United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re A.W. Thompson Company, Debtor
Bankruptcy Case No. 95-30956-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

December 5, 1997

Galen W. Pittman, Hoffman, Pittman & Associates, La Crosse, WI, Former Attorney for Debtor.
David L. Abt, Abt Law Office, S.C., Westby, WI, Current Attorney for Debtor.
Thomas P. Walz, Madison, WI for U.S. Trustee's Office.
William J. Rameker, Murphy & Desmond, S.C., Madison, WI for trustee.

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

This matter comes before the court on an application for fees by attorney Galen W. Pittman ("Pittman"). All parties have stipulated to the following facts contained in offers of proof made by counsel at a hearing held on October 7, 1997 and in the documents attached to the filings of the parties.

Pittman represented Lawrence Delhuery ("Delhuery") in a chapter 13 bankruptcy case filed in early 1995. Pittman was also retained as counsel for the debtor in this case, A.W. Thompson Company (the "Company"), which filed a chapter 11 petition on April 14, 1995. Delhuery was both an officer and shareholder of the Company and the Company was a creditor of Delhuery. Pittman did not disclose his representation of Delhuery in the Application and Affidavit by which he sought to represent the Company in this case. Pittman's employment was approved based on the Application and Affidavit.

Delhuery owed the Company an unspecified amount secured by a second mortgage on his home. Delhuery's chapter 13 plan provided that the Company waived any payment under Delhuery's plan and that

"written documentation provide[d] for payment beyond the 3 year limit of the Code." Delhuery's chapter 13 plan also provided that the Company would pay the IRS's claim against Delhuery which was in excess of $20,000 as part of the Company's chapter 11 proceedings.

The U.S. Trustee discovered in early May that Pittman was not disinterested and asked him to step down as counsel for the Company. Pittman refused to resign. Delhuery's chapter 13 case was dismissed on May 9, 1995, the same day that the U.S. Trustee filed a motion to disqualify Pittman as the Company's attorney. Pittman's appointment was revoked by order of this court on August 21, 1995.

Under § 1107(a) the debtor in possession has the rights and is subject to the limitations of a trustee. Section 327(a) requires that an attorney serving for the trustee be disinterested. Section 1107(b) makes it clear that the attorney for the debtor in possession is subject to the disinterestedness requirement of § 327(a). "Disinterested person" is defined in § 101(14) of the Code:

> "disinterested person" means person that
>
> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not an investment banker for any outstanding security of the debtor;
>
> (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
>
> (D) is not and was not, within two years before the date of the filing of the petition, a director, officer or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
>
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason[.]

Attorney Pittman admits that he was not disinterested at the time he filed this chapter 11 case and sought appointment as debtor's counsel. In addition to the requirement of disinterestedness, § 327(a) requires that the attorney "not hold or represent an interest adverse to the estate."

Section 328(c) provides that (emphasis added):

> Except as provided in section 327(c), 327(e), or 1107(b) of this title, *the court may deny allowance of compensation for services and reimbursement of expenses* of a professional person employed under section 327 or 1103 of this title *if, at any time during such professional person's employment* under section 327 or 1103 of this title, *such professional person is not a disinterested person*, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

In a situation in which a previously appointed attorney was not disinterested, Judge Clevert stated that:

> A failure to disclose any of the connections contemplated by these provisions, even if negligent or inadvertent, may be the basis for the denial or disgorgement of fees, and/or disqualification from further representation.

In re Crivello, 194 B.R. 463, 466 (Bankr. E.D. Wis. 1996), *aff'd*, 205 B.R. 399 (E.D. Wis. 1997) (citing § 328(c)). It is clear that this court has the power to deny fees and to require all fees paid to be disgorged.

The leading Seventh Circuit case dealing with the issue of compensation for an attorney who lacks the statutory attributes required for employment is In re Grabill Corp., 983 F.2d 773 (7th Cir. 1993). In In re Grabill, the law firm seeking approval of its employment was not disinterested but nevertheless sought compensation for work done prior to the finding of a lack of disinterestedness. Id. Despite decisions by other courts allowing attorneys to be compensated for work done prior to an approval of employment, the Seventh Circuit denied the request for fees. In so doing, the court stated that "[t]he scattered cases, none at the court of appeals level, that allow a lawyer to be compensated who, lacking the requisite disinterest, could not have been appointed seem to us just plain wrong." Id. at 777.

The Ninth Circuit dealt with a similar issue in In re Occidental Fin. Group, Inc., 40 F.3d 1059 (9th Cir. 1994). In In re Occidental, the attorney seeking fees also represented the owners/officers of the debtor corporation. The attorney filed an application and affidavit that failed to disclose this lack of disinterestedness. Id. at 1061. While the Ninth Circuit disagreed with the Seventh Circuit by stating that "[a] bankruptcy court may sometimes exercise discretion to make an award of attorneys fees not authorized in advance," the court did not find the "exceptional circumstances" and "satisfactory explanation" necessary for

such an award in In re Occidental. Id. at 1062. The Ninth Circuit held that the attorney's "conflict of interest was plain and substantial" and that the "undisclosed conflict of interest and failure to disclose his representation of the [owners] deprived him of any equitable claim to a retention of the fees for prepetition services." Id. at 1063.

In the instant case, Pittman knew that he represented both the Company and its principal/creditor/debtor. He failed to disclose this dual representation. Pittman has offered no real explanation for this failure to disclose, but rather appears to question the level of disclosure required by the Code and cases interpreting it.

This court is bound by the Seventh Circuit's opinion in In re Grabill, which held that fees for services rendered by an attorney who could not gain court approval were non-compensable. Pittman's employment was approved purely as a result of a false affidavit. He was not in fact qualified for the appointment and if full disclosure had been made would not have received it.

> A court which has approved an attorney's employment pursuant to §327(a), may subsequently deny compensation upon discovering the attorney represents or holds an interest adverse to the estate. Under § 328(c), conflicts which are initially concealed or undisclosed can result in a denial of the attorney's compensation. Therefore, an attorney may be precluded from recovering compensation irrespective of the court's initial approval of employment.

In re Marshall, 211 B.R. 662, 665-66 (Bankr. D. Minn. 1997).

If anything, this case presents a stronger reason to deny fees than was present in In re Grabill. A false affidavit of disinterestedness should not be rewarded. If fees are approved in such cases, there will be little incentive for attorneys to respect the requirement of filing true statements of disinterestedness.

Even under the more liberal approach of the Ninth Circuit, no "exceptional circumstances" have been shown here and no "satisfactory explanation" has been given. The failure to comply with the requirements of the Code is fatal to the fee application in this case, particularly because it seems extremely unlikely that this failure to comply with the Code was unintentional or inadvertent. See In re Crivello, 194 B.R. at 466.

Pittman's application must be denied. Any funds Pittman has previously received in connection with this case must be disgorged to the trustee. It shall be so ordered.