

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 98-11330-JMD
Chapter 7

Dale L. McKibben,
Debtor

*Alexander Nossiff, Esq.
NOSSIFF & GIAMPA, P.C.
Attorney for Debtor*

*Lawrence P. Sumski, Esq.
Chapter 13 Trustee*

*Dale L. McKibben
Debtor*

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it the Application of Nossiff & Giampa, P.C. for Final Approval and Reimbursement of Attorney's Fees and Expenses filed by Debtor's counsel, Alexander Nossiff. Neither the Debtor nor any of her creditors filed a written objection to the application. The Court held a hearing on Attorney Nossiff's application for fees and expenses on September 29, 1999, at which Attorney Nossiff, the Debtor, and Lawrence Sumski, the Chapter 13 Trustee, appeared. At the hearing, the Debtor made an oral objection to Attorney Nossiff's application. The Court took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor filed a Chapter 13 bankruptcy petition with the Court on April 9, 1998 in order to prevent the foreclosure of the Debtor's real property. The Debtor filed her statement of financial affairs and preliminary schedules with her petition on April 9, 1998, but she did not file her Chapter 13 plan. During the six weeks following the Debtor's bankruptcy filing, she amended her schedules, specifically Schedules A, D, E, F, and G. On amended Schedule A, the Debtor listed ten parcels of real estate worth an estimated \$900,300. The majority of these properties were residential rental properties. On amended Schedules D and F, the Debtor listed debts owed to twelve secured creditors, approximately a dozen unsecured creditors, and local, state, and federal governments.

After receiving several extensions of time, the Debtor filed her Chapter 13 plan on June 16, 1998. Through her plan, the Debtor proposed to pay \$19,202 in priority tax claims, \$22,878 in secured arrearage claims, and \$15,184 in general unsecured claims. She sought to sell or surrender five parcels of real estate and to retain another five parcels. The Debtor's plan provided for forty-eight monthly payments of \$1,310 with \$500 to come from her disposable income and the balance from the sale of her real estate.

During the course of the Debtor's case, nine motions for relief were filed with the Court by five different creditors.¹ Each time a motion was filed, Attorney Nossiff drafted an objection to the motion.² The Court held numerous hearings on the motions for relief and, in all but one case, the Debtor and the movant were able to reach an agreement regarding resolution of the motion which permitted the Debtor to maintain possession of the property.³

¹ Wendover Financial Services filed motions for relief on September 4, 1998, March 25, 1999, April 28, 1999, and June 25, 1999; Countrywide Home Loans filed motions for relief on October 14, 1998 and February 1, 1999; NationsBanc Mortgage filed a motion for relief on January 4, 1998; the U.S. Department of Veterans Affairs filed a motion for relief on April 28, 1999; and Citicorp Mortgage, Inc. filed a motion for relief on June 14, 1999.

² Attorney Nossiff filed objections to the various motions for relief on September 21, 1998, November 2, 1998, January 13, 1999, February 23, 1999, April 5, 1999, May 11, 1999, June 22, 1999, and July 13, 1999.

³ On May 26, 1999, the Court granted relief to the U.S. Department of Veterans Affairs with respect to property located at 136 Portland Street in Rochester, New Hampshire.

In addition to the Debtor's ongoing problems with her secured creditors, the Debtor faced additional obstacles during her bankruptcy case from the Chapter 13 trustee and the Internal Revenue Service ("IRS"). On October 26, 1998, Attorney Sumski filed a motion to dismiss or convert the Debtor's case because the Debtor was failing to make timely payments pursuant to the terms of her plan and because the Debtor's plan was not feasible as it relied upon the sale of real estate over time without presenting any evidence of the likelihood of such sales. Attorney Nossiff timely responded to the trustee's motion acknowledging the Debtor's plan payment arrearage and stating that the Debtor was actively marketing various parcels of real estate, including property in Vermont which had substantial equity.

On November 18, 1998, the IRS filed an objection to the Debtor's plan stating that the plan failed to provide for payment of the IRS's priority claim of approximately \$17,000 and its general unsecured claim of approximately \$2,000. In addition, the IRS objected to the plan because the Debtor had not filed her 1997 income tax return, which resulted in the IRS having to estimate its claim.

Despite these apparent difficulties during the Debtor's case, the Debtor obtained court approval for the sale of several parcels of real estate. On April 23, 1998, Attorney Nossiff filed notice of the Debtor's intent to sell property at 2 Jackson Street in Rochester, New Hampshire. The Debtor filed a subsequent motion to sell the real estate on April 9, 1999, and the Court approved the sale of the Jackson Street property at a hearing on April 21, 1999. In addition, in February 1999, Attorney Nossiff filed motions to sell two tracts of land on Flat Rock Bridge Road also in Rochester. The Court approved the sale of these properties on March 3, 1999.

The Court held an initial hearing on confirmation of the Debtor's Chapter 13 plan on December 18, 1998. The hearing was continued until April 30, 1999. Although the Debtor had made some progress on her case, the Debtor's Chapter 13 plan was not ready for confirmation in April. At the Chapter 13 trustee's request, the case was continued to August 6, 1999. On July 28, 1999, about a week before the second continued hearing on confirmation of the Debtor's plan, the Debtor filed an amended plan and her counsel filed an application for fees. In her amended plan, the Debtor proposed to sell or surrender additional

parcels of real estate and proposed making total payments of \$99,830 over the life of the extended sixty month plan. Again, the Debtor proposed making monthly payments of \$500 with the balance to paid upon liquidation of her real estate. Despite the filing of this new plan, on August 6, 1999, the Debtor voluntarily requested that her case be dismissed. The Court granted the Debtor's motion on August 9, 1999 and scheduled a hearing on Attorney Nossiff's request for approval of fees for September 29, 1999.⁴

III. DISCUSSION

Although there is no requirement that the Court approve the employment of an attorney representing a Chapter 13 debtor, the attorney is required to comply with 11 U.S.C. § 329(a) and Federal Rule of Bankruptcy Procedure ("FRBP") 2016(b). See In re Bell, 212 B.R. 654, 656 (Bankr. E.D. Cal. 1997). Section 329(a) of the Bankruptcy Code requires the following:

Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of compensation.

11 U.S.C. § 329(a). FRBP 2016(b) requires that the statement be filed within fifteen days of the order for relief. See Fed. R. Bankr. P. 2016(b); Bell, 212 B.R. at 656. In addition, Local Bankruptcy Rule ("LBR") 2016-2(a) provides that "[t]he amount of any retainer received by counsel shall be included in the attorney compensation statement, which is filed with the petition at the commencement of the case. The Rule 2016 statement shall provide for the scope of services to be rendered." LBR 2016-2(a).

In accordance with section 329(a) of the Bankruptcy Code, FRBP 2016(b), and LBR 2016-2(a), Attorney Nossiff filed a Rule 2016 Statement at the time the Debtor's petition was filed. In his statement, Attorney Nossiff indicated that he had received \$1,500 prior to the Debtor's bankruptcy filing. In return for

⁴ The fact that a bankruptcy case is dismissed does not result in the bankruptcy court losing jurisdiction to consider the allowance of attorney's fees to debtor's counsel. See In re Harshbarger, 205 B.R. 109, 111 (Bankr. S.D. Ohio 1996).

the \$1,500 fee, he agreed to perform an analysis of the Debtor's financial situation, to render advice and assistance in determining whether to file for bankruptcy, to prepare and file any petition, schedule, statement of affairs, and other documents required by the Court, and to represent the Debtor at the first meeting of creditors and the initial confirmation hearing. Attorney Nossiff's Rule 2016 Statement also stated that the Debtor would be charged \$125 per hour for services related to contested matters, adversary proceedings, and redrafting the Debtor's plan.

LBR 2016-2(c) further provides that "[a]ny attorney who proposes to charge a consumer debtor or a business debtor [in Chapter 13] more than the amount which would excuse further disclosure, pursuant to AO 2016-2, shall file an application for compensation in accordance with Bankruptcy Rule 2016." LBR 2016-2(c). In accordance with LBR 2016-2(c), Attorney Nossiff filed such an application with the Court seeking approval of fees in the amount of \$9,650, representing 77.2 hours of legal services at \$125 per hour. Crediting Attorney Nossiff with his prepetition retainer of \$1,500 and an interim award of \$450 from the sale of the Debtor's property, his net request is \$7,700. At the hearing on approval of his fees, Attorney Nossiff indicated that he currently holds in escrow \$4,000 that he received from the Chapter 13 trustee upon dismissal of the Debtor's case.

An applicant seeking final approval of attorney's fees has the burden of demonstrating entitlement to the requested fees. See In re Harshbarger, 205 B.R. 109, 112 (Bankr. S.D. Ohio 1996); In re Thorn, 192 B.R. 52, 55 (Bankr. N.D.N.Y. 1995). "No presumption exists that a professional is entitled to the amount he or she requests." Garb v. Marshall (In re Narragansett Clothing Co.), 210 B.R. 493, 499 (B.A.P. 1st Cir. 1997). "The Court has broad discretion when determining the reasonableness of a fee application." See In re Pirani, 232 B.R. 891, 893 (Bankr. E.D. Tex. 1999).

"Section 330(a) authorizes bankruptcy courts to award reasonable compensation for fees and expenses to professionals." Narragansett Clothing, 210 B.R. at 497. Section 330(a)(1) specifically permits payment of "reasonable compensation" for "actual" and "necessary" services rendered by an attorney and for reimbursement of said attorney's "actual" and "necessary" expenses. See 11 U.S.C. § 330(a); Pirani,

232 B.R. at 892. Section 330(a)(3) requires the Court to examine the nature, extent, and value of the services for which compensation is sought and to make a determination of the amount of reasonable compensation based on such factors as:

1. The time spent on such services;
2. The rates charged for such services;
3. Whether the services were necessary to the administration of the case or were beneficial at the time at which the services were rendered;
4. Whether the services were performed within a reasonable amount of time; and
5. Whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

See 11 U.S.C. § 330(a)(3); Thorn, 192 B.R. at 55. The Court may not award compensation for unnecessary duplication of services or for services that were not reasonably likely to benefit the debtor's estate, except that in a Chapter 13 case the Court may allow reasonable compensation to the debtor's attorney for representing the interest of the debtor in connection with the bankruptcy case based on consideration of the benefit and necessity of such services to the debtor. See 11 U.S.C. § 330(a)(4).

Courts in the First Circuit apply the lodestar approach when reviewing applications for compensation. See Narragansett Clothing, 210 B.R. at 497. "The lodestar is calculated by multiplying the number of hours reasonably incurred by the applicant by a reasonable hourly rate." Id. The applicant bears the burden of proving that his hourly rate is reasonable. See id. at 498. "The bankruptcy court is required to consider prevailing market rates in determining the lodestar, based on usual and customary rates in the jurisdiction." Id. After considering the usual and customary rates in New Hampshire, the Court finds that the rate of \$125 per hour for an attorney is within the range generally allowable for a Chapter 13 case of this size and complexity and should be allowed here.

Having reviewed Attorney Nossiff's fee request in detail, the Court further finds that the request is reasonable and necessary in amount and nature. On the eve of foreclosure, Attorney Nossiff prepared the Debtor's petition, her statement of financial affairs, and schedules. In the following weeks, he filed

amended schedules so as to accurately list the Debtor's secured, unsecured, and priority debt. Attorney Nossiff accompanied the Debtor to the first meeting of creditors and drafted her Chapter 13 plan.

As detailed in his time records, Attorney Nossiff spent considerable time meeting and conferring with the Debtor both in person and over the telephone to discuss various aspects of her case. In addition, Attorney Nossiff objected to nine motions for relief and appeared in Court for several hearings on the these motions. Attorney Nossiff also communicated with the Chapter 13 trustee and attended at least one hearing on confirmation of the Debtor's plan. Attorney Nossiff aided the Debtor in implementing her plan by filing several motions to sell various parcels of real estate, which were approved by the Court at hearings that were attended by Attorney Nossiff. The Court finds that Attorney Nossiff's fees were incurred in fulfilling the Debtor's obligations under the Bankruptcy Code with respect to the filing of her schedules and statement of affairs and a Chapter 13 plan, defending the Debtor's interests in multiple parcels of income producing real property and in assisting the Debtor in resolving ongoing problems with her creditors.

Although the Debtor argued in court that her situation did not improve after she filed for bankruptcy, the Court disagrees with her assessment. The Court finds that through Attorney Nossiff's efforts the Debtor was able to enjoy the benefits of Chapter 13 and the Bankruptcy Code. First, the Debtor obtained the benefit of the automatic stay which prevented the impending foreclosure in April 1998. Second, the Debtor was able to negotiate the sale of three parcels of property, the net proceeds of which she received upon dismissal of her case. Third, despite nine motions for relief being filed during the course of her case, only one property was lost to foreclosure. As the Court indicated at the hearing on Attorney Nossiff's application for fees, the motion was granted only after the Court made a finding that the movant lacked adequate protection and that relief should be granted pursuant to section 362(d)(1) of the Bankruptcy Code. Fourth, although the Debtor did not receive a discharge, she made the decision to voluntarily dismiss her case. The Debtor could have remained in Chapter 13 and continued in her attempt to have her liquidating plan confirmed by the Court.

During the sixteen months that the Debtor's Chapter 13 case was pending, Attorney Nossiff incurred \$9,650 in fees, or an average of \$603.13 per month. In consideration of the Debtor's initial need to file on the eve of a foreclosure, the number of contested matters, the value of the assets involved and the results achieved in resisting relief from the automatic stay, the Court does not find the requested fees to be unreasonable.

IV. CONCLUSION

For the reasons outlined above, pursuant to section 330(a) of the Bankruptcy Code, the Court finds that the services rendered by Attorney Nossiff were actual and necessary and approves the requested fees in the amount of \$9,650. Applying credits of \$1,500 for the prepetition retainer and \$450 from the sale of the Debtor's real estate, the outstanding balance is \$7,700. Although Attorney Nossiff indicated at the hearing that he would be willing to waive \$3,700 and would be satisfied with receiving payment of \$4,000 from the monies he holds in escrow, the Court will not require Attorney Nossiff to waive a portion of his fees. Nevertheless, Attorney Nossiff is free to reach an agreement with the Debtor regarding payment of his fees and may waive some portion if he chooses.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 26th day of October, 1999, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge