

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

APPEARANCES:

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

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

On June 16, 1997, Sand Piper Yachts Inc. d/b/a Peter Kehoe and Associates (“Kehoe”), filed a motion with this Court seeking an order (a) pursuant to section 327(a) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) (“Code”) approving Kehoe's retention as yacht broker in connection with the sale of an asset of this Debtor's estate known as the “Speculator”, and (b) awarding compensation to Kehoe in an amount equal to 10% of the Court approved gross sale price of the “Speculator”.

The motion which was opposed by both the chapter 11 Trustee, Richard C. Breeden (“Trustee”) and the Official Committee of Unsecured Creditors (“Committee”) was heard before the Court in Utica, New York on June 26, 1997 and was submitted for decision on that date. Thereafter, however, Kehoe's attorneys corresponded with the Court suggesting that the motion had been rendered moot by the apparent collapse of the proposed sale of the “Speculator”. The Trustee, however, has urged the Court to proceed with a determination of the motion arguing that this contested matter has not been mooted by any developments related to the sale of the “Speculator”.¹ On September 15, 1997, the Court advised all parties that it would proceed with a determination of Kehoe's motion.

JURISDICTIONAL STATEMENT

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

FACTS

On April 19, 1996, voluntary petitions pursuant to chapter 11 of the Code were filed by American Marine International Ltd. (“AMI”) and Resort Service Co., Inc. On April 25, 1996,

¹ The party that had offered to purchase the “Speculator” allegedly withdrew its offer and has recently commenced an action in a Florida state court against the Trustee to void any obligation it might have to the Trustee arising out of its offer to purchase the Speculator. Upon information and belief, that action has now been removed to the U.S. District Court in Florida.

an involuntary petition was filed against Aloha Capital Corp. On May 10, 1996, the Court issued an Order approving a stipulation pursuant to which Aloha Capital Corp. consented to the entry of an Order for Relief under chapter 11. In the interim, a voluntary chapter 11 petition had also been filed by the Trustee on behalf of The Processing Center, on April 26, 1996 (hereinafter the “Aloha” cases). On June 12, 1996, the Court entered an Order granting joint administration of the Aloha cases. Subsequent thereto the jointly administered cases were substantively consolidated with jointly administered cases entitled The Bennett Funding Group, Inc. cases (“Bennett cases”)² Case No. 96-61376, on July 22, 1997.

Among the assets of the Aloha cases was the “Speculator”, a gaming vessel located in Florida at the time of the filing of these cases. On November 25, 1996, this Court appointed Coastal Passenger Vessels Ltd., LLP (“Coastal”) as ship broker to sell the “Speculator” on a non-exclusive basis. Pursuant to the Order, Coastal was to receive a commission equal to 3% of the sale price.

On June 6, 1997, the Trustee filed a motion with the Court seeking authorization to sell the “Speculator” to Allan Paulson (“Paulson”) for the sum of \$10.75 million. That motion was made returnable before this Court on the same date as the instant motion (“sale motion”).³

The sale motion sought approval for the Trustee to pay a commission to Kehoe of 3% of the sale price or \$322,500. Kehoe opposes the sale motion on the ground that it negotiated the

² The Bennett cases were filed on March 29, 1996 and consist of The Bennett Funding Group, Inc; Bennett Receivables Corporation; Bennett Receivables Corporation II; Bennett Management and Development Corporation. An Order was entered on May 6, 1996, approving joint administration of the Bennett Cases.

³ Because the motions are interrelated, the Court in ruling upon the instant motion has also considered the pleadings submitted in connection with the sale motion.

sale of the “Speculator” on an industry standard commission of 10% not 3% and, therefore, it was entitled to a commission of \$1,075,000. The sale motion was consensually adjourned pending the outcome of this motion.

ARGUMENTS

Kehoe argues that he procured the Paulson offer to purchase the “Speculator” and, in fact, as far back as July 1995, he had brokered a sale between Paulson and AMI, one of the Aloha case Debtors. At that time, Kehoe concedes that he had bargained for a 5% commission. He asserts that in May 1996, he contacted a representative of the Trustee who advised him that the Speculator was still for sale and that in subsequent discussions with other representatives of the Trustee he always made it known that his commission would be 10% of the sale price. The requested increase in commission was allegedly due to the fact that the broker, rather than the shipyard, would have to accomplish the final outfitting and procedures necessary for Coast Guard certification.

Kehoe asserts that on April 30, 1997, Paulson executed a Purchase and Sale Agreement naming Kehoe apparently as agent for the seller, Trustee. That Agreement was forwarded to the Trustee on May 1, 1997, along with a letter from Kehoe to the Trustee in which he again advised the Trustee of his entitlement to a 10% commission. On May 3, 1997, Kehoe advised the Trustee that Paulson had increased his offer from \$10 million to \$10,750,000 in response to a counteroffer by the Trustee. Again Kehoe advised the Trustee of his 10% commission.

In spite of written references to a 10% commission between April 30, 1997 and May 15,

1997, Kehoe received a letter from the Trustee on the latter date advising him that he would recommend a commission of not more than 3% of the gross sale price as outlined in a letter agreement dated May 8, 1997.

Kehoe finally contends that thereafter he continued to assert his claim for a 10% commission on the sale price of the Speculator; however, due to pressure from the Trustee, negotiations continued between Paulson and the Trustee directly, bypassing Kehoe.

The Trustee argues that he retained Coastal as ship broker on a non-exclusive basis. If Coastal had procured a buyer for the Speculator, it would have been paid 3% of the sale price as per the order of retention. Thus, the Trustee asserts that he would have no reason to pay any other broker a commission greater than 3%.

The Trustee does not dispute that Kehoe introduced Paulson to Trustee's representatives or that Kehoe would be the responsible broker if the sale to Paulson closed, but the Trustee contends that he never entered into any agreement, written or oral, to pay Kehoe a 10% commission nor did he have any reason to do so. He points to the May 8, 1997 letter from the Trustee's maritime consultant, Thomas Lihan ("Lihan"), to Kehoe in which the broker was advised that his commission would not exceed 3%.

In supporting affidavits Lihan, as well as Paul Joslyn, Robert Darefsky and Linda Stephens, allegedly the Trustee's representatives, assert that they had no authority to make any agreement with Kehoe on behalf of the Trustee. Lihan asserts that in fact he advised Kehoe on three specific occasions, May 2, May 5 and May 27, 1997, that the Trustee would not agree to a 10% commission and that during the May 27th conversation Kehoe agreed to the 3%.

The Committee simply opposes Kehoe's motion upon the ground that he was never

retained as a yacht broker pursuant to Code § 327(a) and, therefore, is prohibited from being compensated pursuant to Code § 330(a).

DISCUSSION

As a starting point, the Court must consider whether or not Kehoe is a “professional” within the meaning of Code § 327(a). Generally speaking, brokers of all types retained by a trustee or debtor in possession to bring about the sale of property of the estate are held to be professionals. See *In re Providence Television Ltd. Partnership*, 113 B.R. 446 (Bankr. N.D. Ill. 1990); *In re Channel 2 Associates*, 88 B.R. 351 (Bankr. D.N.M. 1988) and *In re Northeast Dairy Cooperation Federation, Inc.*, 74 B.R. 149 (Bankr. N.D.N.Y. 1987). As such they fall squarely within the requirements of Code § 327(a) if they are to later seek compensation from the bankruptcy estate.

The threshold issue to be addressed is whether or not a professional can move under Code § 327 to compel its own appointment in a pending bankruptcy case. Both the Trustee and the Committee assert that only the Trustee may employ professionals pursuant to Code § 327 and, therefore, Kehoe's motion must be denied.

The Court agrees with the Trustee and the Committee that Code § 327(a) cannot serve as the basis for Kehoe's motion since that section is available only to a trustee (and by operation of Code § 1007 to a debtor in possession). See *In re Eagle-Picher Industries Inc.*, 139 B.R. 869, 871 (Bankr. S.D. Ohio 1992); *In re Office Products of America*, 136 B.R. 675 (Bankr. W.D. Tex. 1992); *contra In re Lindo's Tours, USA Inc.*, 55 B.R. 475 (Bankr. M.D. Fla. 1985). That

conclusion does not, however, end the inquiry and, in fact, the crux of the dispute does not focus on Kehoe's lack of appointment pursuant to Code § 327(a). The Trustee's primary objection deals with the amount of commission to be paid to Kehoe not whether a commission should be paid at all.

It is uncontroverted that the Trustee sought and obtained appointment of a broker to market the "Speculator". On November 25, 1996, Coastal was appointed on a non-exclusive basis, to market the maritime assets of AMI including the "Speculator". It is clear, however, from the documentation attached to the various moving and responding papers filed in conjunction with the instant motion, as well as the sale motion, that Coastal played no significant role in the negotiations leading up to the Paulson offer; that, in fact, most of the negotiations occurred between Kehoe and Lihan. While much of the correspondence between Lihan and Kehoe emphasized that Kehoe's commission would be subject to the approval of this Court, nowhere is Kehoe's lack of appointment raised.

From a review of the facts of this matter, as evidenced in the affidavits and documentary evidence submitted in connection with the instant motion, as well as the Trustee's motion for authority to sell the "Speculator" which was heard on the same day and is inextricably intertwined with this motion, it is clear that prior to the filing of these cases and on or about July 31, 1995, AMI and Kehoe entered into a "Vessel Brokerage Agreement Non-Exclusive" ("Brokerage Agreement") whereby Kehoe was retained to sell a "Sidewheel Casino Vessel," presumably the Speculator, and was to be paid a commission of 5% of the sale price of the vessel. (See Objection of Peter Kehoe & Associates to Motion For Order Authorizing Trustee to Sell the Speculator To Allan Paulson," dated June 10, 1997 ("Kehoe Objection"), Exhibit B).

There is no assertion that the Trustee ever sought to assume the Brokerage Agreement and, therefore, is not bound at this point to perform pursuant to its terms. *See N.L.R.B. v. Bildisco*, 465, U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 481 (1984). In fact, the Trustee's retention of Coastal suggests that the Trustee had every intention of rejecting that Brokerage Agreement at or before the date of confirmation. *See Code § 365(d)(2)*.⁴

A further review of the documentary evidence leads the Court to the conclusion that while the Trustee, through his representative Lihan, did lead Kehoe to believe that he would be paid a commission in connection with the sale of the Speculator, it was made clear that the commission would be subject to the approval of this Court and that the Trustee would recommend no more than a 3% commission. (*See Id.* Kehoe Objection at Exhibit N). It is equally clear that Kehoe did not accept the Trustee's proposed recommendation of a 3% commission (*See id. at* Exhibits P and Q).

Kehoe appears to allege that he was somehow led to believe that he would be paid a commission of 10%, but the Court can find no actual proof of that in the record. Even accepting Kehoe's allegations as true that at no time did the Trustee advise him that a 10% commission was unacceptable until after he had procured Paulson as a buyer, that alone does not entitle Kehoe to escape the mandate of Code § 327(a).

Case law suggests that even where the services rendered by the unappointed professional may have been performed in good faith and provided benefit to the estate, they are not

⁴ As indicated, Kehoe contends that a 5% commission was agreed to in 1995 because at that point the shipyard constructing the Speculator would have undertaken Coast Guard certification while under the current circumstances, certification would have to be accomplished by the selling broker.

compensable absent prior appointment pursuant to Code § 327(a). *See In re Met-L-Wood Corp.*, 103 B.R. 972 (Bankr. N.D. Ill. 1989), *aff'd* 115 B.R. 133 (N.D. Ill. 1990); *In re Bicoastal Corp.*, 118 B.R. 855 (Bankr. M.D. Fla. 1990); *In re Robotics Resources R2, Inc.*, 117 B.R. 61 (Bankr. D. Conn. 1990); *In re ICS Cybernetics Inc.*, 97 B.R. 736 (Bankr. N.D.N.Y. 1989).

Conversely, other courts have gone to great lengths to prevent a financial hardship being imposed on the unappointed professional particularly where benefit to the estate can be shown either by granting an appointment *nunc pro tunc* or making an award of fees based upon a theory of quantum merit. *See In re B.E.S. Concrete Products Inc.*, 93 B.R. 228 (Bank. E.D. Cal. 1988); *In re Piecuil*, 145 B.R. 777 (Bankr. W.D.N.Y. 1992); *In re First Sec. Mortg. Co., Inc.*, 117 B.R. 1001 (Bankr. N.D. Okla. 1990); *but see In re Southern Diversified Properties, Inc.*, 110 B.R. 992, 996 (Bankr. N.D. Ga. 1990).

In the instant matter, Kehoe is a shipbroker. As such, there is no reason to believe that he had any particular familiarity with the existence, let alone the requirements, of Code § 327(a). Further, in reviewing the documentation provided to the Court by both Kehoe and the Trustee, there is nothing to suggest that Kehoe was alerted by the Trustee to the rigors of Code § 327(a), though it is clear that he was made aware that any commission to be paid to him was subject to Court approval. Additionally, the appointment of Coastal was as a non-exclusive shipbroker suggesting that the Trustee contemplated buyers being produced by brokers other than Coastal.

In the Second Circuit, the “*per se*” rule prohibiting payment to professions for services rendered prior to approval by the Court, has been strictly applied. *See, e.g. In re Futuronics Corp.*, 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 S.S. Lines, Inc.*, 509 F.2d 1242, 1245-46 (2d Cir. 1975); *In re Robotics*

Resourses R2 Inc., 117 B.R. at 62; *In re French*, 111 B.R. 391, 394 (Bankr. N.D.N.Y. 1989); *In re Ochoa*, 74 B.R. 191, 195-96 (Bankr. N.D.N.Y. 1987); *In re Cuisine Magazine, Inc.*, 61 B.R. 210, 216-17 (Bankr. S.D.N.Y. 1986). The genesis of the rule is to discourage volunteer services by avoiding payment for services that have not been previously authorized. The rule though rigidly applied is not without exception. See *In re Bennett Funding Group, Inc.*, Case No. 96-61376, slip opp. at 9 (Bankr. N.D.N.Y. February 6, 1997).

The Court has recognized the “excusable neglect” or “unavoidable hardship” exceptions to the “per se” rule. See *In re Ochoa, supra*, 74 B.R. at 195; *In re Northeast Dairy Co-op Federation Inc.*, 74 B.R. at 155. The Court is equally well aware of the enlargement of the “excusable neglect” standard by virtue of the decision of the United States Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). At least one bankruptcy court in this Circuit has concluded that the expanded definition of excusable neglect to include “inadvertence, mistake or carelessness”, *see id.* at 388; 113 S.Ct. at 1495, is applicable to employment applications. See *In re 245 Associates LLC*, 188 B.R. 743 (Bankr. S.D.N.Y. 1995). The Court also acknowledges the liberal approach to the per se rule adopted by the bankruptcy court in *In re Piecuil, supra*, 145 B.R. 777.

The facts of this contested matter support a finding of “excusable neglect”.⁵ First, the order appointing Coastal, on a non-exclusive basis, clearly envisioned the sale of the Speculator

⁵ The Court notes that it does not expressly pass on the propriety of extending *Pioneer's* expanded definition of “excusable neglect” to *nunc pro tunc* employment applications as the facts herein satisfy the more restrictive definition of excusable neglect that the Court has utilized in prior decisions.

by a broker other than Coastal. Second, no one suggests that if the Trustee had initially sought the appointment of Kehoe rather than Coastal that the Court would not have approved the appointment. Third, there is no indication that Kehoe was ever made aware by the Trustee of a need for such appointment as a condition to the recovery of an administrative claim in that the Trustee continually led Kehoe to believe that the only condition to payment of a commission was the approval of this Court. Finally, at the time this matter was heard by the Court, it appeared that a significant benefit was about to be conferred on the now substantively consolidated Debtors' estate as a direct result of Kehoe's efforts

In the matter *sub judice* Kehoe seeks both appointment and payment of a 10% commission. While the Court has indicated that it does not believe Kehoe can properly compel his own appointment pursuant to Code § 327(a), as one bankruptcy court has concluded, “it is clear that the bankruptcy court has power to consider the application for allowance for services even though it was not filed by the trustee or by the debtor, but by the professional himself or herself.” *Matter of Lindo's Tours, USA Inc., supra*, 55 B.R. at 478.

Having considered all of the foregoing, the Court concludes that Kehoe cannot be compensated on any basis other than Code § 330, and that as a condition to that compensation, Kehoe must be appointed pursuant to Code § 327. Were the appropriate application for appointment to be filed by the Trustee, the Court would authorize Kehoe's appointment *nunc pro tunc*. Were Kehoe to then refile an application for payment of a commission the Court, assuming the sale of the Speculator is approved as proposed in the sale motion, would award Kehoe a commission of 3% of the sale price.

Based upon the foregoing, Kehoe's present motion must be denied in its entirety.

IT IS SO ORDERED.

Dated at Utica, New York

this 13th day of November 1997

STEPHEN D. GERLING
Chief U. S. Bankruptcy Judge