

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

In re Aaron Ferer & Sons Co.

427 F. Supp. 350 (D. Neb. 1977) · No. BK. 74-0-482 · Decided February 28, 1977

SUMMARY

The United States District Court for the District of Nebraska affirmed a bankruptcy court's award of \$244,505 in attorney's fees to counsel for a Chapter XI debtor-in-possession. The court held that the bankruptcy court did not abuse its discretion by granting a rehearing, receiving additional evidence, or considering factors beyond hourly rates and hours worked in setting the fee award.

CASE DETAILS

COURT	United States District Court for the District of Nebraska
WRITING FOR THE COURT	Schatz, District Judge
JURISDICTION	Nebraska
DECIDED	February 28, 1977
DOCKET	BK. 74-0-482
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the bankruptcy court's memorandum and order allowing attorney's fees to counsel for the debtor-in-possession.
STANDARD OF REVIEW	A bankruptcy court's decision to grant a rehearing or new trial is reviewed for abuse of discretion. Fee allowances are entitled to great weight and will not be disturbed absent clear error, an error of law, or an abuse of discretion.
PRECEDENTIAL VALUE	Published federal district court memorandum opinion; persuasive authority within the district and relevant to deferential review of bankruptcy fee awards.
PARTIES	Max Schwartzman and Sons, Inc. v. Aaron Ferer & Sons Co., debtor-in-possession

TOPICS

- bankruptcy
- appellate procedure
- standard of review
- motion for reconsideration
- chapter 11

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the bankruptcy court abused its discretion by granting counsel a rehearing and permitting additional evidence on the attorney's-fee issue.
2. Whether the bankruptcy court's award of \$244,505.00 in attorney's fees was excessive or otherwise erroneous.

HOLDINGS

1. The bankruptcy court properly granted a rehearing and permitted additional testimony because the motion was based on an error of law in the original fee determination, not merely an attempt to relitigate the same matter.
2. The attorney's-fee award was not excessive, and the bankruptcy court did not clearly err, commit legal error, or abuse its discretion in awarding \$244,505.00.

KEY QUOTATIONS

"A wide range of discretion rests with the trial court in the granting or the refusing of a new trial and appellate review of the ruling is very limited." (427 F. Supp. at 352)

"As a general rule, the findings of the bankruptcy court, particularly with regard to fee allowances, are entitled to and should be accorded great weight by the district court on review." (427 F. Supp. at 354)

"Before an appellate court is warranted in holding that the sound judicial discretion resting in the trial court has been abused in the matter of fixing counsel fees, the evidence, including the testimony of experts, and the facts as to the nature of the work, the amount in controversy, are involved, the intricacy or novelty of the legal questions presented, the duration of the services, the ability of counsel, and the results attained through the service rendered, ought to be such as to convince the court that the amount allowed nisi is manifestly insufficient or excessive." (427 F. Supp. at 355)

FACTUAL BACKGROUND

Aaron Ferer & Sons Co. operated as a debtor-in-possession in a Chapter XI arrangement proceeding lasting approximately sixteen and a half months. Its two law firms sought compensation based on substantial documented hours and hourly rates, initially receiving reduced awards from the bankruptcy court. On rehearing, after additional evidence was presented, the bankruptcy court considered the attorneys' skill, time devoted, contingent nature of compensation, delay in payment, overhead, results obtained, and the successful confirmation of the arrangement, and awarded the fees requested.

PROCEDURAL HISTORY

Aaron Ferer & Sons Co. filed a Chapter XI petition on April 24, 1974. After an initial fee award on October 1, 1975, the bankruptcy court granted the debtor's counsel a rehearing, accepted additional evidence, vacated the prior fee award in part, and allowed total attorney's fees of \$244,505.00. Max Schwartzman and Sons, Inc. appealed, arguing that the rehearing was improper and that the fees were excessive. The district court affirmed.

DISPOSITION

affirmed

CASES CITED

- Sanden v. Mayo Clinic, 495 F.2d 221, 226 (8th Cir. 1974)
- In re American Range & Foundry Co., 41 F.2d 845, 847 (D. Minn. 1930)
- In re Melhado, 1 F. Supp. 591 (E.D. Pa. 1932)
- In re Fineman, 32 F. Supp. 212 (D. Md. 1940)
- In re Valentine, 139 F. Supp. 576, 577 (D. Md. 1956)
- In re Midwest Engineering and Equipment Co., 440 F.2d 326, 328 (7th Cir. 1971)
- In re Paramount Merrick, Inc., 252 F.2d 482 (2d Cir. 1958)
- Miller v. Robinson, 378 F.2d 2 (9th Cir. 1967)
- In re Dole Co., 244 F. Supp. 751 (D.D.C. 1965)
- Tracy v. Spitzer-Rorick Trust & Savings Bank, 12 F.2d 755, 756-57 (8th Cir. 1926)

OPINION

SCHATZ, J.

427 F.Supp. 350 (1977) In the Matter of AARON FERER & SONS CO., Debtor. No. BK. 74-0-482. United States District Court, D. Nebraska. February 28, 1977. *351 Robert F. Craig, Omaha, Neb., for appellant Max Schwartzman. Ray R. Simon, Jerrold L. Strasheim, Omaha, Neb., for defendant. MEMORANDUM OPINION SCHATZ, District Judge. Max Schwartzman and Sons, Inc., appeals from the memorandum and order of the bankruptcy court dated December 1, 1975, allowing counsel for Aaron Ferer and Sons Company, debtor-in-possession, attorney's fees in the amount of \$244,505.00.

Appellant argues that the bankruptcy court erred in granting counsel for Aaron Ferer a rehearing on the attorney's fee issue and erred in granting excessive fees to counsel. This Court affirms. On April 24, 1974, Aaron Ferer filed an original petition for arrangement pursuant to the provisions of Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701, et seq. Approximately sixteen and a half months later, on September 8, 1975, a plan of arrangement was confirmed by the bankruptcy court.

Throughout the Chapter XI proceedings Aaron Ferer was represented by the law firms of Venteicher & Strasheim and White, Lipp, Simon & Powers. On August 13, 1975, the law firms submitted to the bankruptcy court an application for allowance of attorney's fees. Venteicher & Strasheim requested \$113,250.00 for 952.8 hours of legal services. White, Lipp, Simon & Powers requested \$126,930.00 for 1,040.7 hours of legal services.

These figures reflect a rate of \$125.00 per hour for primary counsel and a somewhat lower hourly rate for a minor amount of time expended by other persons. The application was supported by itemized computer time records.

On August 26, 1975, a consolidated hearing was held before the bankruptcy court with respect to the plan of arrangement and the application for attorney's fees. Jerrold L. Strasheim and Ray R. Simon, appearing on behalf of their respective law firms, testified in support of their application. No evidence against the fees was introduced at the hearing.

On October 1, 1975, the bankruptcy court entered a memorandum opinion and order effecting the allowance of fees and expenses. Venteicher & Strasheim were allowed \$69,118.00.[1] White, Lipp, Simon & Powers were allowed \$72,849.00. These amounts reflected a rate of \$70.00 per hour. Counsel for Aaron Ferer thereafter filed a timely motion for rehearing and reconsideration of the fee allowance.

At the rehearing, additional evidence was presented *352 to the bankruptcy court in support of the requested fees. On December 1, 1975, the bankruptcy court entered a memorandum opinion and order vacating in part its prior order of October 1, 1975, and allowing counsel the fees requested.

The amounts allowed by the bankruptcy court were \$117,575.00 for Venteicher & Strasheim and \$126,930.00 for White, Lipp, Simon & Powers. Thus, the total allowance of attorney's fees was \$244,505.00. I. Appellant's first contention is that the bankruptcy court abused its discretion in granting counsel for Aaron Ferer a rehearing and in permitting the introduction of new evidence on the issue of attorney's fees.

Appellant submits that the rehearing served only to relitigate the same issue previously decided by the bankruptcy court in its October 1, 1975, memorandum opinion and order. Rule 923 of the Bankruptcy Rules[2] adopts Fed.R.Civ.P. 59 for rehearings in bankruptcy proceedings. Fed.R. Civ.P. 59(a) reads in pertinent part: A new trial may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in courts of the United States.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. A wide range of discretion rests with the trial court in the granting or the refusing of a new trial and appellate review of the ruling is very limited.

A motion for a new trial is addressed to the sound discretion of the trial court and the action of the trial court should not be upset absent a strong showing of an abuse thereof. *Sanden v. Mayo Clinic*, 495 F.2d 221, 226 (8th Cir. 1974). See also 6A J. Moore, *Moore's Federal Practice* Par. 59.05[5]; 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2803.

This Court finds no abuse of discretion. While it is true that a new trial will not lie merely to relitigate old matter, see 6A Moore's Federal Practice, *supra*, Paragraph 59.07, the motion for rehearing in the instant case was based on error of law.^[3] It was, therefore, proper for the bankruptcy court to fully review the matter as well as receive additional testimony thereon.

II. Appellant's primary contention is that the allowance of attorney's fees to counsel for Aaron Ferer in the amount of \$244,505.00 was excessive. The original memorandum and order of the bankruptcy court allowed counsel for Aaron Ferer an attorney's fee "in accordance with their normal hourly rate and not for the rates applied for." Upon rehearing, the bankruptcy court found these fee allowances inadequate.

The bankruptcy court set forth in a memorandum opinion its reasons for the increased fee allowances. The memorandum reads in extenso: I believe my prior allowances to the attorneys for the debtor as debtor-in-possession are inappropriate because those allowances place too much emphasis on hours worked and hourly rates (the "time-clock" approach) and too little emphasis on other factors which are significant in this Chapter XI proceeding.

This Chapter XI proceeding was filed on April 24, 1974. The hearing on confirmation *353 was held on August 26, 1975 and the order of confirmation was actually entered on September 8, 1975. The attorneys for the debtor undertook the proceeding without benefit of any retainer and have not to this date received any compensation for their services. I believe my prior allowances fail to take into account the significant impact the representation in this case had upon their ability to engage in other employment.

From the beginning of the Chapter XI, the debtor was faced with bitter opposition from both its secured and unsecured creditors. That opposition required the attorneys for the debtor to spend enumerable hours keeping the debtor afloat.

The devotion of this time by the attorneys for the debtor resulted in their inability to provide services to other existing and potential clients. That is an important consideration in fixing their fees. Another factor to be considered is the contingent aspect of the possibility of compensation. If the attorneys for the debtor had been unsuccessful in obtaining confirmation, there is no doubt that this would be a factor in determining their compensation.

Attorneys for debtors who unsuccessfully attempt to formulate an arrangement in general simply are not compensated as much as if an arrangement is confirmed. In addition, if this Chapter XI proceeding had resulted in adjudication instead of confirmation, any prospect of compensation for services rendered to the debtor would have to await liquidation of the debtor's assets and are subordinated to the costs and expenses of the liquidation.

Section 64a(1). The skill of the attorneys is also an important consideration. Not only did the attorneys deal skillfully with procedures and other matters involving bankruptcy law, they dealt

with significant matters of taxation, Securities and Exchange Commission laws and requirements, and intricate matters of commercial law involving not only laws of the United States but questions of law involving the law of foreign countries.

That skill must be appropriately compensated. Particularly is that true when one considers the possibility that compensation is contingent and the long delay in obtaining compensation. I cannot justify compensating skillful attorneys who undertake representation of a Chapter XI debtor at an hourly rate which they could have earned on a more regular basis if they had declined representation of this particular debtor.

These attorney's office overhead expenses continued during this Chapter XI proceeding even though no commensurate income was received by them. The results obtained are also a factor to be considered. Some suggestion has been made that the results obtained for creditors is not large and, therefore, the attorney's compensation should be adjusted downward. By the nature of the debtor's confirmed plan, it is impossible to determine the exact amount of the payment to creditors.

Projections made by the debtor in soliciting acceptance of its plan were necessarily conservative because financial data distributed to creditors had to pass Securities and Exchange Commission's scrutiny. There is evidence before me which would suggest that this conservative approach may be significantly exceeded.

In addition, one of the major goals of Chapter XI is rehabilitation of the debtor. That is a significant result of the proceeding. A test of whether a proposed plan of arrangement may be confirmed is whether or not creditors will receive as much or more from the plan of arrangement as they would in regular bankruptcy.

In my order of confirmation of plan, I found, based on evidence before me, that the plan was "for the best interests of the creditors" (the words of art which describe the foregoing test to confirmation). That order is long since final, there having been no appeal. I do not mean to be understood to say that time spent is irrelevant in determining compensation.

It must be considered. However, assuming that attorneys of the skill and competence of Mr. Strasheim *354 and Mr. Simon can produce in the neighborhood of thirteen to fourteen hundred billable hours a year, their fee applications would show that they have spent approximately one half of the last year and five to six months giving services to the debtor. This is a substantial amount of time away from their otherwise productive time.

In the final analysis, the fixing of compensation for attorneys is a matter of setting an amount which falls within a reasonable range. In consideration of the foregoing, I am unable to say that the fees applied for do not fall within that range. I will, therefore, enter an order setting aside the fees

allowed the law firm of Venteicher and Strasheim and the fees allowed, White, Lipp, Simon and Powers and enter an order allowing them the fees for which they applied.

As a general rule, the findings of the bankruptcy court, particularly with regard to fee allowances, are entitled to and should be accorded great weight by the district court on review. The referee's discretion and judgment, if free from error of law and sufficiently supported by evidence, is entitled to great weight * * *. Collier on Bankruptcy, 14th ed., sec. 62.12, pages 1481-1483.

In *Re American Range & Foundry Co.*, D.C. Minn., 41 F.2d 845, 847, 7 Am.Bankr.Rep., N.S., 170, the judge said: "* * * it is not the business of this court to retry this question or to substitute its judgment for that of the referee, where there is nothing to show that he did not fairly pass on the question in view of the evidence before him, or that there is any mistake of law. * * * The business of fixing attorneys' fees in bankruptcy matters is one peculiarly for the referee.

If this court should make it a practice to pass upon the question of the reasonableness of the allowances made by referees for attorneys' fees, it would mean that it would have to pass upon the question in connection with almost every large bankruptcy matter and a great many of the small ones.

To leave the question to the referees tends to create uniformity of charges and allowances, while to repass upon the question here and substitute the judgment of this court for that of the referee would tend to create inequality and confusion. There is nothing more difficult nor embarrassing than to appraise the value of professional services.

The appraisal must be based largely upon the personal opinion of the one who makes it. Even though an occasional injustice be done, the policy of the court must be to leave the determination of the question of the reasonable value of such services to the judgment of the referee." See also *Matter of Melhado*, D.C.Pa., 1 F.Supp. 591, 21 Am.Bankr.Rep., N.S., 444; *In re Fineman*, D.C.Md., 32 F.Supp. 212, 42 Bankr.Rep., N.S., 566.

In re Valentine, 139 F.Supp. 576, 577 (D.Md.1956). See also *In re Midwest Engineering and Equipment Co.*, 440 F.2d 326, 328 (7th Cir. 1971); *In re Paramount Merrick, Inc.*, 252 F.2d 482 (2d Cir. 1958); *Miller v. Robinson*, 378 F.2d 2 (9th Cir. 1967); *In re Dole Co.*, 244 F.Supp. 751 (D.D.C.1965); *Tracy v. Spitzer-Rorick Trust & Savings Bank*, 12 F.2d 755 (8th Cir.

1926). Upon careful consideration of the record, this Court cannot say the fee allowance of the bankruptcy court was based on findings that are clearly erroneous. Nor does any error of law appear. The factors considered by the bankruptcy court are fully supported by the law. See *In re Paramount Merrick, Inc.*, *supra*, 252 F.2d at 482; *Levin v. Barker*, 122 F.2d 969, 972 (8th Cir.

1941); *In re Detroit International Bridge Co.*, 111 F.2d 235, 237 (6th Cir. 1940). As noted by the Court in *Tracy v. Spitzer-Rorick Trust & Savings Bank*, *supra*: Before an appellate court is

warranted in holding that the sound judicial discretion resting in the trial court has been abused in the matter of fixing counsel fees, the evidence, including the testimony of experts, and the facts as to the nature of the work, the amount in controversy, are involved, the intricacy or novelty of the legal questions presented, the duration of the services, the ability of *355 counsel, and the results attained through the service rendered, ought to be such as to convince the court that the amount allowed nisi is manifestly insufficient or excessive.

(Citations omitted.) 12 F.2d at 756-57. This Court is convinced that the amount allowed here is not excessive and that the order of the bankruptcy court should be affirmed in all respects. A separate order will be entered this day in accordance with this memorandum opinion. NOTES [1] This amount took into account an additional 34.6 hours of legal service which was submitted to the bankruptcy court in a supplemental application.

[2] Rule 923 provides: Except as provided in Rule 307, Rule 59 of the Federal Rules of Civil Procedure applies in bankruptcy cases. [3] As discussed *infra*, this error was the failure of the bankruptcy court to give due weight and consideration to all legal criteria in determining the allowance of attorney's fees.