

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re

Case No. 6:03-bk-05981-KSJ
Chapter 7

HENRY T. NARDELLI,
JOYCE A. NARDELLI

Debtors

MEMORANDUM OPINION OVERRULING
DEBTOR'S OBJECTION TO TRUSTEE'S
APPLICATION FOR COMPENSATION

The Chapter 7 trustee, Carla Musselman, has requested compensation for her services in this case of \$1,125.92 (Doc. No. 86).¹ The debtor, Joyce Nardelli, objects, contending that the trustee's maximum fee is limited to \$679 (Doc. No. 87).² Because the trustee's maximum compensation is limited to a percentage of the distributions she makes to "parties in interest," the issue is whether the fees and costs distributed by the trustee to her attorney should be included in the base calculation. The issue turns on whether a trustee's professionals are included in the definition of a "party in interest."

Bankruptcy Code³ Section 326(a) addresses the limitations on compensation for a Chapter 7 trustee. A Chapter 7 trustee is entitled to receive reasonable compensation for his or her services, in an amount "not to exceed 25 percent on the first \$5,000 or less ... upon all monies disbursed or turned over in the case by the trustee to **parties in interest**, excluding the debtor, but including holders of secured claims." 11 U.S.C. § 326(a) (emphasis added).

In this case, one of the debtors, Henry Nardelli, died after the case was filed. Ultimately, the trustee received \$22,020.08 into the bankruptcy estate, primarily from proceeds paid under Mr. Nardelli's life insurance

policy. The vast majority of these funds will be paid to Mrs. Nardelli because only three creditors filed unsecured claims totaling \$2,713.66. If the trustee's 25 percent commission was calculated on these limited distributions, she would be entitled to receive a maximum commission of approximately \$679, adjusted slightly upward for any interest disbursed to the unsecured creditors (25% x \$2,713.66 = \$678.42).

However, the trustee previously had hired a lawyer, John Meininger, to assist her in this case. Mr. Meininger seeks fees of \$1,725 and costs of \$65. If these fees and costs were added to the amount of unsecured claims, the trustee's maximum commission would increase to \$1,125.92, again subject to upward adjustments for any interest paid to parties in interest (((\$2,713.66 + \$1,725 + \$65) x 25% = \$1,125.92).

The debtor asserts that the trustee's compensation is limited to \$679. The trustee asserts that she is entitled to \$1,125.92. The Court finds that, absent the limitations set forth in Section 326(a) of the Bankruptcy Code, a reasonable compensation for the trustee's services would exceed the higher amount. Therefore, the issue is whether the 25 percent maximum commission is properly based only on disbursements to claim holders, or whether Mr. Meininger's fees and costs can be added to the base, thereby increasing the trustee's compensation.

In determining the maximum trustee compensation allowed under Section 326(a), courts routinely include disbursements made to administrative creditors in the calculations. See, e.g., In re Orient River Investments, Ltd., 133 B.R. 729 (Bankr. E.D. Penn. 1991) (including a trustee's legitimate compensable operating expenses in the base); In re North American Oil & Gas, Inc., 130 B.R. 473, 478 (Bankr.W.D.Tex.1990) (concluding that "disbursements to professionals and disbursements in payment of administrative expenses under Section 503(b)(1)(A) are includable in the base 'all moneys disbursed or turned over to parties in interest' for purposes of calculating the maximum trustee's compensation allowed under Section 326(a)") (citing In re Wallace, 14 F.2d 534, 537 (E.D.Okla.1926), aff'd sub nom., McMillan v. United States Fidelity & Guar. Co., 22 F.2d 155 (8th Cir.1927) (construing Section 48(c) of the Bankruptcy Act of 1898)); 11 U.S.C. § 326(a); 3 COLLIER ON BANKRUPTCY ¶ 326.02[2][e] at 326-11 (15th ed., revised 2002) ("The disbursements on which the trustee's compensation is based

¹ The trustee requested compensation in her Notice of Final Report of Trustee and Application for Compensation filed by United States Trustee (Doc. No. 86).

² The debtor challenged the trustee's compensation in her Objection by Debtors to Notice of Final Report and Application for Compensation (Doc. No. 87).

³ Unless otherwise stated, all references to the Bankruptcy Code herein refer to Title 11 of the United States Code.

include administrative expenses, such as compensation to professional persons or expenses necessarily incurred in administering the estate.”).

Administrative creditors include those supplying post-petition goods or services that benefit the estate. 11 U.S.C. § 503. A typical example of such a creditor is a utility company that continues to supply electricity to the debtor post-petition. The trustee’s professionals are just a different type of administrative creditor. In many cases, the trustee deems it prudent to hire an attorney, perhaps to handle litigation, or an accountant, perhaps to complete a necessary tax return. In each case, the professional is retained to handle a specific task and is entitled to reasonable compensation only to the extent they provide a necessary benefit to the estate. As such, these professionals are similar to a utility company that supplies electricity to a debtor’s warehouse. Both enhance the value of the estate in order to maximize the recovery to creditors. However, if either the utility company or the attorney *fails* to supply any service of value to the estate, neither is entitled to receive any compensation.

The debtor asserts that the trustee’s professionals should be treated differently from other types of administrative creditors, arguing that the trustee’s retained professionals do not constitute “parties in interest.” The United States District Court and the Bankruptcy Court for the Eastern District of New York addressed this issue, respectively, in In re Testaverde, 317 B.R. 51 (E.D. N.Y. 2004) and In re Guido, 237 B.R. 562 (Bankr. E.D. N.Y. 1999). In both cases, the courts held that the trustee, in calculating a maximum fee, could not include fees and costs paid to his own professionals, such as accountants or lawyers, because they did not qualify as parties in interest. Specifically, in Testaverde, the court held that the term “party in interest,” as defined by BLACK’S LAW DICTIONARY, included “one whose pecuniary interest is directly affected by the bankruptcy proceeding” and that the trustee’s professionals did not hold this type of interest. 317 B.R. at 54 (citing BLACK’S LAW DICTIONARY 1122 (6th ed. 1990)).

Such an interpretation of “party in interest” is too constrictive. The term “party in interest” should be construed broadly, not narrowly. Public Service Co. of New Hampshire, 88 B.R. 546, 550 (Bankr. D.N.H. 1988) (citing In re Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984); In re Tarrer, 273 B.R. 724 (Bankr. N. Ga. 2001) (ruling that certain parties had sufficient interests to be deemed “parties in interest” notwithstanding the fact that they were neither debtors, creditors, nor trustees); Orient River, 133 B.R. at 731 (comparing the language of Bankruptcy Act § 48(c)(1), basing the relevant computation on ‘monies disbursed or

turned over ... *to any person*,’ with the language of Bankruptcy Code § 326(a), which bases the computation on distributions to ‘*parties in interest*’ and concluding, given the lack of legislative history evincing otherwise and the dearth of case law contrasting the two provisions, that “realistically there can be no distinctions between the definition of ‘any person’ in Bankruptcy Act § 48(c)(1) and ‘parties in interest’ as under Code § 326(a) for the purpose of interpreting Code § 326.”).

Trustees hire attorneys and accountants every day to help them administer bankruptcy cases. Each retained professional certainly expects to get paid. Moreover, they certainly do *not* expect the trustee to pay the fees from his or her own personal funds. Instead, the retained professionals expect to be paid, if at all, from the distributions made by the trustee to creditors in the case. If BLACK’S LAW DICTIONARY provides the appropriate definition, it is apparent that these retained professionals do have pecuniary interests affected by the bankruptcy proceeding; they either will or will not be paid depending on the monies gathered and distributed by the trustee. Therefore, this Court rejects the analysis of the courts in Testaverde and Guido and holds that professionals retained by Chapter 7 trustees qualify as “parties in interest.” Fees and costs paid to the trustee’s counsel are properly included in the base used to calculate the maximum compensation payable to the trustee.

The debtor’s Objection is overruled. The trustee is entitled to include the amount of Mr. Meininger’s fees and costs in calculating her maximum compensation under Bankruptcy Code Section 326(a). The amount will be slightly in excess of \$1,125.92 because some upward adjustment attributable to interest paid to parties in interest is appropriate. The Court further finds that the maximum allowance is a reasonable compensation for the services provided by the trustee in this case. A separate order consistent with this opinion shall be entered.

DONE AND ORDERED in Orlando, Florida, this 28th day of July, 2005.

/s/ Karen S. Jennemann
KAREN S. JENNEMANN
United States Bankruptcy Judge

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