NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Case No. 17-12378 (CGM)
CAROLE RICHARDS,	:	
	:	Chapter 13
Debtor.	:	

DECISION ON UNITED STATES TRUSTEE'S MOTION FOR REVIEW OF FEES

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

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CECELIA G. MORRIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

William K. Harrington ("U.S. Trustee"), United States Trustee, Region 2, brings this motion for review of fees under 11 U.S.C. §§ 329 and 330(a)(4)(B) and Federal Rules of Bankruptcy Procedure 2016(b) and 2017(b) (ECF No. 171) against the Debtor's attorney, M. Bradford Randolph ("Mr. Randolph"). For the reasons set forth in this decision, the Court holds that Mr. Randolph has violated 11 U.S.C. § 329 and must, among other things, disgorge all fees paid by the Debtor. The Court further finds that Mr. Randolph's actions warrant review by the

Committee on Grievances of the United States District Court for the Southern District of New York.

Jurisdiction

The Court has jurisdiction over this contested matter under 28 U.S.C. §§ 157(a) and 1334(b), the District Court's Standing Order of Reference dated July 10, 1984, and the Amended Standing Order of Reference dated January 31, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(A) ("matters concerning the administration of the estate") and (E) ("orders to turn over property of the estate").

Background

The Debtor filed this Chapter 13 case *pro se* on August 28, 2017. After a brief period in which the Debtor was represented by other counsel, Mr. Randolph filed his appearance on February 20, 2018. (ECF No. 32). Shortly after filing his appearance, the Debtor moved to object to Claim No. 3-1 (ECF No. 39), which is based upon a note and mortgage, filed on October 27, 2017 by Wells Fargo Bank, N.A. as servicer for U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-1. A notice of transfer for Claim No. 3-1 was subsequently filed showing that Specialized Loan Servicing LLC has taken over as servicer.[1] The objection to Claim No. 3-1 was unsuccessful (ECF No. 61), as was an adversary proceeding (Adv. Case No. 18-01647 (CGM)) that the Debtor filed against U.S. Bank, its servicers, and others. The Debtor also filed two appeals from the adversary proceeding. In both appeals, the District Court affirmed this Court's denial of the Debtor's motions to reargue. *Richards v. Credit Suisse First Bos.*

[1] Given the multiple servicers involved, and for consistency, the Court will refer to the creditor filing Claim No. 3-1 as "U.S. Bank."

Mortg. Sec. Corp. (In re Richards), Case Nos. 20-04412 (DLC) and 20-04468 (DLC) (S.D.N.Y. Feb. 3, 2021) (slip op. at 9). Specifically, the District Court held that this Court did not abuse its discretion in denying the motions to reargue and did not commit error in concluding that "any challenge to its ruling on the motion for summary judgment (and the related motion to expunge . . .) should have been brought through an appeal of those rulings." *Id.* (slip op. at 8). The District Court rested these conclusions on the fact that this Court was entitled to consider documents that the Debtor argued were produced late. *Id.* The District Court was explicit that the appeals "[focus] solely on certain exhibits attached to the Penno Declaration and the declaration's discussion of them." *Id.* (slip op. at 7) (footnote omitted).

Despite entering his appearance in 2018, Mr. Randolph did not file a notice of disclosure of compensation of attorney for the Debtor under Federal Rule of Bankruptcy Procedure 2016(b) until July 30, 2020. (ECF No. 164). On his Rule 2016(b) form ("2016(b) Form"), Mr. Randolph indicated that, prior to the filing the statement, he had received $117,745 in compensation, and that the Debtor owed a balance of $486,039. *Id.* Mr. Randolph has continued to charge beyond those stated fees. The 2016(b) Form did not indicate whether Mr. Randolph had received a retainer, nor have contemporaneous records been supplied. Mr. Randolph has not filed a fee application during the pendency of this case, so no fees have been approved.

The U.S. Trustee filed the instant motion on October 14, 2020. In the motion, the U.S. Trustee presented evidence that Mr. Randolph had the Debtor sign two Apartment Building Security Agreements ("Agreements"), each dated June 13, 2019, in which the Debtor purportedly granted security interests in two apartment buildings to Mr. Randolph in exchange for a loan of up to $500,000 "in the form of unpaid legal fees and costs[.]" Mr. Randolph then filed UCC-1 Financing Statements ("UCCs") regarding each apartment building with the Office

of the City Register for the New York City Department of Finance. The U.S. Trustee argued that Mr. Randolph violated his duty of disclosure and demanded excessive and unconscionable legal fees. Based on those arguments, the U.S. Trustee requested that this Court cancel whatever retention agreement might exist between the Debtor and Mr. Randolph, deny all fees, order disgorgement of any fees received, cancel the Agreements and whatever notes underlie them, and direct Mr. Randolph to release the UCCs he recorded.

Mr. Randolph filed his response on January 29, 2021.[2] (ECF No. 184). In his papers, Mr. Randolph stated that he did not have to file a 2016(b) Form sooner, that he has already filed terminations of his UCCs and presented evidence of the terminations, that he has canceled the Agreements and their underlying notes, that his fees are not excessive, and that he has "no intention to ask the Court to pay [his] fees from the moneys sent by the [D]ebtor to the [Chapter 13] [T]rustee[.]"

A hearing on the matter was held telephonically on February 4, 2021. The Court will discuss other pertinent facts as needed below.

Discussion

I. Duty of Disclosure

Under 11 U.S.C. § 329:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this

[2] The U.S Trustee and Mr. Randolph agreed to an initial adjournment of the matter to February 4, 2021. (ECF No. 174). Based upon Local Bankruptcy Rule 9006-1(a), Mr. Randolph's responsive papers were due by January 28, 2021. On that day, Mr. Randolph filed a motion to extend time to February 11, 2021 to file his response. (ECF No. 181). The Court denied that motion the same day. (ECF No. 182). Mr. Randolph then filed a motion for reconsideration of the Court's denial. (ECF No. 183). Before the Court could decide the motion for reconsideration, Mr. Randolph filed his responsive papers. Based upon this filing, which the Court accepted, the Court denied the motion to reconsider as moot. Transcript ("Tr.") (ECF No. 194) at 5.

> title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation. (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—
>
> (1) the estate, if the property transferred—
>
> (A) would have been property of the estate; or
>
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
>
> (2) the entity that made such payment.

Section 329's requirement that compensation paid or promised be disclosed is implemented by Federal Rule of Bankruptcy Procedure 2016(b), which states:

> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. ***A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed***.

(emphasis added). An attorney seeking compensation for services rendered in the bankruptcy case must seek approval from the Court under 11 U.S.C. § 330 and Rule 2016(a).

Here, Mr. Randolph argues that, as he was not retained until five months into the case, he was not required to file a 2016(b) Form, as he could not have filed it within fourteen days of the petition being filed and this Court did not order him to file one. Mr. Randolph ignores the last sentence of Rule 2016(b), which requires disclosure within fourteen days of payment or an agreement not previously disclosed. The Agreements were both executed by the Debtor on June 13, 2019, meaning that Mr. Randolph received compensation via undisclosed note(s) by that date. Mr. Randolph did not file his 2016(b) Form until over thirteen ***months*** later. Mr.

Randolph's failure to file a 2016(b) Form within fourteen days of receipt of the Agreements and their underlying note(s) constitutes a violation of Rule 2016 and, by extension, 11 U.S.C. § 329. The question then shifts to the appropriate remedy for this violation.

"Disclosure of compensation pursuant to § 329 and Rule 2016(b) is mandatory, not permissive. The Bankruptcy Code requires fee disclosure so that courts can prevent overreaching by debtors' attorneys and give interested parties the ability to evaluate the reasonableness of the fees paid. Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny." *In re Ortiz*, 496 B.R. 144, 148 (Bankr. S.D.N.Y. 2013) (brackets, citations, and internal quotation marks omitted). "Given the importance of full disclosure, failure to properly disclose a fee agreement subjects counsel to sanctions—even in the absence of other inappropriate conduct. Anything less than full disclosure leaves counsel exposed to the possibility that the entire fee may be denied, and the approach within the Second Circuit has uniformly been to decide Bankruptcy Code and Rule disclosure violations with an inflexible standard. No exceptions are to be made based upon inadvertency (slipshodness) or good faith. Many courts, perhaps the majority, punish defective disclosure by denying all compensation." *In re Gorski*, 519 B.R. 67, 73 (Bankr. S.D.N.Y. 2014) (brackets, citations, and internal quotation marks omitted); *see also In re Stewart*, 970 F.3d 1255, 1264–65 (10th Cir. 2020) (discussing tendency of courts to deny all fees for § 329(a) violations, stating that "sanctions must sting hard").

Mr. Randolph failed to timely disclose his compensation. His belated disclosure is itself uninformative. It states that he has already received $117,745. It does not say how or for what services. It lists a balance due of $486,039. Given that Mr. Randolph has never filed a fee

application during the pendency of this case, the Court is perplexed as to how these $603,784 (and likely more) in fees were earned. The Court has never had a chance to weigh in on the appropriateness or reasonableness of these fees. Mr. Randolph's responses to the Court's questions at the February 4, 2021 hearing provide little, if any, clarity as to Mr. Randolph's arrangements with the Debtor. For instance, Mr. Randolph indicated that he currently had $206,537 in his trust account from the Debtor for fees. Tr. at 22. He also indicated that he had "put the money back" in his Bank of America account (presumably his trust account), as he had previously deposited at least some of that money into a personal account and paid taxes on it. Tr. at 21. Despite being asked repeatedly at the February 4, 2021 hearing, Mr. Randolph did not indicate the total fees billed to date, despite stating that he has "a listing . . . of every single . . . day of work that [he] did, how much time it is, going all the way back" and that he is also a certified public accountant. Tr. at 27–28. When asked for clarification as to whether he had provided the Debtor with a written document formally canceling the note(s) and Agreements, Mr. Randolph stated that "I've told her that I canceled it. . . . [W]hether I gave it to her, I don't recall. . . . I'd have to look." Tr. at 16.

The way Mr. Randolph has been paid is also problematic. The Debtor's Amended Model Chapter 13 Plan filed on September 28, 2018, while unconfirmed, indicates that all attorney's fees exceeding the flat fee (when Mr. Randolph was queried as to payment of a retainer, he did not answer) are to "be paid from funds held by the [Chapter 13] Trustee as an administrative expense after application to and approval by the Court[.]" Mr. Randolph filed this plan.

Rule 2016(b) requires disclosure of payment within fourteen days. Mr. Randolph did not meet this standard. Having violated Rule 2016(b) and § 329(a), this Court must deny him all compensation for any fees incurred during the pendency of this case. Any compensation received

to date must be disgorged, including the return of all fees paid and the annulment of the notes underlying the Agreements. To the extent the Agreements have not been canceled and the UCCs terminated, they are all annulled, as well. The Court will not, as the U.S. Trustee has requested, cancel the Debtor's retention agreement with Mr. Randolph. The Debtor is free to do this herself and Mr. Randolph will not be paid for his services in this case, in any regard.

II. Ethical Issues

Despite having decided upon a remedy, the Court is troubled by Mr. Randolph's actions in this case. As noted, Mr. Randolph has never filed a fee application during the pendency of this case and the Court has never seen any retention agreement nor contemporaneous attorney records. The Court has had no basis to judge the reasonableness of his fees and whether his services were necessary under § 330. As all fees must be disallowed for violation of § 329, there will be no occasion to judge them. The Court must note that fees in excess of $600,000 are unheard of in a Chapter 13 case. The docket activity in this case and the related adversary proceeding show that Mr. Randolph has spent much of his time trying to defeat U.S. Bank's claim through the objection to claim, the adversary proceeding, and the unsuccessful appeals.

To provide some examples, the Debtor's filings in the objection to claim and the adversary proceeding show serious deficiencies. For example, in the Debtor's reply (ECF No. 52) to the opposition to the Debtor's objection to Claim No. 3-1, the Debtor responded to the servicer's assertion that the note underlying the mortgage was "indorsed to blank," stating that "[t]he word '[i]ndorsed' seems to be an incorrect spelling of the word '[e]ndorsed'. The word 'blank' seems to be an incorrect spelling of the word '[b]ank'."

A note "indorsed" or "endorsed"—both spellings are acceptable—in "blank" is a note with "[a]n indorsement that names no specific payee, thus making the instrument payable to the

bearer and negotiable by delivery only." *Blank indorsement*, Black's Law Dictionary (11th ed. 2019). Quite simply, the Debtor, through Mr. Randolph, proceeded on the assumption that U.S. Bank needed to show an endorsement to U.S. Bank to be able to enforce the note. That is not true. "[T]here is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it . . . . [It also] is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date[.]" *Bayview Loan Servicing, LLC v. Leibowitz*, 185 A.D.3d 769, 125 N.Y.S.3d 291, 292 (2020) (citation and internal quotation marks omitted).

The claims in the adversary proceeding, which were premised on the Debtor's claim of injury from the filing of Claim No. 3-1, fare no better. In the amended complaint, the Debtor alleged that the copy of the note attached to Claim No. 3-1 is different than the one presented to Mr. Randolph on August 20, 2018. (Case No. 18-01647, ECF No. 11). Claim No. 3-1 was initially filed on October 27, 2017. The note Mr. Randolph inspected showed a new allonge assigning the note, which was dated June 11, 2018. Based on that assignment, the note, which was previously endorsed in blank, again became endorsed in blank. As noted on Official Form 410, which is used to file proofs of claim, the claimant must "[f]ill in all the information about the claim ***as of the date the case was filed***." (emphasis added). This case was filed in 2017, as was Claim No. 3-1. Properly, Claim No. 3-1 does not reflect an assignment made in 2018.

The fundamental misunderstandings highlighted in these examples are troubling. Given the serious missteps throughout this case, the adversary proceedings, and the appeals, the amount of fees Mr. Randolph indicates have been paid and accrued is certainly excessive. The Court

leaves it to other authorities to decide whether they are evidence of frivolousness and an intent to delay proceedings.

Just as troubling is that Mr. Randolph's actions in having the Debtor execute the Agreements and his filing of the UCCs violate the automatic stay provisions of § 362(a)(4) (the filing of a bankruptcy petition "operates as a stay, applicable of all entities, of . . . any act to create, perfect, or enforce any lien against property of the estate"). Despite this case being almost three-and-a-half years' old, no plan has been confirmed. As of the date of the filing of the instant motion, the apartment buildings remain property of the estate.[3] *See* 11 U.S.C. § 1327(b) ("confirmation of a plan vests all of the property of the estate in the debtor"). The U.S. Trustee did not raise the issue. Mr. Randolph has not addressed it. The violation is obvious, and, even were the "no fair ground of doubt" to apply, *see Taggart v. Lorenzen*, ___ U.S. ____, 139 S. Ct. 1795, 1799 (2019) (emphasis omitted), Mr. Randolph has not met it given the clarity of the statutes cited. Mr. Randolph's entire defense to this particular matter seems to boil down to his statement that "I just did not realize, and I did not know . . . that I was making any error at all. I didn't know I was doing anything unacceptable." Tr. at 29.

These issues call into question Mr. Randolph's obligations under the New York Rules of Professional Conduct. Rule 1.5(a) prohibits an attorney from "mak[ing] and agreement for, charg[ing], or collect[ing] an excessive or illegal fee or expense." Rule 3.1 prohibits an attorney from bringing a frivolous proceeding. Rule 3.2 prohibits an attorney from "us[ing] means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." Rule 8.4(b) prohibits an attorney from "engag[ing] in illegal conduct that adversely

[3] On February 16, 2021, the Debtor filed a motion to sell one of the apartment buildings. (ECF No. 195), which the Court denied.

reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer[.]" The information presented in this matter demonstrates that Mr. Randolph may have violated these rules, along with others. To that extent, this Court will have a copy of this Decision transmitted to the appropriate disciplinary authority to commence proceedings at its discretion.

Conclusion

For the foregoing reasons, the Court grants in part the U.S. Trustee's motion. A separate order will enter.

/s/ Cecelia G. Morris

Dated: March 5, 2021
Poughkeepsie, New York

Hon. Cecelia G. Morris
Chief U.S. Bankruptcy Judge