

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In Re

NATHAN REX HELSLEY
a.k.a NATE HELSLEY and
STEPHANIE ANN HELSLEY,

Debtors.

Bankruptcy Case
No. 03-41411-JDP

MEMORANDUM OF DECISION

Appearances:

Monte Gray, SERVICE, SPINNER & GRAY, Pocatello, Idaho,
Attorney for Trustee.

R. Sam Hopkins, Pocatello, Idaho, Chapter 7 Trustee.

Introduction

This is another case in which a chapter 7 trustee is unable to demonstrate that the compensation he requests, the maximum amount allowed by the Bankruptcy Code, is reasonable. As a result, the Court approves compensation in a lesser amount.

On January 23, 2007, the Court conducted a hearing concerning chapter 7¹ trustee R. Sam Hopkins' ("Trustee") request for final compensation in the amount of \$2,963.67, the statutory maximum, for his services in the administration of the chapter 7 bankruptcy estate. Docket No. 52. Trustee personally appeared at the hearing, along with his counsel, Monte Gray. Trustee testified and presented evidence and argument in support of his fee request. After due consideration of the record in this case, the evidence and testimony submitted at the hearing, and Trustee's arguments, this Memorandum constitutes the Court's findings of fact and conclusions of law, and disposes of the issues raised in this matter. Fed. R. Bankr. P. 7052; 9014.

Facts

Debtors Nathan and Stephanie Helsley filed a petition for relief under chapter 7 on July 10, 2003. Docket No. 1. Trustee was appointed to administer the bankruptcy estate. There were two primary assets to administer in this case: about \$3,000 in income tax refunds which Debtors promptly surrendered

¹ Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001– 9036, in effect prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

to Trustee;² and the estate's interest in Mr. Helsley's prebankruptcy personal injury claim. To prosecute that tort claim, Trustee requested and obtained approval from the Court to employ Debtors' prebankruptcy retained personal injury lawyer as his special counsel. Docket Nos. 15; 17.

In addition to retaining an attorney to handle the personal injury case, Trustee also sought and received Court approval to hire bankruptcy counsel, Mr. Gray, to represent him. Docket Nos. 7, 8. As near as the Court can tell from the record, Mr. Gray shouldered the responsibility of monitoring the progress of the personal injury action, and working with special counsel. As it turned out, special counsel apparently (and inappropriately) attempted to settle the personal injury action without first obtaining Trustee's consent. Mr. Gray was instrumental in resolving this predicament with special counsel and, eventually, the Court approved a compromise of the personal injury case for a total of \$19,000. With Trustee's blessing, special counsel was paid \$6,500 from the settlement for his compensation, a slightly reduced fee compared to that originally contemplated

² The total state and federal tax refunds surrendered to Trustee was about \$6,700. Trustee later refunded about \$3,700 to the debtors as exempt earned income credits and their post-petition "share" of those refunds.

when he was employed. Mr. Gray charged the bankruptcy estate approximately \$3,500 in fees and costs to achieve this result.³

Trustee testified at the hearing that, in administering this estate, his services consisted primarily of supervising the professionals he hired, and reviewing and reconciling the estate's bank account statements. Trustee indicated there were no particular problems with any of the bank statements, and that he received the tax refunds from the Debtors with very little effort. Trustee submitted an itemization of this time spent in working on this case. Overall, according to his evidence, Trustee expended 27.9 hours of his time performing services in connection with this bankruptcy estate.

In assessing the reasonableness of Trustee's fee request, he asserts that the Court should consider his special skills and abilities. Indeed, Trustee has considerable training and experience. He has a four-year college business degree and passed the state CPA exam. Although Trustee once held a CPA license, his license is not presently current. Before his appointment to the chapter 7 trustee panel in this District in 1999, Trustee worked as either an accountant or corporate controller for several years.

³ Trustee also paid about \$2,200 to debtors' health care providers from the settlement funds.

Trustee testified that through research on the Internet, he discovered that a corporate controller working in Pocatello, Idaho should expect to earn about \$242,000 a year. Trustee indicated this amount was inflated to include the value of vacation time, benefits and a pension, all items which a self-employed person, such as Trustee, would be expected to provide for himself.

Without supplying any details, Trustee also testified that he discovered that hourly rates for bankruptcy trustees working across the country ranged from \$400 in New York to \$200 in California.⁴

Trustee also submitted into evidence an itemization of the overhead expenses he regularly incurs in his operation as a chapter 7 panel trustee. *See Ex.*

1. Trustee contends that the Court should take this information into account when determining an appropriate hourly rate for valuing Trustee's services.

Based upon these facts, Trustee contends his services in this case should be valued at an hourly rate of \$140. Based upon 27.9 hours spent working

⁴ Trustee also requested the Court take judicial notice of Exhibit 2, an affidavit filed by L.D. Fitzgerald, the chapter 7 trustee in another case in this District, *In re Schritter*, Case No. 00-40476, Docket No. 82. Federal Rule of Evidence 201 allows the Court to take judicial notice of its own records. However, the Court may not take as true all facts or other information contained in an affidavit simply because it has been filed in a bankruptcy case. *See* Russell, *Bankruptcy Evidence Manual* (2005 ed.) § 201.5 at p. 590 ("There exists the mistaken notion that [taking judicial notice] means taking judicial notice of the truth of facts asserted in every document in a court file, including pleadings and affidavits."). Mr. Fitzgerald did not testify at the hearing to verify or explain the contents of his affidavit. In the exercise of discretion, the Court declines to consider the information contained in the Fitzgerald affidavit under these circumstances.

on this case, using this rate, Trustee argues his services were worth \$3,906, an amount in excess of the Code maximum. Thus, Trustee argues he should receive that statutory maximum, \$2,963.67, based on total receipts of \$22,136.67.

Of these receipts, and after distributions to special counsel and others, Trustee's final accounting reflects that he holds a balance on hand of about \$13,500, of which Trustee intends to distribute about \$6,600 to Mr. Gray and himself for fees and costs, and about \$6,900 to unsecured creditors.

Disposition of the Issues

Applicable Law

Bankruptcy Code §§ 330(a)(1) and 326(a) govern the bankruptcy court's determination of the amount of reasonable compensation to be awarded to a chapter 7 trustee. *In re Jenkins*, 130 F.3d 1335, 1337 (9th Cir. 1997); *Roderick v. Levy (In re Roderick Timber Co.)*, 185 B.R. 601, 605 n. 3 (9th Cir. BAP 1995); *In re Andona*, 00.2 I.B.C.R. 105, 105 (Bankr. D. Idaho 2000); *In re Mazon*, Case No. 05-42215, 2006 WL 3106708, (Bankr. D. Idaho October 30, 2006); *In re Mason*, Case No. 03-41192, 2006 WL 3714578 (Bankr. D. Idaho December 14, 2006). Trustee fee applications must conform to the requirements of Fed. R. Bankr. P. 2016. *Id.* at 605; *In re Travel Headquarters, Inc.*, 140 B.R. 260, 261-62 (9th Cir. BAP 1992).

Section 326(a) fixes the maximum compensation payable to a chapter 7 trustee in any particular case.⁵ The statute establishes a compensation cap, not an entitlement; the bankruptcy court must decide what amount of compensation is reasonable in each case. *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 788 n.12 (9th Cir. BAP 2000); *In re Clampitt*, 92 I.B.C.R. 153, 154 (Bankr. D. Idaho 1992); *In re Mazon*, Case No. 05-42215, 2006 WL 3106708; *In re Mason*, Case No. 03-41192, 2006 WL 3714578; *In re Castro*, 320 B.R. 690, 693 (Bankr. S.D. Cal. 2005).⁶

⁵ § 326(a) provides: “In a case under chapter 7 or 11, the court may allow *reasonable compensation under section 330 of this title of the trustee for the trustee’s services*, payable after the trustee renders such services, *not to exceed 25 percent of the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.*” (Emphasis added).

§ 330(a)(1) provides: “After notice . . . , the court may award *to a trustee . . . – (A) reasonable compensation for actual, necessary services rendered by the trustee . . . ; (B) reimbursement for actual, necessary expenses.* (Emphasis added).

Fed. R. Bankr. P. 2016(a) provides: “An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth *a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. . . .*” (Emphasis added.)

⁶ Under BAPCPA's new § 330(a)(7), Congress has instructed that “[i]n determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.” The new provision is inapplicable in this case, and the Court expresses no opinion concerning its

Sections 330(a)(3)(A)–(E) list the criteria the bankruptcy court shall consider in determining the amount of reasonable compensation to be awarded under § 330(a). These Code provisions instruct the bankruptcy court to consider, among other things, the time spent by the trustee providing services; the necessity of the services; the rate charged for the services; and the complexity, importance and nature of the problems, issues or tasks addressed. Additional factors used in evaluating a trustee’s request for compensation closely resemble those used in evaluating attorney fee applications, which include the time and labor involved, the novelty and difficulty of the questions presented in the bankruptcy case, and the experience, reputation and ability of the professional. *In re Fin. Corp. of Am.*, 114 B.R. 221, 223 (9th Cir. BAP 1990), *aff’d* 945 F.2d 689 (9th Cir. 1991).

Trustee bears the burden of proving the reasonableness of the fees requested under § 330(a). *In re Roderick Timber Co.*, 185 B.R. at 606; *accord*, *In re Evangeline Refining Co.*, 890 F.2d 1312, 1327 (5th Cir. 1989). As explained in *Roderick Timber*, “[i]t has long been the rule in this circuit that trustees have a duty to meticulously maintain accurate records of time expended on behalf of the estate.” *Id.* at 605 (quoting *Matter of Beverly Crest Convalescent Hosp., Inc.*, 548 F.2d 817, 820 (9th Cir. 1976)). “In obedience to the statute, in

effect.

every case, a bankruptcy court should award only those fees that are proven to be actual, necessary and reasonable. Any lesser requirement would make the Trustee's burden of proof a mere shell." *In re Roderick Timber*, 185 B.R. at 606.

There was no objection made in this case by any interested party or by the U.S. Trustee to Trustee's fee request. But because "there is a tension between the Trustee's role as the representative of creditors on the one hand and, on the other hand, his own self-interest in maximizing his compensation, beyond the mere *power* to review this fee application, the Court has a *duty* to scrutinize the application in the interest of protecting the integrity of the bankruptcy system." *In re Pruitt*, 319 B.R. 636, 638 (Bankr. S.D. Cal. 2004) (citing *In re Busy Beaver Bldg. Ctrs, Inc.*, 19 F.3d 833, 841 (3rd Cir. 1994) (emphasis in original)). Under appropriate circumstances, "the court may, on its own motion . . . award compensation that is less than the amount of compensation that is requested."

§ 330(a)(2).⁷

⁷ In support of his request, Trustee directs the Court to *Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006), decided recently by the Ninth Circuit Court of Appeals. *Eliapo* concerned a request for attorney fees by a chapter 13 debtors' attorney. In evaluating the attorney's fee request, the court reiterated that "[t]he customary method for assessing an attorney's fee application in bankruptcy is the 'lodestar,' under which 'the number of hours reasonably expended' is multiplied by 'a reasonable hourly rate' for the person providing the services." *Id.* at 598 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc.*, 924 F.2d 955, 960 (9th Cir. 1991)). However, the Ninth Circuit concluded that the lodestar approach was not mandatory and that there is "nothing in § 330 that

Analysis

The Court has duly considered the record and evidence presented by Trustee and, in the exercise of its discretion, concludes that \$2,232.00 is reasonable compensation for Trustee's services in this case.

Most of the services provided by Trustee in this case were routine in comparison to those required in most chapter 7 cases. Trustee's time spent reviewing the schedules, conducting the § 341(a) creditors' meeting, reviewing and reconciling the estate bank account, and preparing and filing the documents necessary to administer the estate, are all tasks required to be performed in all chapter 7 asset cases. The same is true with respect to Trustee's efforts in obtaining possession of the tax refunds, which were voluntarily surrendered to him without contest. No extraordinary skills or experience beyond those of a

prevents a bankruptcy court from issuing and then relying on guidelines establishing presumptive fees for routine services in Chapter 13 cases." *Id.* at 599.

The Court has considered *Eliapo* to the extent it is applicable to a chapter 7 trustee's compensation. However, the statute authorizing fees for a chapter 13 debtor's attorney is § 330(a)(4)(B), not § 330(a)(1) which is applicable to chapter 7 trustees. And unlike § 330(a)(1), § 330(a)(4)(B) authorizes the debtor's attorney fees for services which are beneficial and necessary to represent the interests of the debtor, even if those services do not benefit the bankruptcy estate. On the other hand, both statutes restrict compensation to that amount that is reasonable, and so to that extent, the teachings of *Eliapo* are instructive here.

competent trustee are implicated in completing these chores. Such services constitute the bulk of Trustee's time spent in this case.

The balance of Trustee's services, for the most part, involved working with the various estate professionals he employed. While he made the decision to retain those professionals, and apparently supported them when necessary, Trustee's attorneys provided the services which resulted in the primary benefit to the creditors of the bankruptcy estate, the personal injury settlement. Those attorneys charged, and will be paid, a total of about \$10,000, or 53%, of the \$19,000 recovered.⁸

In this case, a reasonable blended hourly rate for trustee services is \$80.00. While in some recent cases the Court has used \$100 per hour in gauging the reasonable value of chapter 7 trustee services, including those of Mr. Hopkins, in this instance, a lower rate is appropriate. Of his itemized time, approximately four hours of total time in this case consists of the routine review and reconciliation of monthly bank statements, a task that was surely facile in light of the relatively small amounts on account.

Another six hours represents travel time between Pocatello and Jerome so Trustee could appear in court. While travel time to and from the

⁸ While not dispositive, it is interesting to note that Trustee's bankruptcy attorney, Mr. Gray, charged the estate \$120 per hour for his time.

courthouse is usually compensable, two observations are appropriate here: (1) it is the practice in this District to compensate travel time at one-half of the normal hourly rate; and (2) in checking the calendars in question, Trustee had several hearings before the Court on each date he assessed travel time, but it appears that Trustee allocated most of his travel time on those days to this case.

Trustee's evidence about the supposed earnings of corporate controllers in this region is suspect, and even if correct, is of little relevance. The duties involved in administering a small chapter 7 case likely do not compare to those necessary to supervise the financial affairs of a going-business concern.

So, too, Trustee's evidence suggesting that trustees in large metropolitan districts command several hundred dollars an hour for their time, is both unreliable and of little help. The Court seriously doubts that a Manhattan chapter 7 trustee, who allegedly earns several hundred dollars an hour, would administer a small, consumer case such as this. Trustee's evidence attempts to compare the "big apple" to small potatoes.

Finally, the Court appreciates Trustee has overhead expenses he must pay to operate. But information about the amount of Trustee's expenses is not very persuasive in establishing a reasonable fee under these circumstances. The amount Trustee spends in his business is tied to both the amount of cases

Trustee chooses to administer, and what resources he believes he requires to do so, factors that are personal to this Trustee's operation.⁹

Conclusion

This is a small case in which Trustee received cash from the debtors, and retained professionals to recover on a personal injury claim. Trustee performed competently, but his services in this case can not be reasonably valued at \$140 per hour. Giving Trustee credit for all of the itemized time and services, the Court finds that \$2,232.00 (27.9 hours @ \$80/hour) is reasonable compensation. Trustee's request for reimbursement of expenses will be approved in the amount sought.

⁹ Exhibit 1 offered by Trustee suggests he had overhead expenses of \$146,000 in 2005. As a result, Trustee asserts he needs \$73 per hour based upon a 2000 hour year to break even. The Court's records indicate Trustee was awarded over \$267,000 in fees and more than \$117,000 in reimbursement of expenses during calendar year 2005. Using Trustee's approach, his total compensation and expenses received in 2005 amounted to \$192 per hour. The Court has had only rare occasions to review this trustee's fees. The Court doubts that by awarding Trustee \$80 per hour in this one case his "bottom line" will be significantly impacted.

Trustee shall submit a form of order approving his final accounting and fee application consistent with this decision.

Dated: April 5, 2007



Honorable Jim D. Pappas
United States Bankruptcy Judge

