

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
) CASE NO. BK99-42288
RODNEY & MARILYN ZWYGART,) A00-4030
)
Debtor(s).) CH. 11
)
_____)
DAVID M. FAUSS, PATTI FAUSS)
GOHRING, and TERI/DOUGLAS)
ENTERPRISES, INC.,)
)
Plaintiffs,)
)
vs.)
)
RODNEY & MARILYN ZWYGART,)
)
Defendants.)

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on December 11, 2003, on the application for compensation filed by the attorneys for David Fauss and Patty Fauss Gohring (Fil. #181) and objection by the debtors (Fil. #182). Kathryn Derr appeared for the movants, and Rodney Zwygart appeared pro se. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) & (O).

The application is granted in substantial part.

The movants seek \$43,188.97 in attorneys' fees and costs incurred in connection with the trial of the matter in May 2003. After trial, judgment was entered in favor of Teri/Douglas Enterprises, Inc., for \$85,278.30 plus costs and attorneys' fees. \$42,468.59 of that judgment, plus costs and attorneys' fees, was awarded to David Fauss and Patti Fauss Gohring. See Judgment filed Oct. 8, 2003 (Fil. #178). The judgment has not been appealed.

The Zwygarts oppose the request for compensation, asserting that Mr. DeLay should not be allowed to recover fees and costs because his representation of the plaintiffs constituted a

conflict of interest based on his prior knowledge of the Zwygarts' financial and legal affairs. This issue was raised by the debtors and ruled on orally at trial, as supplemented by the oral ruling at the hearing on this application. In essence, I have found that Mr. DeLay is not precluded by a conflict of interest from representing the plaintiffs in this matter. His previous contact with the debtors was in his capacity as executive vice-president of the institution where they banked, not as an attorney. There is no evidence that Mr. DeLay's law firm's prior representation of the debtors involved legal matters of the same or substantially similar nature as the matter at bar. Therefore, the objection on conflict-of-interest grounds is overruled.

The underlying judgment is a final order. See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988) (Articulating "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."); Justine Realty Co. v. American Nat'l Can Co., 945 F.2d 1044, 1046-48 (8th Cir. 1991).

The Bankruptcy Code recognizes that attorneys' fees incurred in litigating dischargeability issues are generally not recoverable in the absence of a contractual or statutory provision. Siemer v. Nangle (In re Nangle), 281 B.R. 654, 657 (B.A.P. 8th Cir. 2002). Here, the movants cite Neb. Rev. Stat. § 21-2076(1) and (3) as authority for their application for compensation in this case. Section 21-2076 deals with payment of expenses in derivative proceedings, and provides in relevant part:

On termination of the derivative proceeding the court may:

(1) Order the corporation to pay the plaintiff's reasonable expenses, including attorney's fees, incurred in the proceeding if the court finds that the proceeding has resulted in a substantial benefit to the corporation;

* * *

(3) Order a party to pay an opposing party's reasonable expenses, including attorney's fees, incurred because of the filing of a pleading, motion, or other paper, if the court finds that the pleading, motion, or other paper was not well-grounded in fact, after reasonable inquiry, or warranted by existing law

or a good faith argument for the extension, modification, or reversal of existing law and was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The Fauss plaintiffs seek \$43,188.97 in fees and expenses, from either Teri/Douglas Enterprises or the debtors or both. In determining whether the fees are reasonable and proper, it is appropriate to consider:

the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Winter v. Department of Motor Vehicles, 257 Neb. 28, 34-35, 594 N.W.2d 642, 647 (1999) (citing Schirber v. State, 254 Neb. 1002, 581 N.W.2d 873 (1998)).

This is similar to the "lodestar" method (reasonable time expended multiplied by a reasonably hourly rate) used to calculate reasonable compensation under federal statutes. P.A. Novelly v. Palans (In re Apex Oil Co.), 960 F.2d 728, 730-31 (8th Cir. 1992); Chamberlain v. Kula (In re Kula), 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997). This requires a finding as to whether the number of hours billed was reasonable in light of the complexity of the case, and a finding as to the reasonable hourly rate for the services rendered. Kula at 737. The amount calculated as a result of these findings "presumably reflects (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel; (3) the quality of representation, and (4) the results obtained[.]" Id. at 738.

The movant bears the burden of proving that the requested compensation is reasonable. Kula, 213 B.R. at 737; Walton v. LaBarge (In re Clark), 223 F.3d 859, 863 (8th Cir. 2000).

In this case, the movants seek compensation for a total of 292 hours of professional and paraprofessionals' time, at hourly rates ranging from \$175 to \$40. The three primary attorneys on the case billed as follows: Kathryn Derr worked 151.8 hours at \$150/hour; Thomas DeLay worked 109.1 hours at \$135/hour; and

James J. Mitchell worked 18.3 hours at \$175/hour. Based on the undersigned's familiarity with hourly rates of legal professionals and their staffs in this geographic area, the rates in this case appear to be reasonable. The attorneys in this matter are capable, well-prepared individuals skilled in the areas of bankruptcy, corporate law, and litigation, so their hourly rates reflect their abilities.

This action was filed in March 2000, and came to trial in May 2003. A memorandum opinion and judgment in favor of the plaintiffs were filed in October 2003. A review of the billing records reflects a great deal of case preparation, discovery, and so forth, including the telephone calls and attorney conferences inherent with co-counsel being located in different cities.

The billing statements also contain a small number of entries that bear a closer look. Ms. Derr's time records indicate that she spent 4.9 hours on April 23, 2003, and a small amount of additional time the next day, filing the plaintiffs' trial exhibits electronically. The undersigned is aware that the quantity of exhibits offered by the plaintiffs presented some challenges in getting them onto the court's computer system in accordance with local rules and procedures. However, I am not persuaded that the task should have consumed nearly \$750 worth of attorney time.

In addition, the billing records indicate that plaintiffs' attorneys devoted more than 53 hours to preparing their post-trial brief (24.4 hours for Ms. Derr, and 28.95 hours for Mr. DeLay). While the brief is thoroughly researched and well-written, and deals with the interaction of corporate law and bankruptcy law, it is nevertheless surprising that it required the equivalent of nearly seven days of attorney time.

I find the hourly rates charged to be reasonable, but the total number of hours billed are not reasonable in light of counsels' experience and expertise. The time for filing the trial exhibits will be allowed at \$50 per hour, a reasonable rate for support staff. In addition, the time for preparing the post-trial brief will be reduced to 10 hours each for Ms. Derr and Mr. DeLay, at their normal hourly rate.

The application for compensation (Fil. #181) is granted to the extent explained above. Fees for Mr. DeLay and his staff will be allowed in the amount of \$12,231.05, with costs of

\$655.93. Fees for Ms. Derr's office will be allowed in the amount of \$24,072.50, with costs of \$1,021.24.

Joint and several judgment will be entered against Teri/Douglas Enterprises, Inc., and Rodney & Marilyn Zwygart for total costs and attorneys' fees of \$37,980.72.

DATED: January 26, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
Rodney & Marilyn Zwygart
*Kathryn Derr & James S. Mitchell
Thomas H. DeLay
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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IT IS ORDERED: In accordance with the order filed contemporaneously herewith, joint and several judgment is hereby entered against Teri/Douglas Enterprises, Inc., and Rodney & Marilyn Zwygart for total costs and attorneys' fees of \$37,980.72

DATED: January 26, 2004

BY THE COURT:

/s/ Timothy J. Mahoney

Chief Judge

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