United States Bankruptcy Court
District of New Mexico

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
THE ANGEL FIRE CORPORATION,
Tax ID 85-0226843; and ANGEL FIRE
SKI CORPORATION, Tax ID 86-0290933,

Debtors.

Jointly Administered
No. 11-93-12176 Bohanon (3)(A)
(Formerly No. 93-12176 Brumbaugh (5)(A))

ANGEL FIRE RESORT OPERATIONS, LLC
A New Mexico Limited Liability Company,

Plaintiff,

v.

Adv. No. 03-1192

LEWIS PIERCE and BETTY PIERCE,

Defendants.

MEMORANDUM OPINION
SPECIFYING WHAT FEES AND COSTS
ANGEL FIRE RESORT OPERATIONS, LLC
MUST PAY TO LEWIS & BETTY PIERCE

In connection with the order ruling that Defendants were entitled to an award of attorney fees and costs (doc 21), the Court had received and has received filings (docs 13-16, 23 and 35) from the parties ("Angel Fire" and "Defendants" respectively) and conducted a trial on January 18 and 20, 2005 about what the amount of the award should be. Having reviewed the filings, the evidence and the arguments of counsel, the Court makes the following findings of fact and conclusions of law and ruling.

Facts:

On November 10, 2003, Judge Richard L. Bohanon entered the order in this adversary proceeding dismissing the removed counterclaims and remanding them back to the state court (doc 12). That led to Defendants' application for payment of attorney fees and reimbursement of costs in the amount of $13,180.05[1] (doc 13), supported by an affidavit which included time sheets (doc 14). Angel Fire objected to the application (doc 15) on the grounds that there should be no award of fees, to which Defendants replied (doc 16). The adversary proceeding was then transferred to this judge (doc 17), following which the Court entered its order (doc 21) granting an award of fees and costs but reserving for further litigation what amount of fees and costs should be awarded.

Angel Fire then filed its specific objections to the amounts requested (doc 23, admitted into evidence as Exhibit F), objecting to a total of $1,968.38, arguing that (a) TAS [Thomas Simons, the senior named member of the firm] should not have billed $200 to this file for working on state court matters, (b) Defendants should not be compensated for opposing Angel Fire's motion to reopen the bankruptcy case (including

[1] Unless otherwise stated, the fee figures include applicable New Mexico gross receipts tax.

the time for three attorneys to read Judge Bohanon's dismissal order), and (c) Defendants should not be reimbursed $340 as the cost of courier travel to Albuquerque to file things with the clerk's office.[2] Angel Fire also objected to the award of any additional fees and costs for the litigation about the fees and costs, which it had been informed would be $2,709.[3] The amount at issue was therefore approximately $4,677 ($1,968 + $2,709), although Defendants' have described it as a fight over about $4,300 (Defendants' pre-hearing memorandum, doc 35, at 1). Defendants did not immediately file anything in response to the objection, and the matter was set for trial for Tuesday, January 18, 2005.

On Thursday, January 13, Defendants served on Angel Fire by first class mail their pre-hearing memorandum (doc 35). Defendants provided no explanation why they had not faxed or e-mailed the memorandum to Angel Fire instead of employing the

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[2] With the advent on March 1, 2005 of mandatory e-filing, such charges should largely become a thing of the past.

[3] The objection argued that by not including that claim in the original motion for fees, Defendants had waived it, and in any event, no invoices detailing the time spent had been provided to Angel Fire. The objection was filed on November 2 and docketed on November 3 (doc 23). Exhibit I, stipulated as admissible (doc 36), is an e-mail bearing a time and date of 7.47 am on November 3, 2004 (probably before the objection had even been docketed) from Mr. Friedman to Mr. Askew detailing the time entries and doing the math for the $2,709.86.

United States postal service. The memorandum was filed on Friday, January 14, and docketed on Tuesday, January 18, since the court was closed on Monday, January 17, for the Martin Luther King, Jr. holiday. Angel Fire's counsel did not receive the memorandum until Tuesday morning; the trial was set to commence at 3.00 pm that day.

In the memorandum, Defendants responded to the Angel Fire objections. They conceded that $100 of the TAS $200 ought to be attributed to the state court action, and withdrew the request for the $340 for the travel time for a paralegal to travel to Albuquerque. Doc 35, at 11 and 14 respectively. They then argued that the total fees and costs which Angel Fire ought to pay were now $23,758.27,[4] mostly incurred in defending the fee application and for preparing for and (on an estimated basis) conducting (what turned out only to be the evidence presentation portion of) the trial. Doc 35 at 3.

Defendants then argued that Mr. Friedman's doing the work at the rate of $200 per hour was reasonable, believing that

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[4] That total was comprised of $13,022.81 for obtaining the remand (it is not clear to the Court how the $13,180.05 originally asked for less the $100 and $340 equal $13,022.81), $6,059.85 for fees incurred through December 31, 2004 in moving for the fee award for the remand, $2,521.31 for January 1-13, 2005, and an estimated $2,154.30 for January 14-18, 2005. Doc 35 at 3; the time sheets for these figures are Exhibits A, A-1 and A-2, stipulated as admissible (doc 36).

Angel Fire was challenging his rate. Doc 35 at 4-7. Defendants' belief arose from Angel Fire's response to an interrogatory.[5] Angel Fire responded at trial that it had not been disputing Mr. Friedman's rate of $200 per hour, but merely asserting that some of the work could have been done by someone billing at a lesser rate. Defendants replied that there are times when it is cheaper for the higher priced attorney who is familiar with the case to just do the work rather than transfer and supervise the work. Finally, Defendants reargued that they were entitled to fees for accomplishing the remand, doc 35 at 9-11, including opposing the motion to reopen the bankruptcy case, id. at 11-13, and that they were thereby entitled to fees for collecting the fees, id. at 8-9.

In the opening statement at trial, Angel Fire conceded that most of the fees, about $11,400, were owed (without of course conceding that any fees should be paid), but disputed whether for the small sums at issue, someone at Mr. Friedman's rate ($200 per hour) should have been used. Angel Fire also

[5] Interrogatory no. 4 asked in part, "Do you contend that Simons & Slattery's hourly rates were inappropriate...?" Response: "Yes.... Specific objection is made to the rates charged in Dan Friedman's e-mail of November 3, 2004. [Ex. I.] The appropriate rate would be $150.00. Objection is made to the experience level of personnel used. The rates are too high."

opposed the award of any additional fees, beyond those contained in the original motion which sought $13,180.

The trial testimony focused largely on what Defendants' counsel did and why, and efforts to settle. The parties then did closing argument on January 20, 2005.

Discussion:

During the course of the trial, the Court admitted several exhibits over the objections of Angel Fire. The exhibits were copies of communications between counsel for the two sides, and Angel Fire objected on the grounds that they constituted settlement negotiations that were inadmissible as settlement negotiations. See Fed. R. Evid. 408. Angel Fire also pointed out that there had been no offer of judgment pursuant to Fed. R. Bankr. P. 7068. And it argued that allowing these exhibits into evidence would put counsel in future cases in the position of not being able to discuss a case candidly. In consequence, Angel Fire urged the Court not to accord any weight to those exhibits.[6]

[6] These are Exhibits G, H, and J through O. Exhibits Q through V were also admitted over Angel Fire's objection, but they are merely copies of decisions by this Court, Bankruptcy Judge Mark McFeeley, Chief United States District Judge Martha Vazquez and former Chief United States District Judge James Parker which address attorney fee issues, and are not evidence as such.

Evidence Rule 408 provides in part that evidence of conduct or statements made in compromise negotiations is not admissible, although such evidence may be offered for another purpose, such as negativing a contention of undue delay. These exhibits were admitted to show the efforts to resolve the dispute without going to trial, not for admissions of liability or of what amounts the parties might admit were or were not owing. Nevertheless, the Court recognizes Angel Fire's concern that admitting and considering these exhibits might chill the free and candid exchange of information, viewpoints, arguments and offers of compromise that enhances the informal resolution of disputes. In consequence, having reviewed all the evidence admitted or stipulated to by the parties, the Court has determined that it can and does make this decision without reference to the contested exhibits. The Court has also disregarded testimony tied into those exhibits.

There are several overarching principles applicable to this decision. To begin with, the Court has already ruled that Defendants are entitled to an award of attorney fees and reimbursement of costs.[7] Second, the reasonable expense of

[7] Angel Fire urged the Court to read Martin v. Franklin Capital Corporation, 393 F.3d 1143 (10th Cir. 2004), petition

(continued...)

obtaining the award of fees and costs is also compensable. "In the analogous area of fee litigation under statutory fee provisions, courts commonly allow additional attorney's fees for time spent in establishing an original fee entitlement." Glass v. Pfeffer, 849 F.2d 1261, 1266, n. 3 (10th Cir. 1988) (assessing fees for the necessity of defending an appeal of the trial court decision to award sanctions). Third, once fees are awarded, they should be paid in full unless there is a reasonable objection; the risk of losing an objection is to have to pay the cost of other side for defending (assuming the cost of defense is reasonable in light of the sum being contested). A ruling otherwise would work against the point of the rule. But the award for the additional fees incurred in defending a fee application should be proportional in some way; for example, Defendants should not be rewarded for or protected from their overbilling, such as TAS for two hours instead of one hour or the $340 for hand delivery of documents to Albuquerque.

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[7](...continued)
for cert. filed, Feb. 22, 2005 (No. 04-1140), to see what an appropriate fee award should be. The case stands for the proposition that the trial court is not required to award fees if [Angel Fire] had objectively reasonable grounds to believe the removal was legally proper at time of removal. But that issue has already been decided, and this Court will not revisit it.

A review of the proceedings and the evidence leads this Court to the conclusion that the entire original bill of $13,180.05 less the $340 courier fees and the $100 for Mr. Simons (which the Court will round up to $450, to take into account applicable New Mexico gross receipts tax), for a remaining payable figure of $12,730.05 should have been paid. In addition, Angel Fire was on constructive notice, at a minimum, that Defendants might well seek additional fees for litigating the fee issue. Thus, although Angel Fire recited that the total amount in dispute was $1,968.38, Exhibit F at 3, in reality the figure was, with the then-estimated application fees of $2,709.86 (Exhibit I), at least $4,678.24.

Without consideration of the disregarded exhibits, the Court finds that to some extent, both sides could have communicated somewhat better. A specific statement early on, and certainly earlier than the morning of the trial (as contained in the pretrial memorandum), of the approximately $450 reduction would have reduced the amount in dispute. However, it is also clear to this Court that such an early concession would not have avoided the trial or these further proceedings, given Angel Fi*re's* continued insistence that it would not pay $200 an hour for some of the work done or for the cost of defending the right to collect fees. In addition,

although Angel Fire was careful in its responses to the interrogatories (Exhibit C) to refer back to its filed objections to the fee application (Exhibit F), Defendants can be forgiven if what they understood was that Angel Fire was expanding its challenge to contest the $200 rate across the board. And in fact, Angel Fire's opening statement led the Court to believe that Angel Fire was contesting the $200 rate. In consequence, when Angel Fire conceded in opening statement that it was not contesting approximately $11,400, it was not clear even at that point that only $4,600 was at issue. And more important, Defendants were already in a position of having had to prepare for trial, including having a second attorney to conduct the examination of Mr. Friedman.

Angel Fire's objection to the TAS $200 was halfway conceded by Defendants, and the Court finds that the remaining $100 was appropriately billed. Similarly, the review of and consultation about Judge Bohanon's remand decision (doc 12) took relatively little time. And this was a case, taking place in (so far) two different courts, that required or at least justified more than one attorney working on it. So it would have been foolish for the attorneys not to keep each other informed and to consult with each other. Indeed, that

is one of the advantages of working in a multi-person firm, such as the ones litigating this matter.

Angel Fire's objection to Mr. Friedman doing some of the work rather than someone who bills at a lower rate is overruled. The evidence was clear to the Court that it would have cost as much as and probably more for Mr. Friedman, who was already familiar with the background of this matter, to have directed a portion of the work to a lower-rate attorney and then supervised that work.[8]

The objection to the work on the motion to reopen should also be overruled, since even Angel Fire deemed it related to the removal action.

The $340 charge has been withdrawn, appropriately so.

Angel Fire also asserted that Defendants had waived the right to claim $2,709 for preparation of the original fee

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[8] Exhibit A, at 2, shows that the hourly rates as of March 2003, for partners Simons, Friedman and Reyes were $200, for associate Joseph was $165, and for "OLD TIMEKEEPERS" $85. (Presumably the latter label is a term of art; while one would have expected that Messrs Simons and Friedman would be the "old timekeepers" of the firm, the rate suggests that this group is probably comprised of young paralegals. See, e.g., the June 30, 2003 bill.) Thus, referring the case to someone who billed less may have not been too practical in this firm. That, however, would not have been an excuse for not doing so had it not made more sense for Mr. Friedman to simply do the work himself. And the fact that the hourly rates were still $200 almost two years later (Exhibits A-1 and A-2: bills for January 2005), is some evidence of their current reasonableness.

application by not including it in the application, and that in any event it reserved the right to review invoices. The latter part of the objection is of course well taken. But Angel Fire was still opposing any award of fees for the preparation of the fee application at closing argument on the grounds that it was claimed too late. This aspect of the objection is surprising. First, it is routine in bankruptcy practice for estate professionals who file serial compensation applications to charge the cost of the application preparation in a subsequent application. Second, the law was and is clear that time spent preparing and defending a fee application authorized by statute or case law is compensable. E.g., Glass v. Pfeffer, 849 F.2d 1261. Third, common sense suggests that professionals should be compensated for defending applications. Angel Fire should not be able to chisel away legitimate portions of the award by making it not cost effective to challenge the objections.

The time sheets for November and December 2004 evidence Defendants' conferring with opposing counsel about the fees, conducting discovery and doing legal research in preparation for a trial. These are precisely the sorts of tasks that the Court expects counsel to engage in prior to a trial, and Angel

Fire should obviously have anticipated such activities, and billings therefor.

Angel Fire also objected to Mr. Friedman appearing in person for one of the pretrial conferences conducted by the Court, necessitating travel from and back to Santa Fe, rather than appearing by telephone. At a previous hearing, Angel Fire's counsel had appeared in person while Mr. Friedman appeared by telephone. This time he contacted another of Angel Fire's counsel who was to appear at the hearing and informed her that if she were going to appear in person, he would also appear in person. It was not unreasonable for Mr. Friedman to appear at that subsequent hearing in person. The reality is that some counsel feel the need to observe the judge during a hearing if that same opportunity is afforded to other counsel, and the Court does not here question that advocacy-type judgment. There may well be instances in which out-of-town counsel should not be compensated for appearing in person when it can be done by telephone or when a local attorney can reasonably be employed to appear in person instead, but this small matter did not justify hiring and educating another attorney. And in any event, the appearances in Albuquerque were necessitated in the first place by Angel

Fire's having (improperly) removed the counterclaims to the Bankruptcy Court.

Angel Fire also objects to the preparation of the pretrial memorandum as not required by the Court. The Court did not require such a memorandum, but it also did not forbid such a filing either, and the filing of pretrial memoranda is such a common occurrence at least in other courts that Angel Fire should not have been surprised that such a brief was filed. Defendants' trial preparation, including the brief, is fully compensable.

Similarly, the cost of having two counsel at the trial was required given Defendants' justifiable belief that Angel Fire's objections had expanded to contesting the $200 rate generally. Mr. Friedman announced in the course of his cross examination that Ms. Reyes' time was being billed at $165 per hour, down from $200. The January 2005 time sheets reflect that reduction for the 5.8 hours she had billed through the close of evidence on January 18.[9]

[9] The Court takes the reduction as a gracious effort by Defendants' counsel to make the overall bill more reasonable. Certainly there was nothing in Ms. Reyes' brief but accomplished performance at the trial that would argue for a rate lower than the $200 the firm normally charges for her services.

Taking into account the gratuitous reduction in Ms. Reyes' billing for January in the approximate amount of $200, the "overbilling" is about $250. Even conceding for the purpose of argument Angel Fire's contention that the total amount in dispute was about $4,677, the $250, or even $450 that Angel Fire "won", is almost de minimis. Thus, awarding Defendants the fees and costs they have incurred, less only the $250 but including the fees and costs incurred to conclude the trial with closing argument, would be entirely appropriate. Nevertheless, some proportionality, even if quite small, ought to recognize the relative responsibility of each side. Given that practically speaking the amount at issue, up until closing argument, was effectively at least the $13,180.05, of which $450 was not allowed, and recognizing the late arrival in Angel Fire's office of the pretrial memorandum that contained the concession on the $450, the Court will reduce the current year 2005 fees specifically addressed in this order by 3%.[10]

Conclusion:

While the continuing increase in costs may seem to Angel Fire like the never ending drip of a leaky faucet, Angel Fire

[10] That figure is derived by dividing $450 by $13,180.05 and rounding the 3.41% figure down to 3%.

can turn the faucet off at any time. Conversely, there is no reason to make the Defendants begin to absorb the cost of this litigation if the purpose of the statute is to be observed.[11]

Based on the foregoing, the Court finds that almost all of the fees and cost reimbursements requested by Defendants should be allowed. Specifically, the amount allowed will be the total of (1) the $13,180.05 originally asked for less $450 (for a subtotal of $12,730.05) plus the $6,059.85 for fees incurred through December 31, 2004, and (2) the subtotal of (a) $2,521.31 for January 1-13, 2005 plus the amount for the period from January 14, 2005 forward, to include the trial and closing argument (with Ms. Reyes' time being billed at $165 per hour) and preparation of the affidavit and filing called for in this order[12] (b) reduced by 3%. Concerning the figure for January 14 forward, Defendants' counsel shall prepare an affidavit with time sheets attached, setting out and summarizing the fees and costs incurred, and shall file the affidavit and serve it on Angel Fire's counsel, who shall

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[11] That statement is not entirely accurate of course; given when the work was done, either the firm or the Defendants have had to absorb the time value of the money depending on when or if Defendants have been paying their bills. And there is still the question of when Angel Fire will pay the bill.

[12] To be explicit, this figure will exceed the estimate contained in Exhibit A-2.

have ten (10) days in which to file further objections. If no further objections are filed, Defendants' counsel shall prepare a form of order awarding fees and costs of the total, and submit it to Angel Fire's counsel for approval as to form. If further objections are filed, then Defendants' counsel shall request a hearing thereon. And, on the off chance that counsel may meet and confer and resolve the dispute without further filings, Defendants' counsel shall submit a form of order approved by Angel Fire's counsel.

An order reflecting this ruling shall enter.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 22, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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