

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)
) Bankr. Case No. 87-50123
NEUHAUSER RANCH, INC)
) Chapter 12
Employer's Tax ID No.46-0264665)
) MEMORANDUM OF DECISION RE:
Debtor.) FINAL FEE APPLICATION
) BY DEBTOR'S COUNSEL

The matter before the Court is the Application for Final Compensation of Attorney's Fees, Costs, and Expenses of Debtor's Counsel and the objections thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and subsequent Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Debtor's attorney should not be compensated for services nor reimbursed for expenses related to Debtor's complaint against Lone Star Cattle Limited Partnership.

I.

Debtor filed a Chapter 12 petition on April 24, 1987. By Order entered May 15, 1987, Debtors' employment of Attorney James P. Hurley was approved.¹ The application to employ stated that Attorney Hurley received a \$10,400.00 retainer. Debtor paid the filing fee. Attorney Hurley's services were to be compensated at \$100.00 per hour. His certified legal assistant's services were to be compensated at \$40.00 per hour. Sales tax on services and actual, necessary expenses were to be reimbursed.

On July 30, 1987, Debtor filed an application to employ

¹ The Hon. Peder K. Ecker, presiding.

Attorney William A. Wyman to serve as estate counsel regarding "contract" matters. The application was approved by Order entered July 31, 1987. Under the terms of the application, Attorney Wyman was to receive \$75.00 per hour for services plus reimbursement of sales tax and actual, necessary expenses.

Attorney Wyman filed a fee application on October 17, 1988 requesting \$10,605.30 in interim compensation and sales tax. Several objections to the application were filed, including claims that Debtor's counsel pursued frivolous actions and that some services had not benefitted the estate. A hearing was held November 2, 1988² but was continued on ten days' notice without resolution. The matter was never re-noticed for hearing.

Settlements were reached with most creditors. Judgment was rendered for Defendant-Creditor Lone Star Cattle Company in an adversary commenced by Debtor. A plan was confirmed on June 6, 1991.

Debtor filed its final report and account on June 10, 1994. An evidentiary hearing to determine disposable income is scheduled for June 22 and 23, 1995.

Attorney Hurley filed a final fee application on January 9, 1995. Therein, he requested \$56,735.00 for 567.35 hours of his services; \$2,332.00 for 58.30 hours of his paralegal's services; sales tax on services of \$3,544.02; and reimbursement of \$4,994.13 in expenses for a total request of \$67,605.15. The application

² The case was transferred to the undersigned on May 17, 1988.

also stated that he had received only \$4,937.31 as a retainer, contrary to the \$10,400.00 reported in the application to employ him.

The United States Trustee objected to the application on January 27, 1995 on the grounds that services rendered and costs incurred for the adversary proceeding initiated by Debtor against the Lone Star Cattle Company were not beneficial to the estate; that time for preparing an amended application to employ an estate professional on January 27, 1989 should not be compensated from the estate; that an application to employ Attorney Hurley in the Lone Star Cattle Company adversary unnecessarily duplicated his employment order in the main case; that services rendered on November 30, 1992, July 8, 1994, and July 11, 1994 addressed disposable income and, therefore, are not compensable from the estate; and that services on thirty-one different dates were not sufficiently itemized.

A February 14, 1995 hearing on the application and objection was continued to March 21, 1995 on Attorney Hurley's request to allow him additional time to respond to the U.S. Trustee's objections.

On March 21, 1995, Attorney Hurley filed a copy of his response to the U.S. Trustee objections.³ The Court gave the U.S. Trustee an opportunity to file a written response.

The U.S. Trustee filed supplemental objections on April 3,

³ Attorney Hurley filed the original response on March 24, 1995.

1995. They objected that the fees sought by Attorney Hurley were excessive in light of the size and complexity of the case. They also again objected that the Lone Star Cattle Company adversary proceeding commenced by Debtor was a detriment, not a benefit, to the estate because there was no basis to Debtor's claim. The U.S. Trustee stated that all their other objections had been resolved by Debtor's response except the objection regarding the duplicate employment application for Attorney Hurley in the adversary proceeding.

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.

Section 330⁴ 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.

The applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended. *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991). Services rendered

⁴ Section 330 was amended by the Bankruptcy Reform Act of 1994. However, the amendments to § 330 are not applied here since all services for which Attorney Hurley seeks compensation were rendered prior to the effective date of the amendments.

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, 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.*, 925 F.2d at 260.

III.

Services Related to the Lone Star Cattle Adversary. Upon consideration of the record before the Court and the application of § 330(a), the Court concludes that Debtor's counsel should not be compensated for services nor reimbursed for expenses arising from the adversary proceeding against Lone Star Cattle Limited Partnership and others. The Court ruled in favor of the defendants on all counts on January 23, 1989, after concluding that there was no legal merit to any of Debtor's allegations. Further, the Court

imposed sanctions against Attorney Wyman and Debtor because the complaint in the Lone Star Cattle Company adversary was not well grounded in fact and warranted by law, as required by F.R.Bankr.P. 9011. While no sanctions were sought against or imposed on Attorney Hurley, the Court's October 13, 1989 and October 19, 1989 letter decisions regarding the sanctions further delineate why the Lone Star adversary proceeding was of no benefit to the estate. The Court's Findings and Conclusions entered March 13, 1990 set forth all the procedural errors and sanctionable conduct within the adversary. In sum, the action was "frivolous and without merit." *Neuhauser Ranch, Inc. v. Lone Star Cattle Limited Partnership, et al. (In re Neuhauser Ranch, Inc.)*, Adversary No. 88-5005; Bankr. Case No. 87-50123, slip op. at 3 (Bankr. D.S.D. March 13, 1990).

As a meritless action, the adversary from its inception could never produce any benefit to the estate. Accordingly, any services rendered or expenses incurred related to the adversary must not be paid from the estate. Those services will remain the personal obligation of Debtor and shall be paid by debtor only after Debtor pays any deposable income owed and after the case is closed.

Duplicate Employment Applications. The Court will not deduct from Attorney Hurley's fee application the compensation sought for preparing and filing Plaintiff-Debtor's application to employ him as counsel in the adversary proceeding. The duplicate application, while unnecessary, most likely was prepared as a safeguard and was not intended to generate costs needlessly.

Attorney Hurley's Retainer. The record conflicts on the

amount of the retainer received by Attorney Hurley. The application to employ him states he received \$10,600.00. His final fee application states he received \$4,937.31. Attorney Hurley should submit a letter of explanation on this issue to the Court.

Upon receipt of Attorney Hurley's letter regarding the retainer he received, the Court will enter an order in compliance with the findings and conclusions set forth herein.

Dated this _____ day of June, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By _____
Deputy Clerk

(SEAL)