UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HAROLD W. MC KENZIE — CASE NO. 95-61413

Debtor — Chapter 13

APPEARANCES:

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

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

The Court considers herein three fee applications filed in this Chapter 13 case by David H. Cohen, Esq. ("Cohen"), Debtor's attorney.

The first fee application was filed on June 30, 1995, and was scheduled for argument before this Court in Binghamton, New York on August 14, 1995. That application sought total fees of

$2,500 which covered February 6, 1995 through June 26, 1995.[1]

The second application was filed November 17, 1995 and was scheduled for argument before this Court at Binghamton, New York on December 11, 1995. The second application, which includes all of the hours reflected on the first application plus additional hours consumed through December 11, 1995, seeks approval of a fee of $1,160 allegedly paid to Cohen pre-petition, plus an additional award of $4,500.[2] It is not entirely clear if Cohen seeks two separate awards of $2500 and $5660, respectively, or a single award of $5660.

On January 22, 1996, Cohen filed two more motions, one seeking additional attorney fees of $1,332.50 for the period 11/15/95 through 1/18/96 and the second requesting payment out of the funds held by the Chapter 13 Trustee in the event the case was dismissed. Those motions were scheduled for the Court's motion calendar at Binghamton, New York on February 12, 1996. There was no opposition to any of the fee applications.

JURISDICTIONAL STATEMENT

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

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[1] The actual time records attached to the first application indicate fees and disbursements of $5,735, with total pre-petition payments of $1,160, leaving a balance allegedly due of $4,575.

[2] The actual time records attached to the second application, inclusive of the time reflected on the first fee application, indicate fees and disbursements of $7,357.50.

FACTS AND ARGUMENTS

A review of the docket of this Chapter 13 case indicates that it was filed on April 26, 1995 and since that date the Debtor has filed four separate Chapter 13 plans without obtaining confirmation. The primary objectant to Debtor's various plans has been the Internal Revenue Service ("IRS"), which contends generally that the proposed Chapter 13 plans do not provide sufficient payments to satisfy its claims in full as required by §1322(a)(2) of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code"), and that Debtor's proposed allocation of his allegedly involuntary payments to the IRS pursuant to any such plan is contrary to prevailing case law.[3]

A review of Cohen's fee applications indicates that he is charging $150 per hour for out of court time; $200 per hour for in court time; and, $30 per hour for paralegal time. When travelling, between Binghamton, New York and Utica, New York, Cohen bills at one half his hourly out of court rate or $75 per hour.

Debtor's Chapter 13 petition indicated total assets valued at $185,441 and total liabilities of $307,332. It appears that he intends to fund his Chapter 13 plan with income derived, primarily, from the sale of his former insurance business. As indicated, Debtor has been unsuccessful in confirming a plan to date.[4]

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[3] Objections to plan confirmation have also been interposed by Debtor's former spouse, Catherine C. McKenzie.

[4] On February 12, 1996, the Court orally denied confirmation of the Third Amended Plan and ordered a dismissal of Debtor's

DISCUSSION

Lest there was ever any doubt, Congress in enacting the Bankruptcy Reform Act of 1994, specifically empowered a bankruptcy court to, sua sponte, "award compensation that is less than the amount of compensation that is requested". See Code §330(a)(2) amended effective October 22, 1994. Thus, the absence of party in interest objection to legal fees requested in a bankruptcy case is not an impediment to the Court's independent review of that request.

In its significant revision of Code §330, Congress delineated certain factors which a bankruptcy court shall consider in reviewing a fee application. See §330(a)(3)(A). Perhaps most significant among the factors set out in the amendments to the statute is found in subsection (a)(3)(C), "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title". From the foregoing, it is clear that not all professional services rendered in bankruptcy cases are compensable simply because they have been rendered in good faith.

As Bankruptcy Judge JoAnn C. Stevenson pointed out in the case of In re Copeland, 154 B.R. 693 (Bankr. W.D.Mich. 1993) at page 704,

> "It is important that debtors in bankruptcy have competent, qualified counsel, and it is equally important that counsel be fairly and

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Chapter 13 case.

> reasonably compensated. In the vast majority of Chapter 13 cases, this court therefore allows the fees requested in full. But in a time when the bankruptcy system is generally perceived as serving the interests of bankruptcy professionals at the expense of the debtors and creditors the system was designed to serve, this Court will not allow the fees of professionals to exceed reasonable limits."

While the Court does not suggest that attorney fees should be artificially capped in a Chapter 13 case, the Court does believe that there is generally a range of fees in Chapter 13 cases filed within this District which do not invite specific scrutiny by this Court. Needless to say, the fees sought herein by Cohen far exceed that acceptable range.

The instant Chapter 13 case was filed on April 26, 1995 and was rapidly approaching its first anniversary without a confirmed plan when the Court orally dismissed the case. The case has basically resolved itself into a legal tug of war between a Debtor with significant pre-petition tax liability and the IRS. The Debtor had filed four Chapter 13 plans in an effort to deal with his tax liability within the parameters of the Bankruptcy Code. Additionally, he has objected, unsuccessfully, to the nature of the IRS' claims. (<u>See</u> Memorandum-Decision, Findings of Fact, Conclusions of Law and Order dated November 6, 1995)("November 6th Decision"). To a lesser extent, Debtor had been required to respond to objections filed in opposition to one or more of his Chapter 13 plans by his former spouse, Catherine C. McKenzie.

The time records submitted by Cohen appear to accurately support the fees requested, but that does not end the Court's inquiry when one considers the mandate of Code §330(a)(3)(C). In considering the value of services vis a vis their benefit to the estate, it must be kept in mind that not every individual may be eligible for Chapter 13 relief. Despite the best efforts of counsel, confirmation of a Chapter 13 plan in accordance with Code §§1322 and 1325(a) may be unattainable. At some point in the process, bankruptcy counsel recognizes the legal if not the actual inability of his or her clients to confirm a plan. Beyond that point, counsel's services should not be compensated. This Court thinks it became apparent that the case sub judice was one which was incapable of reaching a confirmed plan, certainly from a legal perspective some time ago.

On February 12, 1996, the Court orally denied confirmation of Debtor's Third Amended Plan due primarily to its lack of compliance with Code §1322(a)(2) and dismissed the case pursuant to Code §1307(c)(1). The legal impediment presented by Code §1322(a)(2) has been known to Cohen in this case for several months. In fact, prior to the Court's November 6th Decision, Cohen indicated that if Debtor was unable to effectively "strip" the IRS' secured claim, it was doubtful that Debtor could propose a confirmable plan. (See November 6th Decision at page 4).

Thereafter, and in spite of the Court's rejection of Cohen's arguments in support of Debtor's Objection to the IRS' claims, he filed two more amended plans which were essentially mirrors of one another insofar as the IRS was concerned. The benefit of those services to this Debtor's estate or the Debtor individually at the time they were rendered, is very questionable.

Under all of the foregoing circumstances and the mandates of Code §330(a)(3)(B), this Court will approve the pre-petition payments to Cohen in the sum of $1,160. See Code §329. Additionally, the Court will approve $2,500 for services rendered between April 26, 1995 and November 5, 1995, recognizing that while such an award does not embrace the so-called "lodestar" approach, it does fairly compensate Cohen within the range of fees for similar Chapter 13 cases filed within this District. The award of $2,500 shall be paid by the Chapter 13 Trustee from the funds which he presently has on hand pursuant to §1326(a)(2) and prior to the actual entry of an order dismissing this case.

IT IS SO ORDERED.

Dated at Utica, New York
this 22nd day of February 1996

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge