

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

FIRST AND GOAL, INC.

CASE NO. 87-00914

Debtor

APPEARANCES:

HAROLD P. GOLDBERG, ESQ.
Attorney for Debtor
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LEE WOODARD, ESQ.
Trustee
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COSTELLO, COONEY & FEARON, ESQS.
Attorneys for Norstar Bank
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MICHAEL RELIGA, ESQ.
Of Counsel

RICHARD CROAK, ESQ.
Office of U.S. Trustee
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FOX, USHER, WINTERS & BAASCH
Accountants
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Syracuse, New York 13202

STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

The Court considers herein the Final Account of Trustee and Application for

Compensation of various professionals in connection with this Chapter 7 case and the preceding Chapter 11 case.

A hearing on the Trustee's Final Account and the various Applications was held before the Court on June 4, 1991 at Syracuse, New York with the Trustee and the several professionals appearing either by counsel or in person. At the hearing the Court reserved decision and gave the parties additional time to submit further documentation in support of their Applications. The only additional documentation received was a letter from Fox, Usher & Company, C.P.A. dated July 9, 1991; a letter from Costello, Cooney & Fearon, Esqs. dated June 28, 1991 and an Affirmation from Harold Goldberg, Esq. dated June 11, 1991.

The Applications pending before the Court may be summarized as follows:

Chapter 7 (converted from Chapter 11 by Order dated July 15, 1988).

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| 1) Lee Woodard, Esq. ("Woodard") - Trustee's Commissions and Expenses Requested - \$1,900.23 | |
| 2) Baum & Woodard, Esqs. ("B&W") - Attorneys for Trustee - Fee Requested - \$1,675.00 | |
| 3) Thomas L. Fox ("Fox") - Accountant for the Trustee - Fee and Disbursements Requested - \$7,651.50 | |
| 4) Costello, Cooney & Fearon, Esqs. ("Costello") - Attorneys for Norstar Bank, a Secured Creditor - | F e e a n d |
| Disbursements Requested - | \$7,870.59 |

Chapter 11 (filed 6/29/87)

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|---|------------------------|
| 1) Fox, Usher, Winters & Baasch ("Fox-Usher") - Accountants for DIP - Fee and Disbursements | Requested - \$8,596.07 |
| 2) Goldberg, Harding & Talev ("Goldberg") - Attorneys for DIP - Fee Requested - \$5,000.00 | |

The Trustee's final Account reflects a balance on hand of \$19,519.74 from which the various professionals have requested payment.

Section 726(b) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") provides generally that a claim allowed under Code §503(b), a so-called administrative claim, which has been incurred in a case converted to Chapter 7, takes priority over a Code §503(b) claim incurred in the prior case (here a Chapter 11 case).

Thus, it is clear that the administrative claims of Woodard, B&W, and Fox, incurred in the Chapter 7 case in whatever amount allowed, take priority of payment over the claims of Fox-Usher and Goldberg, and all other so-called "DIP" claims incurred in the prior Chapter 11 case.

The fee requested by Costello is not administrative in nature, but is based upon Code §506(b) for services rendered on behalf of Norstar Bank, an oversecured creditor, and would appear to take precedence over all other claims considered herein.

Costello contends that its fees and disbursements are actually a part of the secured claim of Norstar, but were simply not paid at the time the Trustee disbursed some \$23,123.35 to Norstar on July 10, 1989 pursuant to an order of this Court dated June 29, 1989.¹

Costello now seeks payment of the attorneys' fees referred to in their prior Fee Applications pursuant to code §506(b). There has been no opposition to Costello's Fee Applications raised by any party in interest. That does not, however, exempt the Court from its independent duty to assess the reasonableness of the fees being sought by Costello. In re Wonder Corp. of America, 82 B.R. 186 (D.Conn. 1988); In re Krohn Bros Dev. Co., 88 B.R. 997 (Bankr. W.D.Mo. 1988), later proceeding 91 B.R. 525.

In order to obtain approval of attorneys' fees pursuant to Code §506(b) three criteria

¹ The Court notes that Costello originally filed an Application for Attorneys' Fees on September 6, 1988, together with a Supplemental Application for Attorneys' Fees on September 21, 1988, both of which were held by the Court for the Final meeting of Creditors. ("Fee Application").

must be met: 1) the underlying agreement must provide for fees; 2) the value of the collateral must exceed the amount of the debt, including interest and fees sought, and; 3) the fees requested must be reasonable. See In re B & W Management, Inc., 63 B.R. 395 (Bankr. D.C. 1986).

There appears to be no dispute that Costello has met the first two criteria in this case. It is the third criteria that is questionable.

An examination of Costello's initial Fee Application filed September 6, 1988, is supported by various billings rendered by Costello to Norstar which are submitted in lieu of contemporaneous time records required by Federal Rule of Bankruptcy Procedure 2016 ("F.R.Bankr.P.") and Rule 17(a)(4) of the Local Bankruptcy Rules for the Northern District of New York ("Local Rules"). The billing dated 10/6/87 clearly does not comply with Local Rule 17(a)(4), though it may be argued that Costello is not seeking professional compensation pursuant to Code §330 and should not be held to the standard of that Local Rule. In addition, the billing dated 7/11/88 includes time previously charged on the billing dated 6/20/88, resulting in negative adjustment of \$736.25.

Costello also filed a Supplemental Fee Application on September 21, 1988 seeking an additional \$1,085.60, utilizing the same client billing format in support of the Supplemental Application to demonstrate reasonableness.

A review of both Fee Applications indicates that Costello devoted a substantial amount of time to extricating a so-called "cash collateral" stipulation from the Debtor while still in the Chapter 11 case, and thereafter seeking an order lifting the stay when the Debtor failed to comply with the Stipulation.

Costello acknowledges in its Fee Application that at the time the Debtor filed Chapter 11 its secured debt totalled \$24,833.91 against collateral valued at a cost of \$275,000.

Given the amount of the debt due its client, Norstar, versus the alleged value of the security, the Court must conclude that Costello's efforts on behalf of its client, while not necessarily characterized as "hyperactive to nearly hysterical", (See In re Reposa, 94 B.R. 257, 261 (Bankr. D.R.I. 1988), were in a large portion, "not necessary either to the collection of, or to protect the bank's claim". Id. at p.262. Here the attorneys' fees sought by way of the Fee Application and Supplemental Fee Application equal 34% of the amount paid to Norstar by the Trustee.

Given the foregoing, the Court concludes that Costello is entitled to reasonable legal fees of \$5,780 plus expense reimbursement of \$150.00, recognizing as did Bankruptcy Judge Arthur Votolato, Jr., "that a determination in these circumstances necessarily includes an element of subjectivity." In re Reposa, supra 94 B.R. 262.

Turning to the Chapter 7 Trustee's commissions of Woodard, the court notes that they have been properly calculated in accordance with Code §326(a), and the Court believes, upon review of the Trustee's final report that the maximum commission is warranted and is, therefore, approved in the sum of \$1,878.73, plus reimbursement of expenses in the sum of \$21.50.

With regard to the Fee Request of B&W as attorneys for the Chapter 7 Trustee, the Court will approve 12.8 hours at an hourly rate of \$125.00 per hour or \$1,600.00.

Turning to the final administrative expense in the Chapter 7 case, the Final Report and Application of Fox. The Court is again troubled.

Accounting services rendered to a Chapter 7 trustee in liquidating assets and winding up the affairs of a non-operative Chapter 7 debtor are generally limited to preparation of final tax returns. In the instant case, the Order of March 3, 1989 appointing Fox was supported by the Trustee's application, which enumerated three specific tasks Fox was required to perform. One of the three tasks, in retrospect, is somewhat inappropriate, to wit: To report to the trustee regarding

financial status of the debtor". Nevertheless, Fox and those apparently in his employ proceeded to render services for which Fox now seeks \$7,651.50 or approximately 40% of the balance on hand in the Trustee's account.

Fox asserts that the time devoted to the Chapter 7 case was significantly increased by the lack of cooperation provided by the Debtor's former principals, a failure of the Debtor to file tax returns for at least two prior years and a lack of help from the Debtor's predecessor accounting firm.

While the Court understands that Debtor's business was carried on in more than one location, and involved a significant amount of inventory, it still finds the fee sought to be out of line with the benefit produced.

The Court also notes that Fox's firm, Fox-Usher, had been appointed as accountants for the Chapter 11 Debtor, effective September 3, 1987, and continued in that capacity through the conversion of the case to Chapter 7 on July 15, 1988, for which a fee is separately sought by Fox-Usher of \$8,516.60. Thus, between September 3, 1987 and November 24, 1989, Fox and/or Fox-Usher seeks some \$16,000 in accounting fees in a bankruptcy case that has generated some \$19,500 for distribution to all creditors.

It is apparent that the true beneficiaries of Fox's expensive services will be the corporate principals whose personal liability, if any, will have been, at least fixed and possibly minimized by the preparation and filing of final corporate tax returns.

Finally, it is to be noted that while the Order of this Court dated March 3, 1989 appointed only "Thomas Fox as accountant for the Trustee", effective February 24, 1989, Fox apparently utilized the services of two other individuals for which he seeks compensation herein. One of those individual, Gennaro J. Concolino, expended some 110 hours for which Fox seeks

approximately \$6,000.

While it would undoubtedly be unfair and inequitable to deny Fox any fee except for the services actually performed by him, it is likewise improper in the Court's view to compensate professionals in any bankruptcy case so that the entire estate is consumed by the award of such compensation, albeit that it is entitled to priority under Code §507(a)(1).

Accordingly, the Court will award Fox the sum of \$6,000 in professional fees incurred during the period February 24, 1989 through November 24, 1989 to be paid as an administrative expense in the Chapter 7 case.

Turning to the professional fees sought in connection with Debtor's Chapter 11 case, the Court notes that Trustee's Final Report makes reference to "DIP" claims of \$639,192.02, which are to be considered on a parity with the professional fees in accordance with Code §503(b) and Code §507(a)(1). Thus, whatever award this Court makes with regard to Goldberg and Fox-Usher, their fees may be paid pro rata with the remaining "DIP claims", since it is apparent that the funds on hand are insufficient to pay these Chapter 11 administrative claims in full.

Fox-Usher seeks a fee for services rendered in the Chapter 11 case of \$8,516.60, plus disbursements of \$79.47. The instant application is the second one filed in the Chapter 11 case, Fox-Usher having been previously awarded a fee of \$2,690 by Order of this Court dated June 20, 1988.

In reviewing Fox-Usher's contemporaneous time records, it again appears that much of its time was consumed in organizing the Debtor's books and records in an effort to prepare tax returns and monthly operating reports. As a result, Fox-Usher's fee request totals in excess of \$11,000 in a case which was pending in Chapter 11 for little more than one year before converting to Chapter 7.

The Court will, however, approve Fox-Usher's fee request of \$8,516.60 and

reimbursement of expenses in the sum of \$79.47 to be paid pro rata with other administrative expenses incurred in the Chapter 11 case.

Finally, the Court has reviewed the Attorney's Affirmation of Goldberg filed on June 13, 1991 subsequent to the June 4, 1991 hearing, and in response to the direction of the Court at said hearing.

Goldberg was appointed to act as Debtor's counsel in the Chapter 11 case pursuant to an Order of this Court dated June 29, 1987. The Application submitted in support of the Order of appointment disclosed that Goldberg "negotiated a fee of \$5,000" apparently "At the outset of this proceeding". (See Affirmation of Goldberg dated June 22, 1987).

Goldberg has submitted contemporaneous time records which reflect services both pre and post-petition, that when compensated at the requested hourly rate of \$125.00 justify a fee of \$6,739.58, which is hereby approved.

Nevertheless, the Court concludes that the \$5,000 retainer was property of the estate under Code §541 and to the extent that it enabled Goldberg to obtain payment of a greater percentage of its Chapter 11 administrative claim than other holders of Code §503(b) claims, it must be disgorged to be distributed pro rata. See In re Chapel Gate Apartments Ltd., 64 B.R. 569 (Bankr. N.D.Tex. 1986).

Therefore, upon a determination by the Trustee of the actual amount of distribution that shall be made to Chapter 11 administrative claimants, Goldberg shall remit to the Trustee such portion of the \$5,000 as shall be necessary to effect such pro rata distribution.

IT IS SO ORDERED

Dated at Utica, New York

this day of September, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge