

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Southern Division

In re:	)	
	)	Bankr. No. 93-40057
TOMMY O. RICE	)	Chapter 7
Social Security No. 478-54-3475	)	
	)	MEMORANDUM OF DECISION RE:
and	)	FINAL FEE APPLICATION
	)	BY ATTORNEY HARMELINK
DIANE ELLEN RICE	)	
Social Security No. 480-64-0330	)	
	)	
Debtors.	)	

The matter before the Court is the Final Rule 2016(a) Application for Compensation and Reimbursement filed by Attorney John E. Harmelink and the objections 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 Harmelink should not be allowed additional compensation and reimbursement from the estate.

I.

Debtors filed a Chapter 13 petition on February 2, 1993. Attorney John Harmelink served as counsel for Debtors.

A plan was confirmed July 19, 1993.<sup>1</sup> By Orders entered August 19, 1993 and September 22, 1993, Attorney Harmelink was awarded \$6,554.35 in compensation and reimbursement for services and expenses through June 30, 1993.

Trustee Yarnall moved for conversion of the case on December 9, 1993 because Debtors had failed to make their plan

<sup>1</sup> The Hon. Peder K. Ecker, presiding.

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payments. The matter was continued several times. The case ultimately was converted to a Chapter 7 proceeding by Order entered October 25, 1994.<sup>2</sup>

After the case was converted, the contract for deed holders on some estate real property filed a motion for relief from the automatic stay. Chapter 13 Trustee Rick A. Yarnall resisted the motion because he wanted to preserve for the estate any equity in the property. Debtors also resisted the motion and argued that equity may exist. A hearing was held November 30, 1994. The parties reached an agreement that provided for a dismissal of the motion on the condition that Trustee Yarnall would accept or reject the contract for deed by July 1, 1995.

Trustee Yarnall accepted the contract and offered the property for sale. Trustee Yarnall also obtained the Court's approval to employ himself as the estate attorney. Services to be performed included assisting with the sale of estate real property. A hearing to accept the high bid on the real property and to receive upset bids was held July 18, 1995. No upset bids were received. Trustee Yarnall received retroactive court approval to employ the realtor that helped with the sale.

On May 15, 1995, Harmelink & Fox filed a third fee application for services and expenses from July 20, 1993 through May 5, 1995. The United States Trustee objected on the grounds that any fees awarded for pre-conversion services and costs must be subordinated

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<sup>2</sup> The case was reassigned to the undersigned on November 1, 1994.

to payment of all post-conversion administrative expenses; services rendered in resistance to the case trustee's motion to dismiss or convert the case did not benefit the estate; and with the exception of services and expenses related to the attorney's appearance with Debtors at the Chapter 7 § 341 meeting on November 18, 1994, none of the post-conversion services benefited the estate.

A hearing was held June 27, 1995. Appearances included John E. Harmelink for Harmelink & Fox Law Office, Charles L. Nail, Jr., Assistant U.S. Trustee, and Chapters 13 and 7 Trustee Rick A. Yarnall. Attorney Harmelink urged the Court to approve all post-conversion fees because he had benefited the estate by securing buyers for the real property being sold by the Trustee. He stated that at the forth coming auction sale he would be "representing the Debtor, the party that wants to buy the property, and, I guess, the estate because it's the estate that will benefit." Trustee Yarnall confirmed that Attorney Harmelink had come to him and told him that he had buyers willing to pay more than the buyer that the Trustee had found. The original buyer that Trustee Yarnall had found subsequently raised his offer. Trustee Yarnall took no position on the fee application.

Assistant U.S. Trustee Nail informed the Court that services by Attorney Harmelink regarding the real estate sale were not included in this fee application and he argued compensation for those services should not be considered at this time. The Court advised Attorney Harmelink that he would need to file another fee application if he wanted compensation for his sale related

services. The Court took the remaining objections to that fee application under advisement.

While a decision on that fee application was pending, Attorney Harmelink filed a final fee application and noticed it for objections. In this final application, Attorney Harmelink sought \$516.57 fees for services rendered, sales tax, and expenses incurred between May 9, 1995 and July 21, 1995. These services mostly related to the sale of estate property.

By Memorandum of Decision and Order entered August 14, 1995, the Court awarded Attorney Harmelink an additional \$521.80 in compensation and reimbursement from the estate arising from the May 15, 1995 fee application. Compensation for services related to the prolonged resolution of the Trustee's Motion to Dismiss and the dischargeability complaint specifically were not allowed. The Court also ordered that all other services rendered and expenses incurred through May 5, 1995 shall be Debtors' personal responsibility.

The United States Trustee objected to Debtor's final fee application on August 16, 1995. The U.S. Trustee again argued that Attorney Harmelink's post-conversion services did not benefit the estate and, therefore, are not compensable from the estate. The U.S. Trustee noted that the services rendered on this application related only to Debtors' dischargeability action and Trustee Yarnall's sale of estate property. The U.S. Trustee argued that the dischargeability action benefited Debtors personally, not the estate. The U.S. Trustee further argued that the sale of estate

property was the responsibility of Trustee Yarnall.

A hearing was held September 20, 1995. Appearances included Attorney Harmelink, *pro se*, and Bruce J. Gering for the United States Trustee. Attorney Harmelink acknowledged his services related to the sale of estate property were voluntary and did not benefit Debtor. He further stated that he served as the middleman between an interested buyer and Trustee Yarnall. The Court expressed its reluctance to compensate gratuitous services that benefit the estate and took the matter under advisement.

## II.

The standards for allowing compensation and reimbursement to a debtor's counsel in this District are based on 11 U.S.C. § 330(a)<sup>3</sup> and the substantial case law from the Court of Appeals for the Eighth Circuit and this Court. The Court set forth these standards in its Memorandum of Decision entered August 14, 1995 and they are incorporated here. Other applicable statutes and case law are incorporated below.

## III.

The objections raised by the United States Trustee will be sustained for the three reasons set forth below.

First, Attorney Harmelink was not employed by the estate to represent the Trustee in matters related to the sale of estate property. With Court approval, Trustee Yarnall employed a realtor

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<sup>3</sup> Section 330 was amended in October 1994. The pre-amendment version is applied here since the case was commenced prior to October 1994.

to sell the real property and employed himself to handle legal matters related to the sale. The employment of another attorney was not necessary and was not pre approved as contemplated by 11 U.S.C. § 327 and F.R.Bankr.P. 2014(a). Further, there are no circumstances present that would warrant a retroactive authorization. See *United States Trustee v. Grenoble Apartments, II (In re Grenoble Apartments), II.*, 152 B.R. 608, 611. n.6 (D.S.D. 1993); *In re Engercy Co-op, Inc.*, 95 B.R. 961, 963 (Bankr. N.D. Ill. 1988).

Second, as Attorney Harmelink himself stated at the hearings on June 27, 1995 and September 20, 1995, he was acting on behalf of a potential buyer, not the estate, when he went to Trustee Yarnall with a higher bid on the estate property. Accordingly, Attorney Harmelink represented an interest adverse to the estate and he was not disinterested as required by § 327(a) for estate professionals. Since Attorney Harmelink was not eligible for employment as an estate professional under § 327(a), Attorney Harmelink also is not entitled to compensation as an estate professional under § 330. See *McCutchen, Doyle, Brown & Enersen v. Official Committee of Unsecured Creditors (In re Weibel, Inc.)*, 176 B.R. 209, 212 (Bankr. 9th Cir. BAP 1994).

The standards for employment of estate professionals set forth in § 327(a) help insure that estate professionals do not represent competing interests, as Attorney Harmelink claimed he did when he said he would represent the buyer and the estate at the sale. Court approval of estate professionals further helps the court

control administrative expenses and "prevent those performing work without the necessary authority from being 'officious intermeddler[s] or gratuitous volunteer[s]'" *In re Sound Radio, Inc.*, 145 B.R. 193, 202 (Bankr. D.N.J. 1992). A bankruptcy case should not become a "public trough at which professionals may feed" when they "volunteer" their services to the detriment of other creditors. *In re W.T. Grant Co.*, 85 B.R. 250, 257 (Bankr. S.D.N.Y. 1988).

Finally, Attorney Harmelink served mostly as an agent for the potential buyer; his services were not legal in nature. Further, the title work he did perform should have been performed by Trustee Yarnall as the case trustee or the estate's attorney. See *W.T. Grant Co.*, 85 B.R. at 256 -57 (an Act case; three-part test for compensating services related to trustee's duties). As the Court stated at the September 20, 1995 hearing, to compensate Attorney Harmelink from the estate for any title work that the Trustee should have done would foster "double dipping" from the estate. See *In re Urrutia*, [8,9] 137 B.R. 563, 567 (D.C. P.R. 1990) (services by a debtor's attorney that are compensated from the estate should be professional in nature, should fall within the scope of duties performed by a debtor's attorney, and should not duplicate or bypass the responsibilities of the trustee).

Since no compensation will be allowed, the corresponding expenses likewise will not be reimbursed. Debtors will be personally responsible for the services on May 15, 1995 relating to the dischargeability action. The Court takes no position on

whether the buyer that Attorney Harmelink found for the Trustee's sale should pay Attorney Harmelink for the sale related services.

An appropriate order will be entered.

Dated this 18 day of December, 1995.

BY THE COURT:

  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:  
Charles L. Nail, Jr., Clerk

By   
Deputy Clerk  
(SEAL)



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

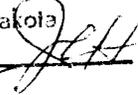
DEC 18 1995

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

CERTIFICATE OF SERVICE

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

U.S. Bankruptcy Clerk  
District of South Dakota

By:   
Date: 12/18/95

Case: 93-40057 Form id: 122 Ntc Date: 12/18/95 Off: 4 Page : 1  
Total notices mailed: 8

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