UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HI-LITE STRIPING CO., INC. — CASE NO. 93-60014

Debtor — Chapter 11

APPEARANCES:

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

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

The Court considers herein the Interim Application For Allowance For Services Rendered By Professional ("Interim Application") filed in this Chapter 11 case by Firley, Moran, Freer & Eassa, P.C. ("Firley") appointed as accountants for Hi-Lite Striping Co., Inc. ("Debtor") by virtue of an Order dated March 18, 1993. The Interim Application covers the period July 1, 1993 through May 31, 1995, and seeks a fee of $17,028.50 and reimbursement of expenses in the amount of $369.47.

The Interim Application first appeared on this Court's motion calendar on November 28, 1995, and was thereafter consensually adjourned from time to time until February 27, 1996. The United States Trustee ("UST") has filed an Objection to the Interim Application. Firley filed a Supplementary Affidavit on

February 26, 1996, and as of that date the Court reserved decision on the Interim Application.

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)(A) and (B).

ARGUMENTS

The thrust of the UST's Objection is based upon Firley's non-disclosure in both its affidavit seeking appointment and the Interim Application, of its relationship with five Debtor affiliated companies, at least three of whom appear to hold pre-petition claims against the Debtor.

The UST contends that the level of non-disclosure here, even though arguably resulting from gross negligence, strips Firley of the "disinterested person" status required by §101(14) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") and casts Firley in the role of a professional holding an interest adverse to the Debtor, thus prohibiting appointment pursuant to Code §327(a). In addition, the UST asserts that Firley by virtue of its lack of disclosure prevented the Court from considering these facts at the time of its appointment. Finally, the UST argues that the duty of disclosure is a continuing one and the consequence for non-disclosure is a denial of all fees.

Firley, in a supplementary affidavit, asserts that it

performed only "limited pre-petition services" for the affiliated companies relating primarily to the preparation of tax returns. With regard to the post-petition period, Firley acknowledges preparing tax returns for three affiliated companies. (See Supplementary Affidavit of Bruce M. Pietraszek sworn to February 23, 1996 at ¶ 8 and 10.) Firley also opines that it was necessary for it to examine the financial backgrounds of these affiliated companies in order to ascertain the financial condition of the Debtor.

Finally, Firley asserts that its non-disclosure was due to its inexperience, that it certainly did not intend to hide any facts and that no actual conflict of interest existed.

DISCUSSION

As the UST points out in its Objection, this Court in prior decisions has rejected the argument that a violation of the duty of disclosure requires per se a denial of all fees. In re Eagle Rock Dairys, Inc., (In re William Michael Bargabos and Christine D. Bargabos) (Case No. 92-63813, May 9, 1995) and In re Mett Management) (Case No. 93-61100 Sept. 7, 1995).

As indicated in its prior decisions, this Court believes that non-disclosure "brings upon the non-complying professional a full and complete inquiry by a bankruptcy court aimed at determining why full disclosure was not made and whether or not the professional had a conflict of interest which would have been otherwise obvious had full disclosure been made." In re Eagle Rock

Dairys, Inc., supra at pg. 10-11.

Here Firley asserts three grounds it asks the Court to consider in making the necessary inquiry. First, it performed only limited pre-petition services on behalf of Debtor's alleged affiliates. Second, that its failure to disclose was inadvertent since "the various Hi-Lite entities were thought of as a single client." (See Supplementary Affidavit of Bruce M. Pietraszek sworn to February 23, 1996 at ¶ 6). Third, that in order to provide accurate accounting advice to the Debtor, it was required to prepare and review post-petition tax returns for at least three alleged affiliates.

While the issues of non-disclosure and lack of disinterestedness are not limited in scope by the nature of the profession of the party seeking appointment pursuant to Code §327(a), the cases relied upon by the UST without exception involve non-disclosure by attorneys. Accountants are not attorneys, generally, and when called upon to provide services in a Chapter 11 case understandably rely upon the attorney seeking their retention to obtain their order of appointment. There is no proof here that Firley also misled Debtor's counsel in his preparation of the application for appointment, nor is there any proof that Firley affirmatively attempted to conceal its lack of disinterestedness. In fact, the contrary is evident from Firley's submission of time records which clearly revealed its conflict of interest.

Code §328(c) does not speak in mandatory terms and the discretion of a bankruptcy court to award (or not award) compensation due to conflict of interest or lack of

disinterestedness has been consistently upheld. See Rome v. Brownstein, 19 F.3d 54, 62 (1st Cir. 1994).

Upon consideration of all of the foregoing, the Court will first reduce the Interim Application by $3,130 which represents compensation sought for services for which the Court is unable to discern from the contemporaneous records a specific benefit to this Debtor or a relationship to the Chapter 11 case. Additionally, and as a discretionary sanction pursuant to Code §328(c) for non-disclosure, the responsibility for which must for the most part be laid at the doorstep of Firley, the Court will disallow an additional $5,000. Thus, the Court will award Firley a fee in the sum of $8,898.50, which shall be paid in accordance with the Debtor's plan of reorganization confirmed by Order of this Court dated February 9, 1995.

With regard to its claim for reimbursement of expenses, the Interim Application includes $369.47 which is identified as having been incurred for "other charges, travel; tax preparation, computer charge". The Court observes that this reference in no way complies with Rule 216.1(b) of the Local Rules of this Court and is, therefore, denied reimbursement subject to Firley's right to file a supplemental application detailing such expenses.

IT IS SO ORDERED.

Dated at Utica, New York
this 13th day of June 1996

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge