

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOHN E. CALABRIA
SHARON A. CALABRIA

CASE NO. 93-61089

Debtors

APPEARANCES:

MICHAEL J. BALANOFF, ESQ.
Chapter 7 Trustee
GREEN & SEIFTER
One Lincoln Center
Syracuse, New York 13202

DOROTHY DICKINSON
Pro Se
Executrix of Estate of Ethel J. Weir
508 Nottingham Road
Syracuse, New York

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

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

Before the Court is a Trustee's Final Report and Proposed Distribution ("Final Report"), filed on January 20, 1999, by Michael J. Balanoff, Esq., Trustee of the within bankruptcy estate ("Trustee").¹ Also before the Court are the Final Reports and Applications of the attorney for the

¹ The Final Report is actually the second Final Report filed in this case. The case was initially closed as a no asset case by an Order dated October 29, 1993. The case was subsequently reopened by an Order dated January 13, 1994, upon the Trustee's allegation that Debtors had concealed an asset and/or transferred the asset on the eve of bankruptcy.

Trustee (“Fee Applications”), filed on the same date.²

Both the Final Report and Fee Applications came on for a hearing before the Court on March 9, 1999. An objection to the Final Report and Fee Applications was filed by Dorothy Dickinson as Executrix of the Estate of Ethel J. Weir (“D. Dickinson”). As a result of the objection, the hearing on the Final Report and Fee Applications was adjourned and the parties were given until April 12, 1999 to make any additional written submissions.

JURISDICTIONAL STATEMENT

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

FACTS

The voluntary Chapter 7 case was filed on April 8, 1993, and the Trustee was duly appointed on the same date. By Order dated May 24, 1993, the firm of Grass, Balanoff & Whitelaw (“GBW”) was appointed as attorney for the Trustee. GBW was again appointed as attorney for the Trustee when the case was reopened by an Order of the Court dated January 14, 1994.

Following the reopening of the case, the Trustee commenced an adversary proceeding

² The attorney for the Trustee has filed two separate Fee Applications as he was a member of two different law firms during the pendency of this case.

against the Debtor, John E. Calabria (“J. Calabria”), and a non-debtor third party, Otto Calabria, seeking to set aside an alleged fraudulent transfer of property and a revocation of J. Calabria’s discharge in bankruptcy.

On or about August 22, 1995, the Trustee moved the Court for an order approving a stipulated settlement of the adversary proceeding which in part would revoke the discharge of J. Calabria, but permit said Debtor to remain in possession of certain real property (“the Wolf St. property) owned nominally by a closely held corporation of which the Debtor was apparently the sole stockholder, for a period not to exceed six months or until earlier sold or remortgaged. The Court approved the stipulated settlement over the objection of D. Dickinson, by an Order dated September 20, 1995.

When the Wolf St. property was not sold within the six month period stipulated to, the Trustee assumed control of the property and employed a realtor to sell it.³ Thereafter, the Trustee sought approval of the Court to sell the property for \$25,000 and the Court approved the sale by Order dated December 8, 1997. The Trustee’s Application in Support of the Sale represented that the only liens against the property were real property taxes totaling approximately \$3,900 and a mortgage securing a remaining balance of approximately \$1,400. Those liens were to attach the sale proceeds. There was no opposition to the Trustee’s proposed sale of the Wolf St. property. It appears that the notice of proposed sale was served on all creditors to include D. Dickinson as Executrix of the Weir estate. An Amended Order approving the sale was entered

³ Prior to the actual sale, Trustee had the property appraised. The appraised value was fixed at \$57,000. In addition, D. Dickinson alleged, and the Trustee does not dispute, that the Wolf St. property was assessed by the City of Syracuse at a full value of \$43,000 in 1995.

on June 3, 1998.⁴

The Final Report reflects the Trustee's receipt of \$45,543.92 plus interest earned of \$475.97 for total receipts of \$46,019.89. It further reflects total disbursements of \$25,263.30 for a net balance on hand of \$20,756.59. The receipts were generated primarily from pre sale rental income derived from the Wolf St. property and the actual sale price proceeds from the property. The disbursements are generally attributable to pre sale mortgage payments, insurance premiums, real property taxes and the requisite prorations and adjustments made at the time of sale.

Subject to approval by this Court are \$16,208.35 administrative claims including Clerk's charges of \$120, Trustee's commissions pursuant to 11 U.S.C. § 326 of \$1,560.60, Trustee expenses of \$1,092.60 and Trustee attorney's fees as set out in the combined Fee Applications of \$13,435.15. Finally, the Trustee has not objected to the allowance of unsecured claims including the claim of the Weir estate, in the total sum of \$25,624.41.

ARGUMENTS

D. Dickinson lodges several complaints concerning the Final Report. Initially, she asserts that she did not object to the sale of the Wolf St. property in December 1997 because the Trustee had assured her that there would be sufficient funds generated from the sale to pay all unsecured claims in full. She asserts that in reality the Wolf St. property was worth far more than the \$25,000 sale price based upon an appraisal procured by the Trustee in 1995 (the "Lavine

⁴ The Amended Order simply added a decretal paragraph authorizing payment of a real estate commission.

appraisal”). That appraisal fixed the value of the real property at \$57,000. In addition, D. Dickinson alleges that the Trustee breached his fiduciary duty in not acting upon the information she provided to him concerning J. Calabria’s concealment of assets at the time of the initial meeting of creditors in 1993 and his decision to ask the Court to permit J. Calabria to remain in possession of the Wolf St. property until January of 1996, ostensibly to permit him to sell the property during which time he was to collect the rents and pay the real property taxes and insurance. D. Dickinson also questions the accuracy of the Statement of Sale prepared in connection with the closing of the Trustee’s transfer of the Wolf St. property in April 1998 and certain entries in the Trustee’s accounting filed in connection with the Final Report. Finally, D. Dickinson asserts that the Trustee should be denied all compensation.

The Trustee has responded that he did act upon D. Dickinson’s allegations of property concealment following the initial meeting of creditors in April 1993. He asserts that in speaking with the Debtors’ attorney, Burton Lowitz, Esq., he was advised that J. Calabria had transferred his stock ownership in the corporation, which actually owned the Wolf St. property, pre-petition to his brother in consideration of certain roof repairs being made by the brother. The Trustee argues that he verified the consideration and in any event the alleged transfer was outside the fraudulent transfer period.

The Trustee contends that it was not until December of 1993, after he had initially closed the case, that D. Dickinson finally provided his then law partner, Mary Lannon Fangio, Esq., with a copy of the transcript of a hearing held in an earlier proceeding in the New York State Surrogate Court, Onondaga County, which conclusively established that J. Calabria, still owned the stock at the time of his bankruptcy petition. At that point the Trustee sought a reopening of

the bankruptcy case.

The Trustee acknowledges that his request that the Court permit J. Calabria to remain in possession and collect rents while he tried to sell the Wolf St. property as part of the settlement of the pending adversary proceeding commenced by the Trustee, while risky was a necessary concession to settle the adversary proceeding. The Trustee points out that as a result of the settlement, J. Calabria's bankruptcy discharge was revoked and D. Dickinson was free to seek payment of any unpaid portion of the Weir Estate's claim directly from J. Calabria.

The Trustee asserts that out of the rents he began to collect in January 1996, he paid delinquent mortgage payments for the period October 1995 through July 1996, to Key Bank, the mortgagee. Those delinquent payments were made on July 15, 1996 and the regular monthly payments were made thereafter. He also contends that once he, as Trustee, took over possession of the Wolf St. property the insurance premium nearly quadrupled requiring payment of \$1,900.88 in 1996 and the same in 1997. He asserts that he also negotiated the 1994 and 1995 unpaid city and county taxes, which totaled in excess of \$5,000, down to a much smaller amount.

As to D. Dickinson's allegations that at the time of the Wolf St. property sale in December 1997 the Trustee assured her that the claim of the Weir Estate would be paid in full, the Trustee indicates he has no recollection of any such conversation and refers to her claim as "baseless." Regarding the LaVine appraisal and the assessed value of the property, the Trustee asserts that by 1997 the property had significantly deteriorated to the point where the City of Syracuse was asserting code violations against the Trustee emanating from the Wolf St. property. The Trustee provides an explanation for the various bank transactions leading up to the closing of the sale of the Wolf St. property as well as the prorations and disbursements attendant upon

the actual closing. He also points out that the bankruptcy estate has not paid any fee to Lowitz, but that it also has not objected to the fee paid him by the Debtors pre-petition.

DISCUSSION

A bankruptcy trustee is subject to personal liability for a willful and deliberate violation of his/her fiduciary duty. Mosser v. Darrow, 341 US 267, 71 S.Ct. 680, 95 L.Ed 927 (1951); In re Gorski, 766 F.2d 723 (2nd Cir. 1985); In re San Juan Hotel Corp., 847 F.2d 931(1st Cir. 1988); In re Barrows, 171 B.R. 455 (Bankr. D.N.H. 1994). Such liability may also attach as the result of negligent as well as knowing or intentional breaches of that duty. In re Gorski, supra, 766 F.2d at 727. In order to charge a trustee with violation of his/her fiduciary duty, a creditor must show by a preponderance of evidence that the trustee has failed to meet an appropriate standard of conduct. In re Valley Steel Corp., 208 B.R. 388, 193 (Bankr. W.D. Va. 1997).

Here, D. Dickinson asserts four principal criticisms of the Trustee's conduct. First she contends that he ignored significant information regarding J. Calabria's continued interest in the Wolf St. property that she attempted to turn over to him at the initial meeting of creditors in 1993, second she argues that the Trustee should not have allowed J. Calabria to remain in possession of the Wolf St. property and collect the rents for any significant period of time, third, she objects to the Trustee's sale of the Wolf St. property for less than its fair market upon the Trustee's representation that the sale price would generate sufficient funds to pay all unsecured creditors in full, and, finally, she argues that there are certain unexplained inconsistencies in the statement of sale relative to the sale of the Wolf St. property.

The Trustee has responded to these criticisms and in view of the fact that neither party has requested an evidentiary hearing, which arguably would add little if anything to the existing record of this dispute, the Court will consider this contested matter based primarily on documentary evidence in the Court's file.

With regard to the dispute over whether or not the Trustee promptly acted on the information gleaned from the records of the proceeding before the Surrogates Court, the Court observes that accepting D. Dickinson's version leads only to the conclusion that the trustee could have avoided the premature closure of the estate in October 1993 and the necessity of having to reopen the same some two and one half months later. Arguably, had the Trustee timely acted upon the information from the Surrogates Court he would have sought a turnover of the corporate stock from J. Calabria.⁵ Instead, the Trustee was compelled to pursue the stock by seeking a revocation of J. Calabria's discharge. The Court does not believe that, even assuming D. Dickinson's contention that J. Calabria's testimony in the Surrogates Court was available at an earlier date, the Trustee's failure to act at that time rises to the level of Trustee negligence or breach of a duty of care. The fact remains that the Trustee did act on the testimony gleaned from the Surrogates Court proceeding, did reopen the case and did recover the Wolf St. property which he ultimately sold. Judged by the appropriate "ordinary prudent man standard," the Court cannot conclude that that standard was not sufficiently adhered to by the Trustee. In re Rollins, 175 B.R. 69, 74 (Bankr. E.D. Cal. 1994)

As to the bankruptcy estate's liability for payment of delinquent real property taxes, D.

⁵ J. Calabria was apparently the sole stockholder in Wolf Street Management Corp., the title owner of the Wolf St. property.

Dickinson criticizes the Trustee for his decision to allow J. Calabria to remain in possession of the Wolf St. property as part of a stipulated settlement of the adversary proceeding the Trustee commenced in July 1994. A review of the Settlement Order dated September 20, 1995, indicates that the Trustee permitted J. Calabria to remain in possession of the Wolf St. property and collect the rents for approximately six months from July 1995 to January 1996, at which point the Trustee would take over possession of the property if J. Calabria had been unable to find either a buyer or mortgage the property and liquidate the Trustee's interest. The Trustee acknowledges that he ran the risk that J. Calabria would neither keep the mortgage payments nor the real estate taxes current while collecting the rents. He points out, however, that such a risk was a part of the negotiated settlement of the adversary proceeding which was approved by this Court over D. Dickinson's objection.

While the Trustee does not directly raise the issue, where "a trustee prior to taking action, and after making full disclosure of all relevant fact, obtains a court order then acts on the basis of that order, he or she may be immune from any personal liability." In re Rollins, 175, B.R. at page 77. Thus, the Court can find no basis to surcharge the Trustee in connection with J. Calabria's non payment of taxes/ mortgage payments during the approximately six months of his continued possession pursuant to the settlement of the adversary proceeding.⁶

Turning to the sale of the Wolf St. property, though the Trustee could also likely invoke derived judicial immunity, D. Dickinson contends that she was misled by the Trustee into

⁶ The Trustee also asserts that following the initial closure of the bankruptcy case in October of 1993, and the issuance of a discharge to J. Calabria, Debtor made a substantial payment on both past due mortgage payments and delinquent taxes. The Trustee points out that had he been administering the property at that time, the estate would have arguably borne these charges.

believing that the sale price of \$25,000, though well below what she considered to be the property's fair market value, would be sufficient to return a 100% dividend to unsecured creditors.⁷

The Trustee does not dispute the conclusion contained in the appraisal he obtained which valued the property at \$57,000 as of May of 1995. He also does not dispute that the property was assessed by the City of Syracuse at \$43,000. He seeks to justify the sale price at less than 50% of the property's appraisal value some two years earlier by pointing to an alleged rapid deterioration of the property to include the need for a new roof with resulting water damage throughout the structure. It does appear from the documentation that has been presented to the Court that the Wolf St. property was the scene of numerous code violations and, in fact, in July 1997, the City filed a petition in Syracuse City Court seeking to obtain monetary penalties from Wolf Street Management Corp. for various code violations at the Wolf St. property.⁸

The Trustee denied that he ever assured D. Dickinson in November 1997 that the claim of the Weir Estate would be paid in full. He asserts that it is not his practice to make such predictions regarding claims distribution.

While the Court has no conclusive evidence of any conversation between the Trustee and D. Dickinson relating to the ultimate dividend to be paid unsecured creditors, the Court does not and did not find the sale price of \$25,000 to constitute an inappropriate liquidation of the Wolf

⁷ D. Dickinson asserts that on or about November 25, 1997, during a phone call to the Trustee, he advised her that there were sufficient funds in the estate to pay all creditors in full.

⁸ On December 2, 1997, a second appraisal was filed by LaVine in which he again valued the Wolf St. property as of November 26, 1997, at \$35,000, which he then adjusted downward by \$10,000 to take into consideration the need for roof and ceiling repairs as well as the correction of a "zoning problem."

St. property.

While appraisals and assessments represent what value an asset might have, neither is the result of an exact science. The best indication of value is what the property will sell for to a willing buyer on the open market. In this case, the Trustee retained the services of Sutton Real Estate to market the property. While the offer obtained by Sutton may have been substantially less than the earlier appraisal, there was nothing before the Court which would indicate that the sale was other than to a willing buyer in an arms length transaction. Thus, the Trustee has incurred no liability in connection with the sale of the Wolf St. property for \$25,000.

Finally, D. Dickinson questions the actual closing of the sale of the Wolf St. property to Timothy J. Wilson as well as certain entries in the accounting which is filed as a part of the Trustee's Final Report. With regard to the closing of the sale, D. Dickinson asserts that the sale price was \$20,000 rather than \$25,000. It is clear that the sale price as approved by the Court was \$25,000, however, there were certain expenses incurred by the Trustee in connection with the sale which are typically paid by the seller. The furnishing of title insurance may arguably be the responsibility of the seller to insure marketable title, even though the insurance generally protects the buyer/lender. In the instant case, however, there is no provision in the contract of sale appears to which require the seller (the Trustee) or the buyer to furnish a title policy, therefore, the Court finds no impropriety in the Trustee having paid for the title policy in the amount of \$363. Other disbursements incurred in connection with sale of the Wolf St. property, i.e. abstract charges, fees for tax searches, recording fees, appraisal fees and realtor commissions, are in the opinion of this Court, appropriate expenses of a real estate seller and in the case of the appraisal fees and realtor commissions were approved by prior Orders of the Court.

With regard to the credit given to Wilson at the closing for rent collected for the months of January through April 1998, the Trustee provides no specific explanation. The Court notes, however, that pursuant to the contract of sale, it was agreed that all adjustments would be made as of “the date of delivery of possession,” while the actual “Statement of Sale” (closing statement) indicates that the “Adjustment Date” was January 1, 1998. Thus, since the Trustee collected the rents from the Wolf St. property during the 4 month period in question, he was required to credit Wilson with those payments.

D. Dickinson is critical of various additional entries in the Trustee’s Estate Cash Receipts and Disbursement Record which is included in the Trustee’s Final Report. For the most part those criticisms were satisfactorily responded to by the Trustee in his letter to the Court dated April 14, 1999, a copy of which was provided to D. Dickinson. Other criticisms though not directly responded to by the Trustee such as why the property insurer rebated only \$749.92 of the \$1,900.88 premium paid by the Trustee in January 1998 when it is D. Dickinson’s opinion that a sum of approximately \$1,400 should have been rebated do not rise to the level of a violation of the Trustee’s fiduciary duty to account to the creditors of the estate. Therefore, the Trustee’s Final Report is approved.

Turning to the Fee Applications which total \$13,435.15, the Court has reviewed the time records attached to each application. The Court notes that if allowed in the full amount, the Fee Applications alone would consume approximately 65% of net estate (balance on hand) leaving approximately \$7,000 to be disbursed to creditors. Of that amount, the Trustee’s commission, expenses and Clerk’s charges, after being allowed in full (\$2,773.20), would further reduce the amount available to unsecured creditors to approximately \$4,500.

While it may be argued that in enacting Code § 507(a)(1) granting a first priority to administrative expenses including professional fees (Code § 503(b)), Congress never intended that those administrative expenses should consume all but an insignificant portion of the assets liquidated in a Chapter 7 case, it is for Congress and not this Court to alter those priorities. Absent a showing of inequitable conduct by the priority claimant, equitable subordination pursuant to Code §310(c) is unavailable to alter the categorical level of priority enjoyed by professional fees and subordinate them to general unsecured creditors. *U.S. V. Noland*, 116 S.Ct. 1524, 1527 (1996).

The Court has, however, reviewed the Fee Applications of the Trustee's counsel in light of Code § 330(a)(3) and while it believes that the services rendered both by Grass, Balanoff and Whitelaw and Costello, Cooney & Fearon as counsel to the Trustee are compensable in full, the Court concludes that the hourly rates charged were in excess of the hourly rates charged within the Central New York State legal community. Accordingly, the Court has adjusted the hourly rates as follows:

Michael J. Balanoff, Esq.

1994	-	\$140 per hour
1997	-	170 per hour
1998	-	180 per hour

Mary Lannon Fangio, Esq.

1993	-	\$120 per hour
1994	-	125 per hour
1995	-	135 per hour

Joseph N. Bulko, Esq.

1997	-	\$130 per hour
1998	-	140 per hour

Victoria Hayes

1996 - \$ 50 per hour
1997 - 55 per hour
1998 - 60 per hour

Applying those hourly rates to the contemporaneous time records submitted, the Court will approve the Fee Application of Grass, Balanoff & Whitelaw in the sum of \$6,545.95 in fees and \$940.40 in disbursements and the Fee Application of Costello, Cooney & Fearon in the sum of \$3,754.50 in fees. There was no request for reimbursement of expenses in connection with this Application.

The balance of \$6,742.54 shall be distributed to unsecured non-priority creditors.

IT IS SO ORDERED.

Dated at Utica, New York

this 16th day of September 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge