UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HAROLD R. SHERRELL
PATRICIA A. SHERRELL — CASE NO. 89-00255
d/b/a Apple Tree
A-Cat-A-Me Child Care
Center,

Debtors

APPEARANCES:

HAROLD R. SHERRELL
Pro Se
55 Bayberry Circle
Liverpool, New York 13090

BODOW LAW FIRM, P.C. — WAYNE BODOW, ESQ.
Attorney for Defendant — Of Counsel
1925 Park Avenue
Syracuse, New York 13208

MARY LEONARD, ESQ.
Trustee
12 Groton Ave.
P.O. Box 787
Cortland, New York 13045

MARTIN, MARTIN & WOODARD, P.C. — DAVID CAPRIOTTI, ESQ.
Attorneys for Citibank — Of Counsel
One Lincoln Center
Syracuse, New York 13202

RALPH A. MINGOLELLI, ESQ.
715 Empire Building
472 South Salina Street
Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein two contested matters filed herein by Harold R. & Patricia A. Sherrell ("Debtors"), seeking to recover fees paid by them to two different attorneys in the course

of this bankruptcy case.

The first contested matter was filed by the Debtors on November 29, 1994 and sought the return of $5,575 allegedly paid to Ralph A. Mingolelli, Esq. ("Mingolelli") on or about January 26, 1993. The second contested matter was filed on December 9, 1994 and sought the return of $1,000 allegedly paid to Wayne R. Bodow, Esq. ("Bodow") on or about August 4, 1993.

The contested matter involving the Mingolelli fee appeared on this Court's calendar at Syracuse, New York on December 4, 1994 and was granted by default. However, upon the Court's subsequent determination that the motion was not timely served, it vacated its oral order and returned the matter to its January 3, 1995 motion calendar at Syracuse, New York and heard oral argument. On that same date, the Court also heard oral argument on the contested matter involving Bodow. The Court reserved on both contested matters.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of these contested matters pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (b)(2)(A).

FACTS

The Debtors filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code") on

February 15, 1989. On June 18, 1993 the case was converted to a case pursuant to Chapter 7.[1] Debtors, during the course of their extended case before this Court, have generally operated a day care center or centers in the suburban Syracuse, New York area.

Almost from the onset of the initial Chapter 11 case, Fleet Bank of New York (formerly known as Norstar Bank)("Fleet") sought to vacate the stay imposed by Code §362(a) and foreclose its mortgages on both the Debtors' residence and their day care center. Conversely, Debtors have continually asserted that Fleet's mortgages were tainted by incorrect calculations of adjustable interest rates and misapplication of Debtors' payments by Fleet's attorneys handling the foreclosure of the mortgage on their residence.

Debtors have also been represented by at least four different attorneys and/or law firms since February 1989. Mingolelli entered the picture on or about January 26, 1993, at which point Fleet was about to sell Debtor's residence at a foreclosure sale conducted pursuant to a state court foreclosure action. Mingolelli does not dispute that he requested and received from the Debtors a fee of $5,000 on or about the same date. Mingolelli also acknowledges subsequently receiving a fee of $540 in connection with his representation of the Debtors in two "State Supreme Court cases". See Objection to Debtors' Motion for Return of Attorneys Fees dated December 30, 1994, page 2.

The docket of this case does not contain any order by

[1] The case was originally converted from Chapter 11 to Chapter 7 by Order dated March 6, 1991, then reconverted to Chapter 11 by Order dated August l3, 1991.

this Court appointing Mingolelli as Debtors' attorney pursuant to Code §327. In fact, Mingolelli admits that he attempted unsuccessfully on two occasions to obtain an order of appointment. (See Objection to Debtors Motion for Return of Attorneys Fees, dated December 30, 1994, page 7)

During the course of his representation of Debtors, Mingolelli commenced an adversary proceeding on or about March 1, 1993 against Fleet alleging that the foreclosure of Debtors' residence was a fraudulent transfer and that it was conducted in violation of an order of this Court. It was during the course of the adversary proceeding that Debtors' Chapter 11 case was converted to a Chapter 7 case. Additionally, while the proceeding was pending, the purchaser of Debtors' residence at the foreclosure sale rescinded its bid and the sale was set aside. Thereafter, Fleet's attorneys sought a voluntary discontinuance of the adversary proceeding. However, by Order of this Court dated December 23, 1993, Mingolelli was discharged as Debtors' attorney and Debtors, acting thereafter pro se, refused to execute the proposed stipulation of discontinuance.

With regard to the contested matter involving Bodow, it appears that on or about July 26, 1993, subsequent to conversion of their case from Chapter 11 to Chapter 7, Debtors consulted Bodow in an effort to convert their case to Chapter 13. At that time they paid Bodow $500. See Exhibit B attached to Debtors' motion papers dated December 8, 1994. On July 28, 1993, Bodow obtained an Order from this Court directing Debtors' creditors and the Chapter 7 trustee to show cause why Debtors should not, inter alia, be

permitted to convert their Chapter 7 case to one pursuant to Chapter 13. The Order to Show Cause was opposed by the United States Trustee, the Chapter 7 Trustee, the Internal Revenue Service and the U.S. Small Business Administration. Debtors' motion was denied by an Order dated August 11, 1993. On August 4, 1993, Debtors paid Bodow an additional $1,000 for "legal services on account". Id. Exhibit B.

ARGUMENTS

With regard to Mingolelli, Debtors, now proceeding pro se, allege that he either lacked the skill necessary to prosecute the adversary proceeding against Fleet or the intention to do so aggressively. Debtors appear to allege in other papers and orally that Mingolelli omitted from the adversary proceeding complaint certain causes of action against Fleet and its attorneys relative to the alleged misapplication of mortgage payments by the attorneys and collection of excessive interest by Fleet.

Mingolelli argues that he entered the Chapter 11 case in January 1993 at the Debtors' pleading that they were without counsel and that they had been refused representation by several other attorneys. He acknowledges that he had never previously represented a Chapter 11 debtor, though he had some familiarity with Chapter 11's and he had handled several Chapter 7 cases. He also points out to the Court that he sought appointment as Debtors'

counsel on two occasions, but was rejected on both occasions.[2]

Mingolelli points out that he also commenced two actions in New York State Supreme Court seeking to stay the Fleet foreclosure and to restrain New York State from closing down two day care centers being operated by the Debtors; both actions were admittedly unsuccessful. Mingolelli also contends that he advised the Debtors that he would not commence any malpractice action against Fleet's attorneys.

Mingolelli has now attached contemporaneous time records to his Objection which reflect 37.2 hours of "in Court" time and 118.5 hours of "out of Court" time devoted to Debtors' case. He asserts that Debtors owe him an additional $3,000 in connection with the two State Court actions on a quantum merit theory.

Turning to Bodow, the Debtors contend that they paid him $500 to file a motion to convert their case from Chapter 7 to Chapter 13 and that while the motion was denied, they do not seek return of that fee. What they do want returned was the additional $1,000 which Bodow charged them. Debtors argue that the $1,000 was intended to be only a "deposit" for services to be rendered by Bodow, apparently in connection with the Debtors continuing Chapter 7 case. Debtors allege that Bodow's partner, Edward Fintel, Esq., agreed that the $1,000 deposit was refundable and they made only three brief visits to Bodow's office after the $1,000 "deposit" was paid.

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[2] Attached to Debtors' motion papers as Exhibit C are two letters dated March 1, 1993 and April 30, 1993 from the U.S. Trustee to Mingolelli citing deficiencies in Mingolelli's Application and proposed order seeking appointment.

Conversely, Bodow asserts that the $500 payment was a retainer "towards legal fees upfront" and that the additional $1,000 would be held in "escrow" in the event the fees exceeded $500.00. See Bodow Affidavit sworn to December 15, 1994, paragraph 5.

Bodow has attached contemporaneous time records to his Responding Affidavit which cover the period 7/26/93 through 8/16/93 and reflect a total of 11.9 hours, with a total fee of $1,712.50. Bodow argues that the figure reflected in the time records doesn't even include his review of voluminous documentation delivered to his office by the Debtors which consumed approximately four hours.

DISCUSSION

With regard to Mingolelli, it is clear that Code §327(a) requires the appointment of a professional in a Chapter 11 case by the bankruptcy court as a condition precedent to the payment of fees. In re Futuronics, 655 F.2d 463, 469 (2d Cir. 1981) cert. denied 455 U.S. 941, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982); In re Progress Lektro Shave Corp., 117 F.2d 602, 604 (2d Cir. 1941); In re Cuisine Magazine, Inc., 61 B.R. 210, 216-217 (Bankr. S.D.N.Y. 1986); In re Sapolin Paints, Inc., 38 B.R. 807, 817 (Bankr. E.D.N.Y. 1984) and Matter of Hucknall Agency, Inc., 1 B.R. 125 (Bankr. W.D.N.Y. 1979). The requirement is no less of a mandate where the professional enters a pending Chapter 11 case as Mingolelli did. In fact, Mingolelli acknowledges that he sought to obtain appointment by the Court presumably pursuant to Code §327 on

two separate occasions without success. Thus, it would appear that if Mingolelli is entitled to any compensation, the Court must consider his appointment on a "nunc pro tunc" basis.

The two letters from the U.S. Trustee to Mingolelli, dated March 1, 1993 and April 30, 1993 respectively, returning Mingolelli's proposed order authorizing employment of attorney ("Employment Order") spell out the deficiencies that required correction. Yet, it appears that from and after April 30, 1993, Mingolelli made no further attempts to obtain the required appointment pursuant to Code §327(a). It is also apparent that Mingolelli made no effort to apply to the Court for approval of the payment of the $5,540 that he accepted from the Debtors between January and December 1993.

It was not until the Debtors filed the instant motion on November 29, 1994, almost one year later, seeking a recovery of the $5,540 that Mingolelli provided the Court with time records. The Court wonders whether Mingolelli would have ever sought approval of the fees if the Debtors had not forced the issue.

Case law is fairly well settled that "nunc pro tunc" appointments pursuant to Code §327(a) are limited to cases of excusable neglect, In re Robotics Resources R2, Inc., 117 B.R. 61, 62 (Bankr. D.Conn. 1990), In re French, 111 B.R. 391, 394 (Bankr. N.D.N.Y. 1989); In re ICS Cybernetics, Inc., 97 B.R. 736, 738 (Bankr. N.D.N.Y. 1989).

Excusable neglect is generally defined as a failure to act due to circumstances beyond the actor's control. While this Court appreciates Mingolelli's contention that he entered the

Chapter 11 case on the eve of a foreclosure sale of Debtors' residence and that he attempted on two occasions to obtain an order of appointment, that does not justify his continuation in the Chapter 11 case for approximately five months without an order of appointment while retaining the unauthorized fees until the Debtors brought the matter before this Court. Such disregard for the mandates of Code §§327 and 330 does not rise to the level of excusable neglect.

If Mingolelli was of the opinion that the U.S. Trustee's Objection to his proposed order authorizing his employment as Debtors' counsel was unjustified, he had the option of moving this Court on notice to the U.S. Trustee for an order compelling his appointment. Mingolelli did not choose to do so. Additionally, Mingolelli never filed any application with the Court pursuant to Code §330 in an effort to obtain approval of the fee notwithstanding his failure to comply with Code §327.

While this Court notes that application of the 'per se' rule adopted in this Circuit with regard to appointment of professionals very often visits a harsh result upon the unappointed professional, and while the Court further acknowledges a move toward a more liberal application of nunc pro tunc appointments, see In re Piecuil, 145 B.R. 777 (Bankr. W.D.N.Y. 1992), this Court is unable to find any factors which mitigate against the rule's strict application here.

Accordingly, the Court will direct Mingolelli to disgorge the fees paid to him by the Debtors between January 26, 1993 and February 7, 1994. In reaching this result, the Court need not

consider Debtors' contentions as to the quality of Mingolelli's representation of them in the Chapter 11 case.

Bodow entered this case at the point at which the Debtors found themselves in a converted Chapter 7 case on or about July 26,1993. Bodow, like Mingolelli, never sought appointment pursuant to Code §327. It is noted, however, that if the fees paid to Bodow were not paid from property of Debtors' Chapter 7 estate, appointment pursuant to Code §327 was unnecessary.

"Where a case is converted from Chapter 11 to Chapter 7, property of the estate is determined by the filing date of the Chapter 11 petition and not by the conversion date." In re Magallanes, 96 B.R. 253, 255 (9th Cir. BAP 1988) (citations omitted) See also Federal Rule of Bankruptcy Procedure (Fed.R.Bankr.P.) 1019. Thus, the Court must reach the conclusion that the $1500 paid to Bodow during July and August 1993 did not constitute property of the Debtors' Chapter 7 estate and Bodow had no requirement to be appointed pursuant to Code §327(a) before accepting the fees. See In re Roaring Creed Min. Co., Inc., 51 B.R. 866, 869 (Bankr. E.D.Tenn. 1985), In re Career Concepts, Inc., 76 B.R. 830, 834 (Bankr. D.Utah 1983).

Turning then to the Debtors' contention that Bodow, while earning the $500 fee, should refund the $1,000, the Court pays particular attention to Exhibit B attached to Debtors' motion papers. That Exhibit consists of two receipts dated 7/26/93 and 8/4/93, respectively, issued by the "Bodow Law Firm, P.C." to "Harold R. Sherrell" and "Harold Sherrill". The 7/26/93 receipt acknowledges payment of $500 and bears the notation "For

application to convert 7 to 13"; the 8/4/93 receipt acknowledges payment of $1,000 and bears the notation "For legal services on account". Bodow argues that the $500 was simply a retainer and the additional $1,000 was to be held in escrow.

Bodow attaches contemporaneous time records to his Responding Affidavit which reflect that between 7/26/93 and 8/16/93, his firm expended 11.9 hours in connection with the representation of the Debtors, requiring payment of $1,712.50 in fees. All but l.3 hours appear to have been devoted to the Debtors' motion to convert their case from Chapter 7 to Chapter 13.

While this Court does not necessarily conclude that the receipt of 7/26/93 standing alone is dispositive, it is clearly indicative of the intent of the parties particularly when the subsequent receipt of 8/4/93 makes no reference to the conversion motion. Further, it is the opinion of this Court that a fee of $1,500 for preparing, filing and arguing a motion to convert a bankruptcy case is excessive. For example, Bodow alleges that his firm expended approximately three hours preparing the motion, including research, and almost two hours preparing a responding affidavit. Additionally, Bodow seeks to charge the Debtors for delivering the motion papers to Utica and driving to and from Utica to argue the motion at his full hourly rate of $150, though Bodow contends that he billed travel time at 1/2 his hourly rate.

The Court further acknowledges that Code §330 is inapplicable to its review of Bodow's fee since the $1,500 paid has been determined to be non-estate property. The Court, however, concludes that the fee should be likened to a pre-petition retainer

which has not become property of the estate and is, therefore, reviewable pursuant to Code §329(a). See In re Mondi Forge Co., 154 B.R. 232, 237-238 (Bankr. N.D.Ohio 1993)

It is the conclusion of this Court that based upon his contemporaneous time records, Bodow is entitled to a fee of $750 for its services rendered to Debtors in connection with the motion to convert between 7/26/93 and 8/16/93. Therefore, the balance of $750 shall be repaid to the Debtors.

One final matter must be addressed and that is the contention raised orally by the current Chapter 7 Trustee, Mary Leonard, Esq. ("Trustee"), that any disgorgement of the Mingolelli fee must be paid over to her as property of the Chapter 7 estate. The Trustee provided no statutory basis for her argument.

In light of the provisions found in Code §348, the Court finds no support for the Trustee's contention. As previously indicated, when a case is converted to another chapter, the estate in the converted case consists only of property that was in existence as of the date of the initial filing, not as of the date of conversion. Thus, property acquired post Chapter 11 filing, but pre-confirmation, does not become property of the estate and does not pass to a trustee in the succeeding case.[3] There has been no

[3] While the Court acknowledges a split of authority as to the effect of a conversion on what constitutes property of the estate pursuant to Code §541 See In re Redick, 81 B.R. 881, 883 (Bankr. E.D.Mich. 1987), the Court concludes that the monies paid to Mingolelli do not constitute property of the Chapter 7 estate by virtue of Code §348(a) which fixes the Chapter 7 estate as of the date of filing of the initial Chapter 11 case on February 15, 1989. See Patrick A. Casey, P.A. v. Hochman, 963 F2d. 1347, 1350 (l0th Cir. 1992); In re Marshall, 79 B.R. 147, 150 (Bankr. N.D.N.Y. 1987); In re Myrvold, 44 B.R. 202, 205 (Bankr. D.Minn. 1984), aff'd sub nomine Koch & Myrvold, 1985 WL 1847 (D.Minn. 1985), aff'd 784

proof offered by the Trustee that supports a conclusion that the $5,540 paid to Mingolelli in July 1993, constituted property owned by the Debtors prior to February l5, 1989, the date of the order for relief.

Having considered all of the foregoing, it is

ORDERED, that Mingolelli shall disgorge and pay over to the Debtors the sum of $5,540 within 45 days of the date of this Order, and it is further

ORDERED, that Bodow shall disgorge and pay over to the Debtors the sum of $750 within 45 days of the date of this Order.

Dated at Utica, New York
this of March 1995

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

F.2d 862 (8th Cir. 1986).