

28 USC § 1920
FRBP 7054(b)
FRBP 9016
FRCP 45(b)(1)
costs
witness fees

Palen v. Olsen Adv.# 10-6111-fra
In re Olsen Main Case # 10-60190-fra7
3/23/11 Alley Not for publication

Plaintiff filed a § 727 proceeding to deny Debtor's full discharge. After extensive discovery, Debtor/Defendant withdrew her answer, waived discharge and obtained an order allowing such waiver.

Plaintiff then filed a cost bill to which Debtor objected. The court held that Plaintiff was the prevailing party and was entitled to her reasonable costs under FRBP 7054(b) and 28 USC § 1920. The court allowed costs for filing fees, a transcript of the § 341 meeting of creditors and service fees for document subpoenas. The court however disallowed the largest cost applied for, which was witness fees paid in conjunction with 29 subpoenas duces tecum. The court held that under FRCP 45(b)(1) (made applicable by FRBP 9016), Plaintiff need not have paid those fees because the subpoenas were simply to produce records; they were not to compel the recipient's appearance at a deposition or court hearing or trial. Further, nothing in the record indicated Plaintiff had given prior notice to Debtor that he was going to serve the subject subpoenas, as required by FRCP 45(b)(1).

E11-7(3)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)	Bankruptcy Case
)	No. 10-60190-fra7
BARBARA CAROL OLSEN,)	
)	
Debtor.)	
<hr/>		
CRAIG PALEN,)	Adversary Proceeding
)	No. 10-6111-fra
)	
Plaintiff,)	
vs.)	
)	
BARBARA CAROL OLSEN,)	
)	
Defendant.)	MEMORANDUM OPINION ¹

Plaintiff filed his complaint on May 1, 2010, seeking a judgment that Defendant/Debtor be denied a discharge under 11 U.S.C. § 727. The prayer for relief requested denial of discharge, and Plaintiff's costs and disbursements: there was no request that the Plaintiff's claim against the Defendant be liquidated.

Before the matter could come to trial, the Debtor filed a written waiver of discharge. Notwithstanding Plaintiff's objection, the Court entered its order approving the waiver on September 27, 2010 (Document 38 in the main case).

///

¹ This Memorandum is not intended for publication.

1 The Court has determined that the Defendant's waiver of her discharge renders the Plaintiff's claim
2 moot. At one point Plaintiff averred that he should be able to liquidate the claim in this proceeding. The
3 Court declined, indicating that it would abstain.²

4 Seeing himself as a prevailing party, Plaintiff has filed a bill of costs in the sum of \$1,875.70.
5 Defendant objects.

6 Plaintiff is the prevailing party and is entitled to his reasonable costs. Bankruptcy Rule 7054(b); 28
7 USC § 1920. Defendant's election to waive her discharge came in the middle of a hotly contested matter,
8 involving, as will be seen, extensive discovery. It would be disingenuous to suggest that the waiver of
9 discharge is not related to the Plaintiff's action.

10 I have reviewed the parties' submissions, and find the Plaintiff's claims for filing fees, fees for service
11 of subpoenas, and fees for a printed transcript to be reasonable.

12 The claim of \$1,860.00 for fees for witnesses is problematic. Between August 16, 2010 and
13 September 1, 2010, Plaintiff issued subpoenas to 29 third parties, accompanying each with a \$40 witness fee.
14 It appears from Plaintiff's submission that each of these requests sought the production of documents, and not
15 the appearance at a deposition or judicial proceeding.

16 The issuance of subpoenas in bankruptcy proceedings is governed by Bankruptcy Rule 9016, which
17 incorporates Rule 45 of the Federal Rules of Civil Procedure. Rule 45(b)(1) states:

18 **(1) By whom; Tendering Fees; Serving a Copy of Certain Subpoenas.** Any person who
19 is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires
20 delivering a copy to the named person and, *if the subpoena requires that person's attendance,*
21 *tendering the fees for one day's attendance and the mileage allowed by law.* Fees and mileage
22 need not be tendered when the subpoena issues on behalf of the United States or any of its
23 officers or agencies. *If the subpoena commands the production of documents, electronically*
24 *stored information, or tangible things or the inspection of premises before trial, then before it*
25 *is served, a notice must be served on each party.* [Emphasis added.]

26 // // //

² In fact, it may be that resolution of the discharge issue deprives the Court of jurisdiction to liquidate the claim, apart from a contested claims proceeding.

1 Since the subpoenas were intended to elicit the production of documentary evidence, tendering fees
2 for attendance or mileage was not required.³ See, Benek v. Kansas City Life Insurance Co., 2008 WL 312667
3 (W.D. Wa. 2008) (recognizing that under Rule 45(b)(1) witness fees are not required when there is no
4 demand to appear).

5 The language quoted above also requires that “a notice” be served on each party prior to service of a
6 subpoena commanding the production of documents. This notice is intended to allow a party the opportunity
7 to object to the requested production and move to quash, or to serve a demand for additional documents.
8 Wright & Miller, Federal Practice and Procedure: Civil 3d §§ 2454 & 2457. There is nothing in the record
9 indicating that notice of the 29 subpoenas duces tecum were served on Defendant before the subpoenas
10 themselves were served.

11 Plaintiff’s costs are allowed in the sum of \$715.70. An order to that effect will be included in the
12 order dismissing this case.

13 The foregoing constitutes the Court’s findings of fact and conclusions of law, which will not be
14 separately stated.

15
16 

17 FRANK R. ALLEY, III
18 Chief Bankruptcy Judge

19
20
21
22
23
24
25
26

³ The subpoenas themselves are not part of the Court’s record. I presume, from the description of the
subpoenas in Plaintiff’s submission, that they are limited to requiring production of documents.