UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Chapter 7
BARRY SISKIN,	:	Case No. 02-10373(SMB)
	:	
Debtor.	:	

MEMORANDUM DECISION AND ORDER OVERRULING DEBTOR'S OBJECTION TO PROFESSIONAL COMPENSATION

A P P E A R A N C E S:

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STUART M. BERNSTEIN
United States Bankruptcy Judge:

The chapter 7 trustee filed his Final Report and request for commissions in this nearly ten-year old case, (*see Trustee's Final Report*, dated May 12, 2011(ECF Doc. # 329)), and his professionals filed their final applications for compensation and reimbursement of expenses. (*See Application of Squire, Sanders & Dempsey L.L.P. Under 11 U.S.C. §§ 330 & 331 for First and Final Allowance of Fees and Reimbursement of Expenses Incurred as Substitute Counsel to*

the Chapter 7 Trustee from August 11, 2008 Through October 13, 2010 and Related Relief, dated Apr. 21, 2011 (ECF Doc. # 333); *Affidavit of Andrew W. Plotzker in Support of Application of Davis, Graber, Plotzker & Ward, LLP for Approval of First and Final Allowance of Compensation and Reimbursement of Expenses as Accountants to the Chapter 7 Trustee*, sworn to Feb. 23, 2011 (ECF Doc. # 334); *Application of Bryan Cave LLP Under 11 U.S.C. §§ 330 and 331 for First and Final Allowance of Fees and Reimbursement of Expenses Incurred as General Counsel to the Chapter 7 Trustee from January 31, 2006 Through August 12, 2008 and Related Relief*, dated Apr. 25, 2011 (ECF Doc. # 335).)

The debtor, a disbarred lawyer, filed an objection to the fee requests, (*See Declaration in Opposition*, undated and filed on Sept. 6, 2011 ("*Siskin Declaration*") (ECF Doc. # 346)), and Nancy Rodriguez, Brian Young and Thomas Wojtaszek, three former employees of the debtor, filed objections to the Final Report. (*See* ECF Doc. ## 342, 343, 344.)

For the reasons that follow, the debtor's objections are overruled, and the resolution of the objections to the Final Report will be resolved following a further hearing.

BACKGROUND

A. Introduction

The debtor, a personal injury attorney on the petition date, filed a chapter 11 case on January 28, 2002. His case highlights the problems relating to the allocation of professional fees between the estate and the debtor, and merits brief mention at the outset. Property of the estate does not include "earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6). When this case was commenced, this rule applied in individual chapter 11 cases, and hence, an individual chapter 11 debtor's post-petition

earnings were not property of the estate.[1] Thus, the fees and receivables attributable to pre-petition services are property of the estate, while the fees and receivables attributable to post-petition services are not.

The rule, easily stated, is nonetheless difficult to apply. At the time of the commencement of the chapter 11 case, a professional debtor typically has the right to fees (*i.e.*, receivables) based upon services rendered pre-petition which are eventually collected post-petition. Furthermore, the commencement of the case does not affect the debtor's right to practice his profession, and he will continue to generate new receivables and collect fees, even on pre-petition matters, that are solely attributable to post-petition services. The challenge is to determine which fees and receivables belong to the estate and which belong to the debtor free of the claims of his pre-petition creditors.

The challenge is less daunting when the professional debtor maintains adequate records that identify the services performed and expenses incurred by the debtor pre-petition and post-petition. Regrettably, the debtor in this case failed to maintain those records, or refused to produce them, and this set the stage for the extensive litigation and substantial professional fees to which he objects.

B. American Transit Insurance Company ("American Transit")

Ironically, the debtor's travails can be traced to his successful prosecution of a lawsuit. Prior to the commencement of his chapter 11 case, the debtor had obtained a judgment in the sum of $4.17 million on behalf of his client, an injured pedestrian, in a matter entitled *Woodson*

[1] The 2005 BAPCPA amendments to the Bankruptcy Code changed this rule. Under § 1115(a)(2), property of the estate includes "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted."

v. Mendon Leasing Corp. ("*Woodson*"). The driver of one of the vehicles involved in the accident defaulted, and American Transit, the driver's insurer, paid the policy limits of approximately $2.9 million. From this amount, the debtor received a fee of $1 million. In addition, the state court appointed the plaintiff as the driver's receiver to sue American Transit for additional damages based on American Transit's breach of the insurance contract.

Unfortunately for the debtor, the judgment was subsequently vacated, the trial court ordered restitution, and the Appellate Division affirmed. *Woodson*, 743 N.Y.S.2d 443 (N.Y. App. Div. 2001). The debtor's obligation to make restitution apparently drove him into bankruptcy and pitted him against American Transit, his largest creditor. American Transit became actively involved in the case, and attempted to obtain discovery relating to the debtor's financial situation.

The debtor's problems relating to the inadequate disclosure of his financial affairs began here. American Transit obtained a series of orders compelling the debtor to produce documentation or give testimony, and after the first order, the subsequent orders often sought the production of the information commanded by the earlier ones. (*See Order: (I) Directing Debtor to Appear for Examination Pursuant to Federal Rule of Bankruptcy Procedure 2004, (II) Directing the Debtor to Produce Documents, and (III) Granting Creditor Leave to Serve Interrogatories,* dated Aug. 14, 2002 (ECF Doc. # 27); *Order Compelling Discovery*, dated Oct. 4, 2002 (ECF Doc. # 52); *Order*, dated Oct. 4, 2002 (ECF Doc. # 53); *Order (A) Directing Debtor to Produce Documents and Answer Interrogatory, and (B) Scheduling Compliance Conference*, dated Dec. 13, 2002 (ECF Doc. # 90); *Order (A) Directing Debtor to Produce Documents, Execute and Affirm an Affidavit, (B) Answer Interrogatory;(C) Scheduling a Motion for Sanctions; and (D) Denying Stay Pending Appeal*, dated Jan. 29, 2003 (ECF Doc. # 97).)

The debtor's noncompliance with the Court's directions culminated in a $72,000 sanction award in favor of American Transit. (*Order (A) Imposing Monetary Discovery Sanction, (B) Directing Further Discovery Compliance, and (C) Scheduling Compliance Conference*, dated Mar. 13, 2003 (ECF Doc. # 111).) The order granting the sanction recited the history of the debtor's "delaying tactics," which it characterized as unreasonable, vexatious, undertaken in bad faith, prejudicial and unacceptable:

> [A] substantial, compensatory monetary sanction is appropriate, having determined that (1) the Debtor's various delaying tactics, and his unreasonable and vexatious multiplication of proceedings herein, were undertaken in bad faith, (2) the Court and ATIC [American Transit] were significantly prejudiced as a result of the Debtor's eight-month refusal to timely comply with his discovery obligations, (3) the sound administration of justice makes it important to deter the kind of unacceptable behavior engaged in by the Debtor, and (4) in light of the Court's repeated warnings that a sanction would be imposed, which warnings were ignored by the Debtor, lesser sanctions would not be effective.

C. The Conversion Motion

The debtor was not having any greater success prosecuting his case. On or about February 28, 2003, the United States Trustee moved, in the alternative, to convert or dismiss the case based upon the lack of progress in the case, the debtor's failure to comply with orders of the Court directing him to provide information to American Transit, his failure to file operating reports in accordance with the United States Trustee's Operating Guidelines, and his failure to pay United States Trustee quarterly fees for the fourth quarter of 2002. (*See Application of the United States Trustee to Convert this Chapter 11 Case to a Chapter 7 Case or, in the Alternative, to Dismiss this Chapter 11 Case*, dated Feb. 28, 2003 (ECF Doc. # 101).) The motion remained pending while the debtor and American Transit continued to fight.

On or about December 7, 2004, the United States of America filed its own motion, seeking to convert or dismiss the case based upon the debtor's failure to file individual tax

returns for the years 1998 through 2003, and asserted substantial claims for unpaid pre-petition and post-petition federal FICA, FUTA, and individual income taxes. (*See Declaration of Paul de la Vega*, dated Dec. 2, 2004 (ECF Doc. # 145).) The United States Trustee, whose own motion was still pending, filed a statement in support of the Government's motion. (*Statement in Further Support of the Motions to Convert this Chapter 11 Case to a Chapter 7 Case or, in the Alternative, to Dismiss this Chapter 11 Case*, dated Jan. 19, 2005 (ECF Doc. # 150).) The debtor's original bankruptcy counsel, Ochs & Goldberg, LLP, also supported the motion, (*see Statement in Response to Motion Convert [sic] Chapter 11 Case to a Chapter 7 Case or, in the Alternative, to Dismiss Chapter 11 Case*, dated Jan. 21, 2005 (ECF Doc. # 151)), as did New York State. The State's supporting affirmation asserted that in addition to the debtor's failure to file a plan and disclosure statement and confirm a plan in nearly three years, the debtor had failed to file and pay post-petition withholding taxes in the aggregate amount of approximately $38,000. (*Affidavit [of Deborah Dwyer] in Support of Motion to Convert or Dismiss*, dated Dec. 23, 2005 (ECF Doc. # 189).)

The Government withdrew its motion after the debtor filed his past due federal income tax returns, (*Notice of Withdrawal of Internal Revenue Service's Motion to Dismiss this Chapter 11 Bankruptcy or, in the Alternative, to Convert it to a Chapter 7*, dated Jan. 18, 2006 (ECF Doc. # 190)), but the United States Trustee and New York State continued to press the United States Trustee's motion. At a hearing held on January 26, 2006,[2] the State argued that the debtor still owed approximately $39,000 in connection with unpaid withholding taxes for his employees (the debtor had filed returns but not paid the tax), and had failed to file any withholding tax returns

[2] The case was originally assigned to Bankruptcy Judge Cornelius Blackshear. Following his retirement, the case was reassigned to me.

after September 2003. (Transcript of the hearing held Jan. 26, 2006 ("Tr."), at 3–4 (ECF Doc. # 212).) The United States Trustee added that the debtor was late and/or delinquent in filing his operating reports. (Tr. at 4–5.) The debtor's counsel did not dispute any of the charges. (*See* Tr. at 5–6.)

As a result, the Court granted the motion to convert at the end of the hearing. By now, the case was four years old with no progress toward a successful conclusion. The debtor had failed to pay administrative expenses (*i.e.*, taxes) causing substantial prejudice to the estate and was a "serial late filer" of tax returns and operating reports. (Tr. at 11.) In addition, there appeared to be a substantial pre-petition receivable that could be used to pay the debtor's creditors. (Tr. at 12.) The Court signed the conversion order that same day, (*Order Converting Chapter 11 Case to a Case Under Chapter 7*, dated Jan. 26, 2006 (ECF Doc. # 193)), and the United States Trustee appointed Robert Geltzer to serve as the case trustee (the "Trustee"). Geltzer retained Bryan Cave LLP ("Bryan Cave") to represent him as his counsel and Davis, Graber, Plotzker & Ward, LLP ("Davis Graber") as his accountants. Squire, Sanders & Dempsey L.L.P. ("Squire Sanders") eventually replaced Bryan Cave, and Bryan Cave, Squire Sanders and Davis Graber are the three final fee applicants along with the Trustee.

D. Post-Conversion Events

The debtor's failure to provide adequate disclosure to American Transit and the United States Trustee continued post-petition, but the conversion and appointment of the Trustee presented him with a bigger problem. Heretofore, the debtor continued to practice law from his office and collect fees without outside interference. While the conversion did not affect the debtor's ability to practice law or his relationship with his clients, he now had to account to the Trustee for his open matters and fees so that the Trustee could determine whether the fees

belonged to the estate (*i.e.*, they were earned pre-petition) or to the debtor (*i.e.*, they were earned post-petition). In particular, the New York Court of Appeals had reversed the order vacating the judgment in the *Woodson* matter, and reinstated the judgment. *Woodson*, 790 N.E.2d 1156 (N.Y. 2003). Since Woodson had sued American Transit as the driver's receiver for breach of contract, the reversal opened up the possibility that the debtor might be due a substantial pre-petition fee.

Consequently, the Trustee had to determine the portion of the fees that the debtor had collected during the prior four years that belonged to the estate, ascertain the portion of future fees allocable to services rendered prior to the petition date, and more immediately, safeguard the property of the estate, including its books and records. Toward that end, the Trustee did what every chapter 7 trustee does immediately upon his appointment; he changed the locks on the doors to the debtor's office to preserve the property and records. This exacerbated the tension between the Trustee and the debtor, who was trying to carry on a law practice from that office, and needed access to his files.

While this crisis was eventually resolved and the debtor was readmitted to the premises, he could not avoid the presence of the Trustee and the Trustee's representatives in his office who needed to review his files and question his employees. The debtor had identified more than 440 pending cases in his inventory but the status and potential value of these cases was not apparent. (*See Affirmation in Support of Trustee's Motion for Order Pursuant to 11 U.S.C. § 327 and Federal Rule of Bankruptcy Procedure 2014 Authorizing Retention of Sheldon Tashman, Esq., George Statfeld, Esq., and Anne-Marie McClean, Esq., as Evaluators to the Trustee,* dated Mar. 6, 2006, at ¶ 4 (ECF Doc. # 215).) To assist him, the Trustee hired three personal injury lawyers to evaluate the worth of the pending cases to the estate, and obtained an order authorizing him to operate the debtor's business for 90 days so that he could pay those employees he needed to

complete his work. (*See Order Pursuant to 11 U.S.C. § 721 Authorizing the Continued Operation of the Debtor's Business for Limited Period*, dated Mar. 29, 2006 (ECF Doc. # 231).)

When the debtor's cooperation was not forthcoming, the Trustee, like American Transit, had to obtain an order compelling the debtor to produce documents and provide information. (*See Order Authorizing Trustee's Examination of the Debtor Barry Siskin and Directing Production of Documents Pursuant to Bankr. R. Proc. 2004*, Mar. 27, 2006 (ECF Doc. # 229).) The parties subsequently entered into a stipulation under which the debtor agreed, *inter alia*, to provide certain case specific information relating to the debtor's inventory and file monthly accountings of the fees. (*Stipulation and Order Pertaining to Agreement Between Robert L. Geltzer as Chapter 7 Trustee and the Debtor Barry Siskin*, dated July 19, 2006 (ECF Doc. # 254).)

Despite this apparent truce, the parties continued to fight over the debtor's production of information. In time, the Trustee obtained an order to show cause regarding the debtor's continuing failure to file the monthly accountings or produce documents and information he had previously been directed to produce. (*Order to Show Cause Regarding Trustee's Motion to Compel Debtor's Compliance with Prior Orders of this Court and for Additional Relief*, dated July 16, 2009 (ECF Doc. # 10, filed in Adv. Proc. No. 08-1381).) Pending the hearing and determination of that motion, the debtor was enjoined from making any disbursements from any of his IOLA or business accounts. (*Id.* at 2.) The Trustee also obtained an order directing the debtor to grant access to his business and financial records and case files. (*Order Directing Debtor to Afford Trustee Access to Debtor's Records*, dated July 27, 2009 (ECF Doc. # 318).) In addition, the trustee commenced an adversary proceeding to deny the debtor a discharge based

upon his failure to keep and preserve records and his withholding of his books and records from the Trustee. (*See Geltzer v. Siskin*, Adv. Proc. No. 08-1381.)[3]

E. The Other Escrow Accounts

During the chapter 11 case, the debtor's operating reports had disclosed only one IOLA account maintained at HSBC Bank. As the result of discovery, the Trustee's counsel learned that the debtor had maintained two additional IOLA accounts, one at Citibank, and one at Commerce Bank, which he had not previously identified. In addition, he had co-mingled his clients' recoveries with his own fees in those accounts. (*Application of Squire, Sanders & Dempsey L.L.P. Under 11 U.S.C. §§ 330 & 331 for First and Final Allowance of Fees and Reimbursement of Expenses Incurred as Substitute Counsel to the Chapter 7 Trustee from August 11, 2008 Through October 13, 2010 and Related Relief*, dated Apr. 21, 2011, at ¶ 11 (ECF Doc. # 333).) The Trustee's counsel requested additional documents, including bank statements and canceled checks, pertaining to the newly disclosed IOLA accounts. (*Id.* at ¶ 12.) When the debtor failed to produce the requested information in a timely manner, the Trustee procured yet another order requiring production. (*Order Directing Debtor-Defendant to Produce Documents*, dated Mar. 26, 2009 (ECF Doc. # 8, filed in Adv. Proc. No. 08-1381).)

The escrow accounts ultimately proved to be the debtor's professional undoing. By order dated June 4, 2009, the debtor was suspended from the practice of law because he was unable to account for decreases in his escrow accounts or transfers between escrow accounts. *In the Matter of Barry Siskin*, 880 N.Y.S.2d 276 (N.Y. App. Div. 2009). He was subsequently disbarred by order dated October 12, 2010, as a result of his failure to seek reinstatement, his

[3] The adversary proceeding is still pending.

failure to withdraw from matters in which he was counsel of record, and his failure to respond to inquiries by the Disciplinary Committee when eleven former clients and/or new counsel sought help from the Disciplinary Committee in locating their case files. *See In the Matter of Barry S. Siskin*, 909 N.Y.S.2d 411 (N.Y. App. Div. 2010). In addition, the Appellate Division appointed an attorney to oversee the return or transfer of client files based upon the debtor's non-responsiveness to the Disciplinary Committee's inquiries.[4]

F. The Pending Applications

The Trustee's Final Report attached his application for compensation and expenses. The cap on his commission under 11 U.S.C. § 326 is $25,934.50, and he seeks this amount. The Trustee also submitted time records indicating that he spent 161.1 hours on the case, and this represented services valued at $75,923 under the "lode star" method. In other words, he is seeking approximately one-third of what he would charge a client (the Trustee is a lawyer) for the amount of time he spent on the case.

The three professionals initially sought final fees aggregating $343,485. According to the United States Trustee, they have agreed to reduce their requests by approximately 45%, and now seek the aggregate amount of $187,925.90. (*See Statement of the United States Trustee with Respect to Applications for Final Commissions, Compensation and Reimbursement of Expenses*, dated July 1, 2011 (ECF Doc. # 331).)

[4] The Trustee and the debtor had entered into a Consent Order allowing the debtor to pay settlement monies, aggregating approximately $70,000, to five clients. (*Consent Order Modifying "Freeze Provision" Contained in the Court's Prior July 16, 2009 Order to Show Cause*, dated Nov. 10, 2009 (ECF Doc. # 16, filed in Adv. Proc. No. 08-1381).) The debtor failed to pay four of the five clients, and the Trustee subsequently entered into a stipulation with the receiver pursuant to which the receiver agreed to make those payments. (*See Stipulated Order Between Trustee and Debtor's State-Court Appointed Receiver Further Modifying this Court's Prior July 16, 2009 Order to Show Cause*, dated July 20, 2011 (ECF Doc. # 20, filed in Adv. Proc. No. 08-1381).)

Finally, the Trustee and his professionals seek expenses aggregating $8,454.78

As noted, three former employees of the debtor filed objections to Final Report. Nancy Rodriguez and Brian Young contend that the Trustee failed to pay their salaries for up to six weeks, and both claim that they are owed approximately $4,000. The Final Report contains a schedule of unpaid administrative creditors, but does not list them. Thomas Wojtaszek is listed as an administrative creditor, but contends he is owed more than reflected in the Final Report. The Trustee has replied to these objections, and the Court will address them at a separate hearing.

The debtor submitted a 37 page objection to the Trustee's Final Report and his professionals' fee applications. (*See Siskin Declaration*.) The thrust of his objection, laced throughout with *ad hominem* attacks directed at the Trustee and his professionals, may be summarized as follows: the Trustee and his professionals performed unnecessary work that did not benefit the estate and was undertaken for the sole purpose of benefiting the Trustee and his professionals and destroying Siskin's practice.[5]

DISCUSSION

Bankruptcy Code § 330 authorizes a bankruptcy court to award reasonable compensation for actual, necessary services, as informed by the criteria described in § 330(a)(3) and (a)(4). Although the debtor views the activities of the Trustee and his professionals as a vendetta against him designed to generate fees for themselves, and even blames the Trustee for his disbarment, I find that the services were reasonable and necessary in light of the circumstances of the case. The essential problem in this case was the debtor's need, on the one hand, to continue his law

[5] At times, Siskin complains about perceived injuries to his clients and his office staff. The Court will ignore these arguments since Siskin lacks standing to assert them.

practice and service his clients, and the Trustee's duty, on the other hand, to marshal the assets of the estate, collecting amounts previously paid and accounts receivable to be paid in the future that pertained to pre-petition services. These competing goals placed the Trustee and the debtor in the same physical office needing the same records, and at times, the same office staff.

The natural tension created by this situation was exacerbated by the debtor's inability to maintain adequate records or willingly provide information relating to the fees earned or to be earned in connection with his inventory of cases. His poor record keeping and lack of appreciation for the duties imposed on a bankruptcy debtor contributed to the sanctions award in favor of American Transit, the failure of the chapter 11 case and its conversion to chapter 7, and the high costs associated with the Trustee's need to obtain court orders compelling the debtor to provide information that he was required to provide under the Bankruptcy Code without the need for additional orders. The Trustee's efforts benefited the estate as he managed to collect $453,055.03 with little or no help from the debtor. Furthermore, the Trustee is seeking approximately one-third of his actual time charges, and the professionals have agreed to a 45% haircut, allowing the Trustee to fully satisfy the chapter 7 administrative expenses and pay a 10% distribution to the chapter 11 claimants. Lastly, while the debtor blames the Trustee for the destruction of his law practice and his ultimate disbarment, the misappropriation or inability to account for escrowed funds rests with the debtor.

Accordingly, the debtor's objection is overruled, but this does not resolve all of the outstanding matters. As noted, three former employees have objected to the Trustee's Final Report, and the Trustee is directed to obtain a hearing date to hear those objections and give notice to the objecting parties. In addition, the Trustee's objection to the debtor's discharge is

still pending. The Trustee is also directed to contact chambers to obtain a date for a pretrial conference, and provide the debtor and his counsel with notice of that conference.

So ordered.

Dated: New York, New York
October 13, 2011

/s/ *Stuart M. Bernstein*
STUART M. BERNSTEIN
United States Bankruptcy Judge