UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

IN RE:

DONAVIN R. SALYERS

CASE NO. 06-10060

DEBTOR

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Milton G. Friedman's Application for Professional Fees (Doc. 115) and the Trustee's objection (Doc. 120). A hearing having been held on January 18, 2011, and the matter having been taken under submission, the Court issues the following Memorandum Opinion and Order. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

I.

Milton G. Friedman ("Friedman") acted as an expert witness for Phaedra Spradlin, the duly appointed Chapter 7 Trustee ("Trustee"), in adversary proceeding number 07-1025. The adversary proceeding was commenced by the Trustee to recover a conveyance by Donavin Salyers ("Debtor") of 300 shares of stock in R&D Associates, Inc., to Sonya Salyers ("Defendant") or in the alternative obtain a money judgment for those shares. The purpose of Friedman's employment was to provide a valuation to the Trustee of R&D and its stock.

The Debtor was President and the sole officer of R&D, an inland river shipyard that specializes in barge and boat repair. When R&D incorporated it authorized the issuance of 2,000 shares of stock. 1,001 shares of stock were issued to the Debtor at R&D's first organizational meeting. Four years after R&D's incorporation, the Debtor surrendered the 1,001 shares to R&D, and R&D issued 800 shares to the Defendant and 400 shares to the Debtor. The Debtor retained his position as president, and the Defendant became a board member and secretary-treasurer of R&D.

Subsequently, B&I Lending, LLC ("B&I") filed suit against the Debtor and other individuals in Greenup Circuit Court to collect on loans guaranteed by the Debtor and other individuals on behalf of Combined Terminals Corporation, an unrelated company in which the Debtor held a 70 percent interest. During the pendency of this action, the Debtor transferred 300 of his 400 shares of stock back to R&D. Those 300 shares were then reissued to the Defendant. The Debtor also resigned as president and was replaced in this position by the Defendant.

A judgment was entered against the Debtor by the Greenup Circuit Court in favor of B&I. Nearly three years later, the Debtor filed for chapter 7 relief.

The Trustee commenced an adversary proceeding to avoid the Debtor's transfer of the 300 shares of stock to R&D that were then immediately reissued to the Defendant. The Trustee sought to recover the value of the shares, or in the alternative to recover the 300 shares themselves. To assist in her efforts, the Trustee employed Friedman to perform a valuation of R&D and its stock. Friedman valued all 2,000 shares of outstanding stock at $2,000,000.00. Following a two day trial during which Friedman testified as to his valuation, the Court found that the Debtor did not receive valuable consideration for the transfer of the 300 shares of stock and that he transferred the stock with the intent to defraud creditors. The Trustee therefore was able to avoid the transfer.

Noticeably absent from the Court's opinion in the adversary proceeding is any reference to the values testified to by Friedman. The remedy allowed by the Court was the recovery of the stock in question and not a monetary judgment.

Although the judgment in the adversary proceeding was entered on June 25, 2008, the Trustee did not file a notice of proposed sale until October 23, 2010. In the proposed sale, which ultimately took place, the Trustee proposed to sell 400 shares of R&D stock to the Defendant for $30,000.00. These shares consisted of the 300 recovered in the adversary proceeding, and the 100 shares which had not been transferred by the Debtor.

Friedman has now filed a fee application seeking $34,250.00 from the Debtor's estate for services rendered from February 15, 2008 through May 7, 2008. The Trustee has filed an objection to Friedman's application. The Trustee argues that several entries in the application should be

disallowed, that the Debtor's estate received no benefit from Friedman's services, and that Friedman seeks fees in excess of what the Trustee was able to receive when she sold the shares. Therefore, the Trustee requests that the Court either disallow the fee application or weigh the benefit to the estate of Friedman's work and testimony when determining his reasonable compensation.

II.

Under section 327, a trustee may employ a professional to assist the trustee in carrying out her duties. 11 U.S.C. § 327(a). There are, however, limitations to the amount of compensation a professional may be paid. Under section 330, the professional may only be awarded "reasonable compensation for actual, necessary expenses." 11 U.S.C. § 330(a)(1)(A) and (B). When determining whether compensation is "reasonable," the Court considers "the nature, the extent, and the value of such services," and also, among other things, "whether the services are 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[.]" 11 U.S.C. § 330(a)(3).

When reviewing fee applications, bankruptcy courts use the lodestar standard as a starting point. *In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991) (adopting the lodestar method for bankruptcy cases). After the court has established a lodestar figure, other factors may also be taken into consideration:

> The bankruptcy court also may exercise its discretion to consider other factors such as the novelty and difficulty of the issues, the special skills of counsel, *the results obtained*, and whether the fee awarded is commensurate with fees for similar professional services in non-bankruptcy cases in the local area.

Id. at 338 (citation omitted) (emphasis added). Once the court has considered these other factors, it may adjust the professional's compensation accordingly. *Geier v. Sundquist*, 372 F.3d 784, 792 (6th Cir. 2004).

Accordingly, the Court must first perform a lodestar analysis, followed by consideration of the results obtained by Friedman's valuation and testimony and whether the lodestar figure may be enhanced or sharply curtailed. This analysis turns upon whether his services were reasonably likely to benefit the Debtor's estate, and also upon the results obtained from his services.

The lodestar standard involves multiplying a reasonable number of hours spent on a case by a reasonable hourly rate. *In re Boddy*, 950 F.2d at 337. A reasonable hourly rate is determined by considering such factors as "the amount involved, customary fees, the level of skill required, reputation of the applicant, time limitation, whether the fee is contingent or fixed, and the case's undesirable aspects, if any." *In re Holder*, 207 B.R. 547, 581 (Bankr. M.D. Tenn. 1997) (quoting *In re Crabtree*, 45 B.R. 463, 465 (Bankr. E.D. Tenn. 1984)). The Court finds Friedman's hourly rate of $200.00 to be reasonable; the Court must still, however, determine whether amount of work performed was reasonable and necessary.

Although Friedman was employed an expert witness, he is held to the same standard as an attorney to provide detailed records to support his fee request. Bankruptcy Rule 2016 requires anyone seeking compensation from the estate to file an detailed application setting forth the services rendered and time expended. Therefore, if an expert witness seeks compensation, he must provide sufficient detail to the court so it can determine whether the time expended was necessary and reasonable.

> The Court should not be required to indulge in guesswork, nor undertake extensive labor to justify a fee for an attorney who has not done so himself. We do not find it to be an unbearable burden to require an attorney seeking compensation to enlighten the Court as to the nature of his toil and the relation it bears to the matter at hand. Absent such a statement, compensation may not be allowed.

In re Tolan, 41 B.R. 751, 754 (Bankr. M.D. Tenn. 1984) (quoting *In re Horn & Hardart Baking Co.*, 30 B.R. 938, 944 (Bankr. E.D. Pa. 1983)). Although Friedman acted as an expert witness rather than counsel for the Trustee, his fee application must meet the same standard.

As a general rule, bankruptcy courts have held that a lack of adequate description will result in denial of compensation. *See In re Sly*, 77 B.R. 115, 118 (Bankr. N.D. Ohio 1086). This includes entries concerning telephone calls, conferences, and travel. Entries for telephone calls or conferences should include the persons involved and the subject matter discussed. *In re Price*, 143 B.R. 190, 195 (Bankr. N.D. Ill. 1992). Friedman has failed to provide such detail in the following two entries:

- 2/22/08 - 2/27/08 - FRIEDMAN, MILT - Various short telephone conference with attorney for client and exchange of short e-mails. Time: 1.10s. Total: $220.00.

- 2/28/08 - FRIEDMAN, MILT - Telephone conference with Chrissy. Time: 1.50s. Total: $300.00.

These bare-bones descriptions do not indicate what was discussed, leaving the Court without the ability to determine whether the phone calls were reasonable or necessary. Because the entries lack sufficient detail, they will be disallowed in their entirety.

Friedman has also failed to provide sufficient detail in several other entries:

- 3/7/08 - FRIEDMAN, MILT - Prepare for field work. Time: 3.00s. Total: $600.00.
- 3/10/08 - FRIEDMAN, MILT - Field work. Time: 10.00s. Total: $2,000.00.
- 3/11/08 - FRIEDMAN, MILT - Field work. Time: 8.00s. Total: $1,600.00.
- 4/2/08 - FRIEDMAN, MILT - Work on file. Time: 3.00s. Total: $600.00.
- 4/3/08 - FRIEDMAN, MILT - Work on file. Time: 2.50s. Total: $500.00.
- 4/4/08 - FRIEDMAN, MILT - Work on file. Time: 5.00s. Total: $1,000.00.
- 4/5/08 - FRIEDMAN, MILT - Work on file. Time: 7.00s. Total: $1,400.00.
- 5/5/08 - FISHER, MARTIN - re: atributions (sic) rules. Time 1.00s. Total: $100.00.

In his response to the Trustee's objection, Friedman states that when he was performing "field work" he was visiting the offices of R&D and R&D's accountants. He argues that requiring him to describe all he did while in the field would be overly burdensome. Such a claim does not excuse Friedman from providing adequate detail to the Court. Regarding such general statements from non-attorney professionals, one bankruptcy court reasoned:

> It is our recent experience that accounting firms seeking fees and reimbursement of expenses do not routinely provide the same level of detail typically found in attorneys' applications. The application at hand is illustrative of this problem. The description of activity on behalf of this debtor supplied by the applicant consists of cryptic phrases such as "discussion with debtor;" "court hearing;" "inventory;" "review work;" "recap time;" and "field work." Each entry is accompanied by the date on which the work was done and a statement of the number of hours spent performing the work. However, such entries are absolutely meaningless to this reader and provide no basis upon which a studied decision can be made whether the time expended was necessary, reasonable, etc. These useless descriptions would not be acceptable in an application from an attorney and are not sufficient in an application from an accountant.

In re Cumberland Bolt & Screw, Inc., 44 B.R. 915, 916 (Bankr. M.D. Tenn. 1984). Friedman argues that "field work" is a commonly accepted term in his profession; however, it is not sufficient for a

professional seeking compensation in a bankruptcy case. Because Friedman's application must meet the standards required for professionals practicing before this Court, terms such as "work on file" and "field work" are insufficient to apprise the Court of what work was performed and whether it was reasonable or necessary. For this reason, Friedman may not be compensated for these entries.

The Court notes that the application also contains three entries that merely state "work on report" or "finish appraisal." Because Friedman was hired by the Trustee to perform a valuation of the R&D stock, the Court will grant Friedman the benefit of the doubt that these entries relate to the drafting of his valuation. Notwithstanding the generalized terms, the amounts will be allowed in full.

Entries for Friedman's fees relating to travel are also problematic. The following entry lacks sufficient detail to determine what was done in preparation for travel to Kentucky for a deposition, and the Court therefore cannot determine whether the time expended was reasonable or necessary:

- 4/28/08 - FRIEDMAN, MILT - Prepare to go to KY for depo. Time: 4.10s. Total: $820.00.

Another entry for travel bills his time at his full hourly rate:

- 4/29/08 - 4/30/08 - FRIEDMAN, MILT - Deposition and travel home. Time: 16.00s. Total: $3,200.00.

Although the first travel entry states that Friedman prepares to travel, there is no explanation of what was done in preparation for his travel. The Court is left to question whether it involved packing a suitcase, or research and review of R&D. Because the entry lacks sufficient detail, it will be denied in full.

Furthermore, it has long been the practice of the bankruptcy courts in this district to not allow a professional to bill for travel at his full hourly rate. *See In re Stabil, Inc.,* No. 94-20819. Friedman's fees in the second travel entry will therefore be reduced to $1,600.00.

Friedman's fee application also contains two entries that state the "time charges for correspondence issued includes an allowance to cover the cost of secretarial time, in particular because in many instances there are either multiple addressees or multiple ccs." Secretarial time, however, is overhead which cannot be reimbursed. *In re Cumberland Bolt & Screw*, 44 B.R. at 917.

The amounts for these entries will be cut by one-half to reflect this standard. Furthermore, the entry for a fax sent by Friedman on 3/2/08 is also overhead, and will be disallowed.

Friedman also engaged in non-compensable work that was outside the scope of his employment, represented by the first entry in his application for "Open Pacer, and review docket, petition, and adversary." Friedman was hired to perform a valuation of R&D's stock, and a review of the adversary proceeding was not necessary to his duties. *See In re Wang Laboratories, Inc.*, 154 B.R. 392 (Bankr. D. Mass. 1993) (holding that accounting firm was hired to handle financial matters only, and could not be compensated for customer visits). Because this task was outside the scope of his employment and not necessary to preparing his valuation, this fee will be disallowed in full.

Lastly, several entries contain tasks which have been lumped together into a single entry:

- 2/18/08 - FRIEDMAN, MILT - Various telephone conference (sic) with attorney for client, receive and review production, prepare document request. Time: 4.50s. Total: $900.00.
- 3/3/08 - FRIEDMAN, MILT - Full day. Receive and read transcript, receive and read objections. E-mails back and forth. Telephone conference with CPA Sharp. Letter to CPAs re: telephone calls on Saturday, and requests thereof. Letter to Ingram re: approach and style of report. Work with staff to create worksheet for income tax returns. Time: 7.00s. Total: $1,400.00.
- 3/4/08 - FRIEDMAN, MILT - Receive and read e-mails from attorney, and respond re: discovery. Perform preliminary research for equipment values on Internet. Time: 2.70s. Total: $540.00.

This type of "lumping" makes it impossible for the Court to discern how much time was spent on each task. The Court cannot determine how much time was spent on telephone conferences, emails, writing letters, or research on equipment values, nor whether the amount of work was reasonable. To further complicate matters, several of the tasks are not set forth in sufficient detail, such as "E-mails back and forth," "Telephone conference with CPA Sharp," and "Various telephone conference (sic) with attorney for client." Courts have routinely held that such "lumping" precludes a meaningful review of time records, and have reduced or disallowed fees for such entries. *See In re Swansea Consol. Resources, Inc.*, 155 B.R. 28, n.5 (Bankr. D. R.I. 1993) ("applications containing

lumped entries may be disallowed on that basis."); *In re Frenz*, 142 B.R. 611, 615 (Bankr. D. Conn. 1992) (imposing a 50% deduction for lumping); *In re Navis Realty, Inc.,* 126 B.R. 137, 144 (Bankr. E.D. N.Y. 1991) (holding that because lumping makes it impossible to determine the reasonableness of services, such entries are nonconpensable). Because the work performed is lumped and lacks sufficient detail, the amounts requested for each entry will be reduced by half.

Based upon the foregoing, the Court finds the lodestar figure that sufficiently represents the reasonable and necessary work performed by Friedman is $21,240.00. This figure represents the $34,250.00 sought by Friedman, minus the disallowances and reductions noted above. Having established an appropriate lodestar figure, the Court now turns to the results obtained by Friedman's services and whether they benefitted the Debtor's estate.

III.

When determining whether a professional's services benefitted a debtor's estate, courts look to three main elements: (1) the "quantity factor," which considers the time spent and customary billing rates; (2) the "quality factor," which considers the quality of work required and delivered while also taking into account the novelty and difficulty of the issues, the skills called for, the time constraints, and the professional's personal qualifications; and lastly (3) the "result factor," which looks at the amount recovered for the estate and its creditors. *In re Keiffer*, 306 B.R. 197, 206 (Bankr. N.D. Ohio 2004) (quoting *In re Penn-Dixie Industries, Inc.* 18 B.R. 834, 838-39 (Bankr. S.D.N.Y 1982)). "Consideration of these broadly stated fee formulation factors permits the court to focus on a firm's baseline time charges, and for cause, modestly enhance or sharply curtail them." *Id.* Therefore, after determining a proper lodestar figure, the Court may consider the results obtained by the professional and whether the services were beneficial to the estate. If the services were not beneficial, the Court may sharply curtail the professional's compensation. *In re Keiffer*, 306 B.R. at 206. This "results based" approach is further buttressed by section 330(a)(4)(A)(ii), which prescribes that the court may not allow compensation for "services that were not reasonably likely to benefit the debtor's estate." 11 U.S.C. § 330(a)(4)(A)(ii)(I).

Friedman valued all 2,000 shares of outstanding stock at $2,000,000.00. The Trustee recovered 300 shares as a result of the Court's ruling in the adversary proceeding and retained 100

shares that were owned by the Debtor on the petition date. Two months after the Court's ruling, R&D, a creditor in the Debtor's bankruptcy case, filed a motion to compel the Trustee to reduce the 400 shares of R&D stock held by the Trustee to money (Doc. 71). The Trustee responded to this motion, stating that she was attempting to sell the stock, but found it difficult because R&D was a small, family-owned business, "which provides a level of discomfort for potential buyers." (Doc. 74). The Debtor also joined R&D's motion to compel, claiming that the 400 shares were his only remaining asset and prevented the closing of his bankruptcy case (Doc.75). Following a hearing on August 27, 2008, the Court took the motion to compel under submission (Doc. 76). Finding the arguments of the Trustee to be well-taken, the Court denied R&D's motion and set the matter for a subsequent status hearing (Doc. 77).

On December 9, 2008, the Trustee filed an application to employ William Bishop to assist here in marketing the 400 shares of stock (Doc. 78). This application was granted by the Court over the objections of R&D and the Debtor (Doc. 85). Three months later, the Trustee filed a status report with the Court stating that she had contacted the Debtor's counsel to determine whether an agreement could be reached for the Debtor's closely-held company to purchase the 400 shares (Doc. 90). Another status report was filed by the Trustee on June 15, 2010, claiming that she was negotiating with the Debtor regarding the settlement of the stock issue (Doc. 92).

On August 19, 2010, R&D again filed a motion to compel the sale of the 400 shares (Doc. 95). At this point in time, the Trustee had held the shares for over two years. The Trustee filed another status report, setting forth that she had been presented with a bill by Friedman and that she had suggested that she and Friedman's attorney discuss Friedman's purchase of the 400 shares as payment of Friedman's bill (Doc. 96). The Trustee had not, however, received a response to this proposal. The Trustee maintained that she was actively seeking to market the shares. An objection to R&D's motion was also filed by the Trustee (Doc. 98). In her objection, the Trustee claimed that she had experienced difficulty in marketing the shares in part from the inability to provide accurate financial information about R&D to potential buyers. This was allegedly due to R&D's election to omit certain disclosures ordinarily included in the financial statements.

Following a hearing on R&D's second motion to compel, the Court issued an order granting

the motion and ordering the Trustee to either conclude a sale of the shares to the Defendant within thirty days, or conduct an absolute auction of the shares within ninety days (Doc. 103). A notice of proposed sale was entered on October 23, 2010, stating that the 400 shares would be sold to the Defendant for $30,000.00 (Doc. 107).

The Trustee had a period of time in excess of two years to sell the stock recovered in the adversary proceeding, during which time she had the benefit of court-appointed assistance to market the estate shares. The market itself is the most telling evidence of value, and the estate's minority interest turned out to have a value of $30,000.00–an amount bearing no resemblance whatsoever to the Friedman valuation.

Viewing the result obtained by Friedman's services, the Court cannot reasonably conclude that Friedman is entitled to compensation in the full amount of $21,240.00. The Court may therefore sharply reduce his awarded fee amount. The Court finds that Friedman is entitled to half the lodestar figure, or $10,620.00, as appropriate compensation. Furthermore, as part of his fee application, Friedman requests expense reimbursements totaling $2,898.97. The Court finds Friedman's expenses to be reasonable and the reimbursement will be allowed in full.

IV.

The Court must closely review fee applications and apply the appropriate standards to requests for compensation, especially in circumstances such as this where an expert's requested fees would deplete the Debtor's estate of all funds available to unsecured creditors. While Friedman's time records may be sufficient in the accounting industry, they are far from adequate in a bankruptcy setting. Furthermore, his work did not result in sufficient benefit to the Debtor's estate. As such, his compensation must be sharply reduced. Accordingly, it is hereby ORDERED and ADJUDGED that professional fees of $10,620.00 and expenses of $2,898.97 are awarded to Milton Friedman.

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The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
Joseph M. Scott, Jr.
Bankruptcy Judge
Dated: Monday, February 07, 2011
(jms)
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