

23

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

N.A. CARY, LTD.

Case No. 89-11392 K

Debtor

DECISION AND ORDER

Upon the motion to allow the professional fees of Robert W. Anderson in the amount of \$12,675.00, Mr. Anderson appeared in support and the principal of the debtor appeared in opposition. It was earlier determined by this Court that 11 U.S.C. § 330 would provide the basis for review in this matter.

There is no doubt that Mr. Anderson spent a significant amount of time in relation to N.A. Cary, Ltd. from June 18, 1989 to August 11, 1989. The question is what was he doing there that is compensable at the expense of others who possess administrative claims against the Chapter 11 estate of N.A. Cary, Ltd. He has had several opportunities to show the Court even the barest shred of evidence to support any of his claimed efforts.

The Court does not question Mr. Anderson's sincerity. Nor does it draw any adverse inference from his failure to offer support for his claims. Further, the Court expressly disclaims any reliance whatsoever on the sworn testimony of Neil Cary on October 22, 1991, or on the unsworn representations of Dianne V. Cary in her letter of February 7, 1992 to the Trustee.

Mr. Anderson claims to have negotiated a financing

source, but offers no letter or memo either to or from him in such regard.

He claims to have investigated a Canadian bidder, but offers not even his own itemization of how this was done.

He claims to have "worked with buyers" in restructuring a product line and marketing, but does not advise of when, where or how.

He claims to have negotiated terms with a potential buyer, but does not even identify the buyer.

To the extent that he claims to have researched the law, no allowance can be made because he is not an attorney and because he was aware that an attorney had been retained by the Debtor.

He claims to have formulated a plan of reorganization for presentation to the Court, but offers not even an outline thereof.

The Court simply finds that Mr. Anderson has failed to offer adequate support of his request for allowance of professional fees under 11 U.S.C. § 330.

Mr. Anderson has appeared before the Court on several occasions in connection with his claim. Indeed a full hearing was held on October 22, 1991, at Buffalo, at which he testified under oath. At further hearing in Batavia on December 17, 1991, I gave him "a week or two" to submit documentary support of his hours worked, work-product, and other evidence of benefit to the estate, so that the reasonable value of his services could be determined under 11 U.S.C. § 330. He did not take advantage of that

opportunity; thus my January 15, 1992 Order, giving him until January 31, 1992 as his "last bite of the apple", so to speak.

On January 15, 1992, I ordered that "any and all documentation [emphasis in original] which Mr. Anderson intends to file in support of his claim "be filed no later than January 31, 1992." Late in the day on Friday, January 31 the Court received a facsimile transmission from Mr. Anderson in response. It was marked "Received" on February 4. (This does not constitute a "filing;" documents may not be filed with the Court by facsimile transmission. Nevertheless, I will entertain his response.)

His response contains no documentation. It merely reiterates his earlier assertions regarding the services he claims to have performed between June 18, 1989 and August 11, 1989. He offers not a single memo, letter, report, proposal, or compilation of data that he claims to have written, initiated, or even received from others for his review.

He claims that "many witnesses can attest to both the existence of, and the quality of time expended..." but he provided not a single affidavit; nor did he appear at the final hearing in Batavia on February 11, 1991 or cause any witness to appear there on his behalf.

Nonetheless, because it is basically unquestioned that Mr. Anderson did in fact devote time to the company (whether documented or not and whether successful or not), this \$12,675.00 request will be allowed in the amount of \$1,000.00.

Whether Mr. Anderson will in fact be paid \$1,000.00 depends on whether there exist sufficient assets to pay all Chapter 11 administrative expenses in full.

A final note. It is evident to the Court that something has gone on beneath the surface of this matter. Under direct examination by the Trustee on October 22, 1991, Mr. Cary testified that he had no recollection of having met Mr. Anderson before Anderson appeared on the business premises in summer of 1989. On consent of Mr. Cary, I permitted Anderson to cross examine Cary, whereupon Cary recalled Anderson having had dinner at Cary's home and discussing there the Chapter 11 filing and how Anderson could assist. Similarly, on direct Cary testified to the effect that he had no idea that Anderson expected payment, but on cross denied believing that Anderson did not expect payment. On cross Cary indeed admitted having forwarded to Debtor's counsel an agreement for Anderson's retention as a consultant, admitted knowing that counsel had not forwarded the agreement to the Court for approval, but acknowledged that Anderson was probably not advised of that fact.

It also came out on cross that as of the summer of 1989, an employee of the company was the girlfriend of Anderson.

Cary's testimony was often initially evasive, then resolved in Anderson's favor in many regards.

This in part led me on December 17, 1991 to determine, over the objection of the U.S. Trustee, that I would nunc pro tunc

approve Anderson's employment as a professional person under 11 U.S.C. § 327.

Yet I am troubled by Anderson's failure to document the services performed.

Although I am laying the matter of an allowance to Mr. Anderson to supposed "rest," I will not hesitate to re-open it for other action upon evidence that any pertinent facts have been concealed from the Court.

Dated: Buffalo, New York
February 24, 1992

/S/ MICHAEL J. KAPLAN
U.S.B.J.