UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

A.L. FALK CO., INC. Case No. 95-23089
Debtor

This is an 11 U.S.C. § 506(b) fee application, and as such it is very different from an 11 U.S.C. § 330 fee application. The difference is detailed in the attached, unpublished decision of the Court in the case of *In re Senft*, No. 92-12645 K, slip op. (Bankr. W.D.N.Y. February 19, 1992).

Even if the Court were to ignore Mr. Beyma's Reply and accept Mr. Falk's allegations at face value, the allegations do not bespeak "needless obstruction" or "gouging."

The "reasonableness" of the application must be assessed from the point of view of the creditor: Did the creditor reasonably believe that the attorney's services employed were necessary to protect its interests in the debtor's property. *United Merchants and Mfrs., Inc. v. Equitable Life Assurance Soc'y. of the United States (In re United Merchants and Mfrs., Inc.)*, 674 F.2d 134, 140 (2d Cir. 1982).

The objector largely complains of the bank's pre-petition posture. Those portions of his objection denoted as paragraphs 4 through 15 are devoted to his frustration at M & T's zealous pursuit of its own interests, leading eventually to the filing. The Court knows of no theory by which § 506(b)

allowances would be unavailable to a lender who refused to work with the debtor to avoid the eventual bankruptcy filing. Nor does the Court see in the pre-petition time entries any evidence that M & T was causing counsel to take steps that M & T would not have thought to be necessary to its own interests. The objector's belief that M & T's activities would not have been necessary had M & T listened to him, misses the mark.

The same is true as to the post-petition period (although that period is scrutinized with particular care, since the "estate" was created by the filing of the petition, and M & T knew then that it could not be compensated for needlessly obstructing the administration of the estate).

Those portions of the objection that are denominated as paragraphs 16 through 20 ignore the fact that because this was an involuntary case, rather than a voluntary case, the Petitioning Involuntary Creditors could have been a greater hurdle to a "negotiated" result to M & T's demands than the Debtor would have been. In effect, the fact asserted by Mr. Falk, that the "Debtor would have agreed to any kind of reasonable . . . request" is largely irrelevant when it is a group of unsecured creditors that have filed the involuntary petition. The Court is also unaware of the legal basis for the representation in the objector's paragraph 18 - - it is the Court's understanding that an involuntary petition is a petition filed under 11 U.S.C. § 303, and such a petition operates as a stay, 11 U.S.C. § 362(a), and

the lift-of-stay provisions do not require that an Order for Relief have been entered.

The objector's complaints as to the January, 1996 time are naive. It is simply not prudent for a secured creditor (even an oversecured creditor) to sit on its hands and wait for a check, and it is not legally possible to convey good title to the buyer without the secured creditor's active involvement (reviewing releases of lien, their execution, etc.).

Though not necessary to this decision, and without passing upon the truth or falsity of the allegations of fact contained in Mr. Beyma's Reply, the Court notes that when that Reply is viewed as Mr. Beyma's own affirmation of what he and his client were motivated to do and why, that affirmation too supports a finding that M & T reasonably believed that the steps it took were necessary to protect its interest in the Debtor's property.

Thus, the objections are overruled, and the Application will be allowed in full.

This brings the Court to the question of the additional $2,000 requested in Mr. Beyma's Reply, in connection with the work done in replying to the Objections. That request will be denied without prejudice to renewing the request in the form of a Rule 11 motion, if appropriate.[1]

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[1]The Court notes that the attorney's signature on the objection seems to have been qualified in an unusual manner and

The reason that the additional $2,000 should not be allowed as a matter of law is not readily apparent from the statute or its judicial gloss. M & T's lien extends to all of the proceeds of its collateral, including the funds from which it now seeks § 506(b) allowance. Further, § 506(b) and the contractual provisions that it ennobles are in abrogation of the "American Rule" that each party bears its own attorney's fees. It is hard to distinguish the bank's effort to obtain the benefit of its bargain out of the proceeds of its collateral here, from a typical proceeding that is clearly covered by § 506(b), such as prosecuting a motion for lift of stay regarding the collateral.

But the Court believes that there is both a reason in law and a reason in fact to distinguish the present proceeding, and to deny the request for additional fees.

As to the question of law, an application to recover costs and fees under § 506(b) presumes that the disposition or valuation of the collateral is a resolved matter and that its proceeds or value is in excess of the amount of the debt. In the case at bar, the collateral has been sold, and the proceeds are safe and are going nowhere. Without intending to exalt the distinction, it seems to the Court that there is a difference

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might be construed as an effort to limit the attorney's Rule 11 certification. If so, it should not be recognized as such by the Court. Rule 11 exists precisely for the purpose of insuring that an officer of the Court has concurred with his client's decision to impose on the Court's time and on his opponent's resources.

between an "application" and a "motion" under the Federal Rules of Bankruptcy Procedure. Unlike Fed.R.Civ.P. 7(b)(1), which states that, "An application to the court for an order shall be by motion," Bankruptcy Rule 9013 states that, "A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing." In Black's Law Dictionary, 1145 (6th ed. 1990), the term "petition" is defined as including,

> An application made to a court *ex parte*, or where there are no parties in opposition, praying for the exercise of the judicial powers of the court in relation to some matter which is not the subject for a suit or action, or for authority to do some act which requires the sanction of the court.

A "motion," is defined as, "An application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant." Black's at 1013. Although it is by no means clear, it seems to the Court that the "act to be done" that is the subject of a "motion" is an act to be done by an adverse party, whereas an "application" or "petition" asks the court for the court's imprimatur or grace.

Under the Bankruptcy Rules, matters brought on by application principally are the approval of employment, requests for direction from the court regarding the form or scope of notices, and applications for professional fees and expenses. Section 506(b) is one of this last group, and when fee or expense applications are opposed they are not thereby converted into

private disputes. The battles over control of the collateral at issue are now ended. The existing dispute is no longer one of a resolution of conflicting claims, rather it is one of a clear statutory duty imposed on the Court to assess the reasonableness of costs and expenses. The Court has grave doubts about an interpretation of § 506(b) that exalts contracts that are in derogation of the American Rule when the proceeding at bar is one in which the Court itself must exercise its own best judgment. The issues should be illuminated by open debate, not chilled by a fear that even a good faith contest that has been lost fairly, will fuel the evil that was sought to be avoided.

Hence, it appears to the Court that, as a matter of law, the American Rule does apply to § 506(b) applications (but also still subject to Rule 11).[2]

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[2]Fee applications under 11 U.S.C. § 330 or § 331, however, are different. Professionals appointed under 11 U.S.C. § 327 or § 1103 are only appointed because it is expected that they will confer a benefit on the estate. To an extent, their compensation is dependent on the benefit they conferred on the only people who have standing to protest the fees. (When the U.S. Trustee protests fees, it is on behalf of those people.) Most importantly, it is well recognized (in the fact, inter alia, that they may be compensated for preparing their fee applications) that while their pursuit of payment does not "benefit" the estate in one sense, the promise of compensation does benefit it (and all estates) in a larger sense. But even as to professionals employed by the estate it may be said, as the Court today holds as to oversecured creditors who make § 506(b) applications, that they should obtain prior approval of the Court before undertaking non-required steps for which compensation will be sought. If M & T had obtained such approval here, the added $2,000 would have been allowed as part of its § 506(b) allowance.

The factual reason upon which the $2,000 request may be denied is that replies to objections are not required by the rules of this Court. This Court's local rules are especially solicitous in such regards. We welcome appearances that may avoid the need for written replies, or that may at least reduce the scope of any written response. Here, M & T presumed the need to expend $2,000 in a response, and in light of the rules of practice in this Court, the Court would have expected M & T to seek prior approval of the Court before it expended, on an unrequired response, monies for which it would seek reimbursement from the estate under § 506(b). Hence, under the circumstances presented, the Court finds that M & T should not have thought it "necessary" to spend another $2,000 in fees and expenses as part of its effort to protect its interests here.

SO ORDERED.

Dated: Buffalo, New York
May , 1996

/s/Michael J. Kaplan

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U.S.B.J.