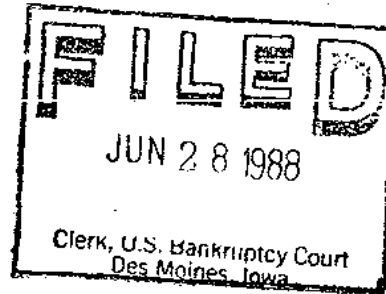


UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa



In the Matter of :
DONALD RAY WUBBENA, : Case No. 87-2258-C
Debtor. : Chapter 7

ORDER

On March 10, 1988 a hearing on a motion to examine attorney fees brought by the Federal Deposit Insurance Corporation (FDIC) was held in Des Moines, Iowa. James H. Cossitt appeared on behalf of the FDIC. Terry L. Gibson appeared on behalf of the United States Trustee. Robert D. Taha, Chapter 7 trustee, was present. Suzanne J. Kruse appeared on behalf of the debtor. On June 15, 1988 a hearing on Division II of the FDIC's second motion to examine attorney fees came on for hearing in Des Moines, Iowa. Dean Mohr appeared on behalf of the FDIC. Terry L. Gibson appeared on behalf of the United States Trustee. No one appeared on behalf of the debtor.

The issue before the court is whether certain services rendered by debtor's counsel are compensable from the estate. The court considers the matter fully submitted.

FACTUAL BACKGROUND

The debtor filed a petition for relief on September 9, 1987. The Rule 2016(b) statement revealed that the debtor

paid his counsel a \$10,000.00 retainer for services rendered in connection with his case. On September 21, 1987 the U.S. Trustee, in a motion to examine attorney fees, characterized the fees as "excessive". He noted that the debtor's schedules failed to specify the terms of the fee arrangement and the amounts that had been billed against the retainer for services previously rendered. The FDIC joined in the U.S. Trustee's motion on October 23, 1987. The court conducted a hearing on October 27, 1987. The parties indicated that the disputes would be resolved since debtor's counsel had agreed to provide a detailed itemization of services rendered.

On January 28, 1988 the FDIC submitted a second motion to examine attorney fees. The FDIC stated that the information provided by debtor's counsel was incomplete and inadequate. It prayed that excessive fees be ordered remitted to the estate and that debtor's counsel be denied compensation for postpetition services that did not benefit the estate. The FDIC particularly objected to having the estate compensate the debtor's counsel for pursuing an appeal of this court's decision denying the debtor's motion to dismiss the Chapter 7 case. The FDIC also objected to a \$5,000.00 payment made by the debtor to attorney William Kutmus. The U.S. Trustee joined in the FDIC's motion on March 8, 1988 stating that the FDIC, the U.S. Trustee and debtor's counsel reached an agreement with respect to prepetition services. However, the U.S. Trustee found that certain postpetition services were excessive and unreasonable. On March 10, 1988

the parties submitted a stipulation regarding attorney fees. The stipulation covers \$3,093.68 in prepetition fees and expenses and \$1,021.97 in postpetition fees and expenses. The FDIC and the U.S. Trustee object to payment of any other fees and expenses.

DISCUSSION

The case is in an unusual posture before the court. The FDIC stipulated to the allowance of fees to be paid from the estate for certain services rendered by debtor's counsel. Yet, in its brief, the FDIC asks the court to disallow fees for a number of the stipulated services. The court will not permit the FDIC, in essence, to renege on its agreement with the debtor. Moreover, the U.S. Trustee is well aware of this court's standards concerning fee applications. The court presumes that the trustee took these standards into account when entering into the stipulation. Accordingly, the court will not alter the stipulation.

The services not covered by the stipulation include an appeal of this court's decision denying the debtor's motion to dismiss and the FDIC's motion for an extension of time to file an objection to discharge and a complaint to determine dischargeability and sums paid to attorney Kutmus. The court must determine whether those services and sums are compensable from the estate.

Section 503 of the Bankruptcy Code governs administrative expenses allowable in a bankruptcy case. Section 503(b) provides in part:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

....

(2) compensation and reimbursement awarded under section 330(a).

Section 330 governs the award of compensation to officers of the court including a debtor's attorney. It is well established that only those services benefitting the estate are recoverable from it. In re Ellrich, 81 B.R. 132, 133 (Bankr. S.D. Fla. 1987); In re Chapel Gate Apartments, Ltd., 64 B.R. 569, 576 (Bankr. N.D. Tex. 1986); In re Spencer, 48 B.R. 168, 171 (Bankr. E.D. N.C. 1985); In re Epstein, 39 B.R. 938, 940 (Bankr. D. N.M. 1984); In re Howerton, 23 B.R. 58, 59 (Bankr. N.D. Tex. 1982); and 2 Collier on Bankruptcy, ¶ 330.04[3] (15th ed. 1987).

Matters pertaining to the appeal and to the FDIC's motion for an extension of time to file a discharge objection and a dischargeability complaint do not inure to the benefit of the debtor's estate. Hence, fees for services related to those matters are not compensable from the estate. The debtor has provided no information to the court concerning the \$5,000.00 paid for the services of attorney Kutmus. It is therefore impossible to determine whether attorney Kutmus' services benefitted the estate.

The debtor maintains that a "benefit to the estate" rule is tantamount to an unconstitutional deprivation of due process in that the rule hinders a debtor's ability to

acquire counsel. The debtor relies in part on Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) wherein the Supreme Court ruled that a state's imposition of court fees that restricted the ability of indigents to bring divorce actions constituted a denial of due process. The applicability of Boddie to the instant case, however, is severely undercut by the Supreme Court's decision in United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). There an indigent, relying principally upon Boddie, claimed that conditioning a bankruptcy discharge on the payment of fees denied him due process. The Supreme Court rejected this claim. It found that a debtor's alleged interest in eliminating burdensome debt did not rise to a constitutional level that required a waiver of fees. Id. 409 U.S. at 434. The court, in addressing the debtor's equal protection arguments, ruled that bankruptcy is not a fundamental right which requires a compelling government interest before regulation may occur. Id. 409 at 446. In light of Kras, restricting compensation from the estate to only services that benefit the estate does not unconstitutionally deprive the debtor of due process of law.

CONCLUSION AND ORDER

WHEREFORE, based upon the foregoing discussion, the court finds that services rendered in connection with the appeal and the discharge and dischargeability matters did not benefit the estate, that the debtor has failed to

establish that Attorney Kutmus' services benefitted the estate and, accordingly, that such services and sums should not be compensated from the estate.

THEREFORE, pursuant to 11 U.S.C. section 329, IT IS ORDERED that fees and expenses in excess of the stipulated amount or \$5,884.35 (\$10,000.00 retainer minus \$3,093.68 prepetition fees and expenses and \$1,021.97 postpetition fees and expenses) and the \$5,000.00 paid to attorney Kutmus be returned to the estate forthwith.

Signed and dated this 28th day of June, 1988.

Lee M. Jackwig
LEE M. JACKWIG
CHIEF, U.S. BANKRUPTCY JUDGE