

In the United States Bankruptcy Court

for the Northern District of Iowa

RICKY LEE BOOHER
Debtor.

Bankruptcy No. 94-10520KC
Chapter 13

ORDER

On January 17, 1995, the above-captioned matter came on for hearing pursuant to assignment. Joe Peiffer appeared on behalf of Debtor Ricky Lee Booher and the Peiffer Law Office ("Peiffer"). Charles Nadler represented creditor Andrea Hess. The matter before the Court was the Peiffer Law Office Application for Approval and Payment of Attorney Fees and Hess' objection thereto. After the presentation of evidence and arguments, the Court took the matter under advisement.

STATEMENT OF THE CASE

When Debtor filed his petition in bankruptcy, forfeiture proceedings against his residence were pending. Postpetition, Debtor moved for approval of the sale of the residence to Grace Colgan pursuant to a prepetition Purchase and Sale Agreement. The Court granted the motion and Debtor's residence was sold. The contract sellers were paid the contract balance and the remainder of the sale proceeds have now been turned over to the Chapter 13 Trustee in the amount of \$13,933.19.

The Court's order filed November 15, 1994 set out the appropriate distribution of the proceeds. It provided that one-half of the proceeds should be applied toward Andrea Hess' property settlement lien arising from the parties' dissolution decree. The other one-half of the proceeds would be applied toward Farmers State Bank's assignment and mortgage and various judgment liens against Debtor.

Peiffer now, for the first time, requests payment of attorney fees out of the sale proceeds pursuant to 11 U.S.C. § 506(c). The application asserts that without these services, the sale would not have been finalized and the property would have been forfeited to the contract sellers. Peiffer filed the motion to sell real estate and worked to clear title in order to complete the transaction. Iowa Realty Co. also requests payment of its brokers commission out of sale proceeds. That matter is currently under advisement and will be addressed by separate order.

Ms. Hess objects to payment of Debtor's attorney fees from the proceeds. She does not object to the amount or reasonableness of the attorney fees. Rather, she objects to where the funds to pay such fees come from. She points out that Peiffer failed to request that attorney fees be paid out of the proceeds in the motion to sell the real estate, in Debtor's Chapter 13 plan or at the hearing to determine priority of lien creditors. Further, the order confirming Debtor's Chapter 13 plan provides for plan payment of attorney fees in the amount of \$3,000 plus expenses.

Peiffer asserts that total attorney fees and expenses in this case are \$4,624.50 and \$1,546.11, respectively. To date, Debtor has paid \$1,599.00. Peiffer requests that \$2,958.00 of fees and \$230.21 of expenses, or a total of \$3,188.21, be paid from the proceeds of the sale of the real estate.

CONCLUSIONS OF LAW

Peiffer seeks attorney fees pursuant to § 506(c), which states:

The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

Administrative claimants such as the Peiffer Law Office have standing to seek payment under § 506(c). United States v. Boatmen's First Nat'l Bank, 5 F.3d 1157, 1159 (8th Cir. 1993). This statute is an exception to the rule that administrative expenses should be paid from the debtor's unencumbered assets. Id. Its purpose is to prevent a windfall to the secured creditor by shifting the costs from the estate to the secured party. Id.

The moving party has the burden to prove entitlement to payment under § 506(c). Brookfield Prod. Credit Ass'n v. Borron, 738 F.2d 951, 952 (8th Cir. 1984). The secured creditor must directly benefit from the services provided. Id. The moving party must prove that absent the costs expended, the property would yield less to the secured creditor than it does as a result of the expenditure. Id. The benefit must be shown in a quantitative rather than qualitative sense. Radtke Heating and Sheet Metal Co. v. State Bank, 103 B.R. 932, 935 (N.D. Ill. 1989). The extent to which the secured property should be charged is in the sound discretion of the court. In re Murray, 105 B.R. 576, 583 (Bankr. C.D. Cal. 1989).

This matter is very similar to the situation in In re Caspers, No. L-89-01347C, slip op. at 2 (Bankr. N.D. Iowa June 30, 1992), in which the Peiffer Law Office, representing the Chapter 11 debtor, handled all the legal work associated with liquidating the debtor's real estate. In Caspers, as in this case, Peiffer did not request payment of attorney fees in the motions to sell or in the Chapter 11 plan. However, the Court held that lack of prior notice to the creditor did not defeat Peiffer's claim. Id. at 4. The Court stated that under § 506(c), the movant must prove that the expenses were (1) reasonable, (2) necessary, and (3) beneficial to the secured creditor. Id. at 3. "The cost to be recovered must have been incurred primarily for the benefit of the secured creditor." Id. The Court held that the fees and expenses which directly relate to the sale of secured property which directly benefitted the secured creditor were properly chargeable under § 506(c). Id. at 4. However, fees and expenses which relate to other matters including negotiation, formulation, and confirmation of debtor's plan would not be allowed as a surcharge under § 506(c). Id.

Hess does not challenge Peiffer's claim that the charges are reasonable and necessary. The Court concludes that Peiffer has met his burden on these two points. The charges are necessary as the services of an attorney were required to finalize the real estate transaction. The charges are reasonable in light of the standards in this District for determining reasonable compensation of attorneys under § 330.

Peiffer has also met the burden to prove that Hess and other secured creditors benefitted from Peiffer's legal services. The bankruptcy petition was filed on the eve of contract forfeiture. The contract sellers moved for relief from stay. None of the secured creditors took any steps to avoid the forfeiture in order to retain Debtor's equity in the property to satisfy their claims. Without Peiffer's efforts, Hess

and the other secured creditors would have received nothing from the property. As in Caspers, this is the type of benefit for which the secured parties, rather than the bankruptcy estate, should be liable.

The Court has reviewed Peiffer's statement of fees and expenses. The statement includes time spent on the real estate sale and on other bankruptcy matters such as filing schedules, negotiations and formulation and confirmation of Debtor's Chapter 13 plan. Without making a line by line analysis, the Court concludes that Attorney Joe Peiffer spent approximately 12 hours on the real estate transaction and Attorney Linda Merritt spent approximately 6 hours. At their customary hourly rate, this amounts to fees of \$1,980. Peiffer also seeks expenses of \$230.21. The Court is unable to determine from the statements whether such expenses are attributable to the real estate transaction rather than general bankruptcy matters and thus will not approve payment of expenses from the sale proceeds.

In summary, the Court concludes that fees in the amount of \$1,980 should be paid to Peiffer out of the proceeds from the sale of real estate. The Order confirming Debtor's Chapter 13 plan previously approved plan payment of attorney fees of \$3,000 plus expenses to Peiffer. The Court assumes that Peiffer's instant Application for Approval and Payment of Attorney Fees intends to substitute the total fees and expenses of \$4,624.50 and \$1,546.11, respectively, for the previously approved \$3,000 plus expenses. As such, the new totals will be approved based on this District's standards for approval of reasonable compensation under § 330. Any balance due after payment of \$1,980 from the sale proceeds shall be paid through the plan.

WHEREFORE, the Peiffer Law Office Application for Approval and Payment of Attorney Fees is GRANTED.

FURTHER, Peiffer Law Office is entitled to payment of fees of \$1,980 from the proceeds of the sale of real estate. Distribution of funds to secured parties pursuant to the Court's order filed November 15, 1994 shall be made based on the balance remaining after such payment.

FURTHER, Peiffer Law Office is allowed total attorney fees of \$4,624.50 and expenses of \$1,546.11 rather than the \$3,000 plus expenses approved in the Order confirming Debtor's Chapter 13 plan.

SO ORDERED this 6th day of February, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge