NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE TIMOTHY DAVID KEENER and LORETTA ANN KEENER, Debtors.	BAP No. WO-04-045
KENNETH C. MCCOY, Appellant, v. JOHN T. HARDEMAN, Trustee, TIMOTHY DAVID KEENER, and LORETTA ANN KEENER, Appellees.	Bankr. No. 03-21308-NLJ Chapter 13 ORDER AND JUDGMENT*

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

Before CLARK, BROWN, and THURMAN, Bankruptcy Judges.

PER CURIAM.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Attorney Kenneth C. McCoy (McCoy) appeals an "Order Regarding Fee Application" entered by the United States Bankruptcy Court for the Western

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

District of Oklahoma, partially denying his request for compensation in the debtors' dismissed Chapter 13 case. For the reasons stated below, the bankruptcy court's Order is AFFIRMED.

I. Background

In March 2003, the Honorable Niles L. Jackson entered a general order entitled "Chapter 13 Guidelines," which, together with the Bankruptcy Code, the Bankruptcy Rules and the bankruptcy court's local rules, "contain the rules for Chapter 13 practice" before Judge Jackson. The Chapter 13 Guidelines state, in relevant part, that attorneys who represent debtors in cases dismissed prior to the confirmation of a plan may be paid fees and costs up to $800.00, inclusive of any retainers, without filing a fee application (Presumptive Fee). In such cases, $800.00 is presumed to be "reasonable compensation" under 11 U.S.C. § 330(a).[1] When fees and costs exceed the Presumptive Fee, attorneys are required to file a fee application itemizing their services, showing that "extraordinary circumstances justify an award of additional fees."[2]

In June 2003, after the Chapter 13 Guidelines became effective, the debtors filed their first Chapter 13 petition, and the case was assigned to Judge Jackson. This case was dismissed prior to confirmation of the debtors' Chapter 13 plan. McCoy, the debtors' attorney, filed a fee application after the first case was dismissed, seeking fees in an amount greater than the Presumptive Fee. In November 2003, the bankruptcy court entered an Order allowing McCoy an administrative expense for his fees and costs in the amount of $1,403.00 (Stipulated Fee Order). The trustee paid McCoy $1,200.00, the totality of funds that the debtors had paid to him prior to the dismissal of their case, pursuant to

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[1] All future statutory references in the text are to title 11 of the United States Code.

[2] Chapter 13 Guidelines at 12, *in* Appellant's Appendix at 57.

the Stipulated Fee Order.

In the meantime, on October 14, 2003, the debtors, represented by McCoy, filed their second Chapter 13 petition, and it was assigned to Judge Jackson. This case was also dismissed prior to the confirmation of the debtors' Chapter 13 plan.

On February 25, 2004, one day after the bankruptcy court entered its Order dismissing the debtors' second Chapter 13 case, McCoy filed a fee application in the second case, seeking compensation in the amount of $1,788.50 (this amount being exclusive of a $100.00 prepetition retainer). The Chapter 13 trustee objected to McCoy's fee application, stating: "The Trustee has only $1,344.00 on hand and counsel seeks $1,788.50. The Trustee has no objection to the allowance of fees in the amount of $1,344.00."[3] The debtors, appearing *pro se*, also filed an objection, asserting that McCoy was not entitled to any fees because he did not represent them as he had promised to do, he failed to give them notice of matters in the case causing their Chapter 13 case to be dismissed, and he failed to communicate on numerous occasions.

At a hearing, the bankruptcy court *sua sponte* objected to McCoy's fee application, stating that under its Chapter 13 Guidelines, McCoy was not entitled to compensation greater than Presumptive Fee absent extraordinary circumstances. The bankruptcy court had reviewed the record in the debtors' first and second cases and McCoy's fee application, and based thereon, it observed that the services that McCoy rendered in the second case appeared to be duplicative of those rendered in the debtors' first case and unnecessary.

McCoy agreed to reduce his requested compensation to $1,344.00, the amount held by the trustee. He argued that fees in that amount were warranted because he was required to reevaluate the debtors' financial situation in the second case, and he attended numerous continued confirmation hearings while the

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[3] Chapter 13 Trustee's Objection at 1, *in* Appellant's Appendix at 12.

debtors attempted to become current on their plan payments. The debtors, who appeared at the hearing *pro se*, disputed that their second case required reevaluation, stating that their financial status was the same, with the exception of the debtor-husband's income.

At the conclusion of the hearing, the bankruptcy court summarily stated that McCoy was not entitled to compensation in excess of the Presumptive Fee because there was not "sufficient proof of extraordinary circumstances" as required under the Chapter 13 Guidelines.[4] Subsequently, the bankruptcy court entered its "Order Regarding Fee Application," memorializing its oral ruling disallowing McCoy compensation greater than the Presumptive Fee of $800.00, and setting forth comprehensive findings of fact and conclusions of law.

In the Order Regarding Fee Application, the bankruptcy court plainly states that its decision to partially disallow McCoy's requested compensation was based on § 330(a) and its Chapter 13 Guidelines. It compared the record in the debtors' first and second cases and concluded that the papers filed showed "minimal differences."[5] The Chapter 13 plan filed in the debtors' second case treated creditors who had objected to confirmation in the first case exactly the same. While a motion for relief from stay was filed in the second case, it was stricken, and then when it was renewed it was never set for hearing. Based upon these findings, the bankruptcy court concluded: "[T]here is insufficient proof of extraordinary circumstances in this case to justify an award of additional fees. In addition, when examining the facts of this case in light of the requirements of § 330, the Court finds insufficient benefit to the estate to justify awarding fees in

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[4] Transcript at 18, *in* Appellant's Appendix at 41.

[5] Order Regarding Fee Application at 6, *in* Appellant's Appendix at 21.

excess of $800."[6]

McCoy timely filed a notice of appeal from the bankruptcy court's final Order Regarding Fee Application.[7] The parties have consented to this Court's jurisdiction because they have not elected to have the case heard by the United States District Court for the Western District of Oklahoma.[8]

II. Discussion

Professional compensation allowed under § 330(a) is an administrative expense entitled to be paid first from estate assets.[9] Section 330(a)(4)(B) governs the allowance of fees requested by an attorney who represents a Chapter 13 debtor, and it states:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.[10]

This section permits the bankruptcy court to allow an attorney "reasonable compensation." In determining what is "reasonable," the court is required to consider the benefit and necessity of the attorney's services to the debtor, and factors set forth in other subsections of § 330(a). Section 330(a)(4)(A) expressly states that bankruptcy courts "shall not" allow compensation for "unnecessary duplication of services."[11]

A bankruptcy court's ultimate decision to allow or disallow compensation

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6 Order Regarding Fee Application at 7-8, *in* Appellant's Appendix at 22-23.

7 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

8 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

9 11 U.S.C. §§ 503(b)(2) & 507(a)(1).

10 Id. § 330(a)(4)(B).

11 Id. § 330(a)(4)(A)(i).

under § 330(a) is reviewed for abuse of discretion.[12] Under this standard of review:

> a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When we apply the "abuse of discretion" standard, we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.[13]

It has also been stated that an order is not an abuse of discretion "unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record."[14]

The bankruptcy court partially disallowed the compensation that McCoy requested in the debtors' second case as unreasonable under § 330(a). This conclusion was based on its findings that many of the services McCoy provided in the second case were unnecessary and not beneficial because they duplicated services that he had rendered in the debtors' first case.[15] Disallowance of compensation for unnecessary duplicative services is a correct application of § 330(a)(4)(B).

McCoy has not challenged the bankruptcy court's findings of fact on

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[12] *See*, *e.g.*, In re Commercial Financial Servs., Inc., 298 B.R. 733, 747 (10th Cir. BAP 2003) (quoting In re Miniscribe Corp., 309 F.3d 1234, 1244 (10th Cir. 2002)); In re Miller, 288 B.R. 879, 881 (10th Cir. BAP 2003) (citing Rubner & Kutner, P.C. v. United States Trustee (In re Lederman Enters., Inc.), 997 F.2d 1321, 1323-24 (10th Cir. 1993); In re Abraham, 221 B.R. 782, 783 (10th Cir. BAP 1998)).

[13] Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994) (citation and quotation omitted).

[14] United States v. Robinson, 39 F.3d 1115, 1116 (10th Cir. 1994).

[15] The bankruptcy court focused on benefit to the estate. *See* Order Regarding Fee Application at 8, *in* Appellant's Appendix at 23. While, as McCoy points out, § 330(a)(4)(B), the subsection of § 330(a) applicable to the allowance of attorney's fees in Chapter 13 cases, requires that the services benefit "the debtor," that section also allows the court to consider other factors, such as benefit to the estate. Under either analysis, duplicative services are not beneficial.

appeal. If they were challenged, all of the findings related to duplicative services are presumed correct because McCoy has not provided us with any record of the first case that was so heavily relied on by the bankruptcy court, thus making it impossible for us to conduct appellate review.[16] Review of the record that has been provided shows that the bankruptcy court's decision to partially deny McCoy's compensation was not based on a "plainly implausible, irrational, or erroneous reading of the record."[17]

In short, we do not have a "definite and firm conviction" that the bankruptcy court erred in partially disallowing McCoy's fees.[18] The bankruptcy court's findings of fact are presumed correct or are fully supported by the record, and the court correctly relied on and applied standards applicable under § 330(a)(4)(B). The amount that it allowed, $800.00, is more than one-half of the $1,344.00 that McCoy requested. There being no abuse of discretion, the Order Regarding Fee Application must be affirmed.

McCoy maintains that we should reverse the bankruptcy court's Order Regarding Fee Application because the Chapter 13 Guidelines, and in particular its Presumptive Fee and "extraordinary circumstances" standard, are not in accord with § 330(a) and, therefore, are improper.[19] We need not address this argument because, even if the Chapter 13 Guidelines are improper (which we are not

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[16] *See, e.g.*, Travelers Indemnity Co. v. Accurate Autobody, Inc., 340 F.3d 1118, 1120 (10th Cir. 2003) ("We are unwilling to reverse the decision of the district court based on a guess–even what we may think to be an informed guess–regarding the content [of the pertinent record]."); Scott v. Hern, 216 F.3d 897, 912 (10th Cir. 2000) (court must affirm when appellant fails to provide a proper appellate record).

[17] Robinson, 39 F.3d at 1116.

[18] Moothart, 21 F.3d at 1504.

[19] McCoy has not argued that the bankruptcy court's procedures denied him a full and fair opportunity to justify the fees requested in his fee application. *See* In re Ingersoll, 238 B.R. 202 (D. Colo. 1999). Accordingly, we do not address that issue.

concluding), the bankruptcy court expressly stated that its decision was based on its examination of "the facts . . . in light of the requirements of § 330."[20] As stated above, § 330(a)(4)(B) is the governing authority, and the bankruptcy court did not err in applying the standards set forth in that section to the facts of this case. The bankruptcy court did not, as argued by McCoy, apply an incorrect legal standard in disallowing a portion of his compensation request, and for the reasons stated herein, it did not abuse of discretion. Accordingly, the Order Regarding Fee Application must be affirmed.

III. Conclusion

The bankruptcy court's Order Regarding Fee Application is AFFIRMED.

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[20] Order Regarding Fee Application at 8, *in* Appellant's Appendix at 23.