

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
ARLYNE N. JACOBSEN,) CASE NO. 02-62018 HCD
) CHAPTER 13
DEBTOR.)

ORDER

At South Bend, Indiana, on December 11, 2003.

Before the court is the “First Application of Lucas, Holcomb & Medrea for Compensation through March 4, 2003,” submitted by Stephen R. Place, Esq., of Lucas, Holcomb & Medrea, attorneys for the debtor Arlyne N. Jacobsen. The Application was filed on September 25, 2003, along with the “Request to Late File Application for Payment of Attorney Fees and Costs.” Notice of the proposed Application was given to creditors; no objection was filed. The court, which has the duty to inquire independently into fees and expenses of professionals even when no objections are filed, now considers whether the Application should be approved. *See In re Environmental Waste Control*, 122 B.R. 341, 345 (Bankr. N.D. Ind. 1990).

Facts

Attorney Stephen R. Place began serving as bankruptcy counsel for debtor Arlyne N. Jacobsen on May 1, 2002. Through her attorney, the debtor filed her petition and schedules and, later, amended schedules. Although the debtor settled various objections to plan confirmation, motions to dismiss, and motions for stay relief, she failed to carry out her settlement agreements. Her chapter 13 plan never was amended or confirmed, and the case was dismissed on August 4, 2003.¹ *See* R. 89.

¹The court granted the motion to dismiss filed by the Internal Revenue Service (“IRS”) on December 3, 2002. The IRS had stated that the debtor had incurred employment tax liability for the second and third quarters of 2002 and had neither filed her third quarter FICA tax return nor made deposits for that quarter. On June 17, 2003, the debtor and the IRS filed a Proposed Agreed Entry Resolving the Motion to Dismiss Filed by the United States of America, and the court granted the Proposed Agreed Entry. *See* R. 85. Under the terms
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The court dismissed the debtor's chapter 13 case pursuant to 11 U.S.C. § 109(g)(1) and ordered the Trustee to submit his final report and account so that the case could be closed. The court's Order specified: "Any entity wishing to file a request for payment of an administrative expense under 11 U.S.C. § 503(b) shall file the request within 14 days from the date of this order." *See* R. 89. On September 25, 2003, 52 rather than 14 days from the date of the court's Order, debtor's counsel filed his "Request to Late File Application for Payment of Attorney Fees and Costs." *See* R. 94. He filed the Application for compensation along with the Request. In it, he sought \$11,121.75 in attorney's fees for the period from February 13, 2002, through March 4, 2003. He stated that he expended 63.55 hours on the case and that his hourly rate is \$175. He also stated that he received a retainer of \$1,985.00.²

¹(...continued)

of the Agreed Entry, if the debtor failed to deposit the required sums – "\$41,449.00 plus a sum sufficient to pay the tax due for the first quarter FICA taxes for 2003" – by June 6, 2003, the IRS would file a verified statement of default and request dismissal or conversion of the matter without further notice and hearing. The debtor failed to deposit in her attorney's trust account the required amounts. On July 10, 2003, the IRS submitted its "Verified Statement of Default of Agreed Entry," declaring that the debtor was in default. The court therefore granted the IRS's motion and dismissed the case.

² Counsel's Disclosure of Compensation of Attorney for Debtor, filed 3½ months after the petition was filed, indicated that Attorney Stephen R. Place agreed to accept "\$2,065 retainer against hourly rate of \$185.00 per hour." R. 17. He stated that he had received \$2,065 and that he had "agreed to share the above-disclosed compensation with a person or persons who are not members or associates of my law firm." *Id.* Without providing a copy of the agreement with the person sharing in the compensation, Place simply attached the statement: "Attorney William Jonelis, 9337 Calumet Avenue, Munster, Indiana is acting as additional counsel at an hourly rate of \$175.00 per hour and has been paid a retainer of \$750.00." *Id.* at 2.

The court notes that (1) counsel Place failed to file the disclosure statement within 15 days after the commencement of the bankruptcy case, as required by Bankruptcy Rule 2016(b); (2) counsel Place failed to file his agreement with counsel Jonelis; (3) fee-splitting arrangements by attorneys in a bankruptcy case generally violate 11 U.S.C. §§ 504 and 327; and (4) counsel Jonelis failed to file with the court an application for approval of employment (§ 327); a showing that he was a disinterested person (§ 327); or a statement concerning compensation for his services on behalf of the debtor (§ 329). Attorneys may be compensated for their services under § 330 only if they have received prior court approval. Fed. R. Bankr. P. 2014. Because the court does not reach the merits concerning the services attorneys Place and Jonelis rendered, however, the court makes no finding or conclusion concerning payment for those services.

Discussion

Debtor's counsel presents a compensation claim as an administrative expense. As the claimant, he bears the burden of proving his entitlement to priority treatment by a preponderance of the evidence. *See Carlson v. United States (In re Carlson)*, 126 F.3d 915, 921 (7th Cir. 1997); *In re Indiana Walnut Prods., Inc.*, 136 B.R. 522, 523 (Bankr. N.D. Ind. 1991). However, the first consideration for this court is whether the court, in its discretion, should grant the request by debtor's counsel to file an untimely fee application. The applicant filed both the Application and the Request for late filing at the same time, 52 (instead of 14) days after the date of the court's Order setting the bar date for the filing of administrative claims. Although Federal Rule of Bankruptcy Procedure 9006(b) requires the filing of a motion when requesting relief after a deadline has passed, this court believes that there is no prejudice to the parties in construing that requirement liberally. It therefore will treat the debtor's counsel's Request as a motion to file his Application out of time.

Section 503(a) of the Bankruptcy Code allows an entity to file a request for payment of an administrative expense, such as compensation for an attorney's services, "tardily . . . if permitted by the court for cause." 11 U.S.C. § 503(a). Federal Rule of Bankruptcy Procedure 9006(b) permits the court to extend a deadline by enlarging the time period in which an act can be done – if the untimely party shows the cause for the untimeliness. The rule states that, "if the request therefor is made before the expiration of the period originally prescribed," the court may order a longer time period with or without a motion or notice. In this case, however, the request for enlargement came 38 days after the time period had expired. The bankruptcy rule states that, in such cases, "the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." Fed. R. Bankr. P. 9006(b) (emphasis added). As the Bankruptcy Appellate Panel of the Eighth Circuit summarized, "if the enlargement is requested *after* the expiration of the specified period, the rule requires not only the showing of cause, but also requires that a motion be made with a showing of excusable neglect." *Agate*

Holdings, Inc. v. Ceresota Mill Ltd. P'ship (In re Ceresota Mill Ltd. P'ship), 211 B.R. 315, 318 (B.A.P. 8th Cir. 1997).

The Supreme Court has made clear that “the determination [of whether a party’s neglect of a deadline is excusable] is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397, 113 S. Ct. 1489, 1498, (1993). Courts have applied the “excusable neglect” standard to the filing of late administrative claims under § 503(a). *See, e.g., In re Anderson*, 253 B.R. 14, 18-19 (Bankr. E.D. Mich. 2000); *In re Gurley*, 235 B.R. 626, 631-32 (Bankr. W.D. Tenn. 1999); *see also In re Ceresota Mill Ltd. P'ship*, 211 B.R. at 318 (untimely objection to fee application reviewed under “cause” and “excusable neglect” standards).

The Seventh Circuit, in describing the equitable and discretionary nature of a judge’s excusable neglect determination, advised that a judge find a careful balance between the standards expected of attorneys and the importance of preserving the integrity of filing deadlines and court rules. *See Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 362-63 (7th Cir. 1997). It reminded attorneys that they are expected to comply with a court’s filing deadlines and local rules and to perform their responsibilities with vigilance and caution. It advised courts to give careful consideration to all the relevant circumstances surrounding the attorney’s omission in a particular case and to weigh the equitable factors set forth in *Pioneer*. *See id.*; *see also In re Singson*, 41 F.3d 316, 319 (7th Cir. 1994) (noting that a party may demonstrate excusable neglect without identifying any “extraordinary” circumstance). This court, heeding such advice, now considers whether the neglect of debtor’s counsel was excusable.

Debtor’s counsel’s Request to file his fee Application late was supported by the following statements:

1. This Court entered an Order dismissing Debtor's Petition of August 4, 2003 and granting ten (10) [sic] days for filing of Application for Administrative Expenses.
2. That counsel was advised by Debtor that she intended to refile her Petition.
3. That counsel does not believe that Debtor intends to refile her Petition at this time.
4. That the Chapter 13 Trustee only holds \$5,000.00 for distribution.
5. That the Chapter 13 Trustee has no objection to counsel's request for permission to late file its Application for Attorney Fees and Costs.

R. 94. In the view of this court, these statements do not offer an explanation for the tardy filing. Statements 1 and 4 simply present information concerning the language of the court's Order and the monetary amounts held by the Trustee. Statement 5 informs the court that the Trustee would allow a late filing. However, Rule 9006(b) establishes that the court, not the Trustee, has discretion to permit a late filing.

The only part of the Request to suggest a reason for the tardiness in filing is found in Statements 2 and 3, which inform the court that the debtor advised counsel that she intended to refile her petition and that counsel did not believe her. This explanation gives no justification for the attorney's failure to file a timely fee application. Indeed, the court finds no link between the debtor's intention to refile and counsel's filing of a compensation claim. As counsel is well aware, the debtor's chapter 13 case was dismissed pursuant to 11 U.S.C. § 109(g)(1).³ The debtor therefore is ineligible to file for bankruptcy relief in another case for 180 days. *See In re Nosker*, 267 B.R. 555, 563 (Bankr. S.D. Ohio 2001); *In re King*, 126 B.R. 777, 781 (Bankr. N.D. Ill. 1991); *see also In re Earl*, 140 B.R. 728, 741 (Bankr. N.D. Ind. 1992) (reviewing a court's statutory authority to enjoin future filings under §§ 109(g), 105, and 349(a)). It was the duty of counsel to advise the debtor that

³ Section 109(g)(1) states, in pertinent part:

. . . [No] individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if —

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case.

11 U.S.C. § 109(g)(1).

she was barred from filing a case under any chapter of the Bankruptcy Code for a period of 180 days from the date of dismissal. The debtor's intention to file another petition has no bearing on the closing of this dismissed case and the filing of requests for payment of administrative expenses. The Request therefore does not explain counsel's neglect or offer a cause or excuse for counsel's failure to file the fee application in a timely fashion. The court finds that such an explanation cannot constitute a showing of "cause" or "excusable neglect," as required by Rule 9006(b).

Moreover, the court can find no other justification for counsel's belated filing. The court's dismissal Order of August 4, 2003, gave administrative expense claimants a specified time period, 14 days from the date of the court's Order, in which to file their claims. The 14-day time period is the generally established period for the filing claims for attorney fees. *See* Fed. R. Civ. P. 54(d)(2)(B). There was no ambiguity in the notification of the court's deadline. The Order also made clear that the chapter 13 case needed to be concluded as expediently as possible. The court notes that debtor's counsel did not claim that the delay in his filing was caused by circumstances outside his reasonable control or that he acted in good faith. Even though the Trustee did not object to the late filing of the fee application, the court finds that counsel's delay is neither excusable nor credible. *See In re Anderson*, 253 B.R. at 19 (concluding that the attorney's personnel hiring difficulties did not constitute excusable neglect).

The court finds, in conclusion, that debtor's counsel has failed to make any showing of "cause" or "excusable neglect" for debtor's counsel's tardy filing. The court therefore denies the "Request to Late File Application for Payment of Attorney Fees and Costs" filed by debtor's counsel, without reaching the merits of its tardy Application.⁴

⁴ Although it is not relevant to the court's determination to deny the Request for late filing of the debtor's counsel's fee application, the court notes parenthetically that the application for compensation was replete with inadequacies and errors, among which are (1) the billing of multiple services together, without stating the specific amount of time spent on each service; (2) the billing of travel time at full instead of one-half of the professional's normal hourly rate; (3) the billing of nonreimbursable support staff services, such as faxing, at attorney fee rates; (4) the billing of meetings with co-counsel not approved by the court; (5) disbursements to
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Conclusion

For the reasons set forth in this Order, the court finds that the “First Application of Lucas, Holcomb & Medrea For Compensation Through March 4, 2003,” filed by Stephen R. Place, Esq., as counsel for Arlyne N. Jacobsen, was untimely filed. It also finds that the “Request to Late File Application for Payment of Attorney Fees and Costs,” filed by debtor’s counsel, has failed to plead or to prove “cause” or “excusable neglect” for the untimely filing of counsel’s fee Application, as required under 11 U.S.C. § 327 and Rule 9006(b) of the Federal Rules of Bankruptcy Procedure. The court therefore denies the Request to Late File Application and disallows the First Application of debtor’s counsel as an administrative expense of the estate.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

⁴(...continued)

co-counsel not approved by the court; and (6) unexplained disbursements for court costs and payment to Chicago Title.