

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ABRANTES CONSTRUCTION CORP.

CASE NO. 91-00058

Debtor

Chapter 11

APPEARANCES;

CARL F. GUY, ESQ.
Attorney for Debtor
850 Fay Road
Syracuse, New York 13219

RICHARD CROAK, ESQ.
Office of U.S. Trustee
10 Broad Street
Utica, New York 13501

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Application for Compensation ("Application") filed by Carl F. Guy, Esq. ("Guy"), Debtor's counsel, on March 27, 1991, seeking approval of a \$2,500.00 retainer and an additional fee of \$8,228.00 for services rendered subsequent to Guy's appointment as Debtor's counsel effective February 1, 1991.

A hearing was held on the Application at Syracuse, New York on April 16, 1991 and the United States Trustee ("UST") appeared in opposition. The UST contends that the Application is unclear insofar as it seeks to approve the payment of a retainer, that the Application violates the 120-day rule found in §331 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") in that it was

filed less than four months after the filing of Debtor's petition pursuant to Chapter 11 on January 9, 1991, and that Guy has rendered services in connection with the cancellation of Debtor's insurance, which services resulted in unnecessary litigation without benefit to the estate.

Following the April 16, 1991 hearing, Guy filed a Reply Affidavit in which he generally outlined his professional experience and the benefits realized by the Debtor as a direct result of his efforts.

The Court, after hearing the arguments of Guy and the UST and reviewing the papers submitted, is unclear on what Guy seeks with regard to the retainer. The contemporaneous time records submitted in support of the Application reflect some 79.22 hours for which Guy seeks \$8,228.00. Absent any further time records, the Court cannot consider approving an amount in excess of \$8,228.00.

If Guy is in possession of \$2,500.00 which he refers to as an "agreed upon retainer", then it must be applied to any fee awarded herein, since he provides no other basis for the Court to authorize approval. See Code §329(b).

In reviewing the \$8,228.00 requested in light of Guy's Application and time records, it is apparent that some portion of the services were rendered by a "legal assistant" though without making mathematical computations, it is not clear which hours were expended by whom. For the most part, it appears that the legal assistant performed primarily legal research and that individual's time was billed at \$65.00 per hour while Guy's time was billed at \$150.00 per hour.

The Court has reviewed the contemporaneous time records and concludes that the fee requested by Guy, in light of the hours reflected therein, is reasonable. The UST contends, however, that the services rendered were both unnecessary and of no benefit to the estate, since they were expended primarily to avoid cancellation of the Debtor's insurance coverage.

The Court is fully familiar with the Debtor's effort to avoid cancellation of its insurance coverage and while it may be argued that Guy's efforts would have been better spent in negotiation than in litigation, the Court cannot reach the conclusion that the services were both unnecessary and of no benefit to the estate.

Turning to the primary thrust of the UST's objection, the 120-day rule found in Code §331, the Court believes that the UST reads more into the statute than Congress intended.

The UST cites In re Structurelite Plastics Corp., 91 B.R. 813 (Bankr. S.D.Ohio 1988) as authority for construing Code §331 so as to prohibit Debtor's counsel from making a fee application earlier than 120 days after the bankruptcy case is filed.

While the Court has been unable to locate any decisional law to the contrary, the Court believes that Bankruptcy Judge Cole's statement at page 817 that "At the time he accepted employment, counsel for the Committee clearly was aware of the fact that §331 requires a 120-day waiting period before interim compensation may first be awarded." was in the nature of dicta and not the central issue before the Court, as Code §331 is herein.

Further, as Guy points out in his letter memo to the Court dated April 19, 1991, Code §331 clearly leaves the door open to more frequent applications with the language "or more often if the Court permits". The Legislative History also points out that Congress intended to permit the Court to entertain more frequent applications "if the circumstances warrant". (H.Rep. No. 95-595 to accompany H.Rep. 8200, 95th Cong. 1st Sess. (1977) p.330).

While Guy correctly points to the "more often" language of Code §331, his application provides the Court with no circumstances which would warrant consideration of a fee application more often than every 120 days. Nevertheless, the Court recognizes that Guy has been actively engaged in representing the Debtor, apparently without compensation, since the case filing

on January 9, 1991, a period in excess of four months from the date of filing to the date of this decision. Guy is a solo practitioner and it may be assumed that this Chapter 11 case has consumed a significant portion of his billable hours over the four-month period.

Conversely, the Court recognizes that one of the most significant factors that must be considered in awarding fees in a bankruptcy context is the "results obtained" test set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). In the instant case, an analysis of "results obtained" in terms of benefit to creditors is difficult to conduct, given the relatively short period of time the Debtor has been operating in Chapter 11.

In consideration of the Court's inability to assess results obtained and in recognition of the uncertain future of this Chapter 11 case, the Court will award Guy the fee requested of \$8,228.00, but directs that 25% of that fee, or \$2,057.00, be held back and paid upon further order of this Court. See In re Four Star Terminals, Inc., 42 B.R. 419 (Bankr. D.Alaska 1984); In re Command Services Corporation, 85 B.R. 230 (Bankr. N.D.N.Y. 1988).

With regard to the references to the \$2,500.00 retainer, while it is unclear what Guy seeks, if the retainer is to be applied against pre-petition, as opposed to post-petition, services, it must be supported by time records so that the Court can examine the retainer in light of Code §329(b).

Thus, the Court will approve Guy's fee in the sum of \$8,228.00 and provide for immediate payment from unencumbered assets of the Debtor in the sum of \$6,171.00, with the balance of \$2,057.00 to be paid upon further order of the Court.

IT IS SO ORDERED.

Dated at Utica, New York

this day of May, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge