

In the United States Bankruptcy Court

for the Northern District of Iowa

RICHARD WILLIAM KNOLL and
LAURA LEE ANN KNOLL

Bankruptcy No. 93-30124XF

Debtor(s).

Chapter 7

ORDER RE: MOTION TO RECONSIDER ORDER ON MOTION TO SELL

Trustee David A. Sergeant requests reconsideration of the court's order granting his motion to sell property of the estate free and clear of liens. The trustee takes exception to the court's failure to permit payment of the auctioneer's fees and expenses on the date of sale. Hearing on the motion to reconsider was held by telephone on August 10, 1994. Sergeant appeared for himself; John F. Schmillen appeared for the United States Trustee.

A settlement agreement entered into by Sergeant, the debtors, and a secured creditor contemplated the sale of machinery and equipment on which the creditor had a lien. To that end, Sergeant pursued the hiring of an auctioneer. In an "application" filed with the court, he "reported" his proposed employment of Ronald C. Peck Auction Service (docket no. 32). The application was not served on creditors or parties. The application stated that Sergeant would request court authorization of the sale and therein would seek permission for immediate payment to the auctioneer (docket no. 32, 2). The auctioneer's Rule 2014(a) verification was included as part of the application as was the U. S. Trustee's agreement to the proposed employment.

The terms of employment were to be:

Commission of 2 percent to sell and 1 percent to clerk plus bond expense of \$210.00, advertising expenses estimated to be between \$500.00 and \$600.00, and other miscellaneous selling expenses such as machinery and site preparation.

(Docket no. 32, 2, page 1).

Sergeant, after consulting with the U. S. Trustee's office, believed that under Local Rule 18A, a court order appointing the auctioneer was not necessary (Motion to Reconsider, docket no. 47, 9). Local Rule 18A provides that a chapter 7 trustee's employment of an appraiser, auctioneer or agent is deemed approved by the court if the U. S. Trustee agrees with the employment and "the agreed compensation is less than \$1,000, or not more than the generally applicable rates for collection of commercial accounts receivable." Local Rule 18A. If read to refer to a flat fee, the \$1,000 limit provides a certain standard. The reference to commercial collection rates does not provide certainty as there is no guide for the ascertainment of such rates. Trustees should not be worried by uncertainty in determining whether an appointment is deemed approved. Therefore, to the extent that the professional's proposed compensation is other than a flat fee of \$1,000 or less, a court order approving the appointment is necessary. In this case, the trustee later sought such an order, and the appointment was approved (docket no. 48), although the court failed to fix the rate of compensation in its order.

Fed.R.Bankr.P. 6005. Nonetheless, the court intended in its order to approve compensation at the rate of 3 percent of the auction's gross receipts plus reasonable sales expenses and cost of bond.

Sergeant filed his motion to sell on June 27, 1994 (docket no. 39). He proposed to sell machinery and equipment free and clear of liens with liens attaching to the proceeds. The public sale is scheduled for August 17, 1994. Notice of the motion and the motion were served on all creditors and parties-in-interest (docket no. 42). No objections were filed.

Paragraphs 7 and 8 of the motion relate to the auctioneer and his compensation. Paragraph 7 states the rate of compensation, and the estimated expenses. Paragraph 8 states:

From the sale proceeds, the Trustee requests that the auctioneer be paid immediately all of his fees and expenses with the balance to be separately deposited in the Estate's account.

(Docket no. 39, page 3, 8).

After passage of the bar date, the trustee submitted to the court a proposed order which granted the motion to sell and which authorized immediate payment of the auctioneer. The court issued the order but eliminated the authorization for immediate payment (docket no. 46).

The trustee seeks reconsideration. He makes two arguments. First, he contends that he has given notice of the rate of compensation, the range of expenses and the intent to pay at sale, and since no one has objected, it is a waste of time, effort and money to require a separate application for payment. Second, he says that it is the general practice of auctioneers to be paid at sale or at least after all checks for purchases at sale have cleared. He says that if trustees do not conform to that practice, it will be difficult for trustees to hire auctioneers.

The trustee's argument as to duplicity of effort has some practical appeal, but it ignores the requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and the Local Rules for this district. His second argument is not supported by any evidence. Even to the extent it were, the solution is not to ignore the Code and Rules.

Section 327(a) of the Code permits the trustee to employ, with the court's approval, auctioneers or other professionals. The trustee may employ the professional on any reasonable terms subject to the court's approval. 11 U.S.C. § 328(a). These sections deal with employment and terms of employment, not actual compensation. Compensation is awarded by the court after notice and hearing. 11 U.S.C. § 330(a); 11 U.S.C. § 102(1). It is clear from the language of § 330(a)(1) that compensation is for services which have been rendered and for actual expenses. Fed.R.Bankr.P. 2016 requires a written application for compensation. This requirement is not inconsistent with the Code. Rule 2002(a) requires 20 days notice of any hearings on such applications to the extent they seek payment in excess of \$500.00. Fed.R.Bankr.P. 2202(a)(7). Written application is required also by Local Rule 18C.

The trustee desires to pay the auctioneer immediately after the sale without the need for application prior to payment. Application, he contends, will unnecessarily delay payment and have a chilling effect on his ability to hire auctioneers in the future. Although common sense would support the proposition that long delays in payment would make it harder to hire professionals, there has been no showing that a delay, of perhaps 30 days, would have such a chilling effect. Once a sale is completed, an application for payment could be filed and served in a week to 10 days. If there are no objections filed during the 20-day notice period, an order could promptly be presented to the court. If there is an

emergency, the trustee could seek to reduce the time for objection. If objections were filed, they would have to be heard. That would present an unavoidable delay. But there has been no showing that the normal schedule of payment would have a chilling effect, despite the alleged trade practice.

There is nothing in the Code or Rules that eliminates the need for application for payment of the professional. This is so even where the employment of the professional and the terms of employment have been disclosed to parties in advance of services being rendered. Thus although there may be some duplication in applying to employ an auctioneer at a set rate of compensation and in then having to apply for the compensation based on that rate, the Code requires as much.

The court will not dispense with the requirement that the professional file an application for compensation for services rendered and expenses incurred. What the court will do in this case is to limit notice and to dispense with hearing so long as the application requests fees at no greater rate than that listed in the notice of sale and application to employ and so long as the expenses do not exceed the range estimated in those pleadings. Even then, the court will have the obligation to examine the fee application to be sure that the terms of employment were not improvident in light of unanticipated developments, 11 U.S.C. § 328(a), and to be sure that the expenses requested, even within the estimated range, were actual and necessary. 11 U.S.C. § 330(a). The time limits provided will have a salutary effect of protecting the trustee from paying fees of unconsummated sales. The reduction of notice should be the exception, not the rule, and reduction in this case should not be seen to encourage more such requests.

ORDER

IT IS ORDERED that the trustee's motion to reconsider is denied.

IT IS ORDERED that Ronald C. Peck Auction Service shall file a final fee application pursuant to 11 U.S.C. § 330, Fed.R.Bankr.P. 2016, and Local rule 18C.

IT IS FURTHER ORDERED that on the condition that the application applies for professional fees at a rate no greater than the rate requested in the trustee's motion to sell and application to employ and so long as the requested reimbursement of expenses is no greater than those estimated in the trustee's applications, service of the fee application need be made only on the debtors and the U. S. Trustee and to those entities requesting notice. The time for filing objections to the application shall be reduced to eight days.

SO ORDERED ON THIS DAY OF AUGUST, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: David Sergeant, Steven Hendricks, and U. S. Trustee.

In the United States Bankruptcy Court

for the Northern District of Iowa

RICHARD WILLIAM KNOLL and
LAURA LEE ANN KNOLL

Bankruptcy No. 93-30124XF

Debtors.

Chapter 7

David A. Sergeant, as attorney for the trustee (also Sergeant), requests award of interim professional fees pursuant to 11 U.S.C. § 331. He seeks \$2,988.00 in fees and \$10.53 in expenses. Creditors and parties were given notice of the application. None objected. Hearing on the application was held by telephone on August 10, 1994. Sergeant appeared on his own behalf. The U. S. Trustee appeared by John F. Schmillen.

Sergeant has requested professional compensation for 29.88 hours of work. The court will allow compensation for 27.06. The requests for which compensation will not be allowed are as follows:

March 18, 1994 -- .37 hours for preparing for a hearing on a fee application for the estate's accountant. The court set a hearing to ask certain questions. However, it was not the trustee's obligation to retain an attorney to advise the accountant.

April 4, 1994 -- .12 hours for preparing a notice to creditors on a proposed settlement. This was nothing more than a form notice which included reference to an attached settlement document and notice of a bar date. Sergeant says the settlement was complex. He is being compensated as attorney for negotiating and preparing the settlement document. However, the notice of settlement is trustee's work.

May 11, 1994 -- .75 hours for preparing a list of equipment to be sold. This property was to be sold pursuant to the settlement agreement. The items to be sold were negotiated by Sergeant as attorney for trustee. The court is not persuaded that preparation of a list from the settlement agreement is other than trustee's work.

Three entries regarding choice of an auctioneer -- January 26, 1994 -- .50 hours (letters to auctioneers); May 11, 1994 -- .33 hours (letters to auctioneers); and May 27, 1994 -- .75 hours (determining choice of auctioneer). The court is not persuaded that generally the retention of auctioneer requires the assistance of an attorney. Nothing in this case indicates that it is an extraordinary exception to such a general rule.

The court finds that the attorney for the trustee is entitled to interim compensation in the amount of \$2,706.00 and reimbursement of expenses in the amount of \$10.53.

IT IS ORDERED that David A. Sergeant is awarded interim compensation as attorney for trustee in the amount of \$2,716.53.

SO ORDERED ON THIS 15th DAY OF AUGUST, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: David Sergeant, Steven Hendricks, and U. S. Trustee.