel has not submitted a fee application but the Court will nevertheless review whether the fee was reasonable under applicable law." Id. at 9.

[4] Cantrell asserted otherwise in his pleading as set forth above.

[5] In re Hoffman Associates, No. 90-02419, slip op. at 6 (Bankr. D.S.C. Dec. 12, 1995) ("It is well established that in objecting to a claim against the Debtor, it is the burden of the objecting party to initially present sufficient evidence to overcome the prima facie presumption of validity enjoyed by a validly filed proof of claim. Having overcome the prima facie presumption, however, the burden of proof then shifts to the party submitting the claim to prove its claim.") (citing In re Allegheny Intern, Inc., 954 F.2d 167 (3d Cir. 1992)).

provided in the claim and supporting documents, making it difficult to determine the validity and accuracy of the claim.

11 U.S.C. § 330(a)(3) provides that the court should include the following factors in analyzing the fees charged:

> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field;[6] and
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3)(A-F). Also, as recently noted by this court in Simmons, the Fourth Circuit also allows the use of other factors, which were first set out in Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978). As stated in Simmons:

> Layered onto the factors set forth in 11 U.S.C. § 330 are certain other factors adopted by the Fourth Circuit. In Harman, the Fourth Circuit determined that the lodestar method may be used to calculate reasonable attorney's fees in a chapter 13 case. See Harman, 772 F.2d at 1152. The lodestar method involves a consideration of the following factors: "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases." Id. (citing Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir. 1978)).

[6] This subsection and consideration was added by the October, 2005 amendment to the Code which was effective two days after the filing of this case. However, as the list of factors was not exhaustive prior to that time, it may be given some weight.

Simmons, slip op. at 7-8. As stated by the Fourth Circuit, "the Barber factors are properly employed in the determination of a reasonable attorney's fee under 11 U.S.C. § 330." Harman v. Levin, 772 F.2d 1150, 1151 (4th Cir 1985).

Cantrell has proven 2.2 hours of time with contemporaneous time records for filing of a Motion to Reconsider, preparation of an affidavit in support, and communications between Cantrell and his client to accomplish this task. Considering all of the factors set out above and after considering the results obtained, the court finds that fees for the Motion to Reconsider should not be allowed. The services in question were not necessary and beneficial toward the completion of the case based on the specific facts of this case. The Motion to Reconsider was neither needed nor justified and charges therefore should not be compensated from estate funds.[7] Therefore, fees claimed based on the 2.2 hours of time expended between December 22, 2006 and January 22, 2007 will not be allowed.

The portion of Cantrell's time reasonably spent for the negotiation of the resumption of payment agreement should be compensated on these facts pursuant to the standards set forth above. For this work alone the trustee has no objection to compensation of $350, with or without evidence. Cantrell has asserted that he should be

[7] This conclusion is reached not only with the benefit of hindsight regarding the Motion to Reconsider, but rather after a detailed review of the evidence in this case. In addition to the hourly timekeeping, Cantrell provided records of the e-mail conversations between him and his clients. Courts rarely have the opportunity to review conversations between attorney and client. However, in this case numerous written conversations between the two were provided by Cantrell, giving considerable insight into the analysis behind the Motion to Reconsider. While the undersigned has no interest in prying into such private conversations, they were presented as evidence and therefore were considered. The information contained in those conversations coupled with the knowledge that the Affidavit was not false and after considering the fact that no effort was made to communicate with creditor's counsel before the filing of the Motion, lead the court to find that the fees incurred for the Motion to Reconsider were unnecessary.

compensated on an hourly basis at the appropriate rate.[8] However, Cantrell did not have time log entries for the time period from January 23 through March 16, 2007.[9] Without proof of the amount of time and/or some evidence for the value of the time during this "gap period," the court has no basis for allowing fees above the objectionable amount. The only evidence before the court is the result achieved and the actual e-mails between Cantrell and others during this period. Cantrell suggests assigning a time of one tenth of an hour per e-mail (6 minutes). However, this conclusion is not supported by the manner in which he billed e-mail conversations within his own time records for the 2.2 hours of time disallowed. Therefore, the court cannot determine the actual or average amount of time to assign to each e-mail, whether some should be grouped together, or included with other tasks. Despite considerable effort by the court, an appropriate amount of time simply cannot be assigned based on this record. Therefore, fees for the matters relating to the resumption of payment agreement will be allowed in the uncontested amount of $350 as there is no conclusive evidence in the record to support a different award.

IT IS THEREFORE, ORDERED, THAT:

1. Cantrell's claim filed May 16, 2007 in the amount of $750 is hereby reduced to $600;
2. The court denies or rejects Cantrell's Affirmative Defenses and related motions.

[8] On this record the court had difficulty conclusively establishing an hourly rate for Cantrell's services but was not required to reach any decision given the deficient time records.

[9] It is notable that the Motion for Reconsideration was filed on January 16, 2007 and creditor's response was filed January 22, 2007. The resumption agreement was entered on March 12, 2007.