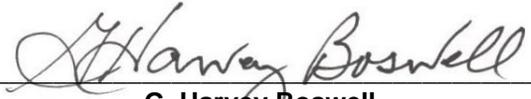




Dated: November 21, 2005
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

TRACY AND STACEY ADAMS

CASE NO. 02-14500

Debtors.

Chapter 7

MEMORANDUM OPINION AND ORDER RE: DEBTORS' MOTION TO RECONSIDER AND REVISE THE ORDER AWARDING ATTORNEY FEES TO JASON WHITWORTH

The Court conducted a hearing on the Debtors' "Motion to Reconsider and Revise the Order Awarding Attorney Fees to Jason Whitworth" on September 7, 2005. FED. R. BANKR. P. 9014 Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052

I. FINDINGS OF FACT

Prior to filing to their voluntary chapter 7 petition, the debtors commenced a predatory lending suit against F.B. Financial Services, Inc., Jeannie Moore and Citifinancial in state court. The debtors hired Jason Whitworth, ("Whitworth"), as their attorney in the matter. After the debtors filed for bankruptcy relief, Whitworth advised the debtors that by operation of the Bankruptcy Code the lawsuit

now belonged to the estate and the trustee had become the plaintiff in the action. Whitworth also contacted the chapter 7 trustee, Michael Tabor, (“Tabor”), and asked Tabor to let him know (1) whether he intended to pursue the action and (2) whether he would hire Whitworth to do so.

On November 21, 2002, Tabor filed an application to employ Whitworth to pursue the state court lawsuit. The debtors did not object to this application. The Court granted the trustee’s application on January 2, 2003.

In the late summer of 2004, the trustee entered into a settlement agreement with the state court defendants whereby the defendants agreed to pay the trustee the sum of \$225,322.00. The trustee filed a motion in this Court on September 21, 2004, to approve the proposed settlement and to approve attorney’s fees for Whitworth in the amount of \$78,862.70. These fees were for Whitworth’s representation of the trustee only. The trustee also sought approval for payment of \$3,321.94 in expenses to Whitworth. According to the certificate of service, this motion was served on the debtors. The debtors signed the settlement agreement and did not object to the settlement terms or the attorney fees. The Court entered an order approving the settlement and Whitworth’s fees and expenses on October 26, 2004.

On June 6, 2005, the debtors filed a legal malpractice action against Whitworth in state court. Although the chapter 7 trustee had employed Whitworth to represent his interest in the state court lawsuit, the debtors alleged that Whitworth never ceased representing them personally. Whitworth denied this allegation; however he did not present any proof to the Court that he took any affirmative steps to cease his individual representation of the debtors in the matter.

According to the malpractice complaint, the debtors alleged that Whitworth breached his duty of care to them by failing to timely seek an increase of the punitive damages cap in accordance with their requests. The debtors did not obtain leave of this Court to file the action. Whitworth filed a notice of removal of the malpractice action on June 16, 2005. The debtors objected to the notice of removal on July 11, 2005. The Court denied the debtors’ objection on July 29, 2005.

On July 14, 2005, Whitworth filed a motion to dismiss the malpractice proceeding. The debtors objected and the Court conducted a hearing on the matter on September 7, 2005. After analyzing the facts of the case, the Court ruled that it did not have jurisdiction over the malpractice action. The Court based its finding on the fact that the Adams were not alleging Whitworth had committed malpractice as the attorney for the trustee, but rather as their personal attorney. The Court remanded the malpractice action to state court.

On August 17, 2005, the debtors filed a motion to reconsider the order awarding attorneys fees. As grounds for this motion, the debtors assert that they did not have a meaningful opportunity to object to

the motion for attorneys fees and, as a result, “they should not be required to pay over \$78,000 of attorney fees for legal work that included malpractice that cost them over \$800,000.” The debtors also allege that the Court may reconsider the order awarding attorney’s fees under Fed. R. Bankr. P. 7054(a) because the order was not a final one.

II. CONCLUSIONS OF LAW

Pursuant to § 541(a) of the Bankruptcy Code, all legal or equitable interests the debtor has in property at the time the case is filed become property of the estate. 11 U.S.C. § 541(a)(1). Property of the estate includes “causes of action.” *Gochenour v. Cleveland Terminals Bldg., Co.*, 118 F.2d 89, 93 (6th Cir. 1941). The right to pursue causes of action belonging to the debtor at the time the case is filed vest in the trustee for the benefit of the estate. *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (1988); *In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997). The trustee’s right to assert the claim is an exclusive one and a trustee may settle claims without the debtor’s approval. *Id.*; *Jones v. Harrell*, 858 F.2d 667, 669 (11th Cir. 1988); *In re Bashour*, 124 B.R. 52, 54 (Bankr. N.D. Ohio 1991) (“Trustees do not represent the debtor nor do they owe the debtor any fiduciary obligation.”).

Pursuant to § 327 of the Bankruptcy Code, the trustee may employ an attorney to represent him in carrying out his duties. 11 U.S.C. § 327. In so doing, the trustee may hire an attorney who has represented the debtor for a “specified special purpose,” such as prosecuting a pending lawsuit. 11 U.S.C. § 327(e). A court may award fees and expenses to the trustee’s attorney under 11 U.S.C. § 330.

In this case, the debtors have alleged that the Court’s October 26, 2004, order awarding Whitworth his attorney fees is not a final order, but rather an interlocutory one. As a result, the debtors argue that the Court may reconsider the order pursuant to FED. R. BANKR. P. 7054(a). It is true that “interim awards of compensation under 11 U.S.C. §§ 330 and 331 are interlocutory orders of the bankruptcy court, and as such, they generally are not considered final judgments;” however, an order awarding fees and expenses is considered final ““where the order conclusively determine[s] the entire section 330 compensation to be paid to the attorneys.”” *Boddy v. United States Bankruptcy Court (In re Boddy)*, 950 F.2d 334, 336 (6th Cir. 1991) (citing *In re Spillane*, 884 F.2d 642, 644 (1st Cir. 1989)). If there is a possibility that additional fees will be sought in a future fee application, then the order is interlocutory and not final.

In the case at bar, the Court’s October 26, 2004, order approving the settlement and Whitworth’s attorneys fees was a final order. The motion seeking approval stated that the settlement amount “will settle the case” and that, in consideration of the settlement, an order of dismissal and full release will be entered. The chapter 7 trustee asked the Court to grant Whitworth an attorney fee of 35% of the

settlement amount plus expenses. Whitworth was employed for the sole purpose of proceeding with the predatory lending suit. Once that lawsuit was settled, there was nothing left for Whitworth to do so there would be no possibility that the trustee would file an additional fee application. Because the October 26, 2004, order approving Whitworth's fees was a final one, FED. R. BANKR. P. 7054 does not grant the Court power to reconsider and revise the award.

Although Rule 7054 is inapplicable to the case at bar, the Court may reconsider the award under FED. R. BANKR. P. 9024. Rule 9024 incorporates FED. R. CIV. P. 60 and provides that a party may receive relief from a "final judgment, order or proceeding" for several reasons, including:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or,
- (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b)(1)-(6). Rule 60(b) attempts to balance the interest in stability of judgments (i.e., the policy of res judicata) with the interest in seeing that judgments not become instruments of oppression and fraud. In the Sixth Circuit, courts must apply Rule 60(b) "equitably and liberally . . . to achieve substantial justice." *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844-45 (6th Cir. 1983).

In the case at bar, the debtors have alleged that the court should grant them relief from the attorney's fee order because they should not be required to pay Whitworth the \$78,862.70. The basis for the debtors' argument is that Whitworth committed malpractice in his representation of them. The debtors have never alleged that Whitworth committed malpractice in his representation of the chapter 7 trustee. In fact, they have never even alleged that Whitworth did anything wrong in his representation of the trustee.

When the Court granted the chapter 7 trustee's motion to approve settlement and the attorney's fee, it do so only after carefully reviewing the application. The Court then approved the payment of the \$78,862.70 attorney's fee and \$3,321.94 in expenses. Those payments were for the work Whitworth performed as attorney for the trustee. In no way, shape or form were those fees or expenses intended to cover any attorneys fee or expenses for Whitworth as the debtors' attorney, if in fact he still was representing them personally.

Upon filing their bankruptcy petition, the state court lawsuit became property of the estate. The trustee had the exclusive right to pursue that action and settle it. Once the matter was settled, the entire \$225,322.00 became property of the estate. Before doing anything else with the money, the chapter 7 trustee was obligated to use the settlement proceeds to pay administrative expenses and any compensation and reimbursement awarded under § 330. 11 U.S.C. § 503(b). Once those fees had been paid, the trustee was obligated to make payments to the debtors' unsecured creditors. 11 U.S.C. § 507(a). Only after all the expenses and claims were paid were the debtors entitled to any of the money. As a result, the Adams were not forced or required to make any payment to Whitworth for his attorney fees. The fees were paid out of the property of the estate, not the Adams' pockets.

In filing their motion, the Adams' have not alleged any of the grounds listed in Rule 60(b) as a basis for overturning Whitworth's fee for the work he did as attorney for the trustee. As a result, their motion must be denied. There is simply no reason for granting them relief from the October 26, 2004, order. The Court is mindful that the Adams believe Whitworth still represented them in the state court action despite his employment by the trustee. Because Whitworth did not present any proof to the Court that he did in fact make it clear to the Adams that he no longer represented them, the Court remanded the malpractice action to the state court; however, this Court must emphasize that in pursuing that malpractice action in state court, the debtors do not have standing to sue Whitworth for any alleged acts he committed as counsel for the trustee. The Adams may only proceed with the malpractice complaint with allegations of malpractice Whitworth committed as their personal attorney. Should the state court find that Whitworth did indeed cease his representation of the Adams, then there will be nothing for which the debtors can recover.

III. ORDER

It is therefore **ORDERED** that the Debtors' "Motion to Reconsider and Revise the Order Awarding Attorney Fees to Jason Whitworth" is **DENIED**.

IT IS SO ORDERED.

mailing list:

W. Scott Rose, attorney for debtors
E. Franklin Childress, attorney for Whitworth
David M. Cook, attorney for Whitworth
Lori J. Keen, attorney for Whitworth
Chapter 7 Trustee