

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOSEPH'S ICE CREAM CO., INC.

CASE NO. 95-60597

Debtor

Chapter 11

APPEARANCES:

SALVATORE G. SCRO, ESQ.
Proposed Attorney for Debtor
135 Old Cove Road
Suite 211
Liverpool, New York 13090

MICHAEL COLLINS, ESQ.
Office of the U.S. Trustee
10 Broad St.
Utica, New York 13501

MARTIN, MARTIN & WOODARD, ESQS.
Attorneys for Creditors Committee
One Lincoln Center
Syracuse, New York 13202

DAVID CAPRIOTTI, ESQ.
Of Counsel

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

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

The Debtor herein seeks to employ Salvatore G. Scro, Esq. ("Scro"), to represent it in connection with its Chapter 11 case, which was filed in this Court on February 24, 1995.

The motion, which is being opposed by the United States Trustee ("UST"), appeared on the Court's calendar at Syracuse, New York on July 18, 1995, and following oral argument, the parties were given an opportunity to submit memoranda of law on or before August 8, 1995.

JURISDICTIONAL STATEMENT

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

FINDINGS

On February 24, 1995, Debtor filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). Scro, who is the son of the president and sole stockholder of the Debtor, Joseph F. Scro, represented the Debtor pre-petition. In addition, Scro had been employed by the Debtor pre-petition in various non-legal capacities and at the time of filing was drawing an annual salary of \$38,000. (See Affirmation of Proposed Attorney for Debtor, dated May 30, 1995, at ¶ 3.)¹

Scro acknowledges that he is not a disinterested person as defined in 11 U.S. C. §101(14) by virtue of his "insider" status, pursuant to Code §101(31)(B), but urges the Court to take a "'practical view' of the case rather than a literal statutory interpretation." (Affirmation at ¶ 7.) Both Scro and the Debtor ask the Court to consider Scro's familiarity with all phases of the Debtor's business, his prior completion of a majority of the work connected with the Chapter 11 and the savings to the Debtor in legal fees.

The UST urges the Court to adopt a strict interpretation

¹ The Court notes that both Federal Rule of Bankruptcy Procedure 2014 and Local 214.1(2) require that the professional file either a verified statement or affidavit.

of Code §327(a) which permits appointment of only professionals who are disinterested.²

DISCUSSION

Scro and the Debtor rely primarily on the rationale of the bankruptcy court in the case of In re Sharon Steel Corporation, 152 B.R. 447 (Bankr. W.D.Pa. 1993). In that case, Price Waterhouse had served as the debtor's pre-petition accountants, and as such was a pre-petition creditor of the debtor and, thus, not disinterested. Debtor's chief financial officer had estimated that it would cost the debtor a half a million dollars to replace Price Waterhouse with another accounting firm. The bankruptcy court, and later the district court on appeal, concluded that while some courts interpret Code §327(a) literally, a more practical approach is one "which considers the economic realities of the case and the overriding purposes of Chapter 11 of the Bankruptcy Code." Id. at pg. 449. See In re Sharon Steel Corporation, 154 B.R. 53 (Bankr. W.D.Pa. 1993), for the district court analysis on appeal.

Unfortunately for Scro and the Debtor, the Third Circuit Court of Appeals reversed both the bankruptcy court and the district court in In re Sharon Steel Corporation, supra, and flatly rejected the lower court's "'flexible approach' in determining whether a professional who is not 'disinterested' under the statutory definition may nevertheless be employed pursuant to

² On July 18, 1995, the unsecured creditors appeared and orally supported Scro's appointment, but did not file any papers for the Court's consideration.

§327(a)." See U.S. Trustee v. Price Waterhouse, 19 F.3d 138, 142 (3rd Cir. 1994). The Circuit Court went on to conclude that, practical benefits notwithstanding, a bankruptcy court cannot utilize equitable considerations to circumvent the plain language of a statute. Id. at pg. 142.

The Court further observes here that one of the significant arguments asserted by Scro and the Debtor, in support of Scro's appointment, is that proposed counsel has already performed a majority of the work on the Debtor's behalf to include the preparation of the Debtor's proposed plan of reorganization. Such an argument has little persuasive effect, however, when one considers that Scro waited some four months post filing to make this motion, thus, rendering services during the intervening period in the absence of any Code §327(a) appointment.

While the Court, of course, recognizes the factual differences between the UST v Price Waterhouse line of cases and the instant matter, there being no indication that Scro is a pre-petition creditor of the Debtor, as the Court has previously held in its unreported decisions in S.W. Johnson Enterprises, Inc., Case No. 94-62346, (December 19, 1994) and B & K Inc., Case No. 94-61355 (December 22, 1994), the dilemma, if that is what it is, created by Code §327(a) needs to be addressed legislatively, not judicially.

Thus, the Court must deny Debtor's motion to employ Scro as its attorney for purposes of this Chapter 11 case.

IT IS SO ORDERED.

Dated at Utica, New York

this day of 1995

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge