UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
Ashland Division

IN RE:	:	
	:	**Chapter 7**
ED EDWARDS AND	:	**Case No. 10-10435**
SALLY EDWARDS,	:	**Judge Joseph M. Scott**
	:	
Debtors	:	
_____	:	

ORDER DENYING MOTION OF DEBTOR FOR RETURN OF ATTORNEY FEES

This matter is before the Court on the *pro se* Debtor's[1] motion to compel, as amended and supplemented ("Motion to Compel") (Docs. 201, 199 & 227). The Motion to Compel requests that the Court order John O. Morgan, Jr. ("Morgan"), counsel for the Chapter 7 Trustee, Phaedra Spradlin ("Trustee"), to return attorney fees in the amount of $2,383.50[2] to the bankruptcy estate. Morgan filed an application for professional fees and expenses ("Application") (Doc. 133) on July 27, 2011. Fees in the total amount of $18,863.28 were awarded to Morgan pursuant to an Order ("Fee Order") (Doc. 137) entered on August 23, 2011.

The basis for the Motion to Compel is that the fees awarded are excessive and duplicative. Further, the Debtor makes unsupported assertions that the Trustee and Mr. Morgan have a history of overcharging fees and that the total amount of Mr. Morgan's fees "was simply based upon the total amount available to be taken from the estate and had no actual correlation to the amount of actual legal work done." (Doc. 199 at 1). The Trustee and Morgan have filed responses (Docs. 203 & 205) objecting to the Motion to Compel, asserting that the Debtor does

[1] Due to the death of Sally Edwards after the filing of the petition, Ed Edwards is the sole Debtor in this case. The Court has previously acknowledged in this case that *pro se* debtors are generally given a certain amount of flexibility. With respect to Mr. Edwards, the Court has found "that the Debtor is a well-educated and long-time businessman." *In re Edwards*, No. 10-10435, slip op. at 5 (Bankr. E.D. Ky. June 23, 2011) (denying Debtor's motion to convert).

[2] In his original Motion (Doc. 201), Debtor asserted that the Trustee and Morgan should be compelled to return $11,287.66 to the bankruptcy estate.

not have standing, and that the Debtor failed to object to or file a timely motion to reconsider the order granting Morgan's Application. Morgan further asserts that his fees are reasonable under the "loadstar" method which has been adopted by the Sixth Circuit for calculating fees. *See Boddy v. United States Bankr. Court (In re Boddy)*, 950 F.2d 334, 337 (6th Cir. 1991). After review of the pleadings, the affidavit of the Debtor ("Debtor's Affidavit") (Doc. 228), and the record in this case, the Court finds that the Motion to Compel will be denied.

Venue for Debtors' Chapter 7 case is proper in this District under 28 U.S.C. §§ 1408 and 1409. This Court has jurisdiction of this Chapter 7 case pursuant to 28 U.S.C. § 1334(b). This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A).

STANDING

A threshold issue is whether Debtor has standing to object to Morgan's Application. "Generally, to have standing in a bankruptcy case, a person must have a pecuniary interest in the outcome of the bankruptcy proceeding." *In re Moss*, 320 B.R. 143, 149 (Bankr. E.D. Mich. 2005) (internal quotations and citations omitted). An insolvent Chapter 7 debtor generally does not have standing to object to fee applications. *See e.g. In re Moss*, 320 B.R. 149 (insolvent Chapter 7 debtor is "considered to have no interest in how his assets are distributed among his creditors and is held not to be a party in interest.") (internal quotations and citations omitted). An exception to the general rule occurs when the debtor has a nondischargeable debt for which he will remain personally responsible after the bankruptcy. *Id.* The same is true where, as here, a debtor has been denied a discharge because any funds not paid to the Trustee's counsel as fees, can be used to further reduce the Debtor's debts and thus his personal responsibility for the debts post-petition. *See McGuirl v. White*, 86 F.3d 1232, 1235-36 (D.C. Cir. 1996) (where debtors were denied discharge of their prepetition debts, they have a sufficient interest to give them standing to object to the trustee's fee application).

The Court finds that Debtor has standing to object to the Application.

MOTION TO COMPEL

The Application was filed on July 27, 2011, and provided for an objection period through August 17, 2011. The Fee Order was entered on August 23, 2011. Debtor did not file a timely objection and has not appealed the Fee Order. The Motion to Compel was not filed until June 15, 2012, almost ten months after entry of the Fee Order. The Motion to Compel is in effect, a motion to alter or amend the Fee Order pursuant to Federal Rule of Civil Procedure 60(b) which is made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024. Federal Rule of Civil Procedure 60(b) provides:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, . . . misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Debtor does not state his grounds for relief under Rule 60(b), and the only grounds the Court can speculate Debtor intends to assert are (3) fraud, misrepresentation, or misconduct by an opposing party and (6) any other reason that justifies relief. "The party seeking to invoke Rule 60(b) bears the burden of establishing that its prerequisites are satisfied." *McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.,* 298 F.3d 586, 592 (6th Cir. 2002).

> Relief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. As a prerequisite to relief under Rule 60(b), a party must establish that the facts of its case are within one of the enumerated reasons contained in Rule 60(b) that warrant relief from judgment. The decision to grant relief under Rule 60(b) is left to the sound discretion of the Court.

In re Reiman, 431 B.R. 901, 909 (Bankr. E.D. Mich. 2010) (internal quotation marks and citations omitted). Debtor is not entitled to relief under Rule 60(b)(3). "Courts have allowed 60(b) relief

from judgments where fraud is proven through clear and convincing evidence." *Nicole Energy Servs., Inc. v. McClatchey*, No. 2:08-CV-0463, 2010 WL 55718, at *7 (S.D. Ohio Jan. 4, 2010) (citing *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009)).

> "A party making a Rule 60(b)(3) motion must establish (1) that the adverse party engaged in fraud or other misconduct, and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Hesling v. CSX Transp., Inc.,* 396 F.3d 632, 641 (5th Cir. 2005) (citing *Gov't Fin. Servs. One,* 62 F.3d at 772). "Rule 60(b)(3) 'is aimed at judgments which were unfairly obtained, not at those which are factually incorrect.'" *Id.* (quoting *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir. 1978)).

United Student Air Funds Inc. v. Roberts (In re Roberts), 376 Fed. App'x 398 (5th Cir. 2010). Debtor makes many allegations against the Trustee and Morgan, all of which are based on only the Debtor's own speculation. The Debtor's Affidavit[3] (Doc. 228) filed in support of his motion to remove the trustee (Docs. 184 & 189), contains multiple assertions of overbilling, that the Trustee and Morgan were acting together in various illegal or unethical acts, and that Morgan's fees were based on the funds available in the bankruptcy estate and not on actual work performed. Debtor states that even though it is probably impossible to prove his assertions, that the Court should "simply employ the mathematical principle 'Occam's razor,' which can be summarized as 'the simplest explanation is generally the correct one.'" (Debtor's Affidavit at 3). This principle has no place in this Court where it is the Debtor's burden to prove *by clear and convincing evidence,* not speculations, that the Trustee and/or Morgan engaged in fraud and/or misconduct. The Debtor does not assert that the Application was not properly served. The record reflects by notice of filing (Doc. 134) that the Application was served upon all creditors, attorneys of record, and interested parties, including Elizabeth Opell Thomas, who was at that time Debtor's attorney of record. Thus, the Fee Order was not obtained unfairly. The Debtor has failed to prove that he is entitled to relief under Rule 60(b)(3).

Further, Debtor is not entitled to relief under Rule 60(b)(6).

[3] Debtor's Affidavit was not based upon his own personal knowledge and no facts were presented. Further, the Affidavit was not notarized and essentially reiterated or added multiple unsupported allegations made by the Debtor.

> Rule 60(b)(6) is applied "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Hopper v. Euclid Manor Nursing Home, Inc.,* 867 F.2d 291, 294 (6th Cir. 1989) (citations omitted). "This is because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b)." *Rogan v. Countrywide Home Loans, Inc. (In re Brown),* 413 B.R. 700, 705 (6th Cir. BAP 2009) (citing *Olle v. The Henry & Wright Corp.,* 910 F.2d 357, 365 (6th Cir. 1990)). Rule 60(b)(6) requires "something more" than circumstances covered by the first five clauses. And those circumstances must include "extreme and undue hardship" in an "unusual" situation "where principles of equity *mandate* relief." *Olle v. The Henry & Wright Corp.,* 910 F.2d at 365 (emphasis in original).

In re Reiman, 431 B.R. at 910. It is the Debtor's own actions in attempting to hide the value of his assets, the amount of his debts, and the amount of his income, and continuous attempts to thwart the Trustee in her attempts to expeditiously liquidate his assets, that resulted in the Trustee obtaining counsel. *See Clippard v. Edwards (In re Edwards)*, Adv. Pro. No. 10-1008, slip op. (Bankr. E.D. Ky. July 1, 2011) (denying Debtor's discharge based in part on above actions); *see also In re Edwards*, No. 10-10435, slip op. (Bankr. E.D. Ky. June 23, 2011) (denying Debtor's motion to convert based in part on above actions). It is not an exceptional or extraordinary circumstance, or an extreme or undue hardship on Debtor, that Morgan's attorney fees will be paid ahead of Debtor's creditors, thus leaving Debtor with more debt to pay post-petition.

CONCLUSION

The Court finds that the Debtor has failed to carry his burden of proving that he is entitled to relief under Rule 60(b).

IT IS HEREBY ORDERED that the Motion to Compel is **DENIED**.

Copies to:
Phaedra Spradlin, Chapter 7 Trustee
John O. Morgan, Jr., Esq.
Rachelle C. Dodson, Esq.
Ed Edwards, Debtor

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The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
Joseph M. Scott, Jr.
Bankruptcy Judge
Dated: Tuesday, September 04, 2012 (jms)
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