

IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED  MAR 30 1968  MOLLIE C. JONES, CLERK BY _____ DEPUTY
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IN RE:

W. J. RUNYON & SON, INC.

CASE NO. 8600304WC

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Edward Ellington, Bankruptcy Judge

**ORDER ON "APPLICATION FOR PAYMENT OF  
ATTORNEY'S FEE" FILED BY SUPERIOR  
AUCTIONEERS AND MARKETING, INC.**

THIS MATTER came before the Court on Superior Auctioneers and Marketing, Inc.'s "Application for Payment of Attorney's Fee" and "Memorandum in Support of Attorney's Fees"; responses by W. J. Runyon & Son, Inc. and Crocker National Bank; and Superior Auctioneers and Marketing, Inc.'s (Superior) "Supplemental Application

for Attorney's Fees. "After considering the matter, the Court finds that Superior Auctioneers and Marketing, Inc.'s application is not well taken and is hereby denied.

#### FACTS

On April 3, 1986, W. J. Runyon & Son, Inc. (Debtor) filed an application to sell assets free and clear of liens and encumbrances. An Order approving the sale of assets was entered by this court on July 28, 1986.

It is important to note two paragraphs in the July 28th Order which require that after the conclusion of the sale, the Debtor and auctioneer shall file applications with the court for payment of any compensation and reimbursement of expenses. Paragraph number 7 of the Order provides:

That within ten (10) days after said auction sale, the debtor and the auctioneer shall make application with this Court for reimbursement of all expenses necessarily incurred in connection with said auction sale pursuant to the auction sale agreement, which application shall include copies of invoices and evidence of payment of said expenses.

Paragraph number 8 of the Order provides:

That within ten (10) days after the conclusion of said auction sale, the auctioneer shall make application for payment of:

a. All sales taxes; and

b. A commission to be paid from the gross receipts (excluding sales taxes) of the auction sale as set forth in the auction sale agreement.

An auction sales agreement was attached as an exhibit to the July 28th Order purporting to be substantially the form of the auction sales agreement the Debtor would execute after the Court approved the sale of assets. Paragraph numbered Roman numeral VII of the agreement provides that the Debtor has the responsibility of delivering the equipment to the auction site with mounted attachments, operating batteries, and adequate fuel; and in sufficient time for "make-ready" preparation and inspection by prospective purchasers. The provisions further provide that all costs incurred by the Debtor necessary to comply with the delivery requirements shall be reimbursed from the proceeds of the sale, subject to approval of this Court. Paragraph numbered Roman numeral VIII of the agreement provides that the auctioneer shall supervise and manage all the "make-ready" repairs and cosmetic work done to enhance the sale of the equipment and maximize the net dollar return from the sale. Again, the agreement provides that all expenditures made by the auctioneer for supervisory assistance and "make-ready" preparations shall be deducted from the sale proceeds of the auction, subject to approval of this Court.

Thus, the Court finds that on October 24, 1986, Superior filed its petition for accounting and payment of commissions, fees and expenses seeking Court approval as required by the July 28th Order. The Debtor filed a response to Superior's Petition and requested the Court's approval for reimbursement of the Debtor's expenses in relation to the auction sale, also in accordance with the July 28th Order. Credit Alliance Corporation, a creditor of the bankrupt debtor, filed an objection to Superior's Petition.

On December 19, 1986, the Court heard the Objection of Credit Alliance Corporation to Superior's Petition. After considering the evidence presented at trial and reviewing all documents and pleadings, the Court found that the fees and expenses requested in Superior's Petition and the expenses requested by the Debtor were appropriate and were allowed to be deducted from the sale proceeds of the equipment. Testimony showed that the work done and expenses incurred were necessary for the proper disposal of the property and were beneficial to the creditor in that all expenses enhanced the value of the equipment and were in an effort to realize the highest potential sales price. The Court further found that following an accounting of all fees and expenses requested by Superior and the Debtor, the fees and expenses were reasonable under the

circumstances of this case and in keeping with the Order of this Court dated July 28th.

Subsequent to the hearing held on December 19, 1986, Superior requested the Court to approve attorney fees incurred by Superior in defending its Petition. On January 22, 1987, the Court entered its "Order on 'Accounting and Petition for Payment of Commissions, Fees and Expenses' filed by Superior Auctioneers and Marketing, Inc." The Court reserved ruling on the approval of attorney fees for the representation of Superior. Superior was allowed 15 days from the date of the entry of the Order in which to submit a memorandum to the Court containing specific code sections and case law in which a creditor such as Superior was allowed attorneys fees under like circumstances. Superior was to submit a copy of its memorandum to the other parties in interest, at which time the other parties were allowed 10 days in which to file a response with the Court.

Superior filed its "Application for Payment of Attorney's Fee" and "Memorandum in Support of Attorney's Fees" on February 5, 1987. The Debtor filed its Response on February 25, 1987. Crocker National Bank filed its response on March 3, 1987. Both Responses were filed more than 10 days after the entry of Superior's Application in violation of the January 22,

1987 Order.

In its Application Superior requests that the Court approve its Application for fees and expenses incurred in the representation of Superior by John T. Sanders. Superior requests an award of \$2,970.00 (27 hours at \$110.00 an hour) for professional services rendered by Mr. Sanders in defending Superior's "Accounting and Petition for Payment of Commissions, Fees and Expenses" against the Objection to same filed by Credit Alliance Corporation.

Superior also requests the Court to award it \$342.19 in out-of-pocket expenses incurred by Mr. Sanders in his representation of Superior.

Superior also requests the Court to award an additional \$220.00 (2 hours at \$110.00 an hour) which "will be expended by Movant in the continuing discharge of its duties to the Applicant, Superior Auctioneers & Marketing, Inc., including but not limited to, consultation with the Court with regard to the application of the attorneys for the Movant concerning the request for attorney's fees as well as any responses necessitated by answers or objections filed on behalf of other parties." (See "Application for Payment of Attorney's Fees", p.3).

Superior filed a "Supplemental Application for Attorney's Fees" on March 6, 1987. Superior states

that in its previous Application it had requested the Court to approve an additional \$220.00 which Superior anticipated incurring with regard to the Application for Attorney's Fees and any other pertinent matter. However, as a result of the failure of Wells Fargo Bank to pay Superior its commission, expenses and fees awarded by the Court on January 22, 1987, Superior asserts that it incurred additional attorney's fees above the two (2) hours requested in the original Application. Subsequently, Superior requests the Court to approve an additional \$1,100.00 (10 hours at \$110.00 an hour) in attorney fees incurred by Superior "in its continuing effort to collect fees, commissions and expenses awarded under the Court's order of January 22, 1987."

To summarize: Superior requests the Court to award it attorney fees and expenses incurred by it from December 5, 1986 through the date of the ruling on the application in the amount of:

Application:

27 hours at \$110.00 = \$2,970.00

2 hours at \$110.00 = 220.00

Supplemental:

10 hours at \$110.00 = 1,110.00

Expenses 342.19

Total \$4,632.19

Superior requests the Court to award to it \$4,632.19 out of the funds realized through the sale authorized by the Court.

#### DISCUSSION

In its "Memorandum in Support of Attorney's Fees", Superior states: "(T)he basis of Movant's argument that it is entitled to recoup its attorney's fees necessarily incurred in the presentation of its petition of payment of fees, commissions and expenses as well as the response to the objection of Credit Alliance Corporation is §330(a) of the Bankruptcy Code."

The compensation and reimbursement of expenses of a professional person are controlled by §330. Section 330(a) states:

(a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328 and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney --

(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney as the case may be, based on the nature, the extent, and the value of such services, the time spent on such



services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual, necessary expenses.

The only professionals who may be compensated under §330 are those whose employment is authorized by section 327 or 1103. 2 Collier on Bankruptcy, Ch. 330.04 (MB 15th Ed. 1987). Section 327 addresses the employment of professional persons by the trustee. Section 1103 authorizes a duly appointed unsecured creditors committee to employ professional persons. Neither situation has occurred in the case at bar. Superior is neither the trustee in this case nor a member of an unsecured creditors committee. Rather, Superior is seeking compensation for professional persons it had hired to represent it (Superior) in this bankruptcy. Therefore, on the face of §330(a), Superior's attorneys are not entitled to compensation from the debtor's estate.

Superior cites several cases in support of its application for attorney fees. However, all four cases cited by Superior in support of its application can be distinguished from the case at bar. In re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985) addressed the issue of compensation for the debtor-in-possession's attorney. Braswell Motor Freight Lines v. Crutcher, Burke and Newson (In re Baswell Freight

Lines, Inc.); 639 F.2d 348 (5th Cir. 1980) dealt with the fee application of the attorney for the operating receiver in a Chapter 11 bankruptcy proceeding. Again, in Rose Pass Mines, Inc. the attorney requesting fees acted as the receiver and subsequently, was appointed trustee of the bankruptcy estate.

All of the above cases can be distinguished from Superior's application. In all of these cases, the person seeking compensation from the debtor's estate for professional services rendered was a professional person specifically entitled to compensation under the Bankruptcy Code.

Superior also cites In re First Colonial Corporation of America, 544 F.2d 1291 (5th Cir. 1977), cert. denied, 431 U.S. 904 (1977), in support of its application. First Colonial also pertained to the fee application of the attorney for the trustee. First Colonial set forth eleven (11) factors to be considered by the Court in determining a reasonable allowance of compensation. First Colonial requires that "each attorney seeking compensation should be required to: file a statement which recites the number of hours worked and contains a description of how each of those hours was spent. (citation omitted). In re First Colonial, 544 F.2d at 1299.

Mr. Sanders sets forth in the "Application for Payment of Attorney's Fees" the eleven factors

enumerated in First Colonial. He also attached a time sheet with a detailed description of how each hour was spent. Although Mr. Sanders may have complied with the requirements of First Colonial in his application for fees, he has not set forth any provision in the Bankruptcy Code which authorizes the Court to award him the fees he has requested from the debtor's estate.

The court has examined numerous cases, but did not find any case supportive of Superior's argument which would authorize the payment of attorney fees out of the debtor's estate to Superior. See: Larve v. Stanley (In re Gulf Hills Development Corp.), 60 B.R. 366 (Bankr.S.D.Miss. 1985)(awarding fees to trustee and attorney for trustee); Matter of Mansfield Tire and Rubber Company, 65 B.R. 446 (Bankr. N.D. Ohio 1986) (Attorney for debtors-in-possession, trustees and accountants); United States v. Larchwood Gardens, Inc., 420 F.2d 531 (3rd Cir. 1970) (Receivers, Attorney and Accountant for Receivers); In re Sayegh, 62 B.R. 601 (Bankr.S.D.Tex. 1986)(Attorney for debtors); In re Ellrich, 16 B.C.D. 1258 (Bankr.S.D.Fla. 1987)(Attorney for debtors).

A line of cases deals with the awarding of attorney fees and expenses to members of the unsecured creditors committee. The standard in the 5th Circuit was established in Pierson and Gaylen v. Creel and

Atwood (Matter of Consolidated Bancshares, Inc.), 785  
F.2d 1249 (5th Cir. 1986).

"Compensation has been denied where the services rendered by the creditor or shareholder were only 'remotely related to the reorganization,' (citation omitted) on the theory that 'a creditor's attorney must ordinarily look to its own client for repayment, unless the creditor's attorney rendered services on behalf of the reorganization, not merely on behalf of his client's interest, and conferred a significant and demonstrable benefit to the debtor's estate and the creditors.' (emphasis added). The inquiry regarding a substantial contribution is one of fact." 785 F.2d at 1253.

Superior has not shown that it has provided a substantial contribution or benefit to the debtor's estate. Superior states in its application that the services of Mr. Sanders were performed solely for the benefit of Superior and no one else.

Mr. Sanders' time sheet attached to the application dates from December 5, 1986. The auction was held October 8, 1986. Mr. Sanders began his representation of Superior 13 days before the hearing on the "Objection of Credit Alliance Corporation to Payment of Auctioneer's Commissions, Fees and Expenses." Mr. Sanders continued his representation of Superior through Superior's attempts to collect its award of fees from the auction proceeds which were being held by Wells Fargo Bank.

Clearly, the estate received no substantial benefit from Mr. Sanders actions. "Generally, counsel to a creditor represents the interests of that party and must look to that creditor, not the estate, for compensation. (citation omitted)." In re Washington Lane Associates, 16 B.C.D. 1130, 1131 (Bankr.E.D.Pa. 1987).

See also: Matter of UNR Industries, Inc., 736 F.2d 1136 (7th Cir. 1984) (Not allow payment of fees of individual creditor on unsecured creditor's committee); In re General Oil Distributors, Inc., 51 B.R. 794 (Bankr. E.D.N.Y. 1985) (UCC expenses approved; individual member's expenses allowed only if substantially contribute to estate); In re GHR Energy Corp., 35 B.R. 539 (Bankr.D.Mass. 1983) (allowed UCC members to be reimbursed for expenses); Bank of Ruleville v. W. J. Chudy (In re W. J. Chudy), 62 B.R. 105 (Bankr.N.D.Miss. 1986) (secured creditor); Blackburn-Bliss Trust v. Hudson Shipbuilders (In re Hudson Shipbuilders), 794 F.2d 1051 (5th Cir. 1986) (secured creditor); In re Erewhon, Inc., 21 B.R. 79 (Bankr.D.Mass. 1982) (secured creditor).

#### CONCLUSION

After careful examination, the court is unable to find any basis for granting Superior its request for fees and expenses. "Only those legal

services rendered in administering the estate and in carrying out the debtor's statutory obligations are recoverable from the estate, as administrative expenses. . ." In re Ellrich, 16 B.C.D. 1258, 1259 (Bankr.S.D.Fla. 1987). Consequently, Superior's "Application for Payment of Attorney's Fee" filed by Ihfe and Miller is hereby denied.

SO ORDERED this the 30<sup>th</sup> day of March, 1988.

  
UNITED STATES BANKRUPTCY JUDGE