

Professional Compensation
11 U.S.C. § 330(a)(1)
Reconsideration
Fed. R. Civ. P. 59
Fed. R. Civ. P. 60(b)

John A. Pahl, Case No. 09-30495-rld7

May 14, RLD
2013

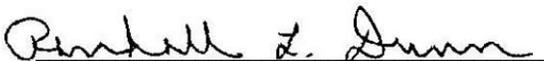
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The bankruptcy court held an evidentiary hearing on debtor's objection to the amended final fee application for compensation of the bankruptcy estate's accountants. Applying the standards for approving compensation to estate professionals as set forth in 11 U.S.C. § 330(a)(1), the bankruptcy court found the services performed and expenses incurred were both necessary and reasonable. In particular, the need for two amendments of the fiduciary tax returns was the result of debtor's failure to provide full and complete information to the accountants at several times throughout the process of the preparation of the estate tax returns.

Twenty-five days after the order was entered overruling the debtor's objection and awarding the compensation requested, the debtor filed a motion for reconsideration. The bankruptcy court determined the motion was untimely as a motion to alter or amend the order under Fed. R. Civ. P. 59. With respect to the application of Fed. R. Civ. P. 60(b)(1), the debtor had not suggested there had been a "mistake, inadvertence, surprise or excusable neglect" from which he should be relieved. In the instant matter, the debtor's disagreement with the court's findings of fact does not render them mistakes, and being based as they were on the debtor's actions, the findings certainly were not products of inadvertence. Fed. R. Civ. P. 60(b)(6) allows the court to grant relief for "any other reason that justifies relief," but only in extraordinary circumstances. Debtor's disagreement with the findings did not rise to the level of "extraordinary circumstances" justifying relief.

P13-3(14)

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
JOHN A. PAHL,) No. 09-30495-rld7
Debtor.) MEMORANDUM OPINION

On April 2, 2013, I held an evidentiary hearing ("Hearing") on the Amended Final Application for Accountant's Compensation ("Amended Final Application") filed by Henderson Bennington Moshofsky, P.C. ("Henderson Bennington") as accountants for the bankruptcy estate of John A. Pahl ("Mr. Pahl"). Mr. Pahl appeared to object to the Amended Final Application.

In deciding this matter, I have considered carefully the testimony of Judith Bennington, a principal of Henderson Bennington, and the Amended Final Application itself, as well as arguments presented by the chapter 7¹ trustee, Kenneth S. Eiler ("Trustee"), and Mr. Pahl. I

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references (continued...)

1 further have taken judicial notice of the docket and documents filed in
2 Mr. Pahl's main chapter 7 case, Case No. 09-30495-rld7, for the purpose
3 of confirming and ascertaining facts not reasonably in dispute. Federal
4 Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa.
5 2006). In addition, I have reviewed relevant legal authorities.

6 Facts²

7 Mr. Pahl commenced this chapter 7 case by filing his bankruptcy
8 petition on January 28, 2009. The Trustee is the duly appointed trustee
9 in Mr. Pahl's bankruptcy case.

10 In his Schedules D, E and F, Mr. Pahl scheduled secured debt
11 totaling \$537,828, priority claims of \$0, and undisputed unsecured claims
12 totaling \$87,530.16. After the chapter 7 case was filed, Mr. Pahl
13 received a payment of \$196,948.27 from the payoff of a promissory note.
14 Eventually, \$100,000 from that payoff was turned over to the Trustee,
15 making Mr. Pahl's bankruptcy case one of those rarities in chapter 7, a
16 solvent case--meaning that allowed unsecured claims in Mr. Pahl's
17 bankruptcy case will be paid 100 cents on the dollar.³ The order
18 granting a discharge to Mr. Pahl was entered on May 18, 2009. See Docket
19 No. 14.

20
21 ¹(...continued)
22 are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
23 Federal Rules of Civil Procedure are referred to as "Civil Rules."

24 ² The background facts come primarily from documents on the court's
25 docket and the narrative included in the Amended Final Application.

26 ³ Mr. Pahl attempted to limit the amount that he would have to pay
to his creditors by filing objections to most claims filed in the case,
requesting that they be disallowed in full, notwithstanding his schedules
in which he averred that all scheduled unsecured claims were undisputed.

1 The Trustee filed an application and order, that was entered by
2 the court on September 17, 2010, to employ Henderson Bennington
3 ("Application to Employ") with compensation not to exceed \$2,000 to
4 perform accounting services and prepare fiduciary tax returns. See
5 Docket No. 37. The assignment was not without its difficulties. The
6 Trustee filed an additional application and order, that was entered by
7 the court on March 21, 2011, to employ Henderson Bennington ("Additional
8 Application") with compensation not to exceed a further \$1,000 for
9 accounting services and preparation of fiduciary tax returns. See Docket
10 No. 104. On April 7, 2011, Mr. Pahl objected ("Objection") to the
11 Additional Application on the ground that "[t]his would bring the total
12 projected accountant fees to \$3,000.00 for services that could be
13 obtained for less than 20% of this amount." See Docket No. 109.

14 The Trustee responded to the Objection, advising that Henderson
15 Bennington had filed final fiduciary returns ("Initial Returns") for the
16 estate, showing taxes of \$8,404 due to the Internal Revenue Service
17 ("IRS") and \$7,854 due to the Oregon Department of Revenue ("ODR"), and
18 had sent a final billing statement to the Trustee in the amount of
19 \$2,359.87. The Trustee further requested that the Objection be overruled
20 and that Mr. Pahl be ordered to turn over an additional \$10,000 forthwith
21 so that administration of his bankruptcy estate could be completed. See
22 Docket No. 112.

23 Mr. Pahl responded with a Petition to Disallow Administrative
24 Expenses and Dismiss Case ("Petition to Dismiss") in which, among other
25 things, Mr. Pahl alleged that:
26

1 2. Trustee has caused tax returns to be prepared
2 after having had his accountants advised that debtor
3 would not owe any such taxes. Tax returns
4 subsequently filed by debtor for tax year 2010 verify
5 this.

6 . . .
7 4. Trustee's "accountant" prepared taxes that were,
8 even if a tax return had been required, improperly
9 prepared and failed to take advantage of significant
10 allowable deductions.

11 5. Trustee's claimed fees include a percentage of the
12 "fees" charged by the accountant. These fees are set
13 at several multiples of the reasonable and ordinary
14 fees charged by equally qualified accountants in this
15 area. . . .

16 See Docket No. 122 (emphasis added).

17 The Trustee filed a response ("Response") to the Petition to
18 Dismiss, including, among other things, the following statements:

19 Initially, the Trustee would note that the debtor
20 continues to assert, without evidence, that the estate
21 is not liable to pay any taxes on the proceeds from a
22 promissory note that was the subject of the Turnover
23 Motion filed by the Trustee (Dkt #28) and later
24 stipulated to by the debtor (Dkt #44). The Trustee's
25 accountant will be present in court to detail as
26 needed the necessity to file tax returns in this
27 matter. However, it is axiomatic that a transaction
28 which paid the debtor in excess of \$196,000 requires
29 the filing of a tax return.

30 See Docket No. 123 (emphasis added).

31 A hearing ("Dismissal Hearing") was held on the Additional
32 Application, the Objection and the Petition to Dismiss, among other
33 matters, on September 30, 2011. At the conclusion of the Dismissal
34 Hearing, the court denied the Petition to Dismiss, provided some guidance
35 as to the total amount of allowed unsecured claims and interest accrued
36 thereon, and deferred consideration of final compensation for Henderson
37 Bennington pending completion of their accounting work for the estate.
38 The court further required Mr. Pahl to deliver copies of his 2005-2010

1 tax returns to chambers in confidence for inspection by Ms. Bennington,
2 without allowing her to make copies of the returns. See Docket No. 124.
3 Mr. Pahl subsequently provided his tax returns for 2007, 2008, 2009 and
4 2010 for in camera review, and Ms. Bennington reviewed them. See Docket
5 No. 131. The copies of his tax returns then were returned to Mr. Pahl.
6 See Docket No. 132.

7 On October 11, 2011, Mr. Pahl filed an objection to Henderson
8 Bennington's claim for compensation in the amount of \$2,359.37,
9 requesting that the claim be disallowed in full. See Docket No. 127. On
10 the same day, the court entered an order advising that, "The court will
11 take no action on the debtor's objection to the trustee's supplemental
12 application to employ and compensate the accountant (#104) pending the
13 filing of the accountant's request for final compensation." See Docket
14 No. 128.

15 Mr. Pahl objected that the Initial Returns were incorrect as
16 there were loss carry forwards which should have been used to offset the
17 taxable income reported. After Ms. Bennington reviewed the copies of his
18 tax returns that Mr. Pahl provided for in camera review, Henderson
19 Bennington prepared amended fiduciary tax returns ("First Amended
20 Returns") for the year ended February 28, 2011, incorporating net
21 operating loss carry forwards. The First Amended Returns showed the
22 estate as entitled to refunds of \$1,231 from the IRS and \$739 from the
23 ODR.

24 Mr. Pahl objected to these amended returns as they did
25 not include the capital loss carry forward on the
26 disposition of the beach house. It had been
[Henderson Bennington's] understanding that the beach
house was being built for Mr. Pahl's personal use.

1 After several talks with Mr. Pahl's accountant,
2 receiving information from the accountant and a letter
3 to Mr. Pahl requesting clarification on intent of
4 whether this property was to be personal or investment
5 [Henderson Bennington] prepared a second amended
6 return ["Second Amended Returns"] for the year ended
7 February 28, 2011. [Henderson Bennington] was not
8 aware this property was 1031 exchange investment
9 property the disposition of which further reduced the
10 estate tax liability. The estate received a federal
11 refund of \$7,177.00 and state refund of \$7,115.00.

12 Amended Final Application, Schedule A.

13 In the Amended Final Application, Henderson Bennington
14 requested total compensation of \$2,875.25 for professional accounting
15 services and \$12.50 in cost reimbursements, for a total of \$2,887.50. At
16 the Hearing, Ms. Bennington testified as to the amount of compensation
17 requested, confirming and elaborating on the narrative included as
18 Schedule A to the Amended Final Application. She further confirmed that,
19 with the piecemeal receipt of information and documentation from Mr. Pahl
20 and his accountants, the estate's final fiduciary returns had to be
21 amended twice to get to final results. The Amended Final Application
22 includes an itemization of time spent on work for Mr. Pahl's estate that
23 I have reviewed.

24 Mr. Pahl's primary argument at the Hearing was that the Trustee
25 and Henderson Bennington were told from day one by him and by his
26 accountant(s) that no tax was owed on the \$196,948.27 promissory note
27 payoff. Therefore, they wasted time and money preparing fiduciary tax
28 returns. He further argued that Henderson Bennington's hourly rates for
29 accounting services were too high, without submitting any evidence as to
30 what appropriate hourly rates should be.

31 Following the presentation of testimony and argument, I took

1 the matter under advisement.

2 Jurisdiction

3 I have jurisdiction to decide this matter under 28 U.S.C.
4 §§ 1334, 157(b) (1) and 157(b) (2) (A).

5 Discussion

6 A. Standards for Approving Compensation to Estate Professionals

7 Under § 330(a) (1), after notice and a hearing, I am authorized
8 to award compensation to estate professionals consistent with the
9 following standards:

- 10 (A) reasonable compensation for actual, necessary
11 services rendered by the trustee, examiner, ombudsman,
12 paraprofessional person, or attorney and by any such person;
13 and
14 (B) reimbursement for actual, necessary expenses.

15 No issue has been raised by Mr. Pahl as to the \$12.50 expenses for which
16 Henderson Bennington requests reimbursement. So, the issues to be
17 resolved focus on whether the professional accounting services performed
18 by Henderson Bennington for the estate were necessary and whether the
19 compensation they are requesting is reasonable in light of the services
20 performed.

21 B. Necessity for Services and Reasonableness of Compensation Requested

22 "The majority of courts have determined the 'necessity' of
23 particular services from the perspective of the time that the services
24 were rendered, rather than based on hindsight after services had been
25 performed." 3 Collier on Bankruptcy ¶ 330.03[1][b][iii] (Alan N. Resnick
26 and Henry J. Sommer eds., 16th ed.), citing In re Krause, 155 F. 702
(S.D.N.Y. 1907).

1 Amended Returns.

2 In these circumstances, it is unfortunate that the fiduciary
3 tax returns had to be revised twice before they really were final, but
4 the responsibility for that extra work rests with Mr. Pahl. If he had
5 provided the Trustee with the documentation required to establish that,
6 in fact, no taxes were owed on the funds received by the estate at the
7 outset, some professional expense could have been avoided. However,
8 based on the situation faced by the Trustee and Henderson Bennington as
9 it unfolded, I find that the services performed by Henderson Bennington
10 in preparing the Initial Returns and the subsequent First Amended Returns
11 and Second Amended Returns were necessary.

12 The efforts expended by personnel of Henderson Bennington
13 performing accounting services for Mr. Pahl's estate are itemized in
14 detail in Schedule B to the Amended Final Application, which as I
15 indicated above, I have reviewed. Mr. Pahl has not challenged that
16 Henderson Bennington personnel actually performed the services set forth
17 in the Schedule B itemization. Accordingly, I find that the services
18 reflected on the Schedule B itemization actually were performed.

19 Finally, the question is whether the charges for the services
20 performed by Henderson Bennington were reasonable. Recall that in the
21

22 ⁴(...continued)

23 examination of Ms. Bennington, he elicited an admission that she had
24 spoken at some point with this accountant. He later hired an accountant
25 in Woodburn, Oregon, with whom Ms. Bennington also spoke. According to
26 Mr. Pahl, his change of accountants was necessitated by the fact that in
his last meeting with the Tillamook accountant, the meeting ended with
the accountant essentially throwing Mr. Pahl out of his office and
advising Mr. Pahl that he was through performing services for him.

1 Objection, Mr. Pahl argued, without evidence, that the estate accountant
2 fees of approximately \$3,000 "could be obtained for less than 20% of this
3 amount." At the Hearing, Mr. Pahl argued that accountant fees of \$280 an
4 hour were too high. It was pointed out to Mr. Pahl at the Hearing that
5 the highest hourly rate reflected in the Amended Final Application for
6 any Henderson Bennington accountant (Ms. Bennington) was \$230 an hour.
7 (It is worthy of note that Ms. Bennington only billed 1.1 hours time at
8 \$230 an hour. She billed 7.5 hours at \$215 an hour and 2.1 hours at
9 \$107.50 an hour.) Mr. Pahl never presented any evidence as to what
10 "reasonable" hourly accountant charges should be.

11 The hourly rates in the Amended Final Application range from
12 \$107.50 to \$230 per hour for accounting services. Based on my review of
13 applications for approval of compensation for accountants over the last
14 fifteen plus years of my service as a bankruptcy judge, I do not find
15 Henderson Bennington's billing rates unreasonable. I further find that
16 it is reasonable to apply a "lodestar" approach to awarding reasonable
17 compensation to Henderson Bennington in this case, as is customary
18 generally in the Ninth Circuit. See, e.g., Ballen v. City of Redmond,
19 466 F.3d 736, 746 (9th Cir. 2006). The lodestar method multiplies the
20 number of hours reasonably expended by the professionals by their
21 reasonable hourly rates. See, e.g., McGrath v. County of Nevada, 67 F.3d
22 248, 252 (9th Cir. 2006).

23 Applying that calculation to the time itemized by Henderson
24 Bennington in the Amended Final Application, I arrive at a total of
25 \$2,875.25, which is the total amount requested for compensation by
26

1 Henderson Bennington in the Amended Final Application.⁵

2 Conclusion

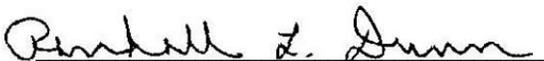
3 Based on the foregoing recitation of background facts and the
4 legal analysis applied to those facts, I conclude that it is appropriate
5 to award final compensation and reimbursement of expenses to Henderson
6 Bennington in the amounts of \$2,875.25 fees and \$12.50 expenses, for a
7 total of \$2,887.75. An order consistent with this Memorandum Opinion
8 will be entered.

9 ###

10 cc: John A. Pahl
11 Kenneth S. Eiler, Trustee
12 Henderson Bennington Moshofsky, PC
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23 ⁵ I confirmed with the Trustee at the Hearing that he was not going
24 to renew his request that Mr. Pahl turn over any additional funds to the
25 estate. The estate has enough money in hand to pay all allowed unsecured
26 claims plus interest and all administrative expenses, whatever I rule in
this matter. The issue for Mr. Pahl is how much, if anything, he gets
back from the \$100,000 he turned over to the Trustee.

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
JOHN A. PAHL,) No. 09-30495-rld7
Debtor.) MEMORANDUM OPINION AND ORDER

On April 4, 2013, after an evidentiary hearing ("Hearing") on April 2, 2013, I issued a Memorandum Opinion (Docket No. 138) stating my findings of fact and conclusions of law with respect to the Amended Final Application for Accountants' Compensation, filed by Henderson Bennington Moshofsky PC ("Henderson"), as accountants for the chapter 7¹ trustee. On April 5, 2013, I issued an Order ("Order") (Docket No. 139) overruling the debtor John A. Pahl's ("Mr. Pahl") objections to my approving compensation to Henderson and awarding Henderson \$2,875.25 fees and \$12.50 expenses, for total compensation of \$2,887.75, consistent with my determinations in the Memorandum Opinion. On April 30, 2013, Mr. Pahl

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 filed a Motion to Reconsider Order Awarding Compensation ("Motion to
2 Reconsider") (Docket No. 142) to Henderson, requesting that I rescind the
3 Order and deny compensation to Henderson. My consideration and
4 disposition of the Motion to Reconsider follow.

5 Discussion

6 "Motions for reconsideration," as such, are not recognized in
7 the Rules or Civil Rules. Motions, such as the Motion to Reconsider, are
8 treated either as motions to alter or amend a judgment under Civil Rule
9 59, applicable in bankruptcy under Rule 9023, or motions for relief from
10 a judgment or order under Civil Rule 60, applicable in bankruptcy under
11 Rule 9024. However, Rule 9023 provides that a motion to alter or amend a
12 judgment or order "shall be filed . . . no later than 14 days after entry
13 of judgment." Since the Motion to Reconsider was filed 25 days after the
14 Order was entered, I will consider it as a motion for relief from the
15 Order under Rule 9024.

16 Civil Rule 60(b) provides the reasons why a court may grant
17 relief from a final order or judgment. Arguably most applicable in this
18 case are Civil Rule 60(b)(1), which allows a court to grant relief from a
19 final order based on "mistake, inadvertence, surprise or excusable
20 neglect," and Civil Rule 60(b)(6), which allows a court to grant relief
21 for "any other reason that justifies relief." "Civil Rule 60(b)(6) is to
22 be used sparingly to prevent manifest injustice, and only granted if
23 there is a showing by the movant of 'extraordinary circumstances.'" Gelb
24 v. United States Trustee (In re Gelb), 2013 WL 1296790 (9th Cir. BAP
25 March 29, 2013) (unpublished), quoting United States v. Alpine Land &
26 Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993).

