

11 USC§ 101(30)(B)(vi)
11 USC § 502(b)(4)
Attorney Fees
Insider

In Re Marquam Investment Corp. Bankr No. 383-01488
District Ct. Civ. No. 88-0915-RE

Unpublished

3/8/90 J. Redden (appeal-reversing J. Hess)

The claimant, a partnership, sought attorney fees incurred in representing the debtor corporation in prepetition litigation. One of the partners was also a 60% shareholder in the debtor. The partnership's legal secretary held the remaining 40% interest in the debtor. Based upon the overlapping ownership interests and other factors, the district court found that the debtor and the partnership claimant were "so intertwined that they cannot be considered separate entities," and held that the claim should be disallowed in its entirety.

P-90-11(22)

FILED

MAR 8 3 05 PM '90

CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON

BY _____

Handwritten signature

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re
MARQUAM INVESTMENT CORP.,

Debtor.

SUZAN BREWER,

Objector/Appellant,

v.

ERWIN & ERWIN, P.C.,

Creditor/Respondent.

Civil No. 88-0915-~~PA~~ RE

Bankruptcy No. 383-01488-H11

OPINION

CHARLES ROBINOWITZ
1211 SW Fifth, Suite 2962
Portland, OR 97204

Attorney for Appellant

CHARLES C. ERWIN
3323 SW Harbor Drive
Portland, OR 97201

Attorney for Respondent

REDDEN, J.

Suzan Brewer (Brewer) appeals the bankruptcy court's
orders allowing the unsecured claim of Erwin & Erwin, P.C.

1 - OPINION

45 P90-11(22)

1 (Erwin & Erwin), for \$120,000 attorney's fees, against debtor
2 Marquam Investment Corp. (Marquam). I reverse the bankruptcy
3 court and remand for entry of an order disallowing Erwin &
4 Erwin's claim in its entirety.

5 BACKGROUND

6 I. Procedural Background

7 This dispute over Erwin & Erwin's claim for attorney's
8 fees is the most recent skirmish in a war between Brewer and
9 Marquam, Brewer's former landlord, that began in 1976. See,
10 e.g., Brewer v. Erwin, 287 Or. 435, 437 & n.1, 600 P.2d 398
11 (1979) (Brewer I) ("[t]he present appeal is one phase of a
12 landlord-tenant dispute to which the parties have devoted an
13 extraordinary amount of their time and efforts"); Brewer v.
14 Erwin, 61 Or. App. 642, 644, 658 P.2d 1180 (Brewer II) ("This
15 ought to be the final round in a protracted course of
16 litigation between these parties who once, though it seems
17 unbelievable now, enjoyed an amicable landlord-tenant
18 relationship."), review denied, 294 Or. 792, 662 P.2d 728
19 (1983). In 1980, Brewer won a \$97,880 state court judgment
20 against Marquam on tort and statutory claims. The judgment
21 became final in 1983, and Marquam petitioned for bankruptcy
22 shortly thereafter.

23 Brewer filed an unsecured claim for \$75,000 in punitive
24 damages against Marquam's estate. Erwin & Erwin filed an
25 unsecured claim for \$120,000 in attorney's fees. In 1988, the
26 bankruptcy court confirmed Marquam's chapter 11 plan, allowing

1 Erwin & Erwin's claim and effectively obliterating Brewer's
2 claim for punitive damages. Brewer appeals the allowance of
3 Erwin & Erwin's claim.

4 II. The Brewer-Marquam Tort Litigation

5 Warde Erwin, Marquam's president, owns about 60% of
6 Marquam's stock. LaVelle Mullenex, Warde Erwin's legal
7 secretary for more than twenty years, owns the remaining 40%
8 of Marquam. Warde Erwin and his son, Charles Erwin, are
9 attorneys and shareholders in the professional corporation of
10 Erwin & Erwin. (Although the professional corporation was
11 formerly known as Erwin, Lamb & Erwin, I will refer to it
12 throughout this opinion as Erwin & Erwin.) When Marquam filed
13 its chapter 11 petition in 1983, it listed Charles Erwin as a
14 director and vice president of Marquam, although he apparently
15 is no longer a Marquam officer. Charles Erwin was responsible
16 for most of the legal services included in Erwin & Erwin's
17 claim. Lawrence Erwin, another son of Warde Erwin, represents
18 Marquam in the bankruptcy proceedings.

19 Brewer rented the second story of an old house from
20 Marquam. In about 1975, Marquam decided to demolish the
21 house. Marquam sent Brewer an eviction notice, but Brewer was
22 reluctant to leave. "She became interested in a group which
23 sought to prevent the demolition of old houses in the
24 neighborhood and attended one or two of the group's meetings."
25 Brewer I, 287 Or. at 437.

26 / / /

1 When Brewer did not leave voluntarily, Mullenex and
2 Warde Erwin became impatient. They repeatedly threatened,
3 menaced, and harassed Brewer and her friends. See id., 287
4 Or. at 458-60. Marquam partially demolished the lower floor
5 of the house while Brewer was still a tenant. There was
6 evidence that Warde Erwin struck Brewer in the face. Id. at
7 459; Brewer II, 61 Or. App. at 645.

8 At trial in September 1977, the court granted motions for
9 involuntary nonsuit and for directed verdicts on Brewer's
10 claims for intentional infliction of emotional distress.
11 Erwin & Erwin represented Marquam. Brewer won \$650 general
12 damages on her battery claim against Warde Erwin and Marquam.

13 On September 25, 1979, the Oregon Supreme Court reversed
14 the trial court's dismissals of Brewer's intentional
15 infliction of emotional distress claims and remanded for a new
16 trial. Brewer I. In March 1980, the second trial ended in
17 mistrial. At the third trial in June 1980, the jury found
18 that Marquam, Mullenex, and Warde Erwin had intentionally
19 inflicted severe emotional distress on Brewer. Brewer II.
20 Brewer was awarded \$20,000 general damages against Warde
21 Erwin, Mullenex, and Marquam; \$75,000 punitive damages
22 against Marquam only; \$2,880 for violation of the Oregon
23 Residential Landlord and Tenant Act, ORS 91.700-.895; and
24 attorney's fees. Id.

25 / / /

26 / / /

1 On February 16, 1983, the Oregon Court of Appeals
2 reversed the trial court's grant of a new trial and remanded
3 for reinstatement of the jury verdict against Warde Erwin,
4 Mullennex, and Marquam. Brewer II, 61 Or. App. 642. On
5 April 26, 1983, the Oregon Supreme Court denied Marquam's
6 petition for review. 294 Or. 792. On May 4, 1983, Marquam
7 filed for bankruptcy.

8 III. Bankruptcy Proceedings

9 Marquam's bankruptcy petition valued its total assets at
10 \$107,152.54. Marquam listed a \$120,000 unsecured debt to
11 Erwin & Erwin "[f]or attorneys' fees rendered staring [sic] in
12 April of 1976 to date for defense and services in various
13 lawsuits entailed in representation of Marquam." Appellant's
14 E.R. at 5.

15 On May 6, 1985, the bankruptcy court completed hearings
16 on whether Erwin & Erwin intended that its legal work be
17 compensated by Marquam. The court stated that

18 neither Charles Erwin nor Mr. Lamb, who are
19 members of the professional corporation, were not
20 stockholders or officers of Marquam and therefore
21 would not derive any benefit from any increase in
22 the assets held by Marquam. The fact that
23 Mr. Erwin spent a great deal of his time over a
24 period of several years devoted to the legal
25 problems of Marquam doesn't seem reasonable to the
26 Court that Mr. Erwin would do that -- would merely
contribute his services without compensation
when he is not -- has no relationship or no
ownership interest in Marquam.

 Mr. Erwin testified that during a part of
that period his income was so low that he was
required to borrow funds. That doesn't seem to

///

1 indicate that -- he wouldn't be donating services
2 to a corporation in which he had no financial
interest.

3 Appellant's E.R. at 20-21. The court also stated that

4 it appears that there would have been no good
5 purpose served, necessarily, in the professional
6 corporation submitting a bill to Marquam when it
7 was known that Marquam had no funds from which
8 those services could be paid, and submitting such
9 a bill would have just been an effort in futility.
Whether or not the attorney fees were mentioned or
an account for attorney fees were mentioned in
those two lawsuits were a matter of tactical trial
tactics and not necessarily evidence that there
was no such agreement that the legal services
would be compensated.

10 Id. at 21. The court was

11 convinced that the evidence shows that the
12 services performed by the professional corporation
13 were not intended to be donated to Marquam but
14 were intended that they would be paid by Marquam
15 when funds were available by Marquam to make
16 payment of those fees, and, therefore, the Court
finds that the claim for attorney fees is a valid
claim, and the only question then remaining is
whether or not the doctrine of equitable
subordination will apply to the claim and whether
or not the amount of the claim is reasonable.

17 Id. at 22-23.

18 On March 25, 1988, the bankruptcy court confirmed
19 Marquam's chapter 11 plan. Id. at 88. The court allowed
20 Erwin & Erwin's claim for \$120,000 attorney's fees.

21 IV. Marquam's Attempts to Evade Brewer's Claim

22 Two courts have found that Marquam improperly attempted
23 to evade Brewer's claim against it.

24 A. Marquam's Transfer to Squaw Creek

25 Under a joint venture agreement executed May 9, 1980, the
26 Warde H. Erwin Trust (Trust) and Paul Martin, an architect,

1 agreed to build and sell condominiums on Marquam's vacant
2 lots. The ill-fated development was to be called Inner City
3 Village. The Trust agreement, which was not recorded,
4 apparently established Lawrence Erwin, Charles Erwin, and
5 LaVelle Mullenex as trustees.

6 On June 20, 1980, the jury returned its verdict for
7 Brewer against Marquam. On June 23, 1980, Marquam transferred
8 its vacant lots to Squaw Creek Construction Co. (Squaw Creek),
9 a corporation owned by Warde Erwin that had no other assets.
10 In return, Marquam received a promise that Squaw Creek would
11 pay for the land if and when Inner City Village was built and
12 sold. If the condominiums were not built, Marquam would get
13 the land back in two or three years.

14 Although Squaw Creek was to pay Marquam for the vacant
15 lots, the joint venture agreement provided that the Trust, not
16 Squaw Creek, would be paid for the vacant lots from the
17 proceeds of condominium sales. The joint venture agreement
18 did not require that the Trust pay Squaw Creek for the vacant
19 lots, although it did provide that Squaw Creek would transfer
20 the vacant lots to the joint venture when needed for
21 development.

22 In August 1980, the Portland Historical Landmark
23 Commission approved the joint venture's plans for Inner City
24 Village, subject to seven conditions. Warde Erwin objected to
25 those conditions. On September 4, 1980, the Portland City
26 Council denied Warde Erwin's appeal. There is no evidence

1 that the plans for Inner City Village were revised to meet the
2 Landmark Commission's seven conditions.

3 Mullennex and Charles Erwin testified at trial that
4 several banks made oral commitments to finance Inner City
5 Village. 2 Respondent's E.R. at 96, 103. These alleged oral
6 commitments were never consummated. In early 1982, Martin
7 sought financing. On January 28, 1982, a bank offered to lend
8 money to the joint venture at 21% percent interest. This
9 attractive offer expired on February 24, 1982.

10 In January 1982, Brewer filed an action in Multnomah
11 County Circuit Court claiming that Marquam had fraudulently
12 transferred its vacant lots to Squaw Creek. At the trial,
13 Marquam contended that the equity in its office building could
14 satisfy Brewer's possible judgment against it. Charles Erwin,
15 Marquam's attorney, did not inform the court that the office
16 building was encumbered by the long-term lease to Erwin &
17 Erwin, or that Erwin & Erwin had an outstanding claim against
18 Marquam for attorney's fees.

19 The Multnomah County Circuit Court set aside the
20 transfer. It stated:

21 Here you have evidence that the assets left
22 in Marquam amount to some one hundred and sixteen
23 thousand eight hundred, if I understand it
correctly, and that's offset somewhat by a
mortgage that exists, which would bring it down
somewhere near \$100,000.

24 [I]t clearly appears that potentially
25 [Brewer's] claim could be in excess of the assets
Marquam has left

26 / / /

1 Appellant's E.R. at 63-64 (transcript of April 12, 1982
2 hearing). The court found that Marquam originally intended to
3 develop Inner City Village, and that the transfer to Squaw
4 Creek was tacked on later to avoid Brewer's claims. The court
5 rejected Charles Erwin's explanation for the transfer: "I
6 think that explanation is more of an afterthought in
7 justifying what was done rather than the reason for what was
8 done." Id. at 66. The court concluded that Marquam intended
9 to hinder and delay Brewer, although the court "avoid[ed]
10 using the word 'defrauding'" regarding Marquam's conduct. Id.
11 Marquam did not appeal.

12 B. The Lease Between Marquam and Erwin & Erwin

13 In 1979, Marquam renewed its lease agreement with Erwin &
14 Erwin. The lease provided that Erwin & Erwin would pay \$750
15 per month rent for 3,202 square feet of office space and a
16 storage basement. The lease required that Erwin & Erwin pay
17 utilities, liability insurance, and maintenance, while Marquam
18 would pay property taxes and fire insurance.

19 During the bankruptcy proceedings, Brewer and the trustee
20 challenged the lease, arguing that it was a fraud on Marquam's
21 creditors. The bankruptcy court found that the trustee had
22 not met its initial burden of showing badges of fraud. On
23 appeal, Judge Malcolm F. Marsh reversed, concluding that the
24 lease was a fraudulent transfer. John B. Franzwa, Inc. v.
25 Erwin & Erwin, P.C. (In re Marquam Investment Corp.),

26 / / /

1 No. 88-114-MA, slip op. at 2 (D. Or. June 13, 1988), quoted in
2 Appellant's E.R. at 76-87.

3 Judge Marsh found that the lease agreement between
4 Marquam and Erwin & Erwin bore many badges of fraud. Marquam
5 executed the lease in anticipation of its continued litigation
6 against Brewer. The lease left Marquam insolvent by
7 encumbering its office building, the only remaining valuable
8 asset after the transfer of the vacant lots to Squaw Creek.
9 Neither party to the lease agreement bothered to observe its
10 terms. Erwin & Erwin paid fire insurance premiums and taxes
11 while Marquam paid for utilities. The parties failed to
12 disclose the lease during the Squaw Creek litigation.

13 Erwin & Erwin paid rent at less than half the market
14 value. Judge Marsh found that "[t]he relationship of [Marquam
15 and Erwin & Erwin] is so close and intertwined that the
16 transaction was clearly not at arm's length." Appellant's
17 E.R. at 83.

18 STANDARD OF REVIEW

19 I. District Court Review

20 The district court acts as an appellate court when it
21 reviews a bankruptcy court judgment. Daniels-Head & Assoc. v.
22 William M. Mercer, Inc. (In re Daniels-Head & Assoc.), 819
23 F.2d 914, 918 (9th Cir. 1987). The district court reviews
24 findings of fact for clear error and reviews conclusions of
25 law de novo. Id.

26 / / /

1 A finding is "clearly erroneous" when the reviewing court
2 on the entire evidence is "left with the definite and firm
3 conviction that a mistake has been committed," even though
4 there is evidence to support the finding. United States v.
5 United States Gypsum Co., 333 U.S. 364, 395 (1948). Even when
6 the trial court's findings are based on the credibility of
7 witnesses, the reviewing court may find clear error because
8 demeanor and inflection are not the only factors that affect
9 the decision to believe a witness. Anderson v. City of
10 Bessemer City, 470 U.S. 564, 575 (1985). "Documents or
11 objective evidence may contradict the witness' story; or the
12 story itself may be so internally inconsistent or implausible
13 on its face that a reasonable factfinder would not credit it."
14 Id.

15 II. Statutory Standard and Burden of Proof

16 The court should disallow a claim by "an insider or
17 attorney of the debtor" to the extent that the claim "exceeds
18 the reasonable value of such services." 11 U.S.C.
19 § 502(b)(4). Section 502(b)(4) was intended to prevent
20 "overreaching by the debtor's attorneys and concealing of
21 assets by debtors." S. Rep. No. 95-989, 95th Cong. 2d Sess.
22 68, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5849.

23 The insider or attorney creditor must adequately support
24 a claim against the debtor's estate. In re All-American
25 Auxiliary Ass'n, 95 Bankr. 540, 545 (Bankr. S.D. Ohio 1989).
26 If the insider or attorney creditor is able to support the

1 claim, the objecting party must point to facts tending to
2 defeat the claim. Id. If the objector does introduce such
3 facts, the creditor must prove the validity of the claim by a
4 preponderance of the evidence. Id.

5 Erwin & Erwin argues that Brewer must show by clear and
6 convincing evidence that Erwin & Erwin intended to donate
7 legal services to Marquam. Assuming that Erwin & Erwin has
8 adequately documented its claim, Brewer has successfully cast
9 doubt on Erwin & Erwin's claim. The burden shifts to Erwin &
10 Erwin. See All-American Auxiliary, 95 Bankr. at 545. Gift
11 law is irrelevant.

12 DISCUSSION

13 I must reverse the orders allowing Erwin & Erwin's claim
14 for attorney's fees. Erwin & Erwin did not adequately support
15 its claim. Even if it had, Erwin & Erwin did not show the
16 validity of its claim by a preponderance of the evidence.

17 The bankruptcy court's rulings are certainly
18 understandable because of the protracted hearings on this
19 claim and the acrimonious and unhelpful presentation by the
20 attorneys. Although the bankruptcy court held evidentiary
21 hearings in 1985, it did not have the opportunity to consider
22 later developments, such as Erwin & Erwin's withdrawal of its
23 allegation that Marquam paid fees through a rental set-off.
24 In addition, this case seems to have become a personal feud
25 among counsel and parties. In the briefs before this court,
26 neither attorney cited the relevant legal standards. Erwin &

1 Erwin focused on Oregon gift law while Brewer cited decisions
2 on equitable subordination.

3 I. Erwin & Erwin Is an Insider

4 Erwin & Erwin argues "[t]here are no claims of
5 'insiders.'" Respondent's Brief at 12. I disagree.

6 Under the Bankruptcy Code, an "insider" includes a
7 "relative of a . . . director, officer or person in control of
8 the debtor." 11 U.S.C. § 101(30)(B)(vi). However, I need not
9 resort to the Bankruptcy Code to realize that both current
10 shareholders in Erwin & Erwin are insiders of Marquam. Warde
11 Erwin is Marquam's president, and Charles Erwin is Warde
12 Erwin's son. Marquam's 1983 bankruptcy petition lists Charles
13 Erwin as Marquam's vice-president and director. See
14 Appellant's E.R. at 4. Marquam's secretary and 40%
15 shareholder, LaVelle Mullenex, has been Erwin & Erwin's legal
16 secretary for many years.

17 Erwin's direct examination of Mullenex at trial on this
18 claim revealed Erwin & Erwin's entanglement with Marquam:

19 Q: Tell the Judge how it is -- what mechanics you
20 would go through to send the bill [for legal
21 services] to Marquam.

22 A: From Erwin & Erwin?

23 Q: Yes, ma'am.

24 A: Well, I suppose I would sit down and add up
25 the timesheets for some particular time and then
26 type that out and probably hand it to somebody or
put it in a file. . . . I did not do that.

Q: You mean you would have to type up a bill and
present it to yourself?

1 A: That's correct.

2 Q: [D]id it ever occur to you to send yourself a
3 bill?

4 A: No, unfortunately probably it didn't.

5 2 Respondent's E.R. at 54-55. Charles Erwin apparently
6 elicited this testimony to show that it would have been
7 pointless for Erwin & Erwin to send a bill to Marquam for
8 legal fees. However, Mullenex's testimony shows that Marquam
9 and Erwin & Erwin are so intertwined that they cannot be
10 considered separate entities.

11 II. Erwin & Erwin's Claim

12 A. The Rental Set-Off

13 Erwin & Erwin originally claimed that it collected
14 attorney's fees from Marquam through a monthly rent set-off of
15 \$184.22 starting in 1976, for a total of \$15,658.70. Charles
16 Erwin testified that the setoff was "the only compensation
17 this law firm -- me -- received during this time."

18 2 Respondent's E.R. at 106. He also testified that "I
19 received some compensation in the form of rental, but only to
20 the extent of \$184 a month." Id. at 107.

21 The set-off has no basis in reality. Erwin & Erwin had
22 never billed Marquam for the set-off and Marquam never listed
23 it as a monthly expense. In fact, Erwin & Erwin was making
24 Marquam's monthly mortgage payments and claiming the
25 difference between the mortgage and rent payments as a set-
26 off. In Erwin & Erwin's revised 1986 claim, the \$15,658.70
attorney's fees set-off disappeared. It reappeared as a

1 \$13,056.73 set-off for utility bills that Erwin & Erwin had
2 paid.

3 The set-off episode shows that Erwin & Erwin's claim was
4 at best an afterthought. Charles Erwin has not explained the
5 set-off's magical transformation from attorney's fees to
6 utility bills.

7 B. Services for Inner City Village

8 The set-off is not the only example of Erwin & Erwin's
9 flexible fee claim. In 1983, the claim included \$34,400 in
10 attorney's fees for "[p]reparation of all documents for unit
11 ownership development [i.e., Inner City Village], associated
12 hearings and conferences, design review - City Council." To
13 support this claim, Charles Erwin testified as follows:

14 Q: Can we agree that the work on the
15 condominium project was going to be free; that
16 there were no legal fees going to be incurred on
17 that?

18 A: No, we cannot agree to any such nonsense.

19 2 Respondent's E.R. at 132.

20 Despite Charles Erwin testimony, the joint venture
21 agreement provided that Erwin & Erwin's services "are to be
22 noncompensated professional services and shall be considered
23 as and when made a noncompensated contribution to the joint
24 venture." Appellant's E.R. at 106. In 1986, Erwin & Erwin
25 dropped its claim for legal work on the Inner City Village
26 project.

///

///

15 - OPINION

1 C. Erwin & Erwin's Failure to Bill Marquam

2 Erwin & Erwin never billed Marquam for legal fees. The
3 parties presented expert testimony on this issue. Richard
4 Solomon, plaintiff's accounting expert, testified that Erwin &
5 Erwin should have sent regular itemized bills to Marquam to
6 show that the parties' transactions were at arms-length.
7 1 Respondent's E.R. at 194-98.

8 According to Erwin & Erwin, its expert, Roy Griffin,
9 testified "[t]hat his experience, in similar client
10 professional relationships, is that billings are sent at the
11 conclusion of lengthy jobs." Respondent's Brief at 7.
12 Despite Erwin & Erwin's quotation marks, the statement is not
13 verbatim and in fact distorts Griffin's testimony. Griffin
14 testified that "when a person performs a service, somewhere
15 along the line he sends progress billings, or waits until the
16 project is completed and sends a billing for the amount of his
17 services; that's normal procedure." 2 Respondent's E.R. at
18 219. When asked about insolvent clients, Griffin stated
19 "[n]ormally I would expect billings to be done, but it would
20 not be unusual in situations where there are no funds
21 available that the billing might be held up and delayed until
22 funds were available." Id.

23 According to Griffin, Erwin & Erwin should have billed
24 Marquam either periodically or at the completion of a project.
25 Erwin & Erwin did neither. By 1980, Erwin & Erwin had

26 / / /

1 completed projects on which it had logged hundreds of billable
2 hours. Erwin & Erwin sent no bills on any completed projects.

3 Griffin did testify that a service provider might delay
4 billing an insolvent client until funds were available.
5 However, Erwin & Erwin did not just delay billing, it never
6 billed. If Marquam was insolvent, then it is hard to
7 understand why Erwin & Erwin continued to represent it for so
8 many years.

9 Erwin & Erwin cites Mullenex's testimony that legal fees
10 were

11 probably discussed every other day or so . . .
12 because we meet and have coffee in the morning,
13 and when this litigation was going on there was so
14 much to do every day that everybody was beginning
to get a little upset about the fact that it was
taking so much time, and how were we going to be
paying the Erwin & Erwin bills.

15 2 Respondent's E.R. at 79. Such testimony shows only the
16 incestuous relationship between Marquam and Erwin & Erwin. It
17 does not show that Erwin & Erwin expected to be paid for its
18 legal services.

19 D. Erwin & Erwin's Time Records

20 Despite its failure to bill Marquam, Erwin & Erwin
21 asserts that "this claimant kept regular time records
22 contemporaneously with all work performed, not just some of
23 it." Respondent's Brief at 14. Erwin & Erwin may have kept
24 regular time records for all the work it performed. However,
25 its claim does not reflect such records. In its 1983 claim,
26 Erwin & Erwin cited no time slips. In its amended 1986 claim,

1 it cited time slips, but they did not account for all the
2 hours claimed.

3 For example, in the 1982 action to set aside the Squaw
4 Valley transfer, Erwin & Erwin's time slips account for 19.75
5 hours, while Erwin & Erwin's reconstruction of time spent is
6 70 hours. Id. at 11. In one landlord-tenant action, Erwin &
7 Erwin's time slips account for 179.25 hours, while Erwin &
8 Erwin's reconstruction of time spent is 445.25 hours. Id. In
9 another case, Erwin & Erwin originally estimated 50 hours,
10 reconstructed 20 hours, and cited no time slips at all.

11 In another example of Erwin & Erwin's flexible attorney's
12 fees, in 1983 Marquam brought action against Aetna Insurance
13 Co. (Aetna), claiming that it had incurred \$120,000 in legal
14 fees during its tort litigation against Brewer. (Marquam
15 claimed that Aetna refused to settle even though Brewer would
16 have accepted \$7,500.) Appellant's E.R. at 72. However, in
17 its 1983 petition, Erwin & Erwin claimed about \$25,600 for the
18 same services.

19 Erwin & Erwin had reasons for keeping time slips other
20 than collecting fees from Marquam. In Marquam's many
21 landlord-tenant actions, Marquam hoped to extract attorney's
22 fees from its tenants if it prevailed.

23 E. Failure to Disclose the Claim for Attorney's Fees

24 Marquam did not disclose Erwin & Erwin's claim for legal
25 fees during the 1980 trial on Brewer's emotional distress
26 claim, or the 1982 trial on the Squaw Creek transfer.

1 Mullenex explained that Marquam did not report its liability
2 to Erwin & Erwin because Marquam is a cash-basis taxpayer.
3 2 Respondent's E.R. at 93.

4 The claim for attorney's fees was relevant in both cases
5 in which Marquam failed to disclose it. In the Brewer tort
6 claim trial, Erwin & Erwin's claim for attorney's fees would
7 have reduced Marquam's net worth, diminishing its potential
8 liability for punitive damages.

9 In the Squaw Creek transfer litigation, the claim for
10 attorney's fees would have further discredited Marquam's
11 argument that it had sufficient assets to pay Brewer's
12 judgment against it. Charles Erwin now states that he did not
13 disclose the fees because "[n]o stipulation was sought nor
14 received, nor did Brewer inquire on the subject of creditors
15 other than herself." That explanation does not seem adequate,
16 because Marquam's net worth was one of the key issues in the
17 case. If Erwin & Erwin's claim was bona fide, it should have
18 been disclosed to the court.

19 Erwin & Erwin argues that it did disclose its claim
20 several times. However, Erwin & Erwin's claims for attorney's
21 fees against Marquam seem to have surfaced when the fees would
22 be paid by a third party. Erwin & Erwin also argues that
23 Brewer was aware of the claim and could have brought it up in
24 the two actions. Brewer is not responsible for raising a
25 claim whose full extent was known only to Erwin & Erwin and
26 Marquam.

1 F. Erwin & Erwin's Profit Motive

2 Erwin & Erwin argues that it never intended to donate its
3 legal work to Marquam without pay. Charles Erwin asserts that
4 he "had to borrow significant funds just to pay bills."
5 Respondent's Brief at 11. He states that his income between
6 1978 and 1982 ranged from \$15,000 to \$31,000. Even if these
7 allegations were documented, they would not show that Erwin &
8 Erwin intended to collect fees from Marquam.

9 This argument is similar to one rejected by the court in
10 All-American Auxiliary, 95 Bankr. 540 (Bankr. S.D. Ohio 1989),
11 where the claimant sought unpaid salary from the debtor. That
12 claimant had no documentation of his claim. Erwin & Erwin's
13 claim should also be rejected as without documentation.

14 Erwin & Erwin has donated services to Marquam. It claims
15 no fees for representing Marquam in Marquam Inv. Corp. v.
16 Beers, 47 Or. App. 711, 731, 615 P.2d 1064, review denied, 290
17 Or. 249 (1980). In at least two other cases, Erwin & Erwin
18 claimed no fees for representing Marquam. See Brewer I, 287
19 Or. at 437 n.1 (citing Marquam Inv. Corp. v. Casciato, No. 77-
20 370 (D. Or. Aug. 10, 1977); Marquam Inv. Corp. v. Bonyhadi,
21 No. A7803-03571 (Multnomah County Circuit Court)).

22 Erwin & Erwin also argues that Charles Lamb would not
23 have donated his time to Marquam. However, no documents show
24 an agreement between Lamb and Erwin & Erwin regarding Lamb's
25 compensation after leaving Erwin & Erwin.

26 / / /

1 G. The Inner City Village Project

2 Erwin & Erwin contends it expected that Marquam would pay
3 it from the proceeds from the Inner City Village condominium
4 project. Although this once was a realistic expectation,
5 Marquam's transfer to Squaw Creek in 1980 made payment from
6 this source unlikely.

7 Marquam transferred its vacant lots to Squaw Creek in
8 return for a promise that Squaw Creek would pay Marquam for
9 the land when and if the condominiums sold. If the
10 condominiums were not built, the land could be tied up for two
11 to three years before Marquam could recover it. During those
12 years, a creditor of Squaw Valley could levy against the
13 property and cut off Marquam's rights.

14 In addition, the Trust and Martin could agree between
15 themselves to reduce the price paid for Marquam's land without
16 consulting Marquam. Even if Marquam were paid for the land,
17 it would receive at most \$150,000, only \$30,000 more than the
18 attorney's fees supposedly due Erwin & Erwin. To collect its
19 fees, Erwin & Erwin would have been required to render its
20 client insolvent.

21 Erwin & Erwin now contends that "Marquam retained
22 improved and [sic] realty and land of a value equivalent [sic]
23 to pay its creditors, in addition to the land which it
24 committed to the development project." Respondent's Brief at
25 9. This assertion directly contradicts the Multnomah County
26 Circuit Court's finding that "the assets that are left with

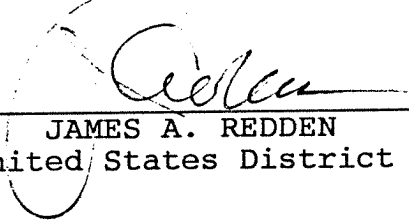
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Marquam are inadequate." Appellant's E.R. at 65. Erwin & Erwin could have disputed the court's findings on direct appeal. It is too late to do so now.

CONCLUSION

The bankruptcy court's orders allowing Erwin & Erwin's claim for attorney's fees are reversed. The case is remanded to the bankruptcy court for the entry of an order disallowing Erwin & Erwin's claim for attorney's fees in its entirety.

DATED this 5 day of March, 1990.



JAMES A. REDDEN
United States District Judge