UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re	:	Chapter 7
Anthony C. Stylianou,	:	Case No. 01-16121 (AJG)
Debtor.	:	

OPINION GRANTING THE MOTION FOR ORDER AUTHORIZING RETENTION OF JO ANNE SIMON, ESQ.

Before the Court is the motion (the "Motion") of the Trustee ("Trustee") for an order authorizing the retention of Jo Anne Simon ("Simon") as attorney for the Trustee *nunc pro tunc* to May 6, 2005.

I. Background

On December 7, 2001, Anthony Stylianou ("Debtor") filed a petition (the "Petition") under Chapter 7 of the Bankruptcy Code. Following the Section 341(a) meeting on January 11, 2002, the Trustee filed a report of no distribution. On January 31, 2002, the Debtor filed an amended petition listing his lawsuit (the "Lawsuit")[1] against the New York City Board of Education (now known as the Department of Education), which he had omitted from his petition's schedule of personal property. On March 25, 2002, an order of discharge was entered and the case was closed.

On March 30, 2004, the Trustee filed a motion to reopen the Debtor's bankruptcy case pursuant to section 350(b) because the Debtor had omitted the Lawsuit from his schedules. Prior

[1] The lawsuit was for Workman's Compensation, In the Line of Duty injury (ILOD) and related damages.

to filing the motion, the Trustee had contacted the Debtor's counsel[2] in the Lawsuit and was informed that the case could be of considerable value to the Debtor's estate. On May 5, 2004, the Court entered an order reopening the Debtor's bankruptcy case.

On April 7, 2005, the Trustee filed an application (the "Levy Davis Retention Application") for an order authorizing retention of Levy Davis & Mahler ("Levy Davis"). The Trustee stated that Levy Davis would be retained under a contingent fee for the purpose of handling the Lawsuit,[3] Simon's office would continue as co-counsel, and he would seek an order authorizing Simon's retention. The Trustee reported that Levy Davis agreed: (1) to file a motion in the court in which the Lawsuit was pending to substitute the Trustee as the successor in interest, (2) to report to the Trustee every January 31, May 31, and November 30, to the Trustee's satisfaction by letter regarding the status of the Lawsuit, (3) that settlement of the Lawsuit was subject to the Trustee's written consent and further approval by the Court, and (4) that upon settlement of the claims being litigated, Levy Davis would turn over the gross proceeds to the Trustee.

On January 16, 2008, the Trustee filed an application (the "Application") seeking court approval of the settlement agreement (the "Settlement") between the Trustee, as the successor-in-interest to the Debtor, and the New York City Board of Education. The Trustee stated in the Application that the Settlement was fair and reasonable and should be accepted. On March 12, 2008, after initially expressing concern over fees for special counsel, the United States Trustee

[2] Simon had been the Debtor's counsel in various non-bankruptcy matters, including the Lawsuit, since 1996.
[3] The order authorizing the retention of Levy Davis as the special counsel to the Trustee (the "Levy Davis Retention Order") ordered that the Trustee was authorized to retain Levy Davis to handle and conclude the Lawsuit and to be compensated under an hourly retainer agreement upon the filing of a proper application, and approval thereof by the Court. The discrepancy between the contingent fee basis of compensation represented by the Trustee in the Levy Davis Retention Application and the hourly fee basis of compensation ordered by the Court in the Levy Davis Retention Order was one of the main sources of controversy resolved by this Court in a prior opinion. *In re Stylianou*, Case No. 01-16121 (AJG), Chapter 7, (August 21, 2009).

(the "UST") agreed that the Settlement was "good, fair, and reasonable" and that regardless of what attorneys fees were granted, the Settlement proceeds would be sufficient to pay the creditors' claims plus interest and return some money to the Debtor. The Court then approved the Settlement but adjourned the portion of the Application related to attorney's fees. On March 20, 2008, the Debtor filed an affidavit opposing the Trustee's application for payment of attorney's fees.[4]

In a reply brief, Levy Davis associate, Jonathan Bernstein ("Bernstein"), shed some light on the proceedings before the district court and the Settlement negotiations leading up to the execution of the agreement. On September 13, 2001, approximately two months prior to filing the Petition, the Debtor filed the Lawsuit in the U.S. District Court for the Eastern District of New York (the "District Court"). On January 25, 2002 the Debtor amended his complaint to add his registered domestic partner, Linda Tieber ("Tieber"), as a co-plaintiff to the Lawsuit. During this time, both the Debtor and Tieber continued to retain Simon as their counsel.

On January 16, 2007, the District Court dismissed on summary judgment most of the Debtor's claims.[5] On April 29, 2007, the Debtor submitted a letter to the District Court requesting a review of the Settlement. In his letter, the Debtor stated that he sought to "buy his way out of bankruptcy by paying the Court $30,000" so he could regain control of the Lawsuit and take the remaining claims to trial.

[4] The Debtor raised two objections at that time: (1) attorney's fees for special counsel should be calculated on a contingent fee basis, and (2) prior payments to Simon by the Debtor or another on his behalf should be credited against the contingent fee amount.

[5] At this point, the Debtor was left with (1) the claim that denial of his first application ILOD benefits was retaliatory and (2) the COBRA claim.

Bernstein submitted a letter to the District Court in which he stated that the Settlement offer was for $140,000 and the Trustee considered it to be fair.[6] Bernstein also acknowledged that after speaking with the Trustee, he advised the Debtor that it would cost $30,000 for the Debtor to buy his way out of bankruptcy. However, Bernstein did state that the Debtor disagreed with the litigation strategy. In a corresponding letter, Simon provided a report of the negotiations on Tieber's behalf. In her report, Simon stated that, (1) she had refrained from billing Tieber separately, and (2) she agreed the Settlement was fair and reasonable. The Debtor was copied on both letters.

The District Court granted the Debtor's request for a 30-day stay on June 18, 2007 and an additional 45-day stay on September 5, 2007. On November 20, 2007, the settlement stay was lifted and the Trustee was allowed to finalize the Settlement subject to approval by this Court. The Debtor objected to the attorney's fees and an evidentiary hearing was held on this issue on June 24, 2009 ("June 2009 Hearing"). In August 2009, this Court approved the Settlement in all respects, including the reasonableness of the attorney's fees.

In an opinion entered on August 21, 2009 (the "Opinion"), this Court found, among other things, that the Trustee must apply for Simon's retention pursuant to Section 327 before it would consider any payment to Simon as the Trustee's counsel. While noting that Simon played an important role in the Lawsuit, the Court divided her work, for purposes of considering her compensation, on the case into three distinct time periods: (1) Debtor's pre-petition period, (2) Debtor's post-petition period prior to the Trustee taking over the Lawsuit, and (3) Debtor's post-petition period after the Trustee takeover. It was undisputed that Simon represented the Debtor

[6] The proceeds were to be distributed: (1) $30,000 to the creditors, (2) $79,200 for attorney's fees, (3) $6,656 would be designated disbursements, and (4) the remainder $24,144 would be distributed to the Debtor.

during the first two periods. However, the nature of Simon's representation of the Debtor during the third period was less clear.

Compounding the failure to seek an order from the Court authorizing her retention, Simon sent a letter to the Debtor in June 2004 ("June 2004 Simon Letter") at the behest of the Trustee, informing the Debtor that he still owed her $37,048. Simon indicated that the Debtor would pay litigation expenses when incurred but that if the plaintiffs won, Simon would apply for attorney's fees from the defendants. The Court noted in the Opinion that there were further statements in that letter which may have caused the Debtor confusion as to Simon's role in the Lawsuit. The Debtor asserted in July 2008 that he did not buy his way out of bankruptcy, despite having the opportunities to have done so, because Simon advised him against it.[7]

At the June 2009 Hearing, the Court questioned Simon about her retention and noted that she had received an affidavit (the "Proposed Simon Retention Affidavit") from the Trustee's office. Simon explained that the Trustee's counsel, Ron Goldstein ("Goldstein") called her to retain her to work on the Lawsuit on a contingent fee basis. Simon went "back and forth a bit" with Goldstein because she thought that a contingent fee agreement was of "a great deal less benefit to the Debtor." The Proposed Simon Retention Affidavit was never submitted to the Court, nor did the Trustee apply for her retention until directed to do so by this Court as set forth in the Opinion.

[7] Simon denies this allegation. In an affidavit filed on April 2, 2008, Simon stated that "at no time did I urge [the Debtor] not to buy himself out of bankruptcy. When the issue of the Trustee's reopening the bankruptcy case arose, I advised [Debtor] consistent with the law. I did so several times over the course of the litigation… It is my belief that [Debtor] has had adequate opportunities to buy his way out of bankruptcy, and has fully understood the circumstances and consequences of his action, but is lacking either in intent or resources." The Court agrees with Simon's assessment of the Debtor's purported desire to buy himself out of bankruptcy.

Upon further questioning, Simon explained that she had understood her role as an "of counsel" to Bernstein. As a result, she did not believe that she needed a separate retainer. The Court noted that she only worked with Levy Davis on this one case and that she did not have any legally recognizable relationship with the firm. Thus, the Court rejected the argument that Simon was "of counsel" to Bernstein, and found that the Trustee must apply to the Court for Simon's retention.

Subsequently, on October 19, 2009, the Trustee filed the Motion requesting for Simon's retainer *nunc pro tunc*, noting, *inter alia*, that the Settlement and the fees are fair and that it is extremely unlikely that the Debtor was in any way confused as to who represented him. A hearing (the "Hearing") with respect to the Motion was adjourned twice at the Debtor's request and was held on February 3, 2010. No timely objections were filed to the Motion. However, at the Hearing, the Debtor sought to oppose the Motion. The Court found that the Debtor failed to establish why his untimely objection should be heard. Further, the record of the proceedings regarding the settlement approval process was before the Court, which already contained the various arguments raised by the Debtor that he sought to argue again at the Hearing. In rendering this opinion with respect to the Motion, the Court has considered the various issues raised by the Debtor regarding the Settlement and the payment of fees to Simon.

II. Discussion

Generally, the Second Circuit disfavors *nunc pro tunc* appointments of counsel. *In re Hutter*, 215 B.R. 308, 315 (Bankr. D. Conn. 1997), *aff'd, Hutter v. Coan*, 40 Fed. Appx. 640 (2nd Cir. 2002). However, this Circuit recognizes that retroactive approval for employment under 11 U.S.C §327 may be granted if the court finds that (1) the court would have granted the

application if made in a timely manner, and (2) the delay in retention was due to either "excusable neglect" or "unavoidable hardship." *See In re Hutter*, 215 B.R. at 315; *See also In re 245 Assocs*., 188 B.R. 743, 750-51 (Bankr. S.D.N.Y. 1995).

A. Employability of Jo Anne Simon under §327(a)

The first prong of the test inquires into whether the Court would have granted Simon's retention application if it had been made in a timely manner. Section 327 states, in relevant part, "[T]he trustee, with the Court's approval, may employ one or more attorneys… that do not hold or represent an interest adverse to the estate, and that are disinterested persons." 11 U.S.C. §327(a). Section 101 of the Bankruptcy Code defines "disinterested person" to mean a person that, "does not have an interest materially adverse to the interest of the estate… for any… reason." 11 U.S.C. §101(14). "Interest adverse to the estate" has been held to mean "(1) any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant, or (2) a predisposition under circumstances that render such a bias against the estate." *In re Hutter*, 215 B.R. at 313; *In re Arochem Corp.,* 181 B.R. 693, 699 (Bankr. D. Conn. 1995). Any disqualifying conflict of interest must be either "actual or reasonably probable" and not "merely theoretical, and its occurrence… merely speculative." *In re Hutter*, 215 B.R. at 313 (citing *Arochem*, 181 B.R. at 700).

For example, in *Arochem*, the court approved the trustee's retention of a law firm that was simultaneously representing another client who was both a creditor of the estate and a shareholder and former director of the debtor. *Arochem*, 181 B.R. at 697. The court held that the fact that the law firm was representing these two clients was not enough to prove that a

conflict of interest existed. Rather the court found insufficient evidence that there was an "inherent rivalry" between the estate and the creditor that would create an actual or reasonably probable conflict of interest. *Id.* at 701.

In this case, since Simon was to be paid from the settlement proceeds, she undoubtedly had an interest in a settlement being reached because in the event that the Debtor buys his way out of bankruptcy and fails to prevail at trial, Simon would receive no compensation. However, there is no evidence that retaining Simon posed any unique risk of conflict that is not inherent in all cases where attorneys are to be paid, at least as one source of compensation, from settlement proceeds. The relevant inquiry is whether the professional has a "meaningful incentive" to act contrary to the best interests of the estate, meaning an incentive "sufficient to place the parties at more than acceptable risk." *In re Stamford Color Photo*, 98 B.R. 135, 138 (Bankr. D. Conn. 1989). Here, there is no evidence that Simon had an incentive to act contrary to the best interest of the estate that would place the parties at more than acceptable risk.

Further, the Debtor argues that Simon was not disinterested because her prior work for him, as well as her continued communication with him after she was retained by the Trustee, confused the Debtor as to her role in the Lawsuit. This argument is not without some merit. The Court found that in the June 2004 Simon Letter, there were statements that may have caused the Debtor confusion as to who was representing him. However, despite the confusing nature of this Letter, there is no evidence that the Debtor actually relied on the advice he received from Simon after she began working for the Trustee. The Debtor claims that the reason he did not buy his way out of bankruptcy was because Simon advised him against it. Even if Simon was advising him in this manner, the Debtor was clearly not swayed by her advice as he continued in attempting to buy his way out of bankruptcy until the Settlement was finalized. In fact, on two

separate occasions he asked and received a stay of the Settlement finalization while he attempted to buy himself out of bankruptcy.[8] Further, even if he did rely on Simon's advice, he was not adversely affected as this Court has found that the Settlement was both fair and reasonable. The Debtor has also never demonstrated to any court involved in this matter that he has the ability to raise the funds necessary to buy his way out of the bankruptcy.

B. Nunc pro tunc Employment

The second prong of the test inquires into whether the delay in seeking court approval resulted from excusable neglect. Applicable case law permits courts "latitude to grant relief where the failure to file a timely application has been explained, and the explanation has been found reasonable." *In re Hutter*, 215 B.R. at 315; *See also In re Piecuil*, 145 B.R. 777, 783 (Bankr. W.D.N.Y. 1992). The determination as to whether the *nunc pro tunc* appointment is appropriate is in essence an equitable one, taking into account all relevant circumstances surrounding the party's omission. Factors the Court must consider include: "[1] the danger of prejudice to the debtor, [2] the length of the delay, including whether it was within the reasonable control of the movant, and [3] whether the movant acted in good faith." *In re Hutter*, 215 B.R. at 315 (citing *In re Inter Urban Broadcasting*, 174 B.R. 441, 448 (E.D. La. 1994)).

In *In re 245 Associates*, the court noted that the Second Circuit had adopted the "excusable neglect" standard instead of the "extraordinary circumstances" test when considering *nunc pro tunc* retention applications.[9] *In re 245 Assocs*. 188 B.R. 743, 752 (Bankr. S.D.N.Y.

[8] It appears that the Debtor's inability to buy himself out of bankruptcy resulted from his inability to raise the $30,000 to do so.

[9] The court reaches the same conclusion in applying the "extraordinary circumstances" standard to the facts of this case. In *In re Keren*, the applicant real estate firm claimed that its failure to apply for retention was the result of extraordinary circumstances because the debtor had continually assured the firm that it would be paid. *In re Keren Ltd. Pshp.*, 225 B.R. 303, 307 (S.D.N.Y 1998), *aff'd, Cushman & Wakefield, Inc. v. Keren Ltd. Pshp.* 189 F.3d 86,

1995). The court then adopted the standard of "excusable neglect" used by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, which is defined as "inadvertence, mistake, or carelessness." *Pioneer Inv. Servs. Co. v. Brunswick Assocs*., 507 U.S. 380, 388 (1993). In granting the trustee's *nunc pro tunc* application in *In re Rainbow Press of Fredonia*, the bankruptcy court held that it would "accord some reasonable latitude for an unintentional oversight having no other adverse impact upon the estate."[10] *In re Rainbow Press*, 197 B.R. 428, 431 (Bankr. W.D.N.Y. 1996).

In light of the totality of the circumstances in this case, the Court finds that the failure to retain Simon meets the standard of "excusable neglect." First, there is no reason to believe that Simon was not acting in good faith. Second, Simon reasonably relied on the Trustee's determination that Simon was an "of counsel" and a separate retainer application was unnecessary. Her reliance on the Trustee was justified given the Trustee's management role over the administration of the Debtor's case and his extensive experience as a bankruptcy trustee. As Simon justifiably relied, it would be inequitable to hold her accountable for the Trustee's mistake regarding her retention application. Moreover, paying just compensation to Simon will not prejudice innocent third parties since the Court has already found that the Settlement was fair, reasonable, and provides equitable treatment to all parties involved. Significantly, much of the

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87-88 (2d Cir. 1999). The court held that the applicant real estate firm was a sophisticated party and should have been aware of bankruptcy payment priorities and procedures despite any assurances from the debtor. *Keren*, 225 B.R. at 306. Unlike the applicant in *Keren*, Simon did not rely on any assurance from the Debtor. Rather, she reasonably relied on the advice of the Trustee, an expert in bankruptcy law. Further, the facts of this case are also distinguishable from the facts of *In re Coney Island Land Company* where a court held that no extraordinary circumstances existed where a petitioner offered no explanation other than "inadvertence." *In re Coney Island Land Company, LLC*, 2006 U.S. Dist. LEXIS 73299 (E.D.N.Y 2006). Here, Simon offers an explanation other than mere inadvertence. Simon reasonably relied on the Trustee's judgment that she did not need to have her retention authorized.

[10] The court noted that the trustee had represented himself in numerous other cases and nothing in the record suggested a pattern of negligence in his conduct. *In re Rainbow Press*, 197 B.R. at 430. It also found significant that the need for legal services arose six years after his selection as trustee. *Id.* at 431. Since trustees typically complete the appointment of attorneys during the early stages of the case, the delayed development likely caused the trustee's oversight. *Id.*

delays in this case were caused by the Debtor. Some of those delays were justified by the Debtor's health condition while others were not. Although the Trustee fully fulfilled his fiduciary obligations to the estate regarding substantive issues presented, certain retention issues that have had to be addressed by the Court in many respects resulted from errors made by the Trustee with respect to the manner in which he proceeded in this case regarding the retention of Special Counsel. Had usual protocol been followed by the Trustee these retention issues would have been addressed early on resulting in a far less complex and disjointed retention process.

III. Conclusion

In sum, the Court finds that (1) it would have granted Simon's retention application if made in a timely manner, and (2) Simon's delay in being retained was due to "excusable neglect." Hence, the Court finds that the standards for *nunc pro tunc* retention have been established.

Therefore, the Motion is GRANTED.

The trustee is to settle an order consistent with this opinion.

September 15, 2010

s/Arthur J. Gonzalez
ARTHUR J. GONZALEZ
CHIEF UNITED STATES BANKRUPTCY JUDGE