

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

IN RE: LEGEND RADIO GROUP, INC.,

Debtor.

JOHN M. LAMIE,)

Appellant,)

v.)

UNITED STATES TRUSTEE,)

Appellee.)

Case No. 1:01CV00025
(7-94-01461-WAS)

OPINION

By: James P. Jones
United States District Judge

John M. Lamie, Browning, Lamie & Gifford, P.C., Abingon, Virginia, for Appellant; Margaret K. Garber, Office of the United States Trustee, Roanoke, Virginia, for Appellee.

The attorney for the debtor appeals the order of the bankruptcy court denying his request for retroactive approval of employment under § 327 of the Bankruptcy Code.

I find that the bankruptcy court did not abuse its discretion in refusing the request, and thus affirm the order.

I

This protracted bankruptcy case began in 1994 when the debtor, Legend Radio Group, Inc., filed a petition in the bankruptcy court under Chapter 11 of the Bankruptcy Code. On June 28, 1994, Judge Pearson entered a “Debtor-in-Possession Order” that, among other things, directed counsel for the debtor to “comply with the provisions of 11 U.S.C. § 327, et seq., and Rule 2014.” Those provisions permit the employment of attorneys and other professionals with the court’s approval, upon application.

The attorney for the debtor did not comply with this direction until shortly before the end of the case, on November 27, 2000, when he filed an “Application for Order Approving Employment of Attorney.” In the application, the attorney sought approval of his employment “nunc pro tunc, effective June 28, 1994.” (Application ¶ 3.)

The United States Trustee objected to the application and a hearing was held before the bankruptcy court on January 17, 2001. Following that hearing, the bankruptcy court (Stone, J.) issued an opinion and order granting the application but only as of its date of filing, November 27, 2000. The court noted that the unfortunate effect of its order was to deny any compensation from the bankruptcy estate to the debtor’s counsel for services performed prior to that date.¹

¹ The court below did indicate that the attorney for the debtor could utilize the pre-petition retainer paid by the debtor to the attorney, which retainer had been duly disclosed in a prior filing with the bankruptcy court pursuant to Bankruptcy Rule 2016(b). That retainer was in the amount of

The debtor's attorney appealed and the parties have briefed the matter and presented oral argument. The appeal is now ripe for decision.

II

The central issue raised by this appeal is not a new one, and courts have formulated varying standards for determining a request for retroactive approval of an application for employment of a professional, such as an attorney. *See, e.g., In re Jarvis*, 53 F.3d 416, 420-421 (1st Cir. 1995) (reviewing cases and adopting “extraordinary circumstances” standard).² It is a discretionary matter for the court, *see id.* at 421, and simple oversight, under any standard, is insufficient. *See id.* at 421-22.

In the present case, I cannot find that the bankruptcy court abused its discretion. Other than oversight, the only circumstances offered by the attorney justifying retroactive approval were that (1) Judge Pearson, now retired, on occasion approved such applications; and (2) the 1994 debtor-in-possession order also directed counsel of record to “continue as counsel for the debtor in possession until further order of this Court.” (Order, 6/28/94, ¶ 3.) However, Judge Pearson in fact disallowed such

\$2000. While the attorney was unable to approximate to the court below the value of his actual services for which he sought retroactive approval, in oral argument in this court he estimated that value at \$10,000 to \$15,000.

² The Fourth Circuit has yet to adopt a position. *See Binswanger Cos. v. Merry-Go-Round Enters., Inc.*, 258 B.R. 608, 612 n.1 (D. Md. 2001).

retroactive approval on occasion, *see In re First Fed. Corp.*, 43 B.R. 388, 389 (Bankr. W.D. Va. 1984), and the 1994 order expressly directed counsel to comply with the statute and rule provisions requiring an application for approval of employment, regardless of its direction to counsel to remain until further order of the court.

Under these circumstances, the bankruptcy court's exercise of discretion must be upheld.³

III

For the foregoing reasons, the order appealed from will be affirmed.⁴ A final judgment will be entered.

DATED: July 30, 2001

United States District Judge

³ Review of the bankruptcy court's discretionary decision is made more difficult because the transcript of the hearing below was not designated as part of the record on appeal.

⁴ The appellant also argues that the United States Trustee had no standing to object to the application. While it does not appear that this argument was made to the bankruptcy court, in any event I find the argument to be without merit. *See* 11 U.S.C.A. § 307 (West 1993) ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding . . ."); 28 U.S.C.A. § 586(a)(3)(H) (West 1993 & Supp. 2001) ("Each United States trustee . . . shall . . . supervise the administration of cases . . . by . . . monitoring applications filed under section 327 of title 11 and . . . fil[e] with the court comments with respect to the approval of such applications.")