

SEP 07 2005

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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NOT FOR PUBLICATION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 No.	WW-04-1556-SJuMa
7	GERALD P. FIORITO and)	Bk. No.	04-11720
8	JEAN FIORITO,)		
9	Debtors.)		
10	KARR TUTTLE CAMPBELL,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	BRUCE P. KRIEGMAN, Trustee;)		
14	UNITED STATES TRUSTEE,)		
15	Appellees.)		

Argued and Submitted on
July 22, 2005 at Seattle, Washington

Filed - September 7, 2005

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

Before: SMITH, JURY² AND MARLAR, 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, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Meredith A. Jury, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal is from a final order granting the fee
2 application of Debtors' former attorneys, Karr Tuttle Campbell
3 ("KTC"). The appellee is the chapter 7 trustee, Bruce P.
4 Kriegman ("trustee"). We AFFIRM the order, as MODIFIED.

5 FACTS

6 Gerald and Jean Fiorito ("Debtors") employed KTC as their
7 bankruptcy counsel and paid the firm a pre-petition retainer of
8 \$45,534. In February 2004, Debtors filed a chapter 11³ petition.
9 In July, after KTC had twice failed to obtain approval of
10 Debtors' disclosure statement, the court converted the case to a
11 chapter 7 on its own motion. KTC subsequently filed a fee
12 application requesting \$94,518 in fees and \$4,130 in costs, and
13 approval to apply the balance of the pre-petition retainer of
14 \$45,787 that it held in its trust account. The chapter 7
15 trustee, a major creditor, and Debtors all objected to KTC's fee
16 request on various grounds, including, that the firm's hourly
17 rates were too high, that the firm performed costly services
18 which were of no benefit to the estate, and that the firm
19 overcharged for its services.

20 After hearing arguments, the court reduced the total amount
21 of fees and costs to \$65,000⁴. In this regard, the court stated

22 . . . I'm going to allow attorney fees to Karr Tuttle
23 in the amount of \$65,000. I think there is a
24 substantial reduction here that's warranted. And while
counsel would like to present this as that complicated

25 ³ 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,
and FRCP references are to the Federal Rules of Civil Procedure.

28 ⁴ The amount to which the attorneys' fees were reduced is
not challenged on appeal.

1 a case, I'm sorry, but I don't think it is. It's
2 pretty straightforward in terms of the creditors were
3 limited to positions, pretty straightforward, very
4 little dispute as far as the factual issues are
5 concerned. What created the problem was pretty
6 obvious. And I don't mind Karr Tuttle making the
7 arguments that they do, but I don't think they're
8 \$95,000 arguments.

9 Transcript of Proceedings, October 29, 2004, 10:21-11:7.

10 The court authorized the application of the retainer to the
11 allowed fees and costs. However, as to the difference, \$19,212
12 (the "unpaid fees"), the court stated

13 The balance of the fees that I have allowed - and I'm
14 just grouping the fees and costs in the \$65,000. The
15 difference I'm going to allow, but I'm going to
16 subordinate it to all the claims in the estate. I'm
17 doing it on the basis that I think a lot of those
18 arguments are for the benefit of Mr. Fiorito [rather
19 than for the benefit of the estate]. And if we get to
20 the point of generating that kind of money in this
21 case, he should pay a larger portion of the fees of
22 Karr Tuttle. So that will be the Court's order. You can
23 draw the money down Mr. Treperinas.

24 Id. at 12:9-19. (Emphasis added).

25 KTC presented a proposed order that was signed and issued by
26 the court on November 1, 2004. The order states, in part, that
27 "the Court finds that the fees and costs were reasonable and
28 necessary, that notice was appropriate, and that the services
29 were of substantial benefit to the estate." (emphasis added). See

30 Order Approving Application for Compensation for Chapter 11
31 Attorneys for the Debtor and Request for Disbursement, dated
32 November 1, 2004. (Emphasis added). The order also provides

33 that the remainder of the fees and costs approved but
34 not paid to Karr Tuttle Campbell shall be an approved
35 claim in favor of Karr Tuttle Campbell subordinate to
36 other creditor claims and shall be satisfied subject to
37 the availability of Estate funds to cover such claim by
38 future order of the court.

1 No party questioned the language in the order or sought a
2 corrected order from the court.

3 KTC argues on appeal that the court erred in subordinating
4 part of its fees because of the express finding in the written
5 order that the firm's services "substantially benefitted" the
6 estate, making KTC's claim allowable as an administrative expense
7 and, thus, subject to the mandatory distribution scheme provided
8 under § 726.

9 JURISDICTION

10 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
11 and § 157(b) (1) and (b) (2) (I). This Panel has jurisdiction
12 under 28 U.S.C. § 158(c).

13 ISSUES

14 1. Whether the order on appeal contains a clerical mistake
15 warranting modification pursuant to Rule 8013.

16 2. Whether the court erred in subordinating the unpaid fees
17 to all other claims.

18 STANDARDS OF REVIEW

19 A bankruptcy court's award of attorneys' fees is reviewed
20 for an abuse of discretion or erroneous application of the law.
21 Southwestern Media, Inc. v. Rau, 708 F.2d 419, 422 (9th Cir.
22 1983); In re York International Building, Inc., 527 F.2d 1061,
23 1068 (9th Cir. 1975). Questions involving the construction or
24 interpretation of § 330 are reviewed de novo. In re Dutta, 175
25 B.R. 41, 43 (9th Cir. BAP 1994).

DISCUSSION

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3 1. The written order contains a clerical error and should be modified.

4 Ignoring the substance of the court's oral ruling, made on
5 the record at the fee petition hearing, KTC urges us to disregard
6 any discrepancies between the oral ruling and written order, and
7 find that the court had no authority to subordinate the unpaid
8 fees. KTC reasons that because the language in the written order
9 suggests that all of KTC's services benefitted the estate, its
10 entire \$65,000 claim is an allowed administrative claim subject
11 to the mandatory provisions of § 726.

12 According to KTC, when there is a conflict between a trial
13 court's oral statements to counsel and its final written order,
14 the written order must control. The trustee maintains that the
15 court clearly expressed its intention at the hearing, which was
16 to grant the unpaid fees on a separate basis, payable by Debtor
17 only and not by the estate as administrative costs.

18 The written order, drafted by KTC and apparently not
19 reviewed by the trustee prior to submission to the court, does
20 not accurately reflect the court's oral ruling. It states that
21 "the [firm's] services were of substantial benefit to the
22 estate," suggesting that the court found that all of the fees
23 generated were for services performed that benefitted the estate,
24 while the court clearly stated at the hearing that it was
25 subordinating the unpaid fees because it found that amount
26 represented services that may have benefitted Debtors but did not
27 benefit the estate.

1 Further, the written order itself is internally
2 inconsistent. On the one hand, the order includes findings that
3 the total fee award of \$65,000 was "reasonable and necessary" and
4 were of "substantial benefit" to the estate. On the other hand,
5 the order nevertheless provides for the subordination of the
6 unpaid fees to all other claims. This begs the question: why
7 would the court subordinate reasonable and necessary fees for
8 services that provided a substantial benefit to the estate? The
9 inconsistency can only be explained by a review of the oral
10 findings made by the court at the hearing. The transcript of the
11 hearing reveals the court's clear finding that some of the
12 services rendered by KTC benefitted only Debtors, and that
13 payment of the fees related to such services should be borne by
14 Debtors and not by the estate.

15 Notably, the order was prepared by KTC and not by the court.
16 It appears that KTC is now attempting, by this appeal, to exploit
17 a discrepancy created by its own drafting error.

18 Rule 8013 permits us to "affirm, modify, or reverse a
19 bankruptcy judge's judgment" Rule 8013. "The rule
20 implements 28 U.S.C. § 2106, which provides that 'the Supreme
21 Court or any other court of appellate jurisdiction may . . .
22 modify . . . any judgment, decree, or order of a court lawfully
23 brought before it for review, . . . as may be just under the
24 circumstances.'" 28 U.S.C. § 2106; Ederel Sport, Inc. v. Gotcha
25 Int'l L.P. (In re Gotcha Int'l L.P.), 311 B.R. 250, 254 (9th Cir.
26 BAP 2004).

27 Under the present circumstances, it is clear from a full
28 reading of the hearing transcript that the court's written order

1 does not clearly or accurately reflect the court's intended
2 ruling. Therefore, we modify the court's order by striking the
3 following language: "the Court finds that the fees and costs were
4 reasonable and necessary, that notice was appropriate, and that
5 the services were of substantial benefit to the estate, now
6 therefore it is hereby:" In its place, the order shall
7 be modified to read: "the Court expressed its findings and
8 conclusions on the record during the October 29, 2004 hearing and
9 those findings are hereby incorporated. Consistent therewith, it
10 is hereby:"

11 2. The court did not err in subordinating the unpaid fees.

12 Although our determination that the court's written order
13 does not accurately reflect its actual oral findings and that the
14 order is internally inconsistent effectively defeats KTC's
15 argument that the subordination provision is erroneous, in the
16 interest of providing the parties a complete analysis, we will
17 separately address the issue of the court's subordination of
18 KTC's fees.

19 KTC does not argue, as a basis for challenging the
20 subordination provision in the order, that the oral finding made
21 by the court at the hearing that some of its professional
22 services were rendered for the sole benefit of Debtors was
23 erroneous. Instead, KTC contends that the order's subordination
24 language is undermined by the favorable recital of findings of
25 "reasonableness" and "necessity" and is, therefore, baseless.

26 The trustee contends that because the court subordinated the
27 unpaid fees based on its finding that they were rendered "for the
28 benefit of Mr. Fiorito," it would have been impossible for the

1 court to award those fees under § 330 and, therefore, the court
2 clearly intended to allow them under § 726(a)(6). The trustee
3 offers examples of actions by KTC that did not provide any
4 benefit to the estate, and were only in the interest of Debtors.

5 First, KTC filed a motion to turn over personal belongings
6 of Debtors, nearly all of which were exempt. Next, KTC attempted
7 to claim two homestead exemptions for Debtors in the amount of
8 \$80,000 in the face of Washington state law that allows a maximum
9 exemption of \$40,000 for married couples. One of the claimed
10 homestead exemptions involved Mr. Fiorito's ownership in the
11 Totem Valley Business Center, a commercial property for which the
12 homestead exemption obviously did not apply. The inclusion of
13 this clearly impermissible homestead exemption, and the ensuing
14 defense of it against an objection by Omni Financial, could only
15 have been for the benefit of Debtors and not the estate.

16 The trustee also attributes the failure of the original and
17 amended disclosure statements and plans of reorganization to
18 KTC's acting in the interest of Debtors and not the estate. The
19 failure of the amended disclosure statements and plans to
20 adequately provide for all creditors led the court, on its own
21 motion, to convert the case from chapter 11 to chapter 7.

22 When services rendered by an attorney are for the sole
23 benefit of the debtor and not the estate, they cannot be paid as
24 an administrative expense under § 330(a). In re Alcala, 918 F.2d
25 99, 103-104 (9th Cir. 1990); Mayer, Glassman & Gaines v. Washam
26 (In re Hanson), 172 B.R. 67 (9th Cir. BAP 1994). Section
27 330(a)(4)(A) provides that "the court shall not allow
28 compensation for - (ii) services that were not - (I) reasonably

1 likely to benefit the debtor's estate; or
2 (II) necessary to the administration of the estate."
3 § 330(a)(4)(A).

4 As the transcript of the hearing unequivocally indicates,
5 the court intended to reduce KTC's fees in two separate steps,
6 based on its finding that some of the firm's services did not
7 benefit the estate. First, the court expressly disallowed
8 \$29,518 in fees (\$94,518 - \$65,000). Second, the court
9 subordinated \$19,212 to all other claims. As all parties agree
10 that there are insufficient assets in the estate to pay
11 creditors' claims in full, the subordination is effectively a
12 disallowance of the fees as an expense of the estate.
13 Significantly, based on the court's finding that the unpaid fees
14 reflect services rendered solely for the benefit of Debtors, and
15 not the estate, the court could have disallowed the unpaid fees
16 outright. Subordination, in this instance, is thus the lesser
17 included "remedy" of disallowance.⁵ For this reason, the court
18 did not err in permitting KTC a greater accommodation than that
19 to which it might have otherwise been entitled.

20 CONCLUSION

21 Based on the foregoing, we AFFIRM the order, as MODIFIED
22 herein.

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27 ⁵ This being the case, neither the distribution provisions
28 of § 726, nor the requirements for subordination under § 510(c)
are implicated or violated by the court's ruling.