

In the United States Bankruptcy Court

for the

Southern District of Georgia at 9 O'clock & 20 min. A.M

Brunswick Division

FILED

Date 7-27-93

MARY C. BECTON, CLERK CE
United States Bankruptcy Court
Savannah, Georgia

In the matter of:)
)
CONCRETE PRODUCTS, INC.)
)
Debtor)

Chapter 11 Case

Number 88-20540

**ORDER ON TRUSTEE'S APPLICATION FOR ATTORNEY'S FEES
AND REIMBURSEMENT OF EXPENSES FOR
PREPARATION OF FEE APPLICATION**

James D. Walker, previously Chapter 11 Trustee in the above-captioned case, filed a supplemental fee application seeking recovery of professional fees as attorney for the Trustee on June 7, 1993. A hearing was held on July 13, 1993 in Brunswick. After consideration of the evidence, taking judicial notice of previous proceedings in this case, together with consideration of all applicable authorities, I enter the following Order.

History of the Case

Walker served as Chapter 11 Trustee for the Debtor in this case from June 1, 1989 until he was excused from any further responsibilities in the case on November 2, 1990. Walker filed an amended application for allowance of Trustee's

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commissions and professional fees as attorney for the Trustee on October 23, 1991. In response to Walker's amended application of October 23, three unsecured creditors, as well as the Debtor, filed objections to the amounts sought in the application. Additionally, the Debtor filed a Motion to Surcharge the Trustee. Hearings on the matter were conducted on December 4, 1991, in Brunswick, on January 3, 1992, in Savannah, and concluded on January 8, 1992, in Brunswick. I entered a memorandum and order on the application on February 7, 1992. *See generally, Matter of Concrete Products, Inc., Chapter 11 Case No. 88-20540, slip op. (Bankr. S.D.Ga. Feb. 7, 1992).*

FINDINGS OF FACT

Walker's supplemental application seeks compensation for 75.8 hours of attorney's fees at a rate of \$100.00 per hour, 2 hours of paralegal fees at a rate of \$50.00 per hour, and reimbursement for expenses in the amount of \$1,221.56. Thus, the total amount sought in the application is \$8,901.56.

In the July 13 hearing, it was revealed that all of the fees which Walker sought in his supplemental fee application arose from the prosecution of his October 23, 1991, fee allowance application. None of the time entries sought compensation for the clerical preparation of any fee application with the exception of

two hours time of a paralegal in Walker's firm. In the hearing, Walker contended that the time he spent preparing for and participating in the hearings on his amended fee application was compensable at the rate he customarily charges for acting as attorney for the Trustee, \$100.00 per hour.

Jack H. Usher, appearing at the hearing as attorney for the United States Trustee, did not dispute the number of hours for which Walker claimed compensation or that such time was compensable. Usher did, however, question whether this time was compensable at the full rate of \$100.00 per hour. He relied upon a number of cases decided in the Eleventh Circuit which suggested that the hours an attorney spends preparing a fee application are compensable, but at a reduced rate.

I ruled, for reasons stated on the record, that I would reduce Walker's compensable hours by 13.5 hours, but otherwise approve the balance of his supplemental application, subject to consideration of the United States Trustee's citations.

CONCLUSIONS OF LAW

The present-day Eleventh Circuit has not dealt with the issue of

whether time spent preparing a fee application is compensable, but the former Fifth Circuit Court of Appeals has. Under Bonner v. City of Prichard, 661 F.2d 1206 (5th Cir. 1981), cases decided by the former Fifth Circuit are binding as precedent upon this Court.

The former Fifth Circuit considered two such cases, and in both, the Court held that time spent preparing a fee application is compensable. See Braswell Motor Freight Lines, Inc. v. Crutcher, Burke & Newsom, 630 F.2d 348, 351 (5th Cir. 1980); Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088, 1092 (5th Cir. 1980). In each case, the Court indicated that, since a fee application is required by the court, it would be an abuse of discretion for the bankruptcy judge to fail to award reasonable fees for the time spent preparing the fees. Braswell, 630 F.2d at 351; Rose Pass Mines, 615 F.2d at 1093.

It is important to note, however, that both Rose Pass and Braswell were decided under the former Bankruptcy Act, which focused on "economy of administration and conservation of estate" in determining professional fees, see In re Manoa, 853 F.2d 687, 689 (9th Cir. 1988), a consideration which is impermissible under Section 330 of the Bankruptcy Code. Under current law, a court should award "reasonable compensation" for actual and necessary services rendered, considering the cost of comparable non-bankruptcy services in arriving at an appropriate hourly rate.

Port Royal Land & Timber Co. v. Berkowitz, et al., 924 F.2d 208 (11th Cir. 1991);
Grant v. George Schumann Tire & Battery Co., 908 F.2d 874 (11th Cir. 1990). See
also In re Manoa, 853 F.2d 687 (9th Cir. 1988).

Accordingly, cases which have dealt with this specific issue under the
Bankruptcy Code have generally held that attorneys are entitled to reasonable fees for
their time spent preparing fee applications. See e.g. In re Newcorp Energy Corp., Inc.,
764 F.2d 655 (9th Cir. 1985). But see In re Bicoastal Corp., 121 B.R. 653, 655 (Bankr.
M.D.Fla. 1990).

In Newcorp Energy, the court held that

[I]t is both inconsistent with the express policy of the
Bankruptcy Reform Act and fundamentally inequitable
to impose substantial requirements on bankruptcy
counsel as prerequisites to their obtaining
compensation while simultaneously denying
compensation for the efforts necessary to comply with
those requirements. The preparation and presentation
of the detailed fee applications required by the
bankruptcy court necessarily involve substantial
investments of time and effort from both counsel and
their staffs. To require counsel to devote considerable
time to the preparation of fee applications but to
demand that they absorb the substantial costs
associated therewith would be to ignore the direct
mandate of section 330(a) that reasonable
compensation be provided for all "actual, necessary"
services rendered by bankruptcy counsel.

In contrast, the court in Bicoastal stated that it was of the opinion that compensation for preparing fee applications must be at a "grossly reduced rate ". In re Bicoastal Corp., 121 B.R. at 655 The court also indicated that compensable time for this particular service should be limited to the time spent by the attorney to review the compilation, for the limited purpose to determine which services rendered were in fact legal services and to draft a narrative description with legal citations of the services rendered by the attorney. Id.

The opinion is unclear, however, as to what the attorneys' regular hourly rate was and the level to which the Court reduced it. Moreover, I do not read Bicoastal as setting forth a blanket rule that fees for the preparation of a fee application must be compensated at a "grossly reduced" rate. Rather, this appears to be a case where the judge's evaluation of all the facts and circumstances surrounding the case led him to the conclusion that a reduction in attorney's fees for time spent preparing a fee application was appropriate.

Thus, the rule that emerges from the above-cited cases is that an attorney's compensation for his or her time spent in preparing a fee application, like other services rendered to a debtor, should be reasonable under the circumstances. In determining "reasonable compensation", a court should consider fee applications

on a case by case basis, looking at the facts and circumstances of each and determining what was required of the attorney in preparing the application. *See generally* Grant v. George Schumann Tire & Battery Co., 908 F.2d at 877 (11th Cir. 1990); Matter of Concrete Products, Inc., Chapter 11 Case No. 88-20540, slip op. at 22 (Bankr. S.D.Ga. Feb. 7, 1992).

In the case *sub judice*, three unsecured creditors filed objections to the amounts which Walker sought in his fee application. Additionally, the Debtor filed both a Motion to Surcharge the Trustee and an objection to the fee application. Consequently, Walker was required to prepare for and attend three different hearings on the application where he made arguments, presented evidence and called witnesses to counter the objections to his application and motion by the debtor. Furthermore, Walker was required to defend his application through two different appeals. Thus, I find that Walker seeks compensation not for preparation of the application (a largely clerical act) but for prosecuting it at trial and through two appeals (clearly legal work). A determination of reasonableness requires the drawing of a distinction between clerical and legal services and the former clearly are not to be compensated at rates applicable to the later.

I hold that activities for which compensation is sought here required both the skill and knowledge of an experienced attorney, and that \$100.00 per hour

is a reasonable rate to charge for such work. I therefore find that the hourly rates charged by the applicant are reasonable and the number of hours for which compensation is sought should be allowed except as otherwise noted.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the Trustee, James D. Walker, Jr., after reduction of 13.5 hours as noted above, is awarded attorney's fees in the amount of \$6,330.00 and reimbursement of expenses in the amount of \$1,221.56.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 26th day of July, 1993.