

AUG 22 2006

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re) BAP Nos. EC-05-1396-SBMo
7 KEVIN M. HEALY,)
8 Debtor.) Bk. No. 04-28375
9 _____)
10 KEVIN M. HEALY,)
11 Appellant,)
12 v.) **MEMORANDUM¹**
13 PETER G. MACALUSO; LAWRENCE)
14 J. LOHEIT, Chapter 13 trustee;))
15 UNITED STATES TRUSTEE,)
16 Appellees.)

Argued and Submitted on July 21, 2006
at Sacramento, California

Filed - August 22, 2006

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

Honorable Robert S. Bardwill, Bankruptcy Judge, presiding

Before: SMITH, BRANDT and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, claim preclusion or issue preclusion. See 9th Cir. BAP Rule 8013-1.

1 Kevin M. Healy ("Debtor") appeals an order approving the
2 chapter 13 trustee's final report and account entered September
3 21, 2005. The order determined that the \$710 the trustee paid to
4 Debtor's attorney, Peter Macaluso ("Macaluso"), pursuant to
5 General Order 03-03 represented reasonable compensation for the
6 services and time expended by Macaluso given the circumstances of
7 the case. The notice of appeal was filed on September 30, 2005.
8 We VACATE and REMAND.

9 **I. FACTS**

10 On August 16, 2004, Debtor² filed a chapter 13 petition³
11 with the assistance of Macaluso. According to the schedules,
12 Debtor had \$271,721.67 in secured debt and \$264,128.82 in
13 unsecured nonpriority debt.⁴ The "Disclosure of Compensation of
14 Attorney for Debtor" (the "compensation disclosure") stated that
15 pursuant to § 329(e) and Rule 2016(b) Debtor agreed to pay
16 Macaluso \$4,000 for legal services related to the bankruptcy;
17 \$500 of this amount was paid pre-petition. The legal services to
18 be provided included:

- 19 a) Analysis of the debtor's financial
20 situation, and rendering advice to the debtor
21 in determining whether to file a petition in
22 bankruptcy;
b) Preparation and filing of any petition,
schedules, statement of affairs and plan

23 ² Debtor is an attorney licensed to practice in California.

24 ³ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
27 enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

28 ⁴ Debtor later amended his schedule F to add \$50,342.70 in
unsecured debt.

1 which may be required;
2 c) Representation of the debtor at the
3 meeting of creditors and confirmation
4 hearing, and any adjourned hearings thereof.
5 . . .

6 Id.

7 In addition, Debtor and Macaluso signed a Rights and
8 Responsibilities of Chapter 13 Debtors and Their Attorneys
9 agreement ("RARA"). The compensation terms of the RARA mirrored
10 those of the compensation disclosure.

11 On October 13, 2004, the trustee filed an objection to
12 Debtor's chapter 13 plan. He asserted that the plan failed
13 because 1) the chapter 7 liquidation analysis pursuant to
14 § 1325(a)(4) was not satisfied, and 2) Debtor was not eligible to
15 file a chapter 13 because his unsecured debt of \$336,811 exceeded
16 the maximum amount allowed under § 109(e) for a chapter 13
17 debtor.⁵ Debtor's subsequent attempt to amend the plan proved
18 unsuccessful. Thereafter, on December 9, 2004, the trustee filed
19 a motion to dismiss the case or to convert it to a chapter 7.
20 Debtor did not oppose the motion, and on January 5, 2005, the
21 court dismissed the case due to ineligibility.

22 On April 28, 2005, the trustee filed his final report, which
23 reflected the \$710 payment he had made to Macaluso from a portion
24 of the plan payments that had been collected from Debtor during
25 the course of the chapter 13 case. Debtor objected to any fees
26 being paid to Macaluso on the grounds that Macaluso had failed to
27 meet the basic standard of skill, care, and legal education
28 required to represent him. In addition, Debtor complained that

⁵ The unsecured debt limit for filing under chapter 13 is \$307,675. 11 U.S.C. § 109(e).

1 Macaluso had repeatedly violated his ethical duties to him and
2 the court.

3 The trustee responded that the payments made were paid
4 pursuant to General Order 03-03, which mandates that attorney
5 fees be paid according to the Guidelines for Payment of
6 Attorneys' Fees in Chapter 13 Cases (the "Guidelines"). Thus,
7 the trustee contended that the \$710 in fees had already been
8 allowed prior to the final report by General Order 03-03, the
9 Guidelines, and the RARA.

10 Macaluso responded that the bankruptcy had been filed under
11 emergency circumstances for the purpose of suspending a pending
12 state court action initiated by Debtor. More specifically, the
13 bankruptcy filing was precipitated by the state court's refusal
14 to stay the litigation under the Servicemembers Civil Relief Act
15 because he was on active duty as a U.S. Naval Reserve officer.⁶
16 According to Macaluso, Debtor hoped to use the breathing spell
17 afforded by the bankruptcy filing to settle the state court
18 litigation and to rebuild his law practice. Macaluso maintained
19 that \$710 was a reasonable amount for service that included,
20 among other things: 1) review of Debtor's financial information;

21
22
23 ⁶ Debtor was ordered to active duty in 2004, and was
24 required to report to duty at Port Hueneme in August of that
25 year. Debtor believed that the pending state court litigation
26 should have been stayed for 90 days under the Servicemembers
27 Civil Relief Act, 50 U.S.C. app. §§ 501-596 (2006), and that he
28 should not have been required to file numerous documents by
August 16, 2004 and appear at a hearing on August 20, 2004
related to a Strategic Lawsuits Against Public Participation
(a.k.a. SLAPP), Cal. Code Civ. Proc. § 425.16 (2006), motion in
state court. Because the state court did not recognize his rights
under the Servicemembers Civil Relief Act, Debtor filed
bankruptcy in an attempt to stay the litigation.

1 2) preparation and filing of the petition; 3) preparation of
2 amendments to schedules I, F, and Debtor's business income; and
3 4) defending against two objections to confirmation and two
4 relief from stay motions. Debtor's reply echoed his prior
5 objection to the final report.

6 The court continued the hearing to September 20, 2005, to
7 allow for additional briefing. Thereafter, Debtor provided
8 supplemental pleadings alleging that Macaluso lacked knowledge of
9 the debt limitations imposed by § 109(e) and that he had failed
10 to adequately represent him in the state court litigation.
11 Further, Debtor contended that Macaluso's incompetence caused him
12 to file a chapter 13 case under which he was statutorily
13 ineligible. Macaluso also filed supplemental briefing, which
14 included a billing statement representing services rendered from
15 August 16, 2004 through January 5, 2005.

16 On September 20, 2005, the matter came to hearing. The
17 bankruptcy court, in a written memorandum, found that

18 [Debtor] agreed to pay Macaluso \$4,000 for
19 services performed in the case, with \$500
20 having been paid pre-petition. . . . As a
21 result, once the Case was dismissed, the
22 Trustee was required under General Order 03-
03 and the Guidelines to pay as much as
\$1,500 to Macaluso on account of attorneys'
fees in the Case.

23 Memorandum Decision at 3. The court went on to find that the
24 billing statement submitted by Macaluso indicated that his time
25 was spent on, among other things, court appearances and
26 communications with Debtor, as well as

27 (a) Objections to confirmation of the Chapter
28 13 Plan filed August 16, 2004 . . . (b)
Motion for Relief from Stay filed by creditor
M. Cynthia Rose . . . (c) Motion for

1 Modification of Stay filed by creditor
2 Charles E. Bauer . . . (d) the Trustee's
3 motion to convert or dismiss the Case.

4 Id. at 4.

5 As Debtor had not objected to any of the time entries on the
6 billing statement, and the time entries correlated with matters
7 on the docket, the court concluded that "the amount disbursed by
8 the [t]rustee to Macaluso on account of the services provided in
9 the case, \$710, [was] reasonable compensation for those services,
10 given the time expended by Macaluso and given the circumstances
11 of the Case." Id. at 4-5.

12 Finally, the court held that in allowing the fees referenced
13 in the final report, it "need not and [would] not make any
14 findings or determinations regarding the allegations raised by
15 [Debtor]" concerning the quality of Macaluso's services, acts of
16 malpractice, or the violation of ethical standards. Id. at 4.

17 Debtor appeals.

18 **II. ISSUE**

19 Whether the bankruptcy court erred in approving as
20 reasonable compensation the amounts disbursed by the trustee to
21 Macaluso without making any specific findings pursuant to
22 § 330(a) in light of Debtor's allegations of incompetent
23 representation.

24 **III. JURISDICTION**

25 Federal subject matter jurisdiction is founded under 28
26 U.S.C. §§ 1334(b) and 157(b)(1). We have appellate jurisdiction
27 over final orders pursuant to 28 U.S.C. § 158(c).
28

1 **IV. STANDARD OF REVIEW**

2 A bankruptcy court's findings of fact are reviewed under the
3 clearly erroneous standard. Hassen Imports P'ship v. KWP Fin. IV
4 (In re Hassen), 256 B.R. 916, 920 (9th Cir. BAP 2000). An
5 appellate court will not disturb a bankruptcy court's award of
6 attorneys' fees "absent an abuse of discretion or an erroneous
7 application of law." Eliapo v. Derham-Burk (In re Eliapo), 298
8 B.R. 392, 397 (9th Cir. BAP 2003); see also Smith v. Hale (In re
9 Smith), 317 F.3d 918, 923 (9th Cir. 2002). "Under an abuse of
10 discretion standard, we will not reverse unless we are
11 'definitely and firmly convinced that the bankruptcy court
12 committed a clear error of judgment.'" In re Eliapo, 298 B.R. at
13 397 (quoting Warrick v. Birdsell, 278 B.R. 182, 184 (9th Cir. BAP
14 2002)).

15 **V. DISCUSSION**

16 Judicial approval of attorney fees is governed by § 330(a),
17 which requires the court to allow reasonable compensation. In re
18 Pedersen, 229 B.R. 445, 447 (Bankr. E.D. Cal. 1999). Debtor
19 complains that the court erred in refusing to make findings as to
20 his allegations of Macaluso's incompetent representation prior to
21 determining that the \$710 payment made by the trustee to Macaluso
22 for his services was reasonable compensation under § 330(a). We
23 agree.

24 A. The Guidelines for Payment of Attorneys' Fees in
25 Chapter 13 Cases

26 In Eliapo, we recognized that bankruptcy courts have the
27 "power to establish a presumptive 'reasonable value' [for] legal
28 fees in consumer bankruptcies." 298 B.R. at 400. Pursuant to

1 this power, the courts in the Eastern District of California
2 created a general order (General Order 03-03) that governs
3 customary legal practices associated with chapter 13 cases.⁷ See
4 United States Bankr. Ct. E. Dist. of Cal., General Order 03-03,
5 <http://www.caeb.uscourts.gov/data/formpubs/GO.03-03.pdf>. This
6 order provides for approval of fees for attorneys representing
7 chapter 13 debtors. Specifically, it states

8 (c) Compensation paid to attorneys for the
9 representation of debtors shall be determined
10 according to the Guidelines for Payment of
11 Attorneys' Fees in Chapter 13 Cases or, when
12 the attorney elects not to comply with the
13 Guidelines for Payment of Attorneys' Fees in
14 Chapter 13 Cases, sections 329 and 330 of the
15 Bankruptcy Code, FRBP 2002, 2016, and 2017,
16 and other applicable authority.

17 Id. at ¶4(c).

18 The Guidelines, in turn, "lay out a streamlined procedure
19 for approval of attorneys' fees in connection with the
20 confirmation of chapter 13 plans." In re Pedersen, 229 B.R. at
21 447. Attorneys may elect to have their fees approved in
22 accordance with the Guidelines and paid as part of the chapter
23 13 plan confirmation process without filing a detailed
24 application if: a) counsel files an executed copy of the RARA
25 and b) no objection to the requested fees has been raised.
26 United States Bankr. Ct. E. Dist. of Cal., Guidelines For
27 Payment of Attorneys' Fees In Chapter 13 Case, http://www.caeb.uscourts.gov/data/formpubs/GL.Pmt_03.pdf. Compliance with the
28 Guidelines is optional, but if an attorney declines to seek
approval of compensation pursuant to them, then "his or her
compensation shall be disclosed, reviewed, and approved in

⁷ General Order 03-03 became effective July 1, 2003.

1 accordance with applicable authority.” Id. at ¶3. The maximum
2 fee which can be approved through this procedure is \$2,500 for
3 nonbusiness cases and \$4,000 for business cases. Id. at ¶2.

4 The Guidelines also provide for the situation where a case
5 is dismissed prior to confirmation and the attorney has elected
6 to be compensated according to the Guidelines. Under the
7 Guidelines,

8 If an attorney has elected to be compensated
9 pursuant to these guidelines but the case is
10 dismissed prior confirmation of a plan,
11 absent a contrary order, the trustee shall
12 pay to the attorney to the extent funds are
13 available an administrative claim equal to
14 50% of the total fee the debtor agreed to pay
15 less any pre-petition retainer. The attorney
16 shall not collect, receive, or demand
17 additional fees from the debtor unless
18 authorized by the court.

19 Id. at ¶6.

20 “The chapter 13 fee guidelines are nothing more than a
21 presumption that compensation is reasonable if paid in the
22 amounts and in the manner prescribed by the guidelines.” In re
23 Pedersen, 229 B.R. at 448; see also, In re Thorn, 192 B.R. 52,
24 54-56 (Bankr. N.D.N.Y 1995); In re Zwern, 181 B.R. 80, 85-86
25 (Bankr. D. Colo. 1995); In re Orris, 166 B.R. 935 (Bankr. W.D.
26 Wash. 1994). Because the Guidelines only establish a presumption
27 of reasonableness, the court or any party in interest may
28 challenge the presumption any time prior to entry of a final
decre. In this circumstance, the attorney is required to file a
conventional fee application in order to demonstrate that his or
her fees are reasonable, whether or not such fees have already
been paid pursuant to a prior order. In re Pedersen, 229 B.R. at
448; United States Bankr. Ct. E. Dist. of Cal., Guidelines For

1 Payment of Attorneys' Fees In Chapter 13 Case, http://www.caeb.uscourts.gov/data/formpubs/GL.Pmt_03.pdf.

3 Here, the RARA provided for fees in the amount of \$4,000,
4 \$500 of which was paid pre-petition. Under the Guidelines and
5 General Order 03-03, after the case was dismissed the trustee was
6 authorized to pay as much as \$1,500 (50% of \$4,000 minus the \$500
7 paid pre-petition) to Macaluso. Thus, the \$710 payment to
8 Macaluso would have been proper and presumed reasonable had
9 Debtor not objected. However, because Debtor did timely object,
10 Macaluso was required to submit a fee application and the court
11 was required to determine the reasonableness of the fees pursuant
12 to § 330(a). At oral argument, counsel for Macaluso agreed that
13 Debtor's objection to the trustee's final account was a proper
14 way to put the reasonableness of Macaluso's fees before the court
15 for determination.

16 B. The Bankruptcy Court Has Discretion in Determining
17 Whether a Fee Application is Reasonable

18 It is within the bankruptcy court's discretion to determine
19 reasonable compensation for services rendered in bankruptcy
20 proceedings. Southwestern Media, Inc. v. Rau, 708 F.2d 419, 422
21 (9th Cir. 1983). In determining the amount of compensation to be
22 allowed, courts are given great deference in their review of a
23 fee application pursuant to § 330. See Gill v. Wittenburg (In re
24 Fin. Corp. of America), 114 B.R. 221, 224 (9th Cir. BAP 1990).

25 Section 330(a) allows a court to award a professional person
26 "reasonable compensation for actual necessary services rendered"
27 and "reimbursement for actual, necessary expenses." 11 U.S.C.
28 § 330(a)(1)(A)-(B). The standard of reasonableness in chapter 13

1 cases "is based upon the benefit and necessity of such service to
2 the debtor as well as other factors that are set forth in § 330."

3 In re Eliapo, 298 B.R. at 398. In determining the reasonable
4 amount of compensation to be awarded to a chapter 13 debtor's
5 attorney, "the court shall consider the nature, the extent, and
6 the value of . . . services" in relation to the following
7 factors:

8 (A) the time spent on such services;

9 (B) the rates charged for such services;

10 (C) whether the services were necessary to
11 the administration of, or beneficial at the
12 time at which the service was rendered toward
13 the completion, of a case under this title;

14 (D) whether the services were performed
15 within a reasonable amount of time
16 commensurate with the complexity, importance,
17 and nature of the problem, issue, or task
18 addressed; and

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

23 11 U.S.C. § 330(a) (3) (A) & (a) (4) (B). Compensation, however,
24 will not be allowed for

- 25 (i) unnecessary duplication of services; or
26 (ii) services that were not-
27 (I) reasonably likely to benefit the
28 debtor's estate; or
29 (II) necessary to administration of the
30 case.

31 11 U.S.C. § 330(a) (4) (A). "Services that are reasonably likely
32 to provide an identifiable, tangible and material benefit to the
33 debtor's estate can be compensated, even if they do not actually
34 provide such a benefit (and as long as such services meet the

1 other requirements of section 330(a))." Smith v. Edwards & Hale
2 (In re Smith), 317 F.3d 918, 926 (9th Cir. 2002).

3 In determining the reasonableness of Macaluso's fee, the
4 court held that "the amount disbursed by the [t]rustee to
5 Macaluso on account of the services provided in the case, \$710,
6 is reasonable compensation for those services, given the time
7 expended by Macaluso and given the circumstances of the Case."
8 Memorandum Decision at 4-5. This sentence alone, however, is
9 insufficient to support a finding of reasonableness under
10 § 330(a). Although the court specifically listed matters on the
11 docket (i.e., objections to confirmation of the chapter 13 plan,
12 motions for relief from stay filed by Cynthia Rose and Charles
13 Bauer, and trustee's motion to convert or dismiss the case) which
14 Macaluso had spent attorney time on in opposing and attending the
15 hearings for, there is no indication that it considered the
16 nature, extent, and value of such services in relation to the
17 § 330(a)(3) factors. Moreover, the court did not address whether
18 the services performed were duplicative, necessary, or beneficial
19 to the estate. Consequently, it abused its discretion by
20 determining the \$710 to be a reasonable fee without making
21 specific findings under § 330(a).

22 In addition, the court erred in refusing to consider
23 Debtor's allegations of incompetence (most notably, his
24 ineligibility for relief under chapter 13) in determining the
25 reasonableness of the distribution. Although there were no
26 objections to any specific professional services billed by
27 Macaluso, if the allegations regarding Macaluso's incompetence
28 concerning the § 109(e) debt limitations are proven, there could

1 be a basis for finding the entire \$710 unreasonable.⁸ In other
2 words, if it turns out that Macaluso negligently counseled Debtor
3 to file a bankruptcy case for which he was clearly ineligible,
4 all of the fees incurred in connection with the ill-advised
5 chapter 13 case might be rendered unreasonable under § 330(a).

6 California Rule of Professional Conduct 3-110 provides that
7 an attorney shall not recklessly fail to perform legal services
8 with competence. "Competence" in any legal service requires that
9 the attorney act with the 1) diligence, 2) learning and skill,
10 and 3) mental, emotional, and physical ability reasonably
11 necessary for the performance of such service. Cal. Rule of
12 Prof'l Conduct R. 3-110(B). Thus, Macaluso had a duty to
13 diligently research the chapter 13 eligibility requirements prior
14 to advising Debtor to file for chapter 13 relief.

15 The court's finding that the \$710 fee was reasonable without
16 addressing Debtor's allegation of incompetence was clearly
17 erroneous, and approving the trustee's distribution of that
18 amount without making the requisite factual findings was an abuse
19 of discretion. If Macaluso knew, or should have known, that
20 Debtor was not eligible for relief under chapter 13, then
21 disgorgement of some or all of his fees may very well be
22 appropriate. See In re Sandavol, 186 B.R. 490, 495 (9th Cir. BAP
23 1995).

24
25 ⁸ Debtor argues that Macaluso violated California Business &
26 Professions Code §§ 6068 & 6148 and the California Rules of
27 Professional Conduct 3-200 (prohibited objectives of employment),
28 3-500 (communication), and 4-200 (fees for legal services).
However, as these arguments are being raised for the first time
on appeal, we decline to address them. See Alaska v. United
States, 201 F.3d 1154, 1163 (9th Cir. 2000).

1 **VI. CONCLUSION**

2 For the foregoing reasons, we VACATE the order entered by
3 the bankruptcy court approving trustee's final report and REMAND
4 for further findings under § 330(a) consistent with this
5 memorandum.

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