

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re)
) In Bankruptcy
CHARLES EDWARD WOODS)
KAREN ANGELA ORTIZ WOODS) Case No. 99-30244
)
Debtors.)
)
H. CARL RUNGE, JR., LTD.,)
)
Plaintiff,)
)
vs.) Adversary No. 99-3051
)
CHARLES EDWARD WOODS and)
KAREN ANGELA ORTIZ WOODS,)
)
Defendants.)

OPINION

The issue before the Court is whether the Debtors' debt to their former attorney is nondischargeable pursuant to 11 U.S.C. §523 (a)(2)(A).

On January 12, 1993, the Debtors, Charles and Karen Woods, suffered a fire loss on property that was insured against such loss by Millers Mutual. When Millers Mutual denied coverage, the Debtors retained the Plaintiff, H. Carl Runge, Jr., to represent them in pursuing their claim against Millers Mutual. The contract signed by the Debtors and Mr. Runge provided for a contingent fee of one-third, which ". . . percentages will be applied against the total amount recovered and that any expenses will be deducted after the percentage agreed to has been subtracted from the total amount recovered." The contract further provided for payment to Mr. Runge on an hourly basis in the event

that the Debtors chose to terminate his services:

If I discharge my attorney for any reason before the above-described contingent attorney fee has been paid, I agree that in the event my attorney either is not entitled to or elects not to collect said contingent fee, I will reimburse it for all expenses advanced and will pay it a reasonable attorney's fee computed at a rate of \$85.00 per hour for time spent by any of its attorneys outside of court including travel time, and at a rate of \$150.00 per hour for the time spent by any of its attorneys in court.

Millers Mutual paid off the balance due on the mortgage to mortgagee Melvin Rainey in September, 1993, in exchange for a deed to the property in question.

On October 20, 1993, the Debtors signed a Mutual Release of All Claims. The document was notarized by Cheryl Whittaker. The Debtors returned the Mutual Release to Mr. Runge and he forwarded it to Williams & Daniels, the attorney for Millers Mutual on October 26, 1993.

The Debtors testified that they fired Mr. Runge sometime between October 20, 1993, and November 3, 1993. However, they never expressly told Mr. Runge in person or by direct telephone contact that he was fired and they never communicated anything of the kind in writing. Mr. Runge testified that neither he nor anyone in his office received any such notification. The Court found Mr. Runge to be much more credible on this issue than the Debtors.

On the first or second day of November, 1993, the Debtors told Mr. Daniels that they had fired Mr. Runge, and wanted to settle without him. On November 3, 1993, the Debtors executed a Mutual Release of All Claims at the office of Mr. Daniels. Mr. Runge was not present and did not have notice of this action. The November 3 agreement is identical to the October 20 agreement negotiated by Mr. Runge in every detail except the November 3 agreement omits any reference to Mr. Runge representing the Debtors.

The Mutual Release of All Claims provided that Millers Mutual would release to the Debtors a free and clear deed to the subject property. In addition, Millers Mutual agreed to pay \$29,283.96 to the Greenville, Illinois Best Western Country View Inn for the Debtors' residence expenses from January to September, 1993. Finally, Millers Mutual agreed to drop all claims for reimbursement of such expenses and release any actions for statutory penalties based on fraud or arson. Mr. Woods testified that "the deal was alright with him."

On November 5, 1993, Mr. Daniels personally executed and delivered to the Debtors at the Bond County Courthouse the deed to the property on which the loss had been suffered. The deed was free and clear of all mortgage encumbrances, said mortgage having been paid by Millers Mutual. The Debtors sold the property on November 9, 1993, for \$35,000.

Mr. Runge directed correspondence to the Debtors on November 16, 1993, and November 23, 1993, regarding the status of the settlement. The Debtors did not respond to Mr. Runge's letters. Litigation in the state court subsequently ensued between Mr. Runge and the Debtors.

On January 29, 1999, the Debtors filed a petition pursuant to Chapter 7 of the Bankruptcy Code. Mr. Runge claims that the Debtors owe him a one-third contingency fee on their recovery of \$107,049.80, i.e. \$35,683.27, and that the debt is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A).

In making the foregoing findings of fact, the Court has credited the testimony of Mr. Runge over that of the Debtors. The Court did not find the Debtors to be credible witnesses. Their lack of credibility was established by their demeanor, what they said, how they said it, and how their testimony related to the other evidence. Their testimony was misleading and evasive. In particular, the Debtors,

failure to recall signing the October 20 settlement agreement defied credibility.

11 U.S. C. §523 (a)(2)(A) excepts from discharge those debts which have been obtained by "false pretenses, a false representation, or actual fraud." In order for a debt to be found nondischargeable under §523 (a)(2)(A), the Plaintiff must prove by a preponderance of the evidence that the Defendants knowingly made a false representation with the intention and purpose of deceiving the creditor, that the creditor relied on the representation, and that the creditor sustained damages as a proximate result of the representation having been made. Field v. Mans, 116 S.Ct. 437, 446 (1995); Grogan v. Garner, 111 S.Ct. 654, 661 (1991); In re Mayer, F.3d 670, 673 (7th Cir. 1995), *cert. denied* 116 S.Ct. 563 (1995); In re Sheridan, 57 F.3d 627, 635 (7th Cir. 1995); In re Scarlata, 979 F.2d 521, 525 (7th Cir. 1992); In re Kimzey, 761 F.2d 421, 423-24 (7th Cir. 1985).

It is clear that the Debtors were aware that Mr. Runge was representing them in their dispute with Millers Mutual. Mr. Woods acknowledged that by signing the attorney representation contract and meeting with Mr. Runge on numerous occasions throughout 1993, that he was representing to Mr. Runge that Mr. Runge would represent him as his attorney, and be paid for it. Mr. Woods further understood that he would owe Mr. Runge on an hourly basis if he fired him. Mr. Woods understood his obligations to Mr. Runge at the time he entered into the contract with Mr. Runge in March, 1993, in November, 1993, when he claims to have fired Mr. Runge and settled the case without him, and when he received the deed to the property and sold it for \$35,000.

Mr. Runge was still representing the Debtors as their attorney on October 20, 1993, when he presented the Mutual Release of All Claims to the Debtors for their signature. As noted above, the Mutual Release of All Claims executed on October 23, 1993, is identical to the Mutual Release of All

Claims document executed without Mr. Runge 14 days later (the sole exception being the omission of Mr. Runge's name as the Debtors' attorney in the latter document).

Shortly after signing the settlement agreement on October 20, 1993, the Debtors engaged in a sharp practice of dealing with the intention of depriving Mr. Runge of his fee. They represented to Millers Mutual that they had fired Mr. Runge as their attorney. They did not communicate to Mr. Runge that he was fired or that they were settling the case without him. They did not tell Mr. Runge when they got the deed to the property or when they sold the property. They did not respond to Mr. Runge's two letters in November 1993. Instead, they left Mr. Runge under the false impression that he was their attorney and that he would be paid out of any settlement.

Mr. Runge justifiably relied on the Debtors' representation that he would be paid out of the settlement. There were no warning signs that the Debtors intended to allow Mr. Runge to negotiate a settlement with Millers Mutual and then avoid paying him his contingent fee by signing the same settlement without him. Mr. Runge was justified in relying on the attorney representation contract and the representations made to him by the Debtors at their numerous meetings.

It is clear that Mr. Runge suffered damages as the proximate result of the Debtors' misrepresentations. The Debtors' fraudulent scheme deprived Mr. Runge of his attorney fee - whether his one-third contingent fee or his payment on an hourly basis.

For the foregoing reasons, the Court finds the debt of the Debtors to Mr. Runge to be nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A).

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: **August 30, 1999**

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE