In the United States Bankruptcy Court

for the Northern District of Iowa

FRED H. ELLING JR.
a/k/a Fred Elling and
SHARON K. ELLING
Debtor(s).

Bankruptcy No. X84-05066

Chapter 7

ORDER RE: APPLICATION FOR ALLOWANCE OF FEES AND EXPENSES

The matter before the court is an application for attorney fees and expenses by John H. Neiman. Objections to the application were filed by the U. S. Trustee, chapter 7 trustee Larry Eide, and Hampton State Bank. A hearing was held on the application and objections thereto on April 11, 1989 in Mason City, Iowa.

The court now issues the following order which shall constitute findings of fact and conclusions of law pursuant to Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2).

FINDINGS OF FACT

1. Fred H. Elling, Jr. and Sharon K. Elling, husband and wife, filed their chapter 11 bankruptcy petition on May 17, 1984.
2. The applicant, John H. Neiman, was employed as the attorney for the debtors in the chapter 11 proceeding. An order authorizing retention and employment of Neiman as the attorney for the debtors-in-possession was entered by the court on July 26, 1984.
3. The debtors filed a motion to convert the case to chapter 7 on March 10, 1986.
4. On January 10, 1989, John H. Neiman filed an application for allowance of fees and expenses during the chapter 11 proceeding. Neiman requested an allowance of $27,174.50 in attorney fees and $3,551.27 for expenses. Objections to the fee application were filed by the U. S. Trustee, chapter 7 trustee Larry Eide, and Hampton State Bank.
5. Chapter 7 trustee Larry Eide filed an objection to the application on January 27, 1989. Eide objected on the basis that the application did not distinguish expenses and services rendered prior to and subsequent to March 10, 1986, the date the case was converted to a chapter 7. Neiman filed a response to the objection on February 6, 1989. Through the response, Neiman amended his application for attorney fees, which eliminated some of the services that were rendered after March 10, 1986. The amendment reduced the request for fees from $27,174.50 to $24,924.50. The total hours of services rendered was reduced by eighteen hours. The expenses were reduced to $3,469.67. With the reduction in fees and expenses, the application of Neiman was reduced to a total of $28,394.17.[(1)] Neiman requests that the fees and expenses be allowed as an administrative expense under the provision of 11 U.S.C. § 503 and as a priority claim under 11 U.S.C. § § 503 and 507.
6. The major objections to the fee application are as to Neiman's fees with regard to bequest-disclaimer litigation and a malpractice lawsuit.

7. Prior to the filing of the chapter 11 bankruptcy, debtor Fred H. Elling, Jr., executed and filed a disclaimer of real estate bequest that he was to receive from his father's estate. The disclaimer sought to have the ownership of the property succeed to his children. The disclaimer was an attempt to have the property pass to his children rather than himself. Hampton State Bank v. Elling (In re Elling, Adv. No. 84-0339M, slip op. (Bankr. N.D. Iowa, Oct. 29, 1984).
8. The disclaimer of the real estate and exclusion of the property from the estate was litigated in an adversary proceeding before the late Honorable William W. Thinnes, Id. Judge Thinnes ruled that the disclaimer executed by the debtor was not effective in transferring his interest in the real estate due to defects in the disclaimer. The inherited property became property of the chapter 11 bankruptcy estate.
9. Neiman included on his fee application time spent working on the adversary proceeding which related to the disclaimer. The application shows that Neiman spent 10.3 hours plus part of 7.4 hours on the disclaimer issue. Law clerks of Neiman spent sixteen hours working on the disclaimer issue while Barbara Buhr, another employee of Neiman's firm, spent 10.5 hours working on the disclaimer issue. The work on the disclaimer issue took place from July 3, 1984 through June 28, 1985.
10. A malpractice lawsuit was brought against the attorney who drafted the disclaimer. As a result of a settlement agreement, the children of Fred Elling received $100,000.00. The debtors or the bankruptcy estate did not receive any proceeds from the malpractice action.
11. Neiman investigated the possibility of bringing a malpractice lawsuit on behalf of the debtors. However, after investigating the claim, Neiman told the debtors that he would not handle any malpractice lawsuit.
12. The fee application indicates that Neiman performed 3.9 hours and part of 7.1 hours working on the potential malpractice action. At the hearing, Neiman represented that the .2 hours of services performed on December 12, 1984 and February 7, 1985 dealt with the malpractice issue. Additionally, the application indicates that part of the services performed on December 31, 1985 and January 4, 1986 dealt with the malpractice issue. Neiman represented during the hearing that this time was spent dealing with the possibility of using malpractice money to purchase a one-half interest in land for the debtors children.

DISCUSSION

The major objections to the fee application of Neiman arise from the time Neiman spent on the disclaimer and malpractice issues. The objectors argue that fees should not be allowed for these services since they did not benefit the chapter 11 estate. They argue that the disclaimer was an attempt to keep the real estate out of the bankruptcy estate and therefore if the disclaimer by Fred Elling would have been valid, the real property would have been kept out of the estate. With regard to the malpractice action, the objectors argue that the proceeds of the settlement were paid to the debtors' children and not to the estate. Therefore, there was no benefit to the estate.

Neiman argues that the services performed with regard to the malpractice and disclaimer issues were intended to benefit the estate and therefore the fee should be allowed as administrative expenses. In hindsight, Neiman agreed that the services relating to the disclaimer and malpractice issues did not benefit the estate. However, Neiman argues that he was employed by Ellings to do legal work and therefore he was obligated to perform the services in order to meet the standards of the code of professional responsibility.

Section 503(b)(2) of Title 11 provides:

> "After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--
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> (2) compensation and reimbursement awarded under section 330(a) of this title.

Section 330(a) provides:

> a. After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney--
> 1. reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
> 2. reimbursement for actual, necessary expenses.

The application to employ attorneys filed by the debtors on June 8, 1984 states:

> The professional services by said John H. Neiman and Stephen P. Carroll to be rendered are:
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> a. To give your applicants legal advice with respect to their powers and duties as debtors-in-possession, in the continued operation of their business and management of their operation;
> b. To prepare on behalf of your applicants, as debtors-in-possession, necessary petitions, answers, orders, reports and other legal papers;
> c. To perform all other legal services for your applicants as debtors-in-possession which may be necessary herein.

An order granting the application to employ attorneys was filed on July 26, 1984.

As a general rule, most courts have concluded that services performed by the debtor's counsel must benefit the estate in order to be compensable as administrative expenses. In re Fruits International, Inc., 87 B.R. 769, 774 (Bankr. D. P.R. 1988); In re S.T.N. Enterprises, Inc., 70 B.R. 823, 839 (Bankr. D. Vt. 1987); In re By-rite Oil Co., 87 B.R. 905, 914 (Bankr. E.D. Mich. 1988); In re Chapel Gate Apartments, Ltd., 64 B.R. 569, 576 (Bankr. N.D. Tex. 1986). See also Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 53 S.Ct. 703, 77 L.Ed. 1327 (1933); In re Evenod Perfumer, Inc., 67 F.2d 878 (2nd Cir. 1933).

This court agrees that a debtor's attorney fees should not be allowed as administrative expenses unless the services performed had the potential of benefiting the estate or were necessary to the debtor during the course of the reorganization. "Administrative expenses are those actual and necessary costs and expenses, including compensation of trustees and professionals, incurred after the commencement of a bankruptcy case to marshall, preserve, enhance, and administer the assets of the estate." 1 Norton Bankruptcy Law & Practice § 12.01 at 2 (1981), citing In re Freedomland, Inc., 480 F.2d 184 (2nd Cir. 1973), aff'd. 419 U.S. 43, 95 S.Ct. 247, 42 L.Ed.2d 212 (1974). Administrative expenses are to be kept at a minimum to preserve as much of the estate as possible for creditors. Otte v. United States,

419 U. S. 43, 53, 95 S.Ct. 247$ 42 L.Ed.2d 212 (1974). Administrative expense status should only be allowed for those expenses which would preserve the estate or benefit the estate in some other manner. Neiman argues that the services rendered with regard to the malpractice and disclaimer issues were intended to benefit the estate and therefore he should be entitled to administrative expense status for his attorney fees. The court has broad discretion in determining whether to allow administrative expense priority. In re Dant & Russell, Inc., 853 F.2d 700, 707 (9th Cir. 1988).

The court agrees that the services rendered by Neiman with regard to the malpractice issue should be allowed as an administrative expense. The proceeds of the malpractice action were paid to the debtors' children and no proceeds inured to the benefit of the debtors or their bankruptcy estate. However, Neiman originally thought that the debtors' estate may have a potential malpractice claim against the attorney who drafted the disclaimer. If the debtor would have had a malpractice claim, the estate would have benefited. Therefore, the court believes that the time Neiman spent researching the malpractice action should be allowed as an administrative expense.

The objectors argue that the services performed by Neiman with regard to the disclaimer issue should not be allowed as an administrative expense since these services did not benefit the estate. The court agrees. The court fails to see how the services performed by Neiman with regard to the disclaimer issue could have ever benefited the estate. The court further does not recognize that debtors' efforts in the disclaimer litigation were intended to benefit the estate or were essential to the debtors during the reorganization case. The intent of the disclaimer was to keep property out of the estate.

The court will not allow the time spent by Neiman on the disclaimer issue as administrative expenses. The dates and times of these disallowed expenses include:

Date	Time Spent (hours)
7-3-84	.2
7-5	1.0
8-17	.3 (BAB)
8-20	1.6 (BAB)
8-21	4.0 (LC)
8-22	3.5 (LC)
8-23	3.0 (BAB)
8-24	3.0 (BAB)
8-28	2.6 (BAB)
8-20	3.4
8-3	.4
9-6	2.2
9-7	3.5 (LC)
9-9	1.0 (LC)
9-10	4.0 (LC)
9-10	.4
9-18	.3
9-21	.3
10-30	.4

6-12-85	.7
6-19	.2
6-20	.4
6-27	.2
6-28	.2

10.3 hours spent by Neiman at $125.00 per hour will be disallowed. Additionally, sixteen hours of services rendered by law clerks at $25.00 per hour and 10.5 hours of services rendered by Barbara Buhr at $65.00 per hour will be disallowed. The total amount of services performed on the disclaimer issue that will be disallowed as administrative expenses is $2,370.00.

Neiman argues that under the code of professional responsibility, as an attorney he had no choice regarding whether to handle the disclaimer issue. Neiman also argues that it is necessary to allow the attorney fees of a chapter 11 debtor as administrative expenses in order to encourage competent attorneys to represent debtors. The court recognizes Neiman's concern. The purpose of allowing attorney fees as an administrative priority expense is to attract capable attorneys to represent debtors in bankruptcy cases. S.Rep. No. 95-989, 95th Cong;, 2d Sess. 40-41 (1978). However, the allowance of the administrative expense must be limited to those services which are rendered with the intent to benefit the estate or which are essential to the debtors during reorganization. Work on the disclaimer litigation does not fall into either category. The intent of the disclaimer was to keep a substantial amount of property out of the estate and out of the hands of the debtors.

The objectors also argue that Neiman is requesting payment of attorney fees which were incurred following the conversion of the case to a chapter 7 as administrative expenses. After the chapter 7 trustee objected to the original fee application, Neiman filed a response eliminating most of the services which were rendered after the conversion date. However, Neiman contends that the services rendered with regard to the preparation of the conversion schedules should be allowed as an administrative expense in the chapter 11 case. The court agrees. Therefore, the court will allow as administrative expenses the services performed with regard to preparation of the conversion schedules.

Hampton State Bank argues that the fees of Neiman from and after January 27, 1986 should not be allowed as administrative expenses since that was the date the debtors informed the court that they were converting to a chapter 7. The bank contends that none of this work, therefore, could be of any benefit to the estate. The debtors continued to operate as a chapter 11 until the date of the conversion in March. Therefore, the court believes that Neiman should be entitled to an administrative expense for the services rendered between January 27, 1986 and the conversion date.

Hampton State Bank also argues that the services rendered with regard to refinancing and the time spent with regard to the deficiency payment on 4-18-86 and 5-2-86 should not be allowed as administrative expenses. The court believes that these services were rendered with the intent to benefit the estate and therefore should be allowed as administrative expenses.

Although Neiman will not be allowed an administrative expense for the services rendered in the disclaimer adversary, Neiman may still be able to collect these attorney fees in some other manner. These fees may be an unsecured claim in the chapter 7 case.

The objectors have not objected to the hourly rate or time spent on the services rendered by Neiman in the chapter 11 proceeding. The court finds that the services performed were reasonable. Therefore, the

court will allow as an administrative expense all services rendered by Neiman other than those services which related to the disclaimer.

ORDER

IT IS ORDERED that John Neiman shall be allowed an administrative expense for attorney fees and expenses pursuant to 11 U.S.C. § 503(b)(2) in the amount of $26,024.17.

SO ORDERED THIS 5th DAY OF MAY, 1989.

William L. Edmonds
Chief Bankruptcy Judge

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1. Neiman's response to Eide's objections states that his application for fees and expenses should be reduced to a total of $23,394.17. There appears to be an error in Neiman's calculation. The correct total should be $28,394.17.