NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 14-074

Bankruptcy Case No. 13-40145-HJB

MICHAEL K. SCHOLD, a/k/a Michael K. Schold, Sr., d/b/a Schold Trucking, d/b/a Schold Builders, and CHRISTINE M. SCHOLD, f/k/a Christine M. Przygoda, Debtors.

PHILIP M. STONE, ESQ., Appellant.

Appeal from the United States Bankruptcy Court for the District of Massachusetts (Hon. Henry J. Boroff, U.S. Bankruptcy Judge)

Before Deasy, Finkle, and Cary, United States Bankruptcy Appellate Panel Judges.

Philip M. Stone, Esq., on brief for Appellant.

May 22, 2015

Finkle, U.S. Bankruptcy Appellate Panel Judge.

Attorney Philip M. Stone ("Stone") appeals from a bankruptcy court order substantially reducing the fees he requested in connection with his representation of chapter 13 debtors Michael K. Schold and Christine M. Schold (collectively, the "Scholds"). For the reasons discussed below, we **VACATE** the order and **REMAND** the matter to the bankruptcy court for proceedings consistent with this opinion.

BACKGROUND

The Scholds hired Stone to represent them in their chapter 13 bankruptcy. In January 2013, the parties executed a retainer agreement whereby the Scholds agreed to pay Stone a flat fee of $10,000.00 for certain specified services, and additional fees at an hourly rate for all other services, plus court filing fees. Section I of the retainer agreement required Stone to: provide general legal advice concerning debt problems; prepare and file required documents such as the bankruptcy petition, initial schedules, statements, declarations, and chapter 13 plan; and represent the Scholds at the § 341 meeting of creditors. Section II of the retainer agreement provided that Stone would charge his hourly billing rate of $325.00 for additional services, including representation of the Scholds in adversary proceedings, attendance at hearings, and review of correspondence and pleadings filed by creditors and interested parties.

Stone filed a chapter 13 petition on behalf of the Scholds on January 24, 2013. He filed the schedules, statements, other required documents, and a proposed chapter 13 plan one month later. The Scholds' Summary of Schedules indicated they had over $1,000,000.00 in secured debt and approximately $300,000.00 in unsecured, nonpriority debt. In Schedule A, the Scholds reported that they jointly owned six parcels of real property in Massachusetts (including two rental properties), and a vacation property in Maine. In their Schedule I, they indicated that Mr.

Schold was the owner and operator of Schold Trucking. They reported in their Statement of Financial Affairs that they were parties in various state court litigation matters. Their chapter 13 plan proposed monthly payments of $1,709.00 for distribution to creditors over a period of 60 months.

In May 2013, Denise Pappalardo, the standing chapter 13 trustee (the "Trustee"), objected to confirmation of the Scholds' chapter 13 plan on the grounds that the Scholds' income was above the applicable median income and they were not providing for all of their projected disposable income to be paid into the plan. The bankruptcy court sustained the Trustee's objection, and ordered the Scholds to amend or modify the chapter 13 plan within 30 days.

On August 27, 2014, creditors Arthur Barbeau and Elizabeth Barbeau (the "Barbeaus") filed a motion to dismiss the Scholds' bankruptcy case on the grounds that Mr. Schold had failed to submit periodic reports to the Trustee as mandated by § 704(a)(8). In their opposition to the motion to dismiss, the Scholds acknowledged they had not filed the operating reports, but explained that they were in the process of preparing them.

Following a hearing on September 17, 2014, the bankruptcy court granted the Barbeaus' motion to dismiss because of the Scholds' "failure to file operating reports for their business." The Scholds filed a motion to vacate the dismissal order, accompanied by profit and loss statements for Schold Trucking for the years 2013 and 2014. The bankruptcy court denied the motion to vacate without a hearing. Thereafter, Stone sought an order preventing the Trustee from disbursing any funds to the Scholds pending the entry of an order regarding compensation he would be seeking. The court granted the motion and stayed such distribution until further order.

Several days later, Stone filed his fee application (the "Application") covering the period from February 4, 2013 through September 30, 2014. He requested fees in the amount of $55,692.50, plus expenses in the amount of $662.56. This aggregate sum included $34,670.00 for services rendered in connection with the defense of the Barbeaus' adversary proceeding (103.60 attorney hours, plus 10 paralegal hours billed at $100.00 per hour). The remaining balance of $20,622.50 related to additional postpetition services rendered to the Scholds. Neither the Trustee nor any other parties objected to the Application.

During the course of the hearing on the Application, the bankruptcy court questioned Mr. Stone regarding the required operating reports, and Stone confirmed that the Scholds had not filed any such reports with the Trustee. The court further inquired whether Stone had instructed the Scholds to forward copies of the required reports to him for review. Stone responded in the negative, explaining that such review was not his 1. The bankruptcy court suggested that this omission in oversight of his clients may very well constitute malpractice. Shifting attention to the Trustee, the court inquired what procedures she had in place to alert her or her staff to a debtor's failure to submit operating reports when mandated under the Bankruptcy Code. She replied that her office tracked such reports on a quarterly basis, and explained that it was customary within the district for such reports to be submitted directly to her by debtors rather than through their counsel. She also advised the court that it was not her practice to seek dismissal of a case when a debtor fails to file such reports unless a debtor also fails to pay the monthly payments required by a debtor's proposed or confirmed plan.

The court concluded:

> Mr. Stone, in my view, you had an obligation to notify your clients that these reports are required, which you say you did, and I have no evidence that you didn't. But frankly, it doesn't matter. You had an obligation to make sure it was happening.

> You also had an obligation to review them and this notion that the debtor sends these financial materials to the Chapter 13 trustee without having them reviewed by counsel, or at least copying them to counsel is, in my view, gross negligence.
>
> So for those reasons, I am allowing, somewhat reluctantly, fees and expenses in the amount of $10,000. The balance is disallowed.

The bankruptcy court entered the order which is the subject of this appeal on December 12, 2014. The order simply stated: "For the reasons set forth in open court, fees and expenses are allowed in the amount of $10,000.00. The balance is disallowed."

This appeal ensued. After filing his notice of appeal, Stone obtained an order from the bankruptcy court again postponing the Trustee's disbursement of funds to the Scholds pending the outcome of this appeal.

On appeal Stone argues: (1) there were no objections to the Application; (2) his hourly rate reflects extensive experience in handling complex cases; (3) the disallowance of 82% of his requested fees was "harsh," "unprecedented," and "abusive"; (4) his practice of not reviewing his clients' operating reports "is similar to that followed by most attorneys representing chapter 13 debtors"; (5) Section II of the Retainer Agreement required the Scholds to pay for any additional services rendered beyond the initial consultations, preparation of the petition and accompanying documents and attendance at the first § 341 meeting of creditors; and (6) the bankruptcy court's decision was based upon an improper factor.

Additionally, in his brief Stone chronicles his efforts to prompt the Scholds to satisfy their reporting obligation. From this chronology, Stone concludes the Scholds "were well aware of their obligation to file the operating reports."

JURISDICTION

A bankruptcy appellate panel is "'duty-bound'" to determine its jurisdiction before proceeding to the merits, even if not raised by the litigants. Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir. 1998) (quoting Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998)). A panel may hear appeals from "final judgments, orders, and decrees." 28 U.S.C. § 158 (a) and (b); see also In re Bank of New England Corp., 218 B.R. at 645. "A bankruptcy court's order allowing or disallowing a professional's final fee application is a final order." White v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (In re CK Liquidation Corp.), 408 B.R. 1, 5 (B.A.P. 1st Cir. 2009) (citation omitted). Thus, we have jurisdiction of this appeal.

STANDARD OF REVIEW

"We review a bankruptcy court's quantification of fees for abuse of discretion." In re Little, 484 B.R. 506, 509 (B.A.P. 1st Cir. 2013) (citing Berliner v. Pappalardo (In re Sullivan), 674 F.3d 65, 68 (1st Cir. 2012) (citing Casco N. Bank, N.A. v. DN Assocs. (In re DN Assocs.), 3 F.3d 512, 515 (1st Cir. 1993)). The First Circuit has explained:

> Apart from mistakes of law—which always constitute abuses of a court's discretion, see United States v. Snyder, 136 F.3d 65, 67 (1st Cir. 1998)—we will set aside a fee award only if it clearly appears that the trial court ignored a factor deserving significant weight, relied upon an improper factor, or evaluated all the proper factors (and no improper ones), but made a serious mistake in weighing them.

Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 292-93 (1st Cir. 2001) (citing Foster v. Mydas Assocs., Inc., 943 F.2d 139, 143 (1st Cir. 1991)).

DISCUSSION

I. The Standard for Compensation in Chapter 13 Cases

"[A] bankruptcy court may award reasonable fees to a lawyer for a [c]hapter 13 debtor in line with 'the benefit and necessity' of the services rendered." In re Sullivan, 674 F.3d at 68 (quoting 11 U.S.C. § 330(a)(4)(B)). "Other considerations to be factored into the decisional calculus include the expertise of the attorney; the time expended by him; the reasonableness of the time given the nature, importance, and complexity of the case; and the reasonableness of the billing rates requested." Id. (citing 11 U.S.C. § 330(a)(3)). The burden of proof is on the professional seeking compensation. In re Little, 484 B.R. at 510 (citations omitted).

"The [§] 330 factors mirror those encapsulated in the traditional lodestar approach to calculating attorneys' fees." In re Sullivan, 674 F.3d at 69 (citing In re Spillane, 884 F.2d 642, 647 (1st Cir. 1989)). The First Circuit has "recognized that the lodestar method is an appropriate measuring device for attorneys' fees in bankruptcy cases." Id. (citation omitted); see also Torres Lopez v. Consejo de Titulares del Condominio Carolina Court Apartments (In re Torres Lopez), 405 B.R. 24, 32-33 (B.A.P. 1st Cir. 2009) ("[A]pplication of the lodestar formula is the critical first step to an assessment of attorney's fees under [§] 330 . . . ."). "Under the lodestar method, a court determines a fee award by 'multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure.'" In re Sullivan, 674 F.3d at 69 (quoting Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 336 (1st Cir. 2008)) (citing In re Spillane, 884 F.2d at 647)).

After calculating the lodestar amount, "'the court may adjust it, up or down, in light of other considerations.'" In re Little, 484 B.R. at 511 (quoting In re Torres Lopez, 405 B.R. at 30). Without doubt, bankruptcy courts have statutory authority to award professional compensation in

an amount less than the amount requested, even in the absence of an objection by a party in interest. See 11 U.S.C. § 330(a)(2) ("The [bankruptcy] court may, on its own motion . . . award compensation that is less than the amount of compensation that is requested."). Given the flexible nature of the lodestar paradigm, "a bankruptcy court need not march mechanically through a checklist of the [§] 330 factors when fashioning a fee award." In re Sullivan, 674 F.3d at 69 (citations omitted). Nor is the court required to "follow a rigid prescription when reducing fees; it may either eliminate specific hours or reduce the overall fee award to a reasonable amount." In re Little, 484 B.R. at 511 (citing In re Sullivan, 674 F.3d at 69, 70; In re Torres Lopez, 405 B.R. at 31).

Much of an appellate court's "focus in reviewing a fee award is on assuring that the trial court provides an adequate explanation for its actions." Bogan v. City of Boston, 489 F.3d 417, 430 (1st Cir. 2007) (citations omitted). "Especially where, as here, a fee award is substantially reduced, the trial court is expected to provide a detailed explanation . . . ." Id. (citation omitted). "As a general rule, a fee-awarding court that makes a substantial reduction in either documented time or authenticated rates should offer reasonably explicit findings, for the court, in such circumstances, has a burden to spell out the whys and wherefores." Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 858 (1st Cir. 1998) (citations omitted) (internal quotations omitted).

While a departure from the preferred lodestar approach "will not necessarily be fatal, spurning all consideration of a lodestar places a substantial burden upon the . . . court to account for its actions." Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 338 (1st Cir. 1997) (citations omitted). Thus, in Coutin, where the trial court provided "no plausible reason for eschewing the lodestar method," the First Circuit vacated the award. Id. at 342.

II. Applying the Standard

Stone sought allowance of attorneys' fees in excess of $50,000.00 and the bankruptcy court approved an award of $10,000.00. Our review of the court's reasoning is limited to the December 12, 2014 order and the transcript of the Application hearing. The order tells us that the basis for the award was set forth during the Application hearing. The transcript of the hearing indicates that the reduced award was premised solely on counsel's failure to ensure that the Scholds were providing financial materials to the Trustee and his failure to review those reports. The record before us does not demonstrate that the bankruptcy court applied the lodestar analysis or deviated from it for specific reasons. In contrast to the guidance detailed in Sullivan, Little, and Torres Lopez, for example, the order and the transcript are silent as to the lodestar analysis. Nor do they provide a "detailed explanation" for the fee award. Bogan v. City of Boston, 489 F.3d at 430 (citation omitted).

CONCLUSION

For the foregoing reasons, we **VACATE** the order appealed from and **REMAND** the matter to the bankruptcy court for further proceedings consistent with this opinion.