attorney fees

In re Plaid Pantries, Inc. 389-31028-dds11

7/8/94 DDS Unpublished

The court denied the request of special counsel to the debtor for additional fees and ordered him to release his security interest in the reorganized debtor's inventory.

In response to the reorganized debtor's motion to require counsel to release his lien, the lawyer requested a fee in addition to the $600,000 he had already received. He argued the additional fee should be calculated as a percentage of the debtor's sales of gasoline, and the release by Arco of a potential claim against the debtor.

Special counsel was not entitled to a further fee. He did not work on the litigation related to the gasoline supply contracts. The earlier settlement agreement concerning his fee limited the scope of his contingent fee to the case he handled. The request for an administrative claim measured by 50% of a potential unsecured claim was found to be almost ludicrous.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	389-31028-dds11
PLAID PANTRIES, INC.,	)	
	)	MEMORANDUM IN SUPPORT OF
Debtor.	)	ORDER DENYING FURTHER FEES TO
	)	RICHARD I. FINE AND
	)	ASSOCIATES, TERMINATING
	)	OUTSTANDING U.C.C.
	)	FINANCING STATEMENTS

Plaid Pantries, Inc. ("Plaid"), the reorganized debtor, filed a motion to compel Richard I. Fine, who formerly was special counsel for Plaid, to release a security interest in inventory for claimed legal fees and to pay damages for his prior failure to do so. Mr. Fine had been Plaid's attorney in an unsuccessful suit by and against Atlantic Richfield Company ("Arco"). The motion involved a controversy arising from a May 1991 settlement of a fee dispute with Mr. Fine. Both parties asked the court to determine whether Mr. Fine, who received $600,000 from the settlement and from other payments, retained a right to further fees from Plaid. The court heard the expanded motion on April 29, 1994 and on June 24, 1994. The

primary issue was whether the settlement agreement between Mr. Fine and Plaid also gave Mr. Fine a right to further fees measured by the value of Arco gasoline supply contracts retained by Plaid upon termination of the Arco litigation. The parties presented their cases by affidavit under Fed. R. Civ. P. 43(e), applicable under Fed. R. Bankr. P. 9014.

Richard I. Fine and Associates should be denied further fees from Plaid and Plaid's motion to require release of security interest and for termination of the financing statements should be granted. Plaid's request for damages under O.R.S. 79.4040(1) should be denied without prejudice to the filing of a complaint. My reasons follow.

Plaid operated neighborhood convenience stores in the Oregon-Washington area, some of which sold gasoline supplied by Arco. Plaid undertook to convert to an "Arco am/pm" operation under a franchise held by Plaid's parent corporation. Disputes occurred. Plaid filed chapter 11 on March 13, 1989 and a week later sued in the bankruptcy court for an injunction against termination by Arco of the franchise and for other relief. Arco then sued Plaid's parent corporation in the district court on April 14, 1989 for breach of the franchise agreement. The district court eventually withdrew reference at the recommendation of the bankruptcy court and consolidated the pending actions. Plaid hired Mr. Fine to conduct this litigation on its behalf under an arrangement approved by the

bankruptcy court. Plaid agreed to pay Mr. Fine the greater of a contingent fee of 33 1/3% - 40% or on an hourly compensation basis not to exceed $1 million. Plaid was to pay monthly 60% of the hours billed.

Arco attempted, independently of the franchise controversy, to cancel some gasoline supply contracts to a few of Plaid's locations and Plaid asserted overpayment for gasoline. Plaid sued in the bankruptcy court to enjoin Arco from canceling the gasoline supply contracts in a case in which the district court later withdrew reference. Plaid, in a third action, also sued Arco in the bankruptcy court to recover overpayments to Arco for gasoline supplied to some of its locations. Arco conceded Plaid's position, renegotiated the supply contracts, and the parties dismissed the supply litigation on August 27, 1990. The franchise litigation and the overpayment litigation continued. Sussman, Shank, Wapnick, Caplan & Stiles ("Sussman Shank"), Plaid's general bankruptcy attorneys, handled the two matters involving cancellation of, and overpayment on, the gasoline supply contracts. Mr. Fine did not participate in this litigation.

On December 10, 1990, the bankruptcy court confirmed a plan of reorganization which called for the sale of Plaid to successors of its former owner. By this time, Plaid had fallen behind in payments to its administrative creditors, including Mr. Fine. As a condition of confirmation under

11 U.S.C. § 1129(a)(9), the court required a deposit intended to cover payment of administrative claims, some of which, including Mr. Fine's claims, were disputed. Plaid gave Mr. Fine a security interest in its inventory in lieu of a cash deposit. Less than three weeks after confirmation of the plan a U. S. magistrate in the am/pm franchise litigation, recommended findings which granted summary judgment to Arco and denied relief to Plaid because of a lack of evidence to support recovery. Plaid lost its damage claim against Arco at an early stage and found it subject to unresolved claims by Arco of up to $7 million. Plaid objected to Mr. Fine's fees on various grounds. Plaid and Mr. Fine settled their disagreement while objections were pending to the magistrate's findings.

Mr. Fine agreed to substitute out of the Arco case at the request of Plaid on condition that he be paid $600,000 with credit for sums already received in accordance with an agreed schedule. In the event that Mr. Fine continued with the franchise litigation, it was understood that Mr. Fine would be entitled to receive a fee of 50% of any "recovery or settlement" with credit for the $600,000 to be paid. Mr. Wapnick, on behalf of Plaid, and Mr. Fine memorialized their agreement in three letters dated April 25, 1991, April 26, 1991, and May 10, 1991. Mr. Wapnick, in the April 26, 1991 letter, limited the contingent fee to "any recovery or settlement arising out of the case which you are now handling."

Mr. Fine accepted the balance of the $600,000 payment agreed upon. Plaid did not substitute Mr. Fine out of the case.

About three months later after settling with Mr. Fine, Plaid filed a motion on July 19, 1991 in the chapter 11 proceeding to approve a settlement between Plaid and Arco. The Sussman Shank firm led the settlement negotiations on behalf of Plaid. Generally, the parties agreed to entry of judgment against Plaid's parent in liquidated damages of $5 million as called for in the am/pm franchise, and to a general and mutual release of claims between Arco, Plaid and third parties subject to certain conditions.

Mr. Fine contended that, because he had not been substituted out of the district court litigation when Arco and Plaid settled the case, he is entitled under the April fee settlement agreement, to 50% of the benefit of the Arco settlement with Plaid, including 50% of gasoline proceeds. Although valuation was not an issue at the last hearing, he asserted a 50% interest in as much as $9 million in value which he roughly divided between the releases and the gasoline supply contracts.

Mr. Fine's contentions are rejected for several reasons. First of all, Mr. Fine did not work on or otherwise have anything to do with the gasoline supply contract litigation or the overpayment litigation which was handled by the Sussman Shank firm. Secondly, the settlement agreement in

Mr. Wapnick's letter of April 26, 1991 limited his contingent fee to "any recovery or settlement arising out of the case which you are now handling for Plaid and Pacific Crest Equities Corp." The Sussman Shank firm settled the supply contract litigation over six months before the settlement with Arco of the franchise litigation. The supply contract litigation did not become part of "the case which you are now handling". Finally, the mention of the gasoline supply contract litigation in the mutual release and settlement agreement entered in the franchise litigation is simply a clarification and acknowledgement that the mutual general releases do not affect litigation and settlements which are collateral and unrelated to the general release. The carve-out of these subjects from the general release is a common drafting technique which does not, except in the vaguest sense, elevate the excluded subjects to a benefit included in the general settlement.

Mr. Fine's argument that he is also entitled to a contingent fee based upon a valuation of the mutual release between Plaid and Arco is equally disingenuous. Having lost the case against Arco for damages at an early stage, Mr. Fine's claim that he is entitled to a 50% contingent fee because the settlement saved Plaid from exposure to the same $5 million judgment against the parent corporation as a result of the same settlement approaches being ludicrous. At best, any recovery by Arco would be a general claim in the chapter 11. Clearly,

the parties intended the contingent fee to depend upon an affirmative recovery and had no intention by settling with Arco to elevate 50% of Arco's general damage claim to an administrative claim to be paid to Mr. Fine. The fact that Plaid survived the Arco litigation without an enormous judgment against it is not reasonably a benefit contemplated under the contingent fee agreement.

Alternatively, Mr. Fine's demands, besides being incorrect, are so unreasonable and improvident in the light of developments not capable of being ascertained at the time of fixing the terms of compensation, that his fees should be limited to what he has already received under 11 U.S.C. § 328(a).

Plaid's request for damages under O.R.S. 79.4040(1) is a matter which must be initiated by complaint under Fed. R. Bankr. P. 7001(1). Plaid's request should be denied without prejudice.

A separate order should enter denying the claim of richard I. Fine and Associates to any further award of fees, finding that there is no secured debt, and ordering that the financing statements be terminated.

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DONAL D. SULLIVAN
Bankruptcy Judge

cc: Norman Wapnick
Richard I. Fine
U. S. Trustee