

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

ESSEX PARKING, INC.  
d/b/a Shoppers Garage

CASE NO. 94-61471

Debtor

Chapter 11

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APPEARANCES:

MEGGESTO & BADERA  
Attorneys for Debtor  
319 E. Water Street  
Syracuse, New York 13202

KIMBERLY SLIMBAUGH, ESQ.  
Of Counsel

GUY VAN BAALEN, ESQ.  
Assistant U.S. Trustee  
10 Broad Street  
Utica, New York 13501

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

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

These contested matters involve two Fee Applications filed in the within chapter 11 case, one by the law firm of Meggesto & Badera (“M&B”) and the other by Daniel Michel (“Michel”), an accountant. M&B was appointed as counsel to Essex Parking, Inc. (“Debtor”) pursuant to an Order of the Court dated June 2, 1994, while Michel was appointed as Debtor’s accountant by an Order dated July 20, 1994.<sup>1</sup>

Both Fee Applications initially appeared on the Court’s motion calendar at Syracuse, New

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<sup>1</sup> The M&B Application covers the period December 1, 1994 through January 20, 1997 and seeks a fee of \$13,529.50 and expenses of \$514.52. The Michel Application covers the period June 1994 through June 1996 and seeks a fee of \$3,030.21.

York on March 18, 1997 and were thereafter consensually adjourned from time to time until May 20, 1997. At that time the matters were submitted for decision. The United States Trustee (“UST”) opposes both Fee Applications.

### **JURISDICTIONAL STATEMENT**

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

### **DISCUSSION**

The objections of the UST fall into three specific categories. The first is based upon Local Rule 216.2(a) of the Local Bankruptcy Rules for the Northern District of New York (effective January 1, 1995)(“LR”). The LR requires that unless the Court fixes a time limit by which a final fee application must be filed, such application “must be filed within 90 days after entry of a final order confirming a plan or such fees and expenses shall be deemed to be waived.”

The UST’s second objection finds its basis in LR 216.1(a)(3)<sup>2</sup> which requires any fee application to contain a factual explanation of the service performed, the results obtained and the size of the estate. The instant Applications appear to be a final Applications since this chapter 11 case, which was filed May 24, 1994, confirmed its chapter 11 plan by Order dated September

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<sup>2</sup> Effective April 15, 1997, Local Rules 216.1 and 216.2(a) were renumbered as Local Rule 2016-1.

4, 1996. Finally, the UST contends that at least insofar as M&B's Application is concerned, it must bear responsibility "for [the] apparent failure on the part of the debtor in failing to consummate a plan from the 'get go'." (Objection of the UST dated March 11, 1997 at ¶ 7.)

It would seem appropriate that unless the Court gets beyond the initial objection of the UST there is no need to consider the remaining two. The UST asserts that the Fee Applications, filed February 25, 1997, were filed some five and one half months after the order of confirmation and, therefore, are time barred from Court consideration by the waiver provision of LR 216.2(a).

M&B, responding to the UST's objection to its Fee Application, asserts that the late filing of the Application was due "to implementation of new computer network and software system," which apparently resulted "in a majority of the billing information being lost and/or unretrievable in the current system." *See* Affidavit of Kimberly A. Slimbaugh, Esq., sworn to the 4th day of April 1997 at ¶ 10). Neither M&B nor Michel, however, offer any explanation for the delay in the filing of the Michel Application. Presumably, because of the delay experienced by M&B with regard to its own Fee Application, it opted not to file Michel's Application either. A circumstance that this Court will not hold Michel accountable for.<sup>3</sup>

An examination of LR 216.2 entitled "Application for Final Compensation" and the "Comment" thereto indicate that the primary purpose of LR 216.2, particularly subsection (a) is "to clarify that professionals who are required to be appointed by the Court in order to be paid must receive Court approval of fees and expenses for service rendered during the case, before the case is closed, or forfeit any legal right to payment." *See* LR 216.2. While the LR on its face

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<sup>3</sup> It is clearly apparent that while Michel prepared his own time records, the Fee Application and accompanying Notice of Motion were prepared and filed by M&B.

appears to compel the Court, without discretion to cut off a professional's right to final compensation for services rendered at the end of a 90 day period commencing with the date of the order confirming the plan, such an interpretation would seem to run afoul of the spirit, if not the letter, of Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 9029(a)(2). While that Rule deals with a violation of local rules which prescribe specific form rather than substance, the intent of Rule 9029(a)(2) is to prevent a denial of a valuable right "because of the nonwillful failure to comply with the requirement." *See* Fed.R.Bankr.P. 9029(a)(2).

In these contested matters, the UST urges the Court to enforce LR 216.2(a), apparently, without regard to the willfulness of M&B's violation (though as an aside, the UST does assert that M&B provides no basis upon which this Court might invoke its "equitable powers" to support a finding of excusable neglect). In response to the position of the UST, M&B argues, as indicated, that its failure to seek fees within 90 days of confirmation was due to a computer failure, a circumstance presumably beyond its control.

A reading of the Comment to LR 216.2(a) leaves the Court with the impression that the use of mandatory language in the LR itself is misplaced. The Comment infers that the intent of the LR is simply to insure that a final application is filed before the case is closed. The LR itself then fixes an artificial deadline of 90 days.<sup>4</sup>

While the Court should not and will not condone lax adherence to LR 216.2(a), other than delay in the closing of the chapter 11 case, the Court can find little if any prejudice occasioned by M&B's delay to any party other than the professional itself. The Court cannot read the LR

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<sup>4</sup> It is noted that LR 322 fixes a deadline of 180 days from the date of the order of confirmation within which the filing of debtor's report of substantial consummation must occur.

as mandating a mechanical denial of a fee application for failure to meet the 90 day deadline where, as here, the professional offers an unchallenged explanation for the delay, and the delay amounts to only an additional two and one half months beyond what LR 216.2(a) allows.

Turning to the UST's criticism of the content of both Fee Applications, the Court must agree that the narrative provided in both Applications falls well below that necessary to comply with LR 216.1(a)(3), or for that matter, the UST's Fee Application Guidelines promulgated on January 30, 1996. While it may be argued that the Court will be provided with a narrative if it simply reviews the time records appended to the Fee Applications, that is not a substitute for compliance with the LR or the Guidelines.

Finally, the UST argues that the overall feasibility of the Debtor's Plan is suspect as a result of certain post-confirmation failures in the payment of priority claims and suggests that M&B should take responsibility for those failures. M&B strenuously disagrees with the position of the UST contending that it duly advised the Debtor of its obligations under the Plan, which is all that it is required to do.<sup>5</sup> While the Court agrees that 11 U.S.C. § 330(a)(3)(C) does require a showing of benefit of professional services to the completion of a case, the Court rejects any notion that a professional is the insurer of the debtor's ability to comply with a confirmed plan. *See In re James Contracting Group, Inc.*, 120 B.R. 868, 872 (Bankr. N.D.Ohio 1990)

Having considered all of the foregoing, the Court will approve the Fee Application of M&B in the sum of \$9,000, with the balance to await the filing and service upon the UST of an

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<sup>5</sup> The Court notes that on September 2, 1997, Key Bank, Debtor's major secured creditor, moved for relief from the stay. That motion appeared on the Court's September 23, 1997 motion calendar and was unopposed, suggesting perhaps that the Debtor's reorganization is in grave jeopardy.

amended final application, which shall comply with LR 216.1(a)(3), within 30 days of the date of this Order. The Court will approve payment of M&B's disbursements in the full amount of \$514.52.

With regard to the Fee Application of Michel, the Court notes that it fails to comply not only with LR 216.1(a)(3), but (a)(4) as well, in that the format in which contemporaneous time records are presented makes the Court's evaluation of the reasonableness of the time allocated to a particular service very difficult. The Court will, however, award the sum of \$2,000, with the balance to await the filing and service upon the UST of an amended fee application, which shall comply with LR 216.1(a)(3) and (4), within 30 days of the date of this Order.

IT IS SO ORDERED.

Dated at Utica, New York

this 1st day of October 1997

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge