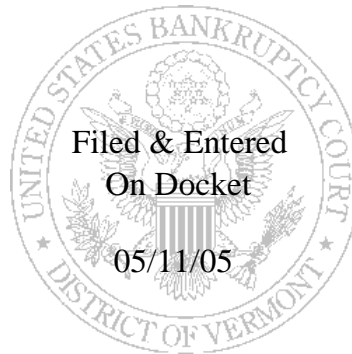


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**In re Michael E. French
Debtor.**



**Chapter 13 Case
01-10603**

*Appearances: Michael Palmer, Esq.
Middlebury, VT
Attorney for Debtor*

*Robert DiPalma, Esq.
Burlington, VT
Attorney for Creditor Suggitt*

ORDER
GRANTING IN PART AND DENYING IN PART APPLICATION FOR ATTORNEY’S FEES
AND DIRECTING THE DEBTOR TO PAY THE ALLOWED FEES DIRECTLY

On March 24, 2005, Michael Palmer, Esq., attorney for the Debtor, filed an application for compensation and reimbursement of expenses, for the period of February 1, 2003 through March 9, 2005, seeking fees in the amount of \$9,865.50 and expenses in the amount of \$105.79 (doc. #134) (the “Fee Application”). It is noteworthy that this Application was filed about three weeks after the Court had entered its “Memorandum of Decision Approving Stipulation With Modification and Granting in Part Both the Debtor's Motion to Refinance and the Creditor's Motion to Modify Plan” (doc. #128) (the “Modification Order”) which authorized the Debtor to modify his plan to refinance his home and pay his plan early, provided that he increased the amount he was offering to pay creditors by \$20,000.

The Court makes two distinct inquiries in regard to this Fee Application. The first is whether the fees and expenses sought are reasonable, necessary and justified, and hence eligible for allowance under § 330 of the Bankruptcy Code. The second is whether the fees may be paid from the fund created by the refinance of the Debtor’s home for payment of the plan under the Modification Order. For the reasons set forth below, the Court grants the Fee Application in part and denies it in part, and directs the Debtor to pay the allowed attorney’s fees outside the Plan, i.e., in addition to the sums directed to be paid to creditors under the Modification Order.

Allowance of Fees and Expenses

To date, Mr. Palmer has been awarded and paid attorney’s fees in the amount of \$18,788.43. Thus, if he is also paid the amount he now seeks, he will have been paid a total of \$28,759.72 for representing the Debtor in this case. As creditor Suggitt points out in her opposition to the Fee Application (doc #136), this would be over 41% of the total funds available under the plan.

Under § 330 and In re STN Enterprises, 70 B.R. 823, 832 (Bankr. D. Vt. 1987), the Court may only allow such fees as are reasonable and necessary. The Court finds that some of the fees sought by Mr. Palmer fail to meet these criteria. In particular, the Court finds the following fees to be administrative, excessive or duplicative:

<i>Date</i>	<i>Description</i>	<i>Time</i>	<i>Amt. Billed</i>
1/29/05	Research standards for modification of plan with respect to Second Motion to Modify	1.35 hrs.	\$ 202.50
2/3/05	Work on preparation for hearing on Second Motion to Modify	4.1 hrs.	\$ 615.00
2/4/05	Prep for negotiation meeting with Robert DiPalma	2.75 hrs.	\$ 412.50
2/6/05	Work on drafting memo in opposition to Second Motion to Modify	2.15 hrs.	\$ 322.50
2/7/05	Research for memo in opposition to Second Motion to Modify	0.65 hrs.	\$ 97.50
2/.8/05	Review of financial records relevant to second motion to modify and prepare summaries of income and deductions for response to second motion to modify	6.25 hrs.	\$ 937.50
2/9/05	Drafting memo in support of objection to second motion to modify	7.15 hrs.	\$1,072.50
2/24/05	Preparation of documents and exhibits for contested hearing	1.25 hrs.	\$ 187.50
2/25/05	Prepare for hearing	2.25 hrs.	\$ 337.50
1/31/05	Service of Objection to Second Motion to Modify	0.2 hrs.	\$ 30.00

The Court also questions the value attributable to the amended schedules and plan that were not filed until the eve of the hearing on the Second Motion to Modify. The tardiness of this filing caused substantial inconvenience to opposing counsel and the Court and did not move the matter forward at all. In light of these findings about the time delineated in the above chart and the tardy pre-hearing filings, the Court approves only twenty (20) hours for the professional services rendered in connection with the opposition to Creditor Suggitt's Second Motion to Modify and disallows the remaining 7.9 hours billed. The 0.2 hours spent in effectuating service is also disallowed; it is administrative in nature and not compensable.

Source of Payment for Allowed Compensation and Expenses

The Debtor's conduct in this case has raised serious issues of good faith and the Court has addressed that in prior decisions. We will not reiterate that history here but we are compelled to revisit the question of good faith in connection with the instant Fee Application. We begin this analysis by pointing out that creditor Suggitt has initiated several hearings, and undoubtedly incurred substantial attorney's fees, raising well founded issues of good faith, and defending her right to payment under chapter 13 through the filing of objections to confirmation. All creditors in this case have benefited from her efforts and the system is improved as a result of her diligence.

The Court finds the timing of this Fee Application raises the issue of good faith once again. The Modification Order was very clear that the increase required in the refinance fund was for unsecured creditors and specifically addressed the need to offset the effect the Debtor's extensive attorney's fees had had on

creditors to date. If the Debtor and his counsel knew at that time, as one must presume they did, that they would be filing an application for additional attorney's fees that would compete with the payment to unsecured creditors, it was incumbent upon them to disclose that at the time of the modification hearing and/or increase the refinance amount to a level sufficient to pay the attorney's fees in addition to the sum required for creditors. They did not do so. The decision the Court made when considering the modification request was made with the understanding that all fees generated from the refinance would go to unsecured creditors. Since this point is so critical to treatment of the Fee Application, the Court sets forth the text of that section of the Modification Order *in toto*.

Rationale for Approval of a Modified Stipulation

As a court of equity and without specific figures upon which it can rely, the Court reaches this determination out of deference to the right of the unsecured creditors to be paid all of the Debtor's disposable income in exchange for the Debtor obtaining the super-discharge of chapter 13, and being mindful of the fact that the distribution to unsecured creditors in this case has been reduced substantially as a result of attorney's fees incurred in litigation during the pendency of this case – most of which would not have been necessary if the Debtor had filed accurate, reliable schedules. Under the confirmed plan, the unsecured creditors are to receive a dividend of 7.53%, or \$17,261.77 (doc. # 112). It is important to note that this reflects litigation in the case prior to confirmation resulted in legal fees due to the Debtor's attorney in the amount of \$18,788.43 (Id.). The total amount available under the plan is \$36,050.20, and roughly half of which was required to be allocated to attorney's fees. If the Debtor increases the amount **he proposed to pay creditors** in the Motion to Refinance by \$ 29,913.80 (as opposed to the \$9,913.80), **the creditors benefit** in three substantial ways. First, the creditors could reasonably attribute a portion of this sum to the amount they might have received as a result of the Debtor's increased income in 2004. **Second, the creditors are then less penalized by the extraordinary litigation expenses in the case. Third, in this way the Debtor and creditors more equally share the burden of the legal fee expenses, rather than the creditors having to bear that entire expense.** For all of these reasons, the Court finds that the Stipulation would be fair and reasonable, and most likely result in a total distribution to creditors equal to the Debtor's disposable income over the term of the plan, if the amount paid from the refinance is adjusted upward by \$20,000.

The Modification Order, (doc #128) pp 6-7. (Emphasis added).

In light of the clearly articulated rationale for the approval of the modified plan in the Modification Order, the history and record of this entire case, the fact that the Debtor's extraordinary attorney's fees are the result of the Debtor's failure to be forthright and to comply with the schedules and plans he has filed, and the Court's conclusion that injustice that would result if the creditors were to bear the cost of the award under the instant Fee Application,


ITS IS HEREBY ORDERED that

1. The Fee Application is granted in part and denied in part; allowing Debtor's attorney fees in the amount of \$8,650.50 and expenses of \$105.79;

2. The Debtor is directed to pay these attorney's fees and expenses directly to Michael Palmer, Esq. with such payment being in addition to, and distinct from, the sums he has paid into the Plan under the Modification Order; and
3. The terms of this Order do not mitigate or modify in any way the Debtor's obligations under the Modification Order.

SO ORDERED.

May 11, 2005
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge