UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

KENNEDY SQUARE ASSOCIATES LIMITED PARTNERSHIP	CASE NO. 96-62274 Chapter 11

Debtor

APPEARANCES:

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER Attorneys for Kennedy Square Associates 1400 First Federal Plaza Rochester, NY 14614	JOHN T. SULLIVAN, ESQ. Of Counsel
GUY A. VAN BAALEN, ESQ. Assistant U.S. Trustee Office of the U.S. Trustee 10 Broad Street, Room 105 Utica, NY 13501	
MARTIN, MARTIN & WOODARD, LLP 1 Lincoln Center, Suite 300 Syracuse, NY 13202	LEE E. WOODARD, ESQ. Of Counsel

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

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

The Court has before it the first and final fee application of Phillips, Lytle, Hitchcock, Blaine & Huber ("Phillips Lytle") filed with this Court on May 14, 1997.[1] Phillips Lytle having been approved as Debtor's counsel, pursuant to an Order of the Court dated December 3, 1996

[1] The fee application is styled as a supplemental application dated 4/14/97. The Court will focus on the instant application.

("appointment order"), which became effective on June 18, 1996, the date on which Phillips Lytle filed a motion for appointment. Pursuant to Section 327(c) of the Bankruptcy Code. (11 U.S.C.§§101-1330) ("Code").

The fee application covers the period April 1, 1996 through February 28, 1997 and seeks a fee of $107,962 and disbursements of $5090.88. It first appeared on the Court's calendar at Syracuse on June 3, 1997 and thereafter adjourned on several occasions and was finally submitted for on July 22, 1997. The Court made a provisional award of fees in the sum of $50,000 on June 3, 1997. The balance of the fee request is the subject of this decision.

JURISDICTIONAL STATEMENT

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

FACTS

The Fee Application seeks compensation for a period of time which follows the filing of the Debtor's petition on May 13, 1996, but prior to the effective date of Phillips Lytle's appointment on June 18, 1996, the Court has identified and proposed to disallow that portion of the entire fee application amounting to $32,252.42. In addition fee application seeks fees in the sum of $2500 which Court identifies as purely clerical time owed $10,290 as what it identifies as travel time. Finally, the Court was unable to pass upon reimbursibility of Phillips Lytle

expenses because they were not as itemized as required by Rule 216.1(b) of the Local Bankruptcy Rules of this Court.[2]

The Court allowed Phillips Lytle an additional period of time to file a supplemental application in response to the Court's criticism of the fee application. On July 21, 1997, Phillips Lytle filed the supplemental application together with a Supplemental Affidavit of John T. Sullivan, Esq., a member of Phillips Lytle, on July 21, 1997 and August 4, 1997, respectively.[3] The United States Trustee ("UST") filed an objection to the fee application on May 26, 1997.

DISCUSSION

The UST alleges that Phillips Lytle is seeking approval of its fees "nunc pro tunc to April 25, 1996", even though by letter dated August 23, 1996 and the Appointment Order Phillips Lytle was well aware that the Court would not approve any fees for services rendered prior to June 18, 1996, the date on which Phillips Lytle moved for appointment.

The UST rejects Phillips Lytle's argument that but for its simultaneous representation of Marine Midland Bank which froze the Debtor's bank accounts post petition, and then subsequently released them, it would have sought appointment in this case much earlier. The UST suggests that the delay was of Phillips Lytle's own making and it should not now be able to charge the estate with the loss of fees that resulted. Finally, the UST points out that Phillips Lytle's Fee Application seeks full hourly rates for travel time in violation of the general policy

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[2] Local Rule 216.1(b) has been renumbered to Local Rule 2015-1.

[3]. It does not appear that debtor of these documents were served upon the UST.

of this Court.

Phillips Lytle reiterates its contention that the delay in its appointment was due solely to a potential conflict of interest which resulted when marine Midland Bank, Debtor's depository bank and a primary client of Phillips Lytle, froze the accounts of the Debtor post petition because it alleged that the Debtor partnership was violating New York State Law in failing to register with the New York Secretary of State. Apparently upon being advised by Phillips Lytle that its position untenable, Marine released the accounts and the potential conflict of interest disappeared.

In its Supplemental Application filed on July 21, 1997, Phillips Lytle for the first time seeks a bonus fee award of $30,000, citing the successful reorganization of the DIP which "required negotiation of these varied and complex interests and developing a successful legal strategy to resolve the conflicting legal rights and expectations of these private and public interests, satisfactory to each, which would allow a consensual plan to be approved, pursuant to Title 11USC §1129(a)." (*See* Affirmation of John T. Sullivan Esq. dated July 18, 1997 at ¶ 18). In addition, Phillips Lytle asserts that the Debtors reorganization became priority work for the firm due to the limited time frame which resulted directly from the borrowing commitments of various lenders.

Phillips Lytle, on August 4, 1997, filed a Supplemental Affidavit of John T. Sullivan, Esq. dealing with the itemization of expenses in order to comply with Local Rule 216.1(b).

Code § 327(a) authorizes a debtor to employ one or more professionals, including attorneys and accountants, with the bankruptcy court's approval. Prior to any award of interim or final compensation, however, a professional's employment must be approved by the

bankruptcy court. This approval must occur before any compensable services are rendered to the estate. *See In re Rainbow Press of the Fredonia,* 197 B.R. 428, 429 (Bankr. W.D.N.Y. 1996); *In re 24J Assocs LLC*, 188 B.R. 743, 749 (Bankr. S.D.N.Y. 1995). This is true regardless of whether any pre-approval services were rendered in good faith and were beneficial to the estate. *See In re Sapolin Points Inc.*, 38B.R. 807, 817 (Bankr. E.D.N.Y. 1984).

In the Second Circuit this "per se" rule prohibiting payment to professionals for services rendered to the estate prior to approval by the court has been applied strictly. *See In re Futeronics Corp.,* 655 F.2d 463, 469, (2d Cir. 1981) cert. denied 455 U.S. 941, 102 S.Ct. 1435, 71 L.Ed. 2d 653 (1982); *In re Sapphire Steamship Lines,* 509. F.2d 1242, 1245-46; *In re Robotics Resources R2 Inc.,* 117 B.R. 61, 62 (Bankr. D. Conn. 1990); *In re French,* 111 B.R. 391, 394 (Bankr. N.D.N.Y. 1989); *In re Cuisine Magazine Inc.,* 61 B.R. 210, 216-17 (Bankr. S.D.N.Y. 1986).

Despite the apparent rigidity and harsh consequences of the "per se" rule, certain exceptions have been acknowledged. This Court has recognized the "excusable neglect" or "unavailable hardship" exception to the "per se" rule. *See In re Northeast Dairy Co -Op Federation Inc.,* 74 B.R. 149, 155 (Bankr. N.D.N.Y. 1987); *In re Ocha,* 74 B.R. 191, 195 (Bankr. N.D.N.Y. 1987). Additionally, the United States Supreme Court has had occasion to interpret the term " excusable neglect" in *Pioneer Investment Services Co-Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 113 S.Ct. 1489 123 L.Ed. 2d 74 (1993) as that term is used in Rule 9006 (b)(1) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") regarding late claims. At least one bankruptcy court has applied the expanded definition of excusable neglect set out in Pioneer to professional employment applications. *See In re 245 Associates LLC*., 188 B.R. 743, 751 (Bankr.

S.D.N.Y. 1995). Finally, the Court acknowledges the liberal approval to "nunc pro tunc" employment adopted by Chief Bankruptcy Judge Michael Kaplan in *In re Piecuil,* 145 B.R. 777 (Bankr. W.D.N.Y. 1992). In sum, Judge Kaplan concluded that the bankruptcy court as a court of equity had considerable latitude where the explanation for one's failure to abide by the rule has been found reasonable.

Here the explanation provided by Phillips Lytle for its failure to obtain appointment pursuant to Code § 327 until June 18, 1996, was essentially that until its client, Marine Midland Bank released the Debtor's bank accounts, it had at least a potential conflict of interest. During the time period in question, May 13, 1996, the date of filing, through June 18, 1996, the date of appointment Phillips Lytle expended a total of 133.9 hours representing total fees of $21,168. In addition, during the same period the firm incurred expenses of $1,147.90.

While Phillips Lytle labels its conflict as potential, it would appear that until Marine Midland released the Debtor's bank accounts the conflict was very real. Had the conflict been potential, nothing would have prevented Phillips Lytle from moving for appointment pursuant to Code § 327(c).[4]

Conversely, if Phillips Lytle's conflict was actual as it appears to have been, then it would have been ineligible to represent the Debtor and appointment pursuant to Code § 327(a) or (c) would have been unavailable. *See In re Michigan General Corp.*, 77 B.R. 97 (Bankr. N.D. Tex. 1987) (the attorney must not be or represent a party that has an economic interest in rival claim with or bias against the estate).

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[4] The Court acknowledges that Marine Midland Bank was apparently not a creditor of the Debtor at the time it froze the Debtor's bank account, but that it did not prohibit the filing of a motion pursuant to Code § 327(c).

Clearly this is not a case in which a professional has simply overlooked the need for appointment and is now met with the rigors of the "per se" rule. The Court need not analyze Phillips Lytle's application from the perspective of "excusable neglect". Rather this is a case in which the professional on the date of filing or shortly thereafter represented a client who arguably engaged in an intentional violation of the stay imposed by Code § 362(a) by freezing the Debtor's bank accounts for a purpose other than preserving its ability to exercise a right of setoff.

Thus, the Court must conclude that Phillips Lytle's fee application must be reduced by the sum of $12,168. in fees. Those fees being attributable to a period of time during which Phillips Lytle could have not served as Debtor's counsel.

The Court noted three other areas of concern at the hearing held on June 3, 1997. The first being some 63 hours devoted to the preparation of the instant Fee Application for which Phillips Lytle seeks approximately $8,800; the second being Phillips Lytle's request for reimbursement of its travel time after June 18, 1996 at its full hourly rate, the sum of $10,290; and, finally, fees amounting to approximately $2,500 for what appear to be largely clerical services.

With regard to the services devoted to the preparation of applications for appointment and the instant Fee Application, the Court notes that of the $8,800 total request, $2,297.50 must be subtracted as that amount has already been deducted by virtue of the "per se" adjustment. As to the remaining $6,502.50, the Court will reduce that amount by $2,000, thus allowing Phillips Lytle the sum of $4,502.50 in connection with the preparation of employment and fee applications. *See* Code § 330(a)(6).

As regards reimbursement for travel time, this Court approves compensation at not more

than one half the professional's hourly rate absent a showing that the professional has been able to render actual professional service while traveling to a court site. Phillips Lytle has made no such showing here and given the distance between the Courthouse facility and its Rochester, New York office, it is doubtful that any significant professional services were rendered while enroute. The ottal hours devoted to travel after June 18, 1996 by one half and reduce the Fee Application by $5,145.

Finally, the Court will accept Phillips Lytle's explanation for what appears to be clerical services and make no adjustment to that amount.

Turning to Phillips Lytle's request for reimbursement of expenses it has filed on August 4, 1997, an itemization of expenses which supports a reduced request of $2,952.75. It suggests that it is unable to itemize the remainder of the $5,090.88 it initially requested. Upon review of the itemization, the Court approve the sum of $2,952.75 to include the filing fee of $800 disbursed on May 13, 1996.

Finally, the Court turns to Phillips Lytle's request for a bonus or fee enhancement of $30,000 for the reasons set forth in the Affirmation of John T. Sullivan, Esq., dated July 18, 1997. Courts have traditionally approved a bonus where the professional can establish (1) exceptional results have been obtained (2) novelty and difficulty of factual and legal questions presented (3) skill, efficiency and experience of attorneys who were committed to effort (4) delay in payment and (5) risk of contingent payment assumed by counsel. *In re Churchfield Management & Trust Corp.,* 98 B.R. 838 (Bankr. N.D. Ill. 1989).

In support of its bonus request, Phillips Lytle cites the overall successful reorganization of the Debtor whose primary assets consisted of 18 multi-family low, medium and highrise

houses containing 409 apartments rented to the public on five city blocks in the City of Syracuse, New York. Phillips Lytle refers to the Debtor's need to obtain new financing, negotiate with its tenants Association, its utility provider and the state and federal bureaucracies with a relatively short time frame as imposing upon it the need to prioritize the Debtor's Chapter 11 case. Additionally, and thought not alleged, it is apparent that Phillips Lytle incurred both a delay in payment and to some extent a risk in payment despite the receipt of the $25,000 retainer.[5] The Court also notes that the Tenants Association while not filing any written response to the Fee Application has supported it orally by appearance of its counsel at hearings on June 16, 1997 and July 22, 1997. Having considered all of the foregoing, the Court will approve a fee enhancement or bonus of an addition 15% of the total fee approved.

Based upon the foregoing, it is

ORDERED that Phillips Lytle shall be awarded a total fee of $79,649 together with reimbursement of expenses of $2,952.75, and it is further

ORDERED that Phillips Lytle shall be awarded a bonus of $11,947.35 and it is finally,

ORDERED that Debtor shall receive a credit of $15,070.50 for the pre-petition retainer[6] and $50,000 pursuant to the Order of this Court dated June 6, 1997, to the extent said sums have actually been received by Phillips Lytle.

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[5] The Court notes that Phillips Lytle's time records evidence some 57 hours of pre-petition time devoted to the Debtor's ultimate reorganization which consumed approximately $10,000 of the retainer.

[6] The retainer credit of $25,000 has been reduced by the sum of $9,929.50 for services rendered pre-petition since the Court finds that the actual conflict arose on or after the date of filing.

Dated at Utica, New York

this day of 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge