

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

FLOWERS, DEVERELL & CRAWFORD,

Debtor.

BK #85-20353-WHB
Chapter 7 (asset)

**MEMORANDUM OPINION AND ORDER
ON TRUSTEE'S APPLICATION FOR COMMISSION
AND OBJECTION OF UNITED STATES TRUSTEE**

The Chapter 7 Trustee in this asset case, Freeman C. Marr, filed his application for compensation on August 16, 1991, seeking statutory commissions in the amount of \$35,711.35, and the United States Trustee objected to the Trustee's commission in that amount. The issue is core since it raises statutory issues under 11 U.S.C. §326(a) which provides for a trustee's commission utilizing upon a percentage scale "upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims." See, 28 U.S.C. §157(b)(2)(A).

The United States Trustee asserts that the Trustee is entitled to a commission on \$623,687.96, that being the amount actually turned over by the Trustee of estate property to parties in interest, excluding the debtor. On the other hand, the Trustee seeks a commission based upon total receipts of \$1,184,378.38 and disbursements of \$1,107,156.09 to date. The Trustee bases his claim for commission upon a prior order of this Court dated May 23, 1985. The Court has reviewed that order which was of course signed by former Chief Judge William B. Leffler and which order lifted the automatic stay as to First State Bank of Covington "with respect to the property of the debtor securing the Bank's claim." The order does provide that "the Bank is to defer to the Trustee's judgment in determining what commercially reasonable steps are to be taken with respect to liquidation of the collateral," but the order makes clear that the proceeds of the sale of the collateral which consisted of cotton and warehouse receipts "are to be used by the Bank to pay the Bank's [secured]

claim, including all interest and expenses of liquidation of the collateral, but not including [the bank's] attorney's fees, and the balance of such proceeds are to be immediately paid over by the Bank to the Trustee."

In addition to this order which accounts for \$559,096.19 of the funds received by the First State Bank of Covington for satisfaction of its secured claim, the United States Trustee objects to the case Trustee receiving a commission on \$1,594.23 which amount was paid over to a third party but held by Judge Leffler not to be property of the bankruptcy estate. As to the \$1,594.23, the Court can easily conclude that Mr. Marr is not entitled to a statutory commission on that amount, since the commission under §362(a) is calculated only "upon . . . moneys disbursed or turned over in the case by the trustee." This statutory language would certainly indicate that only property of the estate or in which the estate has an interest would be included in the calculation for trustee compensation purposes. For example, the legislative history of §326 indicates that the statutory trustee compensation does not include property which the trustee merely turns over to a secured creditor or abandons. See, In re Music Merchandisers, Inc., unpub. opinion case number 385-01035 (Bankr. M.D. Tenn. Sept. 17, 1991), at p. 2.

As to the larger objection of the United States Trustee, the Court's decision must be based not only upon §326 of the Bankruptcy Code but upon Judge Leffler's order dated May 23, 1985. The Trustee argues in his memorandum that he did not simply turn the collateral over to the secured creditor. Rather, the Trustee maintained a decision over whether commercially reasonable steps were being taken in regard to the liquidation of the collateral, and the collateral was sold "free and clear of all liens, encumbrances and adverse claims," except for the lien of warehousemen. However, Judge Leffler's order also provided in paragraph 5 of the ordering clause that the proceeds of the sales would be "used by the Bank to pay the Bank's [secured] claim, including all interest and expenses of liquidation of the collateral." The Court can not read in isolation parts of Judge Leffler's order to infer that the Trustee was actually selling the property free and clear of liens under §363(f) as the Trustee argues in his memorandum. The Trustee is correct that §363(f) only gives a Trustee authority to sell property free and clear of liens. However, Judge Leffler's order is not a §363(f) order. Rather, it is an order lifting the automatic stay to permit the secured creditor to sell the collateral in a

commercially reasonable manner and to turn over net proceeds to the Chapter 7 Trustee. The fact that the Trustee retained some decision making, along with the bank, over the methods of the sale, does not make it a trustee's sale. Had Judge Leffler intended this to be a §363(f) order for the Trustee to sell the property, the Court would expect the order to be worded in a completely different manner so as to authorize the Trustee to conduct the sale and then to pay the secured creditor and warehousemen, and to retain net proceeds.

Judge Keith M. Lundin of the United States Bankruptcy Court for the Middle District of Tennessee has discussed, in a thorough analysis of §326(a), both the legislative history and case law emerging under that Code section, and he reached a conclusion that the statute only permits a trustee's commission upon moneys disbursed or turned over by the trustee. In re Music Merchandisers, Inc., *supra*. Judge Lundin further concluded that the statute did not permit the trustee to collect a commission upon disbursements that were "deemed" to have been made by the trustee. Further, as Judge Lundin commented: "there are good arguments for legislation correcting the wording of §326. In the meantime, the United States trustee's objection" must be sustained. *Id.* This Court agrees with Judge Lundin's analysis, and while the result may appear unfortunate to this Trustee, this Court would observe that Mr. Marr also served in this case as one attorney for the Trustee and has previously been approved for a substantial attorney's fee. This comment is by no means meant to indicate that the Court is critical of the Trustee; rather, the Court is complimentary of the Trustee's efforts both as Trustee and as attorney for the Trustee. The Court is merely observing that Mr. Marr has been compensated in his capacity as attorney for the Trustee and the Court can not find a basis in equity to award a trustee's commission which would be in excess of the maximum amount established under §326(a).

Judge Leif M. Clark has recently discussed this same issue in In re North American Oil & Gas, Inc., 130 B.R. 473 (Bankr. W.D. Tex. 1990) in which opinion Judge Clark points out that the statutory commission is "computed on a 'base' of monies disbursed or turned over . . ." *Id.* at 478. Further, Judge Clark observes that "disbursed," "turnover over," and "moneys," are not defined terms in §326(a). *Id.* Further, Judge Clark notes that "[t]he underlying purpose of Section 326(a) is to assure that the trustee's compensation is fairly proportional to job results. In the last analysis, the ultimate function of a trustee is to distribute the assets of

the estate." Id. at 479 (citations omitted). "Regardless of the seeming inequity of [the statutory] cap when applied to the exigencies of a given case, a court is not permitted to amend the clear language of the statute." Id. at 480-481 (citations omitted).

CONCLUSION

Under the facts present in this case, including the prior orders of former Chief Judge Leffler, combined with the statutory language of §362(a), this Court concludes that the Trustee is not entitled to be paid a commission for either the \$1,594.23 held by Judge Leffler not to be property of this estate or for the \$559,096.19 paid by First State Bank of Covington to itself from sale proceeds. Rather, the Trustee is entitled only to a commission on the amount disbursed by the estate or \$623,687.96.

IT IS THEREFORE ORDERED that the United States Trustee's objections are sustained and the Chapter 7 case Trustee is awarded a statutory commission under §326(a) calculated upon \$623,687.96.

SO ORDERED this 24th day of October, 1991.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

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