

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:)	Chapter 7 Case
)	Number <u>85-40555</u>
DIAMOND MANUFACTURING CO., INC.)	
)	
Debtor)	
_____)	

ORDER

George M. Pahnó, attorney for the debtor, by application seeks interim compensation and reimbursement of expenses requesting payment of fees from the estate for services rendered both prior and subsequent to the conversion of the above captioned case from Chapter 11 to Chapter 7. Objections to the application were filed by the United States Trustee, the Chapter 7 trustee, and creditors Signet Commercial Credit Corporation ("Signet"), Georgia Ports Authority, and Liberty Mutual Insurance Company.¹ Having heard and considered the evidence presented, I enter the following order granting a partial award of the fees requested.

The debtor, Diamond Manufacturing Company, Inc., filed a Chapter 11 petition on August 29, 1985. The case was converted to

¹The objection of Liberty Mutual Insurance Company was overruled based on its failure to appear and prosecute its objection at hearing. Additionally, Signet objected to any payment of fees unless a proof of claim filed by Pahnó in the case was withdrawn. As the proof of claim has been withdrawn, Signet's objection in this regard is moot.

Chapter 7 on August 26, 1988. By court order dated April 20, 1990, the employment of Mr. Pahno as attorney for the debtor-in-possession was approved nunc pro tunc to the date of the Chapter 11 filing. As part of his fee agreement with debtor, Pahno was given \$18,000.00 pre-petition. Pahno's fee application requests an award of \$92,012.50 for services rendered to debtor from August 5, 1985 to October 14, 1993. The documentation attached to the application, however, lists a total of \$110,012.50 in fees billed during that period. The application fee amount of \$92,012.50 equals the total fees less \$18,000.00. Mr. Pahno's application is treated as a request for approval of the total amount of fees documented with authority to apply the \$18,000.00 to any award granted. Mr. Pahno also seeks reimbursement for \$236.42 in expenses.

An interim award of attorney fees to counsel for a debtor falls under the compensation and reimbursement provisions of 11 U.S.C. §§ 330.² Any analysis under § 330 requires a lodestar

²11 U.S.C. § 330 provides in pertinent part:

(a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title [11], the court may award . . . to the 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 case under this title [11]; and

(2) reimbursement for actual, necessary expenses.

determination - a multiplication of the attorney's reasonable hourly rate by the number of hours reasonably expended. Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988).

Mr. Pahnno's application requests fees for services rendered beginning August 5, 1985. However, the order approving Mr. Pahnno's employment was issued nunc pro tunc to the date of filing the Chapter 11 petition, August 29, 1985. The Chapter 7 trustee objects to payment of fees for any services rendered prior to that date. No party in interest has objected to compensation of Mr. Pahnno for services rendered from the date of the Chapter 11 filing until conversion of the case.

In this case my previous issuance of the nunc pro tunc order to the date of filing of the Chapter 11 petition does not prohibit allowance of fees to Mr. Pahnno for services rendered prior to the chapter 11 filing. It is the well-established position of this court that it "has at all times the right and duty to regulate the identity of and compensation of professionals who render services to a debtor in this court." In re Dees Logging, Inc., 158 B.R. 302, 304 (Bankr. S.D. Ga. 1993). Retroactive appointment and approval of fees is allowed, including fees for pre-petition services. Id.; In re Morgan, Chapter 11 Case No. 89-40074, slip op. at 3-6 (Bankr. S.D. Ga. August 11, 1989) (Davis, J.). An attorney for the debtor should not be denied compensation out of the estate for pre-petition services which were directly rendered in contemplation of the filing of the case. Morgan, supra, slip op. at

6-8. An independent review of the fee application reveals that both the pre-petition services and the services rendered during the Chapter 11 case were necessary and reasonable. The fee application requests an hourly rate of \$100.00 for the 677.00 hours of services rendered during that period. I find the rates requested to be reasonable in light of comparable non-bankruptcy cases. Under the lodestar analysis, supra, compensation is approved in the amount of \$67,700.00 for services rendered in conjunction with the chapter 11 case. The Chapter 7 trustee's objection as to the compensability of debtor's attorney's pre-petition services is overruled.

The Chapter 7 trustee, the United States Trustee, Signet, and Georgia Ports Authority all object to payment of any fees from the estate for services rendered subsequent to the conversion of the case unless it is shown that such services were of a benefit to the estate. The Chapter 7 trustee also contends that the services rendered by Mr. Pahnó were duplicative of services rendered by himself as trustee and as the appointed attorney for the trustee.

As a general rule, after a case has been converted from Chapter 11 to Chapter 7, a debtor's attorney can only be compensated under § 330(a) for actual necessary services that benefit the debtor' estate. In re Saunders, 124 B.R. 234, 238 (Bankr. W.D. Tex. 1991); See also, In re Amberg, 148 B.R. 376, 378 (Bankr. D. Conn. 1992). Once a bankruptcy case has been converted to Chapter 7 from Chapter 11, the duties and role of the debtor and its attorney changes; a "debtor-in-possession" no longer exists and the powers of a trustee which was granted to the debtor under 11 U.S.C. §1107 are

extinguished. In the Chapter 7 case, a trustee is appointed, 11 U.S.C. §§ 701, 702, and is given the duty of administering the estate. 11 U.S.C. § 704. With court approval, the trustee may appoint an attorney or other professional to assist the trustee in carrying out those duties. 11 U.S.C. § 327. Through such an appointment, the attorney for the trustee effectively replaces the attorney for the debtor-in-possession in providing counsel and assistance in the estate's administration. See In re Marker, 100 B.R. 569, 570-71 (Bankr. N.D. Ala. 1989); In re Xebec, 147 B.R. 518, 523-24 (Bankr. 9th Cir. 1992).³ For compensation to be awarded to a debtor's attorney from estate funds, the attorney's services must have been rendered in aid of administration of the estate. Xebec, supra, at 523. The estate should not pay for services rendered by a debtor's attorney which are duplicative of services rendered by the attorney for the trustee or which are of benefit to the debtor only. Marker, supra, at 570-71. Nevertheless, a debtor's attorney is entitled to compensation from a Chapter 7 estate for those services rendered after conversion from Chapter 11 which aided the debtor in carrying out his legal duties prescribed by 11 U.S.C. § 521 and Federal Rule of Bankruptcy Procedure 4002. See Xebec, supra, at 523. Such services include aiding the debtor in preparation and filing of the required schedules and statements and representing the debtor through the § 341 meeting of creditors. Saunders, supra at

³Both Marker and Xebec discuss compensation of a debtor's attorney in a Chapter 11 case after a trustee has been appointed under 11 U.S.C. § 1104. I find that situation analogous to the one at hand.

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In this case, the Chapter 7 trustee was also appointed as attorney for the trustee. Mr. Pahno was not employed to aid the trustee pursuant to §327. No evidence was presented by Mr. Pahno, debtor's attorney, that the services he rendered, apart from those undertaken pursuant to the debtor's legal duties, were of benefit to the estate or were not duplicative of the work performed by the attorney for the trustee. I have reviewed Mr. Pahno's application and while the hourly rate requested and the time expended were reasonable in light of the task performed, as to the Chapter 7 case the services were not necessary. As these services were not necessary and of no benefit to the Chapter 7 estate it should not pay for those services. Debtor's attorney is entitled to compensation for his representation of debtor from the date of the Chapter 7 conversion through the meeting of creditors in the Chapter 7 case on October 4, 1988. After an independent review of the application I find those 10.5 hours were reasonably expended. Pahno is entitled to compensation under § 330 of \$1,050.00 for services rendered in the Chapter 7 case.

Pahno's fee request also seeks reimbursement for \$236.42 in expenses. Of that amount, \$42.00 is for copying expenses incurred in 1992. As those expenses would have been incurred solely in connection with services rendered for debtor and not the estate, that amount is disallowed. I find the remainder of the expenses in the amount of \$194.42, incurred during the Chapter 11 case, for mailing and travel, to be reasonable. Reimbursement of those

expenses is approved.

Bankruptcy Code § 503(b)(2) allows § 330(a) fees and expenses to be paid from the estate as an administrative expense.⁴ Both Signet and the Chapter 7 trustee contend, however, that any administrative expense award for services rendered or costs incurred during the Chapter 11 proceeding must be subordinated to the administrative expense claims in the Chapter 7 case pursuant to § 726(b).⁵ I agree.

In a straightforward Chapter 11 case, the compensation claims of the attorney to the

⁴11 U.S.C. § 503(b)(2) provides:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(2) compensation and reimbursement awarded under section 330(a) of this title,

⁵11 U.S.C. § 726(b) provides in pertinent part:

(b) Payment on claims of a kind specified in paragraph (1) . . . of section 507(a) of this title [§503(b) administrative expenses]. . . shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter [7] under section 1112 . . . of this title, a claim allowed under section 503(b) of this title incurred under this chapter [7] after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion . . .

. . .

debtor-in-possession are generally granted administrative priority. See 11 U.S.C. § 503(b)(2). The problem for counsel to a debtor-in-possession occurs if the case fails and is converted to Chapter 7. When that happens, the administrative expenses of the Chapter 11 estate, including the attorneys' fees and expenses, are subordinated to the administrative expenses of the Chapter 7 estate (sometimes referred to as the "burial expenses"). 11 U.S.C. § 726(b). In essence, the administrative claims of the Chapter 7 estate now have priority over the administrative claims of the Chapter 11 estate.

In re Matthews, 154 B.R. 673, 676 (Bankr. W.D. Tex. 1993). Of the fees and costs approved, only the award of \$1,050.00 was for services rendered post-conversion. That amount is allowed as a Chapter 7 administrative expense.

With regard to the remainder of the fee award for services rendered during the Chapter 11 case, any determination of distributive priority under § 726(b) must consider the effect of the \$18,000.00 given Mr. Pahno pre-petition. Those monies were given Mr. Pahno to secure future payment of fees earned in connection with his representation of debtor in the Chapter 11 case. When funds are given to secure the future payment of an unknown amount of services to be rendered in the case, the attorney has a possessory perfected security interest in those monies to the extent that the retainer covers the fees approved for the services performed. In re Dees Logging, Inc., 158 B.R. 302, 307 (Bankr. S.D. Ga. 1993) (Dalis, J.); See also, In re Burnside Steel Foundry Co., 90 B.R. 942, 944 (Bankr. N.D. Ill. 1988); In re K & R Mining, Inc., 105 B.R. 394, 397-98 (Bankr. N.D. Ohio 1989); Matthews, supra, at 676-77. As §

726(b) only affects priorities of holder of unsecured claims, it does not affect payment of fees to Mr. Pahno from the retainer. K & R Mining, supra, at 397. Mr. Pahno is entitled to keep and apply the \$18,000.00 against the approved fees of \$67,700.00 for services rendered in the Chapter 11 case. To the extent that the approved fees exceed the retainer, \$49,700.00, the fees are unsecured and an administrative expense of the Chapter 11 estate. Matthews, supra, at 677. In addition, the \$194.42 in approved expenses incurred during the Chapter 11 case are given Chapter 11 administrative expense status. A total of \$49,894.42 is allowed as a Chapter 11 administrative expense claim. Under § 726(b), that claim is subordinate to any Chapter 7 administrative claims which have accrued or may accrue in the Chapter 7 case. Id. (citing In re Viscount Furniture Corp., 133 B.R. 360, 367-68 (Bankr. N.D. Miss. 1991)).

The Chapter 7 trustee contends that Mr. Pahno has received additional compensation from debtor apart from the \$18,000.00 discussed previously by way of free or reduced rent and office overhead expenses while maintaining a law office at debtor's principal place of business. The trustee seeks to have any such payments-in-kind reflected in any award of compensation given. At hearing, Mr. Pahno stated that all overhead and expenses were paid by him and that the office space was provided as compensation for legal services rendered previously in other legal matters unrelated to the bankruptcy filing. The evidence does not warrant a finding that debtor received any additional compensation apart from the

\$18,000.00 retainer. The Chapter 7 trustee's objection in this regard is overruled.

Finally, Georgia Ports Authority contends that payment of any fees to Mr. Pahnó should be prohibited until all Chapter 7 claims have been determined as the total of the allowed Chapter 7 claims may exceed the funds on hand to pay them. With regard to the fees and costs approved, any disbursement of the Chapter 11 administrative expense claim must necessarily await until a final determination of all Chapter 7 administrative expenses have been made. 11 U.S.C. § 726(b). However, the court has the power to order immediate disbursement of the allowed Chapter 7 administrative expense claim by virtue of 11 U.S.C. § 331, which provides in pertinent part:

. . . a debtor's attorney . . . may apply to the court not more than once every 120 days after an order for relief in a case under this title [11], or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

The right to interim compensation is rooted in the equity power of the bankruptcy court. 2 Collier on Bankruptcy ¶ 331.01, 331-4 (L. King, 15th ed. 1993). At hearing, Georgia Ports Authority presented no evidence to suggest that all administrative claims in this case would not be paid in full. Debtor's attorney has gone unpaid for the \$1,050.00 worth of services initially rendered in aiding debtor in carrying out the debtor's basic legal duties while over

\$500,000.00 has been disbursed to other professionals in the case. Debtor's attorney should not be forced to wait for payment when other professionals have not. Georgia Ports Authority's objection in this regard is overruled.

Based on the foregoing, it is hereby ORDERED that compensation to George M. Pahnó is approved for services rendered as attorney for the debtor in the total amount of \$68,750.00 and for reimbursement of expenses in the amount of \$194.42; it is further

ORDERED that debtor's counsel is allowed to draw against the \$18,000.00 fund received pre-petition as the source for payment of fees generated during the Chapter 11 case; it is further

ORDERED that debtor's counsel is granted a Chapter 11 administrative expense claim in the amount of \$49,894.42 for fees and costs incurred during the Chapter 11 case; it is further

ORDERED that debtor's counsel is granted a Chapter 7 administrative expense claim in the amount of \$1,050.00 to be disbursed immediately by the Chapter 7 trustee from estate funds.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this _____ day of March, 1994.