

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

ROSE WAY, INC.
DOUBLE-D LEASING, INC.
DOUBLE-D, INC.,

Case No. 89-1273-C
89-1274-C
89-1275-C

Chapter 11

Debtors.

ORDER- -APPLICATIONS FOR INTERIM
ALLOWANCE OF FEES AND EXPENSES

On October 20, 1989, the Application for Interim Allowance of Fees and Expenses by Fredrikson and Byron, P.A., and William I. Kampf, (hereinafter "Fredrikson Firm"), attorney for Debtors, and the Application for Interim Fees and Expenses by Ahlers, Cooney, Dorweiler, Haynie, Smith & Albee, and Elizabeth A. Nelson (herein "Ahiers Firm"), attorney for Debtors, came on for hearing. The following appearances were entered: William I. Kampf and Elizabeth A. Nelson for Debtors; Donald F. Neiman for Exchange National Bank; and Terry L. Gibson, Assistant U.S. Trustee.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2) (A). These applications arise under 11 U.S.C. §§ 330 and 331. The Court, upon review of the applications, responses thereto, and the arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On June 8, 1989, Rose Way, Inc., Double-D Leasing, Inc., and Double-D, Inc. filed voluntary petitions seeking relief under

Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §1101 et. sec.

2. On August 23, 1989, an application was filed by the Fredrikson Firm, lead counsel for Debtors, requesting that the Court approve an interim allowance of \$49,237.10 as compensation for services rendered by said firm during the period of June 14, 1989, through July 31, 1989, and \$1,312.20 as reimbursement of expenses occurred during the period concerned. Said application shows that 407.3 hours were expended for services rendered.

3. On August 23, 1989, an application was filed by the Ahlers Firm, local counsel for Debtors, requesting that the Court approve an interim allowance of \$23,466.00 as compensation for services rendered during the period of June 14, 1989, through July 31, 1989, and \$3,709.92, as reimbursement of expenses occurred during said period.

4. Attached to the respective applications were itemized billing statements. These statements reflect services regarding conferences with Debtors' representatives, preparation and filing of statements and schedules, a negotiation of cash collateral agreement, preparation of various pleadings and motions, negotiation of leases and employee benefits, review of Debtors' records, employment of professionals, discovery matters, negotiations and agreements with creditors, utilities and taxing authorities, court appearances and hearings, litigation, conferences with experts, research and briefing, and other services.

5. The financial records of the Debtor companies were in disarray and substitute management replaced existing management shortly before the filing of the petitions.

6. The Fredrikson and Ahlers Firms came into these cases as substitute counsel after the petitions were filed on June 8, 1989.

7. Debtors have entered into an agreement with Exchange National Bank whereby Debtor agrees that payment of fees shall be made from funds subject to the availability requirements of the cash collateral order of September 12, 1989.

8. David C. Rosenberger, a principal of Debtor corporations, advanced \$10,000.00 of his personal funds to the Fredrikson Firm as a retainer. This payment was in the form of two \$5,000.00 checks. One of these checks has been returned because of insufficient funds.

9. Pursuant to Order of June 15, 1989, the Fredrikson Firm has received \$15,000.00 from Debtor-in-possession as a retainer. This retainer is being held in a trust account subject to Court order.

10. David C. Rosenberger has advanced \$2,500.00 of his personal funds to the Ahlers Firm as a retainer on June 19, 1989.

11. Pursuant to Order of July 11, 1989, the Ahlers Firm has received \$10,000.00 from Debtor-in-possession as a retainer. This retainer is also being held in a trust account subject to Court order.

12. The original schedules filed on July 7, 1989, show inherent inaccuracies. The Fredrikson firm requests approximately

\$5,580.00 for the preparation of these schedules. Amended statement of affairs and schedules were filed on October 26, 1989.

13. Alvin I. Bloom, Russell E. Dougherty, and Myron A. Blizzard have filed objections to the approval of the respective applications for allowance of interim fees and expenses. These men are pre-petition employees of Rose Way, Inc. Each claim prepetition wages, fees, and expenses, and each object on the basis that their wages, fees and expenses should be paid before any post-petition professional fees are paid.

DISCUSSION

Under 11 U.S.C. §331, interim compensation may be allowed upon application to the court. Application may be made "not more than once every 120 days after an order for relief" in the case, or more often if permitted by the court. The essential purpose of this section is to relieve counsel and others from the burden of financing lengthy and complex bankruptcy proceedings. Matter of Mansfield Tire & Rubber Co., 19 B.R. 125 (Bankr. N.D. Ohio 1981).

Bankruptcy Rule 2016 requires an applicant seeking interim or final compensation for services from the estate, or reimbursement of necessary expenses, to provide a detailed statement of services rendered, time expended, expenses occurred, and the amounts requested. The adequacy of a fee application in this district is governed by those guidelines set forth in In re Pothoven, 84 B.R. 579 (Bankr. S.D. Iowa 1988). The respective applications meet the requirements of Rule 2016 and the Pothoven standards.

The application for interim compensation should be examined using the same criteria applicable to applications for final compensation awards under 11 U.S.C. §330. Vol 2, Collier on Bankruptcy, 15th Ed., Sec. 331.03, p. 331-7.

An attorney can only be compensated for services which are actual and necessary professional services for the trustee based on "the nature, the extent, and the value..." of the services; "the time spent on" the services; and "the cost of comparable services" in a case other than in bankruptcy. The awarded compensation must be "reasonable." 11 U.S.C. §330(a)(1). The court may also award "reimbursement for actual, necessary expenses." 11 U.S.C. §330(a) (2).

The value of services are those services rendered which are beneficial to the debtor's estate. Matter of Urban America Development Co., 564 F.2d 808 (8th Cir. 1977); In re Tamarack Trail Co., 25 B.R. 259 (Bankr. S.D. Ohio 1982); In re Rosen, 25 B.R. 81 (Bankr. D.S.C. 1981); In re Zweig, 35 B.R. 37 (Bankr. N.D. Ga. 1983); In re Jordan, 54 B.R. 864 (Bankr. D.R.I. 1985).

The orders for relief are under the date of June 8, 1989. The respective applications for interim compensation were filed on August 3, 1989, and the Fredrikson and Ahlers Firms made no prior applications. Thus, the applications do not violate the "once every 120 days after an order for relief" limitation of §331.

In analyzing the applications for compensation, the Court is able to determine the nature and extent of services rendered, but as of the date of hearing, was unable to assess the value of those

services to the estate. The original schedules are inherently inaccurate and the amended schedules were not on file as of the date of hearing. A plan has not been filed and there is still doubt that a plan can be confirmed.

This Court is not saying that interim fees will not be granted prior to the filing of a plan, but the Court is saying that the applicant must give something to the Court and parties in interest by which to evaluate and assess the value of the services to the estate. The schedules on file as of the date of hearing with their errors failed to do so.

There is doubt as to whether the estate will be able to meet the expenses of administration in full. The Court appreciates that 11 U.S.C. §1129(a) (4) requires full disclosure of all payments for services or for costs and expenses incident to the case, and subjects the reasonableness of such payments to the approval of the Court as a condition precedent to the confirmation of the Plan. Consequently, in fixing interim fee awards, the Court is making an award subject to de novo review at the time the final fee application is considered and a refund of fees could be required. In re Callister, 673 F.2d 305, 306–307 (10th Cir. 1982). However, purposeful payment of administrative expenses subject to repayment of part of said sums if there are insufficient funds to pay other administrative claimants is not good policy. In re IML Freight. Inc., 52 B.R. 124 (Bankr. D. Utah 1985).

Accordingly, the respective applications for interim fees must be denied as premature with leave granted to counsel to file an amended application for interim fees.

The matter of payment of interim expenses is a different matter. The amounts are small, and the amounts will not change depending on the success or failure of the case. The Court sees no reason why counsel should have to wait for reimbursement of funds which they have already paid. This award of interim expense is to be applied against the respective retainers earlier received by the respective firms.

The prayer that the Fredrikson Firm be authorized to reimburse David C. Rosenberger for funds advanced should be denied. These funds should be retained in the respective trust accounts until the facts surrounding the financial relationship of the Rosenbergers with Debtor corporations can be developed.

Alvin I. Bloom, Russell E. Dougherty, and Myron A. Blizard have filed objections on the basis that their pre-petition unsecured claims should be paid before the payment of any post-petition administrative fees. The Court appreciates the concern of these objecters and their need for payment. The Bankruptcy Code does favor unsecured claims for wages, salary or commissions earned by Debtors' employees, but the Code gives first priority to payment for expenses of bankruptcy administration. 11 U.S.C. §507(a).

Accordingly, these objections must be overruled.

IT IS ACCORDINGLY ORDERED, as follows:

(1) The objections to the Application for Interim Allowance of Fees by Fredrikson and Byron, P.A., and William I. Kampf, are sustained, and said application is denied with leave granted to refile an amended application for interim allowance of fees.

(2) The objections to the Application for Interim Allowance of fees by Ahlers, Cooney, Dorweiler, Haynie, Smith and Albee, and Elizabeth A. Nelson, are sustained, and said application is denied with leave granted to refile an amended application for interim fees.

(3) The Application for Interim Allowance of Expenses by Fredrikson and Byron, P.A., and William I. Kampf is granted in the amount of \$1,312.20, which award is to be applied against the retainer earlier received.

(4) The Application for Allowance of Interim Expenses by Ahlers, Cooner, Dorweiler, Smith and Albee, and Elizabeth A. Nelson is granted in the amount of \$3,709.92, which award is to be applied against the retainer earlier received.

(5) The prayer that the firm of Fredrikson and Byron be authorized to reimburse David C. Rosenberger for funds advanced is denied.

(6) The objections filed by Alvin I. Bloom, Russell A. Dougherty, and Myron A. Blizard are overruled.

Dated this 9th day of November, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE