ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
JUN 18 2002
TAWANA C. MARSHALL, CLERK
By _____ Deputy

IN RE:	§	
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RESIDENCES AT BEAR CREEK, INC.,	§	CASE NO. 00-33139-SAF-7
	§	
D E B T O R.	§	

MEMORANDUM OPINION AND ORDER

Robert Milbank, Jr., the Chapter 7 trustee of the bankruptcy estate of the Residences at Bear Creek, Inc., has applied for compensation and reimbursement of expenses. In the application, Milbank requested compensation of $120,527.76 and reimbursement of expenses of $10,805.17. Commercial Finish Group, Inc., Pope Plumbing Company, Inc., and Richard W. Pope filed an objection to the application. The court conducted an evidentiary hearing on the application on May 8, 2002. In response to the objection, the trustee voluntarily reduced his compensation request to $102,448.59 and the expenses to $9,184.39. The United States Trustee supports the application, as voluntarily reduced.

The determination of compensation to be paid to a Chapter 7 trustee constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(A)

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and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

Residences at Bear Creek, Inc., owned an eighty unit apartment complex in Greenville, Texas. The trustee operated the apartment complex before selling it, pursuant to court order, to Commercial Finish Group, Inc. At closing, Commercial paid Reilly Mortgage, an entity that held the secured debt on the property. The trustee included that payment in the calculation of his commission under 11 U.S.C. § 326(a).

Section 326(a) provides that the court "may allow reasonable compensation under section 330 of [the Bankruptcy Code] to the trustee . . . not to exceed [decreasing percentages of increasing dollar amounts] upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims." See In the Matter of England, 153 F.3d 232, 235 (5th Cir. 1998).

Commercial contends that the trustee did not disburse money to Reilly Mortgage. Reilly Mortgage held a secured claim against the bankruptcy estate. The trustee sold the property to Commercial. Commercial paid the mortgage at closing. The parties employed a title company to implement the closing. Commercial first asserts that the title company acted on its behalf, and not on behalf of the trustee. As a result, the trustee cannot claim that he disbursed money to Reilly Mortgage.

Alternatively, Commercial asserts that the title company, not the trustee, disbursed the money to the mortgage holder. Relying on the "plain language" of § 326(a), Commercial maintains that the moneys disbursed to Reilly Mortgage may not be included in the trustee's compensation under § 326(a).

Commercial is affiliated with Pope, an insider of the debtor. Pope had been engaged in a dispute with the debtor's other owner, Duane May. Each have claims against the bankruptcy estate. During the trustee's administration of the estate, the trustee paid operating expenses, maintained a 95% occupancy rate, and generated net cash flow. The trustee will pay in full the sole remaining non-insider creditor of the debtor. The trustee will then make a distribution to the insiders. Therefore, any money that Commercial can extract from the trustee's commission will inure to Pope's benefit.

Commercial correctly cites the Fifth Circuit's decision in England, in which the Court teaches that the bankruptcy court cannot apply a "constructive disbursement" to calculate a trustee's commission under § 326(a). Thus, property distributed to a creditor in satisfaction of its claim may not be considered money disbursed by the trustee for purposes of calculating the commission under § 326(a). 153 F.3d at 237. But, Milbank did not distribute property to Commercial to satisfy its claim or to

Reilly Mortgage to satisfy its claim. Milbank sold property to Commercial, using the proceeds to pay creditors.

Commercial suggests, however, that the title company disbursed the money, and, did so at Commercial's direction. The title company did indeed disburse the money to Reilly Mortgage. But, Commercial's suggestion that the title company acted at its direction turns the transaction on its head.

Commercial argues that the Fifth Circuit requires that the plain meaning of "moneys disbursed" be applied to the transaction. The England decision does not suggest that moneys disbursed by a title company, when a trustee sells property of the bankruptcy estate, should not be included in the calculation of the trustee's commission. The "plain language" of words used in a statute cannot be employed to reach a tortured result. Demarest v. Manspeaker, 498 U.S. 184, 190 (1991); United States v. Rodriguez-Rios, 14 F.3d 1040, 1044-45 (5th Cir. 1994). Furthermore, the Fifth Circuit will unflinchingly deviate from the plain meaning of a word or words in a statute if required by compelling reasons. In re Armstrong, 206 F.3d 465, 469-72 (5th Cir. 2000) (determining that "shall turnover" plain meaning yields to the procedure of Internal Revenue Code, even when the IRS agrees with a debtor that the debtor is entitled to a tax refund in a specific amount). And, the Supreme Court directs, that the plain meaning of words used in a provision of the

Bankruptcy Code applies provided the reading makes the Code coherent and consistent. United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

The Bankruptcy Code does not alter the non-bankruptcy process of using a title company to close a real estate transaction for the sale of property of a bankruptcy estate, if the sale and related expenses have been approved by the bankruptcy court. After the bankruptcy court authorizes a sale of the property of the bankruptcy estate, 11 U.S.C. § 363(f), the trustee may employ a title company to implement the closing of the transaction. When the trustee employs a title company, it would be absurd to compel the buyer to actually physically tender the purchase price into the hands of the trustee, who would then tender the relevant portion of the proceeds to the secured creditor. Yet, Commercial claims that the trustee must go through these machinations in order to be credited with the disbursement. Moreover, the manner of calculating the trustee's commission should not force the disruption of the well-established real estate closing process utilizing the services of a title company. Finally, Commercial's position would cause § 326(a) to be inconsistent with the Code's objective to permit the trustee to engage in marketplace transactions upon prior court authorization.

But, in any event, the title company acted at the trustee's direction, as the trustee sold the property. In re Reid, 251 B.R. 512, 517-18 (Bankr. W.D. Mo. 2000). By an order entered December 20, 2000, the court authorized Milbank to sell the apartment complex to Commercial or its designees "for $225,000.00 cash, release of $1,350,000.00 of Commercial Finish Group's claim filed in the bankruptcy estate, and assumption of the existing deed of trust held by Reilly Mortgage . . ., or alternatively, payment in full of the Reilly Mortgage debt with third party financing." Commercial elected to pay the mortgage, rather than assume the mortgage.

Commercial argues that because it elected to pay the mortgage, the title company acted at its direction, not at the trustee's direction, regarding the disbursement of money. Commercial mis-perceives what occurred. Commercial argues as if the trustee sold the property to Commercial, with Commercial assuming the mortgage. And, thereafter, Commercial, as owner of the property, obtained third party financing and used that financing to pay Reilly Mortgage. However, that is not what occurred.

Before the closing, Commercial elected to obtain third party financing. On January 23, 2001, Commercial filed a motion informing the court that it elected to pay the mortgage and requesting that the court direct Reilly Mortgage to accept

payment in full of its debt at closing. By an order entered on February 7, 2001, the court granted that motion. On the next day, February 8, 2001, Commercial and Milbank entered their agreement for the sale and purchase of the property, providing that "[t]he Purchaser will pay at Closing the outstanding principal balance owing at Closing on the Prior Loan." The parties agreed to use the services of a title company.

The title company included the balance due on the mortgage as part of the sales price. The purchaser owed the seller that amount plus the $225,000. The seller in turn owed the mortgage company the balance of the mortgage. Closing costs were assessed. Commercial tendered the funds. The title company paid the mortgage company. The trustee executed the deed. The trustee left the transaction with the net proceeds.

The court concludes, based on these facts, that when a trustee uses a title company to close the sale of real property belonging to the bankruptcy estate, the trustee is entitled to include in the calculation of his commission the proceeds distributed to creditors by the title company in the performance of its services.

Section 326(a) sets a maximum limit on the trustee's commission. England, 153 F.3d at 235. Ultimately, the commission paid to the trustee must be reasonable. 11 U.S.C. § 330(a). The court generally utilizes a lodestar analysis in

its determination of reasonable compensation, especially for a trustee who is a licensed attorney, as is Milbank. To determine reasonable compensation, the court must determine the "nature and extent of the services supplied by" the attorneys. 11 U.S.C. §330(a)(3); In re First Colonial Corp., 544 F.2d 1291, 1299 (5th Cir. 1977). The court must also assess the value of those services in relation to the customary fee and the quality of the work. These two factors comprise the components for the lodestar calculation. See Cobb v. Miller, 818 F.2d 1227, 1231 (5th Cir. 1987). Generally, the lodestar is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The court may then adjust the compensation based on the factors of §330(a)(3) and (4) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Blanchard v. Bergeron, 489 U.S. 87, 91-92, 94-95 (1989). The Johnson factors may be relevant for adjusting the lodestar calculation but no one factor can substitute for the lodestar. Id. Rather, the lodestar shall be presumed to establish a reasonable fee with adjustments made when required by specific evidence. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546, 563-65 (1986).

Milbank had to operate the debtor's apartment complex. He did so while steering the case through the turmoil of the owners' dispute and litigation. He generated net operating income while

administering the property. Moreover, he faced significant litigation from the owners, including contested motions for the sale of the property. Milbank reports time administering the estate of 141.2 hours. He testified that he may have actually had more time on the case, which he did not record. He reported 20 hours for the contested compensation application.

Milbank charged his clients $230 per hour at the beginning of the case, increasing to $250 during the case. Milbank contended that based on his experience, he could charge as much as $350 per hour in the Dallas Metroplex market. The United States Trustee agreed with that position. Nevertheless, Milbank had not charged his clients at that rate during the case. The court uses the rates charged, but, because of the passage of time, uses the $250 per hour rate as reasonable.

For a lodestar analysis, the court would use time of 161.2 hours at the rate of $250 per hour, for a lodestar fee of $40,300. Under the Johnson factors, the court would add an enhancement to the lodestar because of the duties and risks associated with operating a debtor's business in Chapter 7. The lodestar does not reflect the compensation of the operator of a business. The lodestar also does not contemplate the risks of the operation of a business while in a fiduciary capacity.

The court further notes that the sale of real estate usually involves the payment of a commission based on a percentage

calculation. And, the liquidation of property to pay debts usually involves the payment of a percentage of the value of the property as the cost of liquidation. Creditors understand and expect that cost.

These factors lead the court to conclude that reasonable compensation in this case must be more than the lodestar and should approach the commission calculated under § 326(a).

In his response to the objection, Milbank voluntarily reduced his compensation request to $102,448.59. That amount is less than the maximum commission allowed by § 326(a), yet recognizes the factors that compel a commission greater than a pure lodestar calculation. Therefore, the court finds that $102,448.59 constitutes reasonable compensation for the trustee under 11 U.S.C. §§ 326(a) and 330(a).

Milbank's application initially requested reimbursement for expenses paid for the services of Beverly Paul. Milbank employs Paul to perform administrative, paraprofessional, secretarial, and clerical services for him. Paul performed 14.75 hours of paraprofessional work on this case, for which Milbank charged $65 per hour. Paul performed 120.75 hours of accounting and bookkeeping work, for which Milbank charged $55 per hour. She also performed 56 hours of clerical and secretarial work, for which Milbank charged $40 per hour.

Paul testified that her work included reviewing receipts and disbursements for the operation of the apartment complex, including rental collections and operating expenses. She pursued rent collections. She maintained the receipt and payment ledgers, processed mortgage payments, while supervising property management, property maintenance, and cleaning services, etc. Paul also compiled the monthly operating reports required for a business operated by a trustee. The court finds that Paul's work was necessary for the administration of this estate, including the operation of the apartment complex.

Commercial contends, nevertheless, that the trustee may not be reimbursed for the types of services performed by Paul. Commercial concedes that the United States District Court for the Northern District of Texas has held that a Chapter 7 trustee may recover actual, necessary expenses for the types of services performed by Paul. Cavazos v. Simmons, 90 B.R. 234, 240-41 (N.D. Tex. 1988). As a unit of that district court, this court is bound to follow its decisions. Rand Energy Co. v. Strata Directional Tech., Inc., 259 B.R. 274, 276 (Bankr. N.D. Texas 2001). Commercial asserts that the Cavazos decision must be reviewed in light of the Fifth Circuit's decision in England. However, the England decision does not expressly overrule Cavazos. Consequently, Commercial must seek relief from the Cavazos decision from the district court.

But, Commercial further contends that by charging an hourly rate, Milbank may be including a profit factor, thereby exceeding actual expenses. Milbank may only recover his actual expenses. He may not, therefore, include a profit enhancement in otherwise recoverable expenses.

In his response, Milbank voluntarily reduced the requested reimbursement for Paul by 15%. Milbank charged the estate different hourly rates depending on the services that Paul performed. Milbank attempts to charge more for difficult tasks, similar to accounting tasks, and less for simpler tasks that are more clerical in nature. Milbank did not testify, however, that he actually paid Paul different amounts based on the work that she performed. Milbank has not shown that his expenses were greater when Paul performed more "difficult" tasks. Therefore, the court has reduced Paul's hourly billing rate to her lowest billing rate of $40 per hour.

Paul's hourly rate should already include expenses associated with her employment. Paul has an accounting degree and twenty-two years of experience working for law firms, the last twelve with Milbank. In 2001, Milbank paid Paul $57,000. Milbank estimates expenses related to Paul's employment of $8,000-$10,000. The court assumes that those expenses cover employee benefits and other expenses related to Paul's salary. Adding these costs, and factoring a 40 hour work week, Milbank's

actual expenses to employ Paul averaged $32.20 an hour. The hourly rate should also include expenses for office equipment, furniture, and utilities associated with Paul's employment. Charges for the trustee's office rent, storage, equipment, furniture, and routine overhead items are subsumed by the hourly rates billed by Milbank's staff. In re Harbor Financial Group, Inc., 2001 U.S. Dist. LEXIS 14412, 13 (N.D. Tex. 2001). The difference between $32.20 per hour and the lowest billing rate of $40 per hour should cover those expenses. The record does not support a finding of additional expenses depending on the tasks performed by Paul.

Paul reported 191.5 hours working on this case. Paul and Milbank both testified that they believed Paul actually performed more work for the estate than reported. As neither quantified any additional work, the court finds that the work performed must be based on the amount of time actually reported. At $40 per hour, Milbank actually incurred expenses of $7,660.00 for Paul.

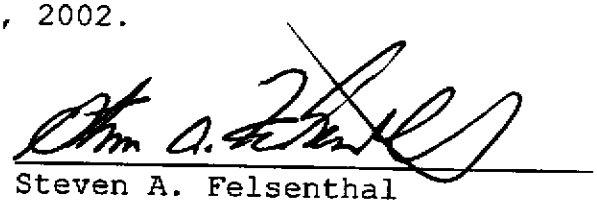
Milbank incurred additional expenses of $965.17 for copies, postage, delivery, and similar expenses. Those expenses were both actual and necessary. Therefore, the court awards total reimbursement of $8,625.17.

Based on the foregoing,

IT IS ORDERED that Robert Milbank, Jr., is awarded compensation of $102,448.59 for his services as trustee of the

Chapter 7 estate of Residences at Bear Creek, Inc., and reimbursement of actual, necessary expenses of $8,625.17. Milbank shall amend his report of proposed distribution accordingly.

Signed this 13th day of June, 2002.



Steven A. Felsenthal
United States Bankruptcy Judge