UNPUBLISHED OPINION

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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IN RE:	)	Bankruptcy No. 84A-00403
JONATHAN HORNE, M.D.,	)	
Debtor.	)	

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MEMORANDUM OPINION

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APPEARANCES

Gerald Suniville, Roe, Fowler, & Moxley, Salt Lake City, Utah, for the debtor; Weston Harris, Watkiss & Campbell, Salt Lake City, Utah, for the trustee.

CASE SUMMARY

This case is before the Court on the application of Roe, Fowler, & Moxley for interim compensation in the amount of $5,428.75 for professional services rendered in defending four dischargeability actions filed against the debtor. The Court is called upon to decide whether fees and expenses incurred by a Chapter 7 debtor in defending dischargeability actions are payable from the bankruptcy estate as an administrative expense.

FACTUAL AND PROCEDURAL BACKGROUND

On February 14, 1984, Jonathan H. Horne, M.D. ("debtor") filed a petition for relief under Chapter 11 of the Bankruptcy Code. On February 28, 1984, the Bankruptcy Court approved the debtor's employment of Roe, Fowler & Moxley "to represent and assist the debtor in connection with any and all matters arising in or related to this bankruptcy case."

On August 9, 1984, this Court heard a motion by Zions First National Bank ("Zions") to either appoint a trustee or an examiner. The motion was granted and Main Hurdman was appointed as trustee. One month later, on debtor's motion, the case was converted to a case under Chapter 7.

Prior to the Chapter 7 conversion, four dischargeability proceedings were filed against the debtor: Zions First National Bank v. Jonathan H. Horne, 84PA-0972; Valley Bank and Trust v. Jonathan H. Horne, 84PA-0971; M. Barry Osborne v. Jonathan H. Horne, 84PA-0977; and Joyce Young Horne v. Jonathan H. Horne, 84PA-0978.

The Zions First National Bank ("Zions") action sought a determination that the amount of $699,000.00 plus interest was nondischargeable pursuant to Section 523(a)(2) of the Bankruptcy Code, because the debtor obtained funds from Zions through the use of a materially false financial statement concerning the debtor's

financial condition, upon which Zions reasonably relied and which the debtor caused to be made with the intent to deceive. Trial was held and the Court found the debt to be dischargeable.

The Valley Bank action also seeks a determination that the amount of $85,000.00 plus interest is nondischargeable on the same grounds as those alleged in the Zions case. Trial has been continued without date.

In the third action, the debtor is accused of slandering Barry Osborne and it is alleged that the resulting damages are therefore nondischargeable pursuant to Section 523(a)(6). The debtor has filed counterclaims against Osborne. Trial is scheduled for June 2, 1986.

The action filed by Joyce Horne alleges that the maintenance, support, and alimony provisions of a divorce decree are nondischargeable pursuant to Section 523(a)(5). Judgment in favor of Joyce Horne has been entered.

On November 26, 1984, hearing was held on the application for interim compensation of Roe, Fowler, & Moxley in the amount of $25,990.58 to be allowed as an administrative expense. At the hearing, counsel for the trustee objected to the application to the extent compensation was sought for representation of the debtor in the four dischargeability actions. The application was approved by

the Court in the amount requested minus $3,746.35. Approval of the remaining amount was taken under advisement and the parties were directed to submit memoranda to the Court.

ISSUE

The sole issue presented for determination is whether fees and expenses incurred in defending dischargeability actions are compensable from the bankruptcy estate as an administrative expense.

DISCUSSION

Under the former Bankruptcy Act, the Supreme Court in Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 53 S. Ct. 703, 77 L. Ed. 1327 (1933), by way of dicta, established as compensable services from the estate those which were "rendered in the aid of the administration of the estate and the carrying out of the provisions of the Act." Id. at 476. Although dicta, this characterization was considered to be the most authoritative standard to be applied when determining what legal services were compensable from the estate under the Act. 3A COLLIER ON BANKRUPTCY § 62.31, at 1598 (14th ed. 1977). Whether services rendered in dischargeability proceedings were compensable from the estate depended upon whether lower federal courts viewed the statement in Pender expansively or merely as a clarification of existing law. Prior to Pender, the prevailing attitude was that compensation would be allowed for services rendered in the

performance of the bankrupt's duties but denied for services in aid of a personal right or privilege of the bankrupt. 3A COLLIER ON BANKRUPTCY § 62.31, at 1599. After Pender, the majority of cases continued to deny compensation for fees and expenses incurred in defending the bankrupt in dischargeability proceedings. See In the Matter of Jones, 665 F.2d 60 (5th Cir. 1982); In re Rotham, 85 F.2d 51 (2nd Cir. 1936). This is the rule in the Tenth Circuit. Lewis v. Fitzgerald, 295 F.2d 877 (1961). The rationale of these cases was that the services rendered were for the benefit of the bankrupt, not for the administration of the estate.The courts which have allowed compensation have interpreted the phraseology in Pender "carrying out the provisions of the Act" to include actions taken to insure that the bankrupt obtains a "fresh start" by means of a discharge decree. See In the Matter of Gray, 7 C.B.C. 571 (Bkrtcy. N.D. Me. 1975).

Under the Bankruptcy Code, the overwhelming majority of cases has also denied the allowance of fees and expenses incurred in defending dischargeability actions. See In re Spencer, 48 B.R. 168 (Bkrtcy. E.D. N.C. 1985); In re Ezell, 45 B.R. 13 (Bkrtcy. M.D. Tenn. 1984); In re Rhoten, 44 B.R. 741, 12 B.C.D. 561, 11 C.B.C. 2d 1033, (Bkrtcy. M.D. Tenn. 1984); In re Epstien, 39 B.R. 938, 11 B.C.D. 1280, Bankr. L. Rep. (CCH) ¶ 69894, 11 C.B.C. 2d 149 (Bkrtcy. D. N.M. 1984); In re Ziverg, 35 B.R. 37 (Bkrtcy. N.D. Ga. 1983); In re Sawichi, 12 B.R. 515, 8 B.C.D. 2, Bankr. L. Rep. (CCH) ¶ 68253 (Bkrtcy. W.D. Wis. 1981). The rationale of these cases is similar to the rationale of the majority position under the former Act. Legal

services which do not relate to the debtor's administrative duties are generally not compensable from the estate. In re Spencer, 48 B.R. at 171; In re Rhoten, 44 B.R. at 743. Neither the Code nor its legislative history has attempted to change the prevailing position under the Act that compensation is limited to services rendered in assisting debtors to perform their legal duties. 2 COLLIER ON BANKRUPTCY, ¶ 330.04(3), at 330-18 (15th ed. 1985).

The allowance of attorney's fees is now governed by Section 330(a) of the Bankruptcy Code, which provides for payment of:

> (1) Reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional person employed by such trustee, professional person, or attorney as the case may be, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and
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> (2) reimbursement for actual, necessary expenses.

In the interest of clarity, this Court in In re Grist, unpublished memorandum opinion, No. 82A-01035 (Bkrtcy. D. Utah, Aug. 2, 1984), held that one change under the Code was that the benefit to the estate or "results obtained" was no longer a paramount factor in determination of allowance of attorneys' fees. Under Section 330(a), reasonable attorneys' fees are compensable from the estate for actual and necessary services.

Therefore, whether legal fees and expenses incurred in defending a debtor in dischargeability actions are compensable depends upon whether such services were necessary. Whether these kinds of services must result in a benefit to the estate is not completely irrelevant since it is a component of necessary.

This Court is of the opinion that necessary services include those that relate to the debtor's administrative responsibilities, e.g., filing the petition and schedules, appearing at the meeting of creditors, etc. (11 U.S.C. §521, Bankruptcy Rule 4002). Services rendered in defense of dischargeability proceedings have no relation to the administration of the estate and no impact, positively or negatively, upon the estate.

Furthermore, the goal of the Bankruptcy Code is to achieve an equitable distribution to unsecured creditors and to grant the honest debtor a "fresh start." In re Epstein, 39 B.R. at 941. Funds devoted to administrative expenses means less available to unsecured creditors. Id. If the debtor's honesty is legitimately called into question, financing from the estate to prove his honesty places the full burden of the debtor's legal expenses on the estate and unfairly tips the scales in favor of a fresh start over distribution of assets. Id. In consumer cases, if a dischargeability action has been brought in bad faith, Section 523(d) of the Bankruptcy Code allows

the Court to award attorneys' fees and costs against an unsuccessful creditor if the action was substantially unjustified and the award would not be unjust.

In his memorandum submitted to the Court, debtor's counsel argues that fees and expenses incurred in defending dischargeable proceedings should be payable out of the estate because former Standing Order No. 28 (now superseded by Local Rule 1(k)) of the United States Bankruptcy Court for the District of Utah requires counsel to represent debtors in "defending discharge and dischargeability actions." However, the intent of this order was to assure that debtor would not be abandoned after an attorney had taken the debtor's money and made a committment to represent the debtor. This order is not to be construed as a guarantee of payment.

CONCLUSION

For the foregoing reasons, the legal fees and expenses in the amount of $3.746.25, incurred in defending the debtor in the four dischargeability actions are not payable out of the estate as an administrative expense. These services were not necessary for the administration of the debtor's duties. Therefore, debtor's counsel will have to look to the debtor for payment.

DATED this 2 day of April, 1986.

John H. Allen
JOHN H. ALLEN
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I certify that a copy of the foregoing MEMORANDUM OPINION was mailed to the following persons:

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DATED this 2 day of April, 1986.

Debra S. Walch
Secretary to Judge Allen