

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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April 10, 2000

Jerry L. Pollard, Esq.
Counsel for Plaintiff
Post Office Box 837
Yankton, South Dakota 57070

Clair R. Gerry, Esq.
Counsel for Darrell Cwach
Post Office Box 966
Sioux Falls, South Dakota 57101

Subject: *Gartner v. Marquette Bank, et al.*
(*In re White Hills, Inc.*),
Adversary No. 99-4004;
Chapter 12 (dismissed); Bankr. No. 93-40149

Dear Counsel:

The matter before the Court is the Motion to Allow Fees and Penalty in Accordance with SDCL 44-3-8 filed by a representative of Defendant-Debtor and the response filed by Plaintiff. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that it must award Defendant-Debtor the requested attorneys' fees and penalty under S.D.C.L. § 44-3-8.

SUMMARY. By order entered May 18, 1999, the Court declared that Plaintiff had an ag products processors' lien for \$7,405.65 on Defendant-Debtor's 1998 hay crop. Plaintiff was given a judgment to that effect on May 24, 1999. Following an affirmance on appeal, the Court directed Defendant-Debtor's counsel at the time to release the \$7,405.65, which was to have been escrowed pursuant to an April 15, 1999. Defendant-Debtor had not fully complied with the Court's escrow order. Consequently, Defendant-Debtor's counsel only had \$5,212.80 that he could release. By order entered December 16, 1999 order, the attorney was directed to promptly release the \$5,212.80 that he held and Defendant-Debtor was given until January 18, 2000 to pay the balance of \$2,192.85 plus certain interest.

Plaintiff and Defendant-Debtor's president, Darrell Cwach continued to squabble. Eventually, Debtor's present counsel (retained after the bankruptcy case was dismissed) sent Plaintiff's

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present counsel the required sum, in the form of a check on the firm's account and a third-party check, and he requested a satisfaction of lien. Plaintiff's counsel responded by letter. He stated that he had advised Plaintiff not to cash the checks because the principal check was made payable to Darrell Cwach, not Debtor and because an accounting for some hay had not yet been made. The letter acknowledged that Plaintiff may have a separate lien against the property of Darrell Cwach and that Plaintiff's present attorney was relying on information supplied by Plaintiff's earlier counsel.

Darrell Cwach sought relief by motion filed March 14, 2000. A hearing was promptly held, at which time the Court directed Plaintiff to cash the checks and satisfy his lien against Debtor. Cwach's attorney was directed to file a fee statement under S.D.C.L. § 44-3-8. The attorney did so by motion on March 16, 2000. Plaintiff filed a response March 27, 2000. He again stated that at the end of 1999 Cwach had hay in his possession that belonged to Debtor or that he had unlawfully disposed of it. He also stated that he had a lien on hay owned by Cwach. Further, citing *Mathie [sic] v. Boston*, 216 N.W. 361 (S.D. 1927), Plaintiff argued that he honestly believed that Cwach could not satisfy the lien because he was said to have not owned any hay. Finally, Plaintiff argued that the attorneys' fees requested by Debtor were excessive.

DISCUSSION. In *Mathieu v. Boston*, 216 N.W. 361 (S.D. 1927), the South Dakota Supreme Court recognized an "honest belief" exception to the application of the costs and penalty provision of S.D.C.L. § 44-3-8. Under the exception, a lien holder who refuses in good faith to release its lien will not be penalized under the statute. *Id.* at 361-62 (quoting *Kronebusch v. Raumin*, 42 N.W. 656 (Dakota Terr. 1889)). The lien holder must have an "honest belief that the [lien] was not entitled to be discharged." *Id.*

The exception does not apply in this case. Whatever dispute Plaintiff may have had with Debtor or Debtor's principals regarding Debtor's ownership of hay for any year other than 1998 or for hay owned by someone other than Debtor, it was not material to the release of the lien imposed by this Court in this adversary proceeding against Debtor's 1998 hay crop. Debtor, through its president, tendered funds to pay the judgment in full, thus disposing of any issues regarding Debtor's ownership of other 1998 hay. Plaintiff could not refuse the payment based on any unrelated disputes. Those matters had to be addressed another day by another court. Hence, neither Plaintiff nor his attorney could have held an honest belief that Plaintiff should not accept the check endorsed by Cwach in payment of the judgment against Debtor.

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The Court also concludes that virtually all the professional services rendered by Debtor's counsel related to the March 14, 2000 motion and hearing were reasonable. One-fourth of an hour on March 14, 2000 for faxing and filing pleadings will be deleted because the services were not professional in nature. See *In re Urrutia*, 137 B.R. 563, 567 (D.P.R. 1990) (cited in *In re Hermanson*, Bankr. No. 95-40711, slip op. at 3 (Bankr. D.S.D. July 11, 1996)); *In re Bonds Luck Foods, Inc.*, 76 B.R. 664, 668 (Bankr. E.D. Ark. 1986). Only one-third of the estimated time related to Debtor's March 16, 2000 motion will be allowed since no hearing on that motion will be held and since Debtor's attorney will not have to draft another order. Costs for faxing will also be reduced from \$.75 to \$.25 per page since overhead costs (excluding any long distance telephone charges) for faxing a piece of paper are no higher for an office than copying it, if that much. See *In re Citi-Westport Partners*, Bankr. No. 94-40047, slip op. at 2 (Bankr. D.S.D. March 6, 1995). Finally, Debtor's attorney's hourly rate will be reduced from \$150 to \$125 since complicated bankruptcy matters were not at issue. This Court has reserved the higher \$150 rate for those more complicated bankruptcy cases that demand this District's most experienced, knowledgeable debtor-creditor law attorneys. See *In re McTighe Industries, Inc.*, Bankr. No. 98-40440, slip op. at 3 (Bankr. D.S.D. March 9, 1999). After these deductions, attorneys' fees of \$447.50, sales tax of \$26.85, costs of \$16.25, and the statutory \$100 penalty will be awarded.

An appropriate order and judgment will be entered.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

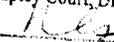
INH:sh

CC: adversary file (docket original; copies to parties in interest)

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to the parties on the attached service list.

APR 10 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

By 

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

APR 10 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 99-04004 Form id: 122 Ntc Date: 04/10/2000 Off: 4 Page : 1
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Aty Harmelink, John E. PO Box 18, Yankton, SD 57078
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Intereste First National Bank, 332 Broadway, Yankton, SD 57078
Aty Gerry, Clair R. PO Box 966, Sioux Falls, SD 57101-0966
~~Intereste U.S. District Court, 400 S. Phillips Ave., Room 220, Sioux Falls, SD 57102~~