

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

-----  
IN RE:

DEBORAH ANNE DEMPERIO

CASE NO. 98-66701

Debtor

Chapter 13

-----  
APPEARANCES:

STEPHEN LANCE CIMINO, ESQ.  
Attorney for Debtor  
307 South Clinton Street  
Syracuse, New York 13202-1250

MILTON J. CRYSTAL, ESQ.  
Attorney for Edward T. Dumas  
447 East Washington Street  
Syracuse, New York 13202-1915

FORTUNA S. HABIB, ESQ.  
Attorney for Onondaga County Dept. of Social Services  
600 South State Street, Suite 710  
Syracuse, New York 13202

MARK W. SWIMELAR, ESQ.  
Chapter 13 Trustee  
250 South Clinton Street, 5<sup>th</sup> Floor  
Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

On January 6, 2000, this Court entered its Memorandum-Decision, Findings of Fact, Conclusions of law and Order (“Order”) concluding that the Onondaga County Department of Social Services (“OCDSS”) and Charles McGowen (“McGowen”) had wilfully violated the automatic stay imposed pursuant to § 362(a)(6) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) (“Code”). The Court further found that neither OCDSS nor McGowen enjoyed the protection

of sovereign immunity pursuant to the Eleventh Amendment. They were ordered to repay the sum of \$746.80 to the Debtor's estate and were further ordered to compensate the Debtor's counsel for "reasonable fees and costs associated with the filing and arguing of this motion." *See* Order dated January 6, 2000 at page 20.)

Pursuant to the Order Debtor's counsel was given 30 days in which to submit time records and serve said time records on OCDSS and McGowen.

On January 22, 2000, Debtor's counsel, Stephen Lance Cimino, Esq. ("Cimino"), filed and served the requested time records. The records reflect a total of 43.2 hours devoted to this contested matter and request an attorney's fee at the rate of \$175 per hour or \$7,560.00. On January 25, 2000, OCDSS and McGowen responded to the time records and fee request by filing an objection to the fee sought. In addition, on January 24, 2000, the Court received correspondence from the attorney representing an additional party to the contested matter, Edward T. Dumas, suggesting that Cimino's fee request be cut in half because the Debtor had proceeded against OCDSS/McGowen, as well as against Dumas and the claim against Dumas had been denied.<sup>1</sup>

In its Objection, OCDSS/McGowen assert that the hourly rate awarded to Cimino must be limited to \$100. They attach a copy of Cimino's Federal Rule of Bankruptcy Procedure 2016(b) Statement which was filed in connection with the bankruptcy petition and provides that "Counsel will be paid \$100 per hour upon application to the Court for services rendered after the filing of the petition." Cimino responds that his customary hourly rate is \$175 per hour, but that

---

<sup>1</sup> The Court has not considered this argument and has, in fact, deleted from Cimino's time records the time allocated to the preparation of a response to the papers filed by Dumas' attorney.

he reduced his hourly rate in this case to \$100 “based in part on the financial circumstances of a client.” (See Attorney Affirmation of Cimino dated January 25, 200, at ¶ 6). Cimino contends that the lower hourly rate should not benefit the “adjudicated contemnors.” *Id.* Additionally, OCDSS/McGowen assert that Cimino’s time records are exaggerated and the total fee is well beyond reasonable standards.

The Court begins its analysis by considering the appropriate hourly rate it should utilize in applying the so-called “lodestar” approach to an award of reasonable attorney’s fees (that is the total hours approved multiplied by an hourly rate). Cimino contends that an award of attorney’s fees should be at his regular hourly rate of \$175. OCDSS/McGowen contend that Cimino should be compensated at the hourly rate set out in his Federal Rule of Bankruptcy Procedure 2016(b) Statement, to wit: \$100 per hour, despite the fact that Cimino argues that the \$100 per hour rate was adjusted due to the financial circumstances of his client.

The Court believes that Cimino’s rate should be limited to \$100 per hour. An analysis of Code § 362(h) indicates that it permits an “individual” injured by a wilful violation of the stay to “recover actual damages, including costs and attorney’s fees.” Thus, one must conclude that what is recoverable is determined by the rate per hour the attorney would have or did in fact charge his or her client in redressing the stay violation. In this case, it is clear from Cimino’s Federal Rule of Bankruptcy Procedure 2016(b) Statement that he would have billed the Debtor at the rate of \$100 not \$175 per hour.

Turning to the allowable hours, the Court has reviewed Cimino’s time records and makes the following appropriate adjustments:

		<u>Requested</u>	<u>Allowed</u>
May 3, 4, 5, 1999	Prepare application for contempt	9.2 hrs.	4 hrs.
June 4, 1999	Review of Objection to Application	9.2 hrs.	1 hr.
June 7, 1999	Legal Research Regarding Objection	2.4 hrs.	1.5 hrs.
June 7, 1999	Prepare for Oral Argument	2 hrs.	1 hr.
August 11, 12, 13, 1999	Prepare Memo Research	8.3 hrs.	4 hrs.
August 18, 19, 20, 1999 (*0.5 for "review of Dumas Response is deleted)	Review of Habib Response/ Research Case law	*9.1 hrs.	4 hrs.
August 23, 1999	Prepare for Oral Argument	2.2 hrs.	1 hr.
The remaining entries are allowed as requested			<u>6.8 hrs.</u>
		Total hrs.	23.3 hrs.

Thus, the Court will award Cimino attorney's fees in the total sum of \$2,330 pursuant to Code § 362(h) and the Order.

IT IS SO ORDERED.

Dated at Utica, New York

this 10th day of February 2000

---

STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge