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11th Circ. Affirms Atty Fee Awards In Nursing Home Ch. 7

By **Emily Johnson**

Law360 (July 15, 2024, 4:23 PM EDT) -- The Eleventh Circuit found Monday a bankruptcy court didn't abuse its discretion when it awarded attorney fees to Shumaker Loop & Kendrick LLP, Fox Rothschild and a firm that merged with Venable for representing the Chapter 7 trustee in a nursing home operator's insolvency.

In a unanimous **opinion**, a three-judge panel rejected two consolidated appeals from the probate estates of Juanita Jackson, Elvira Nunziata, Joseph Webb, Opal Lee Sasser, Arlene Townsend and James H. Jones. The judges concluded that a Florida federal district court wasn't wrong in upholding the bankruptcy court's orders approving payment to Shumaker, Fox Rothschild LLP and Genovese Joblove & Battista PA, which combined with Venable LLP in January 2023.

The panel agreed with the law firms' argument that Section 328 of the U.S. Code, which doesn't require a hearing, applies to this matter instead of Section 330, which would have required a hearing before the court approved their request for payment for professional services.

"We agree that Section 328 applies because the bankruptcy court has already approved the terms and conditions of the trustee employing Shumaker for a fixed fee and Fox Rothschild and Genovese for a contingent fee," the judges said.

The probate estates had filed involuntary Chapter 7 bankruptcy proceedings against Fundamental Long Term Care Inc., alleging it is a sham entity created to store liabilities, including default judgments soaring over \$1 billion that stemmed from wrongful death cases.

After the probate estates won judgments against Trans Healthcare Inc. and its subsidiary, Trans Health Management Inc., the healthcare company deployed a "bust-out scheme" in which it sold Trans Health Management's assets and divested its liability to dump the judgments on a sham entity, the estates said.

When the bankruptcy court approved the settlement term sheet, Shumaker was awarded, after notice and a hearing, a fee of \$750,000 in October 2015, the appellate panel noted.

Further, the bankruptcy court approved the contingency fee in January 2016, after notice was given and it held a hearing, and that fee was affirmed by the district court in October 2019 following notice and a hearing, according to the circuit court decision.

"When the bankruptcy court was set to review the orders under review in this case authorizing payment, the court had enough knowledge of the facts and prior legal disputes in the docket before it to resolve the issue, so the court did not abuse its discretion by not holding hearings," the panel wrote.

The judges rejected one of the appeals' arguments that the district court should have thrown out the bankruptcy court's order granting the Chapter 7 trustee's request to pay Shumaker \$750,000 for representing the trustee in an adversary proceeding. The Eleventh Circuit wasn't persuaded by the probate estates' position that a previous bankruptcy court order "precluded Shumaker" from being paid with funds held by the bankruptcy estate.

The estates also contended that the bankruptcy court improperly granted the Chapter 7 trustee's

motion before holding a hearing or waiting 21 days after the request had been filed.

"The district court found no merit in either argument. And neither do we for the reasons" laid out in the opinion, the circuit judges said.

The panel ruled that the bankruptcy court did not abuse its discretion by not having a 21-day period after the fee requests, as required under Local Rule 2002-4, because "none of the firms invoked Local Rule 2002-4 in their motions to authorize payment."

The judges also concluded that the probate estates can't challenge in their appeals the bankruptcy court's order for the Chapter 7 trustee to hire Fox Rothschild and a partner at the firm, Robert Elgidely, because they didn't preserve the point of whether Fox Rothschild and Elgidely were disinterested parties.

"[W]e have no jurisdiction to consider the issue now," the panel said.

Steven M. Berman of Shumaker, who represented the firms and himself in the appeals, told Law360 Monday they're pleased by the circuit court's decision.

"I think it's consistent with what the bankruptcy court did and what the district court did," Berman said. "I think the appellants were operating under the misimpression that a formal hearing needs to be conducted anytime the Bankruptcy Code or rules talk about notice and hearing. I think both the bankruptcy court and the district court made it clear it's really just notice and an opportunity to be heard, not necessarily in the context of a formal hearing, and that gives the bankruptcy court the ability to sort of control the operations of its court."

Counsel for the estates didn't immediately respond to requests for comment Monday.

U.S. Circuit Judges Charles R. Wilson, Kevin C. Newsom and Gerald Bard Tjoflat sat on the panel for the Eleventh Circuit.

The probate estates are represented by James L. Wilkes, Bennie Lazzara Jr. and Mary J. Perry of Wilkes & Associates PA.

Berman, Shumaker and others are represented by Steven M. Berman and Seth P. Traub of Shumaker Loop & Kendrick LLP, Robert F. Elgidely of Fox Rothschild LLP and John H. Genovese of Genovese Joblove & Battista PA.

The case is Estate of Arlene Townsend et al. v. Berman et al., case number 22-10687, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Covey Son.