

NOT INTENDED FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: : CASE NO. 01-86978
:
KIMBERLY O. JACKSON, : CHAPTER 13
:
Debtor. : JUDGE MASSEY
:
_____:

**ORDER GRANTING IN PART AND DENYING IN PART APPLICATION,
AS AMENDED, FOR ATTORNEY’S FEES PURSUANT TO 11 U.S.C. SECTION 329**

Jonathan C. Ginsberg and Bernd G. Stittleberg of Ginsberg Law Offices represent Kimberly O. Jackson, the Debtor in this Chapter 13 case. With the petition filed on October 25, 2001, Mr. Ginsberg filed a Rule 2016(b) disclosure statement in which he described the fee arrangement with his client. It states that the firm would represent Debtor in “all aspects” of the case for a fee of \$1,500, except that by agreement, the fee would not cover “Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.”

On June 9, 2003, Mr. Ginsberg and Mr. Stittleberg filed an Application for Attorney’s Fees Pursuant to 11 U.S.C. Section 329 (document no. 30), which they amended on August 5, 2003 (document no. 34). In the application as amended (the “Compensation Application”), they seek

total compensation of \$8,507.50 in this Chapter 13 case, of which they acknowledge having received \$1,500. The Compensation Application provides time records of Applicants and states that Mr. Ginsberg's hourly rate is \$250 per hour, that Mr. Stittleberg's rate is \$200 per hour and that staff paralegals' time is billed at \$75 per hour.

Attached to the Compensation Application is a copy of what the Applicants say is the fee agreement with their client. The fee agreement expands upon the description of the fee arrangement stated in the Rule 2016(b) disclosure statement. After providing for legal services to be rendered for the \$1,500 fee, it states:

CLIENT further agrees that in the event that Attorneys perform legal services in this bankruptcy case in addition to those listed above, the firm may submit an application to the U.S. Bankruptcy Court requesting additional compensation. A copy of any such fee application shall be served upon CLIENT at the time it is filed with the clerk of Court. No additional attorney's fees shall be distributed to the firm without prior approval of the U.S. Bankruptcy Court.

But it goes on to state on the following page as follows:

4) the undersigned further understands that a new fee retainer agreement must be agreed upon in the event that the undersigned desires legal representation in bankruptcy matters relating to any complaint filed or hearings mandated by a 11 USC § (sic) 362 relating to a creditor's attempt to obtain relief from the stay, any other Bankruptcy Code Section, or any other matters arising following the confirmation of the Chapter 13 plan or the dismissal of the Chapter 13 plan.

The work described in the Compensation Application may be roughly divided into three categories: (1) work related to motions for relief from stay with respect to property known as 3048 Will Rogers Place, Atlanta, Georgia 30316 (the "Property"), (2) work related to the sale of the Property, and (3) everything else. Although Debtor represented otherwise in her Schedules,

Applicants knew or should have known very early in the case that the Property did not belong to Debtor but belonged to the estate of Debtor's late mother, Gloria Jackson.

The Court held a hearing on the Compensation Application on August 13, 2003. At that hearing counsel for the Chapter 13 Trustee, Mr. Ginsberg, Debtor and one of her siblings, Yolanda Davis, appeared. Ms. Davis voiced an objection to payment of fees from her share of her mother's estate. The Debtor indicated that she opposed the Compensation Application.

After considering arguments, the Court stated that to resolve the matter, there would have to be an evidentiary hearing. Mr. Ginsberg protested that it would be very burdensome on him to have to prepare for and attend such a hearing. The Court responded that it would rule based on the Compensation Application if Mr. Ginsberg did not want to put on evidence but explained in detail to Mr. Ginsberg why factual evidence was essential. The Court also told him to amend the Compensation Application to divide the time into categories of services. The Court gave Mr. Ginsberg ten days to tell the Court whether or not he wanted an evidentiary hearing. Mr. Ginsberg never amended the Compensation Application or requested an evidentiary hearing.

The Court held a status hearing concerning the case on March 17, 2004. The same persons attended. At that conference, Debtor contended without contradiction that she had received no funds from the sale of the Property and that her share was still being held by an attorney representing her mother's estate. Mr. Ginsberg asked the Court to rule on his Compensation Application and made no request for an evidentiary hearing.

Applicants rely on the fee agreement they allegedly had with Debtor in seeking compensation. Mr. Ginsberg summarized that fee agreement in the Rule 2016(b) disclosure

statement by stating that in return for the \$1,500 fee, Applicants would provide legal services for “all aspects” of the case, except for services with respect to adversary proceedings, motions to avoid a lien and motions for relief from stay. The fee agreement allegedly signed by Debtor included lien avoidance motions as part of base services and did not use the words “all aspects” in describing the extent of services. Nonetheless, Applicants represented to the Court that they would represent Debtor for \$1,500 in all aspects of the case except for the excluded services and presented no evidence to show that they should not be bound by the description of the fee arrangement stated in the Rule 1016(b) disclosure statement. The fee agreement attached to the Compensation Application required a new retainer agreement for excluded services, and there is no evidence that Debtor and Applicants ever agreed on a fee arrangement for those services.

Debtor was not a party to an adversary proceeding and did not file a motion to avoid lien. Hence, based on the fee arrangement stated in the Rule 2016(b) disclosure statement, Applicants agreed to provide all legal services to Debtor in connection with this case, including services related to the sale of the Property, except services with respect to motions for stay relief, in exchange for \$1,500.

The Court has carefully reviewed and analyzed the time records submitted by Applicants. The Compensation Application shows that with respect to the two motions for stay relief filed by Wells Fargo Home Mortgage, Inc. with respect to the Property and a motion to reimpose the stay filed by Debtor, Mr. Ginsberg recorded 6 hours, Mr. Stittleberg recorded 5.5 hours and staff recorded .4 hours. Based on their hourly rates, Applicants seek \$2,636.00 for this time.

Compensation of an attorney representing a debtor in a Chapter 13 case is governed by sections 329 and 330(a)(4)(B) of the Bankruptcy Code, 11 U.S.C. §§ 329 and 330(a)(4)(B).

Section 329(b) provides:

(b) If such compensation [paid or payable to an attorney for a debtor] exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to -

(1) the estate, if the property transferred -

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

Section 330(a)(4)(B) provides:

(B) In a chapter 12 or 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.

The other factors referred to in § 330(a)(4)(B) are those set out in § 330(a)(3)A, which provides:

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including -

(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; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Applicants failed to prove that the fee they would charge to the Debtor is reasonable.

There is no evidence that Debtor agreed to the hourly rates stated in the Compensation Application or indeed to pay any additional compensation. The Court is not permitted to speculate on the answer to the question of what in fact were the terms of the fee agreement, if any. With respect to the first two factors in § 330(a)(2)(A), the rates stated in the Compensation Application are well within the range of reasonableness. On the basis of the sparse record, however, it is impossible for the Court to determine with sufficient probability that the amount of time spent on the motions for relief from stay was reasonable.

The next two factors in § 330(a)(3)(A) are the necessity for the legal services and the benefit bestowed. Those services were all about the Property. If the Property belonged to Debtor, the evaluation of necessity and benefit would have been simpler than the actual situation. In fact, the Property was not property of Debtor's bankruptcy estate. Debtor's Schedules showing that she owned the Property were wrong, and she and Applicants knew the Schedules were wrong by the time that the mortgagee on the Property began to complain about not being paid. Yet, neither Debtor nor Applicants bothered to correct the Schedules. That omission leads directly to the problem of proving that the services rendered were necessary and beneficial.

Because the Property was not property of the estate, it is questionable whether the automatic stay applied, notwithstanding that the Debtor may have had an interest in her late mother's estate, a fact also not proved. As it turned out, apparently the only interest that Debtor had in the Property was a possessory interest during some unproven period of time. Without proof that the Debtor possessed the Property at the time of the first motion for relief from stay, it is impossible to conclude that opposing the motion was a necessary service.

Although everyone connected to this case, other than the Court, may think or even know Debtor was a beneficiary of her mother's estate, that the Property was sold leaving funds for distributions to beneficiaries and that Debtor's share of her mother's estate was large enough to justify her incurring legal fees of an additional \$7,000, Applicants offered no evidence to prove these possible facts. Therefore, they failed to show that opposing the motions for stay relief was necessary either legally or financially. Even if Debtor's share of her mother's estate was large, the problem here may not have been a bankruptcy problem but rather a probate problem. It is possible that had the mother's estate been properly administered, the mortgagee would have been delighted to await an imminent sale and that such a course would have been much cheaper than pretending that the Property was property of Debtor's bankruptcy estate.

To the extent that Applicants would contend that staving off foreclosure benefitted the Debtor because the Property was ultimately sold, all the parties apparently agree that the Debtor has yet to enjoy any such direct monetary benefit from the sale of the property. That the efforts of Applicants may have benefitted other beneficiaries of Gloria Jackson's estate is irrelevant because compensation here is limited to services for representation of "the interests of the debtor." 11 U.S.C. § 330(a)(4)(B). There is no evidence that the services benefitted Debtor.

In the abstract, reaching a fee arrangement with a client who is to become a Chapter 13 debtor that a base fee would not cover certain types of services may be perfectly reasonable. In attempting to show that the charge for extra services is reasonable, however, the attorney must address the problem presented where excluded services are included by most other practitioners in the base fee they charge to Chapter 13 debtors.

Everyone who practices in the Chapter 13 arena knows what the customary fee charged by debtors' attorneys is and what they do for that fee. At the time this case was filed, the customary fee in a Chapter 13 case was \$1,500. Chapter 13 debtors' attorneys almost always handle motions for relief from stay as part of the base fee charged to Chapter 13 debtors. Fee applications such as the one here are exceedingly rare in Chapter 13 cases.

These observations do not prove that the work done by attorneys for the usual fee is worth that fee in every Chapter 13 case and do not mean that a fee application in a Chapter 13 case for more than the usual fee would not be granted merely because everyone else is charging the usual fee. The usual fee is not set by the Court but is what attorneys voluntarily choose to charge because they do not have to file a fee application under this Court's General Order No. 9. They also know that if no one objects to the usual fee, they will get paid if the Debtor pays enough to the Chapter 13 Trustee. The fee typically charged by attorneys representing Chapter 13 debtors is an important benchmark in determining what is and is not a reasonable fee. If Ms. Jackson could have obtained the same degree of service from a hundred other lawyers for \$1,500, charging her \$8,500 could not be reasonable in the absence of proof that she agreed to pay a higher fee for a valid reason such as to obtain an extra measure of expertise, competence or personal attention for which she, being fully informed, was willing and able to pay a higher than normal fee. Applicants

offered no evidence to distinguish the services they rendered from those rendered in the typical Chapter 13 case.

It is wholly different to provide in a fee agreement that extra fees will be charged on any matter, including motions for stay relief, where the facts giving rise to the need for additional legal services were not known or knowable to the attorney at the time she accepted employment.

The situation in which Debtor found herself at the beginning of this case was unusual. There is little doubt that she needed better than average legal advice. And what Applicants tried to accomplish for Debtor, they may have accomplished. But they did not prove that the value of those services was more than their base charge of \$1,500.

For these reasons, it is

ORDERED that the Application, as amended, of Jonathan C. Ginsberg and Bernd G. Stittleberg for an award of attorney's fees in this case is DENIED in part and GRANTED in part.

Applicants are awarded compensation in the amount of \$1,500, which amount they have already received.

This 30th day of April 2004.

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE