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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
JOHN H. ABEL and
LOUISE A. ABEL,
Debtors.

Chapter 13
Case #95-11044

Appearances of Counsel:

John H. Abel, Jr.
Bradford, VT
Pro-se

Raymond J. Obuchowski, Esq.
Bethel, VT
Debtors' Counsel

MEMORANDUM OF DECISION
REGARDING THIRD AND FINAL APPLICATION
FOR ALLOWANCE OF COMPENSATION
AND REIMBURSEMENT OF EXPENSES

This cause is before the Court pursuant to the disputed *Third and Final Application of Obuchowski Law Office, as Attorneys for Chapter 13 Debtors, for Allowance of Compensation and Reimbursement of Expenses* filed on June 22, 2000 (hereafter "the Application"), submitted on behalf of the Obuchowski Law Office (hereafter "the Applicant"). John H. Abel (hereafter "the debtor") has filed, *pro se*, an objection to the Application, in the form of a letter dated July 11, 2000 (hereafter "the objection"). Based upon the matters filed of record and the evidentiary hearing held on August 31, 2000, the Application is approved.

BACKGROUND

On December 29, 1995, the debtors, John H. and Louise A. Abel, filed a voluntary petition for

relief under chapter 13 of title 11 U.S.C. ("the Bankruptcy Code"). On January 4, 1996, the Court (Conrad, J.) entered an Order approving the debtors' Application to Employ Bankruptcy Counsel *Nunc Pro Tunc*. After two motions to extend time for filing a chapter 13 plan were granted, the debtors filed their proposed chapter 13 plan on March 12, 1996. In the interim, various motions were granted regarding the debtors' operation of their business and the use of cash collateral. The first amended chapter 13 plan was filed on March 21, 1996, and the second amended plan was filed April 5, 1996. The trustee and several creditors filed objections to the proposed plans. After an evidentiary hearing on May 8, 1996, the debtors filed a third amended plan and the Court (Conrad, J.) entered its Findings and Order confirming that plan on July 11, 1996. The Applicant filed its first fee application on August 13, 1996, and it was approved (Conrad, J.) on September 23, 1996, allowing $10, 214.25 for attorney's fees and $1,336.77 for costs.

On March 18, 1997, creditor, R.L. Vallee/Twin State Fuels, Inc. (hereafter "Twin State Fuels") filed a Motion to Vacate the Order Confirming the Amended Chapter 13 Plan. This motion was granted on May 8, 1997, pursuant to a hearing held on April 29, 1997. On May 30, 1997, the debtors' Motion to Reconsider the Order Revoking Confirmation was denied. The debtors filed a fourth amended chapter 13 plan on January 15, 1998, and it was approved at a hearing held on January 22, 1998. On May 26, 1998, the Court (Conrad, J.) approved the Applicant's second fee application allowing $4,705.75 for attorney's fees and $493.55 for expenses. In the interim, Twin State Fuels filed a motion to convert the case from chapter 13 to chapter 7. After several hearings and additional filings by interested persons, the debtors commenced an adversary proceeding on August 17, 1998 [Adversary Proceeding No. 98-1070] seeking declaratory relief involving a fuel services contract with Twin State Fuels. Hearings were also scheduled and adjourned repeatedly concerning the motion to convert. On March 15, 1999, the Court

(Conrad, J.) denied the motion to convert, without prejudice, based upon a stipulated resolution of the motion. The adversary proceeding was dismissed thereafter on April 30, 1999. The Applicant filed its third and final fee application on June 22, 2000, requesting additional attorney's fees of $7,758.63 and expenses of $637.11. If this third and final fee request is allowed *in toto*, the total fees and expenses allowed in the case would be $22,678.63 and $2,467.43, respectively, and to date the debtor has paid the Applicant $11,562.18 (of the total of $16,750.32 allowed to date)[1].

On July 11, 2000, the debtor filed an objection to the Applicant's third fee application . The objection raises several concerns regarding the overall cost of the bankruptcy case. The debtor indicates that although the debtors executed a form agreement for legal services, the Applicant initially advised him that the chapter 13 case would cost approximately $2,500. The debtor also indicates that subsequent to the filing he was advised he needed to dispose of his interests in a camp in order to resolve a creditor's claim and to obtain plan approval, contrary to representations previously made by the Applicant. The debtor alleges that the Applicant's lack of care is demonstrated by the fact that the confirmation of the plan was revoked solely because of the Applicant's failure to serve the plan upon a creditor, Twin State Fuels, and that the Applicant decided not to take an appeal of the revocation order, notwithstanding the debtor's timely request that he do so.

The debtor further claims that the Applicant was not responsive to his needs during the pendency of the case in that he failed to respond to "the tax issue, various bank issues, and issues of property liens that were not resolved." The debtor recounts problems and disputes involving a fuel supplier, his utilities, and the disputed status of the taxes he apparently owed on property where he operated a business. He

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[1] The Application indicates that the debtors paid an initial retainer in the amount of $2,553.63 and that additional compensation totaling $9,008.55 has been paid through the chapter 13 plan. *See* Application, at exh. B. The Applicant also indicates that he has voluntarily reduced his fees by the sum of $1,729.00 "to maintain the fees as were charged at the commencement of the case." *See* Application, at p. 9.

claims that his grievances regarding these matters have never been resolved by the Applicant. The debtor ultimately asserts that "all and all we were charged for many things that were not done as told" and that "much time and correspondence with other clients and attorneys have been wasted at no value to us." The debtor essentially complains that the compensation being requested is an "overcharge," that he was neglected by the Applicant's senior bankruptcy counsel, that junior counsel was inexperienced and thus was not capable of handling his bankruptcy case efficiently and effectively, that the aggregate attorney fee being requested is excessive, and that he has suffered "much mental and exceptional stress" as a result of the manner in which the Applicant handled the case.

An evidentiary hearing was held to address the instant fee application on August 31, 2000. Prior to the hearing, the chapter 13 standing trustee filed his response to the Application and Objection [Dkt. #185-1], indicating that he would not be attending the evidentiary hearing because he did not believe he had any material evidence to offer and he had not been served a witness subpoena. The trustee's response characterizes this chapter 13 case as a "very long, procedurally complex, and litigious case." At the evidentiary hearing both the debtor and his bankruptcy counsel testified at length regarding the circumstances involved in the often contentious and certainly protracted legal proceedings involved in this case. The Applicant also presented expert testimony by a practicing bankruptcy attorney with respect to the reasonableness of the billing rate and the complexity and necessity of the legal services provided in this chapter 13 case.

DISCUSSION

The touchstones in this District for evaluating the nature, extent and compensability of legal fees are 11 U.S.C. §§ 329 and 330, the *U.S. Trustee's Guidelines for Applications for Compensation and*

Reimbursement, and In re S.T.N. Enterprises, Inc., 70 B.R. 823 (Bankr. D.Vt. 1987). The burden of proving that legal services were actual and necessary and that the compensation being requested is reasonable is upon the applicant. *See* In re S.T.N. Enterprises, Inc., 70 B.R. at 832; In re Poseidon Pools, 180 B.R. 718 (Bankr. E.D.N.Y. 1995). Conversely, a party objecting to the amount of time spent on services has the burden of proving that too much time was spent, and cannot meet his or her burden merely by alleging a general dissatisfaction with the results. *See* In re S.T.N. Enterprises, Inc., 70 B.R. at 840; In re Blackwood Associates, L.P., 165 B.R. 108, 112 (Bankr. E.D.N.Y. 1994). A party objecting to a fee application has a responsibility to challenge with specificity the information presented and to produce evidence controverting that produced by the applicant. *See* In re S.T.N. Enterprises, Inc., 70 B.R. at 840; In re Blackwood Associates, L.P., 165 B.R. at 112 (quoting In re Continental Illinois Security Litigation, 962 F.2d 566, 570 (7th Cir. 1992)).

Where an applicant's documentation of services rendered is too vague or nonspecific to permit a meaningful review, the bankruptcy court may not award compensation for such services. In re S.T.N. Enterprises, Inc., 70 B.R. at 834. A bankruptcy court should not be required to indulge in guesswork or undertake extensive labor to justify fees for counsel who has not done so independently. In re Blackwood Associates, L.P., 165 B.R. at 112. Moreover, it is incumbent upon the bankruptcy court to conduct its own independent analysis of all applications for compensation, regardless of the existence or absence of objections to the fees being requested. *See* § 330(a)(2); In re Cuisine Magazine, Inc., 61 B.R. 210 (Bankr. S.D.N.Y. 1986); *see also* In re S.T.N. Enterprises, Inc., 70 B.R. at 831.

A lodestar analysis is utilized to evaluate the reasonableness of professional fees. This analysis consists of a two step process: one must first determine that a reasonable number of hours have been expended and then multiply that figure by an appropriate billing rate. *See* In re Cena's Fine Furniture, Inc.,

109 B.R. 575 (E.D.N.Y. 1990). A reasonable hourly rate is the prevailing rate for similar services by lawyers of reasonably comparable skill, experience and reputation in the relevant market, which is normally reflected in attorney's customary billing rate. *See* In re Masterwear Corp., 233 B.R. 266 (Bankr. S.D.N.Y. 1999).

In applying the lodestar approach to evaluate applications for compensation for legal services, a variety of factors have been considered in this Circuit in determining whether to adjust a total fee, including the time and labor required; the novelty and difficulty of the questions raised; the skill required to perform the legal services; the preclusion of other employment; the customary fee charged for like work; whether the fee is contingent or fixed; the time limitations imposed by the client; the amount in controversy; the results obtained; the experience, reputation, and ability of legal counsel; the "undesirability" of the case; the nature and length of the professional relationship between the attorney and client; and attorney fee awards in similar cases. *See* In re Sucre, 226 B.R. 340, 351-52 (Bankr. S.D.N.Y. 1998); *see also* §330(a)(3). In scrutinizing the application itself, time entries must provide a reasonably detailed and clear description of the services rendered, *see* In re S.T.N. Enterprises, Inc., 70 B.R. at 832-33, and bankruptcy courts generally do not allow a minimum incremental billing time for particular legal tasks. In re Sapolin Paints, Inc., 38 B.R. 807 (Bankr. E.D.N.Y. 1984); *see also* In re S.T.N. Enterprises, Inc., 70 B.R. at 833.

Lastly, it must be understood that orders approving interim fee requests are interlocutory and remain subject to review by the Court at any time during the proceeding and appropriate adjustments may be made in conjunction with the final fee application, including a direction that an applicant return part or all prior allowed compensation. *See* In re Regan, 135 B.R. 216 (Bankr. E.D.N.Y. 1992). This Court rules on the final compensation request by the Applicant based upon a comprehensive review of the

applications for fees, the supporting documentation filed by the Applicant throughout the case, the testimony presented at the evidentiary hearing, the factors and guidelines referenced above, the objections raised by the debtor, and the equities of this case.

Analysis

It should be emphasized that in determining the "necessity" of the professional services rendered, this Court examines the necessity and reasonableness of the services from the perspective of the time that the services were rendered rather than utilizing "20-20" hindsight. *See* §330(a)(3)(C); *see also* In re American Metallurgical Products Co., Inc., 228 B.R. 146, 159 (Bankr. W.D.Pa. 1998); 3 *Collier on Bankruptcy*, para. 330.04[1][b][iii].

In response to the objection and supporting testimony submitted by the debtor, this Court has carefully examined the pending fee application, along with the preceding applications already approved by this Court (Conrad, J.), in light of the foregoing authorities. Furthermore, the Court has considered the testimony of the debtor, debtors' primary bankruptcy counsel, and the bankruptcy expert retained by the Applicant. In addition to the matters filed in the record, the testimony of these witnesses and their demeanor while testifying are also integral factors in this decision.

As indicated above, while an applicant bears the burden of demonstrating that an application for compensation satisfies the requirements of §330, the objecting party likewise must present evidence in support of any objections and may not rely upon generalized grievances of dissatisfaction. In this instance, the debtor alleges a variety of complaints associated with the overall fee being charged in this chapter 13 case, as well as the quality of work performed and extent of communications on the part of his counsel. The gravamen of the debtor's complaints appear to be a failure of his bankruptcy counsel to communicate adequately, especially regarding the retainer agreement; the fact that counsel did not appeal an adverse

ruling of the bankruptcy court regarding an Order (Conrad, J.) vacating the initial confirmation order; and the handling of a dispute regarding certain post-petition real estate taxes.

In support of the application for compensation, the Applicant presented the testimony of a well qualified expert in the area of bankruptcy practice who testified as to the reasonableness of the hourly rate being charged in the range of $125-$150 per hour in this District, as well as addressing the reasonable and necessary legal services "consistent with the difficulties of the case." The expert witness also acknowledged the difficulty of presenting a typical or average fee in representing debtors in similar cases, indicating that chapter 13 cases may sometimes be more complex than chapter 11 reorganization cases. No contrary expert testimony was provided by the debtor and the facts and opinions expressed by this witness were left unrefuted.

The Applicant also presented testimony by the attorney assigned to handle this bankruptcy case, Mr. Bernard Lewis. The attorney testified regarding his ample background and qualifications for handling this bankruptcy case and the contested matters that arose in the case, as well as the nature and frequency of his communications with the debtor. He testified that he maintained contemporaneous time entries based upon .10 hour time increments. He discussed at length the protracted dispute involving a creditor, Twin State Fuels, which attempted unsuccessfully to have the case converted to chapter 7, and the post-petition property tax dispute that required extensive time and attention. Mr. Lewis also testified regarding a litany of legal problems not reflected in the current application period involving a sexual harassment issue, multiple business locations, and a cash robbery at one of the business locations. Counsel attributed the protracted nature of the subject legal services primarily to an aggressive creditor who persistently opposed the debtors' requests for relief. Regarding the issue of inadequate notice to the creditor, Twin State Fuels, Mr. Lewis testified that he specifically utilized the service address obtained from the debtor's business records,

and without prior complaint by the creditor. He acknowledged a lengthy, complicated and emotional dispute involving the original and subsequent fuel and tank providers at the business premises, and indicated that the matter was ultimately referred to successor counsel. He also indicated that any appeal of the bankruptcy court's ruling regarding the vacating of the prior confirmed plan based upon inadequate notice would not have been cost effective. In conclusion, the debtor's bankruptcy counsel testified that he was absolutely persuaded that his services were necessary and beneficial throughout an admittedly complicated and protracted case.

During the evidentiary hearing, the debtor testified that he was not contesting the hourly rate being charged by his counsel. Hence, the Court must conclude that the debtor's objection is aimed at the number of hours spent. However, the debtor failed to articulate persuasively or identify specifically any tasks or charges that were either duplicative, unnecessary or deficiently performed. While acknowledging unfamiliarity with the details of the case, the debtor directed his ire at the protracted dispute with creditor Twin State Fuels whose fundamental issue arose from alleged lack of notice.

The debtor further emphasized that the need for legal services should have ended with the first confirmed plan and would have if the Applicant had served proper notice. Because of the notice issue, the debtor alleges the confirmation was subsequently re-opened to allow Twin State Fuels to assert its objections to the plan, and this ultimately led to a contentious adversary proceeding initiated by the debtors for declaratory relief. This adversary proceeding was itself somewhat protracted and ultimately resolved by court approved mutual settlement some six months later, after cross-claims, a summary judgment motion and discovery disputes. It cannot be said, however, that the debtor did not benefit from the adversary proceeding inasmuch as the settlement involved a joining together with one of the defendants to the adversary proceeding in opposing Twin State Fuels and a related defendant in state court. As importantly,

the debtor indicated that he lacked knowledge regarding any mistake attributable to his legal counsel concerning the alleged lack of notice to Twin State Fuels.

While the debtor also testified that he was initially advised by the Applicant that his total chapter 13 fee for services would not exceed $2,500, there was no credible testimony presented in this regard. It should be noted that the record does not reflect any prior objections to the previous successful fee applications being raised by the debtors, all of which exceeded $2,500. Moreover, if such a fee "cap" was indeed the agreement of the parties, such an arrangement is contrary to the express terms of the retainer agreement which provides for "additional compensation pursuant to the provisions of the Bankruptcy Code" beyond the initial $2,500 retainer. It is well-settled that parol or verbal evidence may not be used to vary the terms or otherwise contradict a written agreement which is, as here, clear on its face. *See* Zolar Publishing Co. v. Doubleday & Co., Inc., 529 F.2d 663 (2nd Cir. 1975).

Furthermore, the following goals of the chapter 13 proceeding are reflected in the retainer agreement: "To retain your real estate, and to reorganize your business, paying your creditors at least as much as they would get in a liquidation setting." These goals are further qualified by "the validity of the judgment liens on your real property and your ability to fund payments to unsecured creditors." While the debtor complains that he was required to dispose of a certain camp property during the bankruptcy case, he does not indicate that the disposition was contrary to the foregoing terms of the retainer agreement or not otherwise consistent with applicable bankruptcy or state law.

The debtor also complains that the Applicant was not the attorney actually handling his case and that there was inadequate communication with his bankruptcy counsel during the case. However, the retainer agreement expressly allows for the Applicant's law firm to assign various attorneys other than the Applicant, and to require otherwise would not only contravene the agreement but also impermissibly allow

parol testimony to contradict its clear terms.

Regarding ongoing client communications, the Court has carefully reviewed this fee application which is replete with references to communications between counsel and the debtor, both telephonically and in writing, on a periodic basis throughout the application period and especially involving issues pertaining to the multiple attempts to convert the case, the protracted tank removal dispute and the property tax matter.

Lastly, the debtor did not present any objections to the prior fee applications and paid some, but not all, of the previously approved fees through the plan. In order to avoid depleting the funds available for the dividend to unsecured creditors, the Applicant had agreed to seek his attorneys fee award outside the plan.

While this Court acknowledges that the amount of the total chapter 13 fee being requested here is unusual and invites the close scrutiny of this Court and others, based upon this record it cannot be said that the fee is excessive or that the services provided were not necessary or beneficial. During this application period alone, counsel attended six hearings regarding unsuccessful attempts to have this case converted to chapter 7; there was a contentious adversary proceeding that resulted in an amicable settlement between the debtors and a defendant to proceed together against the two remaining defendants in state court; there was a lengthy and complicated dispute surrounding the removal of certain fuel pumps and tanks , and obtaining alternative suppliers as well as paving at the debtor's business premises; and there was also extensive legal work involving disputed real estate tax payments and obtaining an accounting from the town of Weathersfield, Vermont. While the debtor complains about the overall amount of professional fees arising from this final fee application, there is no record of any prior fee objections and the results obtained by the Applicant appear consistent with the goals set forth in the retainer agreement. Nor can it

be said that the failure of bankruptcy counsel to undertake an appeal of the Order vacating the original confirmation order is grounds for denying or reducing fees.

The Court has concerns regarding the aggregate fee being sought by the Applicant, specifically because it is a chapter 13 case. While no two cases are truly comparable, based upon a review of the data collected by the chapter 13 trustee [Dkt. # 189-1] and the clerk's office following the evidentiary hearing, it appears that over the last six years there have been at least six chapter 13 cases which resulted in approved fees over $10,000. However, the debtor/clients did not file an objection in any of these other cases.

The dual purpose of chapter 13 is to provide creditors with the greatest dividend the debtor can afford and in return to give the debtor a fresh start in the form of a super-discharge. *See* 11 U.S.C. §1328(a). In this case the debtor has made all payments required under the plan and those payments appear to be sufficient to provide creditors with the dividend promised in the confirmed plan. The debtors are therefore now entitled to the discharge provided by law. However, in this case the debtors will not have the fresh start envisioned by the Bankruptcy Code because of the substantial sum they will owe their counsel after the closing of the case. This is troubling. Congress designed chapter 13 to be a formulaic repayment mechanism and very carefully laid out the requirements of a plan, the parameters of creditor objections and the pre-requisites to be met for confirmation to ensure that the process would be simpler, more expedient and less expensive than chapter 11 cases. *See* In re Nicholes, 184 B.R. 82, 87 (BAP 9th Cir. 1995)(discussing congressional intent to expeditiously resolve chapter 13 cases); Matter of Pearson, 773 F.2d 751, 753 (6th Cir. 1985)(discussing Congressional intent in reforming chapter 13, including making it more accessible, attractive, and easier for consumers). As a result of the carefully delineated provisions of chapter 13, the vast majority of chapter 13 cases proceed from filing to confirmation to

consummation to closing with virtually no litigation and modest legal fees. But, there are exceptions to that pattern and the instant case demonstrates what can happen when litigation and repeated disputes torture the chapter 13 process.

It should also be noted that since this is not a chapter 11 business there are no ongoing business operations that can generate monies to offset the increased and unforeseen attorney's fees, and the plan cannot be extended to a term of seven or eight years in order to pay both the professional and the general creditors within the plan. Hence, to address this situation of unforeseen attorney's fees, the debtor, the Applicant and the Court must find a way to fulfill three critical, and perhaps somewhat incompatible, obligations: (1) fairly compensate the professionals for their services, (2) pay creditors what the confirmed plan requires, and (3) complete the plan within the time limits set by chapter 13. None of these obligations can be seen as flexible. The Court is aware that the debtor and the Applicant have made good faith efforts to resolve the fee issue between themselves and with the assistance of extrajudicial mediation, and although they did not result in a resolution the parties should nonetheless be commended for engaging in this effort.

In light of the foregoing, this Court finds that the Applicant is entitled to the fees sought, that the plan cannot be amended to extend the term of the plan to pay these attorney's fees and expenses through the plan, that the creditors must be paid the dividend promised in the plan, and that the debtors are otherwise entitled to their discharge at this time. Thus, there is no alternative available under the Bankruptcy Code other than to allow the case to be closed with the Order Approving Compensation and Expenses to remain outstanding for the parties to address outside of the bankruptcy case. This decision leaves the fee issue open for these two parties in a way that is not very satisfactory in many respects, but there does not appear to be any other resolution that comports with the three obligatory principles of chapter 13 bankruptcy cases

set forth above. Thus, notwithstanding this Court's concern regarding the amount of the counsel fees sought in this chapter 13 case and after a careful consideration of the objections raised by the debtor, it cannot conclude upon all the evidence that the amount being requested is either unreasonable, unnecessary, excessive or inconsistent with the goals of the representation as set forth in the fee agreement.

The Court also finds no credible evidence that the services failed to provide benefit to the debtors or their estate. On the contrary, though extensive, the legal services rendered appear to be reasonable, necessary and sufficiently beneficial to the debtor to justify approval. The Court finds no grounds for disturbing the agreement between the parties, and previously approved by Judge Conrad, allowing the debtor to pay the balance of the attorney's fees outside of, and independent of, the confirmed plan.

Therefore, based upon the grounds and authorities set forth above, the Third and Final Application of Obuchowski Law Office, as Attorneys for Chapter 13 Debtors, for Allowance of Compensation and Reimbursement of Expenses is approved. The Applicant may be compensated in the amount of $7,758.63 for fees and reimbursed expenses in the amount of $637.11, in addition to the fees and expenses previously approved by this Court (Conrad, J.).

The Applicant shall submit an Order forthwith.

/s/ Colleen A. Brown
Colleen A. Brown
U.S. Bankruptcy Judge

May 29, 2001
Rutland, Vermont