

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Michael J. Copack

Bankruptcy No. 01 B 09341

Adversary Caption: N/A

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Judge: John H. Squires

Appearance of Counsel:

Attorney for Movant: Robert R. Benjamim, Benjamin and Berneman, Ltd., 205 West Randolph Street, Suite 2110, Chicago, IL 60606

Attorney for Respondent: Carolyn A. Suzzi, Esq., Office of Glenn Stearns, Chapter 13 Standing Trustee, 4343 Commerce Court, #120, Lisle, IL 60532

Trustee: Glenn Stearns, Chapter 13 Standing Trustee, 4343 Commerce Court, #120, Lisle, IL 60532

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	Chapter 13
MICHAEL J. COPACK,)	Bankruptcy No. 01 B 09341
)	Judge John H. Squires
Debtor.)	

MEMORANDUM OPINION

This matter comes before the Court on the application of Robert R. Benjamin (“the Attorney”) for fees in the sum of \$4,080.00 and reimbursement of expenses totaling \$205.00, and the objection thereto filed by Glenn B. Stearns, the Chapter 13 Standing Trustee (the “Trustee”). For the reasons set forth herein, pursuant to 11 U.S.C. § 330, the Court awards the Attorney compensation in the sum of \$2,410.00 and authorizes reimbursement of expenses in the amount of \$205.00. The Court sustains, in part, the objection of the Trustee.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. FACTS AND BACKGROUND

On November 21, 2000, the Debtor filed a Chapter 7 bankruptcy petition (Case

No. 00 B 34222). The Attorney represented the Debtor in that case. The Debtor received a discharge on March 5, 2001. On March 19, 2001, the Debtor filed the case at bar by a Chapter 13 petition. A plan was confirmed on September 21, 2001. The plan provides that all creditors are to be paid 100% of their allowed claims.

On September 13, 2001, the Attorney filed the instant application for compensation. The Attorney seeks an award of \$4,080.00 in fees for 19.40 hours of legal services rendered at the hourly rates of \$200.00 - \$250.00 per hour. In addition, the Attorney seeks reimbursement of his expenses in the amount of \$205.00 for the court costs of filing the case and an amendment to one of the Debtor's Schedules. On September 21, 2001 at the hearing on the application, the Trustee requested leave to file an objection to the application. The Attorney waived the filing of any response to the Trustee's objection and further waived any evidentiary hearing.

The Trustee recommends that the Court only award the Attorney \$1,200.00, the amount the Attorney disclosed in the Statement Pursuant to Rule 2016(b), which was paid by the Debtor prior to the filing of this case. The Trustee argues that many of the services rendered were unreasonable and excessive. In particular, the Trustee notes that the time expended drafting the Schedules and Statement of Affairs, in light of the fact that the Attorney represented the Debtor in the recent prior case, constitutes an unreasonable expenditure of time. Moreover, the Trustee objects to the time spent by the Attorney regarding the Debtor's unfiled 2000 income tax return. The Trustee contends that the Attorney should have been able to ascertain in a relatively short amount of time, not the allegedly excessive time spent, that the tax return was not filed and needed to be filed.

III. DISCUSSION

A. Award of Attorney's Fees

Pursuant to 11 U.S.C. § 330 professionals applying for fees payable out of the bankruptcy estate must demonstrate that their services were actual, necessary and reasonable. Specifically, § 330(a)(4)(B) provides in relevant part:

In a . . . chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B) (emphasis supplied). Those other factors referred to are set forth as follows:

- (3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--
- (A) the time spent on such services;
 - (B) the rates charged for such services;
 - (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;
 - (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance and nature of the problem, issue, or task addressed; and
 - (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

4(A) Except as provided in subparagraph (b), the court shall not allow compensation for—

- (i) unnecessary duplication of services; or
- (ii) services that were not--
 - (I) reasonably likely to benefit the debtor's estate; or
 - (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(3) and (4)(A).

The Court has a duty to examine independently the reasonableness of the fees requested. In re Wyslak, 94 B.R. 540, 541 (Bankr. N.D. Ill. 1988); In re Chicago Lutheran Hosp. Ass'n, 89 B.R. 719, 734-35 (Bankr. N.D. Ill. 1988). The burden of proof to show entitlement to the fees requested is on the Attorney. See In re Kenneth Leventhal & Co., 19 F.3d 1174, 1177 (7th Cir.1994); In re Stoecker, 114 B.R. 965, 969 (Bankr. N.D. Ill. 1990); In re Pettibone Corp., 74 B.R. 293, 299 (Bankr. N.D. Ill. 1987); Cohn v. United States Trustee (In re Ostas), 158 B.R. 312, 323 (N.D. N.Y. 1993). This burden must "not be taken lightly, especially given that every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors." Pettibone, 74 B.R. at 299 (citations omitted). The fee application must stand or fall on its own merits. See In re Wildman, 72 B.R. 700 (Bankr. N.D. Ill. 1987).

The Court has utilized the factors cited in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The twelve Johnson factors are as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or

contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Id. at 717-19.¹

The Court may determine what is the reasonable amount of time a professional should have to spend on a given project. Wildman, 72 B.R. at 713 (citing In re Shades of Beauty, Inc., 56 B.R. 946, 951 (Bankr. E.D. N.Y. 1986), aff'd in part, remanded in part, 95 B.R. 17 (E.D. N.Y. 1988)). The Supreme Court, in Hensley v. Eckerhart, 461 U.S. 424 (1983), ruled that "excessive, redundant or otherwise unnecessary" hours should be excluded from the fees sought. In other words, applicants should exercise good faith "billing judgment." Id. at 434; see also In re Temple Retirement Community, Inc., 97 B.R. 333, 339 (Bankr. W.D. Tex. 1989); In re Pothoven, 84 B.R. 579, 584 (Bankr. S.D. Iowa 1988).

Reasonable time spent does not necessarily include all time actually expended. See In re Chas. A. Stevens & Co., 105 B.R. 866, 870-71 (Bankr. N.D. Ill. 1989). Hence, the exercise of good faith billing judgment comes into play. Compensation will not be awarded for nonproductive time, or for time spent on services that are duplicative of previously rendered services. In determining what constitutes reasonable compensation, the Seventh Circuit has stated that "there are limits--measured by standards of reasonableness--to what a professional can demand in a bankruptcy case." Leventhal, 19

¹ The Johnson factors are referenced in LR83.51.5 of the Rules of Professional Conduct for the Northern District of Illinois, applicable here via Local Bankruptcy Rule 608. All of these factors have been considered in this matter and are discussed hereinafter.

F.3d at 1178.

The Seventh Circuit has stated that the appropriate measure for determining reasonable attorneys' rates charged is the market approach. See In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible."). The Court also views the attorney/client relationship as one in which the terms of the engagement should normally be upheld, including the fee arrangement, so as not to unduly intrude upon the bargain struck between the parties who have entered into an important professional relationship. Moreover, the Seventh Circuit has noted that the Bankruptcy Code requires that attorneys involved in bankruptcy matters receive the same compensation as they would earn in performing similar services outside the bankruptcy context. See In re UNR Indus., Inc., 986 F.2d 207, 209-10 (7th Cir. 1993).

The Court has considered all of the Johnson factors. It is clear that although some time and effort was required by the Attorney to draft a facially confirmable plan, the Court finds that there were some excessive amounts of time charged for the results obtained. This case did not involve any new or difficult questions or call for any exceptional skills. Furthermore, there was no showing that the Attorney was precluded from accepting other employment by taking this case. Moreover, there is no customary fee for this work in this district. There was no showing of any specific time limitations imposed by the client or the circumstances. The result obtained in drafting, negotiating,

filing and obtaining confirmation of the plan was good, but the fees sought by the Attorney are simply too high. The case was typical of many Chapter 13 cases filed in this district in which debtors attempt to save their homes and, as such, was neither undesirable nor unusually difficult, even though it was the second case filed by this Debtor. The Attorney's experience, reputation, and ability have been considered and his requested fees and his \$250.00 per hour billing rate for work performed "out of office" are somewhat higher than those of other counsel in this district seeking fees in comparable Chapter 13 cases.

The Court declines to award \$360.00 in fees to the Attorney for the 1.80 hours expended on February 26, 2001. The Debtor received his discharge in the first bankruptcy case on March 5, 2001. This time entry is prior to that point in time and it is unclear to the Court whether this time spent by the Attorney related to work performed in connection with the Debtor's first case, which would not constitute allowable fees in this second case. It appears that this service was of no benefit to the Debtor or the estate in the instant case and, thus, is not allowed.

Next, the Court agrees with the Trustee and finds that the amount of time expended by the Attorney to draft the Schedules and Statement of Affairs that were dated and executed in March 2001, was unreasonable and excessive especially in light of the fact that the Attorney received \$1,700.00 in the prior case, as disclosed on his Rule 2016(b) statement. It appears that the Attorney spent 8.50 hours on this task (02/26/01 1.80 hours; 03/13/01 2.50 hours; 03/19/01 1.50 hours; 06/07/01 .40 hours; 06/13/01 .50 hours; and 06/13/01 1.80 hours). Given the fact that the Attorney represented the Debtor

in the prior Chapter 7 case wherein those Schedules were dated and executed in November 2000, and much of the information was already available to the Attorney because he had utilized that information to prepare the Schedules and Statement of Affairs in the Chapter 7 case, the preparation of the Schedules and Statement of Affairs in the instant Chapter 13 case should not have required the amount of time the Attorney expended. Comparing and contrasting the two sets of papers shows few material changes, except for the elimination of most of the unsecured debt scheduled in the present case (as a result of the Debtor's Chapter 7 discharge received in the first case) and the inclusion of the current monthly income on Schedule I in the present case (in contrast to no income reported in the first case because the Debtor was then unemployed).

Moreover, the Attorney amended the Debtor's Schedules I and J to reflect the child support payment on Schedule I rather than Schedule J. A review of the Debtor's pay stub would have shown that the child support payment is deducted from the paycheck. Further, Schedule E had to be amended to reflect withholding taxes for the Debtor's failed business. This information was listed on the Statement of Affairs and should have been known to the Attorney. Finally, Schedule D had to be amended to reflect the arrears on the Debtor's second mortgage. Again, the Attorney should have been able to correctly ascertain this information during the 8.50 hours he spent meeting with the Debtor and preparing the Schedules.

The Court declines to award the Attorney fees for the entire 8.50 hours spent on the task of preparing the Schedules and Statement of Affairs because same is excessive.

Rather, the Court will award the Attorney only 4.0 hours for the time expended on this service (03/13/01 2.50 hours and 03/19/01 1.50 hours). The remainder of the time spent on this task is hereby disallowed as excessive (06/07/01 .40 hours; 06/13/01 .50 hours; and 06/13/01 1.80 hours).²

Furthermore, the Court agrees with the Trustee that the Attorney expended an unreasonable amount of time on the issue of the Debtor's unfiled 2000 income tax return. It appears that the Attorney expended approximately 2.10 hours on this issue (06/04/01 .20 hours; 06/04/01 .20 hours; 07/10/01 .10 hours; 07/10/01 .10 hours; 07/13/01 .40 hours; 07/25/01 .30 hours; 08/13/01 .30 hours; and 09/09/01 .50 hours). An experienced bankruptcy practitioner, like the Attorney, should have known that a Chapter 13 plan could not be confirmed, absent the filing of the Debtor's income tax return in order to quantify and provide for payment in full of any allowed priority tax claim for such unpaid taxes as mandated by the interplay between 11 U.S.C. §§ 507(a)(8) and 1322(a)(2). It should not have taken the Attorney over two hours to ascertain from the Debtor that the 2000 income tax return had not been filed. Rather, the time spent by the Attorney gathering the information from the Debtor in order to prepare the Schedules and Statement of Affairs should have yielded this information. Consequently, the Court will award the Attorney only 1.0 hour (06/04/01 .20 hours; 06/04/01 .20 hours; 07/10/01 .10 hours; 07/10/01 .10 hours; and 07/13/01 .40 hours) for the time expended in this regard. The remainder of the time spent on this task is hereby disallowed (07/25/01 .30 hours;

² The time spent on February 26, 2001 was previously disallowed for other reasons and therefore will not be disallowed here.

08/13/01 .30 hours; and 09/09/01 .50 hours).

Moreover, the Court notes that the Attorney appeared before the Court at three separate continued confirmation hearings for a total fee of \$750.00 (06/08/01 1.0 hours; 07/13/01 1.0 hours and 09/21/01 1.0 hours). Pursuant to the Attorney's time entries, he was aware after the first confirmation hearing on June 8, 2001, that the plan could not be confirmed absent the filing of the income tax return. Thus, the Court will not compensate the Attorney for the needless appearance at the continued confirmation hearing on July 13, 2001. That appearance did not benefit the Debtor or the estate because at that point in time, the income tax return still had not been filed and the Attorney knew that the Court would not confirm the plan absent the filing of the return. Hence, the Court disallows the \$250.00 sought for time spent on July 13, 2001.

Additionally, the Court disallows the \$100.00 sought for .50 hours spent on August 27, 2001 for the Attorney's "attention to file to determine if Plan confirmed." That time spent ascertaining whether the plan was confirmed is clearly excessive and unreasonable. The Attorney should have known by his attendance at the July 13, 2001 continued confirmation hearing that the plan had not been confirmed.

Finally, the Court finds that the 1.40 hours spent by the Attorney on September 12, 2001 drafting a two-page motion to vacate the denial of confirmation of the plan was excessive and unreasonable. The Court will allow only .40 hours or \$80.00 for this task.

In sum, the Court awards the Attorney the total amount of \$2,410.00 for the time expended. The Court concludes that many of the points made by the Trustee are well-founded, and thus, sustains, in part, his objection to the Attorney's application.

B. Expense Reimbursement

The Attorney seeks reimbursement of expenses in the amount of \$205.00. The Attorney bears the burden of establishing that he is entitled to reimbursement of expenses. In re Convent Guardian Corp., 103 B.R. 937, 939 (Bankr. N.D. Ill. 1989); In re Affinito & Son, Inc., 63 B.R. 495, 497 (Bankr. W.D. Pa. 1986). The Court will not assume any expense is necessary. See In re Lindberg Prods., Inc., 50 B.R. 220, 221 (Bankr. N.D. Ill. 1985). An expense is necessary if it was incurred because it was required to accomplish the proper representation of the client. See Wildman, 72 B.R. at 731.

The Court will reimburse the Attorney for the \$185.00 statutory fee for filing this case as well as the \$20.00 fee for filing an amended Schedule F for a total of \$205.00. The Court finds that these expenses were incurred by the Attorney to accomplish the proper representation of the Debtor.

IV. CONCLUSION

For the foregoing reasons, the Court awards the Attorney compensation in the sum of \$2,410.00 and authorizes reimbursement of expenses in the amount of \$205.00. The Court sustains, in part, the objection of the Trustee.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:) Chapter 13
MICHAEL J. COPACK,) Bankruptcy No. 01 B 09341
) Judge John H. Squires
Debtor.)

ORDER

For the reasons set forth in a Memorandum Opinion dated the 29th day of October, 2001, the Court hereby awards Robert R. Benjamin, pursuant to 11 U.S.C. § 330, compensation in the sum of \$2,410.00 and authorizes reimbursement of expenses in the amount of \$205.00. The Court sustains, in part, the objection of the Chapter 13 Standing Trustee.

ENTERED:

DATE: _____

**John H. Squires
United States Bankruptcy Judge**

cc: See attached Service List