

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MERCY HOSPITAL OF WATERTOWN

CASE NO. 90-02501

Debtor

Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

Pending before the Court is the Fee Application of Iseman, Cunningham, Riester & Hyde, Esqs. ("Iseman"), seeking a fee of \$3,212.00 and reimbursements of expenses in the sum of \$188.42.

The instant Fee Application is the third interim application filed by Iseman and covers the period December 9, 1992 through December 31, 1992.

A hearing on the Fee Application was scheduled for April 20, 1993 at Utica, New York and was thereafter adjourned to and held on May 11, 1993. The United States of America, through the Department of Health and Human Services ("HHS") filed an opposition to the Fee Application, while Debtor's general bankruptcy counsel filed a post-hearing affirmation in support of the Fee Application.

Iseman was appointed as Special Counsel to the Debtor by virtue of an Order dated October 28, 1991 and has previously obtained approval of fee applications totalling \$60,419.25 for legal services and \$4,491.67 in reimbursement of expenses.

JURISDICTIONAL STATEMENT

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

FACTS

Iseman's appointment as Special Counsel to the Debtor was for the stated purpose of representing the Debtor, inter alia, in connection with an action then pending before this Court entitled "Mercy Hospital of Watertown, Plaintiff v. United States Department of Health and Human Services and New York State Department of Social Services, Debtors (sic), referred to herein as a portion of the "IMD litigation". (See Debtor's Motion Pursuant to 11 U.S.C. §327 dated Aug. 7, 1991 at para. 8).

During the specific period covered in the Third Fee Application, Iseman represented the Debtor in connection with a portion of its IMD litigation, which involved a subsequent action commenced by the Debtor in the United States District Court for the Northern District of New York ("District Court"), researched a possible legal challenge to the federal government's failure to award a contract to the Debtor, provided advice to the Debtor in connection with a pending malpractice case, and assisted the Debtor in negotiating a physician's contract. Iseman's contemporaneous time records reflect 34.3 hours expended in connection with these matters with a total fee sought of \$3,212, together with a total of \$188.42 of incurred disbursements.

ARGUMENTS

HHS opposes the Fee Application on the ground that Iseman's services

in general and those performed during the specific period covered by the current Fee Application, with some minor exceptions, have not benefitted the Debtor's estate.

HHS asserts that the Debtor's pursuit of the so-called IMD litigation against HHS in this Court, the District Court and the United States Second Circuit Court of Appeals ("Court of Appeals"), with Iseman as its Special Counsel, has not produced any tangible benefit to the estate and, in fact, based upon a Decision of this Court dated February 13, 1992, involves matters which do not even constitute property of the Debtor's estate.

Iseman defends its pursuit of the IMD litigation, specifically its motion to reargue before the District Court, as being motivated by an ambiguity in the District Court's initial decision granting HHS's motion for summary judgment in light of the Debtor's decision to appeal the Order of the District Court to the Court of Appeals.

Iseman contends that in spite of the District Court's dismissal of the IMD litigation, and apparently Debtor's motion to reconsider, the Debtor's estate has benefitted from its professional services because its efforts have increased the probability of success on appeal to the Court of Appeals and because this Court has previously reached that conclusion in approving Iseman's two prior fee applications, which included extensive services devoted to the IMD litigation.¹

Finally, Iseman contends that HHS confuses the benefit to the estate test with benefit to a debtor individually in relying on case law cited by HHS in its opposition.

Following the hearing on the Fee Application, Debtor's counsel, on May 20, 1993, filed an Affirmation in support of the Fee Application and in reply to correspondence received by the Court on May 14, 1993 from the United States Attorney's office as attorneys for HHS.

The Affirmation and correspondence, in part, introduce issues which

¹ It is noted that Iseman's motion to reconsider in the District Court was filed after the period for which fees are sought in this Application and the services rendered in connection therewith will, for the most part, presumably be the subject of a future fee application.

are ancillary to the contested matter before the Court and therefore will not be considered herein.

DISCUSSION

The Court acknowledges merit to the opposing positions adopted by both Iseman and HHS.

Iseman finds itself in the difficult position of seeking professional fees for services devoted in large part to the as yet unsuccessful IMD litigation. It asserts, however, that its litigation efforts on behalf of the Debtor have not been undertaken in a frivolous manner, that there is merit to the Debtor's position that it has been incorrectly classified as an "Institution for Mental Disease" (IMD) by HHS and that HHS's decision was ripe for review by a court. Iseman points to the fact that at every step in the litigation, it has acted at the direction of the Debtor and that its prior fee applications have gone unchallenged by any creditor, including HHS.

Conversely, HHS, while not denying the existence of Iseman's efforts on Debtor's behalf, asserts that those efforts were misdirected and unsuccessful, referring to the dismissal of the IMD litigation by this Court, the lack of an appeal therefrom, the filing of a motion to re-argue the District court's granting of HHS's motion for summary judgment and the filing of a premature appeal to the Court of Appeals, which has since been discontinued by stipulation. HHS suggests that the only beneficiary of all of the IMD litigation has been Iseman individually.

HHS also contends that Iseman is pursuing a matter which does not involve property of the estate, relying upon this Court's February 13, 1992 Decision which dismissed the IMD litigation before this Court.

While HHS's reading of that Decision is correct in that this Court concluded that the Debtor did not have any property interest in the "future receipt of Medicaid funds, or in continued status as a qualified provider of health care services", HHS appears to use that finding to conclude that were the Debtor ultimately successful in the IMD litigation and thus, secure Medicaid funding for its services, that such funding would not be property of the Debtor's estate. Having reached that conclusion, HHS posits that even if the Debtor is

ultimately successful, its success will confer no benefit on the creditors of the estate.

It would appear that HHS has painted this Court's findings in its February 13, 1992 Decision with a broader brush than would be permissible. In considering Debtor's argument that HHS had violated the automatic stay provisions of §362(a) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") by terminating its status as a Medicaid provider, this Court concluded that Debtor had no property interest in its continued participation in the Medicaid program or in the future receipt of Medicaid funds and, therefore, Code §362(a) stay had not been violated. From that conclusion, HHS makes a quantum leap to its position herein that even if Debtor prevails on appeal and HHS is compelled to reverse its determination of Debtor's status as an IMD, Debtor's actual receipt of Medicaid funds would not constitute property of the estate and more importantly would confer no benefit on its creditors.

It is obvious that the reinstatement of Medicaid funding would result in present payments to debtor that would clearly constitute property of the Debtor's estate. Thus the Court rejects HHS's argument that even if Debtor were to ultimately prevail in the IMD litigation, it would not result in Debtor's receipt of funds that would constitute property of the estate.

The dispute here, reduced to its simplest terms, is whether or not Iseman's efforts in connection with the IMD litigation have, or for that matter will, benefit the Debtor's creditors, irrespective of whether or not one of those creditors being asked bear the cost of Iseman's services is in fact a defendant in that litigation.

HHS correctly points out that professional services which benefit a debtor individually rather than its estate or are rendered in a fruitless pursuit of a result that the professional knew or should have known was unattainable, are not compensable pursuant to Code §330. See In re Greene, 138 B.R. 403, 409 (Bankr. S.D.N.Y. 1992); In re Old South Transp. Co., Inc., 134 B.R. 660, 664 (Bankr. M.D.Ala. 1991). Conversely, professional compensation in the nature of attorney's fees should not be denied solely because the efforts of counsel fail to achieve a successful result. See In re Greene, supra, 138 B.R. 408.

The instant Fee Application appears to include 25.2 hours rendered

by Iseman in connection with the IMD litigation and 9.1 hours devoted to other services. Exhibit B attached to the Fee Application indicates that for 9.5 hours devoted to the IMD litigation "no charge" is sought.

Additionally, Iseman suggests in its Memorandum of Law filed May 7, 1993 that four of the IMD hours included in the Fee Application do not require approval by the Court pursuant to Code §330, since they were rendered subsequent to the confirmation of Debtor's plan of reorganization. Iseman cites no authority for its position that post-confirmation services are compensable in the absence of court and creditor scrutiny and more significantly, Iseman has elected, by virtue of the instant Fee Application, to submit those hours to review by this Court.

Upon a review of all of the facts and contentions asserted by the parties, the Court does not conclude that the services reflected in the instant Fee Application were of no benefit to the creditors of this estate. Iseman has not been appointed on the basis of a contingent fee and there are no objections to the Fee Application filed by disinterested creditors.

It cannot be said that through December 31, 1992, the Debtor's maintenance of the IMD litigation in this Court and the District Court, through the efforts of Iseman, constituted a fruitless pursuit of the unattainable result or that it was the pursuit of a result that would in no way benefit the Debtor's estate.

In reaching its conclusion, however, the Court does not foreclose the possibility that continuation of the IMD litigation beyond December 31, 1993 might not be considered by this Court at a later date as fruitless and, therefore, noncompensable, notwithstanding the fact that such continuation occurred post-confirmation.

Thus, the Court will approve the Fee Application inclusive of all of the services rendered therein, with the exception of the six hours devoted to a fee application hearing held on December 30, 1992. It appears that four of the hours were devoted purely to travel and are compensable at one-half of Attorney McNeil's hourly rate of \$110.00. Thus the fee sought will be reduced by \$220.00 and finally approved in the sum of \$2,992.00. Iseman's request for reimbursement of expenses appears generally compensable and will be approved in full in the

amount of \$188.42.

IT IS SO ORDERED.

Dated at Utica, New York

this day of September, 1993

STEPHEN D. GERLING
U.S. Bankruptcy Judge