

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:

AARON FERER & SONS CO.,
Debtor and Debtor-in-
Possession.

WILLIAMS & GLYNS BANK
LIMITED and AARON FERER
& SONS LIMITED,

Plaintiffs,

vs.

VENTEICHER & STRASHEIM,

Defendants.

FILED	
DISTRICT OF NEBRASKA	
AT _____	M _____
AUG 15 1984-13	
William L. Olson, Clerk	
By _____	Deputy

(BK No. 74-O-482)

MEMORANDUM AND ORDER
ON APPEAL OF AWARD OF FEES
TO VENTEICHER & STRASHEIM

CV82-O-661

The bankruptcy judge awarded Venteicher & Strasheim, debtor's counsel, a fee in addition to that allowed earlier by interim order for the same period of time. The appeal is from that additional award.

The interim award was made on July 25, 1977, in the amount of \$82,341.00. The additional allowance, \$237,270.00, was made by an order dated November 10, 1982.

My conclusion is that the additional award lacks support in the record. That is not to say that it is in the wrong amount; it is to say that there is no support for it in the record. In that sense, the decision is clearly erroneous. The solution is to be found in a hearing before the bankruptcy judge to enable the making of a full record, followed by a descriptive analysis of the appropriate factors for setting of the fee.

Grady v Shors, 618 F.2d 19 (C.A. 8th Cir. 1980), repeats the six factors mentioned in Levin v Barker, 122 F.2d 969 (C.A. 8th Cir. 1941), cert. denied 315 U.S. 813: (1) the time spent; (2) the intricacy of the questions involved; (3) the size of the estate; (4) the opposition encountered; (5) the results obtained; and (6) the economic spirit of the Bankruptcy Act. Johnson v Georgia Highway Express, Inc., 488 F.2d 714 (C.A. 5th Cir. 1974), lists other factors which are important in some bankruptcy contexts.

The problem in the present case is the inability to tell whether all of the appropriate factors were considered or, if they were, the lack of a description of the facts to support the

view taken by the bankruptcy judge of those factors. What can be discerned from the court's oral opinion, found in the transcript of the hearing of November 10, 1982, filing 2796, is that (a) the bankruptcy judge had earlier awarded the same counsel \$125 an hour in the same case; (b) the services for which the additional award was being sought were performed in 1975 through 1977, as a result of which "their office expenses and overhead and income has suffered . . . , I am confident;" (c) the amount to be awarded is significantly below what they could earn at this time, applying "various discount rates;" and (d) the services represented in the application for the additional award produced a \$5.5 million fund.

My search through the record has not found any factual support for the quoted statement in (b), or any of (c) and (d). No other factors, as far as the opinion reveals, were taken into account.

There is no evidence that I have found that the applicant firms' office expenses and overhead and income have suffered by the passage of time, or that the firm could earn more now than is being awarded or could have earned more earlier. The fund of \$5.5 million included some \$1.9 million in interest, which can hardly be attributed to the services of the applicant firm alone, and the accumulation of that much interest points to the inference that enough money existed in the fund much earlier to pay a fee if the applicant had asked for it earlier.

It cannot be determined from the showing made by the applicant how much time was spent on what specific kinds of work by the various categories of people for whom fees were sought. Attorneys' time is lumped with non-attorneys' time; partners' with associates' and associates' with clerks'. Whether there was duplication of services performed by another firm also representing the debtor is impossible to know from the record presented to the bankruptcy judge. Why \$10 an hour--or any amount--for a secretary's time is allowed or allowable is not shown. These are but some of the unanswered points for inquiry.

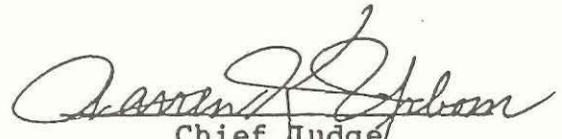
The bankruptcy judge also spoke in his opinion of "continuity" and of an earlier award to the applicant of \$125 an hour. I do not question the propriety of the \$125-an-hour award or Judge Schatz' approval of it on appeal, found at 427 F. Supp. 350 (U.S.D.C. Neb. 1977). But the detailed evidence at the time of that award of the work performed and the expert testimony regarding the special pressures upon the debtor's counsel preceding confirmation of the plan and the total engrossing of counsel in the early stages of the bankruptcy are not shown to have relevancy to the period of time involved in the present controversy. It should not be assumed that facts applicable at one stage of a protracted proceeding or skill necessary for one kind of problem is applicable to another. Each application for fee must be carefully analyzed for its peculiar features and an award made accordingly.

When the hearing of November 10, 1982, was held, counsel for Williams and Glyn's Bank, Ltd. asked for time to be enabled to make discovery. That was denied, but before another hearing on remand is held, adequate opportunity for discovery and presentation of evidence should be afforded.

IT THEREFORE IS ORDERED that the appeal is granted, the order of the bankruptcy court of November 10, 1982, awarding fees to Venteicher & Strasheim for services from June 1975 through June 1977 and expenses is vacated, and the matter of the application for allowance of fees and expenses for that period is remanded to the bankruptcy court for further proceedings.

Dated August 15, 1984.

BY THE COURT


Chief Judge