UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MITCHELL CONKLIN
MARY CONKLIN — CASE NO. 92-63024

Debtors

DAVID G. KLIM, as TRUSTEE for
MITCHELL CONKLIN AND MARY CONKLIN

Plaintiff

vs. — ADV. PRO. NO. 95-70105

ST. LAWRENCE VALLEY EDUCATIONAL TELEVISION COUNCIL, INC.; WNPE-16 TV; WNPI-18 TV; FAYS DRUG COMPANY INC., a/k/a FAYS, INC.; WILLIAM J. SAIFF, JR., individually and doing business as SAIFF'S ROD AND REEL CHARTERS

Defendants

APPEARANCES:

ROBERT J. MILETSKY, ESQ.
Special Counsel for Debtors
630 Third Avenue - Suite 1400
New York, New York 10017

MARTIN, MARTIN & WOODARD, LLP
Attorneys for Successor Trustee
One Lincoln Center
Syracuse, New York 13202

DAVID CAPRIOTTI, ESQ.
Of Counsel

HANCOCK & ESTABROOK, LLP
Attorneys for Fay's Inc.
1500 Mony Tower I
Syracuse, New York 13202

R. JOHN CLARK, ESQ.
Of Counsel

HISCOCK & BARCLAY — JOSEPH SERINO, ESQ.

Attorneys for all other Defendants Of Counsel
Financial Plaza
P.O. Box 4278
Syracuse, New York 13221

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

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

Before the Court is a motion filed by Robert J. Miletsky, Esq. ("RJM") seeking attorney fees in the sum of $3,333.33 in connection with RJM's alleged representation of the plaintiff trustee, David G. Klim, Esq., ("Former Trustee") in the within adversary proceeding.

The motion was initially returnable before the Court at Syracuse, New York on October 22, 1996, and was thereafter consensually adjourned from time to time and was finally argued on December 3, 1996.

The motion was opposed by creditor defendants Fays Incorporated ("Fays"), St. Lawrence Valley Educational Television Counsel, Inc., WNPE-16 TV, WNPI-18 TV and William Saiff, Jr. individually and doing business as Saiff's Rod and Reel Charters ("TV Defendants") and the current Chapter 7 trustee, Lee E. Woodard, Esq. ("Current Trustee")

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§ 1334(b),

157(a), (b)(1) and (2)(B).[1]

FACTS

Rather than reiterate all of the facts giving rise to the adversary proceeding, the Court assumes the parties familiarity with the Court's Memorandum-Decision dated June 20, 1996, and incorporates same herein by reference.

Additionally, RJM relies upon a Retainer Agreement dated August 25, 1995, executed by himself, Mitchell and Mary Conklin ("Debtors") and the Former Trustee.[2] That Retainer Agreement identifies the Former Trustee as the "Client" and RJM as the "Firm" and provides that the Client agrees that the Firm will be compensated at the rate of one-third of any recovery had by settlement or verdict. The Retainer Agreement did not specifically identify the within adversary proceeding nor was it ever approved by an order of this Court.

As of the date hereof, the U.S. District Court for the Northern District of New York has not entered an order either accepting, rejecting or modifying the Memorandum-Decision of this Court dated June 20, 1996. Thus, the settlement has not been consummated.

DISCUSSION

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[1] In its Memorandum-Decision, Proposed Finding of Fact and Conclusions of Law dated June 20, 1996, the Court concluded that it did not have core jurisdiction of the merits of this adversary proceeding. However, the determination of the matter presently before this Court is in essence the determination of a claim allegedly held by RJM pursuant to § 503(b) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code") and may be treated separately from the merits of the adversary proceeding.

[2] David Klim, Esq. is no longer a Trustee having been elected Family Court Judge for Onondaga County, New York in the fall of 1995.

RJM asserts that the settlement of this adversary proceeding was brought about primarily through his efforts. While acknowledging that the proceeding was commenced in the absence of his appointment by the Court, he contends that it was necessary to commence this proceeding to avoid the expiration of the applicable statute of limitations. He also argues that the proposed settlement occurred while his application for appointment as special counsel was pending before this Court.[3]

RJM acknowledges that because of the need to commence the adversary proceeding, he cannot recall contacting the Former Trustee before commencing the instant proceeding in the Former Trustee's name. He does, however, assert that following the filing of the complaint he did confer with the Former Trustee, that discussion culminating in the Retainer Agreement. He also recalls that the Former Trustee then moved for his appointment as special counsel, but in the interim the adversary proceeding was settled for the sum of $10,000 - a settlement that was supported by both the Former and the Current Trustees.

The TV Defendants contend that RJM cannot be compensated in any event until the District Court accepts, rejects or modifies the Memorandum-Decision of this Court. They also suggest that this Court is without jurisdiction to enter a final order regarding RJM's application.

Fays raises similar objections while adding that RJM, upon information and belief, took no part in the settlement negotiations between the Former Trustee and the defendants.

Finally, the Current Trustee opposes the motion contending that he concluded the

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[3] The docket of this adversary proceeding indicates that a motion was initially filed by the Former Trustee on September 11, 1995, seeking the appointment of RJM as special counsel; that motion was thereafter consensually adjourned on no less than six separate occasions through February 6, 1996, when the Current Trustee's motion to compromise and settle the adversary proceeding appeared on the calender.

settlement of the adversary proceeding without any need for RJM's assistance.

CONCLUSION

Initially, the Court considers RJM's argument that he should be awarded compensation based upon the Retainer Agreement that was executed by the Former Trustee on or about August 25, 1995.

Absent prior Court approval pursuant to Code § 327(a), a professional is not entitled to compensation for services rendered post petition. *In re Futuronics Corp.*, 5 B.R. 489 (S.D.N.Y. 1980) *aff'd*. 655 F.2d 463 (2nd Cir. 1981), *cert. denied sub nom. Israel B. Raley v. Futuronics Corp.,* 455 U.S. 941, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982), *In re Sapphire S.S. Lines,* Inc., 509 F.2d 1242, 1245-56 (2d Cir. 1975), *In re French,* 111 B.R. 391, 394 (Bankr. N.D.N.Y. 1989), *In re Maller Restaurant Corp.*, 57 B.R. 72 (Bankr. E.D.N.Y. 1985). The rationale for this approach was considered by the 9th Circuit Court of Appeals in *In re Haley*, 950 F2d 588, 590 (9th Cir. 1991):

> [C]ontrol by the bankruptcy court is necessary to enable the court to contain the estates expenses and avoid intervention by unnecessary participants. The purpose of the rule requiring prior court authorization of a professional's appointment is to eliminate volunteerism and thus aid the court in controlling administrative expenses.

It thus must be concluded that the August 1995 Retainer Agreement is not binding upon the Debtors' estate in the absence of an order of this Court appointing RJM to act as special counsel to the Former Trustee and approving the Retainer Agreement. Further, it is doubtful that the Retainer Agreement, in the absence of an order of this Court, has any binding effect on any party.

Turning to RJM's request that he be appointed on a *nunc pro tunc* basis, he argues that the limitations period on the causes of action was about to expire and, therefore, "I did not wait to be appointed as special counsel, similarly out of concern that any delay might result in the lapsing of the limitation period." (*See* Affidavit of RJM sworn to October 1, 1996 at ¶ 10)

While at first blush RJM's argument might appear credible, it begins to pale when one considers that RJM had no real responsibility to protect the various causes of action ultimately set forth in the Complaint. Those causes of action were and are primarily property of the bankruptcy estate not of the Debtors. *See* Code § 541(a)(1). As such it was the Former Trustee who bore responsibility to preserve the causes of action, not RJM as Debtors' counsel. Thus, RJM engaged in the very "volunteerism" that the 9th Circuit referred to in *In re Haley, supra.* In fact it appears from the docket of this adversary proceeding that it was actually commenced some two and one half months before RJM and the Former Trustee executed the Retainer Agreement, and that the Former Trustee did not move for RJM's appointment until September 11, 1995.

RJM's actions both before and after the filing of this adversary proceeding portray an effort to move forward with litigation against the various defendants either in ignorance of or in disregard for the rights and duties of the Former Trustee, choosing apparently to treat the causes of action as if they were the personal exempt assets of the Debtors. RJM acknowledges that "to be candid, I do not recall if I contacted the Trustee prior to filing the action in his name." (*See* Affidavit of RJM sworn to October 1, 1996 at ¶ 11.)[4]

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[4] The Court notes that on February 7, 1995, RJM commenced an almost identical adversary proceeding on behalf of the Debtors as plaintiffs which adversary proceeding was later dismissed by Order dated May 25, 1995, because the Debtors lacked standing to personally

Finally, RJM asserts that while the Former Trustee's motion to have him appointed as special counsel was pending the adversary proceeding was settled. Nevertheless, he contends that he was the driving force behind the settlement and, therefore, he is entitled to the $3,333.33 which represents the one third called for in the Retainer Agreement.

As the Court has indicated, RJM can be compensated only if the Court grants that portion of his motion seeking *nunc pro tunc* appointment pursuant to Code § 327(a).[5] *Nunc pro tunc* appointment of professionals has never been favored in the Second Circuit. *See In re Rogers-Pyatt Shellac Co.*, 51 F.2d 988 (2d Cir. 1931); *In re Futuronics Corp.*, *supra,* 655 F.2d at, 469. This Court has consistently held that *nunc pro tunc* appointment is available only where there is a showing of excusable neglect or unavoidable hardship. *In re French*, *supra,* 111 B.R. at 394; *In re Ochoa*, 74 B.R. 191, 195-96 (Bankr. N.D.N.Y. 1987); *In re Northeast Dairy Co-Op Federation, Inc.*, 74 B.R. 149, 155 (Bankr. N.D.N.Y. 1987). While the definition of excusable neglect arguably has been somewhat broadened by virtue of the United States Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S.380, 113 S.Ct. 1489, 123 L.Ed.2d, 74 (1993) that case did not involve the "*per se"* rule dealing with the appointment of professionals, but rather with the late filing of proofs of claims pursuant to Federal Rule of Bankruptcy Procedure 9006. The Supreme Court broadened the definition of excusable neglect to include "inadvertence, mistake or carelessness". Recently the Supreme Court's broadened definition of excusable neglect was applied in a professional

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maintain the adversary proceeding.

[5] RJM appears to also hold the view that it is the Court's "policy" which prohibits payment of professional fees in the absence of an order of appointment rather than the clear mandate of Code §§ 330(a) and 331.

appointment context by Bankruptcy Judge Stuart Bernstein in *In re 245 Associates, LLC,* 188 B.R. 743 (Bankr. S.D.N.Y. 1995). *See contra*., *In re Franklin Sav. Corp.,* 181 B.R. 88, 89 (Bankr. D.Kan. 1995), *In re Berman*, 167 B.R. 323, 324 (Bankr. D.Mass. 1994).

Even assuming arguendo that the expanded definition of excusable neglect found in *Pioneer* should have relevance in considering applications for appointment of professionals, it is not clear that RJM should succeed on a *nunc pro tunc* basis beyond the date that the Former Trustee initially filed his motion seeking appointment of special counsel. The Supreme Court analyzed five factors in *Pioneer*, not all of which have relevance to the appointment of professionals. Of the pertinent factors, however, it would appear that RJM cannot meet the criteria implicit in (1) length of delay, (2) whether the delay was beyond RJM's reasonable control, and (3) whether RJM acted in good faith.

The civil action in the District Court was dismissed after consideration of the Defendants' defenses that the Debtors lacked standing to maintain the action. Even before the District Court had finally disposed of the civil action, the Debtors individually commenced an adversary proceeding containing similar, if not identical, causes of action in this Court which was subsequently dismissed again based upon a lack of standing of the Debtors. RJM never sought appointment as special counsel in connection with that adversary proceeding.

Undaunted, on June 6, 1995, this second adversary proceeding was commenced, this time ostensibly in the name of the Former Trustee, though RJM acknowledges that he can't recall ever contacting the Former Trustee **before** commencing the second adversary proceeding in his name as Plaintiff. Finally, RJM points to a motion filed by the Former Trustee seeking his appointment as special counsel which motion was apparently abandoned when serious settlement discussion

ensued.

Upon consideration of all of the facts presented, the Court concludes that RJM's failure to obtain appointment as special counsel does not rise to the level of "excusable neglect", even under the Supreme Court's broadened definition for the period that preceded September 11, 1995.

As to the period of time after the Former Trustee filed his motion and sought to appoint RJM as special counsel, the Court believes and has consistently held that *nunc pro tunc* appointment is appropriate from that point forward because appointment, or lack thereof, is truly beyond the control of the professional.

Having reached this conclusion and having already concluded that the Retainer Agreement has no binding effect on the Debtors' estate, this Court shall evaluate RJM's services utilizing the so-called "lodestar" analysis - the professional's hourly rate multiplied by a number of compensable hours rather than the one third contingency fee arrangement reflected in the Retainer Agreement. That evaluation shall commence with services rendered on or after September 11, 1995.

In order to perform the "lodestar" analysis, RJM will have to provide the Court with contemporaneous time records prepared in accordance with Rule 216.1 of the Local Bankruptcy Rules for the Northern District of New York.[6] Toward that end, the Court, rather than denying the instant motion with prejudice, will permit RJM to supplement the motion by filing and serving upon the parties who have appeared in opposition within thirty (30) days of the date of this Order, contemporaneous time records for the period September 11, 1995 through December

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[6] The Court notes that even if it had initially appointed RJM on the basis of a one third contingency fee, it would have nevertheless required the submission of contemporaneous time records with any fee application.

3, 1996, for services rendered in connection with this adversary proceeding. The adverse parties shall then have a period of fifteen (15) days to file with the Court and serve on RJM any objections to the time records. There shall be no further oral argument before the Court.

IT IS SO ORDERED.

Dated at Utica, New York

this 24th of February 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge