

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

In Re

**W. JOSEPH SARKIS,
a.k.a. Wady J. Sarkis &
OLGA KOZLENKO,**

CASE NO. 89-21160

DECISION & ORDER

Debtors.

BACKGROUND

On November 9, 1989 this case was converted from a Chapter 11 case to a Chapter 7 case and on November 17, 1989 the Office of the United States Trustee (the "U.S. Trustee") appointed a trustee (the "Trustee"). On February 27, 1990 an Order was entered approving the employment of a firm at which the Trustee was an associate to act as the attorneys for the Trustee to pursue legal matters necessary to protect the rights of the creditors of the estate. Later, when the Trustee left the firm, he was substituted as the attorney for the Trustee (the "Attorney for the Trustee").

On September 29, 1993, the Attorney for the Trustee made an application, pursuant to Section 330, for an allowance of \$803.50 as compensation for legal services rendered (the "Application").

On October 22, 1993, the U.S. Trustee filed an objection to the allowance requested (the "U.S. Trustee Objection"). The U.S. Trustee Objection contends that various services for which compensation was requested were required to be performed by the Trustee pursuant to Section 704 and were not legal services required to be performed by the Attorney for the Trustee.

On October 29, 1993, the Attorney for the Trustee filed a Responding Affidavit in which he contended that the U.S. Trustee had an overly broad definition of the Trustee's duties under Section 704, particularly the duties to collect assets and examine and object to claims when those duties involve the necessity for legal services.

DISCUSSION

Section 704 of the Bankruptcy Code sets forth the duties of a trustee which include collecting and reducing to money the property of the estate (Section 704(1)), investigating the financial affairs of the debtor (Section 704(4)), and if a purpose would be served, examining proofs of claim and objecting to the allowance of any claim that is improper (Section 704(5)).

Section 328(b) provides that:

[i]f a court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

It is clear, therefore, and well settled law that a Bankruptcy Court may not compensate an attorney appointed to represent the trustee for services statutorily required of the trustee. *In re King*, 88 B.R. 768, 770 (Bankr. E.D.Va. 1988). "The function of an attorney for the trustee is to render to the estate those services which cannot and should not properly be performed by one who does not have a license to practice law." *In re Shades of Beauty, Inc.*, 56 B.R. 946, 949 (Bankr. E.D.N.Y. 1986), *aff'd*, 95 B.R. 17 (E.D.N.Y. 1988).

11 U.S.C. §586 sets out the duties of the United States Trustee. These duties include establishing, maintaining and supervising a panel of private trustees that are eligible and available to serve as trustees in cases under Chapter 7 (Section 586(a)(1)), supervising the administration of cases and trustees in cases under Chapter 7 and, when appropriate, monitoring applications for compensation and reimbursement filed under Section 330 of the Bankruptcy Code and filing comments with respect to such applications (Section 586(a)(3)(a)).

In the Western District of New York, all of the Chapter 7 panel trustees are experienced commercial and bankruptcy attorneys. In addition, the U.S. Trustee meets regularly with the panel

trustees to discuss the U.S. Trustee's expectations of them in the administration of Chapter 7 cases and other issues, including the employment and compensation of professionals and the nature and extent of their duties.

On a number of occasions, the Court has encouraged the U.S. Trustee and the panel members to meet, discuss and, to the extent possible, establish specific guidelines and understandings as to what are trustee duties under Section 704 and what are legal services which should be provided by an attorney for the trustee in recurring fact patterns where there may be some confusion or overlap.

Given the statutory obligations of the Office of the U.S. Trustee and the Court's belief that the U.S. Trustee has and continues to review and discuss with the panel of trustees the issue of trustee duties versus legal services, the Court, in granting allowances to an attorney for a trustee, must give great weight to the comments and objections of the U.S. Trustee when those comments and objections are that the services performed were trustee duties. This is especially true when the attorney for the trustee is either the trustee or a firm with which the trustee is associated so that the requirements of Section 328(b) are applicable.

In the Application, the Attorney for the Trustee has requested compensation for an extended examination of the debtors regarding potential legal action for the estate. This examination occurred at a Section 341 meeting before the Attorney for the Trustee was even appointed. Aside from being a service performed before the Attorney for the Trustee was even appointed, Section 704(4) requires the Trustee to investigate the financial affairs of the debtor. Gathering general information at a Section 341 meeting as to possible legal causes of action would appear to fall under that duty, especially for an experienced trustee, even if that trustee were not an attorney. It may be that when such general information has been gathered it indicates that the services of an attorney are required. Neither the Application nor the Response of the Trustee provided sufficient detail as to what the

potential legal action was that was being investigated and why the investigation required the services of an attorney. Also, it does not appear from the Court's records that any legal actions were in fact commenced in this case.

The Application further requested compensation for reviewing claims for legal sufficiency and drafting claim objections, services also objected to by the U.S. Trustee as being trustee duties. As set forth above, Section 704(5) requires a trustee to examine proofs of claim and object to their allowance if they are improper. Clearly routine claim objections, such as objections to late filed claims, duplicate claims, fully secured claims, or tax claims to the extent that they include estimated amounts, do not present complex legal issues which would require that an experienced trustee have an attorney initially bring such objections.¹ If a response to the objection is received, it may raise legal issues which would require a trustee to have an attorney further prosecute the objection. In the case of other potential claim objections, even an experienced trustee may need to have an attorney evaluate, file and prosecute a claim objection because the facts present complex, unique or pure legal issues. In that case, the narrative portion of the application for an allowance or the attached time sheets should clearly point this out. In this case, neither the Application nor the Response provided sufficient detail as to why any of the claim objections required legal services. The case file indicates that with the exception of an objection to the claim of Point Pleasant Estates Condominium, which was objected to on the grounds that the claim was a prepetition debt because of a failure to assume an executory contract and the operation of Section 365(g), none of the objections appear to have required legal services since their basis was that the claims in question were secured or duplicates.

The Application further requested compensation for reviewing the file, schedules, Section 341 notes, Chapter 11 conversion documentation and documents forwarded by the Debtors' attorney,

¹ In the Western District of New York at Rochester, the Court has a default procedure for claim objections so that if no response is received, there is no hearing required.

and for dictating a letter to the Debtors' attorney regarding appraisals for various assets and other non-exempt equity and to make an offer to the Trustee to purchase the estate's interest in these. These services appear to be clearly ordinary administrative services required of a Trustee to collect and reduce to money the property of the estate pursuant to Section 704(1) and to investigate the financial affairs of the debtors pursuant to Section 704(4). At times an offer, especially by a debtor, to purchase an interest of the estate in non-exempt assets may involve legal issues (such as the nature and extent of a claimed pension exemption), in which case it may be that an experienced trustee requires the services of an attorney. However, negotiation simply over price or terms, not involving disputed legal issues, is a duty which an experienced trustee can and should perform under Section 704(1).

In the future, when requesting compensation for services involving claim objections, negotiations for the sale of interests in assets of the estate, or any other services and when there are objections filed that the services should have been performed by the trustee, attorneys for trustees must clearly explain why the services of an attorney were required, set forth the specific legal versus business issues which needed resolution and explain why such services could not have been performed by the Trustee.

The demarcation between trustee services and attorney services must be clear and distinct in the attorney's application for compensation, and the specific subject matter and nature of the problem that required legal services must be apparent from the application. *In re King*, 88 B.R. 768, 770 (Bankr. E.D.Va. 1988). To receive compensation, attorneys appointed to represent trustees must exercise professional legal skills and expertise beyond the ordinary knowledge and skill of a trustee. *Id.*

CONCLUSION

The Court in its discretion awards the Attorney for the Trustee \$511.50 as the reasonable value of the actual and necessary services rendered. Deductions were made for some of the services rendered which the Court believes were services which should have been performed by the Trustee under Section 704. These services include examination of the debtors, review of the file, a portion of the services rendered for negotiating the purchase of the interests of the estate in certain assets, and a portion of the services rendered for reviewing and objecting to claims.

IT IS SO ORDERED.

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

Dated: January 12, 1994