

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
MARQUARDT STORAGE COMPANY,) CASE NO. BK73-0-1226
)
BANKRUPT)

MEMORANDUM OPINION

This matter came on for hearing at the final meeting of creditors upon the applications for fees and expenses filed herein by various parties. The applications for fees and expenses plus the amount due the Salary and Expense Fund of this Court exceed \$108,000.00. The total remaining in the hands of the Trustee for distribution is \$94,041.01. A review of the history of this proceeding is necessary to put the matter into perspective.

This straight bankruptcy proceeding was preceded by a Chapter XI proceeding. The Chapter XI petition was filed on December 3, 1973. Prior to the filing of the Chapter XI petition, the bankrupt's business was that of a grain warehouse elevator. Before the filing of the Chapter XI petition, the Nebraska Public Service Commission had discovered a deficiency in the amount of grain on hand at the elevator facility. Pursuant to its statutory rights, the Public Service Commission had taken possession of the grain in the warehouse and liquidated it. The result was that when the Chapter XI petition was filed, the warehouse elevator was not in operation and the grain previously located therein had been sold. The elevator never operated during the course of the Chapter XI proceeding. However, during the course of the Chapter XI proceeding, the Nebraska Public Service Commission paid over to this Court the proceeds of the grain sales in the approximate amount of \$265,000.00. During the course of the Chapter XI proceeding, the debtor proposed several plans, which plans sought to obtain an arrangement with creditors whereby the warehouse facility would be leased at sufficient rental income to service the first mortgage on the property, pay the taxes and provide for periodic payments to unsecured creditors. No plan was ever accepted by creditors and on February 21, 1975, the debtor was adjudicated a bankrupt.

Arnold J. Stern was appointed trustee in bankruptcy. This Court paid to Mr. Stern the sum of approximately \$336,000.00 which it then held representing the proceeds paid to this Court by the Nebraska Public Service Commission. That money, which was invested by the Trustee and drew interest, was claimed by various warehouse receipt holders. Distribution of that money to the warehouse receipt holders was delayed because of prolonged litigation involving Commodity Credit Corporation and the First National Bank of Tekamah, Nebraska. Ultimately, after extensive discovery, a settlement was reached which was approved by this Court. That money was distributed to the warehouse receipt holders.

In addition, the Trustee liquidated the remaining assets of the bankrupt. The most significant assets were the sale of the elevator facility for the sum of approximately \$102,000.00, the collection of part of a judgment against Robert L. Marquardt in the sum of approximately \$30,000.00 and the collection of a judgment against the Washington County Bank of the sum of approximately \$16,000.00. Significantly, interest earned by the Trustee on money invested by him amounted to approximately \$89,000.00. A detailed analysis of the Trustee's receipts is contained in his report on file with the Court. The Trustee's total receipts were \$578,223.64 which figure includes the money turned over to the Trustee by this Court.

After payment of certain expenses, payment of the first mortgage on the elevator facility, and payment of the monies claimed by the warehouse receipt holders, the money on hand with the Trustee is \$94,041.01.

The first application for fees is that of Alexander Grant & Company which performed accounting services for the Trustee. Prior to the notice of final meeting being sent to creditors, Alexander Grant & Company filed an application for fees in the amount of \$2,500.00. No party has voiced objection to that application. However, after the notice had been sent to creditors but before the final meeting, the applicant filed a supplemental request for the sum of \$741.50 for additional work which it had performed for the Trustee. In view of the fact that Local Rule B-9D applies only to attorneys, I conclude that the supplemental application is not barred by the local rule. Nevertheless, the Bankruptcy Rules direct that notice be given to creditors of all applications for fees. However, in the present case, the size of the supplemental application, together with the cost of mailing an additional notice, when compared with the total amounts of the applications for fees and expenses lead me to the conclusion that the just method of treating the supplemental application is to treat it on its merits, it having been disclosed at the final meeting of creditors. Having examined the original application together with the supplemental application, I find them to be reasonable and allowable in the full amount of \$3,241.50.

Arnold Stern, the Trustee, has applied for commissions in the amount of \$6,197.24 as Trustee's commissions. The firm of Eisenstatt, Higgins, Kinnamon & Okun, P.C. (formerly Eisenstatt, Higgins, Kinnamon, Okun & Stern, P.C.) have applied for fees and expenses for their services as Attorney for the Trustee in the amount of \$40,600.00 plus \$582.39 expenses. The law firm has previously been allowed the sum of \$514.83 as an interim allowance for reimbursement of expenses. As previously noted, the Trustee's significant achievements in terms of liquidation were the sale of the elevator facility for approximately \$102,000.00 and the collection of approximately \$46,000.00 by way of litigation with third parties. Those three items resulted in approximately \$148,000.00 for the benefit of creditors generally. In addition, the Trustee became involved in the prolonged litigation involving the Commodity Credit Corporation and the First National Bank of Tekamah, Nebraska, by virtue of allegations that certain claims of the parties were objectionable. I do not mean to be understood to suggest that there were no other services by the Trustee or his attorneys but only to say that the foregoing were significant areas of activity. Viewed in this manner, an allowance for the Trustee and his attorneys in the sum of approximately the amount requested does not seem excessive. This case has been beset by numerous legal questions together with significant litigation. I except the suggestion,

made at the final meeting, that not all services by a Trustee in bankruptcy are compensable at the rates attorneys may charge. Nevertheless, the balance between the two fee applications seems reasonable and I conclude that they should be allowed as applied for.

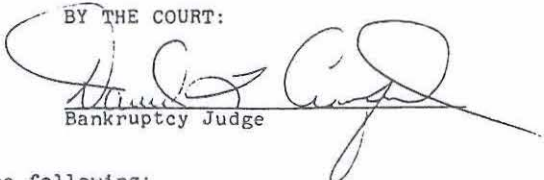
The firm of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler have applied for fees and expenses for their services during the Chapter XI proceeding to the Official Creditors' Committee. The amount of the application is \$14,270.00 in fees and \$90.30 in expenses. A review of the application reflects what appears to be a conservative approach to the application considering the conservation of time expenditures and the hourly rates requested. There were legal reasons why the Creditors' Committee would wish to attempt to formulate a plan of arrangement rather than seek liquidation result. Briefly, this involved a question of whether Commodity Credit Corporation, a governmental agency, would be entitled to priority status in liquidation as opposed to a general creditor in a Chapter XI plan. In any event, no objection has been voiced to the application by the attorneys for the Creditors' Committee and I conclude that it should be allowed as applied for.

Lastly, Clayton Byam and Dennis Connolly have applied for fees for services as the attorney for the debtor and debtor-in-possession in the sum of \$27,000.00 fees and \$303.89 as expenses. In general, attorneys who unsuccessfully attempt to formulate a plan under Chapter XI are simply not compensated at the levels which they might hope to be compensated at if a plan is successfully confirmed. Services which result in benefits to the estate should be compensated at some level. As noted with regard to the application by the attorneys for the Creditors' Committee, there was some interest by creditors in formulating the type of plans which were proposed by the debtor. As a result, even though the debtor had ceased its business operation when it filed under Chapter XI, the situation was not completely hopeless because of creditor interest. Nevertheless, it is difficult from a review of the time record submitted to ascertain significant benefit to the estate from the services of the attorneys for the debtor-in-possession. In addition, as mentioned at the final meeting, one has difficulty differentiating between services rendered to the debtor which may benefit the debtor but not the estate and services rendered to the debtor-in-possession which may have benefited the estate. On balance, I conclude that a reasonable allowance is the sum of \$17,500.00 in fees and the sum of \$303.89 in expenses.

A separate order is entered in accordance with the foregoing.

DATED: April 3, 1979.

BY THE COURT:


Bankruptcy Judge

Copies mailed to each of the following:

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