

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 04-11187

ORDER ON ATTORNEY FEES

The relief set forth on the following pages, for a total of 11 pages including this page, is hereby ORDERED.

FILED BY THE COURT
01/22/2008



Entered: 01/23/2008

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Michael W. Brown and
Christy L. Brown,

Debtor(s).

C/A No. 04-11187-DD

Chapter 13

ORDER ON ATTORNEY FEES

THIS MATTER is before the Court on the Chapter 13 Trustee's ("Trustee") objection to attorney fees ("Objection") sought by John R. Cantrell, Jr. ("Mr. Cantrell"). A hearing was held in this matter on December 17, 2007. The Trustee and Mr. Cantrell, who is the Debtors' attorney, appeared and made arguments for their respective positions. The fees to which the Trustee objects arise from work performed by Mr. Cantrell in defending against a motion for relief from stay filed by HSBC Mortgage Services ("HSBC"). Mr. Cantrell seeks compensation from the chapter 13 estate in the amount of \$1,225.00.

Facts

Debtors filed a petition for relief under chapter 13 of the Bankruptcy Code on September 21, 2004. The disclosure of compensation filed by Mr. Cantrell reports a fee of \$1500 for representing Debtors. His disclosure also reserves the right to charge additional fees for certain services as provided in his retainer agreement, including defending against motions for relief from stay. A plan was confirmed. The plan treats the secured claim of HBSC by providing for the cure of a pre-petition arrearage from a portion of the monthly plan payment. Current post-petition payments to HBSC are to be made directly by Debtors.

On August 29, 2007 HBSC filed a motion for relief from stay seeking authority to foreclose on its collateral, 71 Waterview Road, St. Matthews, South Carolina. HBSC's motion requests that relief be granted based on Debtors' failure to make post-petition payments pursuant to the terms and conditions of their note and mortgage and an alleged lack of adequate protection. It further requests attorney fees in the amount of \$5,150.00. On September 10, 2007 Mr. Cantrell, on behalf of Debtors, filed an objection to HBSC's motion for relief from stay. Debtor's objection (1) admits the delinquencies that are stated in HBSC's certification of facts, (2) opposes HBSC's request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and (3) opposes HBSC's request for attorney fees; demanding proof that the amount of \$5,150.00 is reasonable, necessary, and actually incurred by HBSC.

On September 21, 2007 HBSC amended its motion for relief from stay to change the hearing location from Charleston to Columbia. On September 28, 2007 a consent order was entered which (1) lifts the automatic stay in regards to HBSC's collateral, (2) denies waiver of the 10 day stay provided by Fed. R. Bankr. P. 4001(a)(3), and (3) provides for no award of attorney fees to HSBC. Mr. Cantrell filed a proof of claim on October 6, 2007 requesting payment from the estate of attorney fees in the amount of \$1,225.00 for his defense against the HBSC motion for relief from stay.¹

On October 17, 2007 the Trustee filed an objection to Mr. Cantrell's proof of claim. At the hearing the Trustee indicated that she objected to Mr. Cantrell's claim because she believed a reasonable fee to be \$400 and not the \$1,225 sought by Mr. Cantrell. The Trustee indicated that she and the other chapter 13 trustees in this district

¹ Mr. Cantrell amended his proof of claim on November 30, 2007. The amount of the claim was not altered. The difference in the two proofs of claim is that Mr. Cantrell attached to the later claim a copy of the retainer agreement with his clients and a summary time sheet indicating that he had spent 4.9 hours defending against HBSC's motion.

have a schedule which they use as a guide to determine when to object to fees as unreasonable.

The amount of the attorney fee request of HBSC was apparently a typographical error. Mr. Cantrell actually spent the time and performed the services reflected on the summary time sheet attached to his proof of claim.

Contentions of the Parties and the Procedural Background of the Dispute

The attorney for the Debtors has raised a series of issues that find a basis in the procedure utilized in this District for approval of attorney fees for debtor's counsel in chapter 13 cases. For a number of years prior to January 1, 2008² the form chapter 13 plan mandated for use by local rule provided for the filing of a proof of claim to establish the amount of attorney fees to be paid under the plan and allowed for amendment of the proof of claim as the mechanism for requesting additional fees. *SC LBR 3015-1(a) and Exhibit A thereto*. The local rule and form were adopted (and amended or modified from time to time) based on suggestions from the chapter 13 trustees, counsel for debtors and creditors in consumer cases, and the United States Trustee. Historically, the use of proofs of claim to establish the amount of attorney fees for debtor's counsel evolved as a mechanism to consolidate in one location, the claims register, the documents a trustee would consult in making distribution under the plan. The procedure also distanced the judges from involvement in the rarely contested area of consumer attorney fees.

Mr. Cantrell contends that his proof of claim should be given the *prima facie* validity afforded to proofs of claim pursuant to *Fed. R. Bankr. P 3001(f)*. He suggests

² Operating Order 07-12 adopts a procedure for approval of compensation for debtor's attorneys in chapter 13 cases filed on or after January 1, 2008. It provides for an election from several options for fees, ranging from a fixed fee to applications for all fees sought in the case. An amount for fees may be approved upon confirmation of the plan. If agreed by counsel and the debtor, additional fees may be sought by application.

that the Trustee has no basis for an objection to his fees, that the Court is without jurisdiction to hear this matter because the Trustee did not renew her objection once he amended his proof of claim, that the objection of the Trustee is premised on a view that the trustees set fees in this district, and that his fees are reasonable. Mr. Cantrell also contends that most debtor's attorneys do little to earn the \$400.00 fee customarily requested for objecting to motions for relief from stay. He contends that the attorneys, or more likely a paralegal, file a non-substantive form response and call the attorney for the creditor and request the standard³ settlement order. The Trustee contends that the services rendered were routine in nature and did not bring any real benefit to the debtor. The trustee argues for a fee of \$400.00.

Conclusions of Law

The facial benefit of the administratively convenient (and now abandoned) process for determining compensation for counsel must bow to the Bankruptcy Code and Rules, which require disclosure of compensation paid by the debtor to counsel and an application for payment of fees from the estate.⁴ A local rule cannot contravene the Bankruptcy Code and Rules. *Fed. R. Bankr. P. 9029(a)*. The procedure can survive in cases filed before January 1, 2008, if at all, only if the proof of claim is viewed as a substitute for an application for fees. Previous decisions in this District have treated proofs of claim as the equivalent of an application and placed the burden of proof on the attorney requesting the fee. *See In re Simmons*, C/A No. 06-01566-W, slip op., 2007 Bankr. LEXIS 1101 (Bankr. D.S.C. March 2007). The form in which fees are requested

³ Many motions for relief from stay are settled in this district. The settlement order often provides for curing the post-petition arrearage over a six month period by the resumption of the regular payment and the payment of an additional sum equal to one-sixth of the arrearage plus attorney fees to the movant of five to eight hundred dollars.

⁴ 11 U.S.C. §§ 329 and 330. See also *Fed. R. Bankr. P. 2016(a)*.

does not change the character of the request, and in regards to fee applications the burden of proof lies with the fee applicant. *In re Moss*, 90 B.R. 189 (Bankr. D.S.C. 1988)(quoting *In re Rosen*, 25 B.R. 81, 86 (Bankr. D. S.C. 1982)(“The burden of establishing the reasonableness of the fees rests upon the party making the request”). The proof of claim will be treated as an application for fees. This renders moot the contentions that rest on the law relating to proofs of claim.

The issue is what attorney fee is reasonable. Attorney fees paid under plans in chapter 13 cases are permitted pursuant to 11 U.S.C. § 1322(a)(2)⁵, which provides for the payment of all claims entitled to priority under § 507. Section 507(a)(2) provides for the payment of administrative expenses allowed under § 503(b). Section 503(b)(2) includes compensation and reimbursement awarded under § 330(a). Section 330 states in part that,

In a ... chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B). In determining an amount that represents “reasonable compensation” the Fourth Circuit directs courts to apply a hybrid analysis using a combination of the lodestar method and other factors. In *In re Vernon-Williams* the court:

[E]valuated attorney fees utilizing a “hybrid” of the *Barber* factors and the lodestar method. *In re Vernon-Williams*, 343 B.R. 766, 786 (Bankr.E.D.Va.2006) (citing *Equal Employment Opportunity Comm'n v. Serv. News Co.*, 898 F.2d 958, 965 (4th Cir.1990); *In re Great Sweats, Inc.*, 113 B.R. 240, 241 (Bankr.E.D.Va.1990)). In *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.1978), cert. denied, 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978), the Fourth Circuit held that courts must consider

⁵ Further references to the Bankruptcy Code shall be by section number only.

the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), when determining the reasonableness of the attorney fees requested. These twelve factors [often referred to as the *Barber* factors]include:

“(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.”

In re Vernon-Williams, 377 B.R. 156 (Bankr. E.D.Va. 2007)(citing *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.1978).

Hybrid analysis

Mr. Cantrell essentially argues that a straight lodestar analysis should be employed. He entered into evidence a verified summary statement indicating that he spend 4.9 hours in defense against the motion for relief from stay and he contends that \$250 per hour is a reasonable hourly rate for his services. He contends that both of these figures are reasonable, necessary, and actual. However, the lodestar method is but one element in the Court’s determination of reasonableness. The 12 *Barber* factors must also be considered.

1. *The time and labor expended.* Mr. Cantrell’s verified summary statement indicates that he spend 4.9 hours defending the motion for relief from stay. No party has disputed this assertion. The Court finds that Mr. Cantrell spent 4.9 hours in this matter. However, as his verified statement indicates, much of the time expended was for relatively routine and simple tasks. For example,

approximately two of the 4.9 hours is for locating and communicating with his client.

2. *The novelty and difficulty of the questions raised.* Motions for relief from stay are frequently filed in chapter 13 bankruptcy cases. Here, Debtors admit that they missed certain mortgage payments and agreed to relief from stay. Their only issue with HBSC's Motion was that attorney fees in the amount of \$5,150.00 were requested. Mr. Cantrell indicated at the hearing that the amount of the fee was the sole reason for his objection to HBSC's Motion. After contacting HBSC's counsel it was determined that the amount of the attorney's fee requested was erroneous. Mr Cantrell related that HBSC stated that \$800 would be a satisfactory fee. Mr. Cantrell remained opposed to the award of any attorney fees and eventually, as evidenced by the consent order, prevailed. There is no doubt Mr. Cantrell obtained a reduction in the fees sought. Negotiation for the settlement of motions for relief from stay is rather common and the issue of attorney fees in this particular case was straight forward and not especially difficult. This factor indicates a reduction from the straight lodestar method.
3. *The skill required to properly perform the legal services rendered.* The defense against HBSC's Motion did not require special skills for which a premium should be paid. The fees requested were stated in error. Arguing that a misstated fee amount is too high does not require great skill. This factor does not support an award of the full lodestar amount.
4. *The attorney's opportunity costs in pressing the instant litigation.* Mr. Cantrell offered no evidence that suggests that the defense against HBSC's Motion caused him to forgo other opportunities. This factor is inapplicable.

5. *The customary fee for like work.* The customary fee for like work, negotiating the settlement of a motion for relief from stay, is \$400. For a typical defense to a motion for relief from stay the majority of attorneys charge a flat \$400 rate. Mr. Cantrell's argues that the trustee has effectively set fees at this amount via her "fee schedule." It may be true that many attorneys charge this amount because the Trustee will object if they ask for more than \$400. Nevertheless, the customary fee does not change because attorneys choose not to challenge the Trustee. This factor indicates a reduction from the straight lodestar method.
6. *The attorney's expectations at the outset of the litigation.* There is no evidence of the expectations of Mr. Cantrell, and regardless this factor does not seem terribly applicable to the current issue. This factor is inapplicable.
7. *The time limitations imposed by the client or circumstances.* This factor does not appear relevant to the current issue. This factor is neutral.
8. *The amount in controversy and the results obtained.* Mr. Cantrell did catch an error by HBSC. He objected and requested proof of the fees. HBSC's counsel admitted the error and stated to Mr. Cantrell that he would reduce the request to \$800. Mr. Cantrell requested that HBSC reduce the amount to zero. Thus, the true amount in controversy was approximately \$800. Mr. Cantrell did obtain a result for his client but when viewed in conjunction with the amount it cost (\$1,225 to save \$800) the value of the result is questionable. This factor indicates a reduction from the straight lodestar method.
9. *The experience, reputation and ability of the attorney.* Mr. Cantrell has bankruptcy experience, a good reputation, and is a competent and able attorney. This factor favors the award requested.

10. *The undesirability of the case within the legal community in which the suit arose.*

This factor does not appear especially relevant to the current issue. This factor is neutral.

11. *The nature and length of the professional relationship between attorney and*

client. This factor does not appear especially relevant to the current issue. This factor is neutral.

12. *Attorneys' fees awards in similar cases.* Attorney fees in similar cases are \$400.

This factor indicates a reduction from the straight lodestar method. Mr. Cantrell's argument that other attorneys do little to earn the \$400 fee that is customary does not bolster his entitlement to a greater fee but merely suggests that perhaps the customary fee is too high and that the attention of this Judge to routine fee matters should increase.

One final factor that this Court believes to be relevant is found in the language of the statute itself. Section 330(a) states, in relevant part, that "the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor ... based on a consideration of the *benefit and necessity* of such services...." § 330(a)(4)(B) (*emphasis added*). What was the benefit? Mr. Cantrell may have saved his client \$800 but asks for \$1,225.00 for his services. What is the necessity for the services? HBSC is proceeding to foreclosure. Even had the HBSC fee request gone unnoticed and been incorporated into an order, the Debtors are to receive a discharge in this bankruptcy case. Their liability for the fees comes into play only if the bankruptcy case is dismissed without a discharge and, then, only if HBSC seeks a deficiency claim and realizes less for its collateral than the debt owed by Debtors. The Debtors may also suffer some loss if the \$5150 in fees were awarded and added

to the secured claim of HBSC; but only in the event the property is bid in at the foreclosure sale in such a way as to reduce the Debtors' homestead exemption - an event that is speculative and unlikely.

Conclusion

In awarding reasonable compensation to chapter 13 counsel the Court must balance many factors. An attorney for consumer debtors should receive reasonable compensation. The award of compensation often reduces the dividend available for unsecured creditors. Congress has determined, however, that as a matter of policy reasonable professional fees are to be paid ahead of pre-petition creditors. The controlling factor in this case should be the benefit to the debtors and the necessity of the services. The absence of any real benefit to the debtors, save upon dismissal of the case and the creditor's pursuit of a deficiency judgment, which is at most speculative, requires a reduction from the lodestar. A fee of \$600, more than the customary fee but less than that requested, is reasonable. Mr. Cantrell is therefore awarded \$600, to be paid under the plan as funds become available.

AND IT IS SO ORDERED.

Columbia, South Carolina

January 22, 2008