

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

ABC TRANSIT, INC.,)

ALLEGED BANKRUPT)

CASE NO. BK78-0-90

Appearances: Steven Turner, Attorney
1400 One First Nat'l. Center
Omaha, Nebraska 68102
for the alleged bankrupt,
ABC Transit, Inc.

H. Jerome Kinney, Attorney
Suite 315 Plaza of the Americas
7171 Mercy Road
Omaha, Ne. 68106
and
Eugene Pieper, Attorney
300 Farm Credit Building
Omaha, Ne. 68102
for the petitioning creditors

MEMORANDUM OPINION

Before me is the amended motion for taxation of costs compiled by ABC Transit, Inc., in this involuntary bankruptcy proceeding.

An involuntary petition in bankruptcy was filed against ABC Transit, Inc., by Omaha Truck Plaza, Inc., Bossellman-Hartner, Inc., and Bossellman Truck Plaza, Inc., on January 24, 1978. On that same date, the petitioning creditors applied for the appointment of a receiver and a receiver was appointed. Shortly thereafter, this Court entered an order vacating the appointment of receiver on the basis that a receiver was not necessary. ABC Transit, Inc., moved to dismiss the involuntary petition in bankruptcy on the ground that the petition failed to state a claim upon which relief could be granted. This Court entered an order dismissing the involuntary petition because no specific act of bankruptcy was alleged. An appeal was taken by the petitioning

dismissal was affirmed on appeal.

ABC Transit, Inc., has now applied for an award of costs, attorney fees, and damages pursuant to Bankruptcy Rule 115(e) which provides as follows:

"When a case commenced by the filing of a petition against any person pursuant to Rule 104(a) or Rule 105(b) or (c) is dismissed or withdrawn, the court on reasonable notice to the petitioner or petitioners may award to the prevailing party the same costs that are allowed to a prevailing party in a civil action and reasonable counsel fees, and shall award any other sums required by the Act."

The receiver who was appointed took possession of no property and, accordingly, no assessment is made either against the receiver or her bond. See §69b[11 U.S.C. §109b].

The original motion for taxation of costs asked for assessment of \$100.00 in damages for alleged additional interest which became due from the alleged bankrupt to First Westside Bank of Omaha. That portion of the motion is denied because the evidence before me does not support it.

The bulk of the motion for taxation of costs consists of attorney fees. The motion alleges that \$4,110.60 were incurred together with \$16.78 in costs. The petitioning creditors object to most of the services for which allowance is requested on the basis that the services are not directly related to the defense of the involuntary petition. A review of the itemized motion together with a review of the evidence discloses that the services for which compensation is requested include not only those services directly related to the defense of the involuntary petition but also services rendered in connection with business planning occasioned by the involuntary petition being filed.

A review of Rule 115(e) fails to disclose whether the

involuntary petition or fees incurred however related to the filing of the involuntary petition.

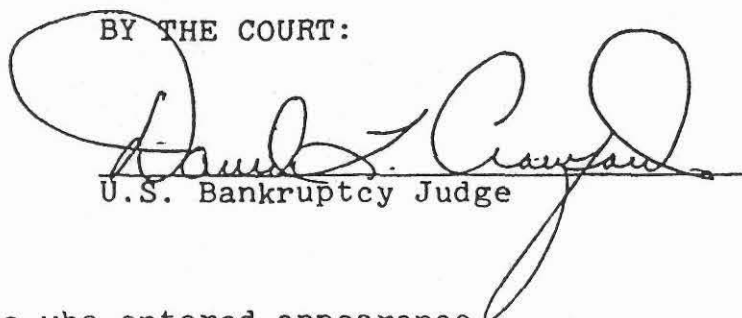
While I acknowledge that it is arguable, and does depend upon a case-by-case analysis, my conclusion is that Rule 115(e) contemplates fees directly related to the defense of the involuntary petition and does not, generally, contemplate an allowance for fees which may be occasioned by peripheral business planning. With that in mind, I have reviewed the itemized description of services and have attempted to select therefrom the services rendered which are shown to be directly related to the defense of the involuntary petition. My conclusion is that approximately 32.4 hours of services are directly related to the defense of the involuntary petition and conclude that those are the services for which fees should be taxed. I also award all costs for which application is made. Applying an hourly rate of \$45.00 results in a fee of \$1,458.00. That strikes me also as a reasonable fee for filing a motion to dismiss with accompanying brief which resulted in an order of dismissal and defending that order of dismissal on appeal.

I should add that I would find that the entire fee application is reasonable and, accordingly, the attorneys for ABC Transit, Inc., are free to bill their client for the balance of the services rendered.

A separate order is entered in accordance with the foregoing.

DATED: December 28, 1979.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to attorneys who entered appearance.