

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
BANKRUPTCY DIVISION
DIVISION OF ST. THOMAS AND ST. JOHN**

IN RE:

KOOL, MANN, COFFEE & CO., f/d/b/a
MOORE, OWEN, THOMAS & COMPANY,
Debtor

Bankruptcy No. 3-90-00017

KOOL, MANN, COFFEE & CO.,
MOORE, OWEN, THOMAS
RESORT PROPERTIES, INC. and,
THOMAS O. MOORE
Plaintiffs

v.

TRAMELL CROW, HARLAN R. CROW, *et al.*
TRAMMELL S. CROW, HARLAN R. CROW,
TRAMMELL S. CROW 1983 TRUST,
ST. THOMAS HOTEL INVESTORS LIMITED
PARTNERS, SHC ST. THOMAS CORPORATION,
WYNDHAM HOTEL COMPANY,
ST. THOMAS PARTNERSHIP
Defendants

Adversary No. 3-91-00004
**Related to Dkt. No. 122,
Defendants' Application for
Award of Costs and Attorney's
Fees**

MEMORANDUM OPINION¹

This is an application for attorney's fees filed by defendants Trammell Crow, Harlan R. Crow, Trammel S. Crow, Trammel S. Crow 1983 Trust, St. Thomas Hotel Investors Limited Partners, SHC St. Thomas Corporation, Wyndham Hotel Corporation, and St. Thomas Partners. Defendants seek attorney's fees and costs pursuant to §541 of Title 5 of the Virgin Islands Code

¹This Memorandum Opinion constitutes the court's findings of fact and conclusions of law. The court's jurisdiction was not at issue.

for an adversary proceeding commenced more than fifteen years ago. Plaintiffs filed a response seeking denial or reduction of any fee and cost allowance. For the reasons cited, the defendants' application is granted.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendants were the prevailing parties in this adversary in which several plaintiffs joined forces. Plaintiff Thomas O. Moore is an individual. Moore, Owen, Thomas Resort Properties, Inc., is a wholly owned subsidiary of the Debtor, Kool, Mann, Coffee & Co. The plaintiffs' adversary complaint, filed on October 15, 1991, contained four counts – (1) Breach of Contract; (2) Accounting; (3) Intentional Misrepresentation, Fraud, and Fraudulent Concealment; (4) Fraud and Misrepresentation. As stated in paragraph eight of the complaint, the plaintiffs pursued these four counts via 1 VIC §4² entitled “Application of common law; restatements.”

The plaintiffs' counts may be categorized as related to contractual and accounting (counts one and two) and fraud (counts three and four) derived from a certain construction project. Under counts one and two, plaintiffs requested the bankruptcy court to find that a sale, transfer and/or assignment of the project occurred, as a matter of law, in a series of transactions. Defendants sought a ruling that no sale, transfer or assignment of the project occurred and that, if such a sale, transfer or assignment occurred, no profit was derived therefrom. The alleged profits were the focus of the litigation.

²Section 4 provides

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

The bankruptcy court issued findings of fact and conclusions of law, held that the applicable statute of limitations barred plaintiffs' claims and entered summary judgment on all counts for defendants.³ On appeal, the district court affirmed the bankruptcy court. *See* Dkt. No. 127.⁴

On September 24, 2004, the defendants filed the instant application for fees and costs with respect to their defense of the claims in this adversary. The defendants requested counsel fees of \$137,855.85 and costs of \$5,254.23 for defending this action. This application is the defendants' first request for costs and attorney's fees. The defendants failed to specifically plead counsel fees in their response or answer to the adversary complaint as required by Fed.R.Bankr.P. 7008(b). In fact, no answer to the complaint appears on the docket. However, in their opposition to the request for attorney's fees and costs, plaintiffs attach a copy of what purports to be an answer to the complaint. *See* Exhibit 1 to Adv. Dkt. No. 126. The issue before the court is whether the defendants have a right to recover attorney's fees and costs pursuant to §541 of Title 5 of the Virgin Islands Code in defense of an adversary proceeding in the Bankruptcy Court predicated on causes of action based on Virgin Islands law.

³The Memorandum Opinion is dated August 31, 2004, but was not docketed until September 7, 2004.

⁴The district court's opinion was dated August 2, 2006, and docketed on August 10, 2006. Its order was dated August 3, 2006, and docketed on August 10, 2006. *See* Dkt. No. 127. The August 3, 2006, order does not have a docket number assigned to it.

II. DISCUSSION

A. Analysis of Applicable Law in Award of Attorney's Fees: Fed.R.Bankr.P. 7008 versus 5 VIC §541

The parties have cited, as applicable and controlling in this proceeding, provisions of the Bankruptcy Code, the Federal Rules of Civil Procedure, and the Virgin Islands Code. The plaintiffs cite Fed.R.Bankr.P. 7008, 7054, and Fed.R.Civ.P. 54(d). Defendants cite §541 of Title 5 of the Virgin Islands Code as controlling law.

Rule 7008(b) provides:

A request for an award of attorney's fees *shall be pleaded* as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.

(Emphasis added.)

Section 541 provides, in pertinent part,

(a) Costs which *may be allowed* in a civil action include: . . . (6) Attorney's fees as provided in subsection (b) of this section.

(b) The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto...

(Emphasis added.) Rule 7008(b) compels a party who requests counsel fees in an adversary proceeding to specifically plead the request in a complaint, cross-claim, third party complaint, answer or reply, as appropriate. Section 541 does not have a requirement to plead attorney's fees. The specific pleading distinction is important because the plaintiffs argue that the defendants failed to ask for counsel fees in their answer to the adversary complaint as required by Fed.R.Bankr.P. 7008(b). As noted above, attached as an exhibit to plaintiffs' opposition to the

fee request is what purports to be defendants' answer to the complaint. *See* Adv. Dkt. No. 126, Exhibit 1. Although no answer was filed of record, for purposes of addressing the instant motion for fees, the court notes that in Exhibit 1 to Adv. Dkt. No. 126 there is no request for fees.⁵ Rather, the defendants requested counsel fees for the first time in an application filed in September of 2004, seventeen days after the Bankruptcy Court's August, 2004 decision. Thus, the defendants failed to comply with the pleading requirements of Rule 7008(b), and they cannot prevail on their claim for fees under Rule 7008(b).

Nonetheless, defendants rely upon §541 of Title 5 of the Virgin Islands Code rather than Rule 7008 to recover attorney's fees. We agree that the causes of action in the adversary were causes of action arising under territorial, not bankruptcy, law. Section 541 permits an award of costs, defined to include attorney's fees associated with litigation, under territorial statutes.⁶ The fact that the causes of action were brought only under territorial law and not bankruptcy law does not render Rule 7008 inapplicable, however. Rule 7008 governs the process by which fees must be sought in a bankruptcy case, even though the substantive entitlement to the fees or costs is based on a territorial statute. However, the matter is complicated because, under Virgin Islands law, certain costs are defined as including attorney's fees. Rule 7008 does not govern the pleading of costs.

⁵In the "wherefore" clause of the answer defendants ask only that "Plaintiffs take nothing by the way of the Complaint, and the Court grant Defendants such other and further relief to which they may show themselves justly entitled." Adv. Dkt. No. 126, Exhibit 1, at 9.

⁶*Cf. Figueroa v. Buccaneer Hotel Inc.*, 188 F.3d 172, 183 (3d Cir.), *rehearing denied* 202 F.3d 253 (3d Cir 1999)(§541 "is only applicable to fees for the litigant who succeeds in pursuing Virgin Islands territorial claims" and any fees and costs associated with federal claims must be deducted); *Thorstenn v. Barnard*, 883 F.2d 217, 218 (3d Cir. 1989)(§541 does not apply to the allowance of attorney's fees for asserted federal claims).

Section 541 of Title 5 of the Virgin Islands Code is available to parties who prevail in litigation or defense of territorial claims. A prevailing party is a party in whose favor the decision or verdict is rendered and judgment is entered.⁷ In this adversary proceeding the defendants received summary judgment on all counts. Thus, it is clear that defendants are the prevailing parties.

Further, the Court of Appeals for the Third Circuit has instructed that, “[i]n awarding fees to a prevailing party under [§]541, the court must subtract fees and costs associated with federal claims, inasmuch as [§]541 is only applicable to fees for the litigant who succeeds in pursuing Virgin Islands territorial claims.”⁸ None of the four counts in the plaintiffs’ complaint alleged violations of federal or bankruptcy law and, therefore, recovery of attorney’s fees and costs by the defendants as prevailing parties is governed by §541. Inasmuch as the complaint specifically alleged causes of action under territorial law, §541 is the applicable law to determine rights to attorney’s fees in this adversary proceeding.

We will examine defendants’ claims on the merits.

B. Time Frame to Plead

Plaintiffs also assert that the fourteen day time period of Fed.R.Civ.P. 54(d) to file a motion for fees applies. We first note that there is no specific time frame stated in §541 to file the application for fees. However, with respect to Rule 54(d), plaintiffs point to a decision of the Virgin Islands Territorial Court, *Kansas Packing Co., Inc. v. Lavilla*, 1998 WL 643032 (Terr.V.I.). *Kansas Packing* was not a bankruptcy case and, although it concerned §541, it is

⁷Black’s Law Dictionary 1069 (rev. 5th ed. 1979).

⁸*Figueroa v. Buccaneer Hotel Inc., supra*, 188 F.3d at 183.

inapplicable to this case because Rule 54(d) is not incorporated into the Federal Rules of Bankruptcy Procedure and does not apply to bankruptcy cases. Bankruptcy Rule 7054 which is applicable to bankruptcy cases has a provision regarding costs. It provides:

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice; on motion served within five days thereafter, the action of the clerk may be reviewed by the court.

Thus, there appears to be no time bar to seeking an award of costs or fees in a circumstance such as that in the instant matter.

C. Determination of Reasonable Attorney's Fees and Costs

Having determined that 5 VIC §541 governs and that, under the clear language of that section defendants, as prevailing parties, are entitled to fees and costs, we must next determine the reasonable amount of the attorney's fees to be awarded under 5 VIC §541. Fees must be determined on the facts of each case.⁹ The intention of the statute is to indemnify the prevailing party for a fair and reasonable portion of the prevailing party's attorney's fees incurred in the prosecution or defense of the action, not necessarily for the entire fee, especially if that amount is excessive under the facts of the case."¹⁰

The lodestar method of determining the amount of a reasonable fee requires consideration of the number of hours reasonably expended on the litigation multiplied by a

⁹*Lucerne Inv. Co. v. Estate Belvedere, Inc.*, 411 F.2d 1205, 1207 (3d Cir. 1969).

¹⁰*Id.*

reasonable hourly rate,¹¹ including fee and cost requests under §541.¹² Those criteria include “the time and labor required, the novelty and difficulty of the questions involved, the skill requisite properly to conduct the cause, the customary charges of the bar for similar services, the amount involved in the controversy, the benefits resulting to the client from the services, and the contingency or certainty of the compensation.”¹³

Defendants seek recovery of attorney’s fees in the amount of \$137,855.85, consisting of \$97,418.35 for Texas counsel and \$40,437.50 for Virgin Islands counsel. Dkt. No. 122 at 6. In his affidavit accompanying the fee application, defendants’ Texas counsel, Mark C. Taylor, asserts that his fees are reasonable and, based on his experience and expertise in other cases, contends that the hours and total amounts billed are reasonable and comparable to those of other attorneys in like cases. *See* Dkt. No. 122, Affidavit of Mark Taylor, at 4. Plaintiffs have not contested the hourly rates, per se, but only the reasonableness of the fees sought.

The opinions of the bankruptcy and district courts identified difficult legal questions raised in the case that required special legal skills beyond general familiarity with Virgin Islands contract law. Furthermore, the amount in controversy was in excess of \$60 million. We do not repeat the history of the underlying action or the findings and conclusions of the bankruptcy and district courts. Suffice it to say that the defendants’ success was, in large part, due to the special services and skill of their attorneys. After full consideration of the record of the proceedings in

¹¹*Jo-Ann’s Launder Center, Inc. v. Chase Manhattan Bank, N.A.*, 31 V.I. 226, 234 (D.V.I 1995)(stating that the determination of the ‘lodestar,’ or initial valuation of an attorney’s services requires consideration of the number of hours spent and the reasonable hourly rate).

¹²*Id.* at 4-5.

¹³*Lucerne Inv. Co., supra*, 411 F.2d at 1207.

the underlying action we conclude that the attorney's fees sought are fair and reasonable. Thus, we approve \$137,855.85 in fees.

Defendants' attorneys billed \$11,382.06 in costs but requested reimbursement of only \$5,254.23, recognizing in their fee application that most of their costs are not recoverable under §541. Their bill included charges for long-distance calls, fax expenses, photocopying, postage, and computerized legal research, which are not authorized by §541. *See* Adv. Dkt. No. 122 at 3, citing *Morcher v. Nash*, 32 F.Supp.2d 239 (D.V.I. 1998). We conclude that defendants' request for \$5,254.23 is reasonable and allow that amount.

III. CONCLUSION

Section 541 of Title 5 of the Virgin Islands Code provides a limited avenue for a prevailing party to seek recovery of attorney's fees and costs in bankruptcy cases. Because §541 applies to this case, and because the amount of fees and costs is reasonable given the complexity of the issues and the requisite skill and expertise required of counsel in defending the action, an order will be entered granting the motion for fees and costs.

DATE: April 17, 2007


Judith K. Fitzgerald jmd
United States Bankruptcy Judge

THE CASE ADMINISTRATOR SHALL SEND A COPY OF THIS OPINION AND ORDER
OF COURT TO THE FOLLOWING:

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**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
BANKRUPTCY DIVISION
DIVISION OF ST. THOMAS AND ST. JOHN**

IN RE:

KOOL, MANN, COFFEE & CO., f/d/b/a
MOORE, OWEN, THOMAS & COMPANY,
Debtor

Bankruptcy No. 390-00017

KOOL, MANN, COFFEE & CO.,
MOORE, OWEN, THOMAS
RESORT PROPERTIES, INC. and,
THOMAS O. MOORE
Plaintiffs

Adversary No. 391-00004
**Related to Dkt. No. 122,
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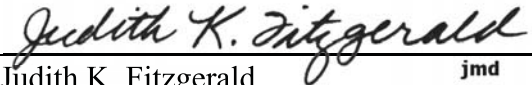
v.

TRAMELL CROW, HARLAN R. CROW,
TRAMMELL S. CROW, TRAMMELL S. CROW
1983 TRUST, ST. THOMAS HOTEL
INVESTORS LIMITED PARTNERS,
SHC ST. THOMAS CORPORATION,
WYNDHAM HOTEL COMPANY,
ST. THOMAS PARTNERSHIP
Defendants

ORDER GRANTING APPLICATION FOR FEES AND EXPENSES

AND NOW, this 17th day of April, **2007**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED and DECREED** that Defendants' application for award of costs of \$5,254.23 and attorney's fees of \$137,855.85 is **GRANTED** against all Plaintiffs, jointly and severally.

It is **FURTHER ORDERED** that the Clerk shall close this Adversary.



Judith K. Fitzgerald jmd
United States Bankruptcy Judge

THE CASE ADMINISTRATOR SHALL SEND A COPY OF THIS OPINION AND ORDER OF COURT TO THE FOLLOWING:

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Dated: 4/17/2007
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