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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NOT FOR PUBLICATION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

1 In re:) BAP No. AZ-10-1109-PaJuBa
2)
3 PFG CONSTRUCTION, INC.,) Bk. No. 09-18520-SSC
4)
5 Debtor.)
6)
7)
8)
9 JAMES M LAGANKE; JAMES M. LAGANKE,)
10 P.L.L.C.,)
11)
12 Appellants,)
13)
14 v.) **M E M O R A N D U M**¹
15)
16 ANTHONY H. MASON, Chapter 7)
17 Trustee,)
18)
19 Appellee.)
20)

Argued and Submitted on October 22, 2010
at Phoenix, Arizona

Filed - November 12, 2010

Appeal from the United States Bankruptcy Court
for the District of Arizona

Hon. Sarah Sharer Curley, U.S. Bankruptcy Judge, Presiding

20 Appearances: James LaGanke appeared pro se and for Appellant
21 James M. LaGanke, P.L.L.C.
22 Terry A. Dake appeared for Appellant Anthony H.
23 Mason, Trustee

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26 Before: PAPPAS, JURY and BAUER,² Bankruptcy Judges

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¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Catherine E. Bauer, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Attorney James M. LaGanke and his law firm (collectively
2 referred to as "LaGanke") appeal the decision of the bankruptcy
3 court ordering them to disgorge a prepetition payment of \$17,000
4 in fees from a client, chapter 7³ debtor PFG Construction, Inc.
5 ("Debtor"). We AFFIRM.

6
7 **FACTS**

8 Acting through its counsel LaGanke, Debtor, a general
9 contractor, filed its chapter 7 petition on August 4, 2009.
10 Anthony H. Mason ("Trustee") was appointed the chapter 7 trustee.
11 In its Statement of Financial Affairs, filed on September 2, 2009,
12 Debtor reported that it had paid LaGanke \$7,500 on July 31, 2009.
13 However, a canceled check in the record reveals that Debtor had
14 actually paid LaGanke \$17,000 on July 31, 2009.

15 On August 12, 2009, LaGanke filed a disclosure of
16 compensation pursuant to Rule 2016(b), in which he represented
17 that Debtor paid him \$7,500 on July 31, 2009.

18 In reviewing the reasonableness of a \$7,500 fee in a chapter
19 7 bankruptcy, Trustee made requests to LaGanke on October 2,
20 October 16 and October 24, 2009 for copies of his billing records.
21 Not receiving them, on October 31, 2009, Trustee filed a Motion to
22 Compel asking the bankruptcy court to direct LaGanke to produce
23 his billing records and evidence of all payments for legal
24 services provided to Debtor. A hearing was held on the Motion to
25 Compel on December 2, 2009, at which the court granted the motion

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³ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 requiring that LaGanke provide the requested materials within ten
2 days.

3 Nineteen days later, LaGanke sent the billing records to
4 Trustee. However, he provided no copies of any payment records.
5 Trustee made several more demands on LaGanke to produce the
6 payment records. When LaGanke failed to comply, Trustee filed a
7 Motion to Show Cause on January 5, 2010. The bankruptcy court
8 ordered LaGanke to appear on February 3, 2010, to show cause why
9 he should not be held in contempt for failing to comply with the
10 order to produce the documents.

11 On January 29, 2010, LaGanke sent a copy of Debtor's check
12 for \$17,000 that LaGanke had received on July 31, 2009, a few
13 days before Debtor filed its chapter 7 petition. That same day,
14 Trustee emailed LaGanke, asking for an explanation of the
15 discrepancy between the \$17,000 actually paid to him by Debtor,
16 and the \$7,500 disclosed in Debtor's SOFA and LaGanke's Rule
17 2016(b) disclosure. LaGanke responded that the \$17,000 payment
18 was "for a number of different matters."

19 Trustee and LaGanke agreed to continue the February 3 show
20 cause hearing in reliance on LaGanke's promise to submit billing
21 statements for the "different matters" by February 5, 2010. When
22 LaGanke missed that deadline on February 18, 2010, Trustee filed a
23 Motion to Compel Disgorgement of the \$17,000. In the Disgorgement
24 Motion, Trustee suggested that, based upon information given to
25 him to date, it appeared that LaGanke was apparently representing
26 Debtor's officers in certain state court matters at the expense of
27 Debtor.

28 LaGanke responded to the motion on February 23, 2010. He

1 admitted receiving the \$17,000 payment which he "allocated for
2 this [bankruptcy] case and prior and future work on certain state
3 court litigation titled Jade II Enterprises, Inc. v. PFG
4 Construction, Inc. et al. Valid or not, the [creditor] in that
5 case sought nearly \$1,000,000 from PFG and its officers,
6 directors, agents and employees." LaGanke reported that he had
7 incurred fees of \$13,559 for his services on the bankruptcy case,
8 and \$4,483 on the Jade II case. Presumably in response to
9 Trustee's argument that he was representing the officers of Debtor
10 rather than Debtor in the state court litigation, LaGanke asserted
11 that the officers were entitled to indemnification from Debtor for
12 legal expenses.

13 On February 24, 2010, Trustee replied. Trustee noted that
14 the state court litigation had been automatically stayed as to
15 Debtor by the bankruptcy filing, and consequently, any services
16 provided by LaGanke after that time solely benefitted Debtor's
17 insiders. Moreover, he pointed out, the indemnification agreement
18 LaGanke referred to was proof that a conflict of interest existed
19 between the officer represented by LaGanke in state court and
20 Debtor.

21 The bankruptcy court continued the show cause hearing to
22 March 16, 2010; a hearing transcript is in the record. In
23 response to the court's question, LaGanke conceded that his Rule
24 2016(b) statement was inaccurate and had not been amended. Hr'g
25 Tr. 7:17-18:6 (March 16, 2010). LaGanke stated that the amount he
26 listed in his disclosure was merely a "guesstimate" of what his
27 fees for his services in the bankruptcy case would be, and he
28 offered to amend the statement. After taking a recess to consider

1 the matter, and after the parties left the courtroom, the
2 bankruptcy court entered its rulings on the record. In pertinent
3 part, the bankruptcy judge stated:

4 I have a problem with Mr. LaGanke inappropriately
5 disclosing the compensation he received. His Rule 2016
6 statement as of August 12th, 2009 . . . I now know that
7 is inaccurate. I know now that there has been a lack of
8 candor with this tribunal on behalf of Mr. LaGanke and
9 his firm. . . . A full and hones[t] disclosure should
10 have been presented to this Court back in August of
11 2009.

12 Hr'g Tr. 16:12-17:1.

13 [T]he compensation that was paid over to Mr. LaGanke was
14 \$17,000, roughly, prepetition, that wasn't utilized for
15 the benefit of the debtor and the debtor's creditors. .
16 . . Those particular funds were used for the benefit of
17 the principal. Once the Debtor filed its bankruptcy
18 case . . . the automatic stay under § 362 comes into
19 play. There was no reason for that state court
20 litigation to go forward as to the Debtor or Debtor's
21 creditors. There was no reason for Mr. LaGanke to take
22 any action in that state court litigation on behalf of
23 this bankruptcy estate.

24 Hr'g Tr. 17:10-21.

25 I find that there was no consent [by Trustee] to any
26 amount of money being paid to Debtor's counsel.

27 Hr'g Tr. 21:25-22:1.

28 Based upon all of those facts as presented, based upon
the case law that I have set up, [it] is the Court's
opinion and conclusion of fact and law that all of the
funds received by Mr. LaGanke, and this would be the
full amount of \$17,000, should be turned over by Mr.
LaGanke and his firm to the Trustee and Trustee's
counsel. I am not allowing any compensation to Debtor's
counsel in this particular case. So I am also
disallowing the \$7500 as disclosed in the August 12th,
2009 document.

Hr'g Tr. 20:18-21:1.

An Order implementing the bankruptcy court's decision and
directing LaGanke to disgorge the \$17,000 payment was entered on
March 25, 2010. LaGanke filed a timely appeal on April 4, 2010.

1 discretion under these facts when it ordered him to disgorge the
2 entire \$17,000 he received from Debtor. We disagree.

3 The bankruptcy court determined that LaGanke had executed and
4 filed an inaccurate Rule 2016(b) disclosure concerning the amounts
5 he received from Debtor prepetition, that those funds were not
6 used for the benefit of the bankruptcy estate and were not
7 authorized by Trustee, and that LaGanke's conduct amounted to a
8 lack of candor with the bankruptcy court. The court therefore
9 ordered full disgorgement of funds paid by Debtor to LaGanke. We
10 find no error in this approach.

11 **I.**

12 Attorneys for the debtor under all chapters of the Bankruptcy
13 Code are required by § 329 and Rule 2016(b) to disclose all funds
14 paid by their debtor client within one year of the filing of the
15 bankruptcy:

16 **Debtor's transactions with attorneys.**

17 (a) Any attorney representing a debtor in a case under
18 this title, or in connection with such a case, whether
19 or not such attorney applies for compensation under this
20 title, shall file with the court a statement of the
21 compensation paid or agreed to be paid, if such payment
22 or agreement was made after one year before the date of
23 the filing of the petition, for services rendered or to
24 be rendered in contemplation of or in connection with
25 the case by such attorney, and the source of such
26 compensation.

22 § 329(a).

23 **Disclosure of compensation paid or promised to attorney**
24 **for debtor.** Every attorney for a debtor, whether or not
25 the attorney applies for compensation, shall file and
26 transmit to the United States trustee within 14 days
27 after the order for relief, or at another time as the
28 court may direct, the statement required by § 329 of the
Code including whether the attorney has shared or agreed
to share the compensation with any other entity. The
statement shall include the particulars of any such
sharing or agreement to share by the attorney, but the
details of any agreement for the sharing of the
compensation with a member or regular associate of the

1 attorney's law firm shall not be required. A
2 supplemental statement shall be filed and transmitted to
3 the United States trustee within 14 days after any
4 payment or agreement not previously disclosed.

5 Rule 2016(b).

6 The Ninth Circuit has, in several decisions, highlighted the
7 critical importance of an accurate Rule 2016(b) statement by
8 debtor's attorneys and the power of a bankruptcy court to enforce
9 compliance with the Rule by ordering denial or disgorgement of
10 funds paid to attorneys.

11 In Nebben & Starrett, Inc. v. Chartwell Fin. Corp. (In re
12 Park-Helena Corp.), 63 F.3d 877 (9th Cir. 1995), the attorneys for
13 the debtor accurately reported the amount of funds they had
14 received for the debtor's account, but failed to disclose that the
15 source of the funds was the debtor's principal shareholder rather
16 than the corporate debtor. Id. at 883. Even though the amount
17 disclosed in their Rule 2016(b) statement was correct, the Ninth
18 Circuit nonetheless held that the attorneys' failure to accurately
19 disclose the source of the payment constituted a violation of
20 Section 329 and Rule 2016. Id. The court affirmed the bankruptcy
21 court's decision to disallow any fees to the debtor's lawyers.

22 Park-Helena stands as a stern warning to debtors' attorneys
23 in this circuit that a Rule 2016(b) statement must be accurate.
24 Subject to the discretion of the bankruptcy court, excuses for
25 filing inaccurate statements may not be acceptable. Indeed, the
26 court admonished, "Even a negligent or inadvertent failure to
27 disclose fully relevant information [in a Rule 2016 statement] may
28 result in a denial of all requested fees." Id. at 882. For
authority for its ruling that a bankruptcy court had discretion to
deny all fees, the court of appeals cited one of the bankruptcy

1 judge's reported decisions, In re Crimson Investments,
2 109 B.R.397, 402 (Bankr. D. Ariz. 1989). Id.

3 The Ninth Circuit expanded on its Park-Helena ruling, and
4 specifically applied it to a disgorgement order, in Law Offices of
5 Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d 1040 (9th
6 Cir. 1997). The court observed that the bankruptcy court's
7 authority to deny completely attorney's fees was grounded in the
8 inherent authority over the debtor's attorney's compensation. The
9 court noted that the Bankruptcy Code also contains a number of
10 provisions (e.g., §§ 327, 329, 330, 331) specifically designed to
11 protect the debtor, creditors and bankruptcy estate from sharp
12 dealings by a debtor's attorney. Id. at 1044 (citing In re
13 Walters, 868 F.2d 665, 668 (4th Cir. 1989) (explaining that § 329
14 and Rule 2016 are designed to protect the creditors and the debtor
15 against overreaching by debtor's attorney)). The Lewis court
16 surveyed the case law and explicitly adopted the rulings of
17 several courts that the bankruptcy court has broad and inherent
18 authority to deny any and all compensation when an attorney fails
19 to meet the requirements of § 329 and Rule 2016(b). Id.; Mapother
20 & Mapother, P.S.C. v. Cooper (In re Downs), 103 F.3d 472, 479
21 (6th Cir. 1996)("The bankruptcy court should deny all compensation
22 to an attorney who exhibits a willful disregard of his fiduciary
23 obligations to fully disclose the nature and circumstances of his
24 fee arrangement under § 329 and Rule 2016. The authority to do so
25 is inherent, and in the face of such infractions should be wielded
26 forcefully."); Arnes v. Boughton (In re Prudhomme), 43 F.3d 1000,
27 1003 (5th Cir. 1995) ("Additionally, the court's broad discretion
28 in awarding and denying fees paid in connection with bankruptcy

1 proceedings empowers the bankruptcy court to order disgorgement as
2 a sanction to debtors' counsel for nondisclosure."); In re Chapel
3 Gate Apartments, Ltd., 64 B.R. 569, 575 (Bankr. N.D. Tex. 1986)
4 ("Indeed, a failure of counsel to obey the mandate of § 329 and
5 Rule 2016 concerning disclosure . . . is a basis for entry of an
6 order denying compensation and requiring the return of sums
7 already paid.").

8 The Lewis court concluded that "an attorney's failure to obey
9 the reporting and disclosure requirements of the Bankruptcy Code
10 and Rules gives the bankruptcy court the discretion to order
11 disgorgement of attorney's fees. . . . The bankruptcy court may
12 order the disgorgement of any payment made to an attorney
13 representing the debtor in connection with a bankruptcy
14 proceeding[.]" In re Lewis, 113 F.3d at 1044-46. The court cited
15 as one authority for this statement In re Crimson Investments,
16 109 B.R. at 400.

17 The BAP has also expressed its commitment to assuring the
18 accuracy of Rule 2016(b) disclosures. Quoting the court's opinion
19 in Park-Helena, the Panel observed that "the disclosure rules are
20 applied literally, even if the results are sometimes harsh.
21 Negligent or inadvertent omissions do not vitiate the failure to
22 disclose." Movitz v. Baker (In re Triple Star Welding, Inc.),
23 324 B.R. 778, 789 (9th Cir. BAP 2005).

24 25 **II.**

26 In this case, the bankruptcy court found that LaGanke had
27 reported that he had received \$7,500 from the debtor within one
28 year of filing the bankruptcy in his Rule 2016(b) statement; that

1 Debtor also reported only a \$7,500 payment prepetition in its
2 SOFA; that the true amount paid by Debtor to LaGanke was \$17,000;
3 that, as he acknowledged, LaGanke was aware when he filed it that
4 his Rule 2016(b) statement was inaccurate; and that LaGanke only
5 revealed the true amount paid to him and provided the cancelled
6 check after repeated requests over many months from Trustee and
7 the threat of contempt. Further, the bankruptcy court determined
8 that LaGanke had actually used the funds to pay for services he
9 provided in defense of Debtor's principals in the state court
10 litigation that was stayed as to Debtor and bankruptcy estate when
11 the bankruptcy case was commenced, and that LaGanke's services in
12 that action had not been authorized by Trustee.

13 We measure these facts against the strong statements in Ninth
14 Circuit case law that inaccuracies in disclosure statements may
15 subject an offending attorney to disgorgement even if the errors
16 in the Rule 2016(b) disclosure are inadvertent, and that in
17 appropriate cases, disgorgement may be for the full amount of fees
18 received by a debtor's attorney. When viewed in this context, it
19 is obvious that the bankruptcy court did not abuse its discretion
20 when it ordered LaGanke to disgorge the \$17,000 paid to him
21 prepetition by Debtor.

22 LaGanke challenges the conclusion of the bankruptcy court on
23 legal and procedural grounds.

24 LaGanke asserts that the bankruptcy court relied on
25 questionable case law to support its decision. He argues:

26 In reaching its conclusion, the Bankruptcy Court relied
27 exclusively on In re Crimson Investments, N.V., 109 B.R.
28 397 ([Bankr. D. Ariz.] 1989) . . . which is a twenty-one
(21) year old decision entered by the sitting bankruptcy
judge in this case. Crimson has only been commented on
once by any court in the last twenty one (21) years and

1 it was not followed (See, in that regard, In re Missouri
2 Min., Inc., 186 B.R. 946 ([Bankr.] W.D. Mo., 1995).

3 LaGanke Op. Br. at 3; see also, LaGanke Reply Br. at 5 (same).

4 LaGanke is incorrect. Contrary to his argument, Crimson
5 Investments is frequently cited as authority for the conclusions
6 reached here by the bankruptcy court. And as noted above, both of
7 the principal Ninth Circuit decisions on disgorgement, Lewis and
8 Park-Helena, cite favorably to Crimson Investments as authority
9 for the rule that the bankruptcy court has discretion to deny fees
10 and order disgorgement based upon a debtor's attorney's
11 inaccurate Rule 2016(b) statement. Indeed, the Fifth and Sixth
12 Circuit Courts of Appeals cases referenced above also cite
13 favorably to Crimson Investments. In re Prudhomme, 43 F.3d at
14 1004; In re Downs, 103 F.3d at 478. Both LEXIS and Westlaw report
15 25 additional cases citing to Crimson Investments.

16 LaGanke's statement that the bankruptcy court relied
17 exclusively on Crimson Investments is also wrong. The bankruptcy
18 court also cited to the Panel's decision in Triple Star Welding,
19 which in turn incorporates references to controlling Ninth Circuit
20 case law. In short, while arguably the bankruptcy court should
21 have cited to the controlling Ninth Circuit cases instead of a
22 local decision, it's reliance on Crimson Investments in this case
23 did not amount to an application of an incorrect rule of law.

24 Moreover, LaGanke's argument misses the point. At bottom,
25 whether the bankruptcy court cited to the correct case law is not
26 critical; whether it applied the correct legal rule is the focus
27 of our inquiry. In other words, even had it failed in this
28 instance to cite to any case law, the bankruptcy court's analysis
and decision in this case appears completely consistent with the

1 controlling Code and Rule provisions, and the Ninth Circuit's and
2 this Panel's decisions. Under these circumstances, LaGanke's
3 argument lacks merit.

4 LaGanke's other objection is that the bankruptcy court did
5 not provide him an opportunity for an evidentiary hearing. But,
6 on this record, the lack of an evidentiary hearing is of no
7 consequence.

8 First, as near as we can tell, LaGanke never requested that
9 the bankruptcy court conduct an evidentiary hearing on the show
10 cause or disgorgement motion.⁴ United States v. Ayres, 166 F.3d
11 991, 995 (9th Cir. 1999)(holding that an evidentiary hearing in a
12 sanction motion contested matter only required when the parties
13 request one). Moreover, there is no requirement in bankruptcy or
14 civil procedure for an evidentiary hearing unless there are
15 disputed issues concerning material facts. Khachikyan v. Hahn
16 (In re Khachikyan), 335 B.R. 121, 126 (9th Cir. BAP 2005). There
17 were no disputed material facts in this case. Indeed, the
18 critical facts found by the bankruptcy court, recited in this
19 decision above, were all matters of record or otherwise undisputed
20 by LaGanke.

21 LaGanke asserts that there were disputed issues of fact
22 regarding whether he had a conflict of interest in representing
23 both Debtor and its principals in state court, whether the "entire
24 amount" paid to him by Debtor was used solely for the benefit of
25 the Debtor's principal, and whether Trustee's email of October 2

26
27 ⁴ LaGanke did request that the court convert the contested
28 disgorgement proceeding to an adversary proceeding, but it appears
that he did not request an evidentiary hearing in the disgorgement
proceeding.

1 was considered by the bankruptcy court in its decision. We have
2 examined the record carefully and conclude that, if these are
3 indeed disputed issues of fact, they are not material.

4 Whether LaGanke had a conflict of interest in his dual status
5 as counsel for both Debtor and its principals in state court is
6 immaterial. A chapter 7 debtor's attorney is not required by the
7 Code to be disinterested. Although the bankruptcy court did
8 observe a possible conflict of interest, as we construe its oral
9 ruling, it was mainly concerned that LaGanke was, if anything,
10 providing services for representing Debtor after the bankruptcy
11 case was filed without Trustee's approval, even though the state
12 court action against Debtor was stayed by the bankruptcy filing.
13 In other words, even if LaGanke could ethically represent both
14 Debtor and its principals, his services in a stayed action did not
15 benefit the bankruptcy estate. The bankruptcy court's focus,
16 then, was on improper use of potential bankruptcy estate funds,
17 not on LaGanke's possible conflict of interest.

18 LaGanke argues that the bankruptcy court found that the
19 \$17,000 was "solely" [LaGanke's term] used for the benefit of
20 debtor's principal. LaGanke's Reply Br. at 3. However, we have
21 examined the record and can locate no such finding.

22 Finally, LaGanke contends that Trustee's October 2 email "was
23 not considered by the bankruptcy court in its decision."
24 LaGanke's Reply Br. at 3-4. The bankruptcy court did, in fact,
25 consider that email:

26 THE COURT: I note that Debtor's counsel at the hearing
27 today set up his opinion that he believed that Trustee
28 and Trustee's counsel had basically provided an open-
ended consent to whatever fees and costs were incurred
by Debtor's counsel to this October 2nd email. I want

1 to emphasize on the record that I have reviewed that
2 email. That email was not an open-ended consent to
3 whatever attorney's fees and costs Mr. LaGanke or his
4 firm might receive. That particular email was simply a
5 recognition that although the particular compensation
disclosed in this case of \$7,500 was on the high side,
there was at least an initial recognition that Trustee
and Trustee's counsel would not come back and request
that any of those funds be turned over.

6 Tr. Hr'g 21:2-14. The bankruptcy court did consider Trustee's
7 email to LaGanke, but decided that disgorgement was proper in
8 spite of it. We find no error in this conclusion.

9
10 **CONCLUSION**

11 The bankruptcy court employed the correct legal standard and
12 its application of that standard to the facts was not illogical,
13 implausible, or without support in inferences that may be drawn
14 from the facts in the record. At bottom, it appears LaGanke filed
15 an inaccurate disclosure of payments received from Debtor, and
16 that fact and others lead the bankruptcy court to decide
17 disgorgement was proper. The bankruptcy court did not abuse its
18 discretion in its decision. We therefore AFFIRM the order of the
19 bankruptcy court.