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(See # 385)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:

HOME CENTER CORPORATION
OF AMERICA

Debtor.

Bankruptcy Number 95B-22952

Chapter 7

MEMORANDUM DECISION AND ORDER DENYING MOTION TO APPOINT
COUNSEL RETROACTIVE TO JUNE 1, 1995

INTRODUCTION

The issue before the Court is whether the facts alleged by counsel for Home Center Corporation of America (Counsel) constitute extraordinary circumstances sufficient to warrant nunc pro tunc approval of appointment of counsel retroactive approximately six months to the date of the filing of the petition. Counsel did not timely move for appointment as counsel for Home Center Corporation of America (Debtor) because the filing of the case was an emergency, Counsel was unusually busy with other cases the week before and two weeks after the Debtor's chapter 11 petition was filed, and because of an unexpected one-day absence of much relied upon secretary/paralegal. For the reasons set forth below, this Court finds that the facts alleged are insufficient to justify nunc pro tunc approval of appointment of Counsel and denies the same.

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PROCEDURAL HISTORY

This issue is before the Court on the Debtor's Motion to Appoint Counsel seeking retroactive appointment to June 1, 1995, the date the Debtor filed its chapter 11 petition (Motion). The Motion was filed November 22, 1995, along with an Affidavit of Proposed Attorney (Affidavit) as an appendix to Counsel's first fee application. The Debtor later filed two supplemental memoranda in support of its Motion.¹ At the hearing on the Motion, the Court approved the appointment of Counsel effective November 22, 1995 and denied without prejudice nunc pro tunc approval of appointment, but permitted the Debtor to brief the issue in the light of the Tenth Circuit's ruling in *Land v. First Nat'l Bank of Alamosa (In re Land)*, 943 F.2d 1265 (10th Cir. 1991).

The Debtor filed two additional memoranda in support of its Motion and the Court again heard argument. Although the Motion was essentially unopposed,² the Court took the Motion under advisement to address concerns raised in the memoranda and on the record at the hearings.

¹ Although the Debtor filed the Motion to Appoint Counsel as well as several supporting memoranda, Counsel also filed a supporting memorandum and argued on his own behalf. To avoid confusion, for the purposes of this Memorandum Decision and Order, the Court will refer to the Debtor and Counsel interchangeably where appropriate.

² The United States trustee (US Trustee) and counsel for the newly appointed chapter 11 trustee (11 Trustee) were present at the hearing. The US Trustee supported the Debtor's Motion stating that Counsel had shown that its failure to timely seek court approval was the result of extraordinary circumstances given the demands placed on Counsel's time and the one-day absence of a much relied upon secretary/paralegal. The 11 Trustee did not oppose the Debtor's Motion believing that to do so would unnecessarily consume additional estate resources and that the services provided by Counsel were reasonably and necessarily rendered and provided a significant benefit to the estate. Counsel for American Stores Properties, Inc., a creditor in the case, supported the Debtor's Motion at the prior hearing believing that the services provided by Counsel provided a benefit to the estate.

FACTS³

Counsel was selected by the Debtor to represent it in this case because of Counsel's knowledge of the bankruptcy system. Eight members of Counsel's firm appear often before the Court. Counsel and his firm have considerable skill, breadth of experience, and knowledge of bankruptcy law, including proceedings under chapter 11.

Counsel and his firm have a standard procedure to ensure timely court approval of applications for its employment as a professional in bankruptcy proceedings. Their custom and practice is to prepare a motion to appoint counsel, an affidavit in support thereof, and a Bankruptcy Rule 2016 statement to be filed simultaneously with the bankruptcy petition. A much relied upon secretary/paralegal prepares the motion, affidavit, and statement for signature. Counsel then has the documents executed, returns them to the secretary/paralegal, and the secretary/paralegal causes them to be filed with the Bankruptcy Court. This procedure has been followed on a regular basis without difficulty for approximately sixteen years.

In this case, the standard procedure was not followed. Although the Motion, Affidavit, and Debtor's Bankruptcy Rule 2016 statement (2016 Statement) were prepared and executed simultaneously with the Debtor's petition, only the 2016 Statement was filed with the Debtor's petition on June 1, 1995. The Motion and Affidavit were instead placed in a file that was to be used for fee applications and the pleadings were not discovered until the time the first fee application was to be filed. The Motion and Affidavit were then filed with the Court almost six months after the Debtor's petition was filed on June 1, 1995.

³ The facts relied upon in this Memorandum Decision and Order are taken from the Court's file in this case, the relevant memoranda, and from representations made at the hearings on the Debtor's Motion.

Counsel explains that the Motion and Affidavit were not timely filed for three reasons. First, the Debtor's bankruptcy filing was an "emergency filing" to avoid eminent seizure of all the Debtor's inventory and equipment. One creditor had instituted state court procedures, seeking a pre-judgment writ of attachment and authorization of sale. Other creditors had instituted collection actions against the Debtor as well. To keep the Debtor's business operating, counsel filed a Motion for Authority to Use Cash Collateral on June 2, 1995, and a hearing was held on an expedited basis on June 5, 1995. The resolution of these matters required more time and effort than usual because the Debtor's operations manager had recently quit, leaving the Debtor's books and records in disarray. Second, Counsel was unusually busy with other cases during the last week of May and the first part of June. At that time, Counsel, who only infrequently practices domestic law, represented a confirmed chapter 11 debtor in a divorce proceeding that involved a complex property division. The matter was time consuming and emotionally draining. During the week of June 5, 1995, Counsel attended many meetings (including a meeting with another bankruptcy judge in this district regarding a chapter 11 case), five to six hearings (including two cash collateral hearings), and other matters. Third, Counsel's much relied upon secretary/paralegal was unexpectedly out of the office on June 5, 1995.

While the Court recognizes that this case was an emergency filing, a review of the file indicates that it was not unusual either in its size or in its complexity. This case does not involve an unusual number of creditors or an unusually large amount of debt. The facts of this case do not raise novel issues. Although it is unfortunate that the Debtor was aggressively pursued by its creditors and

that the Debtor's operations manager left the Debtor's books and records in disarray, it is not unusual to have such events precipitate a bankruptcy filing.

It is undisputed that Counsel was busy. However, Counsel was not prevented from timely *filing* the Motion and Affidavit, especially given that the Motion and Affidavit were timely *prepared and executed*. No assertion is made that because of his schedule, Counsel was not physically able to file the pleadings with the clerk's office, and the Court notes it is customary that such documents are filed by a runner. Beyond Counsel's own experience and abilities, Counsel also had access to significant resources through his firm.

The facts instead indicate the pleadings were merely slipped into a file, and that Counsel's busy schedule prevented discovering the documents in a timely fashion. That Counsel was busy and that a secretary/paralegal was unexpectedly absent for one day, four days after the Debtor's petition was filed thus creating a disruption in the law firm's ordinary routine, does not represent more than neglect in failing to following the firm's standard procedures.

DISCUSSION

I.

The Debtor's Motion to appoint counsel nunc pro tunc presents a core issue and the Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b) and 1334(b) (1995). This Court has both the authority and the obligation to review fee applications sua sponte in the absence of any objection. *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3rd Cir. 1994) ("Beyond possessing the power, we think the bankruptcy court has a duty to review fee applications, notwithstanding the absence of objections by the United States trustee ('UST'), creditors, or any other interested party.");

In re Jensen-Farley Pictures, Inc., 47 B.R. 557, 585 (Bankr. D. Utah 1985) ("The Court has a duty, regardless of whether objections are filed, to determine the reasonableness of all fee requests."). See also 11 U.S.C. § 105(a) (1995).⁴

To receive compensation from the bankruptcy estate under Section 330, a professional's employment must first be approved by the Bankruptcy Court. See *Land*, 943 F.2d at 1266. Approval is obtained through application of the trustee in accordance with Section 327 of the Bankruptcy Code and Bankruptcy Rule 2014(a). Section 327 and Bankruptcy Rule 2014(a) apply to the Debtor as a debtor in possession pursuant to Sections 1101(1) and 1107(a).

II.

As a companion to its Motion, the Debtor seeks compensation for services provided by Counsel prior to the time court approval of Counsel's employment was sought. The Bankruptcy Code does not grant the Court authority to award compensation in this circumstance. The Court can only award compensation for services rendered prior to the filing of Debtor's Motion if nunc pro tunc approval is warranted.⁵

In the Tenth Circuit, "nunc pro tunc approval [of employment] is only appropriate in the most extraordinary circumstances." *Land*, 943 F.2d at 1267-68. Simple neglect is insufficient to justify nunc pro tunc approval. *Id.* at 1268. Although *Land* does not discuss what circumstances rise to the level of "most extraordinary" or what actions constitute "simple neglect," it cites *In re*

⁴ Future references will be to Title 11 of the United States Code unless otherwise noted.

⁵ Courts are divided on the issue of whether a bankruptcy court possesses the authority to approve nunc pro tunc an application for employment. See *Land v. First Nat'l Bank of Alamosa (In re Land)*, 943 F.2d 1265, 1268 n.2 (10th Cir. 1991). Although the Tenth Circuit has not ruled on this issue, the Court will assume it has the authority for the purposes of this Memorandum Decision and Order.

Arkansas Co., Inc., 798 F.2d 645 (3rd Cir. 1986) in support of its holding. *Land*, 943 F.2d at 1267-68. The Court finds the analysis of the *Arkansas* decision persuasive and dispositive of the issues raised by the Debtor's Motion.

The facts of *Arkansas* are similar to the facts before this Court. In *Arkansas* the unsecured creditors committee (Committee) in a chapter 11 case recommended the employment of Benenson & Scher (Scher) as counsel for the Committee. *Arkansas*, 798 F.2d at 645. After the Committee's recommendation, Scher performed services for the Committee for thirteen months before filing an application for court approval of its employment. Upon discovering that it had failed to file an application, Scher promptly moved the court to approve its employment retroactively to the date of the Committee's recommendation, attributing its failure to timely file an application to oversight and inadvertence.

The court in *Arkansas* denied Scher's nunc pro tunc application holding that a bankruptcy court should only grant retroactive approval of appointment of a professional under extraordinary circumstances which do not include "the mere neglect of the professional who was in a position to file a timely application." *Id.* at 650. The court also agreed "with the approach of those courts that limit the grant of retroactive approval to cases where prior approval would have been appropriate and the delay in seeking approval was due to *hardship beyond the professional's control.*" *Id.* at 650 (emphasis added).

Counsel has not alleged sufficient facts to support a finding that the six month delay in seeking court approval was due to hardship beyond Counsel's control. Counsel prepared and had the Motion and Affidavit executed on June 1, 1995, the day the Debtor filed its petition and 2016

Statement, but did not file them until almost six months later on November 22, 1995. Counsel's explanation that the Debtor's filing was an "emergency filing," that Counsel was unusually busy with other cases for approximately three weeks, and the unexpected absence of a secretary/paralegal does not distinguish the present situation from other cases before the Court. Moreover, Counsel has presented no fact to explain why the Motion and Affidavit were not filed at the end of June 1995, presumably when things returned to "normal." Since the Motion and Affidavit were timely prepared and the 2016 Statement was filed with the Debtor's petition on June 1, 1995, this Court cannot find that the failure to timely *file* the Motion and Affidavit was due to anything other than mere oversight and was within Counsel's control.

III.

The Debtor relies on two cases cited in *Arkansas* to support its position that the facts presently before the Court constitute extraordinary circumstances. The Court finds these cases distinguishable from the present situation.

In *In re Bible Deliverance Evangelistic Church*, 39 B.R. 768 (Bankr. E.D. Penn. 1984), the court approved the employment of counsel for the creditors' committee nunc pro tunc fifteen days prior to the date the court authorized the professional's employment. *Id.* at 772. The court granted nunc pro tunc approval because counsel could not "await the outcome of its application for employment"⁶ and because "counsel acted with reasonable promptness in filing its application for

⁶ The debtor's chief operating officer was suspected of concealing assets and information, and was scheduled for an examination fifteen days from the date counsel was approached for retention. *In re Bible Deliverance Evangelistic Church*, 39 B.R. 768, 772 (Bankr. E.D. Penn. 1984).

employment."⁷ *Id.* In this case, the Debtor did not seek court approval of Counsel's employment until almost six months after Counsel was retained. No one has alleged that the Debtor or Counsel were in a constant state of emergency during that period of time.

In *In re Freehold Music Ctr., Inc.*, 49 B.R. 293 (Bankr. D.N.J. 1985), the court approved the employment of accountants for the debtor nunc pro tunc approximately five months. *Id.* at 293-94. The court granted nunc pro tunc approval because the accountants performed work essential to the continuation of the debtor's business and because the accountants relied on representations made by counsel for the debtor that "authorization for their work had been obtained or had been properly arranged." *Id.* at 294. The court in *Freehold* concluded that the accountant's failure to timely receive court approval for their employment "was occasioned not by their own actions, but rather by the action of another whose failure was beyond their own control. At each stage, the accountants conducted themselves appropriately." *Id.* at 296. In the instant case, no one has alleged that the Debtor's failure to timely file the Motion and Affidavit resulted from the misrepresentation of a third party and reasonable reliance by Counsel thereon.

Additionally, the Debtor asks the Court to approve Counsel's employment nunc pro tunc because the Court is familiar with the integrity, experience, and competency of Counsel's firm who frequently appear before the Court. The Debtor argues that the purpose behind requiring prior approval of employment is to ensure that the Court knows the type of person engaged in proceedings before the Court. Although the Court is familiar with and has substantial regard for the professionalism and competency of Counsel's firm, this alone is insufficient to warrant nunc pro tunc

⁷ The *In re Bible Deliverance Evangelistic Church* decision does not state when the professional filed its application with the court. *Id.*

approval of Counsel. To do so would render Sections 327 and 330 meaningless and encourage the type of favoritism and perceived "clubiness" of the bankruptcy bar that the Bankruptcy Code has been amended to eliminate.⁸

Further, the Debtor asks the Court to ignore Tenth Circuit precedent and to adopt the Ninth Circuit's "exceptional circumstances" requirement for nunc pro tunc approval of employment as set forth in *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970 (9th Cir. 1995). In the Ninth Circuit, "[t]o establish the presence of exceptional circumstances, professionals seeking retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankruptcy estate in a significant manner." *Id.* at 974. Even if this Court had the ability to ignore the *Land* decision to adopt the holding in *Atkin*, the Debtor's Motion would still be denied.

The Debtor has not satisfactorily explained its failure to receive judicial approval before Counsel provided services for which it now seeks compensation. The *Atkin* court approved the employment of accountants for the debtors nunc pro tunc three months *inter alia* because the accountants performed work on a continuing emergency basis and because the debtors led the accountants to believe that the requisite court approval would be secured. *Id.* at 976.⁹ No evidence

⁸ In *Arkansas* the court expressly rejected "the notion that a complete and thorough post-application review may substitute for prior approval in most cases" because such an approach "would render meaningless the structure of the Bankruptcy Code and Rules which contain provisions requiring both prior approval of employment and after the fact approval of compensation." *In re Arkansas Co., Inc.*, 798 F.2d 645, 649 (3rd Cir. 1986). The *Arkansas* court found that "[p]rior approval and court appointment . . . are just some of the procedural safeguards imposed by Congress during its overhaul of the bankruptcy procedure" to "eliminate the abuses and detrimental practices that had been found to prevail," including "the cronyism of the 'bankruptcy ring' and attorney control of bankruptcy cases." *Id.* at 649.

⁹ This decision was upheld on appeal to the Bankruptcy Appellate Panel for the Ninth Circuit and by the Ninth Circuit Court of Appeals. *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 971 (9th Cir. 1995). In
(continued...)

has been presented to the Court either that the work performed by Counsel was on a continuing emergency basis or that the Debtor led Counsel to believe that the Debtor would secure the requisite court approval.

Finally, Counsel brings to the Court's attention a copy of a transcript of an oral ruling made by another bankruptcy judge in this district. The Court is unable to determine from the transcript provided, the context of the case, the underlying facts and circumstances of the ruling, including the length of the delay between the services rendered and the professional's application for court approval, or whether the failure to timely seek court approval was the result of an emergency or extraordinary circumstances. Therefore, the oral ruling has no particular applicability to nor compelling weight in this case.

CONCLUSION

The Court concludes that Counsel has failed to prove extraordinary circumstances sufficient to allow nunc pro tunc approval of Counsel retroactive to June 1, 1995. Accordingly, it is hereby

⁹(...continued)
affirming the bankruptcy court's finding of a "satisfactory explanation," the Ninth Circuit relied on the bankruptcy court's findings that the accountants' services "were performed on an intensive basis during a three-month period . . . and [the bankruptcy court] was careful to distinguish, and to disallow payment for, services which it determined were not performed on an emergency basis," and that the accountants "reasonably relied upon the debtors' repeated representations that they would secure the court's approval." *Id.* at 976-77.

ORDERED, that the Debtor's Motion to Appoint Counsel seeking retroactive appointment to June 1, 1995, is denied.

DATED this 28 day of March, 1996.



JUDITH A. BOULDEN
United States Bankruptcy Judge