

FILED & ENTERED

SEP 28 2012

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY bryant DEPUTY CLERK

NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

JAMES GROVE SEELY, III AND
GABRIELA PAUL,

Debtor(s).

Case No.: 2:12-bk-11522-WB

CHAPTER 11

**MEMORANDUM OF DECISION ON FINAL
FEE APPLICATION FOR COMPENSATION
AND REIMBURSEMENT OF EXPENSES OF
THE LAW OFFICES OF MICHAEL JAY
BERGER**

Date: July 19, 2012

Time: 2:00 P.M.

Place: U.S. Bankruptcy Court
Courtroom # 1375
255 E Temple Street
Los Angeles, CA 90012

Before this Court is the Final Fee Application for Compensation and Reimbursement of Expenses ("Fee Final Fee Application") of The Law Offices of Michael Jay Berger ("Debtors' Former Attorney"). On May 17, 2012, Debtors' Former Attorney filed the Final Fee Application requesting fees in the amount of \$32,980.00 and reimbursement of costs in the amount of \$1,015.82 in the Debtors' present bankruptcy case ("Present Case") covering the period of January 16, 2012 through April 9, 2012. On May 24, 2012, Debtors filed an Objection to the

1 Final Fee Application (“Debtors’ Objection”). Debtors objected largely on two grounds: (1) In
2 the Debtors’ prior bankruptcy case (“Prior Case”) (2:11-bk-30498-EC), in which Debtors’
3 Former Attorney also represented the Debtors, filed on May 11, 2011 under Chapter 11 of the
4 Bankruptcy Code, Debtors’ Former Attorney failed to properly account for fees received and
5 retained by Debtors’ Former Attorney; and (2) Debtors’ Former Attorney was negligent in his
6 representation of the Debtors in their Prior Case and in the Present Case to their detriment. On
7 May 31, 2012, Debtors’ Former Attorney filed a Reply to Debtors’ Objection. In the Reply to
8 Debtors’ Objection, Debtors’ Former Attorney admitted that in the Debtors’ Prior Case he
9 refunded the Debtors only \$11,699.91 of the \$20,000.00 retainer fee. Debtors’ Former Attorney
10 also admitted that a fee application was not filed in the Prior Case because the case had been
11 dismissed and because he did not want to incur further expense for the Debtors in the filing and
12 prosecution of a fee application.

13 On June 4, 2012, the United States Trustee (“U.S. Trustee”) filed an Opposition to the
14 Final Fee Application (“U.S. Trustee’s Opposition”). The U.S. Trustee opposed the Final Fee
15 Application on the grounds that Debtors’ Former Attorney retained compensation and disbursed
16 funds to himself in the Prior Case without Court approval of employment or approval of a fee
17 application. Additionally, the U.S. Trustee opposed the Final Fee Application on the grounds
18 that Debtors’ Former Attorney did not disclose in his employment application and disclosure of
19 compensation in the Present Case that he retained funds from the Prior Case.

20 On June 4, 2012, the Court continued the hearing to July 19, 2012 at 2:00 p.m. to allow
21 Debtors’ Former Attorney to respond to the U.S. Trustee’s Opposition. On June 29, 2012,
22 Debtors’ Former Attorney filed his Reply to the U.S. Trustee’s Opposition. Debtors’ Former
23 Attorney admitted that in the Prior Case, he retained \$5,975.89 for fees and expenses incurred
24 and refunded to the Debtors \$11,699.91 of the \$17,675.00 remaining from the retainer fee after
25 accounting for pre-petition services rendered. Debtors’ Former Attorney argued that no fee
26 application was filed in the Prior Case because it seemed a waste of Debtors’ money for an
27 application to go forward when the case was already dismissed. Debtors’ Former Attorney also
28 argued that the Prior Case was dismissed before an employment application could be approved.

1
2 The Court, having considered all the pleadings and the oral arguments at the hearings,
3 makes the following findings of fact and conclusions of law.

4 This is the Debtors second bankruptcy case. The Debtors' first bankruptcy was a chapter
5 11 case filed on May 11, 2011 by Debtors' Former Attorney bearing case number 2:11-bk-30498
6 EC. In the Prior Case, on June 15, 2011, Debtors' Former Attorney filed an employment
7 application. One day later, the U.S. Trustee and the Debtors filed a stipulation dismissing the
8 Debtors' case with a 180 day bar to refile [Dock. No. 17]. On July 6, 2011, the Court
9 dismissed the Prior Case but retained jurisdiction to consider Debtors' Former Attorney's
10 employment application and any application for fees and expenses that may be brought [Dock.
11 No. 21]. Debtors' Former Attorney did not file any application for fees.

12 On January 16, 2012, Debtors filed the Present Case. Debtors' Former Attorney
13 represented the Debtors in the Present Case from the commencement of the case through April 9,
14 2012. Debtors' Former Attorney filed an application to be employed as Debtors' counsel on
15 February 7, 2012 (Docket No. 24). An order approving the application was entered on March 9,
16 2012 (Docket No. 38). On April 9, 2012, Debtors filed a substitution of attorney, substituting
17 new counsel, Law Offices of Thomas E. Kent in place of Debtors' Former Attorney.

18 Debtors' Former Attorney did not disclose the compensation received from the Debtors
19 in the Prior Case in his Employment Application in the Present Case or in his Disclosure of
20 Compensation in the Present Case.

21 The Court is called on to determine two issues: (i) Whether Debtors' Former Attorney
22 should disgorge fees received in the Prior Case and in the Present Case due to his failure to
23 obtain approval of payment of fees in the Prior Case and the failure to disclose the receipt of
24 such fees in the Present Case; and (ii) The amount of reasonable attorneys' fees and costs that are
25 to be awarded to Debtors' Former Attorney for services provided in the Present Case. Our
26 analysis begins with the relevant provisions of the Bankruptcy Code, specifically, §§ 327, 329
27 and 330 of the Bankruptcy Code.
28

1 Section 327 provides that the trustee, or debtor in possession, with Court approval, may
2 employ one or more attorneys, accountants, appraisers, auctioneers, or other professional
3 persons, that do not hold or represent an interest adverse to the estate, and that are disinterested
4 persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
5 Under § 329, an attorney representing a debtor in a case under this title, “whether or not such
6 attorney applies for compensation under this title, shall file with the court a statement of the
7 compensation paid or agreed to be paid, if such payment or agreement was made after one year
8 before the date of the filing of the petition, for services rendered or to be rendered in
9 contemplation of or in connection with the case by such attorney, and the source of such
10 compensation.” 11 U.S.C. § 329; see also Fed.R. Bankr. P. 2016.

11 Section 330(a) (1) provides that:

12 After notice to the parties in interest and the United States Trustee and a hearing,
13 and subject to sections 326, 328, and 329, the Court may award to...a professional
14 person employed under section 327 or 1103--

15 (A) reasonable compensation for actual, necessary services rendered by
16 the trustee, examiner, ombudsman, professional person, or attorney and by any
17 paraprofessional person employed by any such person; and

18 (B) reimbursement for actual, necessary expenses.

19 11 U.S.C. § 330(a)(1).

20 It is axiomatic that professionals seeking compensation must be employed by the estate.
21 “Failure to receive court approval for the employment of a professional in accordance with § 327
22 and Rule 2014 precludes the payment of fees.” In re Shirley, 134 BR 940, 944. (9th Cir. BAP
23 1992). “There is no unjust hardship in requiring attorneys to observe the strict requirements of §
24 327 because professionals are charged with knowledge of the law.” Id. (quoting In re Downtown
25 Inv., Club III, 89 BR 59, 63-64 (9th Cir. BAP 1988). As the Court in In re Shirley provided in
26 pertinent part:

27 When there is no compliance with the Code or rules, a professional may forfeit
28 his right to compensation. The services for which compensation is requested
should have been performed pursuant to appropriate authority under the Code
and in accordance with an order of the Court...Thus an attorney...may be denied
any compensation even though valuable services were rendered in good faith.”

134 BR at 944 (quoting 2 Collier on Bankruptcy, ¶ 327.02 at 327:9-13 (15th ed. 1991)).

1 Pursuant to § 329 of the Bankruptcy Code, the statement of fees received, requires
2 debtor's counsel to disclose all fees received within one year prior to the filing of the bankruptcy
3 petition "in contemplation of" the debtor's bankruptcy. The Court may review these fees for
4 services performed when the debtor was "contemplating bankruptcy." See In re Keller Fin.
5 Servs., Inc., 248 BR 859, 878 (Bankr. M.D. Fla. 2000). This disclosure includes all fees received
6 within one year of the petition date if it can be " 'objectively determined that the services
7 rendered by the attorney have or will have an impact on the bankruptcy case.' " Id. at 879
8 (citation omitted).

9 The burden is on the fee applicant to make a "full, candid, and complete disclosure." In
10 re B.E.S. Concrete Prods., Inc., 93 B.R. 228, 237 (Bankr. E.D. Cal. 1988); see also In re Plaza
11 Hotel Corp., 111 B.R. 882, 883 (Bankr. E.D. Cal. 1990) (stating that "[t]he duty is one of
12 complete disclosure of all facts..."). A fee applicant must disclose "the precise nature of the fee
13 arrangement," and not simply identify the ultimate owner of the funds. See In re Park Helena-
14 Corp., 63 F.3d 877, 881 (9th Cir. 1995) (quoting In re Glenn Elec. Sales Corp., 99 B.R. 596, 600
15 (D. N.J. 1988)). Thus, a debtor's counsel's request for fees must be direct and comprehensive.
16 See id. " 'Coy, or incomplete disclosures ... are not sufficient.' " Id. (citation omitted).

17 When an attorney fails to satisfy the requirements of the Code or the Rules, a bankruptcy
18 court has broad discretion and the inherent authority to deny any and all compensation. See In
19 re Kisseberth, 273 F.3d 714, 721 (6th Cir. 2001). Further, the "failure to comply with the
20 disclosure rules is a sanctionable violation..." See In re Park Helena, 63 F.3d at 880. It is
21 immaterial that the failure to disclose was the result of inadvertence or negligence. In the case of
22 In re Park Helena, the Ninth Circuit stated that "[n]egligent or inadvertent omissions 'do not
23 vitiate the failure to disclose.' " 63 F.3d at 881 (citation omitted). A disclosure violation may
24 thus result in sanctions " 'regardless of actual harm to the estate' " Id. (citation omitted).

25 Here, it is evident that Debtors' Former Counsel failed to obtain approval of his
26 employment in the Prior Case and failed to file and obtain approval of a fee application for
27 payment of his fees for post-petition services in the Prior Case. Further, Debtors' Former
28 Attorney failed to disclose the receipt of such fees in the Present Case in violation of §§ 327, 329

1 and 330 of the Bankruptcy Code. Debtors' Former Attorney attempts to excuse this conduct by
2 stating that the case had been closed and he did not want to incur further expenses for the
3 Debtors and incur further delay in refunding their money to them. However, these statements do
4 not justify the failure. First, it is clear that the counsel has a duty of complete disclosure of all
5 facts. Further, the order closing the Prior Case specifically retained jurisdiction to address the
6 fees to be requested by counsel. The Court also finds a duty to disclose such fees received in the
7 Prior Case in the Debtors' Present Case. Due to the existence of the Prior Case, in order to
8 receive the benefit of the automatic stay in the present case, the Debtors were required to seek an
9 order continuing the stay in effect. The Debtors' Prior Case and counsel's prior representation
10 clearly related to the Present Case. Further, the Debtors' Former Attorney would have been well
11 aware of these facts and his prior compensation at the time of filing this case, yet failed to make
12 any disclosure of such compensation. Thus, the failure to comply with §§ 327, 329 and 330 of
13 the Bankruptcy Code in the Prior Case warrant disgorgement of fees received in such case in the
14 amount of \$5,975.89.

15 With respect to Debtors' Former Attorney's request for compensation in the Present
16 Case, the Court finds that the Debtors' Former Attorney should and will be sanctioned for failing
17 to disclose the payment of fees in the Prior Case. Such sanction will be in the form of a
18 reduction of fees to be awarded in the amount of \$8,840.00.

19 Further, Debtors' Former Attorney's fee application shall be allowed, in part, and denied,
20 in part for the reasons set forth below. The Court has examined the application for payment of
21 fees and expenses and the objections and replies submitted in connection therewith. The Court
22 has also examined the services rendered and fees requested in light of the requirement of §
23 330(a)(1) that the Court award reasonable compensation for actual and necessary services
24 rendered. The Court recognizes that this has been a contentious case with disputes arising with
25 creditors from the moment the case was filed. The Court also recognizes the apparent difficulty
26 in communication between the Debtors and their counsel as evidenced in the pleadings filed in
27 connection with this fee application. The Court finds that the Debtors' Former Attorney did
28 perform some actual and necessary services for the Debtors' estate; however certain of the fees

1 requested are excessive and not reasonable in light of the services performed. Moreover,
2 Debtors' Former Counsel has also requested fees for clerical services that will not be allowed.

3 Specifically, in the Business Operations category, the Court disallows fees in the amount
4 of \$740.00, \$240.00 of which were for clerical services. The balance of such fees was not
5 reasonable for the services provided in connection with the preparation of the February Monthly
6 Operating Report. In the category of Case Administration, the Court disallows fees of
7 \$1,705.00; of this amount \$60.00 is for clerical services related to the e-filing of documents. The
8 Court has determined that the balance of such reduced fees is not reasonable in light of the
9 services performed. In the category of Claims Administration and Objections, the Court
10 disallows \$375.00 in fees for clerical services performed. In the category of Professional
11 Services, the Court disallows \$120.00 for clerical services performed.

12 Additionally, the Relief From Stay Proceedings Category requires significant reductions.
13 The Court finds that fees incurred with respect to the Motion to Continue the Stay were
14 excessive and not reasonable. The time spent in drafting the initial motion, the application for
15 order shortening time, the reply and the order were all excessive. The time spent drafting the
16 objection to the other motions for relief from the stay was also excessive. Additionally, this
17 category included fees for clerical services such as proofs of service and e-filing in the amount of
18 \$140.00, which will be disallowed. The Court therefore, disallows a total of \$6,925.00 of fees in
19 the Relief From Stay Proceedings Category.

20 Thus, the total amount of fees to be allowed is \$23,115.00, which amount is reduced by
21 \$8,840.00 as sanctions for the failure to disclose the compensation received in the Prior Case.
22 This leaves an allowed amount of fees of \$14,275.00 and costs will be allowed as requested in
23 full.

24 //

25 //

26 //

27 //

28 //

The Court will enter an order consistent with this Memorandum of Decision.

Julia W. Brand

DATED: September 28, 2012

United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the Court that a judgment or order entitled (specify): **MEMORANDUM OF DECISION RE: APPLICATION FOR FINAL FEES** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

1. **SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** - Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the Court via NEF and hyperlink to the judgment or order. As of 09/28/12, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

Michael Jay Berger michael.berger@bankruptcypower.com, jennifer.phan@bankruptcypower.com
Thomas Kent tekesq@gmail.com, tkent@tkentlaw.com, kshin@tkentlaw.com
Alvin Mar alvin.mar@usdoj.gov
Ron Maroko ron.maroko@usdoj.gov
Susan Montgomery susan@simontgomerylaw.com
United States Trustee ustpreion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

2. **SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Michael Jay Berger, 9454 Wilshire Blvd. 6th floor, Beverly Hills, CA 90212
James Grove Seely, III and Gabriela Paul (Debtors), 1500 Reeves Street, Los Angeles, CA 90035

☐ Service information continued on attached page

3. **TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

☐ Service information continued on attached page