UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re: ALFRED L. BUCHHOLZ Social Security No. 445-36-5173 and JOSEPHINE M. BUCHHOLZ Social Security No. 504-34-2771 Debtors.	)	Bankr. No. 94-40526 Chapter 12 MEMORANDUM OF DECISION RE: FEE OF APPLICATION OF DEBTORS' COUNSEL (BLEEKER)

The matter before the Court is the application for compensation and reimbursement filed by Douglas R. Bleeker and Debtors' objection thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Attorney Bleeker may be allowed from the estate $4,914.79 in compensation and reimbursement.

I.

Debtors filed a Chapter 12 petition on October 14, 1994. Their attorney, Douglas R. Bleeker, filed a disclosure of compensation that stated Debtors had paid him $2,800.00 pre-petition and that they agreed to pay him another $2,200.00 post-petition.

Debtors filed an application to employ Attorney Bleeker on December 1, 1994. The application stated Attorney Bleeker was to

be "paid from the funds previously deposited in attorney's trust account . . ." and that services would be billed at $90.00 per hour. Attorney Bleeker's employment was authorized by an Order entered December 13, 1994. The Order stated Attorney Bleeker was to be compensated for services and reimbursed for expenses "only upon application in compliance with 11 U.S.C. § 330(a) and F.R.Bankr.P. 2016(a)."

Debtors filed a plan but several objections were raised. A confirmation hearing was held March 28, 1995. Attorney Bleeker and Attorney John E. Harmelink both appeared for Debtors. Attorney Bleeker moved for approval of his withdrawal as Debtors' counsel and Attorney Harmelink advised the Court that he would be representing Debtors. Trustee Yarnall advised the Court that objections to the plan had not all been resolved. By Order entered March 31, 1995, confirmation of Debtors' plan was denied and Debtors were directed to file a modified plan and notice it for hearing on April 25, 1995. A modified plan was not filed timely.

On April 10, 1995, Debtors filed an application to employ John E. Harmelink at $100.00 per hour plus sales tax and expenses. Through Attorney Harmelink, Debtors also moved for an extension of time in which to file a modified plan.

By Order entered April 17, 1995, Attorney Bleeker was allowed to withdraw as Debtors' counsel and Attorney Harmelink was approved as Debtors' new bankruptcy counsel. On May 25, 1995, the Court approved Debtors' request for an extension of time in which to file

a modified plan. Debtors were given until June 27, 1995 to file the modified plan and notice it for hearing.

Attorney Bleeker filed an amended fee application on June 5, 1995. The application stated there was a balance due of $630.10 on September 27, 1994, before the petition was filed. The amended application also stated that Debtors had paid him $3,000.00 for pre-petition services and that the services were billed at $90.00 per hour. The itemized statement began September 27, 1994, prior to the petition date, and continued through April 4, 1995, when the confirmation hearing on Debtors' first plan was held and when both he and Attorney Harmelink appeared. In the amended application, Attorney Bleeker sought $3,610.00 for compensation of services, $216.60 in sales tax, and $458.09 for reimbursement of expenses, for a total of $4,914.79. The total included the pre-petition balance due of $630.10 ($585.00 for compensation, $35.10 for sales tax and $10.00 for a UCC check).

Debtors filed an objection to the amended fee application on June 23, 1995. They argued that Attorney Bleeker may have expended the $3,000.00 on retainer without court approval; that no itemization of services and expenses for the pre-petition balance due of $630.10 was provided; that services on September 27, 1994 and October 3, 1994 did not relate to Debtors' Chapter 12 bankruptcy; and that Attorney Bleeker's trip from Mitchell to Sioux Falls for the hearing on March 28, 1995 was unnecessary.

A hearing was held June 27, 1995. Appearances included

Attorney Harmelink for Debtors, Attorney Bleeker, and Trustee Rick A. Yarnall. Attorney Bleeker filed an unsigned supplement to his fee itemization for the services that comprised the pre-petition balance due of $630.10. The supplement covered services from June 7, 1994 to September 14, 1994 and included services related to a pending foreclosure against Debtors and their discussions about filing a Chapter 12. Attorney Bleeker acknowledged that he had accessed the retainer in his trust account post-petition without court authorization. The Court took the matter under advisement.

II.

The standards for allowing compensation and reimbursement to a debtor's counsel in this District are based on substantial case law from the Court of Appeals for the Eighth Circuit and from this Court. The case law, of course, is based on 11 U.S.C. § 330.[1]

Section 330 of the Bankruptcy Code states the Court may award to a debtor's attorney

> (1) reasonable compensation for actual, necessary services rendered by such . . . attorney . . . based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a [bankruptcy case].
>
> (2) reimbursement for actual, necessary expenses.

Services rendered by the debtor's counsel must benefit the estate to be compensated from the estate. *In re Reed*, 890 F.2d

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[1] Section 330 was amended on October 22, 1994. The pre-amendment version is applied here since Attorney Bleeker's employment was approved under the pre-amendment version.

104, 105-06 (8th Cir. 1989). As this Court previously noted,

> [a]lthough the phrase "benefit the estate" is not defined in *Reed*, . . . the court emphasizes the distinction between services that benefit the estate and those that benefit only the debtor. One court has noted that compensation for services that "benefit the estate" was a standard established under the Bankruptcy Act but that there was no evidence that Congress intended to modify that reasoning when it adopted § 330(a). *In re Ryan*, 82 B.R. 929, 932 (N.D. Ill. 1987). Another court, after comparing § 330(a) with its pre-Code predecessor, concluded that the "benefit the estate" standard is subsumed by the "reasonable compensation for actual, necessary services" standard set forth in § 330(a). *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 485-86 (Bankr. N.D. Ill. 1992). Most notable, neither court, like the court in *Reed*, limited "benefit to the estate" to monetary benefit.

In re Brandenburger, 145 B.R. 624, 628-29 (Bankr. D.S.D. 1992). In essence, the tangible benefit conferred on the estate and its creditors is a proper measure of the appropriate compensation. Moreover, the fees awarded should be reasonable in light of the results obtained. *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260-61 (8th Cir. 1991).

Federal Rule of Bankruptcy Procedure 2016(a) sets forth what information a fee application must include if compensation and reimbursement are sought from the estate. Time records should reflect the actual time spent rendering each particular service. *In re McDaniel Enterprises, Inc.*, Bankr. No. 88-10199, slip op. at 4 (Bankr. D.S.D. April 9, 1991).

The applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended. *H.J. Inc.*, 925 F.2d at 260.

> Inadequate documentation may warrant a reduced fee. [Cites omitted.] Incomplete or imprecise billing records preclude any meaningful review by the . . . court of the fee application for "excessive, redundant, or otherwise unnecessary" hours[.]

Id. (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-437, 76 L.Ed. 2d 40 (1983)).

A case by case, item by item review of the application is appropriate. *In re Marolf Dakota Farms Cheese, Inc.*, Bankr. No. 89-50045, slip op. at 8 (Bankr. D.S.D. October 17, 1990)(cites omitted). "[U]ncertainties should be resolved against the [applicant], if arising because of imprecise recordkeeping without adequate justification. *H.J. Inc.*, 925 F.2d at 261 (quoting *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1275 (8th Cir. 1980)); *In re Hanson*, Bankr. No. 386-00136, slip op. at 7 (Bankr. D.S.D. March 8, 1989). The applicant should be allowed to submit additional records before the Court decides to reduce the lodestar for inadequate documentation. *H.J. Inc.*, 925 F.2d at 260.

An attorney may be allowed reasonable compensation for preparing his fee application and the necessary expenses for filing and serving the application. *In re Kauer*, Bankr. No. 88-30038, slip op. at 10-11 (Bankr. D.S.D. March 27, 1991). In contrast, defending or amending an application are not compensable from the estate.

If a debtor's attorney receives a pre-petition retainer in a Chapter 12 case, the attorney must seek court approval before

expending any of the retainer. *In re Tri-County Water Assoc., Inc.*, 91 B.R. 547, 550 (Bankr. D.S.D. 1988). The general rule, to which South Dakota law conforms, is that pre-petition retainers are held in trust for the debtor and that debtor's equitable interest in this trust constitutes property of the estate. *Id.* at 551 (cites therein). As property of the estate, an application and court approval are required before a retainer may be expended. 11 U.S.C. § 330(a) and F.R.Bankr.P. 2016(a).

When fees are sought before a plan is confirmed, the applicant bears the burden of showing that all services rendered and expenses incurred in the reorganization effort were "necessary" as required by 11 U.S.C. § 330(a). *In re Travis*, Bankr. No. 90-10094, slip op. at 4 (Bankr. D.S.D. April 5, 1991).

III.

Debtors are correct that Attorney Bleeker needed to itemize the services that made up the pre-petition balance of $630.10. Attorney Bleeker has resolved that objection by filing a supplement.

Debtors also are correct that Attorney Bleeker should not have expended any of the $3,000.00 retainer without court approval, as provided by *Tri-County Water*, 91 B.R. at 550. Now that Attorney Bleeker is aware of that requirement, the Court is confident that the same problem will not arise again.

Debtors' third objection was that some pre-petition services

did not relate to Debtors' bankruptcy case. A review of the itemization and supplemental itemization reveals that Attorney Bleeker did render services related to a foreclosure action. Those services, however, appear to be mixed inevitably with the pre-petition services regarding a Chapter 12 filing. Therefore, they will not be disallowed. Had these non bankruptcy services been more remote in nature and time from the bankruptcy, they would have been disallowed under § 330(a).[2]

Debtors' final objection was that Attorney Bleeker did not need to travel from Mitchell to Sioux Falls for the March 28, 1995 hearing when he withdrew as Debtors' counsel. While the Court likely would have approved his appearance by telephone, his appearance was appropriate, as the Court may have had questions about his withdrawal and the transfer of the work in progress to Attorney Harmelink. Fees and costs for the trip will be allowed.

The Court's only remaining concern is that Attorney Bleeker seeks $4,914.79 in compensation and reimbursement although he was unable to get a plan confirmed. In other words, the results obtained may not justify the fees sought because the estate has not

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[2] If Attorney Bleeker's pre-petition services had been unrelated to the bankruptcy case and more remote in time, they would have constituted a claim for payment that Attorney Bleeker held against Debtors. Attorney Bleeker then may not have met the disinterestedness test under 11 U.S.C. § 327(a) when Debtors sought to employ him, since he would have a creditor-debtor relationship with them. A lack of disinterestedness also may have resulted in a denial or reduction of fees, especially if it was not disclosed before Attorney Bleeker was employed. *See, e.g., Electro-Wire Products, Inc. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 359-61 (11th Cir. 1994).

benefited from all services, as demanded by *Reed*, 890 F.2d at 105-06. However, no one has objected on those grounds and there is no evidence before the Court that Attorney Bleeker's attempt at getting a plan confirmed was futile. Modifications in a plan often are necessary before objections are resolved and confirmation may be granted. Therefore, Attorney Bleeker's fees will be allowed as requested. The $3,000.00 retainer he received shall be deducted to determine the remaining balance due from the estate.

An appropriate order will be entered.

Dated this 15th day of August, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

AUG 15 1995

Clerk
U.S. Bankruptcy Court, District of S.D.

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By Diane Mickelson
Deputy Clerk

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to all creditors and other parties in interest set forth on the attached service list.

U.S. Bankruptcy Clerk
District of South Dakota

By: DM
Date: 8-15-95

Case: 94-40526 Form id: 122 Ntc Date: 08/15/95 Off: 4 Page : 1
Total notices mailed: 98

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