

Dated: April 30, 2021
The following is ORDERED:



A handwritten signature in black ink, appearing to read "M. Ruthie Hagan".

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:
Clear the Way Supportive Housing Corp.
Debtor

Case No. 20-24352
Chapter 11, Subchapter V

**MEMORANDUM AND ORDER ON FINAL FEE APPLICATION OF THE LAW
OFFICES OF JOHN E. DUNLAP FOR ALLOWANCE OF FEES**

This matter is before the Court on the Application [DE 131] of attorney John E. Dunlap on behalf of himself and his law firm, the Law Offices of John E. Dunlap, counsel of record for the Debtor-in-possession, for services rendered throughout the brief course of this bankruptcy case. The United States Trustee and the Debtor's representative, Ms. Melissa Shea, filed objections to the fee application [DE 134 and 135, respectively]. A hearing was held on April 6, 2021, at which time the Court took this contested matter under advisement.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). This Court has both the statutory and constitutional authority to hear and determine this matter subject to the statutory appellate provisions of 28 U.S.C. § 158(a)(1) and Part VIII (“Bankruptcy Appeals”) of the Federal Rules of Bankruptcy Procedure. This memorandum of decision constitutes the Court’s findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52, made applicable to this contested matter by FED. R. BANKR. P. 9104 and 7052. Regardless of whether or not specifically referred to in this decision, the Court has examined the docket, the submitted materials, considered statements of counsel, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the Court finds that Mr. Dunlap’s Application for attorney’s fees, as reduced by agreement with the United States Trustee, is hereby granted.

**DISCUSSION OF BACKGROUND FACTS AND
INFORMATION AND PROCEDURAL HISTORY OF THIS CASE**

The Debtor in this case is a non-profit corporation that owns and operates single-family residential housing units in Memphis, Shelby County, Tennessee, and it necessarily employs property managers and maintenance personnel. Like many landlords in 2020, the Debtor’s revenue decreased due to a loss of rental income as the COVID-19 pandemic continued, with eviction moratoriums in place. Debtor’s tenants defaulted on rent obligations and some tenants abandoned the units, leaving the properties in a dilapidated condition and in need of repair. Because of these spiraling events, the Debtor fell behind in the payment of property taxes, which constituted a default under Debtor’s mortgage agreements. The mortgagee planned to proceed with foreclosure on the rental properties on September 8, 2020, and in an effort to stay the foreclosures and seize a breathing spell within which to reorganize, the Debtor voluntarily commenced this case under Chapter 11, Subchapter V of the Bankruptcy Code on September 4,

2020 [DE 1]. On behalf of the Debtor, Mr. Dunlap submitted the bankruptcy petition and simultaneously filed an application to employ himself and his law firm as attorney for the Debtor pursuant to 11 U.S.C. §§ 327(a) and 329, supported by Mr. Dunlap's Verified Statement [DE 2]. The employment application states that Mr. Dunlap received \$2,500 prior to the filing of the petition, and that the Debtor agreed to compensate Mr. Dunlap for services performed in this case at a rate of \$250 per hour. However, the Disclosure of Compensation of Attorney for Debtor attached to the Petition [DE 1] states that Mr. Dunlap agreed to accept a \$10,000 flat fee for his legal services, and having received \$2,500 prior to filing the case, he noted a balance due of \$7,500 from the Debtor. Mr. Dunlap paid the case filing fee of \$1,717 on behalf of the Debtor on September 8, 2020.

Mr. Dunlap's employment application was granted by Order entered on September 30, 2020 [DE 46]. The Order also provided for compensation at an agreed-upon rate of \$250 per hour. As the case progressed, on October 30, 2020, Mr. Dunlap filed a Motion to Accept Compensation [DE 75] stating that he had received an additional \$2,500 as compensation from the Debtor to be placed in his escrow account until such time as the Court approved his final Application.

The Creditor Matrix [DE 1] lists three creditors in the case: (1) City of Memphis, who submitted claims for delinquent property taxes; (2) the Shelby County Trustee, who also submitted claims for delinquent property taxes and (3) Sultani Family Realty of Memphis, the mortgagee for the Debtor's residential rental units. A claim was also submitted on behalf of the Internal Revenue Service, although the IRS was not included on the Creditor Matrix.

With the Debtor and these creditors, the case proceeded along a usual Chapter 11 path with the attendant filing of applications, motions, objections, reports and court hearings posted

on the case docket sheet. In due course, the Debtor submitted a Disclosure Statement [DE 88], a proposed Plan of Reorganization [DE 100] and an Amended Plan [DE 114]. The Debtor's goal was to obtain additional financing in order to pay the delinquent property taxes and to make repairs to several of the dilapidated properties so that rental income would increase, or so that the newly repaired properties could be sold. The Debtor's reorganization efforts came to a halt, however, when a dispute arose over the Debtor's use of cash collateral, and on January 13, 2021, the Court entered an Order Granting Sultani Family Realty Trust's Motion to Dismiss the case pursuant to 11 U.S.C. § 1112, finding that the Debtor improperly used Sultani's cash collateral without Court authorization and without any adequate protection payments to Sultani. [DE 119].

Subsequent to dismissal of the case, Mr. Timothy Stone, the Subchapter V trustee, submitted an Application for fees (\$3,215.50) and expenses (\$25.20) totaling \$3,240.70 [DE 120] which was approved by the Court [DE 128] over objection of the Debtor [DE 125]. Mr. Dunlap then filed his Final Application for allowance of fees [DE 131], setting forth details of the services rendered by category and which evidences 50.95 hours worked at the agreed-upon rate of \$250 for total fees in the amount of \$12,737.50. The Application states that no expense reimbursement is requested. The Application also sets forth Mr. Dunlap's proposal to accept \$5,000 which his firm is holding in its escrow account as payment in full for services rendered as Debtor's counsel in the case – a significant reduction from the itemized amount.

The Debtor has objected to Mr. Dunlap's \$5,000 fee application¹, contending that no fee should be awarded in this case, essentially citing, among other things, ineffective representation, lack of communication, and unnecessary time billed. [DE 135]. Although the United States

¹ Although Mr. Dunlap remains counsel of record for the Debtor, the Debtor's representative, Ms. Melissa Shea, obtained outside counsel to represent the Debtor in objecting to Mr. Dunlap's Application for attorney fees.

Trustee also filed an Objection to Mr. Dunlap's fee application [DE 134], after pointing out a deficiency of detail in some of Mr. Dunlap's fee entries, as well as objecting to some of the work billed, the United States Trustee concluded that, in light of the circumstances, Mr. Dunlap's reduction of his fee to \$5,000 is "reasonable and appropriate." *Id.* at ¶ 12.

Mr. Dunlap filed a Response to the Debtor's objection [DE 140], summarizing a history of the case and his work on behalf of the Debtor, and stating that he received funds from the Debtor in the following amounts:

- a) \$1,717 for the case filing fee
- b) \$5,000 prior to the case filing
- c) \$2,500 payment in October 2020 held in escrow as approved by the Court on November 20, 2020

In addition, Mr. Dunlap contends that in March 2021, the "Bankruptcy Court" contacted his office explaining that it received a check for United States Trustee quarterly fees in error (as these quarterly fees are not required in a Subchapter V case). The check was returned to Mr. Dunlap, who mailed the check back to his client, the Debtor. *Id.* ¶ 27.

A hearing on the Application and the two Objections was held on April 6, 2021, at which time the attorney for the United States Trustee, after investigation, reported in open court that the Debtor paid Mr. Dunlap \$7,500 which he appropriately deposited into his firm's escrow account. As a compromise, the United States Trustee proposed that Mr. Dunlap's fee should be reduced further to the \$2,500 original retainer amount, that \$3,200 of the funds should be disbursed to the Subchapter V trustee as payment towards his approved fees and expenses, and any remaining amount should be returned to the Debtor. Mr. Dunlap expressed his agreement to the proposed terms. The Debtor, however, contended that Mr. Dunlap's ineffective representation left the Debtor in a worse position, that Mr. Dunlap failed to effectively negotiate with the Sultani Family Realty Trust, and that Mr. Dunlap should not be entitled to any fees. The Debtor

requested return of the \$2,500 retainer as well as any additional funds held by Mr. Dunlap in excess of the Subchapter V trustee fees and expenses. It is against this factual background that the Court considers Mr. Dunlap's fee application and the objections raised thereto.

LAW AND ANALYSIS

A professional such as Mr. Dunlap who is employed by the Debtor pursuant to 11 U.S.C. § 327 is entitled to "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). The Bankruptcy Code also provides that the Court shall, after notice and hearing, allow administrative expenses including "compensation and reimbursement awarded under section 330(a) of this title." 11 U.S.C. § 503(b)(2).

Section 330(a)(3) of the Bankruptcy Code codifies the criterion and enumerates several factors for the Court's guidance when determining the amount of reasonable compensation for attorneys, considering the nature, extent and value of the services provided, which include, but are not limited to: (1) the time spent; (2) the rates charged; (3) whether the services were necessary to the administration of, or beneficial at the time rendered toward completion of the case; (4) whether the services were performed within a reasonable amount of time commensurate with the complexity and nature of the issue or task; (5) whether the attorney has skill and experience in the bankruptcy field; and (6) whether the compensation is reasonable based on the customary fees charged by comparably skilled practitioners in non-bankruptcy cases. 11 U.S.C. § 330(a)(3).

It is well established that bankruptcy courts within the Sixth Circuit perform a "lodestar" analysis to determine the reasonableness and necessity of a § 330(a) application for attorney fees

and expenses². *Boddy v. United States Bankr. Ct., Western Dist. of Kentucky (In re Boddy)*, 950 F.2d 334, 338 (6th Cir. 1991) (“At a minimum . . . the bankruptcy courts must expressly calculate the lodestar amount when determining reasonable attorney’s fees.”). “Whether to award fees and, if so, the reasonable amount of the fees are issues committed to the sound discretion of the trial court.” *In re Scarlett Hotels, LLC*, 392 B.R. 698, 700 (B.A.P. 6th Cir. 2008) (citation omitted). The burden of proof rests on the applicant to justify the fees requested. *In re New Boston Coke Corp.*, 299 B.R. 432, 438 (Bankr. E.D. Mich. 2003) (citations omitted).

The first step in the lodestar analysis is determine a reasonable hourly rate. “A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.” *In re Williams*, 357 B.R. 434, 438-9 (B.A.P. 6th Cir. 2007) (citations omitted). The court next considers the reasonableness of the lawyer’s hours expended. *Id.* at 439 (citation omitted). The court must then calculate the lodestar amount by “multiplying the attorney’s reasonable hourly rate by the number of hours reasonably expended.” *In re Boddy*, 950 F.2d at 337 (citations omitted). The *Boddy* Court went on to note that “[t]he bankruptcy court also may exercise its discretion to consider other factors such as the novelty and difficulty of the issues, the special skills of counsel, the results obtained, and whether the fee awarded is commensurate with fees for similar professional services in non-bankruptcy cases in the local area.” *Id.* at 338 (citations omitted).

Even when, as in this case, the Court is reviewing an application for a flat fee, “the fee must be reasonable and the work must be beneficial to the Debtor’s completion of [the

² The Court also notes that in class action cases, or cases with a common fund, the court may also employ a “percentage of fund” analysis. See *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269 (6th Cir. 2016), *reh’g denied*. The percentage of fund analysis is inapplicable to the case at bar.

bankruptcy case]. *In re Pursley*, 577 B.R. 289 (Bankr. E.D. Tenn. 2017) (Court determined the reasonableness of flat fee application submitted by Chapter 13 debtor's attorney). Guided by the factors set forth by Congress and the Sixth Circuit in the *Boddy* decision, the Court will now discuss those factors relevant to this case³ to evaluate the reasonableness of the \$2,500 reduced fee proposed by the United States Trustee, which Mr. Dunlap agreed to accept, in light of the Debtor's Objection and the record in this case.

(i) THE HOURLY RATE CHARGED

Mr. Dunlap's hourly rate is not at issue since, as the Court has stated, the Objection raised by the Debtor is to the \$2,500 flat fee amount that Mr. Dunlap and the United States Trustee have agreed upon. In its consideration of the reasonableness of the flat fee requested by Mr. Dunlap, however, the Court notes that Mr. Dunlap's original hourly rate of \$250 for this case, for which the Debtor contracted, (*see* Application to Employ John E. Dunlap as Attorney for Debtor, DE 2) is well within the customary rate in this jurisdiction for Chapter 11 debtors' counsel with Mr. Dunlap's practice experience. Mr. Dunlap obtained his law license in 1988 [DE 131] and during his career has represented Chapter 11 debtors in numerous cases in this district. The Court finds that Mr. Dunlap's hourly rate is reasonable and therefore a useful gauge for the Court's determination of the reasonableness of the compromised flat fee amount that has been proposed. The Court's finding under this factor weighs in favor of approval of the \$2,500 requested fee.

³ The Court notes that some of the factors listed are discussed and subsumed by the four factors discussed herein, and discussion will not be duplicated for purposes of the Court's analysis.

(ii) THE TIME SPENT AND REASONABLENESS OF TIME EXPENDED

Mr. Dunlap submits in his fee application [DE 131] that he expended 50.95 hours on this case. The United States Trustee's Objection to the fee application [DE 134] disputes several time entries, including the 1.0 hour Mr. Dunlap impermissibly billed for local travel to the Bankruptcy Court in order to pay the case filing fee on September 8, 2020, *Id.* at ¶ 10, and more than 10.5 hours that Mr. Dunlap spent preparing and filing a disclosure statement, and then an amended disclosure statement, when a disclosure statement is not required in a Subchapter V case. *Id.* at ¶ 11. The United States Trustee's Objection also contends that multiple time entries are without sufficient detail to determine reasonableness or necessity. *Id.* at ¶ 9. The Court agrees with the objections submitted by the United States Trustee, including the fact that many of the time entries lack sufficient detail. The Court also notes that Mr. Dunlap listed "no charge" for several time entries, and significantly reduced his fee from \$12,737.50 to \$5,000 – essentially a reduction in hours expended from 50.95 hours to 20 hours. He also waived reimbursement for his firm's expenses. [DE 131]. The reduction in fees and waiver of expenses was sufficient to satisfy the United States Trustee's criticism [DE 134, ¶ 12], and the Court does not doubt that Mr. Dunlap reasonably expended at least 20 hours managing this case. For these reasons, this factor weighs in favor of the Court's approval of the \$2,500 compromised fee request.

(iii) WHETHER THE SERVICES WERE NECESSARY TO THE ADMINISTRATION OF, OR BENEFICIAL AT THE TIME RENDERED TOWARD COMPLETION OF, THE CASE

The Court now considers the necessity and benefit of Mr. Dunlap's efforts as Debtor's counsel in this case. "While § 330 requires a determination that the services were 'reasonably likely to benefit the estate,' there is no requirement that the services at issue resulted in an actual benefit to the estate." *In re New Boston Coke Corp.*, 299 B.R. at 439, quoting 2 Lawrence P.

King, *Collier on Bankruptcy*, § 330.04[5][c] (15th ed. 2003). The *New Boston Coke Corp.* court went on to state:

“[T]he Court must judge the nature of the services and the necessity for them as of the time the work was performed.” *In re James Contracting Group, Inc.*, 120 B.R. 868, 872 (Bankr. N.D. Ohio 1990). A bankruptcy attorney should not be penalized solely for the lack of success of a Chapter 11 reorganization. *Id.* at 872-73. Instead, the Court should evaluate the services provided based on whether counsel exercised its best judgment in performing those services. *Id.* Specifically, the *James Contracting* court sets forth the following standard:

. . . counsel who undertake to represent debtors cannot be required to predict the ultimate outcome of a Chapter 11 reorganization. Indeed, whether they are to be compensated cannot be based upon the success of the reorganization. Such a test would require debtor’s counsel to also be debtor’s guarantors . . . The performance of debtor’s counsel must always be judged after the fact. Nevertheless, the Court must judge the nature of the services and the necessity for them as of the time work was performed. The test for rendering such a decision is whether counsel exercised their best judgment in performing the services. *Id.* at 872-73 (citing *In re Garrison Liquors, Inc.*, 108 B.R. 561, 564 (Bankr. D. Md. 1989)).

In re New Boston Coke Corp., 299 B.R. at 439; see also *In re Cruz*, No. 19-51697, 2020 WL 7635266 at *2 (Bankr. E.D. Mich. Dec. 22, 2020) (slip op.) (“[T]he Court’s task in determining the reasonableness of fees does not permit the Court to forecast what may be the ultimate disposition of the case in the future. Instead, the Court must examine whether the services were reasonably likely to provide a benefit at the time the services were performed.”); *In re Encapsulation Int’l LLC*, No. 96-31762, DE 281 (Bankr. W.D. Tenn. Nov. 16, 1998) (“The Court attempts to avoid mere hindsight second-guessing of an attorney’s work, being aware that what appears unnecessary now may be appeared otherwise in the exigency of the moment.”) (citing *In re Washington Manufacturing Co.*, 101 B.R. 944, 956 (Bankr. M.D. Tenn. 1989)).

The Court is mindful of the fact that the objective of a Chapter 11 bankruptcy case is to achieve a confirmable plan of reorganization and attendant discharge of the debtor. Those results were not achieved in this case. That is not to say, however, that Mr. Dunlap did not provide beneficial and necessary services to the Debtor in the administration of this case. Mr. Dunlap was employed as counsel of record for the Debtor on September 30, 2020 [DE 46] and undoubtedly performed valuable legal services prior to that date. Mr. Dunlap states in his Response to Debtor's Opposition to Application for Compensation [DE ¶ 1] that the officers of the Debtor contacted his office in late July, 2020, to assist with a pending foreclosure of over 60 real properties owned by the Debtor that was set for September 8, 2020. Mr. Dunlap worked to file the Debtor's Chapter 11 petition in an effort to successfully stay the foreclosures and develop a plan of reorganization. The docket sheet reflects that Mr. Dunlap then proceeded to file the "first day motions" to employ counsel and to use cash collateral, filed a motion to accept leases and/or executory contracts, attended the initial debtor interview, reviewed tax records and resolved an objection of the County taxing authority, prepared a proposed plan of reorganization, responded to motions to dismiss filed by the United States Trustee and the mortgagee, as well as filed other various motions and took actions necessary for administration of this case. Mr. Dunlap also stated at the hearing on his fee application that his office essentially took over management of the Debtor's rental properties, which included taking calls from the Debtor's tenants. The commencement of the bankruptcy case saved the Debtor's rental properties from foreclosure and provided a breathing spell for the Debtor throughout its four-month duration.

Based on statements of counsel and the record in the case, the Court finds that Mr. Dunlap provided valuable legal services to the Debtor that were necessary and beneficial at the

time they were rendered. This factor, therefore, weighs in favor of approval of Mr. Dunlap's \$2,500 compromised fee.

(iv) NOVELTY AND COMPLEXITY OF THE CASE

The Court has reviewed the record, conducted hearings and decided various motions, applications and objections in this case, and is of the opinion that this case did not present any novel or unusually complex issues during its administration. Nor was this case without the usual difficulties. This factor does not tilt the scales one way or the other in favor of the reasonableness of Mr. Dunlap's requested fee.

CONCLUSION

After a review of the totality of the circumstances, including the results achieved for the Debtor, and considering the nature, extent and value of Mr. Dunlap's services, the Court finds that Mr. Dunlap has carried his required burden of proof in support of his agreement with the United States Trustee to accept discounted fees in the amount of \$2,500 for work performed in the administration and furtherance of this Chapter 11 bankruptcy case. The Court finds that the \$2,500 fee is reasonable, and a fair and appropriate compromise. Mr. Dunlap's fee application, as modified in open court to reflect a requested fee of \$2,500, is hereby approved. In accordance with this Opinion and the United States Trustee's proposed disbursement of the \$7,500 funds in Mr. Dunlap's trust account, Mr. Dunlap shall disburse (1) \$3,200 to Mr. Timothy Stone, the Subchapter V trustee, as payment towards his fees and expenses; (2) \$2,500 to Mr. Dunlap for services rendered in this case; and (3) any funds remaining shall be returned to the Debtor.

cc: Debtor

Mr. John Dunlap, Attorney for Debtor
Ms. Michele Marie Bowman, Attorney for Debtor
United States Trustee
Tim Stone, Subchapter V Trustee