UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN RE:	)	
	)	BANKRUPTCY CASE NO.
ALLIED PHYSICIANS GROUP, P.A., ET AL.,	)	397-31267-BJH-11
Debtors.	)	
----------	)	
GREGORY WAYNE GINN, ET AL.,	)	
Appellants,	)	CIVIL ACTION NO.
VS.	)	3:04-CV-0765-G
SCOTT M. SEIDEL, CHAPTER 7 TRUSTEE, ON BEHALF OF ALLIED PHYSICIANS GROUP, P.A. and ALLIED PHYSICIANS GROUP OF DFW, INC.,	)	
Appellees.	)	

MEMORANDUM ORDER

This is an appeal by Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. (collectively,"Ginn" or the "Appellants") from a final judgment of the bankruptcy court. After plenary review of the bankruptcy court's judgment, that judgment is -- for the reasons stated below -- affirmed.

I. BACKGROUND & PROCEDURAL HISTORY

This appeal arises out of separate filings by Allied Physicians Group, P.A. and Allied Physicians of DFW, Inc. (collectively, the "debtors") for protection under Chapter 11 of the Bankruptcy Code. Brief of Appellee Scott M. Seidel, Chapter 7 Trustee on Behalf of Allied Physicians Group, P.A. and Allied Physicians of DFW, Inc. ("Appellee's Brief") at 1.

On January 21, 1998, the bankruptcy court approved a plan for the liquidation and distribution of all of the debtors' assets to their creditors ("liquidation plan"). Designation for Appellant(s) Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. ("Record I") at 251-60. Ginn was appointed the plan agent. Appellee's Brief at 1. As the plan agent, Ginn was responsible for the management and distribution of the debtors' assets. Record I at 237-40. After a show cause hearing, the bankruptcy court entered an order on November 22, 1999 ("disgorgement order") that enjoined Ginn from making any further payments as the plan agent, required Ginn to disgorge all fees previously paid, converted the case to Chapter 7, and ordered the Chapter 7 Trustee Scott Seidel ("trustee" or the "Appellee") to audit Ginn's bank account and records. *Id.* at 2878-79. On March 3, 2000, the bankruptcy court issued its Findings of Fact and Conclusions of Law ("March findings"). *Id.* at 3137-52. In these findings, the bankruptcy court held that Ginn owed the creditors a duty as a

fiduciary under the liquidation plan.[1] *Id.* at 3149-50. The bankruptcy court concluded that Ginn breached his fiduciary duty by "intentionally violating the [liquidation plan] through his unbridled use of trust funds, and by violation of applicable bankruptcy law and state law as to conduct of fiduciaries." *Id.* at 3151-52. Ginn appealed the disgorgement order and the underlying March findings. *Id.* at 3153-55.

On November 27, 2000, United States District Judge Joe Kendall heard oral arguments on the March findings. *Id.* at 4971-5059. During this hearing, Judge Kendall ordered Ginn and other appellants to file fee applications, and scheduled two hearings to review those fee applications. *Id.* at 5366-67. Pursuant to this order, Ginn submitted a lengthy fee application that requested $397,058.73 in fees and expenses. *Id.* 5060-5242. Judge Kendall affirmed both the disgorgement order and the March findings and remanded the case back to the bankruptcy court for a determination of Ginn's fee application. *Id.* at 5299-5300.

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[1] Specifically, the bankruptcy court determined that Ginn failed to hold the estate's assets in a depository approved by the United States Trustee and improperly lent $300,000 of estate funds "to a friend." Record I at 3144-45. The bankruptcy court further found that Ginn failed to comply with the terms of the liquidation plan regarding the payment of professional fees and that Ginn improperly appointed professional associates as members of an advisory committee created by the liquidation plan. *Id.* at 3146-48. The bankruptcy court noted that during the two years, Ginn exercised authority over the debtors' estate and controlled over $2,600,000. *Id.* at 3149. From this amount, Ginn paid a single secured creditor's claim of approximately $40,000 but paid himself and other professionals fees totaling approximately $2,000,000. *Id.*

Ginn, dissatisfied with the resolution of his appeal by the district court, filed an appeal to the Fifth Circuit, which was dismissed for lack of jurisdiction on May 31, 2001. *Id.* at 5371-72, 5330. On the same day that the Fifth Circuit dismissed Ginn's appeal, Ginn answered the trustee's objections to his fee application. *Id.* at 3510-17. On November 16, 2001, the trustee filed a motion for partial summary judgment asking the court to find that Ginn breached his fiduciary duty and therefore forfeited his compensation. *Id.* at 3566-80. The bankruptcy court granted the trustee's motion for partial summary judgment, concluding that Ginn -- who owed the duty of a fiduciary to the estate's creditors -- breached his fiduciary duty by conduct "beneath a standard of any reasonable business judgment." *Id.* at 4822. On April 11, 2002, the trustee filed a motion for summary judgment requesting the dismissal of Ginn's counterclaims, which the bankruptcy court granted on July 15, 2002. *Id.* at 4858-63. On September 24, 2002, the bankruptcy court dismissed all remaining claims against Ginn and entered a final judgment denying Ginn all compensation. *Id.* at 4862-63.

From the above orders, Ginn appealed to this court seeking a review of the bankruptcy court's disgorgement order and March findings and a review of the summary judgment orders. In a memorandum order of May 16, 2003, this court held that the law of the case doctrine applied and therefore refused to revisit the bankruptcy court's findings that had been affirmed by Judge Kendall. Record

Designation for Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. ("Record II") at 137-41. Although this court affirmed the bankruptcy court's granting of summary judgment in favor of the trustee, it remanded the case to the bankruptcy court for a determination of the correct amount of compensation to be forfeited. *Id.* at 126-46. Specifically, this court stated:

> Although the bankruptcy court found that Ginn breached his fiduciary duty and ordered the "total forfeiture of Ginn's compensation," the actual amount of the forfeiture is unclear. Ginn initially disgorged $366,590.79, but later requested $397,058.73 in his fee application. The trustee, in its motion for partial summary judgment, sought forfeiture of $397,058.73. Therefore, because the bankruptcy court did not address injury or causation, the court must remand this case to the bankruptcy court for the *limited purpose* of determining the actual amount subject to forfeiture and whether any portion of that amount constitutes damages that requires a showing of injury and causation.

In re Allied Physicians Group, P.A., No.3:97-31267-HCA-7, Civ. A. 3:02-CV-2329-G, Civ. A. 3:02-CV-2368-G, 2003 WL 21149493, at *7 (N.D. Tex. May 16, 2003) (emphasis added) (internal citations omitted); Record II at 145-46.

On remand, the bankruptcy court concluded that the actual amount subject to forfeiture was $366,590.79, and that no portion of that amount constituted damages that required a showing of injury or causation. Record II at 121. Accordingly, Ginn now brings this appeal (his fourth to this court) from the final judgment entered by the bankruptcy court on remand.

II. ISSUES

This appeal presents the following issues: (1) whether the bankruptcy court erred in determining that the amount of compensation subject to forfeiture was $366,590.79; (2) whether the bankruptcy court erred in ordering that no portion of the amount subject to forfeiture constitutes damages that require a showing of injury or causation; and (3) whether the bankruptcy court erred by refusing to allow the Appellants to offer additional evidence at the hearing on remand.

III. ANALYSIS

A. Jurisdiction

This court exercises jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. § 158(a)(1) and Federal Rule of Bankruptcy Procedure 8001(a). 28 U.S.C. § 158(a)(1); FED. R. BANKR. P. 8001(a).

B. Standard of Review

When reviewing a decision of the bankruptcy court, the district court "functions as an appellate court and applies the standard of review generally applied in federal court appeals." *Matter of Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992); *Matter of Coston*, 991 F.2d 257, 261 n.3 (5th Cir. 1993) (citing *Matter of Hipp, Inc.*, 895 F.2d 1503, 1517 (5th Cir. 1990)). Conclusions of law are reviewed *de novo*. *Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). Findings of fact, on the other hand, "whether based on oral or documentary evidence, shall not be set aside

unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses." *Webb*, 954 F.2d at 1104; FED. R. BANKR. P. 8013. "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed.'" *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206, 209 (5th Cir. 1983) (quoting *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948)). Finally, mixed questions of law and fact are reviewed *de novo*. *Matter of National Gypsum Company*, 208 F.3d 498, 504 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000).

C. Forfeiture of Fees

Under Texas law, once a breach of fiduciary duty is found, a party is not required to prove injury or causation where the remedy sought is partial or total forfeiture. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) ("An agent's breach of fiduciary duty should be deterred even when the principal is not damaged."); see also *Matter of Segerstrom*, 247 F.3d 218, 226 n.5 (5th Cir. 2001). The party need not prove actual damages in order to obtain a fee forfeiture for the breach of a fiduciary duty owed to him because "[i]t is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation." Burrow, 997 S.W.2d at 238. Under the remedial regime of *Burrow*, the court is given discretion in determining the amount of compensation to be forfeited. *Id.* at 245.

The notion of forfeiture is grounded on two principles. First, if a fiduciary breaches his duties during the relationship of trust, the principal is considered not to have received what he bargained for. *Id.* at 237-38. Second, fee forfeiture is intended to discourage fiduciaries from being disloyal to their principals, *i.e.*, "to protect relationships of trust by discouraging agents' disloyalty." *Id.* at 238. Therefore, if the fiduciary is a lawyer who engages in a clear and serious violation of a duty to a client, he may be required to forfeit *some or all* of his compensation for the matter. *Id.* at 241 (*citing* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)) (emphasis added). On the other hand, an award of actual damages, unlike a forfeiture, requires a showing of injury and causation. *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.--San Antonio 2000, no writ).

On a previous appeal, this case was remanded back to the bankruptcy court for the limited purpose of determining the actual amount subject to forfeiture. See *In re Allied Physicians Group*, 2003 WL 21149493 (N.D. Tex. May 16, 2003), at *7. Initially, confusion arose from the fact that the Appellants had filed a fee application in the amount of $397,058.73. Appellee's Brief at 7. The Appellee originally requested that the bankruptcy court order disgorgement in that amount. *Id.* The Appellants, however, only paid themselves compensation in the amount of $366,590.79. *Id.* Since the amount requested by the Trustee exceeded the compensation received by the Appellants, the request for disgorgement of an amount

that exceeded the amount of compensation could be considered a request for damages that would require proof of injury and causation. In the proceedings on remand, the bankruptcy court determined that the correct amount of forfeiture was $366,590.79, the actual amount of compensation that the Appellants had paid themselves from estate funds. Record II at 121.

Despite the bankruptcy court's forfeiture order, the Appellants argue that requiring them to forfeit reimbursed costs and expenses and third-party rent payment reimbursements, without any finding of injury or causation, was not warranted. Brief of Appellants Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. ("Appellants' Brief") at 6-7. The Appellee, on the other hand, contends that "all compensation" received by a disloyal fiduciary should be forfeited. Appellee's Brief at 5. Therefore, the Appellee maintains, the bankruptcy court did not err in requiring the Appellants to forfeit compensation in the form of reimbursed expenses and third-party rent payments. *See* Appellee's Brief at 4-5. Regarding reimbursable expenses, the court agrees with the bankruptcy court that this form of compensation should be forfeited under the remedial regime of *Burrow*. Other courts, under similar circumstances, have concluded that expenses can be forfeited when a breach of fiduciary duty has occurred. See, *e.g.*, *In re Endeco, Inc.*, 1. B.R. 64, 67 (D. N.D. Bankr. 1979) ("A trustee in Bankruptcy in a reorganization case or any Bankruptcy case who embezzles from said estate, forfeits, as a matter of law, any commissions, or fees and expenses

which he may have earned [as Trustee]."). Therefore, the Appellants should be required to forfeit the amount of compensation they received for reimbursable expenses. Though the issue of whether third-party rent payments fall under the umbrella of compensation is less clear than the above forms of compensation, the court concludes that the facts in this case require a forfeiture. When the debtors filed for bankruptcy, they had no ongoing operations. Record II at 111. During the proceedings on remand, the Appellee stated that when the Appellants took over as the plan agent, they issued several checks made payable to Ginn that reflected payments for "March rent," "April rent," "May rent," and "September rent" in the amount of approximately $11,000. *Id.*; see also *id.* at 56-58, 60. Since the debtors were not leasing office space during this time period, these payments were -- as the bankruptcy court apparently concluded -- used by the Appellants to defray personal office rent.[2] See *id.* at 111. This court can reverse the factual findings of the bankruptcy court only if the findings are clearly erroneous. *Webb*, 954 F.2d at 1104; FED. R. BANKR. P. 8013. The bankruptcy court's evaluation of the evidence presented during the hearing on remand cannot be said to be clearly erroneous.

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[2] The debtor and the reorganized debtor conducted their business activities in leased locations and issued each of these checks to Gregory Wayne Ginn, P.C. Appellants' Brief at 7-8. The Appellants contend that after the reorganization plan was confirmed, the debtors allegedly leased office space in the same building as the plan agent's offices, but in different, non-adjacent lease space. *Id.*

Thus, the third-party rent payments were correctly included in compensation that could be forfeited.

Although the Appellants stress that the "proper limits of the equitable remedy under *Burrow* should not exceed the amount of fees actually received," Appellants' Brief at 5, they fail to direct this court to a single case that distinguishes between fees and reimbursable expenses in the context of forfeiture. In fact, the Appellants appear to gloss over *Burrow's* reasoning that all compensation received by a disloyal fiduciary is forfeited:

> It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."

Burrow, 997 S.W.2d at 239 (citing *Kinzbach Tool Company v. Corbett-Wallace Corporation*, 160 S.W.2d 509, 514 (Tex. 1942)).

The Appellants advance several arguments in their briefs that the remedial regime of *Burrow* should not be applied to reimbursable expenses and third- party rent payments, relying on *Matter of Segerstrom*, 247 F.3d 218 (5th Cir. 2001), and *Liberty Mutual Insurance Company v. Gardere & Wynne, L.L.P*, 82 Fed. Appx. 116 (5th Cir. 2003), in support of their arguments. *See* Appellants' Brief at 6. The court, however, finds these cases distinguishable. The Appellants cite *Segerstrom* for the proposition that injury and causation must be established when a plaintiff seeks to

recover damages for breach of a fiduciary duty. *Id.* In *Segerstrom*, a chapter 7 bankruptcy trustee filed a legal malpractice claim against the debtor's former attorney seeking to recover $8.5 million in damages. 247 F.3d at 221-22. The court held that the trustee failed to offer sufficient evidence that the attorney's representation caused injury to the debtor in the litigation at issue. *Id.* at 228-29. *Segerstrom* is distinguishable from this case because the Appellee here has not sought to recover damages for the Appellants' breach of fiduciary duty. The Appellee only sought, and was awarded, disgorgement of all compensation received by the Appellants as an equitable remedy for the breach of fiduciary duty. The Appellants' reliance on *Liberty Mutual* is similarly misplaced. In *Liberty Mutual*, the court held that the law firm was not required to forfeit the client fees that it had earned representing the opponent. *Liberty Mutual*, 82 Fed. Appx. at 121. The client brought action alleging that its former law firm breached its fiduciary duty by representing the opponent in the lawsuit and sought damages for the breach. *Id.* at 117-18. However, the disgorged fees that the client sought from the law firm were not fees that it had paid to the law firm but fees that another client (the opponent) had paid to the law firm. *Id.* at 121. Because the claims asserted by the client sought damages rather than forfeiture, *Burrow's* rationale was not applicable. *Id.* In this case, the Appellee has sought forfeiture of the compensation that the Appellants paid themselves with estate funds;

he has not sought to recover any compensation paid by the Appellants to other parties, or any compensation received by the Appellants from other parties.

The Appellants also ask this court to take judicial notice of the United States Bankruptcy Court for the Northern District of Texas' Standing Order 2000-7 for the purpose of establishing that compensation and expense reimbursement should be treated differently. Reply Brief of Appellants Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. ("Appellants' Reply Brief") at 3-4. Contrary to the Appellants' contention, however, bankruptcy case law confirms that there is no distinction between compensation and reimbursement expenses under the code. See, *e.g.*, *In re Mercury*, 280 B.R. 35, 57 (Bankr. S.D. N.Y. 2002) ("Section 328(c) states, in pertinent part, that 'the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 . . .'"); *In re Angelika Films 57th, Inc.*, 246 B.R. 176, 179 (S.D. N.Y. 2000) ("Thus, it is clear that if counsel ceases to be disinterested at any time during its representation of the debtor, the bankruptcy court may deny *all* compensation and expenses.") (emphasis in original); *In re Grabill Corporation*, 113 B.R. 966, 969-70 (Bankr. N.D. Ill. 1990) (finding that a professional retained to represent the estate under Section 327 may be denied compensation and reimbursement of expenses if he was not disinterested or burdened by a conflict of interest) (citing *Woods v. City National Bank & Trust Company of Chicago*, 312 U.S. 262, 266 (1941)), *aff'd*, 135 B.R. 835 (N.D. Ill.

1991), *aff'd,* 983 F.2d 773 (7th Cir. 1993). Given the treatment of compensation and expenses under the Bankruptcy Code, Appellants' argument is unpersuasive.

It is true that expansion of the *Burrow* remedial scheme is unwarranted, see *Liberty Mutual*, 82 Fed. Appx. at 121, and today's holding does no violence to that concept. Instead, the court concludes merely that the bankruptcy court did not err in allowing forfeiture of all compensation, however denominated, received by the Appellants.

D. Evidence of the Nature of Expenses

The Appellants argue that the bankruptcy court erred by refusing to allow them to produce evidence at the hearing on remand. Appellants' Brief at 9. Specifically, the Appellants sought to submit evidence of the breakdown between fees and expenses disgorged by the Appellants. *Id.* It must be remembered, however, that this case involves appeals from two separate orders granting summary judgment in favor of the Appellee, and both summary judgment records have been closed for several years. Appellee's Brief at 7.

In this circuit, "materials not presented to the district court for consideration of a motion for summary judgment are never properly before the reviewing court." *Fields v. City of South Houston, Texas*, 922 F.2d 1183, 1188 (5th Cir. 1991) (citing *John v. State of Louisiana*, 757 F.2d 698, 710 (5th Cir. 1990)). On remand, the lower court is not limited to the record before it but "retains the discretion to admit additional

evidence" submitted by a party on a summary judgment motion. *United States v. Wilson*, 322 F.3d 353, 360 (5th Cir. 2003) (quoting *United States v. Bell Petroleum Services, Inc.*, 64 F.3d 202, 204 (5th Cir. 1995)) (citations omitted); see also *Fields*, 922 F.2d at 1188. If the lower court refuses to consider new material submitted by a party on reconsideration, the appellate court reviews the lower court's refusal to consider such materials under the abuse of discretion standard. *Fields*, 922 F.2d at 1188.

In this case, the bankruptcy court considered whether additional evidence should be admitted during the remand hearing but ultimately declined to receive such evidence. This court has already considered the merits of the appeal from the orders granting the summary judgment in favor of the Appellee. Under these circumstances, the bankruptcy court did not abuse its discretion by refusing to consider new evidence tendered for the first time by the Appellants several years after the summary judgment record was closed.[3]

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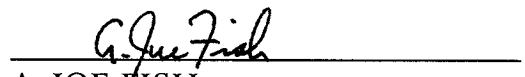
[3] Furthermore, even if the bankruptcy court did abuse its discretion in refusing to allow the Appellants to produce additional evidence, any such error was harmless. The bankruptcy court concluded that *Burrow* did not distinguish between fees and expenses and ordered that the Appellants forfeit all compensation, however denominated. *See* Record II at 121. Thus, consideration of the evidence proffered by the Appellants was immaterial to the bankruptcy court's ruling.

For the foregoing reasons, the judgment of the bankruptcy court is **AFFIRMED**.

SO ORDERED.

December 15, 2004.



A. JOE FISH
CHIEF JUDGE