

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In the Matter of	:	
THOMAS & KATHRYN OLICK	:	
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THOMAS W. OLICK	:	CIVIL ACTION
Plaintiff/Appellant,	:	NO. 01-7145
	:	
v.	:	
	:	
WILLIAM C. HOUSE,	:	
Defendant/Appellee.	:	

MEMORANDUM and ORDER

YOHN, J. JULY _____, 2002

Debtor, Thomas Olick (“Olick”), appeals from the bankruptcy court’s November 21, 2001 order dismissing as moot his October 26, 2001 motion to discharge his former attorney, William C. House (“House”) as debtors’ counsel. In reaching this conclusion, the bankruptcy court relied on two factual findings: (1) that the bankruptcy court had granted House’s motion to withdraw as debtors’ counsel on March 3, 1999, and (2) that the arbitrations in front of a panel of National Association of Securities Dealers (“NASD”) arbitrators, which were the subject of House’s separate appointment as special counsel to the chapter 13 Trustee, had concluded. Because the record supports these findings, I find that the bankruptcy court did not err in denying as moot Olick’s motion to discharge House and I will affirm the bankruptcy court’s November 21, 2001 order.¹

¹ Pursuant to Bankruptcy Rule 8006, Olick filed a statement of the issues to be presented on appeal, raising the following issues for this court to consider:

1. “Do Debtors have a right to discharge counsel who is unwilling or unable

BACKGROUND

Thomas Olick and his wife filed for chapter 13 bankruptcy on July 11, 1996. (Bankruptcy Case No. 96-22123T). By order of the bankruptcy court, on April 29, 1997, William C. House was appointed to serve as special counsel to the chapter 13 trustee to represent Olick in a pair of arbitration proceedings consolidated for hearing before a panel of NASD arbitrators.² In

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- to properly represent them?
 2. “After the filing of a Motion and a Hearing, on the merits, did the Bankruptcy Court abuse its’ discretionary privileges by refusing to rule on Debtors’ 3/20/98 Motion to Discharge Counsel?
 3. “Is an attorney discharged for cause . . . entitled to compensation from the Debtors’ or their bankruptcy estate?
 4. “Do Debtors’ have a right to counsel of their choice and/or to represent themselves pro se?
 5. “Was it proper for the bankruptcy court to force the services of an attorney . . . upon Debtors who had no confidence in that attorney’s abilities?”

None of these issues raise, directly or indirectly, the issue of whether the bankruptcy court properly found that Olick’s October 26, 2001 motion to discharge was moot. Therefore, these issues are not properly before the court.

Olick’s appeal brief raises four additional issues, two of which are again irrelevant to this appeal. However, the other two issues raised by Olick in his appeal brief are proper for the court to consider. First, Olick questions whether the bankruptcy court erred in finding that the NASD arbitrations had concluded, and second, he questions whether the bankruptcy court erred in concluding that his motion to discharge House was moot. Because there is no evidence of Olick’s bad faith in not raising these issues in his Rule 8006 statement or of any prejudice to House because of this failure, I will consider these two relevant issues. *See In re Comer*, 716 F.2d 168, 177 (3d Cir. 1983) (“[N]ot every failure to follow procedural rules mandates dismissal of [an] appeal”); *Kroope v. Kroope*, 1997 WL 16631 at * 3 (E.D. Pa. 1997) (Court found that failure of an appellant to raise an issue under Bankruptcy Rule 8006 is not a per se bar on a court’s ability to consider such issue on appeal, but if such failure is coupled with prejudice to the appellee or bad faith of the appellant, the district court will not consider the issue on review.). *But see In re Brenner*, 1991 WL 214051 at * 5 (E.D. Pa. 1991) (Issues not included in the Rule 8006 statement of issues are waived on appeal, and a reviewing court need not consider them.).

² The consolidated proceedings were *Olick v. Dippel, et al.*, NASD Case No. 94-05051, and *Olick v. John Hancock Distributors, Inc. et al.*, NASD Case No. 96-01247.

addition, House also became the Olick's general bankruptcy counsel pursuant to a private agreement with them.

Thereafter, the business relationship between Olick and House soured and on March 23, 1998,³ Olick filed a motion in bankruptcy court to discharge House as his counsel. Record, Doc. 20. At a hearing held the next day on matters unrelated to this motion, the bankruptcy court acknowledged receipt of Olick's motion to discharge House but indicated that it would not rule on the motion at that time. No hearing on this motion was ever sought by Olick, noticed or held. Thus, the bankruptcy court never entered an order with regard to it.

On May 20, 1998, House filed a motion to withdraw from his representation as special counsel to the trustee for the NASD arbitrations. Record, Doc. 24. Again, no hearing was ever noticed or held on this motion and the bankruptcy court never entered an order on it. However, on January 20, 1999, House filed a motion to withdraw as Olick's bankruptcy counsel, which the bankruptcy court granted on March 11, 1999. Doc. 6, Exs. 1, 2. House was thereby terminated as Olick's bankruptcy counsel of record.

On October 26, 2001, Olick re-filed a copy of the motion to discharge House that he had filed with the bankruptcy court in March 1998. Doc. 5, Ex. A. The bankruptcy court denied this motion as moot by order dated November 21, 2001, finding that House was no longer Olick's bankruptcy counsel because (1) he had been discharged as debtors' counsel on March 11, 1999 by bankruptcy court order, and (2) the NASD arbitrations to which he had been appointed special counsel had concluded. On December 28, 2001, Olick filed an appeal of this order. It is this

³ Olick claims that his motion to discharge was filed on March 20, 1998. However, the docket indicates that this motion was not filed until March 23, 1998.

appeal that is presently before the court.

STANDARD OF REVIEW

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual findings and a de novo standard to review its conclusions of law. *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994). A finding of fact is clearly erroneous if a reviewing court has a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The factual determination of the bankruptcy court will be accepted unless that determination is either "completely devoid of minimum evidentiary support" or "bears no rational relationship to the supportive evidentiary data." *Hoots v. Pennsylvania*, 703 F.2d 722, 725 (3d Cir. 1983).

DISCUSSION

Olick first filed a motion to discharge House as his personal counsel in the bankruptcy proceedings in March 1998. Record, Doc. 20. However, the record does not disclose that Olick ever sought a hearing on the motion, and no hearing was ever noticed or held.⁴ In fact, the

⁴ Contrary to Olick's contention, the hearing held on March 24, 1998 was not on the merits of his motion to discharge House. First, this hearing was scheduled before the motion to discharge was even filed. Under the local bankruptcy rules in effect in 1998, a motion was to be accompanied by a proposed order scheduling a hearing and requiring the filing of an answer. 1995 L.B.R. 9014.1(b)(2). Those opposing the motion were allowed fifteen days to answer. 1995 L.B.R. 9014.1(d). Thus, under the rules no hearing could be scheduled to review the substance of a motion sooner than fifteen days from service of the motion. 1995 L.B.R. 9014.2. The fact that Olick's March 23, 1998 motion to discharge was filed only one day before the March 24, 1998 hearing in which Olick claims the bankruptcy court reviewed the merits of his motion, indicates that this hearing was not scheduled to review the substance of his motion to discharge. Second, the brief colloquy that occurred at the hearing concerning Olick's motion to discharge

bankruptcy court had not entered an order on Olick's March 1998 motion when, on January 20, 1999, House filed a motion to withdraw as debtor's counsel. Doc. 6, Ex. 1. The bankruptcy court considered House's motion and granted it on March 11, 1999, thereby terminating House as Olick's bankruptcy counsel of record. Doc. 6, Ex. 2. Apparently ignoring the impact of this order, Olick re-filed his March 1998 motion to discharge House as his bankruptcy counsel on October 26, 2001. The bankruptcy court scheduled a hearing on the merits of Olick's motion, but prior to the hearing, the bankruptcy court issued its November 21, 2001 order denying the motion as moot in view of the fact that pursuant to the March 11, 1999 order, House had already been terminated as debtors' counsel.

Based on this sequence of events, it is clear that at the time the bankruptcy court considered Olick's October 2001 motion to discharge House as his bankruptcy counsel, House had been granted permission to withdraw as Olick's bankruptcy counsel and had been relieved of his professional duties to Olick. As such, an order on Olick's re-filed motion to discharge House would have been meaningless because there was no attorney-client relationship upon which it could operate. Thus, the bankruptcy court properly denied the motion as moot.

Olick does not appear to contest the bankruptcy court finding that it had granted House's motion to withdraw on March 11, 1999, and thereby discharged him as debtor's counsel.

Instead, in his appeal brief Olick questions the bankruptcy court's finding that the NASD arbitrations, which were the subject of House's separate appointment as special counsel to the

amounted to nothing more than an announcement by the bankruptcy court that it would put the motion aside, to be ruled on at another time, because at the present time it was convenient and beneficial for House to remain as Olick's counsel on bankruptcy matters, especially since he had appeared at the hearing with regard to such matters. Record, Doc. 7 at 18.

Trustee, had concluded. Olick maintains that while these arbitrations have concluded, there is on-going litigation concerning the arbitration awards that causes House to remain as Olick's special counsel.

In order to resolve this issue, the scope of House's April 29, 1997 special counsel appointment must be considered. If the appointment extended only to the arbitration proceedings themselves, the bankruptcy court would be correct in finding House's role as special counsel to the Trustee to have concluded. However, if the appointment extended beyond the arbitrations to include any subsequent litigation involving the arbitration awards, the bankruptcy court would not be correct in finding House's role as special counsel to have concluded if, as Olick contends, the awards are currently the subject of pending court litigation.

Because no copy of the appointment papers has been included in the record or attached to any brief submitted to this court, it is impossible for the court to determine the precise scope of House's appointment as special counsel to the Trustee and/or Olick. However, as indicated by its November 21, 2001 order, it is clear that the bankruptcy court considered the appointment only to relate to House's representation of Olick in the NASD arbitration proceedings themselves and not to extend to any continuing litigation of the arbitration awards. Record, Doc. 6. In a footnote to its November 21, 2001 order the bankruptcy court stated, "House's appointment as special counsel related only to his representation of the Trustee and/or Debtor in the NASD arbitration proceedings" and since "these proceedings have now been finally concluded, House has completed his role as special counsel." *Id.* Absent any record as to the scope of House's appointment, I must accept this statement by the bankruptcy court that House was appointed special counsel only to represent Olick in the arbitration proceedings and not to represent him in

any subsequent litigation.

In any event, *Olick v. Hancock*, 96-01247, the first litigation that Olick maintains is currently pending in court, has been concluded. On May 13, 2002, the Supreme Court denied Olick's petition for a writ of certiorari. The other litigation, *Olick v. Dippel*⁵, 93-1495, while currently the subject of an appeal concerning the district court's denial of a motion to vacate the arbitration award, does not involve a matter in which House is currently representing Olick. The docket reveals that Olick is representing himself in this matter and that House has no connection to the litigation. Thus, even if House's appointment extended beyond the arbitrations themselves to include the subsequent court litigation, he is not now representing Olick in that litigation.

Despite these factual findings, Olick argues that the bankruptcy court erred in concluding that his motion to discharge House as debtors' counsel was moot because its determination impacted his obligation to compensate House for his services. This argument, however, fundamentally ignores the reason for the bankruptcy court's conclusion that Olick's motion to discharge House was moot. Because House had already been discharged by a March 11, 1999 order, there was no longer an attorney-client relationship existing between Olick and House upon which the relief sought by Olick, an order discharging House as his bankruptcy counsel, could operate. Olick's present attempt to explain why his motion to discharge House is not moot simply does not address or disturb the basis for that determination by the bankruptcy court. It may be that Olick wishes that the bankruptcy court had dealt with his original motion to discharge House. However, appealing the bankruptcy court order of November 21, 2001, as he has done here, is not the way to challenge the bankruptcy court's inaction as to his original

⁵ Olick refers to this arbitration as *Olick v. Nikles*.

motion. The November 21, 2001 order dealt only with Olick's re-filed motion to discharge House. In denying this motion, the bankruptcy court properly considered the situation as it existed in October 2001, finding that because House was no longer representing Olick in any bankruptcy matters, Olick's motion to discharge House was moot.

The court cannot avoid the conclusion that Olick has raised this issue in order to bring yet another challenge to House's fee application. The matter of House's compensation was the subject of two earlier appeals filed in this court (01-CA-1606; 01-CA-1607) in which Olick challenged the March 1, 2001 order of the bankruptcy court approving House's fee application and the June 7, 2001 order denying reconsideration of that order. On March 19, 2002, this court affirmed these orders of the bankruptcy court to the extent that they approved House's fee application for the period of April 29, 1997 through March 24, 1998 and remanded the matter to the bankruptcy court for clarification of its statement regarding House's volunteer status from March through December 1998. Thus, the only issue remaining with regard to House's entitlement to compensation is whether the legal services provided by House from March through December 1998 were volunteered to Olick or provided to him with the expectation of payment. The bankruptcy court's decision to deny as moot Olick's October 26, 2001 motion to discharge House has no effect upon the bankruptcy court's resolution of this final outstanding issue regarding House's entitlement to compensation from Olick. As such, I find that the bankruptcy court did not err in concluding that Olick's motion to discharge House was moot.

CONCLUSION

Upon review of the record and the relevant documents attached to parties' briefs, I find

that at the time the bankruptcy court considered Olick's October 26, 2001 motion to discharge House as debtors' counsel, House no longer represented Olick in any bankruptcy matters. By that time, the bankruptcy court had granted House's motion to withdraw as debtors' bankruptcy counsel and the NASD arbitrations, which were the subject of House's special appointment as counsel to the Trustee, had concluded. Because there was no attorney-client relationship between House and Olick upon which a motion to discharge House could operate, the bankruptcy court was correct to deny Olick's motion to discharge House as debtors' counsel as moot. Accordingly, the bankruptcy court's November 21, 2001 order will be affirmed.⁶

An appropriate order follows.

⁶ Because the November 21, 2001 will be affirmed, House's motion to dismiss the appeal will be denied as moot. Additionally, because of this affirmance, it is unnecessary for the court to consider whether the record designated by Olick in this appeal improperly contains documents not before the bankruptcy court and should be stricken or whether Olick should be allowed to amend his statement of issues and his designation of the record on appeal. As a result, I will also deny as moot House's motion to strike the amended statement of issues on appeal and Olick's motion to amend his statement of issues and his designation of the record on appeal.

Finally, Olick's Rule 9024 motion for relief from the bankruptcy court order of March 1, 2001 will be dismissed. On February 8, 2002, the bankruptcy court denied the identical Rule 9024 motion on the basis that it lacked jurisdiction because an appeal of the March 1, 2001 order was pending in district court. Contrary to what Olick would like the court to believe, in denying Olick's Rule 9024 motion, the bankruptcy court did not opine that jurisdiction to consider the Rule 9024 motion lies in the district court. Additionally, I note that on March 19, 2002, this court affirmed in part the bankruptcy court's March 1, 2001 order and on June 6, 2002, this court dismissed Olick's direct appeal of the February 8, 2002 order. (02-CA-1393).

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Plaintiff/Appellant,	:	NO. 01-7145
	:	
v.	:	
	:	
WILLIAM C. HOUSE,	:	
Defendant/Appellee.	:	

ORDER

And now this _____ day of July, 2002, upon consideration of Thomas Olick’s Appeal Brief; and William House’s opposition; it is hereby ORDERED that the bankruptcy court’s order dated November 21, 2001 is AFFIRMED.

It is further ORDERED that House’s motion to dismiss this appeal and to strike the record (Doc. 5) is DENIED as moot.

It is further ORDERED that Olick’s Rule 9024 motion for relief from the bankruptcy court’s order dated March 1, 2001 (Doc. 9) is DENIED.

It is further ORDERED that Olick’s motion to amend his statement of issues and his designation of the record on appeal (Doc. 11) is DENIED as moot.

William H. Yohn, Jr., J.