UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 8:03-bk-20775-PMG

CHC INDUSTRIES, INC.,
f/k/a Cleaners Hanger Company,

Debtor. Chapter 11

ORDER ON MOTION FOR RECONSIDERATION OF ORDERS APPROVING INTERIM FEE APPLICATIONS OF GLENN RASMUSSEN FOGARTY & HOOKER, P.A.

THIS CASE came before the Court for hearing to consider the Motion for Reconsideration of Orders Approving Interim Fee Applications of Glenn Rasmussen Fogarty & Hooker, P.A. The Motion was filed by the equity interest holders of CHC Industries, Inc.

In the Motion, the equity interest holders (Equity Holders) seek reconsideration of six separate orders that awarded interim fees and expenses to Glenn Rasmussen Fogarty & Hooker, P.A. (Glenn Rasmussen). Glenn Rasmussen is the attorney of record for the Official Unsecured Creditors' Committee (the Committee) in this case.

Glenn Rasmussen filed a written Response in Opposition to the Motion.

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Background

The Debtor filed its petition under Chapter 11 of the Bankruptcy Code on October 6, 2003.

On December 19, 2003, the Debtor filed a Motion for Entry of an Order Regarding Cycles and Procedures for Seeking and Awarding Interim Fees to Professionals. (Doc. 210).

On April 2, 2004, the Court entered an Order Regarding Cycles and Procedures for Seeking and Awarding Interim Fees to Professionals (the Procedural Order). (Doc. 385).

Generally, the Procedural Order authorizes the Debtor to pay attorneys employed by the Debtor and the Committee on a monthly basis in accordance with the conditions set forth in the Order. The Procedural Order also requires the attorneys to file and serve interim fee applications according to a designated schedule, and sets forth the procedure for providing notice to interested parties of all

hearings scheduled to consider the interim applications. Finally, the Procedural Order provides in material part:

> 1. All transactions between the Committee and the attorneys "shall be subject to §329 of the Bankruptcy Code and other provisions of the Bankruptcy Code to review the necessity and reasonable value of any actual services rendered or expenses incurred" by the attorneys. (Paragraph 1).
>
> 2. The acceptance of employment constitutes a representation by the attorneys that they "agree to disgorge any compensation received which its [sic] later determined to be excessive by the Bankruptcy Court." (Paragraph 1.c).
>
> 3. Any party in interest may object to interim fees and expenses sought by the attorneys "by filing with the Clerk a written objection no later than five days before the hearing on the application." (Paragraph 5).

(Doc. 385). The Procedural Order was served on the Local Rule 1007-2 Parties in Interest List. (Docs. 385, 387).

On March 1, 2004, prior to the entry of the Procedural Order, the Committee filed its Application for Approval of Counsel for the Official Unsecured Creditors' Committee. (Doc. 341).

On April 16, 2004, the Court entered an Order authorizing the Committee to employ Glenn Rasmussen as its counsel. (Doc. 398).

On March 31, 2004, August 2, 2004, November 30, 2004, April 12, 2005, August 4, 2005, and December 5, 2005, respectively, Glenn Rasmussen filed its First, Second, Third, Fourth, Fifth, and Sixth Applications for Interim Allowance and Payment of Fees and Expenses. (Docs. 382, 607, 737, 1057, 1347, and 1559). The Interim Applications were filed pursuant to the schedule set forth in the Procedural Order.

A notice of the hearing scheduled on each Application was filed with the Court and served on the Local Rule 1007-2 Parties in Interest List in accordance with the Procedural Order. (Docs. 392, 611, 744, 1171, 1378, and 1562). In each instance, the Notice provided:

> Any party desiring to object to the [] fee applications listed on Exhibit "A" hereto shall (a) file with the Clerk of the Court its objection no later than [a calendar date]; and (b) serve at the time it is filed a copy of the objection on the applicant whose application is the subject of the objection; . . . .

According to each Notice, the deadline for filing the objection was five days before the hearing scheduled on the Application.

No objections were filed to any of the Applications submitted by Glenn Rasmussen, and no objections to Glenn Rasmussen's Applications were asserted at the hearings conducted on April 26, 2004, November 1, 2004, January 24, 2005, July 11, 2005, September 19, 2005, and January 30, 2006.

On May 14, 2004, November 22, 2004, February 8, 2005, August 5, 2005, October 4, 2005, and February 14, 2006, respectively, the Court entered separate Orders approving Glenn Rasmussen's First, Second, Third, Fourth, Fifth, and Sixth Applications. In each instance, the fees and costs requested in the underlying Application were approved in their entirety, and the Debtor was authorized to pay the allowed amounts to Glenn Rasmussen. Also in each case, the Order provided:

> This is an interlocutory order that is subject to this Court's further review and revision during the course of this case. <u>This Court may review any aspects of this interim allowance at any other point in time during this case</u>.

(Docs. 435, 721, 856, 1359, 1439, and 1645)(Emphasis supplied).

On February 26, 2006, GrayRobinson, P.A. entered a Notice of Appearance in this case on behalf of the Equity Holders. (Doc. 1670).

On the same date, February 26, 2006, the Equity Holders filed the Motion for Reconsideration that is currently before the Court. In the Motion, the Equity Holders ask the Court to reconsider each of the Orders approving Glenn Rasmussen's interim allowance of fees "on the basis that the attorney's fees approved by the Court are unreasonable and excessive in amount for the services provided." (Doc. 1671).

On March 28, 2006, Glenn Rasmussen filed its Seventh Application for Interim Allowance and Payment of Fees and Expenses. (Doc. 1729).

On April 17, 2006, the Equity Holders filed an Objection to the Seventh Application, again on the basis that the fees requested "are unreasonable and excessive in amount for the services provided." (Doc. 1765).

On April 28, 2006, the Equity Holders filed a Supplemental Objection to Glenn Rasmussen's Seventh Application. (Doc. 1775). Although the title of the Supplement refers only to the Seventh Application, the content of the Supplemental Objection relates to all of the fees and costs awarded to Glenn Rasmussen in the six prior Interim Fee Orders.

In the Supplement, for example, the Equity Holders assert that the primary issues presented in the Debtor's case were handled by special counsel or other professionals employed to handle those specific matters, and that the Committee's counsel therefore should have played only a limited role in the reorganization. (Doc. 1775, Paragraph 15). To the extent that Glenn Rasmussen worked on the dominant issues in the case, such as the liquidation of the Debtor's assets, the litigation involving Ispat's claim, the resolution of the Pension Benefit Guaranty Corporation claim, and the management of certain labor law matters, the Equity Holders contend that such work was "duplicative of work of several specialized law firms." (Transcript of May 8, 2006, hearing, p. 51).

Additionally, the Equity Holders assert that the fees awarded to Glenn Rasmussen in the Interim Orders were excessive as a general matter because of overriding concerns in the case. In this regard, the Equity Holders contend that (1) Glenn Rasmussen's fees were disproportionate to the Committee's constituency and to fees awarded to other professionals, (2) the fees were not supported by results, as evidenced by the limited number of pleadings filed by Glenn Rasmussen in the case, (3) the services

provided by Glenn Rasmussen, such as its involvement in the Ispat litigation, were contrary to the interests of the estate, and that (4) Glenn Rasmussen is not entitled to any credit for the fact that unsecured creditors will be paid in full with interest in the Chapter 11 case. (Doc. 1775, Paragraph 16).

Finally, the Equity Holders assert that the fees awarded to Glenn Rasmussen in the Interim Orders were excessive because of specific entries in its time records and statements. In this regard, the Equity Holders contend that the number of hours devoted by the law firm to particular services was excessive, and that certain of the entries in Glenn Rasmussen's time records are not sufficiently detailed to be compensable. (Doc. 1775, Paragraph 17).

Discussion

The matter under consideration is the Equity Holders' Motion for Reconsideration of six Orders approving the Interim Fee Applications filed by Glenn Rasmussen. In the Motion, the Equity Holders contend that the Orders should be reconsidered because the "attorney's fees approved by the Court are unreasonable and excessive in amount for the services provided."

It should be noted at the outset that neither Glenn Rasmussen nor Robert B. Glenn have or have ever had any relationship, personal or professional, with the undersigned Bankruptcy Judge.

The Court finds that the Equity Holders are not procedurally precluded from filing the Motion for Reconsideration.

The Court also finds, however, that the Motion for Reconsideration should be denied, because the equities of the case do not warrant disgorgement of the Interim Fees awarded to Glenn Rasmussen.

A. The Court is authorized to determine the reasonableness of the fees.

Interim compensation for professionals employed in a bankruptcy case is governed by §331 of the Bankruptcy Code. Section 331 provides:

11 USC §331. Interim compensation

> A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

11 U.S.C. §331. The purpose of §331 "is to prevent bankruptcy professionals from having to wait until conclusion of the bankruptcy case for compensation and reimbursement." In re Kids Creek Partners, L.P., 236 B.R. 871, 875 (Bankr. N.D. Ill. 1999).

It is fundamental, however, that compensation paid to a professional under §331 is also subject to the provisions set forth in §329 of the Bankruptcy Code. Section 329(b) provides that if "such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive." 11 U.S.C. §329(b).

In other words, §329(b) of the Bankruptcy Code "expressly provides that the Bankruptcy Court may order the disgorgement of any fees paid to a professional where it is ultimately determined that the payment was excessive," and that "all professional fees which are paid under sections 328, 330 or 331 are subject to the Bankruptcy Court's inherent authority to order disgorgement." In re Mariner Post-Acute Network, Inc., 257 B.R. 723, 730 (Bankr. D. Del. 2000).

In this case, the broad language contained in the Procedural Order and in each of the Orders approving Glenn Rasmussen's Interim Fee Applications confirms that the allowances are subject to review for a determination of reasonableness.

Paragraph 1 of the Procedural Order, for example, expressly provides that all transactions between the Debtor and/or the Committee and the Committee's attorney are subject to §329 of the Bankruptcy

Code for purposes of reviewing the necessity and reasonable value of the services rendered. (Doc. 385).

Further, pursuant to Paragraph 1.c of the Procedural Order, attorneys who accepted interim fees in accordance with the Order expressly agreed to disgorge any compensation that is later determined to be excessive. (Doc. 385).

Finally, each of the Orders allowing the interim fees provides that the Court may review "any aspects" of the interim allowances "at any point in time" during the case. (Docs. 435, 721, 856, 1359, 1439, and 1645).

These comprehensive provisions in the Bankruptcy Code and in the prior Orders entered in this case clearly furnish the Court with broad authority to determine the reasonableness of the interim fees awarded to Glenn Rasmussen under §331 of the Bankruptcy Code. Nothing in the Code or the prior Orders precludes the Equity Holders from invoking the Court's broad authority to reconsider and finally determine the interim fees.

B. Reconsideration of the Interim Fee Orders should be denied.

The Court has reviewed the Motion for Reconsideration and Supplemental Objection to Glenn Rasmussen's Seventh Application, however, and finds that the grounds alleged by the Equity Holders do not warrant any reduction of the fees and expenses previously awarded in this case.

In their Motion for Reconsideration, the Equity Holders seek the Court's reconsideration of Glenn Rasmussen's interim fee awards on the basis that the fees approved by the Court are unreasonable and excessive. (Doc. 1671). The Equity Holders do not expressly request an Order requiring Glenn Rasmussen to disgorge a portion of the fees paid pursuant to the interim Orders. Nevertheless, such disgorgement would be the logical consequence of the reconsideration sought by the Equity Holders.

1. The issue of disgorgement is within the Court's discretion.

It is generally held that the "disgorgement of interim fees in either a Chapter 7 or 11 case is a discretionary matter." In re Anolik, 207 B.R. 34, 39 (Bankr. D. Mass. 1997). "A majority of courts . . . take the view that, because the Code does not expressly mention disgorgement, the question is left to the discretion of the bankruptcy court." In re Chute, 235 B.R. 700, 702 (Bankr. D. Mass. 1999). See also In re Kids Creek Partners, L.P., 236 B.R. at 875(Disgorgement is a discretionary matter).

"The court's discretion to determine the propriety of disgorgement of previously paid administrative claims must be applied on a case by case basis." In re Anolik, 207 B.R. at 39. Generally, compelling circumstances must be shown to warrant the exercise of the Court's discretion regarding disgorgement. In re Kids Creek Partners, L.P., 236 B.R. at 875.

Clearly, "disgorgement is a harsh remedy that should only be applied in extreme situations." In re LTV Steel Company, Inc., 288 B.R. 775, 779 (Bankr. N.D. Ohio 2002). "Disgorgement is a harsh

remedy, one that should be applied only when mandated by the equities of a case." In re Anolik, 207 B.R. at 39.

2. The estate is not administratively insolvent.

"The issue of disgorgement of professional fees most often arises when . . . the assets of an estate prove to be insufficient to fully reimburse all administrative claimants." In those cases, "it is within the bankruptcy court's power to order disgorgement of professional fees in order to achieve a pro rata distribution to administrative claimants in administratively insolvent cases." In re Chute, 235 B.R. at 701.

In other words, interim fees awards are typically revisited for the purpose of effectuating the Bankruptcy Code's distribution scheme after it has been determined that an estate is administratively insolvent. In re Kids Creek Partners, L.P., 236 B.R. at 875. See also Specker Motor Sales Co. v. Eisen, 393 F.3d 659, 663-65 (6th Cir. 2004).

Generally, the interplay of §331 and §329(b) is intended to operate as a method to compensate professionals for ongoing work, while at the same time preserving the Court's ability to order disgorgement if at the conclusion of the case the professional is found to have been paid more than his proportionate share of the funds available for administrative claimants. In re Gherman, 114 B.R. 305, 307 (Bankr. S.D. Fla. 1990)(quoting In re Kaiser Steel Corp., 74 B.R. 885, 891 (Bankr. D. Colo. 1987)).

For additional cases supporting the proposition that interim fee awards are generally reviewed when the assets of the estate ultimately prove to be insufficient to pay all administrative claims in full, see In re Lockwood Corporation, 216 B.R. 628, 635 (Bankr. D. Neb. 1997)(A cause of action for disgorgement exists if the bankruptcy estate is administratively insolvent.); In re Lochmiller Industries, Inc., 178 B.R. 241, 251 (Bankr. S.D. Cal. 1995)(A professional may be required to disgorge interim

compensation upon a showing of administrative insolvency.); and In re Kearing, 170 B.R. 1, 7 (Bankr. D.C. 1994)(The Court had the power to order the disgorgement of interim fees in order to ensure that administrative claimants are paid their pro rata share of estate assets.).

In this case, the Debtor's estate is not administratively insolvent. The Liquidation Analysis attached to the Debtor's Second Amended Disclosure Statement, as approved by the Court, indicates that the Debtor held cash in its bank account in the amount of $13,004,412.00 as of January 31, 2005, and that the liquidation value of all of its assets equaled the sum of $16,244,923.37. The estimated amount of the Debtor's administrative claims totaled the sum of $2,542,366.00, however, and its priority and secured claims totaled the sum of $666,656.24. (Doc. 988, Exhibit 2).

Further, the Debtor's Third Amended Plan of Reorganization was confirmed on March 21, 2006. (Doc. 1713). It is undisputed that the Plan as confirmed provides for the payment of all allowed administrative and priority claims in full on the Distribution Date, as defined in the Plan. It is also undisputed that the principal amount of all allowed unsecured claims, together with interest computed at the Federal Judgment Rate, will be paid in full under the confirmed Plan. (Doc. 1713, p. 10).

In fact, the Equity Holders acknowledge that the Committee's constituency of unsecured creditors "will be paid in full in this Reorganization, like other constituencies that were paid at other times during this Reorganization." (Doc. 1775, Paragraph 16).

This is not a case in which review of Glenn Rasmussen's Interim Fee Orders is necessary to ensure that all administrative claimants are paid their pro rata share of the estate's assets.

3. The grounds alleged by the Equity Holders do not warrant disgorgement.

As shown above, the administrative insolvency of a bankruptcy estate is a situation that may justify the disgorgement of interim fees previously paid to a professional. As also shown, however, the remedy of disgorgement is considered a harsh remedy that should only be applied when mandated by the equities of the case. In re Anolik, 207 B.R. at 39.

In this case, the grounds alleged by the Equity Holders do not justify the disgorgement of the interim fees awarded to Glenn Rasmussen.

The Equity Holders do not assert, for example, that they recently discovered egregious misconduct, ethical breaches, or misrepresentations on the part of Glenn Rasmussen. See In re LTV Steel Company, Inc., 288 B.R. at 780 n.2(An attorney's violation of his disclosure obligations may justify disgorgement.) Neither do the Equity Holders allege that subsequent developments in the case have rendered the Interim Fee Orders improvident or unreasonable.

On the contrary, the Equity Holders seek reconsideration of the interim awards based on the allegations (1) that Glenn Rasmussen's services duplicated the services performed by other professionals, (2) that the awards were not supported by the services provided and the results obtained in the case, and (3) that specific entries in Glenn Rasmussen's records were vague or showed excessive time spent on particular tasks. (Doc. 1775, Paragraphs 15, 16, 17).

In other words, the Equity Holders' Motion is basically a challenge to specific services described in Glenn Rasmussen's Interim Fee Applications, and also a challenge to the time required to perform such services.

The Equity Holders could have asserted the challenges at the time that Glenn Rasmussen filed the Applications.

The Applications were filed with the Court and thereby placed in the public record. The Notices of Hearing on each of the Applications included a list of all professionals seeking compensation during the fee cycle, the docket number for all of the Applications, the time period for which fees were requested, and the amount of the fees and costs requested by each professional. (Docs. 392, 611, 744, 1171, 1378, and 1562).

The supporting information for each of the Interim Applications was available to any party interested in monitoring the fees incurred in the case.

No objections to Glenn Rasmussen's Applications were asserted, however, and the Court entered six separate Orders approving the Applications. The Orders were entered during an active period in the case that spanned almost two years. During this period, Glenn Rasmussen continued to provide extensive legal services to the Committee in reliance on the uncontested nature of the awards.

In short, the Equity Holders do not allege that Glenn Rasmussen engaged in any misconduct or violated any of its disclosure obligations. Instead, the objections asserted by the Equity Holders are essentially standard challenges to the hours and services set forth in the Applications, and could have been raised as the Applications were filed. The Court entered six separate Orders (during a period of almost two years) before the Equity Holders objected to the awards.

Under these circumstances, the Court finds that it would be inequitable to require Glenn Rasmussen to disgorge any of the fees awarded to it pursuant to the Interim Fee Orders.

4. The Equity Holders' objections are untimely.

Additionally, the Equity Holders did not assert their objections within the time periods expressly established by the Procedural Order and the Notices of Hearing.

The Procedural Order sets forth specific rules by which the interim allowances are administered in this case, and the rules include a mechanism by which interested parties receive notice of the interim fees requested by the attorneys, together with an opportunity for the interested parties to object to any particular application.

The Procedural Order provides that any interested party may object to interim fees requested by an attorney by filing a written objection "no later than five days before the hearing on the application." (Doc. 385).

Each Notice of Hearing on the Interim Fee Applications also includes a statement that any party who wishes to object to an application shall file a written objection with the Court no later than the specific date set forth in the Notice.

The creation of deadlines for objecting to interim fee applications (as well as deadlines for filing the applications themselves) performs a significant function in the progress of Chapter 11 cases. Specifically, it is important for administrative claims to be established as early as possible in the case, because such claims are entitled to payment before certain other classes of creditors. Consequently, the efficient resolution of all administrative expense claims is a vital step in the reorganization process. In re LTV Steel Company, Inc., 288 B.R. at 779.

It is clear that the Equity Holders did not object to Glenn Rasmussen's Interim Fee Applications by the deadlines established in the Procedural Order and the Notices of Hearing.

Given the untimeliness of the objection, together with the other factors discussed above, the Court finds that disgorgement would be inequitable in this case.

5. The interim fees awarded to Glenn Rasmussen are reasonable.

Finally, it is generally accepted that the Bankruptcy Court is "uniquely qualified in determining the reasonableness of fees and expenses paid to attorneys." In re Ray, 283 B.R. 70, 83 (Bankr. N.D. Okla. 2002). The Bankruptcy Judge is considered knowledgeable as to the fees charged by attorneys in his area in general, and as to the quality of the legal work presented by the particular attorneys in a case. In re W.J. Services, Inc., 139 B.R. 824, 828 (Bankr. S.D. Tex. 1992). See also In re Jemps, Inc., 330 B.R. 258, 262 (Bankr. D. Wyo. 2005)(The Bankruptcy Court may determine the reasonableness of fees based on his own knowledge and experience, and his subjective judgment of the entire circumstances presented.)

In this case, the Court has presided over this case since its commencement, and has observed the courtroom advocacy of all of the attorneys appearing in the case as they worked through complex issues involving a multimillion-dollar estate.

Specifically, the Court notes that an attorney from Glenn Rasmussen attended all of the major hearings in this case, and participated constructively in disputes that were often contentious or essentially deadlocked. Glenn Rasmussen's contributions at the hearings reflected an in-depth preparedness and familiarity with the facts and issues, and an approach to the issues that served the Committee's duties and responsibilities under §1103 of the Bankruptcy Code.

The Court reviewed each of Glenn Rasmussen's Interim Fee Applications prior to approving them, and found that the legal services described in the entries were consistent with the contributions to the case that the Court observed.

The Court will not require Glenn Rasmussen to disgorge the compensation that it has received.

Conclusion

The matter before the Court is the Equity Holders' Motion for Reconsideration of six separate Orders that awarded interim fees and expenses to Glenn Rasmussen, as attorney for the Creditors' Committee in this case. The Motion should be denied.

The Court is clearly authorized to determine and review the reasonableness of fees awarded to professionals employed in Chapter 11 cases. In this case, however, the Court will not reconsider the interim fees awarded to Glenn Rasmussen because (1) the estate is not administratively insolvent, (2) the Equity Holders' objections are essentially standard challenges that could have been asserted when the Applications were filed, (3) the Equity Holders did not show that reconsideration is warranted because of wrongdoing or subsequent developments in the case, (4) the objections are untimely, and (5) the fees were reasonable based on Glenn Rasmussen's contributions to the case.

Under these circumstances, disgorgement would be inequitable, and the Equity Holders' Motion for Reconsideration should therefore be denied.

Accordingly:

IT IS ORDERED that the Motion for Reconsideration of Orders Approving Interim Fee Applications of Glenn Rasmussen Fogarty & Hooker, P.A., filed by the equity interest holders of CHC Industries, Inc., is denied.

DATED this 5th day of September, 2006.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge