NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1109-PaJuBa
PFG CONSTRUCTION, INC.,	Bk. No. 09-18520-SSC
Debtor.	
JAMES M LAGANKE; JAMES M. LAGANKE, P.L.L.C.,	
Appellants,	
v.	**M E M O R A N D U M**[1]
ANTHONY H. MASON, Chapter 7 Trustee,	
Appellee.	

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

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

Before: PAPPAS, JURY and BAUER,[2] Bankruptcy Judges

[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.

Attorney James M. LaGanke and his law firm (collectively referred to as "LaGanke") appeal the decision of the bankruptcy court ordering them to disgorge a prepetition payment of $17,000 in fees from a client, chapter 7[3] debtor PFG Construction, Inc. ("Debtor"). We AFFIRM.

FACTS

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

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

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

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

requiring that LaGanke provide the requested materials within ten days.

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

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

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

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

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

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

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

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

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

Hr'g Tr. 16:12–17:1.

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

Hr'g Tr. 17:10–21.

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

Hr'g Tr. 21:25–22:1.

> 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.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court abuse its discretion in ordering LaGanke to disgorge the $17,000 received from Debtor?

STANDARD OF REVIEW

An order directing counsel to disgorge fees is reviewed for abuse of discretion. Hale v. United States Tr., 509 F.3d 1139, 1147 (9th Cir. 2007). In applying an abuse of discretion test, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal rule, we then determine whether its "application of the correct legal standard [to the facts] was (1) illogical, (2)implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks omitted). If the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from the facts in the record, then the bankruptcy court has abused its discretion. Id.

DISCUSSION

LaGanke argues that the bankruptcy court abused its

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

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

I.

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

> **Debtor's transactions with attorneys.** (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

§ 329(a).

> **Disclosure of compensation paid or promised to attorney for debtor**. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the 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

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

Rule 2016(b).

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

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

Park-Helena stands as a stern warning to debtors' attorneys in this circuit that a Rule 2016(b) statement must be accurate. Subject to the discretion of the bankruptcy court, excuses for filing inaccurate statements may not be acceptable. Indeed, the court admonished, "Even a negligent or inadvertent failure to disclose fully relevant information [in a Rule 2016 statement] may 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

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

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

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

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

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

II.

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

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

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

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

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

> In reaching its conclusion, the Bankruptcy Court relied exclusively on In re Crimson Investments, N.V., 109 B.R. 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> THE COURT: I note that Debtor's counsel at the hearing today set up his opinion that he believed that Trustee 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

> to emphasize on the record that I have reviewed that email. That email was not an open-ended consent to whatever attorney's fees and costs Mr. LaGanke or his firm might receive. That particular email was simply a 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.

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

CONCLUSION

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