IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	Bankruptcy Number 98B-32761
DONNIE LEE AMOS,	
Debtor.	Chapter 7

MEMORANDUM DECISION AND ORDER REGARDING FEE APPLICATION

David T. Berry and Berry Bertch & Birch (Applicants) seek allowance of attorney fees incurred during their representation of Donnie Lee Amos (Debtor). At issue is under what section of the Code and in what amount should be fees be allowed, and, if allowed, from what funds and in what priority should the fees be paid.

FACTS

When the Debtor filed a petition seeking relief under Chapter 13 of the Bankruptcy Code, the 11 U.S.C. § 541[1] property of the estate consisted of two assets: the Debtor's home, and a counterclaim asserted by the Debtor in litigation pending in State Court (Adversary Proceeding). The Debtor's home was sold pursuant to § 363 preconfirmation. The net sale proceeds were paid to the

[1] Future references are to Title 11 of the United States Code unless otherwise noted.

Chapter 13 Trustee to be held as property of the estate pending further order of the Court.[2] The Adversary Proceeding (99PB-2060) was removed to this Court and the Debtor's counterclaim, which was prosecuted by counsel other than the Applicants, eventually resulted in a Judgment in favor of the Debtor for amounts in excess of $100,000. The Judgment was appealed and collection is pending.

The Debtor proposed a plan that provided for satisfaction of creditors' claims from payments to be paid from the Debtor's post filing income, contribution of the net proceeds of the sale of the Debtor's home, and up to $147,000, less costs, of the recovery from the Judgment. The prosecution of the adversary proceeding, and other matters, resulted in continuances of the confirmation hearing on the Debtor's chapter 13 plan. On September 7, 1999, prior to the final date for the Debtor to either obtain confirmation of his Chapter 13 plan or face conversion, the Debtor filed a notice to convert his case to Chapter 7. As of the date of conversion, the Chapter 13 Trustee was holding § 1306(a) property of approximately $10,100 from the funds generated from the sale of the Debtor's home that the Debtor stipulated would be used to pay his creditors, and § 1306(a)(2) property of approximately $2,500 from monthly plan payments made from the Debtor's post petition income.

Prior to filing the notice of conversion, the Applicants filed a Fee Application (First Application) seeking $7,077.00 in fees and $618.95 in expenses for a total of $7,695.95, covering services from November 17, 1998 through August 5, 1999. Allowance of the First Application was to

---

[2] The Debtor stipulated that the proceeds from the § 363 sale were to be held as property of the estate for distribution to his creditors, subject only to his homestead claim which was ultimately allowed and distributed to the Debtor.

be heard at the hearing on confirmation of the Debtor's Chapter 13 plan, but was not heard because of the conversion to chapter 7.

Subsequent to conversion, the Applicants noticed the allowance of the fees contained in the First Application for hearing. At that hearing the Court expressed concern regarding the failure of the Applicants to obtain approval of their fees prior to conversion of the case to Chapter 7, and allowed a continuance to properly notice the hearing and to enable the Applicants to specify which section of the Code supported allowance of their fees.

The Applicants then filed an Amended Fee Application (Second Application) covering services from November 17, 1998 but extending to November 11, 1999, and reformatted into project billing. The Second Application seeks $4,022.00 in fees pursuant to § 330(a), and $4,102.00 in fees pursuant to § 503(b)(2), and that the Court enter an order requiring payment of the fees and costs pursuant to § 1326(a)(2). The Second Application contains 4.9 hours of additional time entries at $150 per hour, or $735, yet the Second Application increases the total amount sought by an additional $1,047.00. Unable to ascertain where the additional fees come from and without further explanation in the Second Application, the Court determines the total amount of fees sought are $7,812.

The itemization attached to both the First and Second Application reveals entries totaling $2,045.46 that are not compensable as reasonable compensation for actual, necessary services to the Debtor under the criteria set forth in § 330(a)(3)(A). Entries totaling $372 describe clerical

activities[3] that constitute overhead and are not separately billable, and those fees are therefore disallowed. Many of the entries are "lumped,"[4] that is, contain more than one task with only one time entry. Lumped entries prohibit the Court from making an informed judgment regarding whether the amount of time spent to accomplish a particular task was commensurate with the complexity, importance, and nature of the problem, issue, or task addressed. Five percent of the total fees, or $390.60, are therefore disallowed as lumped entries. Some of the listed activities were not performed in a timely manner.[5] Five percent of the total fees, or $390.60, are therefore disallowed for untimely prosecution of the case. The Applicants have segregated $2,022 in fees relating to the Adversary Proceeding. A careful review of these fees reflects a duplication of services in reviewing the events in the Adversary Proceeding, and in consulting with the attorney who actually tried the case. While it is reasonable that the Applicants remained informed of the events in the Adversary Proceeding and

---

[3] Carlyn Lueck, described as a certified paralegal, has various time entries billed at $60 per hour. Some of the entries such as the time recorded on 11/30/98 for 1.0 hours, 2/1/99 for .6 hours, 3/11/99 for 2.4 hours, 6/4/99 for 2.0 hours, and 6/15/99 for .2 hours, describe her activities as sending, copying, hand delivering, mailing or faxing documents. From the descriptions provided it is impossible to ascertain what special skills or training as a paralegal were required to accomplish these tasks.

[4] For example, entry dated 3/11/99 for a total of 2.4 hours is described as "[d]raft motion to allow sale [a four page pleading with exhibits], draft notice of hearing [a two paragraph, two page pleading], draft motion/order to shorten time [two, two page pleadings]." The sale motion may have required some deliberation, but the notice of hearing, and motion and order shortening time are routine pleadings. From the description the Court has no way of knowing whether the bulk of the 2.4 hours were expended drafting the more complex sale motion, or whether the time spent drafting the routine pleadings was reasonable.

[5] Although the claims bar date was March 31, 1999 and the claims were reviewed April 7, 1999, claim objections were not filed until July 19, 1999 and were noticed for hearing after the continued confirmation hearing. Failure to timely resolve claims was one of the reasons the Debtor's plan was not prepared for confirmation at the second continued confirmation hearing, and required yet a third continuance. Orders have never been submitted by the Applicants on the claim objections.

incorporated the results into the Debtor's plan, the time spent is excessive, duplicative, and therefore unnecessary. Therefore, one third, or $667.26 of the fees in this category are disallowed. Fees of $225 listed in the Second Application were incurred after conversion to a Chapter 7, and are disallowed. In total, fees of $5,766.54 represent reasonable compensation for the Applicant's representation of the Debtor's interests in connection with the case. Expenses sought in the amount of $618.75 represent the Debtor's actual and necessary costs.[6]

DISCUSSION

The Applicants argue that the issue related to allowance of the fees has three possible components. First, are "gap period" attorney's fees and costs incurred after the filing of the Chapter 13 petition but before conversion to Chapter 7 construed as § 348(d)[7] prepetition claims. Second, should "gap period" attorney's fees be allowed pursuant to § 330(a)(4)(B)[8] and paid from the funds held by

---

[6] The Second Application seeks costs of $903.05. Included in the amount sought is 2,086 copies at $.20 per copy which the Applicants incorrectly calculate to be $658.40. The accurate calculation is $417.20. Since the costs are not specifically itemized and the increased amount as represented by the Applicants is unreliable, the Court allows the amount set forth in the First Application.

[7] Section 348(d) states:

A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section . . . 1307 of this title, *other than a claim specified in section 503(b) of this title*, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition. (Emphasis added.)

[8] Section 330(a)(4)(B) states:

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interest 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.

the Chapter 13 Trustee pursuant to § 1326(a)(2).[9] Third, should a portion of the fees be allowed as § 503(b)(1)(A)[10] claims. This statement of the issues is incomplete because implicit in resolution of the fee issue is a determination of which property should satisfy the fees, and in what priority the fees should be paid. A determination of these issues will likely effect the amount actually received by the Applicants for any allowed fees.

Allowance

The Applicants correctly point out that the mere conversion of the Debtor's case from Chapter 13 to Chapter 7 does not render their fees prepetition debts. Section 348, which sets forth the effect of conversion, provides that only those debts arising post filing but preconversion that are **not** § 503(b) claims, e.g. claims that arise from either the actual, necessary costs and expenses of preserving the estate, or from compensation and reimbursement awarded pursuant to § 330(a), are treated as having arisen prior to the date of filing. Section 330(a)(4)(B), in turn, allows for reasonable compensation to a Chapter 13 debtor's attorney for representing the interests of a debtor in connection with a case. As set forth above, the Court disallows $2,045.46 in fees, but concludes that fees of

---

[9] Section 1326(a)(2) states:

A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. . . . If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

[10] Section 503(b) states:

After notice and a hearing, there shall be allowed administrative expenses, . . . including —

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commission for services rendered after the commencement of the case.

. . .

(2) compensation and reimbursement awarded under section 330(a) of this title.

$5,766.54 and costs of $618.95 are allowable under § 330(a)(4)(B) as reasonable compensation to the Applicants for representing the Debtor's interest in connection with the Chapter 13 case.

The Applicants alternatively seek allowance of a portion of their fees (which may include those fees disallowed above) pursuant to § 503(b)(1)(A). The relief is denied. "Statutory priorities [including § 503(b)(1)(A)] are to be narrowly construed '[b]ecause the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among his creditors.'" *In re Amarex, Inc.*, 853 F.2d 1526, 1530 (10th Cir. 1988) (quoting *Trustees of Amalgamated Ins. Fund v. McFarlin's*, 789 F.2d 98, 100 (2d Cir. 1986)), *quoted in In re Bayly Corp.*, 163 F.3d 1205, 1208 (10th Cir. 1998); *see In re Mid Region Petroleum, Inc.*, 1 F.3d 1130,1134 (10th Cir. 1993) (§ 503(a)(1)(A) was not intended to saddle debtors with special post-petition obligations lightly or give preferential treatment to certain select creditors by creating a broad category of administrative expenses). As highlighted by the case before the Court, the Code provides an intricate structure that regulates the allowance and payment of fees for officers of the estate. The Code is also generous in the criteria for allowing fees to attorneys for Chapter 13 debtors (as opposed to attorneys for Chapter 7 debtors) for representation of the debtor. For example, services related to plan construction, abatements, financial counseling, decisions regarding what property the Chapter 13 debtor should retain, prosecution of the Debtor's rights to exempt property, or conversion, are allowable because they are legitimate services to protect the interests of the debtor. Why then, would the Code allow fees under § 503(b)(1)(A) that are disallowed under the broad structures of § 330(a)(4)(B)? Broadening the attorney fee allowance provisions to include § 503(b)(1)(A) only because fees are disallowed under

§ 330(a)(4)(B) not only upsets the statutory scheme, it invades one of the few Code sections that allows administrative claim status for non-attorney fee claims. When the Code already provides a category for allowance of the Applicant's Chapter 13 fees incurred in representing the Debtor, it would be inappropriate to ignore the provisions of § 330(a)(4)(B), and instead allow the Applicant's fees as necessary costs of preserving the estate, in order to allow a greater return to the Applicants than the Code would ordinarily allow. *United States v. Noland*, 517 U.S. 535 (1996) (decisions about treatment of categories of claims in bankruptcy proceedings are not dictated or illuminated by principles of equity and do not fall within judicial power of equitable subordination.)[11] Such an extension of § 503(b)(1)(A) would also be contrary to the fundamental tenet of statutory construction that a court should not construe a general statue to conflict with a specific statute. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *State Bank of Southern Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070 (10th Cir. 1996); *Franklin v. United States*, 992

[11] The closest factual situation to the case at bar is where professional persons have failed to obtain employment under §§ 327 or 1103, yet seek fees under § 503(b)(1)(A). Though the Tenth Circuit has not addressed the issue of whether § 503(b)(1)(A) priority should be afforded to claims for fees by professionals whose employment has not been approved by the bankruptcy court, treating such claims as administrative expenses under § 503(b)(1)(A) contradicts the well-established rule in the Tenth Circuit that a professional who renders services to the estate without authorization to do so acts as a volunteer and may not be compensated by the estate. *In re Interwest Bus. Equip., Inc*., 23 F.3d 311, 318 (10th Cir. 1994); *In re Land*, 943 F.2d 1265, 1267 (10th Cir. 1991). *See also In re Keren Limited Partnership*, 189 F.3d 86 (2nd Cir. 1999); *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99 (3rd Cir. 1988).; *Shapiro Buchman L.L.P, v. Gore Brothers (In re Monument Auto Detail, Inc*.). 226 B.R. 219 (9th Cir. BAP 1998); *In re Concrete Products, Inc.*, 208 B.R. 1000 (Bankr. S.D.Ga. 1996)(citing numerous cases).

F.2d 1492, 1502 (10th Cir.1993) ("[A] specific statute ... should not be deemed controlled or nullified by a general statute ... absent a definite contrary intention.")

Payment

Once allowed under § 330(a)(4)(B), the issue becomes from what funds may the Applicants' fees and costs be paid? The Debtor's case was converted on the date of filing the notice for the purposes of applying § 348(c) and Fed. R. Bankr. P. 1019. Fed. R. Bankr. P. 1017(d). Although § 1362(a)(2) requires the Standing Chapter 13 Trustee to return payments, less unpaid claims allowed under § 503(b) to the Debtor if a plan is not confirmed, if a case is converted to Chapter 7, the Chapter 13 Trustee is required to forthwith turn over property of the estate[12] to the Chapter 7 Trustee. Fed. R. Bankr. P. 1019(4). Therefore, in this case the proceeds from the sale of the Debtor's house are forwarded to the Chapter 7 Trustee for eventual distribution to creditors pursuant to prior order of the Court, but the $2,500 in monthly plan payments paid by the Debtor from his post-filing income are returned to the Debtor, but "less unpaid claims allowed under § 503(b)." § 1362(a). This rather ambiguous language could mean that, to be paid from the $2,500, the Applicant's fees must have already been *allowed* as of the date of conversion. Or it could be read consistent with § 503(a) that the only criteria for payment from the $2,500 is that a timely request for payment had been made. Although the Applicants did not have an allowed § 503(b) claim as of the date of conversion, they had

[12] There is no inconsistency in these provisions, because property required to be turned over to the Chapter 7 trustee upon conversion pursuant to Fed. R. Bankr. P. 1019(4) consists only of property of the estate defined under § 541, not property defined under § 1306(a)(2).

timely filed their First Application. New Fed. R. Bankr. P. 1019(6)[13] now clarifies that the focus of § 503(a) and § 1362(a)(2) is on timely filing, not allowance, of a request for payment under § 503(a). Since the Applicants timely filed their First Application under § 503(a) and the fees are now allowed administrative claims under § 503(b)(2), they should be paid by the Standing Chapter 13 Trustee prior to returning any remaining § 1306(a)(2) funds to the Debtor. If there are more in allowed chapter 13 administrative claims than there are available § 1306(a)(2) funds, the allowed § 503(b)(2) administrative claims should be prorated.[14]

The remainder of the allowed chapter 13 administrative expenses not paid from § 1306(a)(2) funds may be paid from § 541 property. However, the remaining allowed chapter 13 administrative expenses are subordinated to allowed chapter 7 administrative expenses by virtue of § 726.[15] *In re Rodriguez*, 240 B.R. 912, 916 (Bankr. D. Colo 1999) (Congress made the policy

---

[13] Fed. R. Bankr. P. 1019(6), effective December 1, 1999, states:

A request for payment of an administrative expenses incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or a time fixed by the Court.

[14] An order allowing costs of $2,023.91 for the attorney that tried the Adversary Proceeding has been entered pre-conversion in this case. It should be noted that fees payable to the Standing Chapter 13 Trustee are outside this analysis because not allowed by § 503. *In re Rodriguez*, 240 B.R. 912, 916 (Bankr. D. Colo 1999).

[15] Section 726 states:

(a) Except as provided in Section 510 of this title, property of the estate shall be distributed —

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title . . . ,

. . . .

(b) Payment on claims of a kind specified in paragraph (1) . . . of section 507(a), shall be made pro rata among claims of the kind specified in each such particular

(continued...)

decision that chapter 7 expenses are paid first, thus preconversion expenses of administration are paid in chapter 7 as a second tier expense). The allowed fees will not share *pro rata* with chapter 7 allowed administrative fees, because they are allowed under § 330(a)(4)(B), and do not receive a stepped up priority that would occur if they were allowed as § 503(b)(1)(A) administrative claims.

Procedure in Future Cases

It has not escaped the Court that the ruling in this case impacts the procedure generally followed in this jurisdiction for obtaining the allowance of administrative expense claims when converting a Chapter 13 case to a Chapter 7 case. To date, if attorney fees were sought the procedure has been to file a motion to convert a case to Chapter 7, rather than a notice of conversion pursuant to Fed. R. Bankr. P. 1017(f)(3). The order converting the case then also allowed, as appropriate, the attorney fees. Since under new Fed. R. Bankr. P. 1019(6) the focus is on timeliness of filing the application, not allowance of the fees, a change in procedure is warranted. Henceforth, those parties who seek allowance of Chapter 13 administrative expenses, whether attorney fees[16] or other expenses, must timely file a request for payment of the administrative expense prior to conversion of the case to

---

[15](...continued)

> paragraph, except that in a case that has been converted to this changer under section . . . 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion . . . .

[16] No change in the current procedure that eliminates itemization of attorney fees and does not require notice for a request for payment of a fee application less than $500, or that requires notice and opportunity for a hearing for fee applications between $500 and $900 but does not require itemization, and that requires a hearing as well as itemization for any attorney fee applications in excess of $900 is warranted.

Chapter 7. However, in order to lessen the delay that may be involved in closing Chapter 13 cases that have been converted to Chapter 7, any request for payment of an administrative expense filed prior to conversion that has not been resolved by a final order, or other order extending the period, within sixty days of the conversion will be deemed waived by the applicant. Upon such allowance or waiver, the Standing Chapter 13 Trustee will make final disbursement of all funds.

Therefore, it is hereby

ORDERED, that Applicants are allowed $5,766.54 in fees and $618.95 in costs for a total of $6,385.24, payable by the Standing Chapter 13 Trustee *prorata* with similar allowed administrative claims from § 1306(a)(2) property. If the allowed fees and costs are not satisfied therefrom, they may be paid by the Chapter 7 Trustee as a second tier distribution from § 541 property of the estate as may ultimately be distributed according to § 726(b).

DATED this ____ day of February, 2000.

JUDITH A. BOULDEN
United States Bankruptcy Judge

_____ooo0ooo_____

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM DECISION AND ORDER REGARDING FEE APPLICATION** upon the following by mailing the same, postage prepaid, on **February____, 2000** to:

David T. Berry, Esq.
Berry Bertch & Birch
5296 South 300 West, Suite 10
Salt Lake City, Utah 84107

Andres! Diaz, Esq.
Standing Chapter 13 Trustee
9 Exchange Place, Suite 313
Salt Lake City, Utah 84111

R. Kimball Mosier, Esq.
185 South State, Suite 700
Salt Lake City, UT
84111-0185

Craig S. Dunlap
Law Clerk