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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NOT FOR PUBLICATION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

In re:)	BAP No. AZ-11-1401-PaDJu
)	
IMG TRANSPORT, L.L.C.,)	Bk. No. 09-28626
)	
Debtor.)	
_____)	
)	
IMG TRANSPORT, L.L.C.,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
LAWRENCE J. WARFIELD, Chapter)	
7 Trustee,)	
)	
Appellee.)	
_____)	

Argued and Submitted on February 24, 2012
at Phoenix, Arizona

Filed - March 5, 2012

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

Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding

Appearances: Scott D. Gibson appeared for appellant IMG
Transport, L.L.C.; Terry A. Dake appeared for
appellee Lawrence J. Warfield, Chapter 7 Trustee.

Before: PAPPAS, DUNN and JURY, 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.

1 Gibson, Nakamura & Green ("GNG"), the law firm that
2 represents chapter 7² debtor IMG Transport, L.L.C. ("Debtor"),
3 appeals the bankruptcy court's order requiring it to disgorge
4 \$8,794.62 in fees it received to appellee Lawrence Warfield, the
5 trustee in Debtor's bankruptcy case ("Trustee"). We AFFIRM.

6 **I. FACTS**

7 Debtor was a Yuma trucking company. GNG, a Tucson law firm,
8 was retained by Debtor on November 5, 2009, to represent the
9 company in a case under chapter 7 of the Bankruptcy Code. For
10 its services, Debtor agreed to pay GNG a flat fee of \$12,000,
11 plus expenses. Acting through GNG partner Scott D. Gibson
12 ("Gibson"), Debtor's petition was filed on November 6, 2009. On
13 November 23, 2009, GNG filed a Rule 2016(b) Disclosure of
14 Compensation of Attorney for Debtor, stating that it had received
15 \$12,000 from Debtor prior to the filing of the bankruptcy case to
16 represent Debtor.

17 Trustee was appointed to serve as chapter 7 trustee. On
18 December 4, 2009, Debtor's schedules and Statement of Financial
19 Affairs ("SOFA") were filed. The schedules disclose that Debtor
20 owned only four assets and that it had no secured creditors and
21 seven unsecured creditors, only one of which was listed as
22 disputed. Debtor's responses to the relevant questions on the
23 SOFA were brief and unremarkable.

24 The § 341 meeting of creditors took place in Yuma on
25 December 16, 2009. Gibson appeared representing Debtor at the

26
27 ² 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 meeting.

2 The bankruptcy case was otherwise uneventful until May 31,
3 2011, when Trustee filed a Motion to Compel Turnover (the
4 "Turnover Motion"). In it, Trustee requested that the bankruptcy
5 court review the \$12,000 fee paid by Debtor to GNG under
6 § 329(b). Trustee argued that, under the circumstances, the
7 \$12,000 flat fee paid to GNG was "patently unreasonable," and
8 that a fee of \$3,000 was reasonable for an experienced bankruptcy
9 lawyer to represent a chapter 7 corporate debtor in an
10 uncomplicated case with few assets and creditors. To support his
11 view that the amount paid to GNG was excessive, Trustee cited
12 nine corporate chapter 7 cases filed in the Yuma division of the
13 Arizona bankruptcy court in the same year as the IMG case, in
14 which the attorney's fees ranged from \$1,500 to \$4,000. Trustee
15 therefore sought an order requiring that \$9,000 of GNG's \$12,000
16 fee be disgorged and paid over to Trustee.

17 GNG filed a response to the Turnover Motion on June 16,
18 2011. In it, GNG noted that Debtor had retained GNG pursuant to
19 a nonrefundable flat fee agreement. In setting the amount of the
20 fee in this case, GNG had been particularly concerned about the
21 risks associated with representing a client that had just lost in
22 "extremely extensive litigation for a personal injury matter";
23 that the client's principal did not speak English; that there
24 would be significant costs for GNG lawyers to travel between
25 Tucson and Yuma; and that there was the potential for other
26 proceedings that might arise in the case. GNG argued that
27 Arizona state case law supported the reasonableness of a flat fee
28 arrangement even where, after the fact, the payment to counsel

1 exceeded usual billing rates. Attached to GNG's response was a
2 copy of the retainer letter and a statement detailing the time
3 and services provided by GNG to Debtor.

4 Trustee filed a reply on June 21, 2011, contending that
5 while Debtor had the right to engage its choice of attorney, it
6 could not do so at unreasonable cost to the bankruptcy estate.
7 Trustee challenged several of the entries in the GNG fee
8 statement. For example, Trustee pointed out that GNG's statement
9 allocated 10.5 hours at Gibson's \$395 partner billing rate for
10 his preparation and travel to attend the fifteen-minute § 341
11 meeting in Yuma. Trustee questioned why a local attorney could
12 not have been engaged to appear at the meeting for considerably
13 less than \$4,147.50. Trustee's other criticisms of GNG's billing
14 statement included its twice billing for paralegal time to make
15 photocopies and billing 2.5 hours of Gibson's time for preparing
16 a simple, three-page bankruptcy petition.

17 The bankruptcy court held a hearing on Trustee's motion on
18 June 24, 2011. After the parties made substantially the same
19 arguments as those in the motion, response and reply, the court
20 took the issues under advisement to, in its words, review the
21 pleadings and the fee statement with a "fine tooth comb."

22 The bankruptcy court entered an order disposing of the
23 Turnover Motion on July 19, 2011 (the "Disgorgement Order"). In
24 the Disgorgement Order, the court found that: (1) Debtor's
25 schedules listed only five non-insider creditors, very little
26 tangible personal property, and no real property; (2) Debtor was
27 required to respond to few of the twenty-five questions in the
28 form Statement of Financial Affairs; (3) other than the pleadings

1 regarding the Turnover Motion, the petition, and some minor
2 matters, "little else of substance performed by the Debtor's
3 attorneys appears in the file." The bankruptcy court determined
4 that \$3,000 was a reasonable fee for the work done by GNG. After
5 also allowing GNG's costs, the balance of the \$12,000 retainer,
6 \$8,794.62, was ordered disgorged by GNG to Trustee.

7 Debtor filed a timely appeal on July 20, 2011.

8 JURISDICTION

9 The bankruptcy court had jurisdiction under 28 U.S.C.
10 § 1334(b) and § 157(b)(2)(A). We have jurisdiction under 28
11 U.S.C. § 158.

12 ISSUE

13 Whether the bankruptcy court abused its discretion in
14 ordering GNG to disgorge \$8,794.00 to Trustee.

15 STANDARD OF REVIEW

16 An order reviewing fees and directing a debtor's attorney to
17 disgorge excessive amounts paid prior to the bankruptcy filing
18 under § 329(b) is reviewed for abuse of discretion. Hale v.
19 United States Tr., 509 F.3d 1139, 1147 (9th Cir. 2007).

20 In applying an abuse of discretion test, we first "determine
21 de novo whether the [bankruptcy] court identified the correct
22 legal rule to apply to the relief requested." United States v.
23 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If the
24 bankruptcy court identified the correct legal rule, we then
25 determine whether its "application of the correct legal standard
26 [to the facts] was (1) illogical, (2) implausible, or (3) without
27 support in inferences that may be drawn from the facts in the
28 record." Id. If the bankruptcy court did not identify the

1 correct legal rule, or its application of the correct legal
2 standard to the facts was illogical, implausible, or without
3 support in inferences that may be drawn from the facts in the
4 record, then the bankruptcy court has abused its discretion. Id.

5 **DISCUSSION**

6 Section 329(a) requires an attorney representing a debtor to
7 disclose the amount of all compensation "paid or agreed to be
8 paid, if such payment or agreement was made after one year before
9 the date of the filing of the petition, for services rendered or
10 to be rendered in contemplation of or in connection with the case
11" Section 329(b), in turn, provides that "[i]f such
12 compensation exceeds the reasonable value of any such services,
13 the [bankruptcy] court may cancel any such agreement, or order
14 the return of any such payment[.]" It is undisputed in this
15 appeal that, prior to the filing of its petition, Debtor paid
16 \$12,000 to GNG to represent the company in its bankruptcy case.

17 The burden is upon the applicant to demonstrate that the
18 fees requested are reasonable. Law Offices of David A. Boone v.
19 Derham-Burk (In re Eliapo), 298 B.R. 392, 402 (9th Cir. BAP
20 2003), aff'd in part, rev'd in part on other grounds, 468 F.3d
21 592 (9th Cir. 2006); see also Hensley v. Eckerhart, 461 U.S. 424,
22 437 (1983) ("Fee applicant bears the burden of establishing
23 entitlement to an award and documenting the appropriate hours
24 expended and hourly rates."). The standard applied under §
25 329(b) to determine the reasonable value of the debtor's
26 attorney's fees is the same as that set forth in § 330(a) for
27 determining the amount of reasonable compensation for a
28 bankruptcy estate's professionals. Am. Law Ctr. PC v. Stanley

1 (In re Jastrem), 253 F.3d 438, 443 (9th Cir. 2001) (citing Hale
2 v. United States Tr. (In re Basham), 208 B.R. 926 (9th Cir. BAP
3 1997), aff'd 152 F.3d 924 (9th Cir. 1998)). Under § 330(a)(3),
4 to determine a reasonable fee, the bankruptcy court should
5 consider "the nature, the extent, and the value of such services,
6 taking into account all relevant factors" Included among
7 those factors are:

- 8 (A) the time spent on such services;
- 9 (B) the rates charged for such services;
- 10 (C) whether the services were necessary to the
11 administration of, or beneficial at the time at
12 which the service was rendered toward the
13 completion of, a case under this title;
- 14 (D) whether the services were performed within a
15 reasonable amount of time commensurate with the
16 complexity, importance, and nature of the problem,
17 issue, or task addressed;
- 18 (E) with respect to a professional person, whether the
19 person is board certified or otherwise has
20 demonstrated skill and experience in the
21 bankruptcy field; and
- 22 (F) whether the compensation is reasonable based on
23 the customary compensation charged by comparably
24 skilled practitioners in cases other than cases
25 under this title.

26 § 330(a)(3) (emphasis added); In re Basham, 208 B.R. at 931.

27 This Panel has analyzed §330(a) on numerous occasions and
28 has also identified factors for the bankruptcy court to consider

1 when determining reasonableness, including:

- 2 (a) Were the services authorized?
- 3 (b) Were the services necessary or beneficial to the
administration of the estate at the time they were
rendered?
- 4 (c) Are the services adequately documented?
- 5 (d) Are the fees required reasonable, taking into
consideration the factors set forth in section
330(a)(3)?
- 6 (e) In making the determination, the court must
7 consider whether the professional exercised reasonable
billing judgment.

8 Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswick Drug Co.

9 (In re Mednet), 251 B.R. 103, 108 (9th Cir. BAP 2000). In

10 Leichty v. Neary (In re Strand), 375 F.3d 854, 880 (9th Cir.

11 2004), the Ninth Circuit confirmed that the In re Mednet factors

12 provided the "correct standard" for an appellate court to

13 evaluate a reasonableness determination regarding attorney's fees

14 in a bankruptcy case.

15 In addition, the Ninth Circuit recently ruled that a trial
16 court may rely on its own knowledge of reasonable and proper fees
17 in determining the reasonableness of attorney's fees.

18 This court has never addressed whether it is proper for
19 a [trial] court to rely on its own familiarity with the
legal market. Other circuit courts have held that
20 judges are justified in relying on their own knowledge
of customary rates and their experience concerning
21 reasonable and proper fees. See, e.g., Norman v. Hous.
Auth. of City of Montgomery, 836 F.2d 1292, 1303 (11th
22 Cir. 1988) (courts are experts as to the reasonableness
of attorney fees and award may be based on court's own
23 experience); In re U.S. Golf Corp., 639 F.2d 1197, 1207
(5th Cir. 1981) (same). We agree.

24 Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011).

25 At the hearing on June 24, 2011, GNG argued that the
26 bankruptcy court should not order disgorgement because flat fee
27 arrangements were reasonable under Arizona law. The bankruptcy
28 court disagreed, pointing out that prebankruptcy transfers from a

1 debtor to its counsel, even if proper under state law, were
2 unquestionably subject to review by the bankruptcy court under
3 §§ 329 and 330. To further explain its views, the court referred
4 the parties to its recent decision regarding the methodology and
5 analysis employed by the court in determining the reasonableness
6 of fees. In re AVC Villa Del Lago, 2010 WL 119830 (Bankr. D.
7 Ariz. 2010). The bankruptcy court summarized the decision in
8 these words:

9 [This] is not an easy job for a judge to do. I have to
10 sit there and take apart [counsel's] fee app piece by
11 piece. I then look at what happened in the file. I
12 then have to make an internal judgment as to each entry
13 as to whether or not I think the debtor's lawyer,
14 whoever it is being challenged, spent too much time or
15 not. I adjust it. That's the process.

16 Hr'g Tr. 10:22-28, June 24, 2011.

17 In the Disgorgement Order, the bankruptcy court noted that
18 Debtor's schedules listed only a few creditors and assets and
19 that little information was required to respond to the questions
20 in the SOFA. It also noted that "[o]ther than these pleadings,
21 the petition, a motion and order to extend time to file
22 schedules, etc., little else of substance performed by the
23 debtor's attorneys, appears in the file." Id. In addition, the
24 bankruptcy court was cognizant of Trustee's contention that it
25 was unreasonable in this case for GNG to charge Debtor over
26 \$4,000 for Gibson's travel to attend a brief § 341 meeting in
27 Yuma.

28 GNG had the burden of showing that its fees were reasonable.
In re Eliapo, 298 B.R. at 402. Because GNG submitted a copy of
both the retainer agreement with Debtor, and a detailed list of
the services it rendered in this case, we may assume that the

1 bankruptcy court considered the nature and extent of GNG's
2 services provided to Debtor. It appears that the bankruptcy
3 court applied the correct legal rules in evaluating the
4 reasonableness of GNG's fees, as discussed in its thoughtful
5 prior decision in In re AVC Villa Del Lago. Based upon the
6 record before it, as informed by the experience of the seasoned
7 bankruptcy judge, the bankruptcy court determined that \$3,000 was
8 a reasonable fee for GNG's services under the facts of this case.

9 GNG disagrees with the bankruptcy court's decision. In the
10 bankruptcy court, and again in its opening brief on appeal, GNG
11 argued that the bankruptcy court erred because, under Arizona
12 law, a nonrefundable flat fee "is a reasonable fee arrangement
13 which should not be subject to critical review by the courts[.]"
14 GNG points out that "such flat fee arrangements are part of the
15 negotiation of arrangements between client and attorney, which
16 should be allowed to stand, even if ultimately the amount of the
17 services rendered is less than the hourly rate of fees." GNG Op.
18 Br. at 9. GNG cites In re Connolly, 55 P.3d 756 (Ariz. 2002),
19 for support.

20 Of course, on its surface, GNG's assertion that the
21 bankruptcy court may not examine the reasonableness of fee
22 agreements sanctioned under state law as "reasonable" would seem
23 to conflict directly with § 329(b), which expressly authorizes a
24 bankruptcy court to review a debtor's fee arrangement with its
25 counsel, to "cancel such agreement," and to order an attorney to
26 disgorge any payments received from a debtor "[i]f such
27 compensation exceeds the reasonable value of any such services
28" In the face of such conflict, state law must yield.

1 Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe
2 Insulation Co.), ___ F.3d. ___, 2012 WL 178998 *13 (9th Cir.
3 2012) ("It is a familiar and well-established principle that the
4 Supremacy Clause . . . invalidates state laws that 'interfere
5 with, or are contrary to,' federal law.) (quoting Hillsborough
6 Cnty. v. Automated Med. Laboratories, Inc., 471 U.S. 707, 712
7 (1985)).

8 However, as Trustee points out, even if state law should
9 influence the bankruptcy court's determination of the
10 reasonableness of GNG's fees in this case, In re Connolly does
11 not support GNG's position. More precisely, the Connolly court
12 ruled that:

13 We have also explained that "regardless of how [a] fee
14 is characterized . . . each [fee agreement] must be
15 carefully examined on its own facts for
16 reasonableness." Id. Finally, like other fee
17 arrangements, non-refundable flat fees are subject to
18 retrospective analysis. See In the Matter of Swartz,
19 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984) ("We
20 hold . . . that if at the conclusion of a lawyer's
21 services it appears that a fee, which seemed reasonable
22 when agreed upon, has become excessive, the attorney
23 may not stand upon the contract; he must reduce the
24 fee.").

25 In re Connolly, 55 P.3d at 762. In other words, the Arizona case
26 law on flat fee agreements appears consistent with § 329(b) in
27 that such an arrangement "must be carefully examined on its own
28 facts for reasonableness" and excessive fees reduced. Id.

29 GNG abandoned this argument in its reply brief: "Appellant
30 agrees that the Court has the ability to review fees of Debtor's
31 counsel for reasonableness even under a 'flat fee' arrangement
32 such as here." GNG Reply Br. at 5. Instead, GNG repeated its
33 earlier argument that "the determination of the facts still
34 requires some modicum of evidence and an opportunity to provide

1 competing evidence. . . . [T]hat opportunity was never provided
2 in this case.” GNG Reply Br. at 5. GNG also argues it should
3 have had an opportunity to present evidence on the reasonableness
4 of its fees. Id.

5 GNG’s suggestion that it was not given a fair opportunity to
6 prove up the value of its fees in this case is not supported by
7 the record. Indeed, GNG explicitly waived the bankruptcy court’s
8 offer of a continuance to allow it to supplement the pleadings:

9 THE COURT: Are you seeking a continuance to buff up the
10 file?

11 GIBSON: No, Your Honor. I’m asking you to rule –

12 THE COURT: Okay.

13 GIBSON: – based upon the record before you.

14 Hr’g Tr. 8:21-25, June 24, 2011.³

15 Even if GNG had not waived the bankruptcy court’s offer of a
16 continuance, as noted above, in applying § 330(a)(3) to the facts
17 of a case, the Ninth Circuit has ruled that a court may rely on
18 its own knowledge of reasonable and proper fees in determining
19 the reasonableness of attorney’s fees. Oroudjian, 647 F.3d at
20 928. In other words, a bankruptcy court does not necessarily
21 need expert testimony to properly evaluate the reasonableness of
22 professional fees for the services rendered by the debtor’s

24 ³ At oral argument before the Panel, Gibson insisted that
25 this colloquy occurred early in the hearing before the bankruptcy
26 court, and that he later repeated his request for an evidentiary
27 hearing. This is incorrect. We have carefully examined the
28 transcript of the June 24, 2011 hearing. Gibson made no further
request for an opportunity to submit evidence after the colloquy
quoted above.

1 attorney in a bankruptcy case. Boleman Law Firm, P.C. v. United
2 States, 355 B.R. 548, 552 (E.D. Va. 2006) (sitting as a
3 bankruptcy appeals court, ruling that expert testimony is not
4 necessary to establish the value of an attorney's services since
5 a bankruptcy judge is presumed knowledgeable as to fees charged
6 by attorneys in general and as to the quality of legal work
7 presented to him by particular attorneys); In re Monahan Ford
8 Corp. of Flushing, 390 B.R. 493, 504 (Bankr. E.D.N.Y. 2008)
9 (expert testimony relating to a fee application excluded because
10 the court was itself an expert and the expert testimony would not
11 assist the trier of fact); In re Terex Corp., 70 B.R. 996, 1001
12 (Bankr. N.D. Ohio 1987)(expert testimony as to the reasonableness
13 of fees excluded).

14 In sum, we conclude that the bankruptcy court, in
15 determining that \$12,000 was excessive and that a reasonable fee
16 for GNG's services in this case was \$3,000, applied the correct
17 law, §§ 329(b) and 330(a), and that its findings were not
18 illogical, implausible, or without support in inferences that may
19 be drawn from the facts in the record. As a result, the
20 bankruptcy court did not abuse its discretion in ordering GNG to
21 disgorge to Trustee the amount it received from Debtor for fees
22 in excess of \$3,000 plus costs.

23 CONCLUSION

24 The bankruptcy court's Disgorgement Order is AFFIRMED.
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