UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

KADENEZ CORPORATION — CASE NO. 96-62039

Debtor — Chapter 11

APPEARANCES:

STEVEN J. BLUMENKRANTZ, ESQ.
Attorney for Debtor
189 Main Street
Oneonta, NY 13820

WILLIAM F. LARKIN, ESQ.
Attorney for Internal Revenue Service
Assistant U.S. Attorney
U.S. Department of Justice
P.O. Box 7198
100 South Salina Street
Syracuse, New York 13261-7198

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

MEMORANDUM- DECISION AND ORDER

On November 10, 1997, the Court considered the Application For Allowance of Compensation and Expenses ("Fee Application") of Debtor's counsel, Steven J. Blumenkrantz, Esq. ("Blumenkrantz"), which Application sought approval of a fee of $5,780.75 and reimbursement of expenses in the amount of $1,074. Also before the Court on the aforementioned date was Blumenkrantz's motion for modification of the Court's Order of December 5, 1996, appointing Blumenkrantz as counsel to the Debtor effective September 6, 1996. The motion seeks an effective date of appointment as of May 29, 1996.

While no formal objection was interposed to either motion, the Internal Revenue Service

("IRS") did assert an objection to payment of the requested fees and disbursements until the administrative tax claim of the IRS is paid in full, pursuant to the Debtor's confirmed Chapter 11 plan.[1]

A review of the Fee Application indicates that while it seeks to approve a fee of $5,780.75, Blumenkrantz has previously applied a total retainer of approximately $4,000 to his fees during the course of the Chapter 11 case without seeking any approval from this Court to do so.

The motions present two significant issues, the first deals with the propriety of an attorney applying a pre-petition retainer to his fees post-petition in the absence of an application to a bankruptcy court pursuant to §§ 330 or 331 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). The second is the basis for Blumenkrantz seeking a *nunc pro tunc* appointment approximately one year after the entry of the order of appointment.

Considering the application of the retainer first, the Court notes that there appears to be some confusion as to the amount of that retainer. In Blumenkrantz's Application for Order Approving Employment of Attorney ("Appointment Application") filed with the Court on December 5, 1996, he asserts at ¶ 5 that he received a retainer of $6,000 on April 26, 1996. Attached to the Appointment Application is the retainer agreement which reiterates the payment of a $6,000 retainer. The Fee Application, however, references the deposit of a retainer in Blumenkrantz's escrow account on April 26, 1996 of only $4,000 with an apparent return of $1,500 of the retainer to the Debtor on June 20, 1996 (approximately 2 months post-petition), to

---

[1] Debtor's Chapter 11 Plan was confirmed by Order of this Court dated December 16, 1997.

enable Debtor to pay a utility bill. The Court will assume that the total retainer received by Blumenkrantz was $6,000, of which $1,500 was ultimately returned to the Debtor.

The law generally provides that an attorney may not apply a pre-petition retainer to services rendered post-petition to a Chapter 11 debtor in the absence of an application and order from a bankruptcy court.[2] *See* Code § 329(a), *In re Hathaway Ranch Partnership*, 116 B.R. 208, 217 (Bankr. C.D. Cal. 1990); *In re McDonald Bros. Const. Co.*, 114 B.R. 989, 1000 (Bankr. N.D. Ill. 1990); *In re Burnside Steel Foundry*, 90 B.R. 942, 944 (Bankr. N.D. Ill. 1988). Thus, it would appear that post-petition application of any part of the retainer by Blumenkrantz to his fees in the absence of a Court order was unauthorized. The Court presumes, however, that such application by Blumenkrantz was inadvertent and does not warrant any disgorgement at this time.

Turning to the second motion filed by Blumenkrantz, it is urged that the Court amend its Order of December 5, 1996, to make his appointment effective May 29, 1996. In support of the motion, Blumenkrantz alleges that he filed his Application for appointment and a proposed order with the Court and the U.S. Trustee on the May 29th date, that the application was returned by the U.S. Trustee approximately one month later for some minor corrections and was resubmitted "On or before September 1996." (See Blumenkrantz Affidavit sworn to October 22, 1997). Thereafter, the Court executed the proposed order on December 5, 1996 making Blumenkrantz's appointment effective September 6, 1996. It does not appear that Blumenkrantz objected to the effective date of his appointment until he filed the instant motion, almost one year later. In addition, he seems to infer that the delay in considering his appointment as Debtor's counsel was

---

[2] Without engaging in any detailed analysis, the Court will presume that $6,000 received by Blumenkrantz constitutes a security retainer.

somehow due to an administrative oversight by both the U.S. Trustee and the Court, yet Blumenkrantz acknowledges that on June 28, 1996, he had the application returned to him by the U.S. Trustee for "some minor corrections", but did not resubmit the corrected application until "On or before September 1996," (it appears the actual resubmission date was September 6, 1996). approximately two months later. In fact, the Court appointed Blumenkrantz *nunc pro tunc* to September 6, 1996. It finds no basis, however, to reconsider that date on the papers presented in connection with this motion.

Absent prior Court approval pursuant to Code § 327, 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 462 (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 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).

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, 195-196 (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. Recently, however, the Supreme Court's broadened definition of excusable neglect was applied in a professional appointment context by Bankruptcy Judge Stuart Bernstein in *In re 245 Associates, LLC*, 188 B.R. 743 (Bankr. S.D.N.Y.). *See contra, In re Franklin Sav. Corp.*, 181 B.R., 88, 89 (Bankr. D. Kan. 1995); *In re Beman*, 167 B.R. 323, 324 (Bankr. D. Mass. 1994).

Assuming arguendo that the expanded definition of excusable neglect is applicable to the appointment of professionals, it is not clear that Blumenkrantz can meet the criteria established by the Supreme Court in *Pioneer* to wit: the length of delay and whether the delay was beyond Blumenkrantz's reasonable control. Clearly, the delay between the return of the application to Blumenkrantz by the U.S. Trustee on or about June 28, 1996, for some minor corrections, and its resubmission on September 6, 1996, would not constitute excusable neglect and had the application been promptly resubmitted to the Court and the U.S. Trustee in early July, the Court may very well have considered an appointment effective May 29, 1996.

Having concluded that it will not amend the Order of Appointment dated December 5, 1996, the Court will reduce the Fee Application by 20.85 "per se" hours (6.1 hours attributable to Blumenkrantz and 14.75 hours attributable to a paralegal) incurred between May 1, 1996 and September 6, 1996 or a total of $1,647.50.

Analyzing the Fee Application from a substantive perspective, the Court notes that several of the "paralegal" entries appear to constitute services of a purely clerical nature, such as, "Letter to clients," "Filed Certificate of mailing Order and Notice with Court," "faxed mortgage, etc. to Attorney Angelo Peter Romas." In addition, it appears that both Blumenkrantz and the paralegal were billing for attendance at the same event, i.e., Code § 341 meeting of creditors and Status

Conferences required by the Court. In light of the total fee request, the fact that this is a confirmed chapter 11 case and infrequency of these entries, however, the Court will not make any downward adjustment. Turning to the request for reimbursement of expenses, the Court will approve the sum of $1,074.

With regard to the concern raised by the IRS, the Court agrees that pursuant to Code § 503(b), Blumenkrantz's fees and expenses share the same level of priority as the IRS administrative tax claim and neither claim can be paid to prejudice of the other.

Thus, the Court will approve total fees of $4,133.25 and total reimbursable expenses of $1,074. The Court will credit the Debtor with payment of a retainer of $4,500[3], thus entitling Blumenkrantz to the additional sum of $707.25.

IT IS SO ORDERED.

Dated at Utica, New York

this 9th day of February 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[3] The Court arrives at this figure by assuming a total retainer paid of $6,000 less a $1,500 refund of that retainer on June 20, 1996.