

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:)	Chapter 12 Case
)	Number <u>91-60388</u>
HENRY J. CONDER)	
GRACE M. CONDER)	
)	
Debtors)	
_____))	
)	
MERRILL, STONE & PARKS)	
)	
Movants)	FILED
)	At 4 O'clock & 21 min. P.M.
vs.)	Date: 9-13-93
)	
E. B. MILES AND)	
PEMBROKE STATE BANK)	
)	
Objecting Creditors)	

ORDER

Merrill, Stone & Parks (the "law firm") by application filed May 13, 1993, seek an award of interim compensation and reimbursement of out-of-pocket expenses totaling Eleven Thousand Three Hundred Seventy-One and 39/100 (\$11,371.39) Dollars as attorneys for the debtors in this Chapter 12 case. The interim fee application also requests that the payment of the fee award be made from unencumbered funds in the possession of the Chapter 12 trustee and given administrative expense priority. The application asserts that the law firm has expended 81.4 hours in representing the

debtors in connection with this Chapter 12 proceeding and requests an award of compensation at the rate of One Hundred Twenty-Five and No/100 (\$125.00) Dollars per hour totaling Ten Thousand One Hundred Seventy-Five and No/100 (\$10,175.00) Dollars. Additionally the application itemizes a total of One Thousand One Hundred

Ninety-Six and 39/100 (\$1,196.39) Dollars as out-of-pocket expenses incurred. The application further states that the debtors have paid the law firm Seven Thousand Two Hundred Twenty-Five and No/100 (\$7,225.00) Dollars. Pembroke State Bank and E. B. Miles, the holders of allowed unsecured claims object to the payment of attorney fees to the law firm as an administrative expense from unencumbered assets in the hands of the Chapter 12 trustee. Based upon the evidence presented, argument of counsel, and a review of the file in this Chapter 12 proceeding, I make the following findings of fact and conclusions of law sustaining the objection.

This dispute began with the debtors' application for leave to sell property of the estate secured by a lien of the Pembroke State Bank. Under the confirmed modified plan, the property sought to be sold had previously been valued at Nine Thousand Five Hundred and No/100 (\$9,500.00) Dollars. The debtor proposed to sell the property for that sum. The Pembroke State Bank objected to the sale and the sale price was bid up and the property sold for Eighteen Thousand Five Hundred and No/100 (\$18,500.00) Dollars. Nine Thousand Five Hundred and No/100 (\$9,500.00) Dollars was paid to the

Pembroke State Bank on its allowed secured claim and the balance of the fund, Nine Thousand and No/100 (\$9,000.00) Dollars is held by the Chapter 12 trustee for distribution in accordance with the terms of the debtors' plan. The Pembroke State Bank and E. B. Miles holders of allowed unsecured claims believe the Nine Thousand and No/100 (\$9,000.00) Dollars fund should be disbursed pro rata among the holders of unsecured claims and asserts that this was the understanding of all interested parties and the court. The law firm now asserts its claim to a portion of this fund Four Thousand One Hundred Forty-Six and 39/100 (\$4,146.39) Dollars (\$11,371.39 - \$7,225.00 previously paid by debtors) as an unsecured claim to be paid as an administrative expense under 11 U.S.C. §503(b)(2).¹ Attorney fees for counsel for

¹11 U.S.C. §503(b)(2) provides:

(b) After notice and a hearing, there shall

the debtor fall under the compensation and reimbursement provisions of §330² and are granted administrative expense priority under §503. If the law firm is entitled to an award of attorney fees and reimbursement of out-of-pocket expenses in excess of Seven Thousand Two Hundred Twenty-Five and No/100 (\$7,225.00) Dollars already paid by the debtors that award would be allowed as an administrative expense under §503(b)(2) and paid first in priority under §507(a)(1).³ Contrary to the position taken by the objecting creditors, there was no understanding or agreement made at the hearing approving the

be allowed administrative expenses, other than claims allowed under 502(f) of this title [11], including -- . . .

(2) compensation and reimbursement awarded under §330(a) of this title [11]; . . .

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.

³11 U.S.C. §507(a)(1) provides:

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under §503(b) of this title [11] . . .

modification to the confirmed plan providing for the sale of the property to the effect that any excess funds would be distributed to the general unsecured creditors pro rata.

Remaining for determination is the nature of the employment agreement between the law firm and the debtors and the award of appropriate fees and out-of-pocket expenses under the

employment agreement. Pursuant to Bankruptcy Rule 2016(b) Charles B. Merrill, Jr. of the law firm, filed a statement dated July 15, 1991 which stated:

The undersigned, pursuant to Rule 2016(b), Rules of Bankruptcy Procedure, states that:

1. The compensation paid or promised by the Debtor(s), to the undersigned, is as follows:

For legal services rendered,	
Debtor(s) agrees to pay	\$6,000.00
Prior to the filing of this	
Statement, Debtor(s) has paid	<u>\$4,050.00</u>
Balance Due	\$1,950.00

2. The Filing Fee has been paid.

3. The Services rendered or to be rendered include the following:

(a) Analysis of the financial situation, and rendering advice and assistance to the client in determining whether to file a petition under Title 11, U.S.C.

(b) Preparation and filing of the petition, schedules, statement of affairs and other documents required by the court.

(c) Representation of the client at the first meeting of creditors. . . .

By application filed October 9, 1991 the debtors sought to employ the law firm as attorneys in the Chapter 12 case. The application in part provided:

In the continuance of applicants' business and pending proceeding in this Court, it will be necessary for various

professional services to be rendered for which it is necessary to retain attorneys, among the services below:

(a) To give the Debtors legal advice with respect to the powers and duties as Debtor-In-Possession and with respect to the continued operation of their business and the management of their properties;

(b) To prepare on behalf of applicants as Debtor-In-Possession, necessary applications, answers, reports and other legal papers;

(c) To prepare pleadings and applications and to conduct examinations incident to the administration of applicants estate;

(d) To take any and all necessary action instant to the proper preservation and administration of the estate;

(e) To assist the Debtors-In-Possession with the preparation and filing of a Statement of Affairs and Schedules as appropriate; and

(f) To perform all other legal services for applicants as Debtor-In-Possession which may be necessary herein; and it is necessary for Debtor-In-Possession to employ attorneys for such professional services. . .

Applicants desire to employ MERRILL, STONE & PARKS under general retainer because of the extensive legal services required on behalf of applicants.

Order was entered October 18, 1991 appointing the law firm as attorneys for the debtor which order provided:

That the Debtors be authorized to employ the services of MERRILL, STONE h PARKS as attorneys for the debtor subject to objection by any party in interest within 20 days of the date hereof. The compensation for such attorneys will be later fixed and determined by the Court in such manner as the Court may from time to time direct after notice to creditors.

Bankruptcy Code §328 provides in part:

(a) The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under §327⁴ . . . on

⁴11 U.S.C. §327 provides in part:

(a) . . . the trustee, with the court's approval may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in

any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. (emphasis added).

11 U.S.C. §328(a). The issue is whether the agreement between the debtors and the law firm represents a hiring by retainer or a deposit of a fund with the law firm which fund was given to secure at least partially the future payment of an unknown amount of services to be rendered by the law firm on behalf of the debtor.

The use of the word 'retainer' in an attorney's fee agreement to described a payment by a debtor to an attorney before the filing of a contemplated . . . bankruptcy petition is in most instances confusing and misleading. Retainer is defined as 'the act of the client in employing his attorney or counsel, and also denotes the fee which the client pays when he retains the attorney to act for him, and thereby prevents him from acting for his adversary. The term can mean a fee not only for the rendition of professional services when requested, but also for the attorney taking the case, making himself available to handle it, and refusing employment by plaintiff's adversary; or it can mean solely the compensation for services to be performed in a specific case.' Black's Law Dictionary, 1183 (Fifth Edition 1979). Under this definition, a retainer paid is a fee paid to the attorney and earned by the attorney upon the attorneys' agreeing to represent the debtor in the bankruptcy proceeding. The funds paid to an attorney in contemplation of representing a debtor in a bankruptcy petition may in fact be a 'retainer' if the fee paid is a flat fee for all services to be performed in the specific

case. This is usually the situation in Chapter 7 [or Chapter 13] proceedings.

In re: Georgian Arm Properties, Chapter 11 case No. 89-10313, slip op. at 4 (Bankr. S.D. Ga. March 1, 1990) (Dalis, B.J.).

Barring a clear expression of an understanding between the debtor and debtor's attorney that the payment to the attorney made prior to the filing of a . . . bankruptcy petition and in 'contemplation of that petition is a flat fee for all services to be rendered by the attorney in connection with the bankruptcy proceeding, the funds paid will be construed by the court as a payment to secure the payment of past and future services rendered by the

carrying out the trustee's duties under this title [11].

attorney in connection with the case, remain property of the estate, and are not earned fees and reimbursement for out-of-pocket expenses until approved by this court.

In re: Dees Logging, Inc. 1993 Bankr. Lexis 1162 (Bankr. S.D. Ga. 1993 Dalis, B. J.) (quoting In re: Georgian Arm Properties, Chapter 11 case No. 89-10313, slip op. at 7.)

Due to the apparent general confusion and variance in perceived definition, the mere use of the term 'retainer' in such agreement shall not be construed as a clear expression of intent.

In re: Georgian Arm Properties, supra at 7.

In Georgian Arm Properties the disclosure filed by counsel pursuant to Bankruptcy Rule 2016 provided that the 'retainer' was to be used by the attorneys to pay them for the value of services charged at an hourly rate rendered in contemplation of the bankruptcy petition. In Dees Logging, Inc. the Bankruptcy Rule 2016(b) Statement of Attorney Compensation filed by debtor's

attorney stated that the debtor has paid to the attorney \$1,000.00 and further provided that the debtor agreed to pay \$75.00 per hour for the attorney's services. In both Georgian Arm Properties and Dees Logging, Inc., I found that the fund paid to counsel was meant to secure at least partially the future payment of an unknown amount of services to be rendered on behalf of the debtor and as such the fund remains property of the estate until awarded to the attorney by the court on appropriate application, notice and hearing with any such award based upon the "lodestar" method of determining appropriate reasonable attorney fees pursuant to Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292 (11th Cir. 1988). The nature of the retention agreement between the debtors and the law firm in this case differs substantially from the agreement in the two referenced cases. Not only did the application for retention of counsel provide for the retention of counsel under general retainer but the Bankruptcy Rule 2016 statement clearly contemplates a flat fee for legal services. The 2016(b) statement discloses an

agreement between the debtors and the law firm for a total payment for legal services rendered of Six Thousand and No/100 (\$6,000.00) Dollars with Four Thousand Fifty and No/100 (\$4,050.00) Dollars paid prepetition and a balance due of One Thousand Nine Thousand Nine Hundred Fifty and No/100 (\$1,950.00) Dollars. Neither the application nor the Bankruptcy Rule 2016(b) statement make reference to any hourly rate to be charged by counsel.

The terms disclosed and the amounts actually paid clearly establish the nature of the agreement between the debtors and the law firm to be a flat fee retainer for representation of the debtors in this Chapter 12 proceeding. The debtors have paid to the law firm Seven Thousand Two Hundred Twenty-Five and No/100 (\$7,225.00) Dollars. The retainer fee of Six Thousand and No/100 (\$6,000.00) Dollars together with the out-of-pocket expenses, which from a review of the application appear reasonable, totaling One Thousand One Hundred Ninety-Six and 39/100 (\$1,196.39) Dollars, equals Seven Thousand One Hundred Ninety-Six and 39/100 (\$7,196.39) Dollars which is within Thirty and No/100 (\$30.00) Dollars of the actual amount paid.

I have reviewed the application for compensation by the law firm and have no doubt that the law firm expended the time set forth in the application on behalf of the estate in this Chapter 12 proceeding, but any award of reasonable fees must be made in light of the agreement between the debtor and the attorney for the rendering of the necessary services. Bankruptcy Code §330 provides for the necessary oversight of attorney fees and the provisions of 11 U.S.C. §329(b) and Bankruptcy Rule 2017⁵ provide protection

⁵11 U.S.C. §329(b) provides in pertinent part:

(b) If such compensation exceeds the reasonable value of such services, the court may cancel any such agreement, or order the return of any such payment, to the extent

against and remedy to the estate and all interested parties for overreaching by debtor's counsel regardless of whether the agreement with the attorney was for the payment of a retainer, a flat fee in contemplation of all services, or a deposit to the attorney to secure the payment of future undetermined fees. In re: Georgian Arm Properties, supra at 6-7.

The law firm having received payment of a general retainer of Six Thousand and No/100 (\$6,000.00) Dollars and sufficient funds to satisfy its out-of-pocket expense request of One Thousand One Hundred Ninety-Six and 39/100 (\$1,196.39) Dollars it is ORDERED that the law firm's application for additional compensation and award as an administrative expense is denied; and

further ORDERED that the law firm's employment under general retainer of Six Thousand and No/100 (\$6,000.00) Dollars and reimbursement of out-of-pocket expenses in the amount of One Thousand One Hundred Ninety-Six and 39/100 (\$1,196.39) Dollars is approved and paid from funds already paid by the debtors to the law firm. No additional compensation is allowed.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 13th day of September, 1993.

excessive . . .

Bankruptcy Rule 2017 provides in pertinent part:

(a) On motion by any party in interest or on the court's on initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor . . . to an attorney for services rendered or to be rendered is excessive.