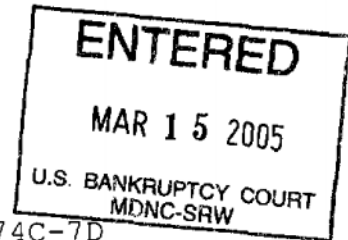


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:

Robert Lazarus,

Debtor.

)
)
)
)
)
)

Case No. 05-80274C-7D

MEMORANDUM OPINION

This case came before the court on March 10, 2005, pursuant to a show cause order directed to Nancy Couch issued on February 8, 2005, at the request of the Bankruptcy Administrator. Robyn C. Whitman appeared on behalf of the Bankruptcy Administrator and Nancy Couch appeared pro se.

PROCEDURAL BACKGROUND

On January 28, 2005, the Debtor filed a Chapter 7 petition, schedules A through J and a statement of financial affairs which contained the signature of the Debtor and the signature of Nancy Couch who signed as petition preparer. The motion that initiated this proceeding was filed by the Bankruptcy Administrator on February 2, 2005, and requests that the court order a hearing regarding the activities and fee of Nancy Couch as a petition preparer in this case. In response to the Bankruptcy Administrator's motion, an order was entered on February 8, 2005, directing that Nancy Couch appear before the court for a determination of whether she had violated any of the provisions of § 110 of the Bankruptcy Code, whether she had engaged in fraudulent, unfair or deceptive acts within the meaning of

§ 110(I), including the unauthorized practice of law, and whether any fee or compensation received by her was excessive. A hearing was held on March 10, 2005, pursuant to the show cause order and the evidence of the parties-in-interest was received. The following are the findings and conclusions from the hearing.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) which this court may hear and determine except for any matters that should be certified to the district court pursuant to 11 U.S.C. § 110(i)(1).

FACTS

For several months prior to January of 2005, the Debtor was unemployed and experiencing financial difficulties. During that time, he was receiving hypnotherapy from Nancy Couch, a hypnotherapist located in Durham, North Carolina. During the course of his therapy, the Debtor disclosed his financial situation to Ms. Couch and discussed a possible bankruptcy filing with her. These discussions led to an arrangement under which the Debtor agreed to pay Ms. Couch to prepare the documents required in order for the Debtor to file for bankruptcy. The Debtor then furnished

Ms. Couch with a copy of his bills. Ms. Couch obtained a set of official bankruptcy forms from the bankruptcy court and, after reviewing the forms with the Debtor and discussing with him the information called for in the forms, Ms. Couch filled out the forms by typing information onto the blank forms. The documents prepared by Ms. Couch consisted of a petition, schedules and statement of financial affairs. Ms. Couch then had the Debtor sign the forms and furnished him with the original and a copy of the forms. The Debtor then went to the bankruptcy court in Greensboro where he paid his filing fee and filed this Chapter 7 case. The Debtor paid Ms. Couch the sum of \$565.00 for the preparation of the bankruptcy documents prepared by her.

DISCUSSION

The issues to be resolved in this proceeding arise under § 110 of the Bankruptcy Code which regulates the conduct of bankruptcy petition preparers. Congress enacted § 110 to "address the growing problem of bankruptcy [petition] preparers who abuse the system in the course of preparing documents for debtors to file." 2 COLLIER ON BANKRUPTCY, ¶ 110.LH (15th ed. rev. 2003) (citing S.Rep. No. 103-168, 103rd Cong., 1st Sess 51 (1993)). The enactment of § 110 was intended as a consumer protection measure to protect individuals from unfair or deceptive conduct on the part of petition preparers not employed by or supervised by an attorney. Section 110 requires petition preparers to take certain actions and proscribes other

conduct on their part, while adding sanctions for noncompliance and mechanisms for court oversight.

A. Is Ms. Couch subject to the provisions of § 110?

Section 110(a)(1) defines a petition preparer as "a person, other than an attorney or an employee of an attorney, who prepares for compensation a document for filing." Under Section 110(a)(2), a document for filing means "a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title." It is undisputed that the Debtor paid Nancy Couch to have the schedules and statement of financial affairs that were filed in his case prepared and that Ms. Couch typed the information contained on the petition, schedules and statement of financial affairs that were filed in his case. These facts establish that Ms. Couch "prepared" documents for filing in a bankruptcy case and that she, therefore, is a "bankruptcy petition preparer" for purposes of § 110 since she is neither an attorney nor an employee of an attorney. This conclusion is confirmed by Ms. Couch's certification, which is contained in the portion of the schedules where she signed, stating that "I am a petition preparer as defined in 11 U.S.C. § 110 [and] I prepared this document for compensation . . ."

According to the undisputed evidence, the amount of the compensation that Ms. Couch received from the Debtor was \$565.00.

Whether this amount of compensation is appropriate and may be retained by Ms. Couch is controlled by subparagraph (h) of § 110. Section 110(h)(2) provides that the court "shall disallow and order the immediate turnover to the bankruptcy trustee of any fee referred to in paragraph (1) found to be in excess of the value of services rendered for the documents prepared." Under § 110(h)(3), the debtor, the trustee, a creditor or the Bankruptcy Administrator "may file a motion for an order under paragraph (2)." The motion for show cause order filed by the Bankruptcy Administrator in this case is such a motion and the court therefore is called upon to make a determination as to whether the \$565.00 charged by Ms. Couch in this case exceeds the value of the services provided by her as petition preparer.

B. Did Ms. Couch Charge a Fee in Excess
of the Reasonable Value of the Services
Rendered?

At the outset, it should be noted that the services for which a petition preparer may be compensated are limited to authorized services which, in fact, are performed by the petition preparer. In order for services to be authorized and hence compensable, the services must be services which the petition preparer can lawfully perform. An important consideration in determining whether the services that were performed by a petition preparer were lawful and authorized is whether the petition preparer has engaged in activities that constitute the unauthorized practice of law. As to the activities or services that do constitute the unauthorized

practice of law, no compensation should or will be awarded.

In determining whether the petition preparer is seeking compensation for activities or services that constitute the unauthorized practice of law, it is appropriate for the court to look to applicable state law regarding the unauthorized practice of law. See In re Boettcher, 262 B.R. 94, 96 (Bankr. N.D. Cal. 2001) ("While a federal court has inherent authority to regulate the conduct of all who practice in it, state law is properly considered in determining whether the unauthorized practice of law has occurred in a bankruptcy court."); In re Bachman, 113 B.R. 769, 772-74 (Bankr. S.D. Fla. 1990). This is consistent with § 110(k) which provides that "[n]othing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law." Since this case is pending in a bankruptcy court sitting in North Carolina, the court in the present case may consider applicable North Carolina law pertaining to the unauthorized practice of law in deciding what constitutes reasonable compensation for Ms. Couch.¹

¹The court's consideration of State law pertaining to the unauthorized practice of law is not limited to determinations regarding compensation. It also is appropriate for the court to consider whether a petition preparer has given legal advice or otherwise engaged in the unauthorized practice of law in determining whether there has been a "fraudulent, unfair, or deceptive act" on the part of the petition preparer in deciding whether to make a certification to the district court pursuant to § 110(i) or whether to grant injunctive relief pursuant to § 110(j).

In North Carolina only licensed attorneys may engage in the practice of law. N.C.G.S. § 84-4 prohibits any person who is not admitted and licensed by the North Carolina State Bar as an attorney-at-law from engaging in the practice of law in North Carolina. Under N.C.G.S. § 84-2.1, the practice of law is defined to include "performing any legal service for any other person . . . with or without compensation, specifically including . . . the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies" Although the North Carolina courts apparently have not addressed the issue, most courts have concluded that although a non-attorney may not create a document for another person or advise on how the document should be prepared, merely typing or "scrivening" a petition or legal document for another person does not constitute the practice of law. This distinction has been made in dealing with petition preparers under § 110. For example, in In re Landry, 268 B.R. 301, 304 (Bankr. M.D. Fla. 2001), the court stated as follows:

The type of compensable services that a bankruptcy petition preparer can render are extremely limited. Petition preparers, who by definition are not attorneys, cannot give legal advice or otherwise engage in the unauthorized practice of law Clearly, as recognized by the District Court, a bankruptcy petition preparer cannot assist the debtor in completing forms, provide legal advice that would assist a prospective debtor in making determinations as to which type of bankruptcy to file or which exemptions to take, or direct clients to particular legal

publications or specific pages so that they can attempt to find legal answers on their own. The very act of directing a prospective debtor to review a particular section of a legal book in and of itself constitutes legal advice. By focusing on one answer and excluding others, the bankruptcy petition preparer steps over the line. As stated by the District Court, "Legal advice is legal advice, whether it comes directly from the petition preparer or indirectly via, for example, a bankruptcy treatise being recited by that preparer."

In accord, In re Schneider, 271 B.R. 761, 764 (Bankr. D. Vt. 2002) ("[T]he BPP moves at his or her peril when performing any service beyond that of simply typing the information provided by a prospective debtor on approved bankruptcy forms."); In re Guttierrez, 248 B.R. 287, 297 (Bankr. W.D. Tex. 2000) ("Section 110 itself proscribes virtually all conduct falling into the category of guidance or advice, effectively restricting 'petition preparers' to rendering only 'scrivening/typing' services. Anything else-be it suggesting bankruptcy as an available remedy for a debtor's financial problems, explaining how to fill out the schedules, or answering questions about exemptions or whether a claim is or is not secured will invariably contravene either state laws proscribing the unauthorized practice of law or other more specific provisions of § 110."). Further, the fact that individuals have the right to represent themselves in a bankruptcy case and chose to do so does not result in an expansion of the type of services which can be provided by an unlicensed petition preparer:

Each citizen has the right to represent himself or herself. Pro se debtors may succeed or fail by their own lights. Debtors who seek expertise or guidance, if they are to have a fair chance at succeeding, must be guided by informed counselors for whom effective standards of practice and ethics are in place. A petition preparer may be the do-it-yourself debtor's scrivener-nothing more.

In re Moore, 232 B.R. 1, 15 (Bankr. D. Me. 1999).

To summarize, a bankruptcy petition preparer can meet with a prospective debtor, provide blank bankruptcy forms for the debtor to complete without any assistance from the petition preparer, type the information on the applicable bankruptcy forms without change or alteration, copy the documents prepared for the prospective debtor and deliver the original and at least one copy of the documents to the prospective debtor. To the extent that the petition preparer performs these scrivener-type services, the petition preparer is entitled to receive reasonable compensation. See Landry, 268 B.R. at 304 ("a bankruptcy petition preparer can expect to receive compensation only for secretarial-type services").

In a proceeding under § 110, the burden of proving the reasonableness of a fee collected by a bankruptcy petition preparer rests upon the petition preparer. See In re Froehlich, 23 Fed. Appx. 572, 574, 2001 WL 1530594 (7th Cir. 2001) (petition preparer, as the party seeking fees, "has the burden of establishing that he or she is entitled to them once a question regarding their reasonableness has been raised."); In re Haney, 284 B.R. 841, 850-

51 (Bankr. N.D. Ohio 2002); In re Doser, 281 B.R. 292, 313 (Bankr. D. Idaho 2002); In re Bush, 275 B.R. 69, 85-86 (Bankr. D. Idaho 2002). In the present case, the Bankruptcy Administrator has shown that Ms. Couch acted as a petition preparer and that she collected a fee from the Debtor and has raised a question regarding the reasonableness of the fee. The ultimate burden of proof regarding the reasonableness of the fee then shifted to and rested with Ms. Couch. Ms. Couch failed to offer any credible evidence regarding the reasonableness of her fee and therefore failed to show by a preponderance of the evidence that the fee she charged in this case was reasonable compensation for her services as a petition preparer.

In determining what the compensation for a petition preparer should be, the court concludes that the proper analogy is what professional typists or word processors would charge because their services are most comparable to what a petition preparer is authorized to do. Viewed in this light, the court finds that the reasonable value of the services provided by Ms. Couch in the present case does not exceed the sum of \$80.00. Having found that the reasonable value of the services provided by Ms. Couch does not exceed \$80.00, the court further finds that the \$565.00 fee that was charged by Ms. Couch in this case is excessive to the extent of \$485.00 and concludes that \$485.00 of the fee therefore should be disallowed and that Ms. Couch should be ordered to turn over

\$485.00 to the Chapter 7 Trustee in this case.

C. Ms. Couch violated subparagraph (I)
of § 110.

The Bankruptcy Administrator contends that Ms. Couch engaged in the unauthorized practice of law in her dealings with the Debtor and thereby engaged in fraudulent, unfair or deceptive conduct within the meaning of § 110(I). For the reasons that follow, the court has concluded that the evidence substantiated this contention.

It is a violation of subsection (I) for a petition preparer to engage in any fraudulent, unfair or deceptive act and the bankruptcy court is directed by § 110(I) to make a certification to the district court if such conduct occurs. Section 110 does not contain a definition of a "fraudulent, unfair or deceptive act". However, the courts have concluded that if a petition preparer engages in the unauthorized practice of law in dealing with bankruptcy debtors, the petition preparer thereby commits an act that is fraudulent, unfair and deceptive for purposes of § 110(I). See In re Doser, 292 B.R. 652, 659 (D. Idaho 2003); Bush, 275 B.R. at 83; In re Dunkle, 272 B.R. 450, 456 (Bankr. W.D. Pa. 2002); In re Moffett, 263 B.R. 805, 813 (Bankr. W.D. Ky. 2001).

It was clear from the evidence in this case that Ms. Couch did not limit her involvement with the Debtor to merely typing information supplied by the Debtor onto the bankruptcy forms. With regard to the information contained in the schedules regarding

matters such as priority claims, executory contracts, codebtors and exemptions, the evidence reflected that the Debtor had no understanding regarding such matters and that Ms. Couch counseled and advised the Debtor regarding such matters and that in some instances actually decided what information would be inserted in the forms. In doing so, Ms. Couch obviously engaged in the unauthorized practice of law.

D. Appropriateness of Injunctive Relief.

Under § 110(j), the debtor, a trustee, a creditor or the Bankruptcy Administrator "may bring a civil action to enjoin a bankruptcy petition preparer from engaging in any conduct in violation of this section or from further acting as a bankruptcy petition preparer." Pursuant to this provision, the parties specified in subparagraph (j) may bring an adversary proceeding in the bankruptcy court in order to enjoin a petition preparer who is violating § 110 or engaging in fraudulent, unfair or deceptive conduct and the bankruptcy court has the authority to grant such relief in an appropriate case. However, the fact that Congress has granted statutory standing to debtors, creditors, trustees and the Bankruptcy Administrator to seek injunctive relief does not preclude the bankruptcy court from raising the issue of injunctive relief by means of an order to show cause. See In re Graves, 279 B.R. 266, 273 (9th Cir. B.A.P. 2002). But, if injunctive relief is pursued through a show cause order rather than an adversary

proceeding, principles of due process mandate that the petition preparer be afforded the procedural protections that inhere in an adversary proceeding. Id. at 274. An essential procedural protection that must be afforded is notice to the petition preparer that injunctive relief is to be considered. Id. at 276.

This proceeding was initiated by means of a motion for show cause order and the issuance of a show cause order in response to the motion. The show cause order sets forth with specificity the matters that are to be considered at the hearing and deals specifically with injunctive relief. In that regard the order provides that one of the matters to be considered is "whether Nancy Couch should be enjoined from engaging in conduct which is in violation of § 110 or from further acting as a bankruptcy petition preparer in this district." The court concludes that service of the show cause order upon Ms. Couch provided the requisite notice regarding injunctive relief and that there is no procedural impediment to the court granting such relief at this time. See Moore, 290 B.R. at 292-93. The court further concludes that injunctive relief is appropriate at this time under which Ms. Couch should be permanently enjoined from providing any services other than acting solely as a scrivener and typing such documents for filing in bankruptcy cases filed or pending in this court without providing any services that are prohibited by N.C.G.S. § 84-4.

CONCLUSION

Based upon the foregoing findings and conclusions, an order shall be entered in this case contemporaneously with the filing of this memorandum opinion granting the following relief:

(1) \$485.00 of the fee charged by Ms. Couch in this case shall be disallowed and Ms. Couch shall be ordered to disgorge and turnover \$485.00 to the Chapter 7 Trustee in this case pursuant to § 110(h)(2) of the Bankruptcy Code;

(2) The fact of the above-described fraudulent, unfair or deceptive acts shall be certified to the United States District Court for the Middle District of North Carolina pursuant to § 110(i)(1) of the Bankruptcy Code; and

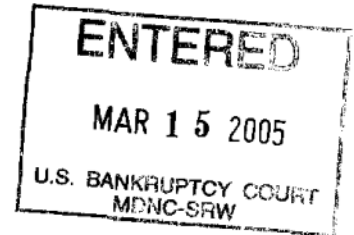
(3) Ms. Couch shall be enjoined from engaging in the unauthorized practice of law.

This 14th day of March, 2005.



WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)
)
Robert Lazarus,) Case No. 05-80274C-7D
)
Debtor.)
)

ORDER

In accordance with the memorandum opinion filed contemporaneously with the entry of this order, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The court hereby disallows \$485.00 of the \$565.00 fee received by Nancy Couch from the Debtor in this case and Nancy Couch is hereby ordered to disgorge and immediately turnover \$485.00 to the Chapter 7 Trustee in this case pursuant to § 110(h)(2) of the Bankruptcy Code and shall not perform any services as a petition preparer in any case filed in this district until such sum has been paid to the Chapter 7 Trustee in this case;

(2) Nancy Couch is hereby permanently enjoined and prohibited from providing any services involving or related to the preparation of bankruptcy petitions, schedules, statements of financial affairs and related documents for filing with the United States Bankruptcy Court for the Middle District of North Carolina other than acting solely as a scrivener and typing such documents and from providing any services or engaging in any conduct that constitutes the practice of law as defined in N.C.G.S. § 84-2.1; and

(3) The fact of the fraudulent, unfair or deceptive acts on the part of Nancy Couch which are described in such memorandum opinion are hereby certified to the United States District Court for the Middle District of North Carolina through the transmission of a copy of this order and a copy of the memorandum opinion to the District Court in accordance with § 110(i)(1) of the Bankruptcy Code.

This 14th day of March, 2005.

William L. Stocks
WILLIAM L. STOCKS
United States Bankruptcy Judge