United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]
[rev'd, Case No. 94-C-62-S (W.D. Wis. Mar. 29, 1994)]

In re Houligans of Eau Claire, Inc., Debtor
Bankruptcy Case No. 93-11291-11

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

December 6, 1993

Lawrence J. Kaiser, for the debtor.
Sheree Dandurand, Ass't. U.S. Trustee, for the office of the U.S. Trustee.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This matter is before the Court on a motion by the debtor in possession to appoint W.J. Bauman Associates, Ltd., as its accountant during the pendency of its Chapter 11 case. The United States Trustee has objected to the motion. The debtor is Houligans of Eau Claire, Inc., and it is represented by Lawrence J. Kaiser. Sheree Dandurand, Assistant U.S. Trustee, represents the office of the U.S. Trustee for the Western District of Wisconsin.

The facts are very brief. The debtor filed a Chapter 11 bankruptcy on May 3, 1993. The total amount of unsecured debt listed in the debtor's bankruptcy schedules is $24,017.22. W.J. Bauman Associates, Ltd. (Accountant), the accountant which the debtor seeks to employ, is listed among the debtor's unsecured creditors. The debt to the Accountant is $1,504.44, which comprises 6.25% of the total amount of unsecured debt. Prior to the Chapter 11 filing, the debtor had retained the Accountant to prepare its tax returns and audit its books. The U.S. Trustee bases its objection to the debtor's motion on the existence of this prepetition debt to the Accountant. The parties have filed briefs in support of their respective positions and the Court has taken the matter under advisement.

In support of its objection, the U.S. Trustee references two provisions of the Bankruptcy Code. The first is 11 U.S.C. § 327(a) which provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

See 11 U.S.C. § 327(a) (West 1993). The second provision, § 101(14)(A), defines "disinterested person" to include a person who "[i]s not a creditor, an equity security

holder, or an insider." See 11 U.S.C. § 101(14)(A) (West 1993).

The U.S. Trustee asserts that this language is clear and unequivocal -- if the person is a creditor of the debtor, she is not "disinterested" for purposes of § 327(a) and therefore cannot be employed by the debtor. The U.S. Trustee cites numerous cases in support of its position. See, e.g., Pierce v. Aetna Life Ins. Co. (In re Pierce), 809 F.2d 1356 (8th Cir. 1987); In re Classic Roadsters, Ltd., 150 B.R. 751 (Bankr. D.N.D. 1993); In re Apex Oil Co., 128 B.R. 671 (Bankr. E.D. Mo. 1991); In re Diamond Mtg. Corp. of Ill., 135 B.R. 78 (Bankr. N.D. Ill. 1990); In re Estes, 57 B.R. 158 (Bankr. N.D. Ala. 1986); In re Patterson, 53 B.R. 366 (Bankr. D. Neb. 1985); In re B.E.T. Genetics, Inc., 35 B.R. 269 (Bankr. E.D. Cal. 1983).

The U.S. Trustee acknowledges that a few courts have declined to apply §§ 327(a) and 101(14) so strictly, but further asserts that these cases were wrongly decided. See, e.g., In re Microwave Products of America, Inc., 94 B.R. 971 (Bankr. W.D. Tenn. 1989); In re Viking Ranches, Inc., 89 B.R. 113 (Bankr. C.D. Cal. 1988); In re Best Western Heritage Inn Partnership, 79 B.R. 736 (Bankr. E.D. Tenn. 1987).

As further support for its position, the U.S. Trustee distinguishes another relevant provision of the Bankruptcy Code -- § 1107(b). That section provides that " [n]otwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case." See 11 U.S.C. § 1107(b) (West 1993). This section does not rescue the debtor's motion from dismissal, the U.S. Trustee contends, since the Accountant at issue is also a creditor of the debtor. This fact allegedly removes the Accountant from the "solely because of such person's employment . . . " requirement of § 1107(b). After reviewing and distinguishing additional case law, the U.S. Trustee concludes its brief by positing that the Court is bound to follow the plain language of §§ 327(a) and 101(14).

The Court has considered the arguments and case precedent cited by the U.S. Trustee and the debtor's response to them. The Court has also examined other case precedent not cited by the parties and has considered the practical implications of each of the proffered positions in light of the fundamental purposes underlying the Bankruptcy Code. Although the U.S. Trustee's position has facial appeal because of its certainty and ease of application, the Court is unpersuaded that it is the better approach. Rather, the Court decides to adopt the more flexible case-by-case approach favored by the debtor. Numerous reasons support this result.

First and foremost, the particular facts of this case weigh against a strict, unyielding interpretation of the relevant Code provisions. As already noted, the claim upon which the U.S. Trustee bases its objection amounts to only $1,504.44 -- or roughly 6.25% of the total unsecured debt in the debtor's bankruptcy estate. Thus the allegedly disqualifying prepetition claim is very small. In this Court's view, such a small claim is, without more, insufficient to warrant denial of the debtor's motion.

Second, the only objecting party is the U.S. Trustee. No creditor has objected to the debtor's motion. In fact, the attorney representing the creditors' committee -- James G. Moldenhauer -- submitted a letter to the Court on October 28, 1993 in support of it. In his letter, Attorney Moldenhauer asserts that it would be " [e]conomically and financially unwise and potentially wasteful to the unsecured creditors to require the debtor to employ a new accountant." Attorney Moldenhauer further notes that "[t]he resources of the debtor would be more appropriately used to fund payments to the unsecured creditors . . . rather than be paid to a new

accounting firm simply to duplicate work that has already . . . been provided."

Such policy considerations provide a third ground to the Court upon which to base its result. The purpose of a reorganization under Chapter 11 is to facilitate the restructuring of a business' finances "[s]o that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." See H.R. Rep. No. 595, 95th Cong., 1st Sess. 220-221 (1977). As noted by the attorney for the creditors' committee, denying the debtor's motion would undoubtedly waste resources of the debtor on duplicative accounting work and could thereby reduce any eventual return to unsecured creditors. Such an effect would contravene the aforementioned fundamental purpose of Chapter 11 by lessening the probability of confirmation and successful completion of a plan which the debtor would ultimately propose.

Fourth, other courts -- albeit a minority -- have reached the same result under similar facts. These and other courts advocate a flexible, case-by-case approach in considering applications for employment of professionals under § 327(a). See In re Martin, 817 F.2d 175, 180-83 (1st Cir. 1987) (listing 12 factors to consider in making § 327(a) determinations); U.S. Trustee v. Price Waterhouse (In re Sharon Steel Corp.), 154 B.R. 53, 55 (W.D. Pa. 1993); Michel v. Carter (In re Carter), 116 B.R. 123, 126-27 (E.D. Wis. 1990); In re Gilmore, 127 B.R. 406, 408-09 (Bankr. M.D. Tenn. 1991); In re Microwave Products of America, Inc., 94 B.R. 971, 974 (Bankr. W.D. Tenn. 1989); In re Viking Ranches, Inc., 89 B.R. 113, 115-116 (Bankr. C.D. Cal. 1988); In re Best Western Heritage Inn Partnership, 79 B.R. 736, 740-741 (Bankr. E.D. Tenn. 1987). The Sharon Steel and Viking Ranches cases are especially on-point with the present case. Those cases both involved applications to employ accountants who were prepetition creditors of the debtor. In both cases the only party objecting to the application was the U.S. Trustee. Sharon Steel, 154 B.R. at 55; Viking Ranches, 89 B.R. at 114. In deciding to approve the debtor's application, the Sharon Steel court stressed the unnecessary cost and delay which would result if the debtor were required to employ a new accountant. 154 B.R. at 55. The court in Viking Ranches emphasized that the claim amount at issue was "[d]e minimus in comparison to the size of the estate." 89 B.R. at 115. In refusing to strictly apply § 327(a), the court interpreted "employment" in § 1107(b) to include any professional who is a creditor solely because of prepetition employment. Viking Ranches, 89 B.R. at 115. As noted, the facts of this case are very similar to those of Sharon Steel and Viking Ranches. The claim involved is very small and the U.S. Trustee is the only objecting party. The Sharon Steel and Viking Ranches cases thus provide strong support for the result the Court reaches here.

Fifth, many of the cases cited by the U.S. Trustee in support of its position are factually distinguishable from this one. More specifically, most of those cases involved professionals found to be "interested" for significant reasons other than the fact that they were merely prepetition creditors of the debtors at issue. Many of those cases involved creditors who held other interests which were adverse to the debtor's estate. In addition, many of those cases also involved very substantial prepetition claims. See, e.g., Pierce v. Aetna Life Ins. Co. (In re Pierce), 809 F.2d 1356 (8th Cir. 1987) (attorney-creditor's claim for fees totaled $61,553.02, attorney held mortgages on debtor's property and failed to disclose it in his application for employment); In re Classic Roadsters, Ltd., 150 B.R. 751 (Bankr. D.N.D. 1993) (attorney fee claim for $16,164.46, attorney was escrow agent in a transaction between major secured creditor and debtor); In re Apex Oil Co., 128 B.R. 671 (Bankr. E.D. Mo. 1991) (attorney fee claim for $602,103.68, large number of insider relationships between attorney and debtors, attorney's representation of possible adversaries of debtors,

failure to disclose insider relationships); In re Patterson, 53 B.R. 366 (Bankr. D. Neb. 1985) (attorney fee claim for $8,015.26, law firm was co-owner of real estate with the debtor and was thus an "insider," failure to disclose claim and insider relationship); In re B.E.T. Genetics, Inc., 35 B.R. 269 (Bankr. E.D. Cal. 1983) (attorney was officer of debtor corporation, failure to disclose insider relationship).

In contrast to those cases, the present case involves an accounting firm with a prepetition claim of $1,504.44; none of the other aforementioned conflicts or adverse interests is present. Nor is the nondisclosure element -- a significant factor in the result reached in many of the aforementioned cases -- present in this case; the debtor disclosed the prepetition debt to the Accountant in its schedules and in its application to employ the professional. The cases relied upon by the U.S. Trustee, therefore, are unpersuasive when applied to the present facts.

Sixth, nearly all of the cases cited by the U.S. Trustee involved applications to employ attorneys. This case involves an application to employ an accountant. More than one court has noted the differing functions of an attorney and an accountant in their relationship to a debtor for purposes of conflict determination. See, e.g., In re Michigan Gen'l Corp., 77 B.R. 97, 107-08 (Bankr. N.D. Tex. 1987); see generally Regina Stango Kelbon, Ellen S. Herman & Richard Scott Bell, Conflicts, The Appointment of "Professionals," and Fiduciary Duties of Major Parties in Chapter 11, 8 Bankr. Dev. J. 349, 377-79 (1991). In addressing this distinction, the Michigan General case cited the following excerpt from the a U.S. Supreme Court case:

> The Hickman work-product doctrine was founded upon the private attorney's role as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

See United States v. Arthur Young & Co., 465 U.S. 805, 817-818 (1984). Although the current debtor admittedly seeks to employ the Accountant for purposes which differ in part from those involved in the Supreme Court's case,[(1)] the Court nevertheless believes this factor to be worthy of note in reaching the result it does. The fact that an accountant is at issue here serves to further distinguish this case from most of those relied upon by the U.S. Trustee.

Seventh and finally, several courts have noted that the purpose behind the "disinterested" requirement is to identify persons who exhibit a risk of acting in a manner calculated to maximize their own interests at the expense of the best interests of the estate. See In re Federated Dept. Stores, Inc., 114 B.R. 501, 504 (Bankr. S.D. Ohio 1990), citing with approval In re O'Connor, 52 B.R. 892, 899 (Bankr. W.D. Okla. 1985). As opined by the O'Connor court, "[t]he question should not be, does [the professional] possess a slight interest in the debtor, but does [the professional] possess an interest such as would color the requisite independent judgment and impartial attitude." In re O'Connor, 52 B.R. at 899. This Court finds that a fully disclosed prepetition debt of $1,504.44 does not cast doubt on the independent judgment or impartial attitude of an accountant hired to prepare the

debtor's tax returns and audit its books. This single factor of a small prepetition debt is thus insufficient to preclude a finding of the requisite "disinterestedness" for purposes of § 327(a). Rigid adherence to the statutory language in this case, therefore, would not serve to further the purpose behind the statutory "disinterested" requirement.(2)

All of this is not to say, however, that any professional who is also a prepetition creditor would always be found by this Court to be "disinterested" for purposes of § 327(a). The Court fully acknowledges that there may be cases involving larger prepetition claims, objecting creditors, and/or a closer connectedness between a debtor and a professional sufficient to preclude a finding that the professional is disinterested. In reaching the result it does, the Court is merely advocating a case-by-case approach in addressing applications for employment of professionals. Ease of application and certainty of result may admittedly be desirable. Factors such as these, however, should not take precedence over more fundamental notions of equity and congruity with the underlying purposes of the Bankruptcy Code. For all of the enumerated reasons, therefore, the Court is convinced that the result it reaches is the proper one under the facts presented.

Accordingly, the U.S. Trustee's objection to the debtor's application is denied; the debtor's application to employ W.J. Bauman Associates, Ltd., as an accountant in its Chapter 11 case is approved.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTES:

1. The debtor seeks to employ the Accountant for the purpose of preparing tax returns and auditing its books.

2. Still other courts have identified a slightly different purpose behind § 327(a) -- that being to "[e]nsure the integrity of the bankruptcy process . . . [and maintain] public confidence in the bankruptcy system." See, e.g., In re Gilmore, 127 B.R. 406, 409-10 (Bankr. M.D. Tenn. 1991), citing with approval In re Watson, 94 B.R. 111, 117 (Bankr. S.D. Ohio 1988). The Court finds that this statutory purpose would likewise not be furthered by rigid adherence to statutory language. Allowing an accounting firm holding a minor prepetition claim to prepare the debtor's tax returns and audit its books would in no way threaten the integrity of, or public confidence in, the bankruptcy system.