

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

IN RE:

Elizabeth H. Lisenby Estate Protection  
Trust u/a dated February 2, 2017,

Alleged Debtor.

C/A No. 17-05050-DD

Chapter 7

**ORDER**

This matter is before the Court on alleged debtor Elizabeth H. Lisenby Estate Protection Trust's ("Lisenby Trust") November 6, 2017 motion to dismiss [Docket No. 6] the involuntary petition filed by Mark E. Shelley, PC d/b/a The Shelley Law Firm ("Shelley Law") on October 9, 2017. An objection to the motion to dismiss was filed by Shelley Law on December 1, 2017 [Docket No. 10]. Lisenby Trust filed a response on December 6, 2017 [Docket No. 11]. A hearing was held on February 13, 2018. The Court took the matter under advisement at the conclusion of the hearing, and now issues this order. Lisenby Trust's motion is granted.

**BACKGROUND**

This involuntary bankruptcy arises from a fee dispute based on the legal representation of Ronald Lisenby ("Ron") by Shelley Law in a contentious dispute between Ron and Kathryn Lisenby Perry ("Kathryn"), concerning the estate of their mother, Elizabeth Lisenby. Ron held the power of attorney for his mother and was the executor of her will. Upon learning of a potential challenge by Kathryn to their mother's will and his actions as attorney in fact under the power of attorney, Ron retained Shelley Law for certain limited purposes. Shelley Law initially charged and received a \$40,000 flat fee to handle the analysis of potential claims against the estate and Ron, both individually and as executor. The \$40,000 flat fee arrangement was proposed in a letter to Ron dated September 1, 2016. Ron responded to the proposal with an email dated September

3, 2016 stating, “Most of your letter I understand but some of it I do not understand.” Ron executed a “Legal services agreement—limited agreement—non-refundable retainer” on September 8, 2016 outlining the agreement, stating that the limited engagement did not cover litigation, including litigation that may ensue before the Clerk of Court.

On October 3, 2016, Kathryn filed motions to remove Ron as executor and for an accounting before the Cabarrus County Clerk of Court in North Carolina Superior Court. Shelley Law continued representing Ron after the motion to remove was filed. As part of the motion for an accounting, Kathryn argued she was entitled to \$375,000.00 from the estate. Shelley Law and Ron executed a second fee agreement covering the motion to remove and motion for an accounting, providing a contingency fee of 40% of any estate assets that Shelley Law was able to keep from Kathryn (“Second Fee Agreement”). The Second Fee Agreement was dated October 3, 2016, however, Mark Shelley testified that the Second Fee Agreement was drafted and executed on February 9, 2017. This occurred after the hearing on the motion to remove Ron as executor but before the Clerk of Court issued its order on the motion. The Second Fee Agreement provided that Shelley Law was entitled to full payment of the potential contingency fee if it was terminated at any point, or if Ron was removed as executor. The full contingency fee was also payable upon a determination that Kathryn was not entitled to the funds she sought from the estate, if settlement was reached, or if Kathryn abandoned her claim. As part of the Second Fee Agreement, Shelley Law required Ron to execute a \$150,000 “Credit Facility Note” to protect its fee.

A third fee agreement was entered into between Ron and Shelley Law for the defense of a matter to-be-filed by Kathryn in Superior Court. The third fee agreement was dated December 6, 2016, however Mr. Shelley testified it was executed on February 9, 2017. The third fee agreement detailed Shelley Law’s representation of Ron, individually and as executor, on an hourly basis in

the Superior Court action. Shelley Law moved to dismiss the complaint in the Superior Court action, and a hearing was held on the motion to dismiss. On January 23, 2017, Shelley Law learned that the motion to dismiss before the Superior Court was denied. The third fee agreement, as noted earlier, was drafted and signed on February 9, 2017.

After learning the motion to dismiss before the Superior Court had been denied, and while waiting on an order from the Clerk of Court on the motion to remove Ron as executor, Shelley Law advised Ron to place assets jointly held with Kathryn in a trust, the alleged debtor in this case, and appointed Ron to serve as trustee. Ron signed a Credit Facility Note, dated October 3, 2016, but signed February 9, 2017, on behalf of the Estate of Elizabeth H. Lisenby. Ron signed a Guaranty of Payment Contract on behalf of the estate unconditionally guarantying all payments under the Credit Facility Note on February 9, 2017. Ron signed a document styled “Exoneration of Ronald Lisenby and Security Interest” on February 9, 2017, purporting to exonerate Ron of personal liability of all contracts entered into in his capacity as executor on behalf of the estate, and pledging to Shelley Law, as additional collateral security, an interest in all bank accounts of Lisenby Trust.

The Clerk of Court entered an order on February 15, 2017 finding that Ron should be removed as executor for the estate because of the ongoing dispute between him and Kathryn in Superior Court. The Clerk of Court ordered that the successor personal representative/executor of the estate was to “determine the question of compensation for Respondent [Ron] and Respondent’s attorney [Shelley Law].<sup>1</sup>” Mr. Shelley testified at the hearing that he never contacted the successor personal representative regarding the legal fees at issue.

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<sup>1</sup> Lisenby Trust Exhibit 7.

After the Clerk of Court's decision, Shelley Law filed two UCC-1 Financing Statements against Lisenby Trust. The first was on behalf of Mark E. Shelley, PC, indicating it was a secured party with collateral covered by all bank accounts of Lisenby Trust. Shelley Law also filed an identical UCC-1 on behalf of Fitzgerald Law, a law firm that had taken over representing Ron. Shelley Law sent a letter to Ron withdrawing as counsel on March 19, 2017. Thereafter, Fitzgerald Law negotiated a global settlement with Kathryn.

Shelley Law filed the involuntary bankruptcy petition on October 13, 2017, as a petitioning creditor based upon the legal fees it claims are owed by Lisenby Trust based on the Second Fee Agreement. Shelley Law argues it earned the contingent fee provided for in the Second Fee Agreement, and that no dispute exists regarding the debt it feels it is owed. Lisenby Trust argues the contingent fee was never earned by Shelley Law, bona fide disputes exist regarding the debt, both factually and legally, and the alleged debt violates the Clerk of Court order that Shelley Law's fee be determined by the successor personal representative.

### **ANALYSIS**

An involuntary bankruptcy case under 11 U.S.C. § 303 is commenced by the filing of a petition under chapter 7 or 11 by "three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount..." *See* 11 U.S.C. § 303(b)(1). For an involuntary petition filed against a person with fewer than 12 creditors, only one entity that holds a claim that is in the aggregate at least \$15,775 is required. *See* 11 U.S.C. § 303(b)(2). A petitioning creditor has the burden of proving its eligibility as petitioner by establishing that a debt exists and the debt is not subject to a bona fide dispute. Resolution of Lisenby Trust's motion turns on whether a debt exists and whether there are bona fide disputes concerning Shelley's claims.

### **A. Bona Fide Dispute**

“Although courts have not agreed on a precise definition of ‘bona fide dispute,’ it clearly entails some sort of meritorious, existing conflict.” *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 715 (4th Cir. 1993). The Fourth Circuit has adopted the view that “a bona fide dispute requires ‘an objective basis for either a factual or a legal dispute as to the validity of [the] debt.’” *In re Byrd*, 357 F.3d 433, 437 (4th Cir. 2004) (internal citations omitted). Further, “a bona fide dispute exists only when there are substantial factual or legal questions that bear upon the debtor’s liability.” *Id.* “The bankruptcy court need not resolve the merits of the bona fide dispute, but simply determine whether one exists.” *Id.* A petitioning creditor has the burden of proving that its claims are not the subject of a bona fide dispute.

Shelley Law has the initial burden of demonstrating a prima facie case that its claim is not contingent or subject to a bona fide dispute. Shelley Law relies on the Second Fee Agreement as the basis of its claim. Shelley Law argues the contingent fee described in the Second Fee Agreement was earned when the Clerk of Court issued the order removing Ron as executor, because it did not find the \$375,000 sought by Kathryn was owed by the estate. On cross-examination, Mr. Shelley testified that the Clerk of Court’s order did not address the money sought by Kathryn, nor did the eventual settlement agreement reached between Ron and Kathryn.

Even if some obligation can be established in this case, the purported debt is subject to substantial factual and legal questions regarding whether a debt is owed and how much is owed. Lisenby Trust contests the validity of the Second Fee Agreement, the contingency agreement that is the basis of Shelley Law’s claim, arguing it is void because it guarantees full payment of the proposed contingency fee to Shelley Law even if the representation was terminated. The Second Fee Agreement was executed in North Carolina and the services were rendered in North Carolina.

Under North Carolina law, a full contingency fee is not proper upon termination, but instead a reasonable calculation of the services performed is required. *See Clerk of Superior Court of Guilford County v. Guilford Builders Supply Co., Inc.*, 87 N.C. App. 386, 389, 361 S.E.2d 115, 117 (1987) (“In *Covington v. Rhodes*...a panel of this Court adopted the modern rule that an attorney employed pursuant to a contingent fee contract who is discharged before completion of the matter for which he was employed can recover only the reasonable value of his services as of the date of discharge, regardless of whether the discharge is with or without cause.”). Shelley Law’s claim in this matter is based on the full contingent fee envisioned by the Second Fee Agreement, creating a dispute regarding the legitimacy of the claimed debt. Under the established law regarding contingent fee agreements, a dispute exists regarding the amount of the claim, because the reasonable value of Shelley Law’s services as of the date of discharge has not been determined. This Court is not in a position to, and is not required to, decide the merits of the dispute by determining the reasonable value of Shelley Law’s services.

Further, a bona fide dispute regarding the validity of the Second Fee Agreement exists because of the timing of the agreement. As discussed previously, Mr. Shelley testified that the Second Fee Agreement was drafted and signed on February 9, 2017, despite being dated October 3, 2016. The timing of when the Second Fee Agreement was drafted and signed is important because it occurred after Shelley Law learned that the motion to dismiss before the Superior Court was denied and after the hearing before the Clerk of Court on removing Ron as executor. Notably one of the events that would give rise to a fee under the agreement was removal of Ron as executor. The timing of when the Second Fee Agreement was drafted and signed, and the backdating of the agreement, create a bona fide dispute regarding the validity of the agreement.

In addition to the dispute over the validity of the contingent fee arrangement in the Second Fee Agreement, a dispute exists as to the debt by virtue of the Clerk of Court order. The Cabarrus County Clerk of Court required Shelley Law's fees to be determined by the successor personal representative of the estate. The Clerk of Court's order specifically ordered, "The successor personal representative determine that the question of compensation for Respondent [Ron] and Respondent's attorney [Shelley Law].<sup>2</sup>" Shelley Law argues that it requested payment of the legal fees from Ron, in his capacity as executor, after the Clerk of Court's order, but before Ron was officially removed as executor of the estate. Implying that Shelley Law expected Ron to inform the successor personal representative. At the hearing, Mr. Shelley testified that he never contacted the successor personal representative regarding the fees he felt he was entitled to, and the personal representative never determined the fees Shelley Law was entitled to. The Clerk of Court's order, and the lack of a determination by the successor personal representative, establishes yet another substantial legal dispute concerning the debt alleged in this case.

Finally, Comment 10 to Rule 1.5 of The Revised Rules of Professional Conduct of the North Carolina State Bar requires that "[b]efore filing an action to collect a disputed fee, the client must be advised of the fee resolution program." The rules require an attorney to engage in the fee resolution program if a complaint is filed by a client. At the hearing, Lisenby Trust entered into evidence a "Petition for Resolution of Disputed Fee" filed with the Attorney Client Assistance Program of The North Carolina Bar by Ron on May 24, 2017.<sup>3</sup> Mr. Shelley indicated he was not aware that the petition had been filed. The petition filed by Ron for resolution of disputed fees is

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<sup>2</sup> Lisenby Trust Exhibit 7.

<sup>3</sup> Lisenby Trust Exhibit 11.

further evidence of a bona fide dispute regarding Shelley Law's claim. The North Carolina Bar has an interest in resolving any such dispute involving one of its members.

### **CONCLUSION**

Shelley Law's claim against Lisenby Trust is subject to bona fide disputes. Lisenby Trust's motion to dismiss is granted. The Court reserves jurisdiction to determine whether Lisenby Trust is entitled to costs, attorney's fees, or other damages pursuant to § 303(i). Lisenby Trust may file a motion for fees and request for hearing within fourteen (14) days of this order becoming final. The motion should be accompanied by an itemized listing of fees and costs and should be served on Shelley Law and its counsel. Shelley Law's response shall be filed within fourteen (14) days of the filing of Lisenby Trust's motion.

AND IT IS SO ORDERED.

**FILED BY THE COURT**  
**03/05/2018**



Entered: 03/06/2018

David R. Duncan  
Chief US Bankruptcy Judge  
District of South Carolina