

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

RANDALL STEVEN HUDOCK
and JOSEPHINE V. HUDOCK,

Debtors,

_____ /

KRISPEN S. CARROLL,
CHAPTER 13 TRUSTEE,

Appellant,

vs.

Civil Action No. 12-13965
HON. MARK A. GOLDSMITH

Bankruptcy No. 11-59343-PJS
HON. PHILLIP J. SHEFFERLY

REEDS, REEDS, HAMMERSCHMIDT &
STICKRADT, PC,

Appellee.

_____ /

**OPINION AND ORDER REVERSING THE ORDER OF THE BANKRUPTCY COURT
REGARDING ATTORNEY FEES and REMANDING THE CASE TO THE
BANKRUPTCY COURT FOR FURTHER PROCEEDINGS**

I. INTRODUCTION

This is a bankruptcy appeal. Debtors Randall S. Hudock and Josephine V. Hudock filed a voluntary petition under Chapter 13 of the Bankruptcy Code. Bankruptcy Record (“B.R.”) at 11 of 264 (Dkt. 2). On September 10, 2012, the debtors’ amended Chapter 13 plan was confirmed by an order of the Bankruptcy Court. B.R. at 211. On the same day, the Bankruptcy Court entered an order approving attorney fees to Appellee, counsel for debtors, in the amount of \$6,231.50 and costs in the amount of \$55.30. B.R. at 262. Appellant subsequently brought this appeal, challenging the award of attorney fees. Both parties have filed briefs (Dkts. 6, 7). For

the reasons that follow, the Court reverses the order of the Bankruptcy Court awarding attorney fees to Appellee, and remands the case to the Bankruptcy Court for further proceedings.

II. BACKGROUND

The action below is a voluntary Chapter 13 bankruptcy petition filed by Randall S. Hudock and Josephine V. Hudock. The debtors filed schedules of their assets and liabilities, on which they noted that they possessed a residence worth \$180,000. B.R. at 25. On Schedule D – Creditors Holding Secured Claims, the debtors listed a claim held by Everhome Mortgage Co., with an amount of \$179,920, all of which was secured by a mortgage on the residence, except for \$620, which was unsecured. B.R. at 34. The schedule also listed a claim held by Mortgage Service Center in the amount of \$97,560, which was a home equity loan secured by a second mortgage on the residence, all of which claim was no longer secured. B.R. at 34.

The debtors filed a Chapter 13 plan. B.R. at 92. The plan indicates that the debtors sought to strip the lien of Mortgage Service Center and “treat the debt as a class eight, general unsecured claim.” B.R. at 94. The plan lists the market value of the property as \$180,000. Id.

The debtors then filed an adversary claim against Mortgage Service Center, alleging that the debtors are entitled to avoid the unsecured second mortgage. B.R. at 108-109. The debtors subsequently dismissed this complaint and filed a complaint against Bank of America, N.A., which was the party that actually held the second mortgage. B.R. at 116-117. The second complaint was identical to the first, except that the name of the defendant was changed. PHH Mortgage Corp., as servicer for Bank of America, filed objections, alleging that there was equity in the residential property above the first mortgage lien and PHH Mortgage was therefore entitled to a fully secured lien on the property. B.R. at 119.

In subsequently-filed amended schedules, the debtors listed the value of the residential

property at \$278,180. B.R. at 178. The debtors also filed an amended Chapter 13 plan that provided for the surrender of the mortgage property. B.R. at 189. This amended plan was confirmed by order of the Bankruptcy Court. B.R. at 211. Appellee then filed an application for attorney fees in the amount of \$7,031.50 and costs in the amount of \$55.30. B.R. at 215-216. Appellee did not bill for the hours worked on the first adversary complaint. B.R. at 224.

On June 19, 2012, the Bankruptcy Court conducted a hearing on the application for approval of attorney fees. At the hearing, Andrijana Vujic on behalf of Appellee stated, “Mr. Hudock and Mrs. Hudock believe that their house was worth less than the first mortgage. They looked at the market and talked to some real estate agents. . . . I was in constant contact . . . regarding appraisals and just discussing resolution of this adversary. Much of this is not even charged for.” B.R. at 247. She continued, “[W]hen my clients obtained an appraisal and we realized that a lien strip may not be proper, we discussed . . . about possibly bifurcating the claim.” B.R. at 247-248. Bifurcation would have resulted in a partial stripping of the second lien. See Appellee’s Br. at 9 (Dkt. 7).

The Bankruptcy Court, ruling from the bench, stated:

[T]he trustee’s largest point here is that this is not a case that warrants a \$7,086 fee, and even the debtor’s counsel’s own estimate as recently as February 29 when the amended plan was filed estimated \$5,500 for the life of the plan.

. . . .

In the In re Boddy case, B-o-d-d-y, the Sixth Circuit, 1991, explained that in the Court’s consideration of the factors under Section 330(a) of the Bankruptcy Code, the Court should apply a lodestar analysis, which is basically to determine a reasonable hourly rate, which should consist of the prevailing market rate in the relevant legal community for similar services by a lawyer’s reasonably comparable skills, experience, and reputation. And the next step in this lodestar analysis identified in In re Boddy is to determine the lawyer’s reasonable hours. So the trustee’s objection focuses on both aspects of the lodestar analysis, first the hourly rates and, second, the reasonable hours.

B.R. at 256-257.

The Bankruptcy Court overruled Appellant's objection regarding hourly rates, concluding that Appellee's hourly rates were reasonable. B.R. at 257. The Bankruptcy Court then stated:

I'm going to reduce the fees, not as much as the trustee has suggested, but I'm going to reduce them by \$800, which I think would provide a fee that is still far in excess of the standard fee for a case of this kind or the fee that's customarily charged for a case of this kind, and I'm satisfied with the explanation of the circumstances here that there were good reasons why it took as much as it did, but I'm not persuaded that the entire fee is reasonable.

So rather than pick out specific hours, I will note that in making my reduction of \$800 that there were multiple adjournments of the confirmation hearing that appear to have been caused by the -- among other reasons -- I realize there were some other issues outstanding, but they appear to have been caused in large part by the two adversary proceedings and the attempt by the debtors to seek lien strip relief which, frankly, was unlikely based on the debtor's own schedules, so I think that's the primary reason why I think the fees were driven up as high as they are.

B.R. at 259-260.

The Bankruptcy Court then entered an order approving attorney fees in the amount of \$6,231.50 and costs in the amount of \$55.30. B.R. at 262.

III. STANDARD OF REVIEW

A bankruptcy court's order allowing or disallowing fees under 11 U.S.C. § 330(a) will not be disturbed on review, unless the bankruptcy court abused its discretion. In re Veltri Metal Prods., Inc., 189 F. App'x 385, 388-89 (6th Cir. 2006). "An abuse of discretion occurs when the bankruptcy court relies upon clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." In re Airspect Air, Inc., 385 F.3d 915, 920 (6th Cir. 2004). See also In re Robinson, 189 F. App'x 371, 373 (6th Cir. 2006) ("bankruptcy court is afforded broad discretion in determining attorney's fees" under 11 U.S.C. § 330(a)). The standard of review of the bankruptcy court's findings of fact is clear error, and the standard of review of the bankruptcy court's conclusions of law is de novo. In re The Gibson Group, 66 F.3d 1436, 1440 (6th Cir. 1995).

IV. ANALYSIS

Appellant argues that the Bankruptcy Court abused its discretion by failing to properly apply the lodestar analysis by declining to determine the reasonable number of hours worked by the debtors' counsel on the bankruptcy case, and instead making a nominal reduction in fees based on the futile lien strip proceedings. Appellant Br. at 6-7 (Dkt. 6).¹ Appellee responds that the Bankruptcy Court knew and applied the appropriate lodestar analysis, with citations to controlling authority. Appellee Br. at 8 (Dkt. 7). Appellee further argues that the debtors' counsel did not bill for any fees incurred through the filing of the first adversary claim, which was brought against the wrong party, and that the second adversary lien strip claim conferred a reasonable benefit on the debtors by opening the door to the possibility of bifurcating the second mortgage loan. Id. at 9. Appellee argues that the Bankruptcy Court's findings of fact were therefore not clearly erroneous and should be upheld. Id. at 9-10.

A bankruptcy court has the authority to reduce attorney fee awards that "exceed[] the reasonable value of [] such services." 11 U.S.C. § 329(b). The Bankruptcy Code provides that a bankruptcy court must consider the following factors in determining the amount of attorney fees to be awarded:

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, 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;

¹ Appellant does not challenge on appeal the Bankruptcy Court's determination of the reasonableness of the hourly rate.

(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;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

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

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for--

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(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.

11 U.S.C. § 330(a).

The Sixth Circuit has held that the lodestar method of calculating attorney fees is applicable to bankruptcy cases. In re Boddy, 950 F.2d 334, 337 (6th Cir. 1991). Under the lodestar analysis, “the court will arrive at an attorney’s fee by first determining the ‘lodestar’ amount, which is calculated by ‘multiplying the attorney’s reasonable hourly rate by the number of hours reasonably expended.’” Id. (citations omitted).

In determining reasonable attorney’s fees, the Bankruptcy Court must expressly calculate

the lodestar amount, rather than relying on other standards to determine the fee award. In re Boddy, 950 F.2d at 337-338. The Sixth Circuit has explained:

In the present case, the bankruptcy court did not engage in the lodestar analysis. The bankruptcy court instead employed the Robinson “normal and customary” standard to determine the fee award. No effort was made to determine a reasonable hourly rate for the particular attorney handling the case and then multiply that rate by the reasonable hours worked on the case. Rather, the court focused on whether the services performed were “extraordinary” in order to determine if interim fees were warranted. This was an abuse of discretion by the bankruptcy court because it applied an improper legal standard.

. . . .

Nor can it be argued that the bankruptcy court’s approach in the present case necessarily involved use of the lodestar method. This is not apparent from the bankruptcy court’s opinion, and we will not infer that the proper analysis was performed without some evidence in the record. Indeed, one of the problems with the bankruptcy court’s approach is that it allows the court to award attorney’s fees with little or no analysis of how the fees are determined. We are unable to assess the propriety of a fee award on appeal without any explanation as to how the court calculated the amount of the award. Matter of Evangeline Refining Co., 890 F.2d 1312, 1328 (5th Cir.1989). Without at least some discussion of the lodestar factors, the award of attorney’s fees in Chapter 13 bankruptcy cases in the Western District of Kentucky becomes arbitrary and unreviewable. Id.; see also In re Paster, 119 B.R. 468, 470 (E.D. Pa.1990) (lodestar factors should be considered in Chapter 13 cases).

Nevertheless, we do not hold that the bankruptcy court can never consider the “normal and customary” services rendered in a Chapter 13 bankruptcy. The court can legitimately take into account the typical compensation that is adequate for attorney’s fees in Chapter 13 cases, as long as it expressly discusses these factors in light of the reasonable hours actually worked and a reasonable hourly rate.

Id. at 337-338 (some citations omitted).

In a more recent case, a bankruptcy appellate panel of the Sixth Circuit emphasized the necessity of specifically explaining “which hours detailed in the . . . fee application were disallowed and why.” In re Williams, 357 B.R. 434, 440 (B.A.P. 6th Cir. 2007).² The court held

² Although Williams was a Chapter 7 bankruptcy case, the court’s discussion of the lodestar requirement is applicable to the present Chapter 13 case. See Boddy, 950 F.2d at 337 (adopting the lodestar analysis for all bankruptcy cases, without distinguishing between Chapter 13 and Chapter 7 cases).

that the failure to do so constitutes an abuse of discretion:

While the bankruptcy court discussed some of the factors which are subsumed in the lodestar analysis, such as the novelty and difficulty of the issues, it did not expressly calculate the lodestar amount by using the Sixth Circuit mandated methodology. This failure is legally erroneous. “At a minimum ... the bankruptcy courts must expressly calculate the lodestar amount when determining reasonable fees.” Boddy, 950 F.2d at 338. The bankruptcy court did not determine the Appellant’s reasonable hourly rate. Nor did the court explain which hours detailed in the Appellant’s fee application were disallowed and why. The court focused instead on whether the tasks completed were above and beyond what it expected to be included in the presumptive fee. By applying this improper legal standard, the bankruptcy court abused its discretion. Boddy, 950 F.2d at 337. After the bankruptcy court conducts a lodestar analysis consistent with Boddy, the fee award may be lesser or greater than the presumptive fee.

Id. (emphasis in original).

In the instant case, the parties dispute whether the lien strip proceedings conferred a reasonable benefit on the debtors or the estate.³ The Bankruptcy Court concluded that the attempt to seek lien strip relief “was unlikely based on the debtor’s own schedules” and was “the primary reason why . . . the fees were driven up as high as they are,” B.R. at 260, but the Bankruptcy Court did not expressly determine which hours detailed in the fee application were disallowed or calculate the reasonable number of hours actually worked. Instead, the Bankruptcy Court declined to identify specific hours that would be disallowed, stating, “So rather than pick out specific hours, I will note that in making my reduction of \$800 that there were multiple adjournments of the confirmation hearing [and] some other issues outstanding” B.R. at 259-260 (emphasis added).

³ A Chapter 13 bankruptcy debtor may only attempt to modify an unsecured claim – not a secured claim. In re Lane, 280 F.3d 663, 669 (6th Cir. 2002). A secondary lien on a property is totally unsecured if a higher-priority secured claim is in an amount greater than the “security value,” i.e. the value of the property. Id. As the Bankruptcy Court noted in its ruling, in the instant case it was “unlikely” that Appellee’s lien strip efforts would be successful, because the value of the residential property as reported on the debtors’ schedules exceeded the amount of the primary mortgage, rendering the second mortgage loan totally unsecured.

The Court concludes that the Bankruptcy Court failed to properly apply the lodestar analysis. Rather than calculate the lodestar amount, the Bankruptcy Court reduced the fee award by a nominal amount – \$800 – without determining the reasonable number of hours actually worked by counsel. Because the Bankruptcy Court did not properly apply a binding legal standard, the Bankruptcy Court abused its discretion.

Appellee cites one case to support the proposition that a bankruptcy court need not specifically discuss the reasonable hourly rate or hours worked, In re Big Rivers Elec. Corp., 252 B.R. 676 (W.D. Ky 2000). In Big Rivers, the district court concluded that the bankruptcy court “in essence performed a lodestar analysis” by discussing a variety of factors subsumed in the lodestar analysis, even though the bankruptcy did not expressly discuss the reasonable hours expended or whether the hourly rate was reasonable. Id. at 683. The court further concluded that the bankruptcy court “obviously found reasonable . . . the hourly rate.” Id. However, this Court concludes that the non-binding decision in Big Rivers is not persuasive. First, Big Rivers was decided before Williams, which clearly articulated the requirement that a bankruptcy court must explicitly discuss the reasonable hourly rate and reasonable hours worked. Furthermore, the Court is not persuaded by the Big Rivers court’s interpretation of Boddy; the Sixth Circuit in Boddy expressly required a specific calculation of the lodestar amount. Therefore, Big Rivers does not alter the Court’s analysis.

V. CONCLUSION

Because the Bankruptcy Court improperly applied the lodestar analysis, the Court reverses and remands the case for further proceedings. On remand, the Bankruptcy Court must undertake a proper lodestar analysis, including determination of the reasonable number of hours worked by the debtors’ counsel.

SO ORDERED.

Dated: August 6, 2013
Flint, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on August 6, 2013.

s/Deborah J. Goltz
DEBORAH J. GOLTZ
Case Manager