NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CHAD MICHAEL BRIGGS and DEBORAH WYNN BRIGGS, formerly known as Debbie White, formerly known as Debbie Black, Debtors.	BAP No. CO-06-089
GEORGE T. CARLSON & ASSOCIATES, Appellant.	Bankr. No. 05-22860-ABC Chapter 13 ORDER AND JUDGMENT*

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

Before McFEELEY, Chief Judge, BOHANON, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

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.

I. BACKGROUND

Debtors' counsel, George T. Carlson & Associates ("Carlson"), appeals the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

bankruptcy court's order denying payment of its fees out of the confirmed plan. The Debtors originally filed a petition for Chapter 7 relief in May 2005.[1] Carlson filed a disclosure of attorney fees in connection with the Chapter 7 petition, indicating an agreed fee of $1,500, all of which had been paid by the Debtors pre-petition.[2] In November 2005, Debtors filed a motion to convert their case to Chapter 13, which was granted.[3] In connection with that conversion, Carlson filed another disclosure of compensation, indicating an agreed fee of $4,000, of which Debtors had paid $750.[4] Debtors' Chapter 13 plan, which was confirmed by the bankruptcy court in May 2006, specifies $2,950 as unpaid attorney fees and $300 as estimated costs.[5]

In June 2006, Carlson submitted a fee application, showing total fees of $2,094 and total costs of $122.18.[6] After subtracting $750 paid by Debtors, Carlson requested allowance of $1,466.18 net fees and expenses, all payable through the confirmed plan. As required by the local bankruptcy rules for the District of Colorado ("Local Rules"), Carlson served the required notice of fee application, containing a provision that "[i]f there is no objection, the Court may allow the fee as requested, order further supplementation or set the Application for hearing."[7] No objections or hearing requests were filed, and Carlson filed a

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1 *Voluntary Pet. in* Appendix to Brief of Appellant George T. Carlson & Assoc. ("App.") at 1-3.

2 *Disclosure of Compensation of Att'y for Debtor in* App. at 4.

3 *Mot. to Convert in* App. at 6; *Bankruptcy Ct. Docket in* App. at 9.

4 App. at 10.

5 *Ch. 13 Plan in* App. at 12; *Order Granting Mot. to Confirm and Confirming Plan Dated 4/06 in* App. at 21.

6 *Ch. 13 Fee Application in* App. at 22.

7 *Notice of Ch. 13 Fee Appl. in* App. at 28.

certificate to that effect, requesting entry of an order granting the fee request.[8] Five days later, the bankruptcy court entered an order allowing Carlson all of its requested fees and expenses, but with the proviso that "$0.00 is payable out of plan payments."[9]

Carlson filed a motion to reconsider the court's fee order, arguing that the confirmed plan provided for $3,250 in fees and costs, yet the court's award of $2,216 was expressly made not payable through the plan.[10] The bankruptcy court denied Carlson's motion to reconsider, stating:

> Counsel requested allowance of fees in the amount of $2,094 and costs of $122.18. Counsel disclosed in its Chapter 13 Fee Application that it had received $750 to date for fee and expenses. The record in this case, however, reflects that Counsel disclosed receiving $1,500 in advance of filing Debtors' case as a Chapter 7 and the amended fee disclosure reports an additional $750 having been paid. Thus, Counsel had [sic] received a total of $2,250 in connection with this case. That amount is greater than the amount Counsel billed for services rendered in the Chapter 13 case.[11]

Carlson appealed, and no opposition to his appeal has been filed.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[12] Because the notice of appeal was timely filed within ten days of a final order, and because Carlson, the only party to this appeal, has not elected to have the appeal heard by the district court, this Court has appellate jurisdiction.

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[8] *Certificate of Non-Contested Matter and Req. for Entry of Order in* App. at 30.

[9] *Order Allowing/Approving Fees in* App. at 32.

[10] *Mot. to Reconsider Fee Orde*r *in* App. at 34.

[11] *Order on Mot. to Reconsider in* App. at 36.

[12] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

III. STANDARD OF REVIEW

This Court reviews a bankruptcy court's award of attorney's fees for abuse of discretion, while the factual findings underlying the award are reviewed for clear error.[13]

IV. DISCUSSION

Carlson bases its appeal primarily on the bankruptcy court's failure to hold a hearing. According to Carlson, this failure violates 11 U.S.C. § 330(a) and Federal Rule of Bankruptcy Procedure 2017 and constitutes a denial of procedural due process.[14] The premise that a hearing was required is flawed in at least two ways. First, the bankruptcy court actually granted the requested fees in their entirety. Second, and even more significantly, Carlson never requested a hearing in the bankruptcy court, thereby failing to preserve this issue for appeal.[15]

A. Failure to Hold a Hearing

Most of Carlson's claim of entitlement to a hearing is premised on the incorrect assertion that attorney fees were denied. In fact, the bankruptcy court awarded Carlson its fees in their entirety. None of the rules cited by Carlson for the proposition that a hearing should have been held apply to such a situation. Thus, for example, Federal Rule of Bankruptcy Procedure 2017 addresses claims that debtor's attorney fees are "excessive." Carlson mistakenly relies on 11 U.S.C. § 330(a)(1) for the same proposition. That provision applies only to "a professional person employed under section 327 or 1103," which Carlson is not.[16] The appropriate subsection of § 330 is (a)(4)(B), which provides that the court

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[13] *In re Meridian Reserve, Inc.*, 87 F.3d 406, 409 (10th Cir. 1996).

[14] Brief of Appellant ("Brief") at 8-9.

[15] *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (appellate court generally will not consider issues that were not raised below).

[16] See *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004); *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006).

"may allow reasonable compensation to the debtor's attorney" in a Chapter 13 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." Conspicuously absent is any requirement that the court hold a hearing,[17] particularly when all of the requested fees are awarded. Moreover, nowhere in these provisions is there any requirement that a hearing be held on the issue of how an award of fees is to be paid.[18]

Absent a provision requiring a hearing, one must be requested before it can be asserted that it was denied. In this case, Carlson never requested a hearing in the bankruptcy court. The most logical time to have done so was in connection with Carlson's motion for reconsideration since, until that time, Carlson would likely have seen no need for a hearing. However, given that Carlson had obtained what was perceived as a summary adverse ruling on an uncontested matter, it would have been reasonable to request a hearing in connection with reconsideration. At the very least, this would have allowed Carlson to discover the bankruptcy court's reasoning and to offer additional evidence, if necessary. Instead, Carlson simply reiterated its previous claim. Though there is no guarantee that the court would have granted a hearing, Carlson's failure to request one is fatal to such claims on appeal.[19]

B. Ruling Contrary to the Evidence

Without the hearing denial issues, Carlson's appeal is limited to its claim that the court's ruling is inconsistent with the evidence. We disagree. Since this

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[17] See *In re Eliapo*, 468 F.3d at 601-02.

[18] Both *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833 (3rd Cir. 1994) and *In re Eliapo*, which relies heavily on it, concern denials or reductions of fee requests. As such, Carlson's reliance on such cases for the proposition that a hearing was required in this case is misplaced.

[19] *In re Walker*, 959 F.2d at 896.

is an attorney fees case, we review the award for abuse of discretion, which means that the bankruptcy court either "based its decision on an erroneous conclusion of law or . . . there is no rational basis in evidence for the ruling," keeping in mind that "[i]t is the burden of the party applying for attorney fees to establish the extent and reasonableness of the request . . . ."[20] In addition, the Local Rules upon which Carlson relies in this appeal require that every fee application include a statement of "compensation previously sought by and allowed to the applicant . . . ."[21]

Carlson contends on appeal that the bankruptcy court erroneously considered payments made in the Chapter 7 proceedings in connection with the Chapter 13 fee application. However, there was only one "case" before the bankruptcy court, though at different times it proceeded under different chapters of the Bankruptcy Code. Therefore, the fee application should have detailed the fees and payments for the entire case, as required by the Local Rules. Because Carlson failed to provide the bankruptcy court with any description of fees that had been billed and paid prior to the conversion, it was permissible for the court to conclude that all of the previous payments should apply to the current fee request. Accordingly, we are unable to conclude that such a determination was without a rational basis.[22]

V. CONCLUSION

This Court will not consider issues raised for the first time on appeal. Therefore, we decline to consider Carlson's claim that failure to hold a hearing on

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[20] *Mann v. Reynolds*, 46 F.3d 1055, 1062 (10th Cir. 1995) (citation omitted).

[21] Colo. L. Bankr. Rule 216(a)(1). Although subsection (c) of this rule allows a "narrative fee application," in Chapter 13 cases, that provision does not eliminate the requirement that fees already paid be described.

[22] Carlson also failed to provide this Court, as part of the record on appeal, with any way of determining how, or if, the Chapter 7 retainer had been spent.

its fees request violated due process. The bankruptcy court was not required to hold a hearing under the circumstances of this case. Finally, the bankruptcy court did not abuse its discretion in determining the amount and means of payment of the fees. The bankruptcy court's order on attorney fees is therefore affirmed.