

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

COMPUTERS, ETC.

CASE NO. 90-01419

Debtor

APPEARANCES:

BRUCE B. ROSWIG, ESQ.
Attorney for Appraiser
510 Monroe Building
333 East Onondaga Street
Syracuse, New York 13202

ALLAN BENTKOFSKY, ESQ.
Chapter 7 Trustee
504 Metcalf Ave.
Auburn, New York 13021

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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

This contested matter is before the Court by way of a final meeting on the Trustee's Final Account, Application For Compensation and Notice of Objection to claim ("Final Account"), which appeared on the Court's July 18, 1995 calendar at Syracuse, New York. Also on the calendar on the same date was the Trustee's Motion to Approve Payment of an \$1800 fee to Appraisal Research Inc. ("Appraisal"), as an administrative expense.

At said hearing, the Court, over the objection of Appraisal, orally awarded a fee of \$600 to said creditor.

Upon subsequent review of the Trustee's Application for payment of an administrative claim to Appraisal and correspondence from both the Trustee, Allan J. Bentkofsky, Esq. ("Trustee") and

Appraisals attorney, Bruce B. Roswig ("Roswig"), the Court vacated its oral order and agreed to take the matter under submission. The Court required the parties to submit memoranda of law on or before August 14, 1995.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of the contested matter pursuant to 28 U.S.C. §§1334(b), 157(a)(b)(1) and (2)(B).

FACTS

On June 6, 1990, the Trustee was appointed in this Chapter 7 case and thereafter qualified as such.

Following his appointment, the Trustee proceeded to liquidate property of the Debtor's estate which purportedly consisted of desks, chairs, cabinets, telephone systems, a computer inventory and miscellaneous office equipment alleged by the Debtor to have a value of \$141,735.32. (See Application of Trustee dated 7/26/90 and 1/20/95).

In liquidating the aforementioned property, the Trustee sought the appointment of Appraisal to perform an appraisal of the Debtor's assets. On August 24, 1990, this Court ordered the appointment of Appraisal effective August 2, 1990, to act as appraiser. Appraisal's compensation was fixed in said Order at \$600 per day, not to exceed \$2,000, which fee would be "paid as an expense of administration upon further application to the Court."

(See Order for Appointment of Appraiser, dated August 25, 1990). In support of the Order of Appointment, John Havemeyer ("Havemeyer"), Appraisal's president, submitted an affidavit to the Court, captioned in the Debtor's case, in which, inter alia, he acknowledged that the Debtor "was in the retail sale of computer equipment", that he held no interest adverse to the "estate of the debtor", and that he would "undertake the appraisal of the various assets at the rate of \$600 per day, not to exceed \$2,000." (See Affidavit of John Havemeyer, Appraiser, sworn to July 30, 1990). It is apparent that Appraisal, through Havemeyer, knew that it had been retained to appraise assets of Chapter 7 bankruptcy estate. In fact, at paragraph ¶2 of the Havemeyer Affidavit he avers that he has previously testified at "evaluation hearings before the Bankruptcy Court."

Following its retention, Appraisal set about the task of appraising Debtor's assets and on October 9, 1990, it provided the Trustee with a written appraisal in which it concluded that the assets it appraised had a value of only \$10,015.65 at retail and only \$5,025.56 at liquidation. On page 3 of the appraisal report, it is noted "In summary I was not able to locate most of the items on the Evaluation report supplied to me. I found most of the items to be either used or broken." (See Report dated October 19, 1990 attached to Appraisal's Application dated July 5, 1995).

Following receipt of Appraisal's Report of October 19, 1990, the Trustee attempted to locate the missing inventory and thereafter referred the matter to the Federal Bureau of Investigation ("FBI"). Following an investigation of several

months, the FBI closed its file. No additional inventory was apparently recovered. (See Application of Trustee dated January 20, 1995).

The Trustee proceeded to administer the remaining assets of Debtor's estate and collected the sum of \$2,928.88 in accounts receivable of the Debtor. It also appears that the Trustee abandoned the inventory appraised by Appraisal.¹ The Trustee's Final Report references total receipt of \$3,319.59, which includes interest earned on the accounts receivable. From the \$3,319.59, and prior to the Final Meeting, the Trustee reimbursed himself for bond premiums of \$14.21, paid \$23.85 to "Marshall & Testone, Reimbursement of Expenses"; paid \$262.50 to "Beauchine & Associates, 114 Grant Ave., Auburn, NY 13021, Corporate Tax Return 10/90, 10/91 and 10/92";² paid \$1,073.00 to "Corporation Tax Bureau EIN #16-1208492, years ended - October 1990, 1991 and 1992"; paid \$16.58 to Internal Revenue Service, Andover, MA 05501, TIN 16-1208492 12/31/92 and transferred \$29.36 from "Money Market Account. #000312617846265 to General Acct. #000312617846266". (See Trustee's Final Report and Proposed Distribution dated January 21, 1995).

On or about October 22, 1990, Appraisal forwarded a

¹ On November 16, 1990, this Court entered an Order on the motion of Marine Midland Bank N.A., modifying the automatic stay and permitting Marine to enforce its security interest in, inter alia, Debtor's inventory. The Order provided that in the event of a surplus following liquidation of its collateral, that surplus would be turned over to the Chapter 7 Trustee. The Trustee's Final Report does not indicate the inclusion of any surplus.

² Beauchine & Associates, P.C. had been appointed as Trustee's Accountants by Order dated March 19, 1992. No fee was fixed in the Order.

statement for its services to the Trustee. The statement requested payment of a fee of \$1800. On December 3, 1990, Appraisal sent a letter to the Trustee advising the Trustee that its account was overdue. Again on January 16, 1991, Appraisal corresponded with the Trustee demanding payment of its account and advising the Trustee if the account was not paid within 10 days, Appraisal would turn the account over to its attorney to commence collection. On September 24, 1991, Appraisal again wrote to the Trustee advising him the account was almost one year old and asserting its intent to sue the Trustee "personally" for the amount claimed due. The letter also contends that the Trustee "got permission from the Court for us to do this appraisal."

On January 6, 1992, Roswig wrote to the Trustee demanding payment of the amount alleged to be due. The letter also alleges that the Trustee and Havemeyer agreed to a fee of \$2400, which Havemeyer believed had been approved by this Court. It also asserts that Havemeyer discovered a number of empty boxes at Debtor's premises and "only about \$16,000.00 in computers." Finally, the letter acknowledges that the Trustee advised Havemeyer after the appraisal was completed that "the estate had no money and that he could not be paid."

On January 9, 1992, the Trustee responded to Roswig advising him that an investigation was underway by the FBI and the U.S. Attorney regarding a possible theft of assets, that the estate had approximately \$3,000 in funds and that he would be unable to pay his client until the case was closed to avoid payment ahead of other administrative claimants.

On January 15, 1992, Roswig replied to the Trustee and, inter alia, inquired of the Trustee that if Appraisal would not be paid in full, "What other arrangements will be made to satisfy the bill." In response, on January 20, 1992, the Trustee advised Roswig that it was more than likely Appraisal would receive its "full fee when the case is finally closed." Thereafter, a series of letters ensued between Roswig and the Trustee leading up to the Final Meeting on July 18, 1995.

At the final meeting, pursuant to a Notice issued by the Trustee dated 5/22/95, the Court was advised that the Trustee's had total receipts of \$3,319.59, plus an undetermined amount of additional interest, total disbursements of \$1,419.50, leaving a balance then on hand of \$1,900.09. From that balance, Trustee's commissions and expenses of \$430.21 was requested. Additionally the Trustee sought his attorney's fee of \$1,690.00 and payment of Appraisal's fee of \$1,800.

ARGUMENTS

Appraisal asserts that it is entitled to payment of the \$1,800 fee in full together with interest for a total fee of \$3,911.00 as of June 1995. Apparently, Appraisal also seeks its attorney's fees.

Appraisal argues that the Trustee never told it that it might not be paid its fee in full and had he done so, Appraisal would not have accepted the assignment. It contends that it is entitled to interest on its fee under applicable New York State

law.

Appraisal objects to the Trustee's payment in full of the fees of Beauchine & Associates as well as the taxes due New York State and the Internal Revenue Service asserting a violation of the Fourteenth Amendment to the U.S. Constitution. Finally, Appraisal argues that as long as it rendered services in a competent manner, this Court has no discretion to reduce its fee.

DISCUSSION

The Court here faces a dilemma which has resulted from the Trustee's full payment during the case of so-called administrative claims allowable pursuant to Code §503(b) only to discover at the conclusion of the case that he has insufficient funds to pay additional administrative expenses in the full amount requested.

During the pendency of the case, the Trustee paid the following administrative expense claims:

11/18/91	- Allan J. Bentskofsky Blanket Bond Premium	\$ 5.26
12/8/92	- Allan J. Bentskofsky Blank Bond Premium	5.61
2/11/93	- Marshall & Testone Reimbursement of Expenses	23.85
9/3/93	- Beauchine & Associates Corporate Tax Returns 1990, '91 and '92	262.50
9/9/93	- New York State Corporation Tax Bureau	1,073.00
12/15/93	- Allan J. Bentskofsky Blanket Bond Premium	3.34
3/22/94	- From Money Market Acct. to General Account	29.36
6/15/95	- Internal Revenue Service	<u>16.58</u>

Total Disbursement as per Trustee's Final Report	\$1,419.50
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Subtracting the Total Disbursements from the Trustee's Total Receipts of \$2,928.88 plus accrued interest of \$390.71, left Trustee with balance on hand as of May 15, 1995 of \$1,900.09. (See Trustee's Final Report and Proposed Distribution).

The conundrum occurs because there remain additional requested, but unpaid, administrative claims of:

Trustee's Commissions Pursuant to Code §326	\$ 279.59
Trustee expenses	150.62
Trustee's attorney fees	1,690.00
Appraisal's fee ³	<u>1,800.00</u>
	\$3,920.21

Appraisal argues that it was never told that its fees would not be paid in full and had it been so informed, it would not have accepted the assignment. Appraisal's position is somewhat untenable, however, in light of the language of Court order appointing it which required that its compensation was to be paid only upon "further application to the Court." Additionally, as indicated, Havemeyer, Appraisal's president, was not a neophyte to the bankruptcy process having acknowledged in one Affidavit submitted in support of its appointment his familiarity with proceedings before the bankruptcy court.

It is apparent that "most" of the inventory Appraisal had been retained to appraise was not located at the time the appraisal

³ Appraisal, as indicated, is currently requesting a total fee of \$3,911.00 as of June 27, 1995 which includes the original fee sought plus interest.

was actually performed and, in fact, was never located. (See letter from Appraisal to Trustee dated October 19, 1990, attached to Appraisal Application dated July 5, 1995). Despite the fact that most of what was to be appraised was found to be missing, Appraisal's bill for services rendered came within \$200 of the \$2,000 cap.

Appraisal's counsel asserts that this Court has no discretion but to approve payment in full. (See letter from Bruce Roswig, Esq. to the Court dated July 24, 1995). The Court, however, does not agree that it is without discretion where events unknown at the time of appointment later impact on the fee arrangement. Code §328(a) provides,

"Notwithstanding such terms and conditions, the Court May allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."

Case law interpreting Code §328(a) emphasizes that a bankruptcy court may not alter the terms of a previously approved professional compensation arrangement unless it finds the original terms improvident in light of subsequent developments not capable of being anticipated at the inception of the arrangement. See Pitrat v. Reimers (In re Reimers) 972, F.2d 1127, 1128 (9th Cir. 1992); In re Begun, 162 B.R. 168, 178 (Bankr. N.D.Ill. 1993); In re Schubert, 143 B.R. 337, 342 (S.D.N.Y. 1992); In re Cal Farm Supply Co., 110 B.R. 461, 465 (Bankr. E.C.Cal. 1989). This same case law points out that the unanticipated developments aspect of Code

§328(a) must be broadly interpreted. In re Cal Farm Supply Co., supra 110 B.R. 465.

In the matter *sub judice* Debtor's petition listed an inventory value of \$141,735 and in seeking to appoint Appraisal it appears that the Trustee reasonably relied upon this valuation. There is no proof before the Court that in July of 1990, the Trustee had any reason to seriously doubt the valuation or the existence of the inventory. In fact, it was not until Appraisal entered upon Debtor's premises and discovered that much of what was on the "list" furnished by Debtor was in fact missing, that the Trustee apparently became aware of a potential theft or misappropriation. At that point, he referred the matter to the FBI and the U.S. Attorney's office. Ultimately, after being advised by Appraisal that the inventory that remained had a retail value of only \$10,000 and a wholesale value of \$5,000, the Trustee consented to the motion of Marine Midland Bank, NA to modify the automatic stay in order to permit Marine to enforce its security interest in the remaining inventory.

Appraisal, for its part, nevertheless sought payment of \$1,800 from the Trustee even though it was apparently then aware that over \$100,000 of the inventory was missing and not subject to appraisal. One can only conclude, based upon Appraisal's current demands, that had it actually located and set about appraising the missing inventory, at \$600 a day, it would have grossly underestimated the value of its services and the time to be consumed.

It is clear to this Court that the proposed compensation

arrangement whereby Appraisal would have been paid approximately 18% of the value of the actual appraised inventory at retail and 36% at wholesale would be improvident. The arrangement is all the more improvident when one considers that the inventory generated absolutely no benefit to unsecured creditors due to the security interest of Marine Midland Bank NA.

While Code §328(a) may appear to work an undue hardship on Appraisal, it does not rise to the level of a violation of Appraisal's constitutional rights as its attorney suggests. While the Court does not condone the Trustee assurances that Appraisal would be paid in full, nor his payment of other administrative claimants in advance of the Final Meeting, the mandates of Code §328(a) cannot be disregarded.

The Court concludes that upon review of the appraisal furnished to the Trustee dated October 19, 1990 and the significantly reduced scope of Appraisal's engagement, Appraisal's services are reasonably compensable in the total sum of \$600 and that Appraisal shall have a claim pursuant to Code §503(b)(1) in that amount which claim the Trustee shall pay in full.

IT IS SO ORDERED.

Dated at Utica, New York

this day of 1995

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge