UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

TERRY L. RAINEY Case No. 96-12652 K

Debtor

This case began in Chapter 13, then converted to Chapter 7 before the Debtor's counsel was paid. This is an "asset case," and counsel has sought allowance of his fees in the Chapter 7 case as an administrative expense. The U.S. Trustee has opposed.

First, I find that the decision of the Second Circuit in *In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996), lays to rest the concerns first raised by Judge Bucki in his decision in *In re Thomas*, 195 B.R. 18 (Bankr. W.D.N.Y. 1996). *In Ames*, the Circuit stated:

> Although debtors' attorneys were not specifically included in the coverage of the amended section 330, *Collier* asserts that this omission was inadvertent. We are inclined to agree. However, the merit of [the debtor's counsel's] fee application should not hinge on the accuracy of *Collier's* assertion. Where the benefits of services to the estate are the same, it makes no sense to treat performances of such benefits by debtors' attorneys differently than performances by other retained professionals. This accords with 'the statute's aims that attorneys be reasonably compensated and that future attorneys not be deterred from taking bankruptcy cases due to a failure to pay adequate compensation." As reasoned in *Collier*, if the services of a debtor's attorney "*are reasonably likely to benefit the debtor's estate*, they should be compensable."

Id. at 71-72 (citations omitted) (emphasis added).

Although the case before the Second Circuit was a Chapter 11 case and could have been decided on the grounds that counsel was a "person employed under section 327," it

was not so decided. The authority to disregard an inadvertent error in bankruptcy legislation was thoroughly discussed by the Second Circuit as early as 1980 in the case of *New York State Higher Education Services Corp. v. Adamo (In re Adamo)*, 619 F.2d 216 (2d Cir. 1980). It appears to this Court that such was the clear command of *In re Ames* as well.

However, the fact that § 330 does not prohibit allowance to debtor's counsel does not mean that the fees sought here must be allowed. Rather, the application must be scrutinized for a "reasonable likelihood" of benefit to the estate. In general, this writer has found that test to be satisfied in a Chapter 7 case only where the legal services were necessary to assist a debtor in assisting the trustee, *e.g.*, attending the § 341 meeting, performing the debtor's duty of cooperation, obtaining assets for the trustee at the trustee's request.

The Court has examined the docket and the file and can find no such activity other than attending the § 341 meeting. None of the other activities undertaken by counsel appear to have had a reasonable likelihood of benefitting the estate. Indeed, the Chapter 13 effort yielded nothing for creditors, and the assets held by the Chapter 7 Trustee did not require the performance of legal services for the Debtor.

From one perspective it is regrettable that an attorney who has simply placed his client's best interest ahead of his own by moving ahead without a retainer, ends up having to look to payment from his bankrupt client, while creditors may look to assets on hand. But from another perspective, what has he done for the creditors, that he should come ahead of them? If he, by taking prompt action, preserved assets for creditors at his own risk, there might be a different result. But there is no hint of that being the case here, and that question must be left to

another day.

When debtors' attorneys move ahead with Chapter 13 cases in reliance on payment under the Chapter 13 plan, they know they are at risk that the case will be converted or dismissed before they are paid.[1] That risk is not removed by the happenstance in a converted case that some assets are available for the Chapter 7 estate.

Counsel will be allowed $350 as a Chapter 7 administrative expense for preparing for and attending the § 341 meeting. Because Local Rule 2016-1 imposes numerous postpetition obligations on a debtor's attorney, it flows as a consequence that counsel has no vested right to a fee until the work required by the Rule is completed. The other side of that coin is that the Debtor's obligation to the applicant must be viewed as a post-bankruptcy obligation, regardless of when the work was performed, and Counsel is free to collect the balance of the fee from the Debtor.

SO ORDERED.

Dated: Buffalo, New York
March 26, 1998

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.

[1] Under the 1898 Act and Rules, counsel enjoyed an express distributive priority in Chapter XIII cases. The salutary purpose of encouraging lawyers to encourage Chapter 13 rather than Chapter 7 continues to be served by including such a priority as a plan provision, approved by the court, though it is never appropriate for counsel to advise Chapter 13 solely to assure payment of counsel's fees.