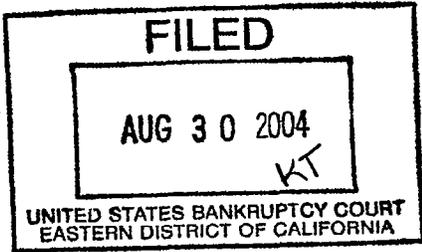


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IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re Case No. 01-17265-A7

CHARLES EUGENE BLAIR

Debtor.

MEMORANDUM DECISION RE
TRUSTEE'S FINAL REPORT AND
ACCOUNT AND APPLICATION FOR
COMPENSATION

A hearing was held June 23, 2004, on the objection by Debtor Charles Eugene Blair (the "Debtor") to the Chapter 7 Trustee's Application for Compensation. Following the hearing, the court took the matter under submission. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A).

Introduction

The issue here is whether the chapter 7 trustee (the "Trustee") may include in her fee base moneys disbursed by the escrow company to secured creditors. The Debtor argues that such disbursements by the escrow company amount to "constructive disbursements" and should not be included in the Trustee's fee base. The court disagrees.

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1 Factual Background

2 The Debtor filed his chapter 7 case on August 1, 2001. The
3 United States Trustee appointed Beth Maxwell Stratton as the
4 Trustee for the Debtor's case. On May 19, 2004, the Trustee
5 filed her Final Report and Application for Compensation and
6 Reimbursement (the "FRA").

7 The FRA lists total receipts of \$795,621.42, disbursements
8 of \$638,824.60 and a balance of funds of \$156,796.82. The
9 Trustee seeks \$34,726.47 in compensation and \$371.74 in
10 reimbursement of expenses.¹ The United States Trustee reviewed
11 and approved the FRA.

12 The Trustee's Narrative, attached to FRA, states that all
13 claims were paid in full with interest and there is a surplus to
14 the Debtor. The Trustee explains that there were substantial
15 non-exempt assets in this case. The Trustee sold the Debtor's
16 home (the "Rose Avenue Property"), which consisted of a house and
17 several acres of almond trees, free and clear of liens to a third
18 party in October 2002. While the Trustee marketed the Rose
19 Avenue Property, secured creditor Mary Bowman leased the property
20 from the Trustee, pursuant to a court order, so that the almond
21 trees could be properly cared for pending the sale of the
22 property. All allowed secured liens against the Rose Avenue
23

24 ¹ The FRA also seeks \$19,123.12 in compensation and
25 \$1,030.80 for the Trustee's attorney and \$3,449.50 in
26 compensation for the Trustee's accountant. These professionals'
27 employment has been approved by the court. There was no
28 objection by the Debtor or any other party to their final
applications for compensation. The court granted their
applications for compensation at the hearing on June 23, 2004,
having found that the compensation requested was reasonable.

1 Property were paid in full from the sale.

2 The Debtor was the co-owner of an apartment complex (the
3 "Apartments"). The Trustee filed a lawsuit against the co-owner
4 of the Apartments to allow a sale pursuant to Bankruptcy Code
5 §363. Shortly before trial, the Trustee and the co-owner entered
6 into a stipulated judgment allowing for the sale of the
7 Apartments if the Debtor and the co-owner did not pay the Trustee
8 enough to pay all the allowed claims in full. The Debtor and co-
9 owner failed to make the required payment, and in October 2003
10 the Trustee sold the Apartments free and clear of liens to a
11 third party.²

12 On June 16, 2004, the Debtor filed his Objection to the FRA
13 (the "Objection"). The Objection argues that although the FRA
14 alleges total receipts of \$795,621.42, the Trustee's bank account
15 record, which is attached to the FRA, shows that the Trustee only
16 received \$327,777.55. The Objection alleges that the difference
17 was distributed directly to secured creditors from the escrow
18 holders in the sales of the Rose Avenue Property and Apartments.
19 The Debtor argues that Section 326(a) only allows the Trustee to
20 be compensated based on the funds disbursed directly by the
21 Trustee, which does not include amounts distributed by the title
22 company.

23 Analysis

24 The issue here is whether the Trustee may include in her fee
25 base moneys disbursed by the escrow company to secured creditors

27 ² The Rose Avenue Property and the Apartments were sold free
28 and clear of several liens against each property which were in
dispute.

1 after the Trustee sold the properties subject to their security
2 interests. The Debtor contends that disbursed funds which were
3 directly distributed by the escrow company amount to
4 "constructive disbursements" and should not be included in the
5 Trustee's fee base. However, the Debtor's reliance on the
6 constructive disbursement theory is misplaced. That theory
7 focuses on what was disbursed, while this case involves a dispute
8 based on who disbursed the sale proceeds.

9 The court must determine whether the Trustee properly
10 calculated her fee base when she included moneys which were
11 directly disbursed by the escrow agent she employed during sales
12 of assets. Section 326 fixes the maximum compensation payable to
13 a trustee.³ Section 326(a) provides in relevant part that ". . .
14 the court may allow reasonable compensation under section 330 of
15 this title of the trustee for the trustee's services...upon all
16 moneys disbursed or turned over in the case by the trustee to
17 parties in interest, excluding the debtor, but including holders
18 of secured claims." 11 U.S.C. §326(a) (emphasis added).

19 The courts have provided guidance in determining whether a
20 trustee's fee base passes muster under §326(a). Compensation
21 seems to be based on whether the trustee justifiably administered
22 the particular property during the bankruptcy case and whether
23 the trustee properly performed services in relation to that
24 property. 7 Alan N. Resnick & Henry J. Sommer, Collier on
25 Bankruptcy ¶ 326.02[2][f][ii] (15th ed. Rev. 2003)

26
27 ³ Section 330, which authorizes compensation for services
28 and reimbursement of expenses of officers of the estate,
including the trustee, refers to Section 326.

1 In Southwest Media, Inc. v. Rau, the Ninth Circuit examined
2 the purpose of Section 76(c) of the Bankruptcy Act.⁴ 708 F.2d
3 419 (9th Cir. 1983). The Ninth Circuit concluded that the
4 trustee compensation provision insures that a trustee's
5 compensation is commensurate with the trustee's services so the
6 statute "recognizes that the trustee's administration of an
7 estate containing encumbered assets may sometimes prove equally
8 difficult and time-consuming as if the assets were unencumbered."
9 Id. at 423. When determining whether the trustee properly
10 calculated his fee base, the Ninth Circuit focused on his actions
11 while administering the estate. Although Rau was decided under
12 the Bankruptcy Act of 1898, it established the proposition that
13 the purpose of the fee cap, under the Act or the Code, is to
14 ensure that trustee compensation is "commensurate with trustee's
15 services." See, In re Hages, 252 B.R. 789 at 794 (Bankr. N.D.
16 Cal. 2000).

17 The Third Circuit has looked to legislative history to
18 determine congressional intent underlying Section 326(a). In re
19 Lan, 192 F.3d 109 (3rd Cir. 1999). In describing Section 326(a),
20 Congress stated in relevant part:

21 It should be noted that the base on which the maximum
22 fee is computed includes moneys turned over to secured
23 creditors, to cover the situation where the trustee
24 liquidates property subject to a lien and distributes
25 the proceeds. It does not cover cases in which the
trustee simply turns over the property to the secured
creditor, nor where the trustee abandons the property

26 ⁴ The language of Section 326(a) does not differ materially
27 from the former statute, Section 76(c) of the Bankruptcy Act
28 which states in pertinent part: ". . . upon all moneys disbursed
or turned over by [the trustee] to any persons, including
lienholders . . ." 11 U.S.C. §76(c) (1976).

1 and the secured creditor is permitted to foreclose.
2 H.R. REP. NO. 95-595, at 327 (1978).

3 Based on the legislative history, the Third Circuit
4 distilled two important factors to determine whether moneys
5 should be included in the trustee's fee base. Both these factors
6 stem from the trustee's primary duty to reduce property to money.
7 Lan, 192 F.3d at 117.

8 First, the bankruptcy court must examine whether the trustee
9 sold assets and whether he disbursed something other than just
10 turning over property to secured creditors. Id. Second, the
11 bankruptcy court must find that the trustee justifiably
12 administered a property or fund. This depends on whether
13 administering the asset benefitted the general estate. Lan, 192
14 F.3d at 119.

15 The Trustee cited In re Tyczka, 287 B.R. 465 (Bankr. E.D.
16 Mo. 2002) which directly addresses whether he could include
17 funds disbursed on her behalf by the title company in his fee
18 base. In Tyczka, the trustee included in his fee base
19 disbursements of sale proceeds from the debtor's residence to
20 secured creditors even though the disbursements were made by the
21 title company. Tyczka, 287 B.R. at 469. The bankruptcy court
22 stated that

23 "[i]t is of no consequence that the disbursements of
24 sale proceeds to the secured creditors and for expenses
25 were actually made by the title company, rather than by
26 the Trustee. Trustee authorized these disbursements
27 through his participation in the closing process." Id.

28 Again, the emphasis is on the actions of the trustee in
administering the estate.

The Debtor cited In re Moreno, 295 B.R. 402 (Bankr. S.D. Fl.

1 2003) to address the issue of who should disburse the cash
2 proceeds for purposes of calculating the Trustee's fee base. In
3 Moreno, the trustee calculated her requested fee based upon her
4 having made total disbursements of \$72,150.39, even though the
5 trustee had only disbursed \$15,284.53, and the difference had
6 been disbursed by a third party. 295 B.R. at 403. This is where
7 the similarity with the facts of this case stops.

8 In Moreno, the balance of the funds was disbursed by a
9 settlement agent on the sale of a parcel of property. Although
10 the trustee in Moreno was authorized by the court to sell the
11 property, the court never authorized the settlement agent to
12 represent the trustee or to act as her agent. On that basis the
13 Moreno court did not include the balance of the funds disbursed
14 by the settlement agent in the trustee's fee base. Moreno, 295
15 B.R. at 403.

16 Here, the court expressly approved the use of an escrow
17 holder and its role in distributing the sale proceeds to secured
18 creditors. The Trustee sought the court's approval of the sale
19 free and clear for both the Rose Avenue Property and the
20 Apartments. In both motions, the Trustee specifically stated how
21 the sale proceeds would be applied at the close of escrow and
22 that the distribution of the sale proceeds was set forth in the
23 Preliminary Report by Fidelity National Title Company.⁵ The
24 motion for authority to sell the Rose Avenue Property requests an
25 order authorizing the sale of the properties

27 ⁵This report was attached as an exhibit to the motions for
28 authority to sell the properties.

1 "with the sale proceeds to be applied first to any
2 customary costs associated with closing Escrow, and
3 then as set forth above, with all sums then remaining
4 to be held in the escrow account until the disputed
5 balance owing on the first Deed of Trust is resolved by
6 stipulation or Court Order; with any and all sums then
7 remaining being paid over to the Trustee and held with
8 other funds of the Estate pending further order of this
9 Court." (emphasis added).

10 The motion for authority to sell the Apartments contains
11 similar language regarding the role of the escrow holder and the
12 distribution of the sale proceeds. Both orders approving the
13 sales of the properties also state that "[t]he remaining funds
14 will be held in escrow until further order of this Court, or
15 until lien releases from each of the three disputed lienholders
16 has been received, and then any and all sums remaining shall be
17 paid over to the Trustee."

18 Therefore, when determining whether a trustee properly
19 calculated her fee base pursuant to §326(a), the court should
20 examine how the trustee administered the property of the estate.
21 Where a sale has been negotiated and the Trustee obtained
22 approval of the sale which included employment of an escrow
23 agent, the court need not focus on who technically disbursed the
24 funds. The emphasis should be on whether the trustee negotiated
25 the sale, whether the trustee disbursed something, rather than
26 just turning over the property, and whether the sale benefitted
27 the estate.

28 Here, the Trustee put in a substantial amount of work to
negotiate sales of the encumbered assets in this case. She
determined that even though the properties were encumbered, there
was equity available to pay other creditors. She stated that she
spent substantial time negotiating with the secured creditors and

1 ensured that all secured creditors received a distribution. The
2 Trustee obtained approval to sell two properties and the court
3 approved her use of an escrow holder. While the Trustee marketed
4 the Rose Avenue Property, she negotiated to lease the Rose Avenue
5 property, so that the almond trees on that property could be
6 properly cared for pending the sale of the property. Such work
7 on the Trustee's part benefitted the estate since all creditors
8 were paid 100% of their claims plus interest and there was a
9 substantial surplus (approximately \$25,000) to distribute to the
10 Debtor.

11 Now the court addresses the Debtor's argument that disbursed
12 funds which were distributed directly by the escrow company
13 amounted to "constructive disbursements," which should not be
14 included in the Trustee's fee base. The "constructive
15 disbursement" theory involves disbursements of property or other
16 consideration, deemed to be "moneys disbursed or turned over"
17 under Section 326(a). In re Lan, 192 F.3d 109 (3rd Cir. 1999).
18 Although there is disagreement among courts on whether to include
19 "constructive disbursements" to calculate a trustee's
20 compensation base, all cases dealing with "constructive
21 disbursements" focus on the nature of the consideration
22 transferred to the creditor.

23 Since there is no dispute as to what was transferred to the
24 creditors here, the Debtor's reliance on the "constructive
25 disbursement" theory is misplaced. The Trustee sold two
26 properties free and clear to third parties and the allowed claims
27 of the creditors secured by the properties were paid at the
28 trustee's direction, through an escrow agent. There was no

1 credit bid, assumption of mortgage, or agreement to transfer the
2 real property to the secured creditors in full satisfaction of
3 their claims. Therefore, the "constructive disbursement" theory
4 is not applicable in this case.

5 In any event, the Ninth Circuit has adopted the constructive
6 disbursement theory to increase the trustee's compensation base,
7 and Ninth Circuit precedent is binding authority on this court.

8 In Rau, the mortgagee bid on the property pursuant to Section
9 363(k), and the Ninth Circuit held that the trustee was deemed to
10 have constructively received and paid out the proceeds of the
11 sale. 708 F.2d at 424. In another case, the Ninth Circuit
12 treated the assumption of the existing mortgages as a
13 disbursement and included it in the trustee's fee base even
14 though it did not expressly use the term "constructive
15 disbursement." York International Building, Inc. v. Chaney (In
16 re York), 527 F.2d 1061 (9th Cir. 1976). Although both of these
17 cases were decided under the Bankruptcy Act, they established the
18 trend to include "constructive disbursements" in a trustee's fee
19 base in the Ninth Circuit. See, In re McNar, 120 B.R. 149 at 153
20 (Bankr. C.D. Cal. 1990).

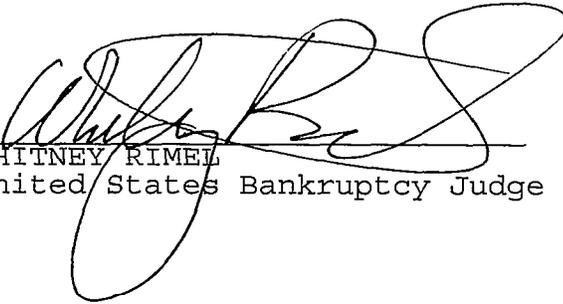
21 Conclusion

22 The Trustee obtained approval to sell two properties and the
23 court approved her use of an escrow holder. The court is
24 persuaded that the Trustee fulfilled her primary duty to reduce
25 property to money in such a way as to benefit the estate.
26 Therefore, the rationale underlying Section 326(a) is satisfied.
27 The fee base should be calculated accordingly. The Trustee's fee
28 base should include the portions of the sale proceeds disbursed

1 by the title company to the secured creditors.

2 The Trustee shall submit a form of order consistent
3 herewith.

4 DATED: August 30, 2004

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WHITNEY RIMEL
United States Bankruptcy Judge

1 PROOF OF SERVICE BY MAIL

2 STATE OF CALIFORNIA)
3) ss. _
4 COUNTY OF FRESNO)

5 I am a citizen of the United States and a resident of the
6 county aforesaid; I am over the age of eighteen years and not a
7 party to the within above-entitled action; my business address is
8 2656 U.S. Courthouse, 1130 O Street, Fresno, California, 93721.
9 On August 30, 2004, I served the within document on the
10 interested parties in said action by placing a true copy thereof
11 enclosed in a sealed envelope with postage thereon fully prepaid,
12 in the United States mail at Fresno, California, addressed as
13 follows:

14 Beth Maxwell Stratton, Esq.
15 SENG & STRATTON
16 7415 North Palm Avenue, Suite 101
17 Fresno, California 93711

18 David R. Jenkins, Esq.
19 P. O. Box 1406
20 Fresno, California 93716

21 Jeffrey J. Lodge, Esq.
22 Office of the United States Trustee
23 1110 U. S. Courthouse
24 1130 O Street
25 Fresno, California 93721

26 I certify (or declare), under penalty of perjury, that the
27 foregoing is true and correct. Executed on August 30, 2004, at
28 Fresno, California.

Kathy Torres
Kathy Torres PLS