

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

ROBERT EUGENE HOWARD
SS# 411-64-0186 and
CALLIE STEWART HOWARD
SS# 415-60-8870,

Debtors.

No. 96-22512
Chapter 12

M E M O R A N D U M

APPEARANCES :

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*Attorneys for C. Kenneth Still,
Chapter 12 Trustee*

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This case is before the court on the debtors' objection to the administrative claim of N. David Roberts, attorney for the chapter 12 trustee, in the amount of \$4,733.17. For the following reasons, the objection will be overruled and the claim will be allowed. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(B).

The debtors filed their petition initiating this chapter 12 case on November 4, 1996, after their previous *pro se* chapter 12 case, no. 96-21199, was dismissed by order entered October 15, 1996, for failure to file a plan. Upon the second filing, the chapter 12 trustee, C. Kenneth Still (the "Trustee"), and Associates Financial Services Company of Tennessee, Inc. ("Associates") filed a joint motion to dismiss the case, asserting, *inter alia*, that the case "was filed in bad faith and for the purpose and intent of delaying creditors," the debtors were prohibited from filing the second case pursuant to 11 U.S.C. § 109(g)(1) "because the debtors did not properly prosecute their prior case which was dismissed by the Court for cause," and the debtors did not "qualify as family farmers" and were not otherwise eligible for relief under chapter 12 because they did not have "regular farm income from which to fund a plan or plan payments." An extensive hearing on the motion to dismiss was conducted by the court on February 18, 1997, and an

order denying the motion was entered the next day. A hearing on the debtors' proposed second plan of reorganization and objections thereto filed by the Trustee, Associates and Consumer Credit Union was conducted on May 13, 1997, whereupon confirmation of the debtors' second plan was denied. See *In re Howard*, 212 B.R. 864 (Bankr. E.D. Tenn. 1997). Thereafter, the debtors filed a third amended plan on July 29, 1997, which plan was confirmed by order entered August 13, 1997.

The administrative claim which is at issue has the pertinent billing records attached as exhibits. Those records evidence that the Trustee's attorney seeks payment for services rendered from November 5, 1996 through March 19, 1997, a total of 35.3 hours at \$125.00 per hour, *i.e.*, \$4,412.50 plus \$320.67 in expenses. The services performed by Mr. Roberts include review of the debtors' bankruptcy documents and consultation with the Trustee, conferences with debtors' counsel and creditors in conjunction with the meeting of creditors, attendance at a stay relief hearing, consultation with Associates' counsel, preparation and filing of the motion to dismiss, brief, and pretrial statement, discovery in connection with the dismissal motion consisting of the debtors' depositions, attendance at the hearing on the dismissal motion, analysis and consultation with the Trustee regarding the debtors' plan, preparation of

objection to plan, and preparation of administrative claim.¹ Mr. Roberts does not seek payment for services rendered by him in connection with the confirmation hearing although he appeared and participated in that hearing.

In their objection to Mr. Roberts' claim, the debtors assert

¹The exact breakdown of the 35.5 hours is as follows: an initial telephone consultation with the trustee and the preparation and filing of a notice of appearance (.5 of hour); a telephone call from Associates' counsel concerning a motion to dismiss (.2 of hour); review of the debtors' bankruptcy documents and a telephone consultation with the trustee concerning those documents and the motion to dismiss (.25 of hour); conferences with creditors and debtors' counsel at the meeting of creditors held in Johnson City, Tennessee, and on that same day, attendance at the hearing on Consumer Credit Union's motion for relief from stay (3.5 hours); preparation of application to employ, order and motion to dismiss, and conference with Associates' counsel concerning the motion to dismiss and review of case law provided by Associates' counsel in that regard (2.5 hours); letter to clerk concerning filing of motion to dismiss (.25 of hour); attendance of pretrial conference (.5 of hour); travel to Kingsport for debtors' depositions in Kingsport, Tennessee, and conferences with Associates' and debtors' counsel concerning pretrial statement (8.5 hours); telephone conference with Associates' counsel about and the completion of a pretrial statement (1 hour); telephone conference with debtors' counsel regarding stipulations for hearing (.5 of hour); legal research for trial brief (1 hour); review and marking of deposition transcripts for hearing, conference with Associates' counsel about and preparation of pretrial brief (5 hours); appearance at hearing on the motion to dismiss (10 hours); telephone consultation with Trustee concerning debtors' motion to extend time to file plan (.1 of hour); telephone consultation with Trustee regarding objection to feasibility of plan and nonpayment of interest thereunder, and submission of claim (.25 of hour); and analysis of the plan, preparation of an objection thereto, and preparation of claim (1.25 hours).

that "some or all of this claim should be disallowed pursuant to 11 U.S.C. § 330(a)(3) and 11 U.S.C. § 330(a)(4)(A)" because "the services were to some extent unnecessary duplication of the objections made by Associates Financial Service of Tennessee, Inc." and "the services were not reasonably likely to benefit Debtors' estate and they were not necessary to the administration of the case." A hearing on the objection was held in conjunction with the confirmation hearing although the debtors offered no evidence in support of their assertion that compensation should be denied and are apparently simply relying on the record in the case. Nonetheless, 11 U.S.C. § 330(a)²

²In pertinent part, 11 U.S.C. § 330(a) provides as follows:

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to ... a professional person employed under section 327 or 1103-

(A) reasonable compensation for actual, necessary services rendered by the ... professional person; and
(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A)[sic] In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;
(B) the rates charged for such services;

(continued...)

places the duty squarely upon the court to analyze the services performed and determine a reasonable compensation for the Trustee's attorney whose employment was previously approved pursuant to 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014(a).

After consideration of the factors enumerated under subsection (a)(3) of § 330, the court finds the services performed by the Trustee's attorney to be prudent and the rate of \$125.00 per hour justified in light of his level of expertise and years of practice before this court. Furthermore, the court finds that the services were performed within a reasonable amount of time commensurate with the nature of the tasks, and that the compensation sought is reasonable based upon this

²(...continued)

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case

....

court's knowledge of the customary compensation charged by comparably skilled practitioners in cases other than those in bankruptcy.

The debtors argue that the Trustee's pursuit of the motion to dismiss did not benefit the estate and was not necessary to the administration of the case. Although the Trustee's motion to dismiss was denied, that does not of itself imply that it was without grounds. The issues raised by the motion to dismiss were valid and it was not certain by any means that the debtors would prevail. The debtors had virtually ceased farming, creditors had already been delayed by one bankruptcy filing which had folded when the debtors failed to propose a plan, and there was serious question as to the debtors' ability to reorganize. There was a real concern that creditors were being needlessly and hopelessly delayed and that they would be better off outside of bankruptcy because of the substantial equity in the debtors' farm which was sufficient to pay creditors in full. In light of these facts, the court believes that pursuit of the motion to dismiss was at that time necessary to the proper administration of the estate. The concept of "benefit of the estate" is not restricted to a dollar for dollar interpretation. See *In re Holder*, 207 B.R. 574, 584 (Bankr. M.D. Tenn. 1997)(quoting *In re Delta Petroleum, Ltd.*, 193 B.R. 99, 108

(Bankr. D.P.R. 1996)).

The debtors assert that the time which the Trustee's attorney spent on pursuing the motion to dismiss "was an unnecessary duplication of services in that a well-financed creditor, Associates ..., employed and retained counsel to dismiss the case on the identical grounds sought by the Trustee" and that "the legal services performed by the attorney for the Trustee could have, and more properly should have, been performed by Associates." The Trustee responds that as the representative of the estate under 11 U.S.C. § 323(a), he has a duty to represent the interests of all creditors and because it was his opinion that the debtors' second filing was made in bad faith and detrimental to the interests of creditors, he sought to have the case dismissed. The Trustee contends that the fact that Associates took the identical position as that of the Trustee, does not relieve the Trustee of his obligation to all the creditors. The court agrees.

As for the alleged duplication of services, no other request for compensation under 11 U.S.C. § 330(a) has been made or previously approved by the court. This is not a situation where two attorneys whose employment has been authorized by the court request double compensation for the same services. See, e.g., *Cle-Ware Indus., Inc. v. Sokolsky*, 493 F.2d 863, 875 (6th Cir.

1974), *cert. denied* 419 U.S. 829, 95 S. Ct. 50 (1974); *In re Yankee Seafood Corp.*, 53 B.R. 285, 286 (Bankr. D.R.I. 1985). To the contrary, the debtors' argument is that because Associates is oversecured and may have a contractual right to add its attorney's fees and expenses incurred in the joint prosecution of the motion to dismiss to increase the amount of its claim, the Trustee's attorney should not be compensated for the services he provided as they were an unnecessary duplication of services provided by Associates' counsel. The court does not agree that it is precluded from awarding compensation to the Trustee's attorney for similar services performed by Associates' counsel simply because Associates may contractually recover its attorney's fees and expenses.

Accordingly, the debtors' objection to administrative claim will be overruled. The foregoing constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a), as incorporated by Fed. R. Bankr. P. 7052.

FILED: January 5, 1998

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE