NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re: ODENTHAL, COLLEEN, Debtor(s).	No. 01-00915-W13 Adv. No. A01-00043-W13
ODENTHAL, COLLEEN, Plaintiff(s), vs. FRANK E. MCCRAW, individually, and d/b/a INLAND TOWING, and JOHN DOE, Inland Towing Employee, Defendant(s).	MEMORANDUM DECISION RE: ATTORNEY'S FEES AWARDED PURSUANT TO F.R.B.P. 7068 OFFER OF JUDGMENT

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on September 26, 2001 to determine an award of plaintiff's attorneys' fees. The court's oral decision was rendered on September 27, 2001. Plaintiff was represented by Gregory Lockwood and Mary Ellen Gaffney-Brown and defendant was represented by Scott Smith. Counsel requested that the court's decision be written as the application of F.R.B.P. 7068 to actions for violating the automatic stay is of interest to many practitioners. The court now enters its written decision.

On July 18, 2001, the defendant made an Offer of Judgment pursuant

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EASTERN DISTRICT OF WASHINGTON

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to F.R.B.P. 7068 which incorporates the provisions of Fed. R. Civ. P. 68. The offer stated:

> Defendants hereby offer to have judgment taken in the amount of $4,000.00, which constitutes your client's claims for gas/food/rides of $276.00, clothing of $999.98, and the balance to reflect costs and attorney fees. Plaintiff is also offered the improvements made to the automobile while in the possession of Defendants or third parties at no charge.

That offer was rejected. Trial occurred on August 21, 2001 and the court ruled in favor of the plaintiff and awarded damages. The question presented is whether the judgment obtained after trial was more favorable to the plaintiff than the Offer of Judgment. If trial resulted in a less favorable resolution than the July Offer of Judgment, plaintiff may not recover any fees incurred after July 18, 2001, but is limited to reasonable fees incurred as of the time the offer was received.

F.R.B.P. 7068 does not abrogate the underlying requirement of 11 U.S.C. § 362(h) that only reasonable fees may be awarded. The first question is whether the fees requested are reasonable and thus recoverable under 11 U.S.C. § 362(h). Plaintiff's counsel Mary Ellen Gaffney-Brown requested fees totaling $6,664.10 plus costs of $89.42. Plaintiff's counsel Gregory Lockwood requested $3,702.00 in fees plus costs of $435.85. In awarding fees, only the reasonable value of the services provided which benefit the estate are to be approved and various factors are to be considered in reaching that determination. Reviewing the billing records of the plaintiff's counsel and those provided by defendant's counsel, and based upon the court's knowledge of the case, the sum total of the plaintiff's fees was reasonable, i.e.,

the fees for counsel Ms. Gaffney-Brown and Mr. Lockwood. Defendant objects to the fees of Mr. Lockwood as duplicative. Mr. Lockwood was retained shortly before trial once it became apparent that Ms. Gaffney-Brown would become a witness. The retaining of Mr. Lockwood was done purely for the trial preparation and duplication was minimal. This may have been a conservative interpretation of the Canons of Ethics, but this court is reluctant to discourage any conservative interpretation of the ethical rules.

It is also apparent that both parties engaged in good faith settlement discussions and there were simply unforeseen circumstances which required a greater expenditure of time and effort on the part of the parties than typically would have been expected in a case of this nature. There were, for example, significant difficulties obtaining the personal records and personnel information from the plaintiff's employer. Both plaintiff's and defendant's counsel are to be commended for the way in which they dealt with a case in which unexpected difficulties arose. The total fees requested by the plaintiff under the circumstances of the case were reasonable.

Secondly, the question of whether the plaintiff is entitled to recover any fees for legal services after receipt of the Offer of Judgment must be addressed. Plaintiff sought recovery of the vehicle which had been sold in violation of the automatic stay and the improvements made to it by the non-party purchaser (which is yet another example of the unforeseen events which took place in the litigation). Plaintiff sought recovery of consequential damages for lost wages, loss of personal items in the vehicle, and out-of-pocket alternative

transportation expenses. Plaintiff sought recovery of costs and attorney fees. Plaintiff also sought recovery of punitive damages.

Prior to the time of the Offer of Judgment, the vehicle, with improvements, had been returned to the plaintiff so the court will not discuss that claim further. The Offer of Judgement was for payment of $4,000 which included $276 for out-of-pocket expenses and $998.99 for loss of the personal items. The balance of the $4,000.00 represented attorney fees and costs. It is not disputed that at the time the Offer of Judgment was received by the plaintiff, the majority of the fees now sought by Ms. Gaffney-Brown had been incurred and that Mr. Lockwood had incurred fees from July 10, 2001 through July 19, 2001, the exact amount of which the court has not calculated.

Shortly before trial, the plaintiff withdrew that part of the consequential damages claim arising from lost wages. At trial, the court found a violation of the automatic stay which by that time had been admitted by the defendant. Consequential damages of $276 representing the out-of-pocket expenses were awarded. No consequential damages were awarded for the loss of personal items nor were punitive damages awarded.

Defendant argues that the Offer of Judgment was more favorable than the outcome at trial. It provided for a recovery of $4,000 which was greater than the $276 recovered at trial so an award of fees should be limited to those incurred when the offer was received by plaintiff. The plaintiff argues that final resolution was more favorable than the Offer of Judgment. The theory is that the total claims by the plaintiff should be considered. Since those claims and 11 U.S.C. § 362(h)

specifically include an award of costs and fees and since those fees totaled approximately $6,700 at the time of the receipt of the Offer of Judgment, that amount has to be added to the $276. Therefore, the minimum recovery after trial would be $6,976 which is greater than the $4,000 offer.

Conceptually, this result is similar to the application of Fed. R. Civ. P. 68 in a civil suit for personal injury where the plaintiff's damage claims contain many elements such as out-of-pocket medical costs, lost wages, compensation for pain and suffering, etc. In such cases, if the total recovery on all claims exceeds the amount offered under Fed. R. Civ. P. 68, the plaintiff has obtained a more favorable result and is entitled to fees incurred after the Offer of Judgment. This would be true even though the plaintiff may not have recovered any damages for a particular element such as lost wages.

Of course, in such personal injury litigation, attorney fees and costs are not statutory elements of damage as is true under 11 U.S.C. § 362(h). It is the unique language of 11 U.S.C. § 362(h) which makes applicability of F.R.B.P. 7068 to actions for violating the automatic stay difficult.[1] Since by statute attorney fees are an element of damages, the recovery on that portion of the plaintiff's damage claim must be factored into the recovery to which the plaintiff was entitled after trial.

The court finds the plaintiff's legal theory persuasive. Once

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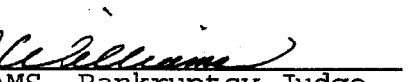
[1]See *Michael Campion v. Associated Credit Services, Inc.*, No. A00-00229-W13, a decision of this court which is on the court's website, which analyzes the general rules of interpretation of Fed. R. Civ. P. 68.

plaintiff demonstrates that a violation of the automatic stay occurred and has resulted in damage, the plaintiff is entitled to recovery of all actual damages. Under 11 U.S.C. § 362(h), actual damages may consist of many elements such as lost wages, loss of personal property, out-of-pocket expenses, costs and attorney fees. In determining whether the result at trial is more favorable to the plaintiff than the Offer of Judgment, the court should look to the total recovery of damages, i.e., the recovery obtained for each element of consequential damages added to any attorney fees awarded under 11 U.S.C. § 362(h). That total should be compared to the Offer of Judgment.

In this case, the plaintiff received no recovery for lost wages and no recovery for punitive damages. The plaintiff recovered $276 as one element of consequential damages and was entitled to recover costs and approximately $6,700 of attorney fees as other elements of actual damages. The total damages were greater than the $4,000 offered and plaintiff improved her position as a result of trial. Therefore, plaintiff is entitled to the total fees and costs requested.

The Clerk of Court is directed to file this Memorandum Decision and provide copies to counsel.

DATED this 10th day of October, 2001.



PATRICIA C. WILLIAMS, Bankruptcy Judge