

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK
CHAMBERS OF THE BANKRUPTCY JUDGE**

**HON. STEPHEN D. GERLING
CHIEF U.S. BANKRUPTCY JUDGE**

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RE: Bert C. Brinkerhoff
Case No. 02-67814

LETTER DECISION AND ORDER

The Court considers herein a motion filed in this Chapter 7 case by Randy J. Schaal, Esq. (“Schaal”), attorney for Carolyn J. Cooley, Esq. (“Trustee”),¹ seeking an order to pay David P. LiBassi, Esq. (“LiBassi”), as special counsel to the Trustee, the sum of \$90,909 in fees and \$10,480.95 in expenses in connection with a judgement obtained by LiBassi on behalf of Bert C. Brinkerhoff (“Debtor”) following a trial in state court (“state court judgement”). LiBassi was appointed to act as special counsel to the Trustee pursuant to an Order, dated October 12, 2007, “for

¹ Schaal was appointed to act as general counsel to the Trustee pursuant to an Order, dated June 3, 2008.

the purpose of continuing to pursue a personal injury claim.”²

In addition to the fee and expenses referenced above, it appears that LiBassi has requested additional compensation in the sum of \$5,000 for services he rendered in connection with an appeal of the state court judgement. Schaal contends that initially he did not oppose the request of LiBassi for additional compensation that would bring his total compensation up to 40% of the state court judgement, and he even obtained the consent of the U.S. Trustee for such an increase. However, Schaal asserts that LiBassi never returned an affidavit, presumably prepared by Schaal, in support of the additional compensation. Thus, Schaal does not now recommend approval of LiBassi’s request for the additional \$5,000.

Debtor has also weighed in on this contested matter by filing an Affirmation in which his attorney, Julia M. Navelli, Esq., asserts that because LiBassi failed to provide all documentation to the Trustee, the Debtor has suffered “extreme financial hardship.” (*See* Affirmation of Julia M. Navelli, Esq., dated October 20, 2008 at ¶ 5). Debtor’s attorney also affirms Schaal’s contention that LiBassi never filed an affidavit in support of the additional post trial compensation.

The instant motion is not the Court’s first encounter with the fee dispute between Schaal, the Debtor, and LiBassi. On July 9, 2008, Schaal filed a motion in which he sought an order of this Court directing LiBassi to turn over \$110,909, apparently the sum retained by LiBassi in payment

² The Court notes that pursuant to an Order dated May 8, 2003, Robert Delle, Esq. (“Delle”) had been appointed to continue to pursue a personal injury claim on the Debtor’s behalf. In her application to appoint LiBassi, the Trustee acknowledged that another attorney had been previously appointed special counsel but was unable “to advance the proceeding” and that the subsequent representation of the Debtor had been undertaken by LiBassi. She also asserted that the prior counsel had not notified her that he was no longer handling the Debtor’s claim. (*See* Trustee’s Application for Appointment of Special Counsel dated October 9, 2007 at ¶ 2). Presumably Delle was the prior counsel referred to in the Trustee’s application; however, his appointment was never actually terminated by an order of this Court.

of his fees and disbursements pursuant to the Order of appointment. Schaal argued that LiBassi was required to turn over to the Trustee the entire amount of the state court judgement (\$273,000) and to thereafter make application to the Court for approval of his fees and disbursements. LiBassi had resisted the turnover, contending that under Massachusetts law he had a statutory lien on the state court judgement, which secured his fee and expenses. In addition, he argued that the amount he actually turned over to the Trustee (\$162,000) far exceeded the amount necessary to pay the Debtor's creditors and then opined that the real reason the Trustee sought turnover of the entire sum recovered was so that the Trustee could "personally benefit by attempting to take a percentage on the amount of Special Counsel's fee and not benefit the Bankruptcy estate." (*See* Special Counsel's Motion in Opposition to Motion to Compel, filed July 21, 2008 at ¶ 11).

After hearing argument on the prior motion, the Court ordered LiBassi to turn over the remaining \$110,909 to the Trustee, and that ruling was memorialized in an Order, dated August 12, 2008. The Order further directed that in addition to the turnover of funds, LiBassi should file an affidavit "in support with time records to the best of special counsel's ability at least in an outline form trustee will then bring a motion forthwith for payment of special counsel fees and expenses." In compliance with the August 12th Order, LiBassi turned over the \$110,909 to the Trustee, and the Trustee filed the instant motion on September 15, 2008. In support of the motion, LiBassi filed an Affidavit requesting payment of not only the one third contingent fee of \$90,909 and expenses of \$10,480.95, but also an additional fee of \$5,000 for his services in connection with the appeal of the state court judgement. In the Affidavit, LiBassi refers to his efforts in convincing the attorneys for the defendants in the state court action not to pursue an appeal. He estimates that he expended an additional 25 hours in post trial proceedings. Finally, he suggests that he has expended some 60

hours on issues related to this bankruptcy case, including travel to and from his law office in Massachusetts.

It is LiBassi's request for the additional \$5,000 that has drawn the ire of both the Trustee and the Debtor.³ The Trustee maintains that in the absence of a court order authorizing the additional compensation, special counsel is simply not entitled to the requested \$5,000. He asserts that the earlier refusal of LiBassi to turn over the \$110,909 until ordered to do so by this Court should weigh heavily against any equitable consideration favoring his request for additional compensation. The Trustee opines that such an award would add insult to injury. The Debtor asserts that LiBassi's conduct in connection with initially withholding his fees and now requesting additional fees has caused the case to drag on too long to the detriment of the Debtor.

LiBassi cites the Court to its own ruling in the case of *In re Warren M. Churco*, 2008 WL1734228 (Bankr. N.D.N.Y. April 10, 2008) wherein the Court concluded, "[w]hile hindsight is frequently 20/20, the Court believes that it must allow certain latitude to professionals in their representation of a Chapter 7 trustee by applying a standard of reasonableness. (citation omitted)." While the Court does not intend to back away from its statement in *Churco*, the discreet issue there was whether the services rendered by the trustee's counsel were duplicative of those to be performed by the trustee himself and/or whether the services were excessive or unnecessary. The Court submits that that is not the issue here. The issue here is whether a professional is entitled be compensated for services rendered beyond the scope of his/her court ordered employment. While

³ LiBassi notes that the discussion concerning whether he is entitled to total compensation of 40% of the state court judgement is disingenuous since that would entitle him to an additional \$19,000, approximately. He seeks only an additional \$5,000, which equates to an additional 1.5% of the recovery.

it is true that “reasonableness” is generally the standard employed when a bankruptcy court considers an award of compensation pursuant to 11 U.S.C. § 330(a)(1), a court does not even reach the reasonableness standard unless the services performed by the professional are authorized. *See Broyles v. Tudor, Bailey & Co., P.C.*, 2000 WL 1206610 (N.D. Tex. Aug. 24, 2000) (noting that once the bankruptcy court “approved a means of payment under § 328, such as a contingent fee, the bankruptcy court could not on submission of the final fee application approve instead a ‘reasonable’ fee under § 330(a), unless it found that the original arrangement was improvident because of unanticipated circumstances”).

Here there does not seem to be any real dispute between the parties that LiBassi was not authorized to perform any services in connection with any appeal of the state court judgement or that, if he was, those services would be fully compensated by the receipt of one-third of the recovery plus disbursements. The Order which appointed LiBassi in October of 2007 limited his compensation to “one -third of the gross proceeds (of the lawsuit) plus reimbursement for disbursements necessary to prosecute the claim, subject to court approval.” If LiBassi intended to claim compensation in any amount for services rendered in connection with a potential appeal of the state court judgement, he should have filed a supplemental application and obtained a further order of the Court.⁴

It would seem that equity does not favor LiBassi’s request for additional compensation. Most significantly, the Court must consider his conduct in refusing to remit the gross proceeds of the state court lawsuit to the Trustee, thus necessitating the Trustee’s motion seeking an order

⁴ It would appear that this is precisely the procedure that Schaal had in mind when he provided LiBassi with a proposed affidavit whereby the Trustee would support special counsel’s request for additional compensation in connection with the appeal.

compelling turnover.⁵ Such conduct will likely result in additional expense to the estate when the Trustee and her counsel, Schaal, apply for their final compensation. In addition, LiBassi offers no real explanation as to why he did not take Schaal up on his offer to expand LiBassi's scope of employment to include the appellate work. Finally, there is the contention of the Debtor that as a result of LiBassi's conduct, he "has suffered extreme financial hardships." (*See* Affirmation of Julia M. Navelli, Esq., dated October 20, 2008 at ¶ 5). Though that assertion is not "fleshed out," the Debtor's attorney contends that LiBassi's conduct has delayed the process and presumably prevented the Debtor from obtaining what will almost certainly be surplus funds returned to him after all of his creditors are paid in full.

It is fairly well settled that a professional appointed in a bankruptcy case pursuant to 11 U.S.C. § 327(e) is entitled to be reasonably compensated for services rendered within the scope of the order appointing him/her.⁶ *See In re Engel*, 124 F.3d 567, 590 (3d Cir. 1997) (commenting that "[i]n the rare situation where special counsel is authorized under § 327(e), and counsel then engages in a course of representation or conduct that is beyond the scope of his or her authorization, that subsection would also operate to limit or prevent compensation from the estate). In unique

⁵ Li Bassi defends his refusal to turnover his one third of the proceeds of the state court judgement by, inter alia, relying on Massachusetts law but it is not clear that this was the initial position taken by LiBassi, albeit incorrect, when confronted by the turnover demand of the Trustee or was a position subsequently adopted in responding to the Trustee's July 2008 motion.

⁶ While the Order of October 12, 2007 appointing LiBassi contains no specific statutory reference, it is apparent to the Court that the appointment was made pursuant to Code § 327(e). The Court notes that in the Trustee's Application For Appointment Of Special Counsel For Trustee, dated October 9, 2007 at ¶ 2, Trustee Cooley indicated that LiBassi had already obtained a judgement in the amount of \$175,000,"but the insurance carrier may decide to appeal and the time to do so has not yet expired." The Order, however, makes no reference to the pending appeal and simply fixes LiBassi's compensation at "one-third of the gross proceeds plus reimbursement for disbursements necessary to prosecute the claim, subject to court approval."

situations, professionals may be appointed pursuant to § 327 on terms and conditions that vary somewhat from the norm, such as in the instant case where LiBassi's compensation was fixed at one-third of any recovery in the state court. *See Technology Lending Partners, LLC v. San Patricio County Community Action Agency*, 2008 WL 1730536, at *2 (S.D.Tex. April 9, 2008). Such types of compensation arrangements are sanctioned by 11 U.S.C. § 328(a), and the standard to be applied by a bankruptcy court in passing upon such a professional's fee application is one of "improvidence," that is, the appointing court may award compensation on different terms and conditions from those initially approved where it finds those terms and conditions are improvident in light of developments not capable of being anticipated at the time of fixing those terms and conditions. *See In re Chewing & Frey Security, Inc.*, 328 B.R. 899, 911 (Bankr. N.D.Ga. 2005). However, Code § 328 does not provide the professional with a basis to render services outside the scope set out in the original application and order approving the employment and then seek compensation for those services on some "improvident" standard.

As noted above, in this case, LiBassi's compensation was fixed at "one-third of the gross proceeds plus reimbursement for disbursements necessary to prosecute the claim, subject to court approval." (*See Order for Appointment of Special Counsel*, dated October 12, 2007). If LiBassi or the Trustee had intended that special counsel be able to seek additional compensation from the estate for appellate work in connection with the state court judgement, the Order should have so stated, or LiBassi should have sought to expand (as Schaal proposed) the scope of his employment.

Thus, LiBassi is entitled to be paid the sum of \$90,909 in fees and \$10,480.95 in

reimbursement of his expenses and nothing more.⁷

IT IS SO ORDERED.

Dated at Utica, New York

this 21st day of November 2008

/s/ Hon. Stephen D. Gerling
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

⁷By an Order dated November 12, 2005, the Court, *inter alia*, allowed the Trustee to remit to LiBassi the sum of \$90,909 in fees and \$10,480.95 in expenses.