

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

B & K GROCERY, INC.

CASE NO. 94-61355

Debtor

Chapter 11

APPEARANCES:

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

MEMORANDUM-DECISION, FINDING OF FACTS,
CONCLUSION OF LAW AND ORDER

Debtor has filed a motion seeking an order appointing Douglas D. Tracy, Business and Tax Consultant ("Tracy"), as Debtor's accountant.

The motion appeared on the Court's motion calendar at Syracuse, New York on August 2, 1994 and was thereafter adjourned to August 16, 1994. The motion was opposed by the United States Trustee ("UST").

JURISDICTIONAL STATEMENT

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

FACTS

On May 13, 1994, Debtor filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code"). Prior to the filing of the Chapter 11 petition, Debtor had employed Tracy as its accountant and Tracy was owed \$3,826.25 for his pre-petition services. (See Affidavit of Douglas D. Tracy sworn to July 6, 1994 at paragraph 2.)

Debtor's motion seeks to appoint Tracy as his accountant nunc pro tunc to the date of the Chapter 11 filing and enter into an arrangement whereby he would advance Tracy the sum of \$125 weekly to be applied against the total fees due for the month.

Tracy has not consented to a waiver of his claim for pre-petition services.

ARGUMENTS

The UST opposes Tracy's appointment claiming that the professional does not meet the disinterested test mandated by Code §§327(a) and 101(14)(A), since he holds a pre-petition claim against the Debtor.

The UST also objects to Debtor's proposal to pay Tracy the sum of \$125 per week in the absence of any articulated need for such an arrangement as well as Tracy's nunc pro tunc appointment to the date on which the Chapter 11 case was filed.

Subsequent to the argument of the motion, Debtor's counsel provided the Court and UST with a letter dated August 18,

1994 from Tracy wherein he contends that he seeks weekly payment of \$125 for services rendered to the Debtor as a bookkeeper employee rather than as an accountant professional. Tracy's letter opines that it is only compensation for services rendered as an accountant that should be subject to UST review and Court approval.

DISCUSSION

The Court must first address the UST's assertion that Tracy is not disinterested and, therefore, cannot qualify for appointment pursuant to Code §327(a).

This Court has recently considered the issue of disinterestedness insofar as it relates to a professional who has rendered services to a debtor pre-petition and is proposed for appointment post-petition pursuant to Code §327(a). See In S.W. Johnson Enterprises, Inc., Case No. 94-62346, December 19, 1994.

In that case this Court concluded that it would adopt the majority view as articulated in the recent decision of the Third Circuit Court of Appeals in UST v. Price Waterhouse, 19 F3rd, 138 (3rd Cir. 1994). That view holds that a professional who has rendered services to a debtor pre-petition for which a sum of money is due and owing at the time of filing is disqualified from seeking appointment post-petition pursuant to Code §327(a) because the professional is not disinterested. See also In re Eastern Charter Tours, Inc., 167 B.R. 995 (Bankr. M.D.Ga. 1994); In re Siliconix, Inc., 135 B.R. 378 (Bankr. N.D.Cal. 1991); In re Watervliet Paper Co., Inc., 96 B.R. 768 (Bankr. W.D.Mich. 1989) Aff'd. 111 B.R. 131

(W.D.Mich. 1989).

The facts of the matter sub judice are almost identical to those in In re S.W. Johnson Enterprises, Inc., infra. In both instances the professional seeking appointment had been retained by the respective Debtors pre-petition, both held a pre-petition claim for those services and neither proposed to waive their claim. The Court must, therefore, reach the conclusion that Tracy is not disinterested and, therefore, cannot meet the requirements of Code §327(a). The Court further concludes that Tracy cannot avoid the consequences of Code §327(a) by alleging that as to certain services being provided he is an employee of the Debtor rather than a professional.

Having reached the conclusion regarding Tracy's inability to comply with Code §327(a), the Court need not consider the other objections raised by the UST's objection regarding weekly payments and the request for Tracy's nunc pro tunc appointment.

Based upon the forgoing, it is

ORDERED that Debtor's motion seeking to appoint Tracy as Debtor's accountant is denied.

Dated at Utica, New York

this day of December 1994.

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge