UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 91-40108
NORMAN EUGENE FRENCH	)	Chapter 7
Social Security No. 503-32-7701	)	MEMORANDUM OF DECISION RE: SIXTH INTERIM AND FINAL FEE APPLICATIONS OF DEBTOR'S COUNSEL
Debtor.	)	

The matters before the Court are the sixth interim and the final fee applications filed by Debtor's counsel, J. Bruce Blake, and the responses thereto filed by the United States Trustee and Debtor. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Debtor's counsel is not entitled to additional compensation or reimbursement as requested under his sixth interim fee application and his final fee application. Further, no fees previously awarded will be disgorged. Any unpaid compensation for services and reimbursement of expenses shall be the personal responsibility of Debtor.

I.

Since at least 1987, Norman E. "Jim" French and Velma M. French had been litigating a divorce and property settlement. At a hearing on February 8, 1991, the state court judge presiding over this domestic relations case ordered Jim French to vacate the couple's farm. Interim possession was awarded to Velma French. Jim French (Debtor) filed a Chapter 12 petition on February 12, 1991. Soon thereafter, Debtor commenced an adversary proceeding against his ex-wife attempting to recover the farm. That matter

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was settled by Order entered April 2, 1991. Debtor also soon commenced an adversary proceeding seeking a removal of the divorce proceeding to the Bankruptcy Court. Velma French resisted the removal. By Order entered October 28, 1991, this Court[1] remanded the adversary proceeding to state court with the caveat that "the Bankruptcy Court shall retain its right and power to review any property dispositions made by the state court as to any property which is property of the Chapter 12 estate[.]"

On December 3, 1991, several months after the petition was filed, Farmers Home Administration (FmHA) filed a motion to dismiss on the grounds that the state court order, which gave Debtor's ex-wife possession of the farm, precluded Debtor from qualifying for Chapter 12 relief. Chapter 12 Trustee Rick A. Yarnall and Farm Credit Bank of Omaha (FCBO) joined the motion. By a supplemental pleading filed January 10, 1992, Trustee Yarnall also urged dismissal of the case because Debtor had not gotten a plan confirmed, although the case had been pending several months, and because Debtor had failed to file monthly reports. A hearing was held January 14, 1992. The Court took under advisement the motion to dismiss and continued the hearing on a motion to withdraw as Debtor's counsel by Attorney Blake. In compliance with the Court's directive at the hearing, on January 23, 1992, FmHA filed an amendment to its motion to dismiss that argued the case should be dismissed because Debtor had not gotten a plan confirmed and could

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[1] The Hon. Peder K. Ecker, presiding.

not get a plan confirmed until he resolved his legal problems with his estranged wife. The Court allowed interested parties to file briefs in response to the amendment.

On March 20, 1992, Judge Ecker entered a Memorandum Decision and Order that denied FmHA's motion to dismiss on the grounds of unreasonable delay and held:

> Any blame for the fact this case is more than one year old is to be shared by all parties, creditors, and Debtor. Delay has been caused by all parties, not the Debtor alone. Therefore, the creditors have not been prejudiced. And even though the apparent acrimony between Debtor and his wife has fueled a seemingly endless divorce, it is not accurate to conclude that Debtor has single-handedly done the same with the bankruptcy case so as to prejudice creditors[.]

No appeal from that decision was taken. A plan was never confirmed. While the case was pending, Debtor was convicted on both state and federal criminal charges and was incarcerated. On June 2, 1992, FmHA filed a motion to convert the case to Chapter 7 for fraud. FmHA later reached a settlement with Debtor that resolved several pending motions and which allowed Debtor to use $25,480.46 plus interest to pay attorney's fees. The settlement was approved by Order entered April 9, 1993. The motion to convert was never heard.

No plan was ever confirmed.

As a result of its involvement in Debtor's federal criminal case, the United States District Court for the District of South Dakota transferred the bankruptcy case to the undersigned on December 30, 1993. The case was converted to a Chapter 7 proceeding for fraud on February 7, 1994.

During the Chapter 12 proceeding, Debtor's bankruptcy attorney, J. Bruce Blake, filed five interim fee applications. Total compensation and reimbursement awarded was $46,632.36.[2]

On March 2, 1994, Attorney Blake filed a sixth interim fee application for $12,697.00 for services and expenses from March 13, 1993 through February 6, 1994. The application also stated Attorney Blake had been awarded $46,632.36 to date, that he had been paid $41,499.63 to date, and the interest of $3,019.27 that had accrued[3] for a total unpaid balance of $8,152.00.

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[2]

DATE OF APPLICATION:	OBJECTIONS BY:	DISPOSITION:
June 14, 1991 for Feb. 8, 1991 through June 10, 1991	No objections filed.	$14,385.00 awarded on July 10, 1991
Oct. 25, 1991 for June 11, 1991 through Oct. 16, 1991	FmHa regarding source of compensation; apparently was withdrawn	$ 9,829.00 awarded on November 25, 1991
April 14, 1992 for Oct. 17, 1991 through April 8, 1992	U.S. Trustee regarding compensation for services related to divorce or criminal action	$ 7,523.36 awarded on May 18, 1992
Sept. 18, 1992 for April 9, 1992 through September 15, 1992	U.S. Trustee regarding compensation for services related to divorce or criminal action	$ 6,743.00 awarded Nov. 5, 1992
March 18, 1993 for Sept. 16, 1992 through March 12, 1993	No objections filed.	$ 8,152.00 awarded on April 14, 1993

[3] The Order authorizing Debtor to employ Attorney Blake did not provide for the payment of interest on any unpaid fees. Further, none of the fee applications requested interest and none of the fee orders provided for the payment of any interest. Any mention of interest on the unpaid balance first appeared in Attorney Blake's April 14, 1992 application but the rate of interest applied and how it was applied are not set forth anywhere. No one has objected to the application of interest to unpaid fees by Attorney Blake so the interest payments will not be disgorged. However, Attorney Blake and other estate professionals are cautioned that any provision for interest on unpaid fees must be approved by the Court as a part of the fee application process.

The United States Trustee objected to Attorney Blake's sixth interim fee application on several grounds. First, the United States Trustee argued that the fees sought were excessive in light of the results obtained: Debtor never had a plan confirmed. The U.S. Trustee questioned whether the case was ever a candidate for reorganization as discussed in *In re Alderson*, 114 B.R. 672,679-81 (Bankr. D.S.D. 1990). Second, the U.S. Trustee argued certain identified services did not benefit the estate. Some of these services related to divorce or criminal proceedings involving Debtor and a motion to remove Debtor as the debtor-in-possession. Third, the U.S. Trustee argued Attorney Blake's statement of expenses did not provide sufficient detail regarding long distance telephone calls, photocopies, or postage.

Prior to a scheduled hearing on June 14, 1994, Attorney Blake and Bruce J. Gering, counsel for the U.S. Trustee, reported they had reached an agreement whereby Attorney Blake would withdraw the March 2, 1994 interim application. The stipulation was filed June 20, 1994 and provided that Attorney Blake could refile the application if sufficient funds existed in the Chapter 7 estate to pay Chapter 12 pre-conversion, administrative expenses.

On October 3, 1994, Attorney Blake refiled his sixth interim application. He again sought $12,697.00 for services from March 13, 1993 through February 6, 1994. The U.S. Trustee again objected on the grounds that total compensation and reimbursement awarded to date were excessive in light of the results obtained, especially where a plan was never confirmed and where the case may

never have been a candidate for reorganization. Further, the U.S. Trustee argued certain identified services related to Debtor's divorce or criminal proceedings and a motion to remove Debtor as the debtor-in-possession did not benefit the estate and that Attorney Blake's statement of expenses did not provide sufficient detail regarding long distance telephone calls, photocopies, or postage.

Concomitant with his sixth interim application, Attorney Blake also filed a final fee application on October 3, 1994. Therein, he sought an additional $2,807.00 for services and expenses from February 7, 1994 through September 19, 1994. Debtor responded to the Application by requesting a hearing on it. He did not specifically object to the final application. The U.S. Trustee objected to the post-conversion services rendered by Attorney Blake, excluding the services related to Debtor's appearance at the Chapter 7 § 341 meeting, on the grounds that the post-conversion services benefitted Debtor, not the estate.

A hearing on both the sixth interim and final fee applications was held November 28, 1994. Appearances included Attorney Blake and Attorney Gering and Assistant U.S. Attorney Charles L. Nail, III, for the U.S. Trustee. At the hearing, Attorney Blake provided a history of the case from his perspective. He said he never doubted Debtor could reorganize because Debtor's operation cash flowed and because it was not a large case by Chapter 12 standards. Attorney Blake said Debtor's case originally was a "garden variety" reorganization that was complicated only by Debtor's

divorce. Ultimately, Attorney Blake said the reorganization failed because of Debtor's state and federal criminal convictions. Attorney Blake said Debtor was a very difficult client but he was confident that Debtor had not engaged in criminal activity. Attorney Blake also said he had wanted to attack the federal criminal charges through a dischargeability complaint against FmHA but was prevented from doing so by Debtor's criminal counsel.

In response to questions from the bench regarding why Debtor filed a bankruptcy petition, Attorney Blake said he was asked by Debtor's divorce attorney to see if he could help. At that time, Debtor had been litigating the divorce and property settlement for some five years and the state court judge had given possession of the farm to Debtor's ex-wife. Attorney Blake said the bankruptcy petition was intended to restore Debtor to the possession of his farm and to protect the cattle and other assets. Attorney Blake further stated that he ultimately got the divorce action removed to the bankruptcy court so that the problem was "managed." However, he acknowledged that subsequent criminal problems and FmHA's eventual unwillingness to negotiate undermined any reorganization.

The United States Trustee questioned whether the case was ever a candidate for reorganization and, therefore, whether all compensation for Chapter 12 services should be denied, including the interim compensation already awarded.

With the Court's permission, Attorney Blake filed a supplement to his sixth interim application on December 28, 1994 that included an itemization of telephone calls and additional information on

copying charges and postage to which the U.S. Trustee had objected. The matter was taken 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 (a)[4], which provides:

> (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 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,

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[4] Since the services for which Attorney Blake seeks compensation were rendered prior to the amendment of § 330(a) on October 22, 1994, the pre-amendment version of § 330(a) is applied here.

> 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, (8th Cir. 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.

The Court should refer to the lodestar approach and the twelve factors recognized in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *In re Grimes*, 115 B.R. 639, 642-43 (Bankr. D.S.D. 1990); *see also P.A. Novelly v. Palans (In re Apex Oil Co.)*, 960 F.2d 728 (8th Cir. 1992). The twelve factors discussed in *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform legal services properly; (4) the preclusion of employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

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 record keeping 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.

When fees are sought before a plan is confirmed or when a Chapter 11, 12, or 13 case is converted to a Chapter 7, 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). If the case has been converted to a Chapter 7, the allowed pre-conversion fees will be a priority administrative expense behind the Chapter 7 administrative expenses. 11 U.S.C. § 726(b). However, if a converted case was never an appropriate candidate for reorganization, compensation for all services directed toward reorganization may be denied. *In re Alderson*, 114 B.R. 672, 679-81 (Bankr. D.S.D. 1990).

After a reorganization case is converted to a Chapter 7, the debtor's counsel generally is compensated for assisting the debtor

in preparing and filing any required reports or amended schedules and for representing the debtor at the Chapter 7 § 341 meeting of creditors. *See In re Walgamuth*, Bankr. No. 91-50270, slip op. at 5, (Bankr. D.S.D. July 1, 1992)(citing *In re Nu-Process Industries, Inc.*, 13 B.R. 136, 138 (Bankr. E.D. Mich. 1981)).

III.

From a review of the record and in recognition of Attorney Blake's statements at the November 28, 1994 hearing, it is clear that this Debtor never belonged in bankruptcy. Debtor's legal problems were with the state court divorce action. Any relief to which he was entitled when the state court gave possession of the farm to his estranged wife should have been sought from that tribunal or the South Dakota Supreme Court. Debtor's assets always exceeded his liabilities and his farming operation cash flowed, even when Debtor was incarcerated and unable to attend to his own business affairs. While Debtor and his counsel may have chosen the Bankruptcy Court as a forum of greater convenience and familiarity to fight Debtor's battle with his estranged wife, the true nature of Debtor's legal problems with his ex-wife was not altered. Debtor subsequently complicated his problems by perjuring himself before both the state court and this Court and his farm was liquidated upon conversion to Chapter 7 for fraud.

Generally, where a petition was never appropriate, no compensation from the estate would be awarded to the debtor's counsel because the bankruptcy estate -- and therefore, the estate's creditors -- should not bear the cost of an ill conceived

filing. In this case, however, the Court will not disgorge any fees already paid to Attorney Blake. First, no creditor or other party in interest timely raised the issue of whether this was an appropriate filing. *See In re Purpura*, 170 B.R. 202 (Bankr. E.D.N.Y. 1994). The case was nearly a year old before FmHA sought dismissal of the case. Second, no party questioned the propriety of the case when Attorney Blake filed his several fee applications. If concerns were harbored that this case was inappropriate or that the reorganization would fail, interested parties should have objected to further compensation for Debtor's attorney until the case moved forward. While these objections may not have been successful, they would have put Attorney Blake and the Court on notice and would have preserved that objection when final fees were awarded. *See* 11 U.S.C. § 329(b).[5] Finally, all creditors should receive payment in full. Absent any of these three circumstances, disgorgement of all or some of Attorney Blake's fees may have been appropriate.

The Court, however, will not award any more compensation or reimbursement from the estate to Attorney Blake for two reasons. First, assuming this once was an appropriate Chapter 12 case, the $41,499.63 already received by Attorney Blake from the estate and other sources is more than sufficient to compensate him for the work performed and the results obtained. The bankruptcy law issues

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[5] Amendments made to § 330 by the Bankruptcy Reform Act of 1994 specifically provide for the return of excess interim fees paid. 11 U.S.C. § 330(a)(5)(enacted October 22, 1994).

presented were not complicated and a plan was never confirmed. As Attorney Blake stated, but for Debtor's problems with his ex-wife and the criminal convictions during the pendency of the case, this was a "garden variety" Chapter 12.

Second, any additional compensation and reimbursement should come from Debtor, not the estate, because it was Debtor who benefited from the majority of Attorney Blake's services. These final two fee applications do not raise the issue of whether Attorney Blake appropriately represented Debtor. Attorney Blake zealously represented Debtor and strived to achieve the best legal result possible for him, even after Debtor compounded his legal problems by perjuring himself and committing other fraudulent acts. These fee applications do not raise the issue of whether the services rendered and the compensation sought are reasonable. There is no doubt that Attorney Blake performed only necessary services and incurred only necessary expenses. There is no doubt that all the compensation and reimbursement sought were reasonable in light of the work performed and the results for *Debtor*, not the estate. Therefore, no additional compensation or reimbursement from the estate is warranted. The sums sought in the sixth interim application and the final application shall be Debtor's personal responsibility. If Trustee Yarnall has funds available after paying all creditors, including Debtor's ex-wife and his present wife, he may turn those funds over to Attorney Blake to apply to his fees as set forth in his sixth and final fee applications, excluding any further interest payment since interest has never

been approved by this Court.

An Order will be entered denying any compensation or reimbursement from the estate for Attorney Blake's sixth interim and final fee applications. The Order shall state that unpaid fees and the fees and expenses set forth in the sixth interim and final fee applications, excluding interest, are Debtor's personal responsibility and may be paid from any excess funds that Trustee Yarnall has after paying all creditors.

So ordered this 24 day of March, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT

CERTIFICATE OF SERVICE

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

Patricia Merritt, Bankruptcy Clerk

By: _____

Date: MAR 24 1995

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

MAR 24 1995

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

Case: 91-40108 Form id: 122 Ntc Date: 03/24/95 Off: 3 Page : 1
Total notices mailed: 14

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Aty	Tiede, Stuart L. 310 S. First Ave., Sioux Falls, SD 57102
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