

*In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division*

In the matter of:)	
)	
LINDA J. BACON)	Chapter 13 Case
)	
<i>Debtor</i>)	Number <u>03-44067</u>
)	
)	
JAMES L. FORSYTHE)	Chapter 13 Case
JANICE F. FORSYTHE)	
)	Number <u>04-42195</u>
<i>Debtors</i>)	
)	
)	
SABRINA N. STANLEY)	Chapter 7 Case
)	
<i>Debtor</i>)	Number <u>05-41600</u>

MEMORANDUM AND ORDER

FINDINGS OF FACT

Linda J. Bacon

Debtor's case was filed December 17, 2003. On August 12, 2005, a Motion to Settle Personal Injury Claim was filed by Benjamin S. Eichholz, attorney for Ms. Bacon, now known as Linda Peters. On the same date, Mr. Eichholz filed an Application for Approval of his employment as her personal injury counsel. The Court did not enter an Order on that application nor on the motion to settle but scheduled the matter for a hearing

on November 2, 2005. When the case was called Ms. Peters was present, her bankruptcy counsel Barbara Braziel was present as well as the Chapter 13 Trustee, however, Mr. Eichholz did not appear. An announcement was made by a member of the Bar that she was appearing as a courtesy to another attorney, not a member of Mr. Eichholz's firm, who had originally agreed to "stand in" as substitute counsel for Mr. Eichholz. The Court questioned substitute counsel to determine her knowledge of the merits of the motion before the Court, and she stated forthrightly that she knew nothing about the merits of the case, but had simply been asked to "stand in" at the hearing, and was doing so as a professional courtesy.

The Motion to Settle states "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 23, ¶ 1). The record reveals that the Court has entered no such Order. The Motion further sets forth that the settlement amount is \$1,000.00, \$437.50 of which will be due to Benjamin S. Eichholz, and the net of \$562.50 to be paid to the Debtor. The Order that was submitted to the Court for approval, however, states "the Motion to Settle Personal Injury Claim is hereby granted and that [sic] of LINDA PETER'S settlement of \$25,000.00, \$8,595.91 will be due to Benjamin S. Eichholz . . ."

Because Mr. Eichholz's substitute counsel had no knowledge of the case and obviously could not explain the discrepancies in Mr. Eichholz's pleadings as set forth above, the Court questioned the Debtor. She stated that Mr. Eichholz had called her on one occasion after she hired him and told her that he had obtained a settlement offer in the amount of

\$2,800.00, which she authorized him to consummate. She later received notification that the amount had been reduced to \$1,500.00 and ultimately to \$1,000.00. She was provided no explanation as to why the \$2,800.00 settlement which she authorized had been reduced, and she gave Mr. Eichholz no authority to settle the case for any lesser amount. She had no idea why any pleadings presented to the Court would have suggested that her settlement was as much as \$25,000.00, and at the conclusion of the hearing I took the matter under advisement. However, because Ms. Bacon had not authorized the settlement amount which was being proffered, because Mr. Eichholz had never been approved to represent her, and because he failed to appear at the hearing, I stated that I would not approve his employment and would not approve this settlement. I directed her bankruptcy counsel to confer with her at a later time and inform the Court whether they wished the settlement motion to be placed back on the Court's calendar.

James L. Forsythe
Janice F. Forsythe

Debtors' case was filed July 23, 2004. On August 12, 2005, Benjamin S. Eichholz filed an application seeking the employment of Benjamin S. Eichholz, as personal injury counsel for Debtor, Janice F. Forsythe. On the same date Mr. Eichholz filed a Motion to Settle Personal Injury Claim. The Motion stated: "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 36, ¶ 1). No such Order was ever entered by the Court. The Motion was set for a hearing on November 2, 2005. When the case was called for hearing, Mr. Eichholz did not

appear. Substitute counsel who had made an appearance in the Bacon case, which was called immediately prior to the Forsythe case on the Court's calendar that day and which is referenced earlier in this Order, announced that she wished to be excused from making an appearance in this case. The Court granted that request, after being informed that, similar to the previous case, substitute counsel had no knowledge of the merits of the application or the settlement and had only been contacted the night before the hearing and asked to make the "stand in" appearance.

This Motion sought approval of a settlement of \$7,500.00 with \$3,158.73 payable to Mr. Eichholz and a net of \$3,932.35 payable to the Debtor. However, the proposed order approving the settlement recited that \$3,932.35 would be due Mr. Eichholz and that \$3,932.35 would be paid to the Chapter 13 Trustee pending completion of the plan. Because there was no appearance by Mr. Eichholz, Debtors' bankruptcy counsel was not in a position to recommend the settlement, but offered the observation that the Debtor had incurred over \$5,000.00 in "hard" medical costs, had had numerous x-rays and an MRI and had been referred to Dr. Roy Baker, a noted neurosurgeon in Savannah. Dr. Baker took a conservative course of treatment and recommended physical therapy to the Debtor, and at this point, the Debtor appears to have recovered from the effects of her injuries. However, bankruptcy counsel made the observation, without knowing more about the case, that with medicals in the \$5,000.00 range, with the type of tests required, and the referral to a neurosurgeon, the \$7,500.00 settlement did not seem adequate in comparison to counsel's experience in handling similar personal injury claims.

The Court conducted an inquiry of the Debtor, Janice Forsythe, the injured plaintiff, and her husband, the co-debtor, James Forsythe, and learned the following: The Debtor/Wife seemed more or less resigned to accepting the settlement because her personal injury counsel Mr. Eichholz had urged her to accept it, and because she is, in essence, ready to conclude the matter and move on with her life. However, she stated that she proffered the settlement amount was “too low,” and more importantly, that she had not authorized Mr. Eichholz to conclude the settlement. According to her, he had indicated that he would attempt to settle the case for \$10,000.00, but had not sought her permission or authority to settle in any amount other than an earlier offer of \$6,000.00, which she refused.

Neither Mr. nor Mrs. Forsythe ever received any notification from Mr. Eichholz that the case had been settled in any amount, until they received a notice from the Court advising them of the hearing which was scheduled upon Mr. Eichholz’s Motion to settle for \$7,500.00. Mr. Forsythe called Mr. Eichholz’s office when he received the notice and questioned why the case had been settled and who had authorized it. Mr. Eichholz’s reply was “you ought to be thanking me for getting you this much money.” Neither Debtor nor her husband authorized Mr. Eichholz to enter a settlement.

At the conclusion of the hearing, I ruled that Mr. Eichholz would not be appointed to serve as counsel in this case and that the settlement would not be approved because the clients had not authorized the settlement, Mr. Eichholz had not appeared, and it did not appear that the settlement was in the best interest of the Debtors. By subsequent

order I required Mr. Eichholz to turn over to the Debtor her file regarding the personal injury claim if she exercised her option to seek other representation.

Sabrina N. Stanley

Debtor filed a Chapter 7 case on June 22, 2005. On August 22, 2005, a Motion to Settle Personal Injury Claim (the “Motion”) was filed on her behalf by Benjamin S. Eichholz, attorney for Ms. Stanley. The Motion asserted that “This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor’s claim.” (Docket No. 11, paragraph 1.) No such order of appointment had ever been sought by counsel or entered by the Court. The Motion was also inconsistent or misleading when it asserted that the settlement amount was \$5,500.00 in paragraph two but then stated that the settlement amount was \$6,519.00 in paragraph three.

The Court issued a Notice of Hearing on this Motion on September 21, 2005 and assigned a hearing for October 11, 2005. At the time the matter was called for hearing, Debtor appeared with her bankruptcy counsel, John E. Pytte, but there was no appearance by Mr. Eichholz or any associate counsel in his office.

The Court conducted its usual inquiry into the nature of Debtor’s injury, the question of whether the bankruptcy estate had any interest in the settlement, and whether it was included within Debtor’s claim of exemption. It was determined that the Trustee in the case had filed a Report of No Distribution determining that the claim was worth no more than

\$10,000.00 and that Debtor had claimed that amount as exempt. Accordingly, there was no objection from the Chapter 7 Trustee to the amount of the settlement.

The Court then inquired of Debtor whether she was satisfied with the settlement, and with the attorney's fees that were being sought by Mr. Eichholz in the amount of \$2,274.25 (according to the Motion) or \$1,937.19 (according to the proposed order). Debtor stated that she had had no communication with Mr. Eichholz's office except when she was informed that the case had been settled. She also stated that she did not think the settlement was high enough. She described how she had been injured in an automobile collision, continued to suffer as a result of those injuries, and wished to find another attorney. In light of Mr. Eichholz's failure to appear, the Court ruled that the settlement would not be approved and the matter would not be reassigned for another hearing until Mr. Pytte determined that the matter should be reset for a hearing.

On October 12, 2005, Mr. Pytte addressed a letter to the Court that was received on October 17. The letter informed the Court that, after the hearing, Mr. Pytte had met with his client who advised him that Mr. Eichholz's office had already distributed the funds, and that she had spent her share on ordinary living expenses.

Mr. Eichholz has never been appointed by this Court to represent Debtor despite the allegations of the Motion; did not appear at the hearing before the Court pursuant to proper notice; has not obtained an order authorizing the settlement or the disbursement of

any funds; is not entitled to any attorney's fees in a case where he has neither been appointed to represent a debtor nor obtained the Court's written authorization to settle the case and to pay himself a fee; and his pleadings in this case were sloppy at best and misleading at worst.

CONCLUSIONS OF LAW

Unfortunately, this is not the first time the Court has observed this type of behavior from Mr. Eichholz. See In re Glover, 2003 WL 23811474, *4 (Bankr. S.D. Ga. 2003). In an Order in In re Glover approving Mr. Eichholz's application for employment and his request for attorney's fees entered on June 13, 2003, which ruled on similar requests in those cases, I reduced Mr. Eichholz's fees from 33⅓ contingent fee in each case, which would have been in excess of \$8,000.00 total, to \$1,000.00 in each case, plus expenses advanced. Although both orders speak for themselves as to the facts which were persuasive, it is a fair summary that the reduction in fees was supported as a result of the following conduct which I found had occurred: (1) Mr. Eichholz failed to appear at the scheduled hearing in each case scheduled for December 18, 2002; (2) had failed to inform the Court, the debtor's bankruptcy counsel, or the trustee concerning the merits of the case; and (3) no other information was provided to assist them or the Court in determining whether the settlements were in the best interests of the debtors, the creditors, or their estates. The Motions were scheduled for further hearing on February 13, 2003, and Mr. Eichholz again failed to appear and was granted a rescheduled hearing on April 17, 2003.

At the hearing on April 17 considerable discussion ensued, because in each

case debtors had signed settlement statements in October of 2002 acknowledging prior receipt of their net proceeds from the settlements. This was at a time when the Court had not approved the settlement, nor had the Court approved any attorneys fees, nor had even the initial hearing on those applications been scheduled. When questioned about this, Mr. Eichholz replied that the checks were not written in either case until after the Court had approved the settlement. He was unable to explain why he had filed in Court copies of the settlement statements signed by the debtors reciting that they had in fact been paid in October, but blamed it upon the volume of his practice, turnover in his staff, and the use of a form disbursement documents that he utilizes in all personal injury cases, not those specifically tailored to bankruptcy cases where court approval of the settlement is a precondition to disbursement.

Among the findings in the Order dated June 13, 2003, in In re Glover, 2003 WL 23811474, *3 (Bankr. S.D. Ga. 2003), is the following:

Given the series of actions, omissions, and late-filed motions on the part of Mr. Eichholz regarding these debtors and one other debtor under this Court's jurisdiction, denial of Mr. Eichholz's application for employment would be justifiable.

Nevertheless, in light of the settlements which the Debtors and the Trustee agreed were satisfactory, Mr. Eichholz's employment cannot be said to be entirely without value to Debtor and his bankruptcy estate.

Although that Order did not articulate further reasons for giving Mr. Eichholz the benefit of the doubt, review of the audio recording of the April 17, 2003, hearing reveals the following:

Mr. Eichholz began his presentation by stating that he had no excuses for his failure to appear, but that over the past two years believed that the standards for approval of attorney's fees and settlements in the Bankruptcy Court had changed and, as he said, become a "moving target." He asserted that, in the past, he had routinely filed applications for approval of fees, and had had those fees and settlements approved without making a court appearance. Without commenting in this Order on all that occurred in that hearing, and whether or not his characterization of the Court's previous method of handling settlements was accurate, the record also reveals that he sought to excuse his failure to appear at the December 18, 2002, hearing because he thought everyone had agreed to the settlement and that his appearance was unnecessary, explained his second failure to appear as a result of staff turnover, and concluded by assuring the Court that he would appear "everytime" a matter was scheduled before the Court and "whenever" he needed to be in Court in the future.

He acknowledged that the debtors' signatures on a settlement sheet acknowledging receipt was "in error" and was "premature," and assured the Court that he would amend his settlement statements in all future bankruptcy matters to omit any reference on the client's part to receipt of funds prior to the time that the Court actually acted on and approved the settlement. Notwithstanding serious reservations, these assurances were sufficiently persuasive for me to allow a substantially reduced fee in each of the cases as previously set forth in this Order.

Later that year in In re Dudley, Ch. 13 Case No. 02-41902, Mr. Eichholz persuaded another attorney, not regularly associated with his practice, to appear at a hearing on December 18, 2003, to seek approval of a personal injury settlement and approval of his attorney's fee. When that attorney was questioned, he was quite forthright with the Court and revealed that he had no information concerning the case other than a general understanding of the nature of the automobile collision that the debtor had been involved in, the medical expenses that had been incurred, and the total settlement of \$11,160.00. He had no information with which he could support or justify the amount of the fee which Mr. Eichholz was seeking in the amount of 33 $\frac{1}{3}$ percent. He explained his appearance on Mr. Eichholz's behalf by telling the Court that he had been asked the previous evening at a Christmas party to appear on Mr. Eichholz's behalf.

Furthermore, Ms. Dudley, the client, was called to testify, as is customary, and the Court inquired whether she was satisfied with the settlement and satisfied with the services of her attorney. Ms. Dudley was satisfied with the settlement amount, but not with the services of Mr. Eichholz. She informed the Court that she had had minimal contact with Mr. Eichholz, that she had spoken with him when she retained him and on at least one other occasion, but had left several messages that were never returned. As a result, I denied the attorney fee request but approved the settlement. At a subsequent hearing on March 23, 2004, to consider approval of Mr. Eichholz's attorney fees, Ms. Dudley stated that when she appeared at the hearing in December 2003 to be assisted by Mr. Eichholz's substitute counsel, she had to brief him on the case before it was called for a hearing. She stated that

she did not feel she had been represented by Mr. Eichholz at all, did not feel that she was treated the way a client should be, and objected to his being paid the full fee that he sought.

At this subsequent hearing, Constance Thomas, then associated with Mr. Eichholz's law firm, made an effective presentation in support of the fee application within the framework of her knowledge of the case, and of Mr. Eichholz's record keeping, but in the final analysis was unable to provide the Court with any specific information as to why Mr. Eichholz had in fact earned a 33 $\frac{1}{3}$ percent fee in the case. As a result, I allowed a \$1,500.00 fee rather than the approximate \$4,400.00 which had been requested. Again, the Court in its discretion, at that point, might very well have refused any compensation, but the presence of Ms. Thomas, who is well known to the Court, and her apparent sincerity and effectiveness on behalf of her client and the fee applicant, coupled with Mr. Eichholz's previous representations, persuaded me that he had in fact followed through on what he had previously assured the Court he would do. That is, that he would ensure that all appearances were timely made in all cases when the Court required it, and in other ways would correct the errors and omissions which had characterized his previous practice before this Court.

For some period of time after the Court ruled in Glover, Fuller, and Dudley, Mr. Eichholz responded by improving his office procedures and/or ensuring that counsel regularly associated with his firm made timely appearances in matters scheduled in Court. The conduct in these three recent cases, however, reveals those improvements to have been transitory, and demands more effective action.

This recent pattern of conduct by Mr. Eichholz's office does not meet the standards set by this Court for attorneys representing debtors in personal injury or bankruptcy matters. According to the Bankruptcy Code, no attorney is authorized to represent a debtor in this Court without Court approval. *See* 11 U.S.C. §§ 327 and 329. In many instances, the Court has granted retroactive approval to counsel to represent debtors under certain circumstances. *See In re Concrete Products, Inc.*, 208 B.R. 1000, 1008 (Bankr. S.D. Ga. 1996)(“This Court has consistently followed the less rigid line of cases [on retroactive appointments] subject to the requirement that the professional who seeks such employment must show (1) that the professional would have been qualified for employment at the onset, and throughout the period of time for which the services are to be compensated, and (2) that the applicant's failure to obtain prior approval at an earlier time is excusable.”); *see also In re Fuller*, 2002 WL 32667474, *2 (Bankr. S.D. Ga. 2002)(stating that “the approval of an attorney retroactively is both authorized and reasonable if the attorney is otherwise qualified to serve and would have been appointed earlier had a timely application been made”).

Up to this point, Mr. Eichholz has been the beneficiary of this Court's presumption that attorneys duly licensed to practice law in this state who are members of the Bar of the United States District Court, of which this Court is a unit, are presumptively qualified to represent debtors in either bankruptcy or personal injury matters. As a result, this Court has not hesitated to grant retroactive approval of counsel's representation of debtors in personal injury matters when no objection to that representation has been received and when there is nothing in the record to suggest that the attorney is not fully qualified to

represent the debtor. In Fuller, Glover, and Dudley this latitude was more than severely tested. In those cases, eight separate hearings were scheduled. Mr. Eichholz appeared in person in only two. He sent associate counsel to one. He sent unqualified counsel to another. He utterly failed to make any appearance in four. As a result, his fee requests in excess of \$12,600.00 were reduced to \$3,500.00. His conduct improved, as indeed one would have expected. However, that improvement was transitory if not illusory.

Mr. Eichholz's conduct in the three cases before the Court today reveal that he has utterly failed to live up to the previous assurances which he gave the Court, and on which the Court relied, that the type of unprofessional behavior and sloppy work exhibited in prior cases would not be repeated in the future, to wit: (1) He assured the Court at the previous hearings in the Fuller and Glover cases that he would appear anytime the Court required his presence, and he failed to do that in each of these three cases. (2) His pleadings continue to be sloppy at best and misleading at worst. In each of these three cases, his Motion for Approval of the Settlement recites that he has already been approved to serve as counsel to these debtors in their personal injury cases when in fact no such Order has ever been entered in any of the three cases and in some, the amount of settlement or attorney's fees contain significant discrepancies. (3) He has apparently disbursed the settlement proceeds in at least one case before court approval of the settlement. (4) He has failed to communicate in a professional manner with his clients and has apparently settled cases without obtaining his clients' consent. (5) He has failed to appear as he is required to do in all regularly scheduled hearings that involve his personal injury representation of debtors

before this Court, has failed to have substitute counsel regularly associated with him appear, and has lapsed into the incredible and unbelievable practice of engaging well-intentioned and highly respected counsel to appear, based on a last minute request, when they have no knowledge of the case and no professional relationship either with Mr. Eichholz as a regularly associated member of his firm or with the debtors who they purport to “stand in” for. Egregious examples of this include the circumstances of Mr. Eichholz’s sending counsel in the Dudley case based on a request made at a Christmas party the night before the hearing as well as his sending counsel in the Bacon case presently before the Court based on a last minute telephone call the night before the hearing, not from Mr. Eichholz, but from the first attorney whom he entreated to appear as “stand in” counsel.

This conduct makes it clear that Mr. Eichholz is no longer entitled to enjoy the latitude of the Court in granting retroactive approval of his employment to represent debtors in this Court.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that within ten days of this order Benjamin S. Eichholz file with the Court and serve on Debtor’s counsel, each case Trustee, and the Assistant United States Trustee, B. Amon James, an accounting of all funds received and disbursed with regard to any settlement he has entered into on behalf of Debtors, Linda J. Bacon, James L. Forsythe and Janice F. Forsythe, or Sabrina N. Stanley.

FURTHER ORDERED that Benjamin S. Eichholz immediately remit to the case Trustee, pending further Order of the Court, any sums received as a result of any such settlement and not previously disbursed to individuals or parties other than Benjamin S. Eichholz, Attorney at Law.

FURTHER ORDERED in light of the conduct in these cases, and the pattern of prior conduct in similar matters in this Court, that Benjamin S. Eichholz will no longer be granted retroactive approval of his representation of any debtor in this Court. A copy of this Order shall be served on all Chapter 7 and Chapter 13 Trustees in this District and upon the Assistant United States Trustee. Should Mr. Eichholz wish to represent debtors in personal injury cases, he is ordered to file the appropriate application for employment, together with the debtor's written consent, and a copy of any fee or other contract with the debtor, and appear with the debtor when the Motion seeking appointment is scheduled for a hearing.

FURTHER ORDERED that Mr. Eichholz appear on

Thursday, January 5, 2006
at 2:00 o'clock p.m.
Bankruptcy Courtroom 228
United States Courthouse
125 Bull Street
Savannah, Georgia

to show cause why this Court should not make a recommendation of disciplinary action to the Chief United States District Court Judge, pursuant to Local Rule 83.5 of the United States

District Court for the Southern District of Georgia. Not later than Wednesday, December 28, 2005, Mr. Eichholz shall file with the Court and serve upon the Assistant United States Trustee his written response to this Show Cause Order.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 2005.