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11 U.S.C. § 110

In re Stacy, Case No. 395-33618-elp7
U.S. Trustee v. Tank, Adv. No. 96-3303

4/3/97 ELP published

In a previous opinion, the court had held that defendant, a bankruptcy petition preparer, had violated various sections of 11 U.S.C. § 110, and ordered him to pay a fine. When defendant did not pay the fine, the US Trustee brought this action to enjoin defendant from acting as a bankruptcy petition preparer. On summary judgment, the court determined pursuant to 11 U.S.C. § 110(j)(2)(B) that defendant should be permanently and nationally enjoined from acting as a bankruptcy petition preparer.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
EDWIN AND SUSAN STACY,) 395-33618-elp7
Debtors,) Adversary Proceeding No.
) 96-3303-elp
)
UNITED STATES TRUSTEE,) MEMORANDUM OPINION
)
Plaintiff,)
)
v.)
)
ROBERT TANK, dba Legal)
Alternatives, dba Law Review,)
)
Defendant.)

This matter came before the court on plaintiff's Motion for Entry of Summary Judgment. For the reasons set out below, I will grant the motion.

FACTS

Defendant is a bankruptcy petition preparer as defined in 11 U.S.C. § 110(a)(1). On March 15, 1996, I entered a judgment against defendant for, among other things, violating 11 U.S.C.

1 § 110(f). The judgment required defendant to pay \$5,045¹ within 30
2 days. On April 3, 1996, the district court entered a judgment under
3 11 U.S.C. § 110(i), ordering defendant to pay \$2,000 to debtors
4 Edwin and Susan Stacy, \$1,000 to Edward Hostmann, who is the Chapter
5 7 trustee for the Stacys, and \$3,105 to Hostmann's attorney, Peter
6 McKittrick, for attorney fees.

7 On May 22, 1996, plaintiff filed this complaint, alleging
8 that defendant had not paid the penalties and fines imposed by the
9 judgments, and requesting that I enjoin defendant from further
10 acting as a bankruptcy petition preparer, pursuant to 11 U.S.C.
11 § 110(j)(2)(B). Plaintiff filed a motion for summary judgment on
12 August 15, which was accompanied by affidavits indicating that, as
13 of that date, defendant had not paid any portion of the judgments.
14 In apparent response to the motion for summary judgment, defendant
15 proposed to pay McKittrick over time. He did not make any proposals
16 regarding payment of any of the other amounts due.

17 I held a hearing on the motion for summary judgment on
18 September 25. At that time, I ordered defendant to provide
19 plaintiff with a financial statement and proposal regarding payment
20 by October 1, and I continued the hearing until October 23. On
21 October 8, defendant sent to plaintiff by fascimile bankruptcy
22 schedules of income and expenses, purporting to show defendant's
23 financial condition. The schedules showed that defendant had excess
24 disposable income of \$530 per month. Defendant proposed to pay

25
26 ¹ This includes a fine of \$5,000 for violations of 11 U.S.C. § 110(f)
and \$45 for excessive fees pursuant to 11 U.S.C. § 110(h).

1 McKittrick \$250 per month on the judgment in McKittrick's favor, but
2 again made no proposal to pay the \$5,045 judgment. On October 22,
3 defendant proposed payment of \$250 per month on that judgment.

4 Defendant was present at the October 23 continued hearing on
5 the motion for summary judgment. At that hearing, I ordered him to
6 pay \$250 per month into the court on the \$5,045 fine and \$250 per
7 month to Hostmann and the Stacys on their judgment, with the first
8 payment to be made by October 30 and payments to be made on the 15th
9 of each month thereafter. I informed defendant that failure to pay
10 when due would constitute willful failure to pay, and that if he did
11 not pay as ordered, I would grant plaintiff's motion for summary
12 judgment and enjoin him from acting as a bankruptcy petition
13 preparer. I also ordered defendant to provide a copy of his 1994
14 and 1995 tax returns to plaintiff and McKittrick within two weeks.

15 The order reflecting the October 23 ruling was entered on
16 November 5. That order provided, in part:

17 "5. The Court will enter an order granting the United
18 States Trustee's motion for summary judgment and will enjoin
19 Robert Tank from acting as a bankruptcy petition preparer if
20 Robert Tank fails to comply with the terms of this order."

21 Plaintiff filed a request for entry of summary judgment on
22 December 3, 1996. As of that date, neither Hostmann nor McKittrick
23 had received any payments as ordered. The court had received two
24 \$250 payments, each one 5 days late. Defendant had not provided his
25 tax returns to either plaintiff or McKittrick.

26 Two days later, on December 5, defendant filed a complaint
against the United States in federal district court, for Trade Name

1 Infringement and Clarification of 11 U.S.C. § 110. On December 12,
2 he filed a motion for injunction and motion for temporary
3 restraining order (TRO), seeking to enjoin the U.S. Trustee,
4 Department of Justice, this court, and the United States from
5 enforcing the payment of fines and penalties and from enjoining him
6 from acting as a bankruptcy petition preparer, pending the outcome
7 of the district court action. The next day, the district court
8 referred the motions for injunction and TRO to this court for
9 consideration.

10 On January 8, 1997, I held a hearing on, among other things,
11 plaintiff's request for entry of summary judgment. I indicated that
12 the plaintiff's submissions, which were not controverted, made out a
13 case for summary judgment. The facts showed that defendant had not
14 complied with my earlier order regarding payment of the fines and
15 penalties. I indicated that I would enter summary judgment unless
16 defendant prevailed on his motions for TRO and injunction. I set a
17 briefing schedule for those motions.

18 Following receipt of the parties' briefing on the TRO and
19 injunction motions, I recommended to the district court that it deny
20 the motions for temporary restraining order and injunction, because
21 defendant (plaintiff in the district court case) had not properly
22 served the complaint or the motions. On April 1, 1997, the district
23 court entered an order denying the motions for TRO and injunction.
24 Therefore, I am now prepared to enter summary judgment in this case.

25 DISCUSSION

26 Under 11 U.S.C. § 110(j)(2)(B), "[i]f the court finds that a

1 bankruptcy petition preparer * * * has not paid a penalty imposed
2 under this section, the court may enjoin the person from acting as a
3 bankruptcy petition preparer." As the above stated facts
4 demonstrate, defendant has failed to pay the penalties imposed by
5 the March and April judgments, despite the October 23 payment
6 schedule that was set based on defendant's own proposal for payment
7 over time. Defendant was warned that failure to abide by the
8 payment schedule would constitute a willful failure to pay, and
9 would result in entry of an injunction against him prohibiting him
10 from acting as a bankruptcy petition preparer. Nonetheless,
11 defendant did not pay. Defendant explained that he withheld
12 payments in hopes that the district court would enjoin enforcement
13 of the judgments. Defendant did not ask the court for relief from
14 the payment schedule while he pursued the injunction and TRO.
15 Instead, he simply chose not to comply with the court order.²

16 Based on defendant's willful failure to pay the fines and
17 penalties ordered by this court and the district court imposed under
18 11 U.S.C. § 110, I conclude that plaintiff is entitled to summary
19 judgment on its first claim for relief in the First Amended
20 Complaint. Defendant will be permanently and nationally enjoined
21 from acting as a bankruptcy petition preparer, as defined in 11
22 U.S.C. § 110(a)(1). The court will set a status conference to
23 discuss the trial schedule for the remainder of plaintiff's claims.

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25 ² The explanation that he was waiting for a determination of the TRO and
26 injunction motions does not explain why he did not make the October and November
payments, both of which were due before he filed his district court action.

1 Counsel for plaintiff shall submit an order reflecting this ruling.

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ELIZABETH L. PERRIS
Bankruptcy Judge

cc: Herbert C. Sundby
Robert Tank
Pamela J. Griffith
Edwin and Susan Stacy
Edward C. Hostmann
Peter C. McKittrick