

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In Re:) Bankr. Case No. 92-30036
)
WILSON FERRIS YOST) Chapter 7
Social Security No. [REDACTED]-7708)
)
and) MEMORANDUM OF DECISION RE:
) FEE APPLICATION BY
IONA MAE YOST,) DEBTOR'S COUNSEL
Social Security No. [REDACTED]-7405)
)
Debtors.)

The matter before the Court is the Motion for Approval of Attorney Fee and Costs as Administrative Expense filed by John W. Keller, counsel for Debtor, and the objections thereto filed by creditor Leland Cain and the United States Trustee. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying order shall constitute findings and conclusions under F.R.Bankr.P. 7052.

I.

Debtors Wilson F. and Iona M. Yost filed a Chapter 12 petition on April 30, 1992. On July 13, 1992, Debtors filed a Motion to Approve Retaining Counsel wherein they sought court approval to employ John W. Keller as their bankruptcy attorney. Attorney Keller also filed an Affidavit of Disinterestedness of Counsel on July 13, 1992. On August 7, 1992, the United States Trustee objected to the application to employ Attorney Keller because neither Debtors' Motion nor Attorney Keller's affidavit complied with F.R.Bankr.P. 2014. Debtors and Attorney Keller have not filed the necessary amended documents and Attorney Keller's employment has never been approved by the Court.

The case was converted to a Chapter 7 proceeding on August 18, 1992.

On April 8, 1993, Attorney Keller filed a Motion for Approval of Attorney Fee and Costs as Administrative Expense. Therein, he sought from the estate compensation of \$3,146.88 (31.25 hours at \$95.00 per hour), sales tax of \$240.00, and expenses of \$276.57 for a total of \$3,423.45.

Creditor Leland Cain filed an objection to Attorney Keller's fee application on April 28, 1993. Cain argued the fees sought "are in excess of reasonable fees for a Chapter 7 case and were not incurred in aiding the estate."

The United States Trustee filed an objection on April 29, 1993. The United States Trustee stated Attorney Keller's fees for pre-conversion services had to be subordinated to Chapter 7 administrative expenses. The United States Trustee also argued that the entries for certain stated dates were not sufficiently documented and that most post-conversion services did not benefit the estate. The United States Trustee also requested from Attorney Keller a justification of his expense charge of \$.50 per mile.

A hearing was held May 11, 1993. Attorney Keller was allowed ten days to file an amended itemization of services. The objectors could then refile objection if necessary.

Attorney Keller filed an amended itemization of services and expenses on May 20, 1993. The United States Trustee filed a response on May 27, 1993. The United States Trustee withdrew some of his objections but continued to object that:

(1) the description of services rendered on July 21 and 28, 1992 lack specificity as required by *In re Hanson*, Bankr. No.

386-00136, slip op. at 6 (Bankr. D.S.D. March 8, 1989);

(2) the time spent on each service rendered on July 28, 1992 and October 15, 1992 are "lumped," rather than separately stated;

(3) all post-conversion services, except representing Debtors at the Chapter 7 § 341 meeting, are not compensable from the estate because those services did not benefit the estate; and

(4) any compensation or reimbursement awarded to Attorney Keller must be subordinated to Chapter 7 administrative expenses under 11 U.S.C. § 726(b).

The matter was taken under advisement.

II.

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]; and

(2) reimbursement for actual, necessary expenses.

Federal Rule of Bankruptcy Procedure 2016(a) sets forth what information a fee application must include if compensation and reimbursement is sought from the estate:

1. a statement of the payments already made or promised to the applicant;

2. the source of the compensation paid or promised;

3. the particulars of any sharing agreement;

4. the services rendered;

5. the time expended;

6. the expenses incurred; and

7. the amounts requested.

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). Time records should reflect the actual time necessary to render each particular service. In *re McDaniel Enterprises, Inc.*, Bankr. No. 88-10199, slip op. at 4 (Bankr. D.S.D. 1991).

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[.]

H.J. Inc., 925 F.2d at 260 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (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 19, 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)); see also *In re Hanson*, Bankr. No. 386-00136, slip op. at 7 (Bankr. D.S.D. 1989).

Services rendered by the debtor's counsel must benefit the estate, rather than only the debtor, to be compensated from the estate. In *re Reed*, 890 F.2d 104, 105-06 (8th Cir. 1989). The benefit, however, need not be measurable in monetary terms. In *re Brandenburger*, 145 B.R. 624, 628-29 (Bankr. D.S.D. 1992).

Whenever a reorganization case is converted to a Chapter 7, the debtor's counsel will have the burden to show 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). The allowed pre-conversion fees will be a priority administrative expense behind the Chapter 7 administrative expenses. 11 U.S.C. § 726(b). Moreover, 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).

In a Chapter 7 case, the debtor's attorney is generally compensated from the estate for analyzing the debtor's financial condition; rendering advice and assistance to the debtor in determining whether to file a petition in bankruptcy; preparing the petition, the schedules of assets and liabilities, and the statement of affairs; and representing the debtor at the § 341 meeting of creditors. 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.

Having reviewed Attorney Keller's amended itemization of services dated May 20, 1993, the United States Trustee response dated May 27, 1993, and the applicable case law, the Court concludes the following:

A. Order Authorizing Employment.

Before the Court can award Attorney Keller compensation for Chapter 12 services, his employment by the bankruptcy estate must be approved under § 327(a) and F.R. Bankr. P. 2014(a). The United

States Trustee is asked to work with Attorney Keller to insure that Attorney Keller understands and promptly corrects the shortfalls in Debtors' employment application and Attorney Keller's affidavit of professional to be employed. Upon receipt of the amended application and new affidavit, the Court will enter an appropriate employment order.

B. Description of services rendered on July 21 and 28, 1992.

Attorney Keller has not sufficiently described the legal services rendered on July 21, 1992. From this entry, the Court is unable to determine whether the telephone call was necessary or whether the time spent on the telephone call was reasonable. Compensation for that date, therefore, must be denied.

Compensation for July 28, 1992 also will not be allowed because the description of services is insufficient. Since the Court was not told the time Attorney Keller spent in travel, the nature of the hearing, or the purpose of the conference with Debtors, the Court is unable to discern the necessity of each service or reasonableness of the time spent on each.

C. Statement of the time spent on each service rendered on July 28 and October 15, 1992.

Section 330(a) allows compensation to be awarded only for "actual, necessary" services. The only way the Court can assess whether each service rendered meets this criteria is if the time spent on each service is listed. On July 28, 1992 Debtor traveled to a court site, attended a hearing, and then met with his clients but the time spent on each of these three distinct services was not stated. On October 15, 1992, Attorney Keller did not differentiate the time he spent at the § 341 meeting from the time he was in conference with Attorney Zell trying to settle Leland Cain's claim.

Consequently, compensation for services on July 28, 1992 and October 15, 1992 may not be allowed in full since the Court cannot assess the reasonableness of the time charged for each service rendered. As discussed in part D. below, Attorney Keller will be allowed some compensation for services on October 15, 1992.

In future fee applications, Attorney Keller should state the actual minutes (not portions of hours) he spends on each legal service rendered on a particular day.

D. Post-conversion services.

Since Debtors' case was converted to a Chapter 7, the Court must analyze all of Attorney Keller's post-conversion services as if Debtors had originally filed a Chapter 7 petition. At the time of the conversion, Attorney Keller had already analyzed Debtors' financial situation and prepared their petition and schedules. Therefore, the only remaining Chapter 7 service that may be compensated is Attorney Keller's representation of Debtors at the Chapter 7 § 341 meeting. All other post-conversion services were for the benefit of Debtors personally. Therefore, compensation for Attorney Keller's other post-conversion services is a personal obligation of Debtors', not the estate's. Since Attorney Keller did not distinguish the compensable time spent at the Chapter 7 § 341 meeting from other non compensable services on October 15, 1992, he will be allowed one hour for the § 341 meeting.

E. Subordination of fees for Chapter 12 services and expenses under 11 U.S.C. §726(b).

The United States Trustee has correctly interpreted § 726(b). Any compensation or reimbursement awarded to Attorney Keller for Chapter 12 services must be subordinated to Chapter 7 administrative expenses. Therefore, Attorney Keller may be

compensated with other Chapter 7 administrative expenses for his one hour service at the Chapter 7 § 341 meeting. Compensation and reimbursement awarded to Attorney Keller for Chapter 12 services shall be paid after the Chapter 7 administrative expenses, if funds remain.

In addition to addressing the objections of the United States Trustee, the Court also must address whether the hourly rate sought by Attorney Keller is reasonable. A survey of hourly rates charged for services of comparable quality by bankruptcy attorney's of similar experience in the District of South Dakota indicates a more reasonable rate for Attorney Keller is \$85.00 per hour. Any compensation awarded in this converted case shall, therefore, be based on that rate.

An appropriate order shall be entered.

Dated this ____ day of August, 1993.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In Re:) Bankr. Case No. 92-30036
)
WILSON FERRIS YOST)
Social Security No. [REDACTED]-7708) Chapter 7
)
) ORDER REQUIRING AMENDED
) APPLICATION TO EMPLOY COUNSEL
IONA MAE YOST,) AND AFFIDAVIT OF PROFESSIONAL
Social Security No. [REDACTED]-7405) AND CONDITIONALLY AWARDING
) COMPENSATION AND REIMBURSEMENT
Debtors.) TO DEBTORS' COUNSEL

In compliance with and recognition of the Memorandum of Decision Re: Fee Application by Debtors' Counsel entered this day,

IT IS HEREBY ORDERED that Debtors shall promptly file an amended application to employ counsel in compliance with 11 U.S.C. § 327(a) and F.R.Bankr.P. 2014(a) and that Attorney John W. Keller shall file a new affidavit of professional to be employed in compliance with F.R.Bankr.P. 2014(a); and

IT IS FURTHER ORDERED that Attorney John W. Keller shall be awarded, as a Chapter 7 administrative expense, compensation for services of \$90.10, including sales tax, and reimbursement of expenses of \$28.80 for travel; and

IT IS FURTHER ORDERED that should Debtors' employment of Attorney John W. Keller be authorized under § 327(a) and F.R.Bankr.P. 2104 and should estate funds become available, then Attorney John W. Keller shall be awarded, as a Chapter 12 pre-conversion administrative expense, compensation for services of \$1,621.80, including sales tax, and reimbursement of expenses of \$122.97 for travel and a copy of a deposition.

So ordered this ____ day of August, 1993.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy
(SEAL)