UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
	Chapter 11
Debtors	Substantively Consolidated

RICHARD C. BREEDEN, TRUSTEE FOR
THE BENNETT FUNDING GROUP, INC.

Plaintiff

vs. ADV. PRO. NO. 98-42829A

MONROE SYSTEMS FOR BUSINESS, INC.

Defendant

APPEARANCES:

WILLKIE FARR & GALLAGHER Attorneys for Defendant 787 Seventh Avenue New York, NY 10019-6099	NANCY K. MCCABE, ESQ. Of Counsel
SAPERSTON & DAY, P.C. Special Counsel to Trustee 360 South Warren Street, 6th Floor Syracuse, New York 13202	ROBERT B. LIDDELL, ESQ. Of Counsel

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

MEMORANDUM-DECISION AND ORDER

On June 24, 1999, this Court heard oral argument on the Defendant's ("Monroe") motion seeking a dismissal of Plaintiff's ("Trustee") Complaint. The motion was filed pursuant to Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 4(m) and 12(b)(5). Both rules are applicable to this adversary proceeding by incorporation in Federal Rules of Bankruptcy Procedure

("Fed.R.Bankr.P.") 7004(a) and 7012(b).

At the close of oral argument the Court denied Monroe's motion, but indicated that it would award Monroe reasonable attorney's fees incurred in connection with the filing of the motion. On July 27, 1999, the Court executed an Order denying the motion.

Despite the Court's indication that it would award attorney's fees, the Trustee, by his Special Counsel, has filed a Response to the Affidavit of Monroe's counsel, in support of the fees, asserting that there is no procedural basis for the award of attorney's fees in connection with this motion. Special Counsel relies on Fed.R.Bankr.P. 7008(b) and 7054. (*See* Amended Response of Trustee dated August 20, 1999).

Special Counsel asserts that a bankruptcy court may award attorney's fees only to the "prevailing party" and only where the request for an award is made in a "pleading." *See* Fed.R.Bankr.P. 7008(b).[1]

The Court does not believe that its authority is restricted to the extent that it cannot award attorney's fees on a motion to dismiss where it finds conduct on the part of the Trustee's Special Counsel that unnecessarily prolonged motion practice that was otherwise moot. *See* 11 U.S.C. § 105(a). Fed.R.Bankr.P. 7008(b) cannot be read to limit an award of attorney's fees only where the request is contained in a pleading enumerated in that Rule. *In re Bryson,* 131 F.3d 601, 603 (7th Cir. 1997); *In re Kriss*, 217 B.R. 147, 159 (Bankr. S.D.N.Y. 1998); *In re Flagg*, 215 B.R. 79, 82 (Bankr. N.D. Okla. 1997).

Turning to the merits of Monroe's request for attorney's fees, the Court believes that

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[1] Neither the Court nor the parties consider Fed.R.Bankr.P. 9011 applicable to the instant motion.

equity prevails to some extent on both sides of the present dispute.

Trustee's Special Counsel refers the Court to its letter of January 18, 1999, in which it provided Monroe's counsel with copies of the Orders entered by this Court extending its time to serve complaints on Monroe and numerous other defendants. Trustee's Special Counsel infers that Monroe's counsel should have withdrawn the dismissal motion grounded on Fed.R.Bankr.P. 7004(a) and 7012(b) upon receipt of that letter.

Conversely, Monroe's counsel asserts that Trustee's Special Counsel waited some five months after Monroe had filed its initial motion to provide it with copies of the extension Orders which emanated from various motions before the Court, none of which were ever served on Monroe.

While the Court is sensitive to the argument of Trustee's Special Counsel, that following the receipt of its January 18, 1999 letter with copies of the Orders, Monroe's counsel should have voluntarily withdrawn its motion, the Court concludes that it is conduct of Trustee's Special Counsel that warrants the imposition of attorney's fees.

Monroe's motion was served on Trustee's Special Counsel on or about August 14, 1998, at a time when one or more of the Court's extension Orders were in place. Despite Trustee's Special Counsel's assertions at oral argument, Monroe's counsel was not made formally aware of those Orders until Trustee's Special Counsel finally sent the January 18, 1999 letter to Monroe's counsel enclosing copies of the pertinent Orders. No explanation is given for the approximate five (5) month delay. Accordingly, the Court believes that Monroe is entitled to an award of reasonable attorney's fees for the period August 14, 1998, through January 18, 1999.

Monroe's attorneys have filed time records which seek fees of $8,378 for services

rendered generally within the time frame referenced above. In reviewing the initial dismissal motion and accompanying memorandum of law and after considering the relative equities, the Court cannot in good conscience award the fees requested. For example, on July 27, 1998, and again on August 10, 1998, Monroe's counsel consumed some 6.6 hours or $2,657 in fees preparing and revising the motion to dismiss. Likewise, on August 11 and 12, 1998, Monroe's counsel consumed 5.3 hours or $1,722 in fees, again revising both the motion and a memorandum of law. Yet, the motion consists of a Notice, and four and one half page Affidavit with a copy of the unserved complaint attached. The memorandum of law was six and one half pages in length, dealing with the relatively straight-forward procedural issue of timely service and good cause found in Fed.R.Bankr.P. 7004(a) and Fed.R.Civ.P. 4(m). The Court is of the opinion that the reasonable value of the services rendered in connection with the preparation and service of the motion and memorandum of law in August of 1998 is $1,500. The Court believes that had Trustee's Special Counsel acted diligently upon obtaining the first extension Order on July 22, 1998, Monroe's counsel would not have been required to file any motion in reliance on Fed.R.Bankr.P. 7004(a) and Fed.R.Civ.P. 4(m). Conversely, after Trustee's Special Counsel provided copies of the relevant orders to Monroe's counsel in January 1999, arguably, the motion should have been withdrawn. In any event, Monroe's counsel is not entitled to any attorney's fees during the period subsequent to January 18, 1999.

Therefore, the Court awards Monroe's counsel $1,500 in attorney's fees to be paid from the unencumbered funds of the consolidated estates subject, however, to the right of the Unsecured Creditor's Committee to argue that said fees should be deducted from a subsequent fee application of Trustee's Special Counsel.

IT IS SO ORDERED.

Dated at Utica, New York

this 7th day of October

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge