

DOCKET NUMBER: 99-11575

ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: William B. Toomey, Robbie D. Toomey, Stephen K. Orso

CHAPTER: 7

ATTORNEYS: S. K. Orso

DATE: 2/16/00

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

WILLIAM B. TOOMEY
ROBBIE D. TOOMEY

Case No. 99-11575-MAM-7

Debtors.

**ORDER REQUIRING STEPHEN K. ORSO, ATTORNEY
FOR DEBTORS, TO TURN OVER FUNDS TO DEBTORS**

This case is before the Court on the Court's own show cause order requiring Stephen K. Orso to appear and show cause why Mr. Orso should not be required to disgorge some or all of the fees he collected from debtors for this case. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is ordering Mr. Orso to turn over \$150 of the fee he received from the debtors to them.

FACTS

The Court stated the facts presented to the Court at the trial of the discharge case in the order to show cause dated February 2, 2000, and the order and judgment granting discharge to debtors dated February 2, 2000, as well. They are incorporated by reference. At the hearing on the order to show cause, Mr. Orso appeared and offered further evidence. He produced the "Instructions for Filling Out the Bankruptcy Questionnaire" which the Toomeys had completed. It stated that the debtors had a 1951 Ford truck. It also stated that the truck was collateral for a loan from First National Bank of Atmore. Mr. Orso listed the truck on the debtors' Schedules B and C. Debtors must list the items of personal property which they own and wish to exempt on

these schedules. He did not list the pickup truck on Schedule D as collateral for the loan of First National Bank of Atmore. Consequently, at the first meeting of creditors, the Bankruptcy Administrator did not question the Toomeys about the truck at all. If the truck had been listed on Schedule D, the Bankruptcy Administrator would have asked the Toomeys whether they still owned the truck. Mr. Orso came to the show cause hearing with evidence that he had filed that day an amendment to the schedules of the Toomeys that deleted the truck from Schedule B and Schedule C (the Exempt Asset Schedule).

Mr. Orso had told the Court at the trial of the discharge case, in argument, that the debtors had said that the truck was sold prebankruptcy at the first meeting of creditors. He had also stated that his failure to list the asset on the proper schedules (or not list it) was a common error. Mr. Orso believed at the time of the trial that what had happened was that the asset was listed on Schedule D and not on Schedule B or C.

LAW

A debtor's counsel must provide a debtor with reasonably competent legal services to earn the fees he or she is paid in handling a bankruptcy case. *See, e.g., Hale v. United States Trustee (In re Basham)*, 208 B.R. 926 (9th Cir. BAP 1997); *In re Morrison*, 231 B.R. 754 (Bankr. W.D. Mo. 1999). In this case, Mr. Orso charged the debtors \$575 for his services. He did not provide \$575 of value for their money. The Court has authority to review this fee pursuant to §§ 105 and 329(b) of the Bankruptcy Code.

Mr. Orso should be able to provide to the Court correctly filled out bankruptcy schedules for debtors he represents. Mr. Orso's questionnaire may be adequate. However, he must use it appropriately when completing schedules. In this case, the questionnaire completed by the debtors reveals that they listed that they owned a 1951 truck and that it was security for a loan

from First National Bank of Atmore. The truck information was transferred to Schedules B and C of the Toomeys' petition, but not to Schedule D. If the truck had been listed on Schedule D, the Bankruptcy Administrator would have found out through his routine questions that the truck had been sold before bankruptcy. The Toomeys would then have amended their schedules very early in this case.

Mr. Orso argues that the incorrect listing of the truck caused no extra work and is a minimal or insubstantial error. The relief from stay motion of First National would have been necessary in any event to obtain possession of the trailer which was also security for the loan. Since the Bank's collateral was sold prepetition, the discharge suit would have been filed anyway. When the Bank found out about the fact that the collateral was missing is irrelevant. He is correct.

Mr. Orso also states that the Bank did not attend the first meeting of creditors at which it could have found out about the missing collateral and the Bank did not file a 2004 Examination request for the information either. He is correct.

Mr. Orso also argues that attorneys are going to make errors on schedules; that it is hard to do all of the work required for the fees normally charged in these cases; and he is not the only attorney who makes these errors. He is correct.

Mr. Orso's arguments do not persuade this Court that no reduction in fees should be ordered in this case. First, the debtors provided information to Mr. Orso in the questionnaire which should have required him to place the information about the truck in Schedule D. This listing would have revealed the sale of the truck early in the case. Schedules are required to be correct. The signature of the debtors under penalty of perjury on the schedules makes that clear. The bankruptcy system only works if the information debtors give the court and creditors is true

and complete. Schedules must be amended when they are incorrect, particularly when the error is substantive. Second, whether a trial on the discharge objection would have occurred or not if the truck's sale had been disclosed misses the point. The type of trial (discharge or dischargeability) may have been affected, the issues tried may have been affected, and the length of trial should have been less. The debtors were required to be present in court for a trial at a time when they could have been working. Failure to give creditors true, complete facts at the beginning of a case leads creditors to mistrust information given later. This requires more testimony under oath and more witnesses. Third, whether a creditor could have helped itself and found out the facts in another way also misses the point. There is certain information debtors are required to provide correctly to creditors in their schedules. It was not provided in this case. That is a debtor problem, and creditors should not have to seek this information in a more expensive or time consuming manner.

Mr. Orso should not have listed the asset on any schedules. When the debtors listed it on their questionnaire, their error should have been caught in a meeting with counsel before the petition was filed. If not, the asset would have been listed as security for the Bank's debt, and would have been discovered to be sold by the Bankruptcy Administrator at the first meeting of creditors. At that point an amendment to the schedules would have been done. In this case, even when counsel knew that the truck did not exist, no amendment to the schedules was done until this Court determined that counsel's fee should likely be reduced. All of these scenarios required earlier action by Mr. Orso. No action was taken.

The evidence provided by Mr. Orso mitigated somewhat the situation the Court believed existed after the trial of the discharge objection. Accordingly, instead of requiring Mr. Orso to repay the entire fee, only about 1/4 of the fee, or \$150, must be returned. Mr. Orso's handling of

the adversary trial, his preparation of the bankruptcy papers as to other assets and debts, his handling of other matters during the bankruptcy were adequate.

The Court is ordering that the money be returned to the debtors and not to the trustee. The sum is too small for administration by the trustee. Also, the debtors have been inconvenienced by the time they had to spend in trial of the discharge case and in dealing with the relief from stay issues as they related to the nonexistent truck.

THEREFORE IT IS ORDERED that Stephen K. Orso shall return to the debtors the sum of One Hundred Fifty and no/100ths Dollars (\$150.00) by March 31, 2000.

Dated: February 16, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE