

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FRANCIS LAFAYETTE)
)
 Appellant,)
)
 v.) Civil Action No.
) 4:08-CV-40202-DPW
)
 SHAWN DUNN,)
)
 Appellee.)

MEMORANDUM AND ORDER
September 30, 2009

This is an appeal from a final order of the Bankruptcy Court denying Attorney Francis Lafayette's Application for Compensation and Expenses as Counsel to a Debtor. The denial was essentially grounded upon Lafayette's failure to perform competently and with due consideration for court rules and rulings in the proceeding as to which he sought fees and expenses.

I. BACKGROUND

On October 1, 2007, Lafayette filed a Chapter 13 case styled *In re Shawn Dunn*, No. 07-43625. That case was dismissed on November 9, 2007 for failure to file necessary papers. Lafayette filed a fee application in the case; but on March 17, 2008, Judge Boroff denied the application and also ordered Lafayette to return to Dunn all funds received from him.

Meanwhile, on February 21, 2008, Lafayette had filed a second Chapter 13 petition styled *In re Shawn Dunn*, No. 08-40480,

in connection with which he induced Dunn to give him a new retainer. In the second case, Judge Boroff found serious errors in Dunn's petition. It contained omissions in the schedules, including failure to disclose medical, food or clothing expenses for Dunn or his three children. The schedules were relevant to the question whether Dunn was a suitable Chapter 13 debtor because they would have revealed the extent of Dunn's ability to pay his debts. Dunn's second case was dismissed on June 5, 2008, prior to confirmation, on grounds of failure to file amended schedules as required by the court.

On June 16, 2008 Lafayette filed the Application for Compensation and Expenses as Counsel to the Debtor (the "Fee Application") at issue in this appeal seeking fees and expenses in the second case. The fees requested were \$3,410.00; the expenses requested were \$62.03. Lafayette listed his rate as \$220.00 per hour for his time, but also reported in his biography that his "current hourly rate in Chapter 13 bankruptcy cases is \$150 . . .". He claimed he spent 15.5 hours on the case.

On September 3, 2006 Judge Boroff held a hearing on the Fee Application at the conclusion of which he denied the Fee Application and disallowed expenses. From a review of the hearing transcript, it is apparent that Judge Boroff found that (1) the Fee Application was improperly drafted and included errors such as reference to inconsistent hourly rates, (2) the \$220.00 hourly rate claimed by Mr. Lafayette was unjustifiably

high, (\$150.00 per hour was the highest rate that Judge Boroff would consider for Lafayette), (3) there were serious shortcomings in the services Lafayette provided, including errors and omissions in the schedules which, if submitted properly, would have revealed Mr. Dunn was ineligible for treatment under Chapter 13, and (4) Lafayette had undermined the court order in Dunn's first case - directing that Lafayette return the retainer to Dunn for that proceeding - by obtaining a retainer for the second case.

Judge Boroff ordered that Lafayette pay over to the Clerk of Court, pending final disposition of any appeal, all funds received from Dunn.

Lafayette appeals the denial of fees and expenses on the grounds that the bankruptcy court abused its discretion.

II. PRIOR MISCONDUCT

Lafayette has engaged in a pattern of professional misconduct in the Bankruptcy Court for this District.¹ On

¹ Since the filing of the instant appeal, Lafayette has been suspended from practice in this Court - including the Bankruptcy Court for this District - for breach of duties of competence and diligence in representation of clients, failure of the duty of candor to the Bankruptcy Court and failure to obey court orders requiring him to refund client funds and to pay monetary sanctions. In re *Attorney Disciplinary Proceeding Francis J. Lafayette*, Nos. 05-mc-10053 and 08-mc-10132 (D. Mass Apr. 7, 2009) *appeal docketed* No. 09-1588 (1st Cir. May 5, 2009). The *Dunn* cases at issue in this instant appeal were not among the predicates relied upon by the Court in imposing the sanction of suspension. Nevertheless, because Lafayette's suspension is on appeal, I have refrained from disposing of the instant appeal

numerous occasions, Lafayette has been denied fees by bankruptcy judges because of incompetent legal services that provided no benefit, and in some cases harmed, his clients. See e.g., *In re Geary*, 2007 WL 2746671 (B.A.P. 1st Cir. Aug. 6, 2007); *In re Kaplan*, 373 B.R. 213 (Bankr.D.Mass. 2004) (Rosenthal, J.); *In re LaFrance*, 311 BR.1 (Bankr.D.Mass. 2004) (Boroff, J.).

Lafayette and Judge Boroff in particular have a long history of cases in which Judge Boroff has denied or limited Mr. Lafayette's fees and sanctioned him. See *In re Withrow*, 391 B.R. 217 (Bankr. D.Mass. 2008); *In re LaClaire*, 360 B.R. 388 (Bankr. D.Mass. 2006); *In re LaFrance*, 311 B.R. 1. In *LaFrance*, Judge Boroff described Attorney Lafayette's practices as "sloppy, careless and unprofessional." 311 B.R. at 25, and ordered Lafayette to file fee applications in all his future bankruptcy cases. *Id.* at 26. The requirement of mandatory fee applications was unusual and tailored to Lafayette. Normally under the Bankruptcy Court's local rules, MLRB 13-7(b), lawyers for Chapter 13 debtors do not need to file fee applications when their fees do not exceed \$2,500 for prepetition services and \$500 for post-petition services because in ordinary cases the expense of preparing the application outweighs any benefits to the debtor.

pending further direction from the Court of Appeals. I find, however, Lafayette now is in default of his briefing obligation in the Court of Appeals. Consequently, I will not stay disposition of this matter any further.

Id. at 22. In *Withrow*, Judge Boroff noted that "since the issuance of the *LaFrance* decision, this Court has denied countless fee applications by Attorney Lafayette on account of the same or similar poor quality services." 217 B.R. at 229.

III. THE INSTANT APPEAL

Review of the Bankruptcy Court Order on appeal here is governed by Rule 8013 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). Rule 8013 provides that a district court may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Bankruptcy courts are accorded broad discretion in determining reasonable fee allowances. *In re Casco Bay Lines, Inc.*, 25 B.R. 747, 753 (B.A.P. 1st Cir. 1982) citing *Dickinson Industrial Site v. Cowan*, 309 U.S. 382 (1940). Their decisions should be disturbed only upon a showing of an abuse of discretion. *Id.*

Under Section 330 of the Bankruptcy Code, attorneys are entitled to "reasonable compensation for actual, necessary services ... based on the nature, the extent, and the value of such services, the time spent on such services and the cost of comparable services..." 11 U.S.C. § 330(a)(1)(A).

Courts apply a "lodestar analysis" in determining "reasonable compensation" under section 330. *In re Bank of New England Corp.*, 142 B.R. 584, 586 (D. Mass. 1992). "Under this

method, "the fee-setting court first establishes a "threshold point of reference" or the "lodestar," which is the number of hours reasonably spent by each [professional] multiplied by his reasonably hourly rate. . . . This lodestar can then be adjusted up or down to reflect a variety of factors, such as delay in payment, quality of representation, and the results obtained" *Id. quoting Boston & Maine Corp. v. Moore*, 776 F.2d 2, 7 (1st Cir. 1985).

Judge Boroff did not explicitly conduct a full lodestar analysis; instead he relied on a less formal colloquy with Lafayette during the hearing on the Fee Application to determine the relevant considerations. During that hearing, Judge Boroff considered what a reasonable hourly rate for Lafayette was. He found that Lafayette's claimed \$220.00 hourly rate was inappropriate and determined that the highest justifiable rate for his services was \$150.00.

Judge Boroff did not focus on whether a specific number of hours had been spent on the case. Rather, to determine reasonableness he evaluated fundamental errors made by Lafayette in Dunn's bankruptcy petition schedules. In essence, Judge Boroff found that the number of hours reasonably spent by Lafayette on this case was zero because the work conducted was subcompetent and should never have been pursued in the manner it was. This was no momentary lapse in professional performance.

It was precisely because of Lafayette's failure to provide necessary submissions in connection with the first Dunn petition, that a second Dunn case was filed and both cases were dismissed for failure to make proper submissions.

During the hearing Judge Boroff also properly considered a non-lodestar factor: Lafayette's undermining of the earlier court order that he return monies to Dunn. Judge Boroff supportably found Lafayette contrived to evade that order by obtaining a second retainer.

The facts and legal issues in this appeal are similar to those in *Zambrana v. King*, 366 B.R.264 (D. Mass 2007), another case involving appeal by Lafayette from the denial of fees for a bankruptcy case. In *Zambrana*, Lafayette was denied fees in a case in which he was found on appeal by Judge Ponsor to have represented the debtor in a "rather floundering" manner. *Id.* at 265. Judge Ponsor concluded that there was no abuse of discretion in denying Lafayette fees given the manner in which he had prosecuted the bankruptcy case in issue. *Id.* at 265. See also *In re Diaz*, 348 B.R. 753, 758 (fees denied where court found that the debtor's attorney provided no value, irrespective of how much time was spent on the services or the ultimate outcome of the case).

The Bankruptcy Court here did not abuse its discretion by denying Lafayette fees in the second *Dunn* matter. Lafayette conferred no value to Dunn through his services; the case was

again dismissed - as was the first Dunn matter - prior to confirmation. Lafayette's performance was unworthy of compensation; indeed, it deserves condemnation.

III. CONCLUSION

For the reasons set forth above, the bankruptcy's court's order is hereby AFFIRMED and the monies being held by the Bankruptcy Court shall be returned to Dunn.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE