

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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**In Re:**

**ROBERT W. HICKEY,**

**BK. NO. 92-22292**

**Debtor.**

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**DOUGLAS J. LUSTIG, TRUSTEE,**

**Plaintiff,**

**A.P. NO. 93-2205**

**vs.**

**AGAPE TOOL & DIE, INC.,**

**DECISION & ORDER**

**Defendant.**

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**BACKGROUND**

On August 24, 1992 the debtor, Robert W. Hickey, C.P.A. (the "Debtor"), filed a petition initiating a Chapter 7 case. Thereafter, Douglas J. Lustig was appointed as trustee (the "Trustee").

On October 12, 1993, the Trustee commenced an adversary proceeding against the defendant, Agape Tool & Die, Inc. ("Agape Tool"), to collect \$9300.00, the outstanding balance alleged to be due to the estate from Agape Tool for accounting services performed on its behalf by the Debtor and the employees of his accounting practice.

The \$9300.00 balance alleged to be due represents the unpaid balance due after the application of \$1750 in payments on three prepetition statements rendered by the Debtor to Agape Tool: (1) a December 4, 1989 statement in the amount of \$4950.00; (2) a February 9, 1990 statement in the amount of \$600.00; and (3) a July 31, 1990 statement in the amount of \$5500.00.

The Court conducted several pretrials in connection with this adversary proceeding and a day certain trial was held on March 24, 1994 at which the Debtor and Rory Miesch ("Miesch"), the President of Agape Tool, testified.

## **DISCUSSION**

At trial, the Debtor testified as to the nature and extent of the services rendered to Agape Tool which formed the basis for each of the three statements in question. The statements were based on computer summaries of time records maintained by the individuals who had rendered the services. These summaries set forth in detail the services performed, the individual who performed them and the time frame when they were performed. The Debtor further testified that in his professional opinion, as a CPA with over 16 years experience, the amounts billed for the services in each instance represented the reasonable value of the services performed by the Debtor and his employees based on their experience and the charges for such services in the community. The Debtor also testified that although there was no written or specific agreement as to the amounts to be billed for the services in question, the amounts billed were for services in fact performed for Agape Tool at its request and in accordance with prior billing practices by the Debtor and another firm which the Debtor was formerly associated with which had performed similar accounting services for Agape Tool.

The testimony presented by Miesch, although it indicated that the Debtor may not have attended very well to the client relationship with Agape Tool, especially with respect to notifying it of periodic increases in hourly rates, did not indicate that the services rendered were not requested by and necessary to the business of Agape Tool or that the amounts billed were not in fact the reasonable value of the services actually performed for which Agape Tool benefitted.

As to a counterclaim interposed by Agape Tool that it should be able to recover an offset against any amounts due to the Debtor which it had paid to a third party certified public accountant to allegedly correct work done by the Debtor, no credible evidence was provided by Agape Tool at

the pleading, pretrial or trial stages of the adversary proceeding which proved that the amounts paid could be charged against or recovered from the Debtor.<sup>1</sup>

As to a counterclaim for lost profits by Agape Tool for the time spent by Miesch in connection with correcting alleged mistakes made by the Debtor, these amounts would not be recoverable from the Debtor as a matter of law, since there is no statutory, contractual or common law basis for such recovery under the circumstances of this case.

### **CONCLUSION**

The Trustee has met his burden to show that the \$9300.00 alleged to be due to the estate from Agape Tool represents the reasonable value of the services performed for Agape Tool at its request and for which it benefitted. Therefore, a judgment in the amount of \$9300.00 will be entered against Agape Tool unless such amount is paid to the Trustee within 30 days of the date of an order reflecting this decision is entered. If such amounts are not paid within the 30 day period, a separate judgment may be entered in favor of the Trustee. The counterclaims of Agape Tool are in all respects denied.

**IT IS SO ORDERED.**

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**HON. JOHN C. NINFO, II**  
**U.S. BANKRUPTCY COURT JUDGE**

**Dated: April 19, 1994**

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<sup>1</sup> Although the Court scheduled a day certain trial for March 24, 1994, Agape Tool did not file a witness list by March 17, 1994 as required by a February 16, 1994 Order and did not have a witness at trial who could present credible evidence to prove its counterclaims.