

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
Statesville Division

In Re:)	Case No. 94-50572
)	Chapter 7
FRANK HERBERT SIMPSON,)	
)	
Debtor.)	
_____)	

ORDER

This matter come before the Court on July 5, 1995 upon continued hearing on the Trustee's Application for Interim Fees and Expenses for J. Samuel Gorham, attorney for the Trustee, and the Trustee's Application for Preservation Expenses payable to Glenn McCrary. At the original hearing of these motions on June 7, 1995, an objection was raised, not to the allowance of these fees and expenses, but to payment of the same, which objection was asserted by Robert Laney, Esq. ("Laney). Laney, until allowed to withdraw, served as counsel for the Debtor-in-Possession in this case.

After hearing the arguments of counsel, the Court allowed the parties one week in which to tender briefs.

After reviewing the arguments made by counsel, the Court does **Find and Conclude** as follows:

1. This case was filed on October 24, 1994 as a Chapter 11 case.
2. On December 15, 1994, due to misconduct by the Debtor, the Court ordered that J. Samuel Gorham ("Gorham") be appointed Chapter 11 trustee in this case.
3. On January 3, 1995, the trustee was allowed to hire Glenn McCrary ("McCrary") as a collection agent and manager for the

trustee. The primary function of McCrary in this case was to review the real estate the Debtor owned, and to the extent authorized by the Court and practicable given the circumstances, to attempt to collect rents on these properties.

4. On April 5, 1995, the case was converted to Chapter 7. Due to his familiarity with the case, Gorham was continued as Chapter 7 trustee, and McCrary as his assistant.

5. Laney in addition to serving as counsel for the Debtor, is a Chapter 11 administrative claimant holding an allowed Chapter 11 administrative expense claim of \$6,127.92. These fees have not been paid to date.

6. On May 17, the trustee filed an Application for Interim Fees and Expenses for his firm as counsel, seeking allowance and payment of \$8,285.80 fees and \$471.92 of expenses for his firm's work in the Chapter 11 period. (December 8 through April 20, 1995). Of this amount, the trustee asserts that fees of \$5,728.00 and expenses of \$372.32 were attributable to Section 506 preservation fees of property of the estate which allegedly constituted cash collateral of secured creditors. That application further requested Chapter 7 administrative expense status for fees of \$1,448.00 and expenses of \$98.10, covering the period of April 20 through May 17, 1995. Of this amount \$776.00 is alleged to be for Section 506(c) preservation fees and \$98.10 for expenses.

7. On May 30, 1995, the trustee filed an Application for Preservation Expenses payable to McCrary for his work in protecting the Debtor's real estate. This application sought allowance and

payment of fees and expenses for the period of December 21, 1994 through the date of the application. In total, the trustee seeks allowance and payment of fees of \$4,550.00 and expenses of \$529.88 for the Chapter 11 period and Chapter 7 fees of \$227.50 and expenses of \$17.82 for the period of April 20 through May 30, 1995.

8. Laney has objected to the trustee's request to allow payment in this case, asserting that inasmuch as his fees are as yet unpaid and have equal priority to the portion of these requests that are Chapter 11 expense claims, the trustee's attorneys and McCrary should not be paid at this point. Alternatively he states these should be paid only pro rata with his claim. In support thereof he cites U.S.C. § 503(b)(1)(A) together with 11 U.S.C. § 330(a) and 11 U.S.C. § 331.

9. The trustee points out that the bulk of the funds which the estate presently holds, [which are admittedly insufficient to pay all Chapter 11 expenses and Chapter 7 expenses in full at the present time], would not have been created but for efforts of the trustee and his employee McCrary. Effectively, the trustee seeks a retroactive, super-priority expense status for his and Mr. McCrary's Chapter 11 expenses.

10. The Court hereby awards, on an interim basis and, to the extent that the estate has sufficient monies to do so without imperiling future operations, orders payment of the Chapter 7 interim fees sought by Trustee's counsel of \$1,448.00 and expenses of \$98.10. The Court further allows on an interim basis, and

orders payment to McCrary of, fees of \$227.50 and expenses of \$17.82 for the Chapter 7 period.

11. Obviously, Chapter 7 administrative expense fees claim a higher payment priority than Chapter 11 expenses, so the argument that pro rata sharing must be made is inapplicable to this portion of these Applications.

12. With respect to the Chapter 11 expenses, the Court recognizes the general rule that claims against the estate share pro rata against assets provided these are assets of the estate. This normally would dictate that no Chapter 11 administrative expense claims be paid until such time as there are sufficient monies to pay all Chapter 7 expenses in full, and then these should be allowed only on a pro rata basis.

13. What makes this situation different however, at least as to McCrary, is that a good portion of these monies derive from a Court-ordered 11 U.S.C. § 506 charge on property that was alleged to be collateral of secured creditors.

14. Also differing from the normal circumstance is the fact that, but for the efforts of McCrary, these monies would likely not have been generated at all. The Court takes judicial notice of the tangled and difficult history of this case and the difficulties under which the trustee and McCrary have labored, including a total lack of unencumbered assets. The appointment of the trustee, and of McCrary, in this case was necessary only due to the fact that the debtor-in-possession had failed to perform his duties under the Bankruptcy Code and under state law vis à vis his "tenants". While

this was not due to any specific fault of Laney, had he been able to control his client, the fees sought by the Trustee, and many of those already awarded to Laney, would not have been necessary. The Court recognizes that attorneys in Chapter 11 cases are not always apprised of all that their clients are doing. However, this fact does affect the equities herein.

15. Gorham, for his part, has served in many cases in this district as a Chapter 11 and a Chapter 7 trustee and counsel for the trustee and is well aware of the attendant risks. McCrary, on the other hand, is a layman who is unfamiliar with the system and one who provided a valued service to this estate when no one else was willing to do so.

16. Given the equities of the situation and based upon the interplay of 11 U.S.C. § 506 and 105, the Court believes that it should allow, and to the extent possible (after payment of allowable Chapter 7 expenses), authorize payment of the Chapter 11 sums applied for by McCrary, to wit: fees of \$4,550.00 and expenses of \$529.88.

17. The trustee's Chapter 11 expenses of \$8,285.80 and expenses \$471.92 are allowed, but payment of these is deferred pending on approved distribution from the Chapter 7 estate.

IT IS SO ORDERED.

This the 17th day of August, 1995.


United States Bankruptcy Judge