

MAY 01 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	EC-05-1286-MoPaBu
)		
JERRY JOHNSON,)	Bk. No.	00-27827-D-13L
)		
Debtor.)		
_____)		
MARK A. WOLFF,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
JERRY JOHNSON; LAWRENCE)		
LOHEIT, Chapter 13 Trustee,)		
)		
Appellees.)		
_____)		

Argued and Submitted on March 24, 2006
at Sacramento, California

Filed - May 1, 2006

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding.

Before: MONTALI, PAPPAS and BUFFORD,¹ Bankruptcy Judges.

¹ Hon. Samuel L. Bufford, Bankruptcy Judge for the Central
District of California, sitting by designation.

1 MONTALI, Bankruptcy Judge:

2

3 A chapter 13 debtor's amended plan provided that attorneys'
4 fees remaining unpaid at the completion of the case would not be
5 discharged and would be paid directly by the debtor after entry of
6 his discharge. Debtor's counsel filed a fee application
7 requesting approval of fees incurred after confirmation of
8 debtor's plan and requesting that the court permit the fees to be
9 paid directly by debtor outside of the plan. The bankruptcy court
10 entered an order approving the requested fees and allowing
11 collection of the fees directly from debtor. The court
12 nevertheless indicated in its civil minutes that counsel could not
13 collect fees from the debtor after entry of discharge and that any
14 fees remaining unpaid at that time would be discharged. Counsel
15 appealed and we REVERSE.

16

17 **I.**
FACTS

18 Appellant Mark A. Wolff, Esq. ("Attorney") is counsel for
19 chapter 13² debtor Jerry Johnson ("Debtor"). On June 12, 2003,
20 Debtor filed his third modified chapter 13 plan and a motion to
21 confirm that plan. Debtor signed the third modified plan, which
22 provided that "[a]dditional attorney fees remaining unpaid upon
23 completion of this case shall not be discharged and shall be paid

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25 ² Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
1995) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 directly by debtor after entry of discharge." The third modified
2 plan also states that "[Attorney] opts to have his or her fees
3 approved and paid in accordance with the court's Guidelines for
4 Payment of Attorneys' Fees in Chapter 13 Cases." The bankruptcy
5 court entered an order confirming the third modified plan on
6 August 6, 2003.

7 The Eastern District of California's Guidelines for Payment
8 of Attorneys' Fees in Chapter 13 Cases ("Guidelines") provide
9 that, except for pre-petition retainers, all attorney fees "shall
10 be paid through the plan unless otherwise ordered." Guidelines at
11 Paragraph 5 (emphasis added). "Absent court authorization, the
12 attorney may not receive fees directly from the debtor"
13 Id. (emphasis added). Therefore, direct payment of fees by a
14 debtor is acceptable under the Guidelines if the court approves
15 it.

16 On March 23, 2005, appellee Lawrence Loheit ("Trustee"),
17 chapter 13 trustee in Debtor's case, filed a final report and
18 account indicating that Attorney had been paid \$1,450 through the
19 chapter 13 plan. On April 28, 2005, Attorney filed an application
20 for additional compensation for post-confirmation services in the
21 amount of \$1,116.64 (the "Application"). Attorney requested that
22 these additional fees be paid through the chapter 13 plan "to the
23 extent available" and "directly by Debtor to the extent not
24 available through the Chapter 13 plan." No one opposed the
25 Application.³

26
27 ³ Debtor has taken no position either before us or at the
28 bankruptcy court, even though our decision will obligate him to
(continued...)

1 On June 7, 2005, the bankruptcy court held a hearing on the
2 Application, but continued the hearing so that Attorney could file
3 further briefs. Attorney did so and the court held a further
4 hearing on June 21, when it approved the Application. According
5 to the civil minutes, the court authorized Attorney to collect the
6 approved fees directly from Debtor prior to discharge,⁴ but held
7 that Attorney could not collect any unpaid amounts after entry of
8 Debtor's discharge, citing In re Hanson, 223 B.R. 775 (Bankr. D.
9 Ore. 1998).

10 On June 27, 2005, the bankruptcy court entered a Civil Minute
11 Order stating "IT IS ORDERED that the [A]pplication is approved
12 for a total of \$1,116.64 in fees and costs and may presently be
13 collected directly from the debtor."⁵ (Emphasis added.)
14 Interestingly, even though the order does refer to the civil
15

16 ³(...continued)
17 pay Attorney. We question Trustee's standing before us since he
18 took no position on the Application. Investors Thrift v. Lam (In
19 re Lam), 192 F.3d 1309, 1310-11 (9th Cir. 1999). Nevertheless, we
are obligated to decide the merits of Attorney's position whether
or not there is opposition.

20 ⁴ The bankruptcy court's docket reflects entry of an order
21 discharging Debtor on October 11, 2005, even though Attorney and
Trustee stated at oral argument that the discharge has not been
22 entered. We believe that the docket and the discharge order
linked to it are accurate.

23 ⁵ Attorney appeals because the bankruptcy court mandated in
24 its civil minutes that he could not collect fees directly from
Debtor after entry of the discharge (which occurred on October 11,
25 2005). Unfortunately, the aspect of the court's decision about
which Attorney complains is not in the order itself. Nonetheless,
26 because the order is vague (not defining "presently") and because
it refers to the civil minutes, we believe that the court intended
27 to foreclose Attorney's ability to collect his fees post-
discharge. Accordingly, we treat the order as incorporating the
28 civil minutes, particularly in defining the term "presently." We
therefore will review the error identified by Attorney.

1 minutes, it does not specify that Debtor's liability for any
2 unpaid fees would be discharged upon entry of the discharge. It
3 simply allows the fees and permits collection "presently" from
4 Debtor. Attorney filed a timely notice of appeal.

5
6 **II.
ISSUE**

7 Did the bankruptcy court err in concluding that approved
8 attorneys' fees remaining unpaid as of the date of Debtor's
9 discharge would be discharged?

10
11 **III.
STANDARD OF REVIEW**

12 A bankruptcy court's findings of fact are reviewed for clear
13 error, and conclusions of law are subject to de novo review.
14 Devers v. Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751,
15 753 (9th Cir. 1985). To the extent that questions of fact cannot
16 be separated from questions of law, we review these questions as
17 mixed questions of law and fact, applying a de novo standard.
18 Ratanasen v. Cal. Dep't of Health Servs., 11 F.3d 1467, 1469 (9th
19 Cir. 1993).

20
21 **IV.
DISCUSSION**

22 Citing Hanson, the bankruptcy court held that upon entry of
23 Debtor's discharge, the debtor's personal liability for any unpaid
24 administrative expenses owed to Attorney would be discharged. In
25 Hanson, the court held that "in Chapter 13, if a confirmed plan
26 provides for the postconfirmation services of the debtor's
27 counsel, the Chapter 13 discharge bars collection of the debt for
28 those services." Hanson, 223 B.R. at 778.

1 The attorney in Hanson pursued collection of postconfirmation
2 fees directly from his debtor clients even though he never sought
3 approval of such fees from the court and even though the chapter
4 13 plan provided for payment of postconfirmation fees. Hanson,
5 223 B.R. at 777-79. The plans in question directed the chapter 13
6 trustee to pay administrative expenses. Id. at 778. As noted in
7 Hanson, “[t]he reasoning in this opinion applies only to cases in
8 which the plan provides for payment of postconfirmation fees.”
9 Id. at 778 n.7.

10 Here, unlike in Hanson, the confirmed third modified plan
11 specifically provided that attorney fees remaining unpaid at the
12 completion of plan payments would be paid directly by Debtor.
13 Thus, while the third modified plan did “provide for payment of
14 postconfirmation fees,” it explicitly set forth a treatment
15 different than that contained in Hanson. The reasoning of Hanson
16 is thus inapplicable. Instead, the explicit and approved
17 provision of the confirmed third modified plan governs. Great
18 Lakes Higher Educ. Corp. v. Pardee (In re Pardee), 193 F.3d 1083,
19 1086 (9th Cir. 1999) (when a chapter 13 plan is confirmed, it is
20 binding on all parties, even if a provision is inconsistent with
21 the Bankruptcy Code); 11 U.S.C. § 1329 (a chapter 13 plan as
22 modified becomes the plan); 11 U.S.C. § 1327(a) (provisions of a
23 confirmed plan are binding).

24 Section 1322(b)(10) allows a chapter 13 plan to “include any
25 other appropriate provision not inconsistent with this title.” 11
26 U.S.C. § 1322(b)(10). In this case, the pertinent provision of
27 the confirmed third modified plan is consistent with both the
28 Bankruptcy Code and the Guidelines. Section 1322(a) provides that

1 a chapter 13 plan shall provide for the full payment of priority
2 claims, including administrative expenses "unless the holder of a
3 particular claim agrees to a different treatment of such claim."
4 11 U.S.C. § 1322(a)(2) (emphasis added). In addition, section
5 1326(c) recites that the trustee shall make payments to creditors
6 under the plan "[e]xcept as otherwise provided in the plan." 11
7 U.S.C. § 1326(c). Here, Debtor and Attorney agreed to a treatment
8 of Attorney's priority claim whereby Attorney waived his right to
9 full payment under the plan as long as full payment was made
10 directly by debtor after completion of the plan.⁶ This enabled
11 Debtor to complete his plan payments without reducing or
12 stretching out payments to other creditors. The Bankruptcy Code
13 contemplates such arrangements, and the court confirmed a plan
14 that explicitly provided such an arrangement.⁷ In addition, the
15 Guidelines permit direct payment by debtors of attorneys' fees if
16 the court permits it. The bankruptcy court permitted such payment
17 in this case by confirming the third modified plan.

18
19 **V.**
20 **CONCLUSION**

21
22 ⁶ While a debtor may not provide for the payment of a
23 priority or administrative claim outside the plan without the
24 consent of the creditor (Florida v. Randolph (In re Randolph), 273
25 B.R. 914, 918 (Bankr. M.D. Fla. 2002)), the creditor here
26 (Attorney) drafted and filed the third modified plan, thus
27 affirming his consent. Debtor demonstrated his consent by signing
28 the Plan and by filing a declaration in support of the payment
arrangement.

26 ⁷ If, as the bankruptcy court's decision suggests, express
27 provisions whereby priority claimants agree to be paid outside the
28 plan constitute "treatment" which would discharge the debt upon
completion of the plan, such creditors would have no incentive to
waive priority treatment.

1 Because the confirmed plan explicitly provided that fees owed
2 to Attorney could be paid directly by Debtor upon completion of
3 plan payments, the bankruptcy court erred in holding that Hanson
4 mandated discharge of unpaid fees. We therefore REVERSE.

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