UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MICHAEL A. ST. DENIS
AMANDA K. ST. DENIS

CASE NO. 00-61123

Debtors

Chapter 11

APPEARANCES:

AK PROPERTIES, INC.
c/o KATHLEEN VANDERBILT
510 North Tioga Street
Ithaca, New York 14851

LESLIE N. REIZES, ESQ.
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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

Presently before the Court is an application filed on May 27, 2003 and supplemented on August 22, 2003, by AK Properties, Inc. ("AK") seeking the allowance of compensation and reimbursement of expenses (the "Application") in the amount of $31,247 for property management services rendered between February 1, 2001 through and including August 31, 2001 (the "Period"). Michael and Amanda St. Denis ("M. St. Denis" and "A. St. Denis," respectively,

and collectively, the "Debtors") filed an objection to the Application on June 23, 2003. An evidentiary hearing was conducted in Utica, New York on February 11, 2004, after which the Court provided the parties an opportunity to submit memoranda of law. The matter was submitted for decision on March 12, 2004.

JURISDICTIONAL STATEMENT

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

FACTS

The Debtors and Kathleen Vanderbilt ("Vanderbilt"), the president of AK, signed a management agreement (the "Agreement") on January 11, 2000. AK agreed to manage seventy-two rental units owned by the Debtors in Ithaca, New York in exchange for, *inter alia*, a fee of $2,500 per month, plus $50 for each lease renewal, half of one month's rent for each new lease, and $22 per hour for maintenance services plus the cost of materials. Agreement art. 2(f-1), 5 *admitted as* AK's Exhibit 1. The Agreement specifically required AK to perform, *inter alia*, the following services: collect and deposit rent payments; produce monthly statements of income and expenses; pay mortgages, taxes, and utilities; show vacant properties and screen potential tenants; and provide around-the-clock answering service. Agreement art. 2. Vanderbilt testified that the Agreement's compensation structure was below market when analyzed on a per-unit basis.

On May 13, 2000, the Debtors filed a voluntary petition under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). *In re St. Denis*, No. 00-61123, Doc. No. 1 (Bankr. N.D.N.Y. May 13, 2000). On May 12, 2000, the Debtors filed an application seeking to retain AK as property manager. *St. Denis*, Doc. No. 27, *admitted as* Debtors' Exhibit A. The application stated that AK would provide the array of services listed in the Agreement as well as tender advice in connection with the Debtors' plan of reorganization. *Id.* ¶ 5. The Court approved the retention of AK as the Debtors' property manager in an Order signed May 17, 2000. *St. Denis*, Doc. No. 27, *admitted as* AK's Exhibit 3. AK's first fee application was prepared and filed by the Debtors' attorney. *St. Denis*, Doc. No. 149, *admitted as* AK's Exhibit 2. On February 23, 2001, the Court approved AK's first application for compensation for the period of May 13, 2000 through and including January 31, 2001, allowing the full amount of its request of $23,055.25. *St. Denis*, Doc. No. 171.

Vanderbilt testified that during the post-petition period AK provided services that were beyond the scope of the Agreement. Specifically, AK provided Kenneth Perworchik ("Perworchik"), the Debtors' accountant, with property-specific income and expense statements to facilitate the preparation of the Debtors' tax returns and monthly operating reports filed with the Court and the United States Trustee's Office. Peworchik testified that the data submitted by AK was sufficient for preparing monthly operating reports, but insufficient for preparing tax returns. Perworchik added that the Debtors' failure to provide him with relevant financial data contributed to his failure to timely file post-confirmation monthly operating reports and tax returns.

The Debtors terminated AK in August 2001. M. St. Denis cited the high cost of AK's

services, particularly with regard to maintenance, as the reason for AK's termination. Vanderbilt testified that the Agreement provision that required AK to obtain the Debtors' consent for repairs over $250 was relaxed by oral modification. The Debtors denied this allegation and point to article 6(g) of the Agreement requiring modification to be in writing.

In the months leading up to the termination of AK, it is undisputed that the relationship among M. St. Denis and A. St. Denis and Vanderbilt had significantly deteriorated. During that period, the Debtors were in the midst of a divorce proceeding. Vanderbilt testified that she often received conflicting instructions from M. St. Denis and A. St. Denis, while the Debtors testified that they received complaints from tenants about AK's poor service.

Before turning over the management of the properties to the Debtors, Vanderbilt paid herself $31,247, the amount she believed AK was owed for the Period. Vanderbilt testified that after the Debtors' attorney ignored her request to file a final fee application on AK's behalf she sought the advice of three attorneys as well as Assistant U.S. Trustee Guy Van Baalen ("Van Baalen") regarding her right to compensation. These conversations led her to believe that paying herself was permissible. While Van Baalen recalled having spoken to Vanderbilt, he denied ever having advised her to pay herself. The Debtors then moved for disgorgement of Vanderbilt's unauthorized payment, which the Court granted in an Order dated March 20, 2002. *St. Denis*, Doc. No. 233. After Vanderbilt failed to comply with the March 20th Order and disgorge the funds, the Debtors moved for a contempt Order, which the Court granted June 12, 2002. *St. Denis*, Doc. No. 239. Both of these Orders were entered on default. Vanderbilt testified that she failed to appear at the hearings on the Debtors' disgorgement and contempt motions because she believed that she could not appear without counsel, which she could not afford.

The Debtors ultimately filed a claim against AK's surety and received $31,247.

DISCUSSION

A professional retained by a debtor pursuant to Code § 327, such as AK, is entitled to reasonable compensation under Code § 330. *In re Bennett Funding Group, Inc.*, 213 B.R. 234, 241-42 (Bankr. N.D.N.Y. 1997). According to this Court's Order approving AK's retention by the Debtors, AK was empowered to provide the array of services set forth in the Agreement as well as advise the Debtors in connection with their plan of reorganization. The May 17, 2000 Order provided that "any post petition fees to be paid and/or the reimbursement of expenses of said firm as property manager for the debtors in possession are subject to Court approval based on application to the Court."

The Debtors object to AK's Application because AK provided poor service, billed the Debtors for excessive maintenance costs in contravention of the Agreement, failed to provide records requested by Perworchik, and paid itself without Court approval. AK argues that its fees were reasonable and that it was a bankruptcy novice and paid itself on the basis of an erroneous belief.

AK's fee request is broken down as follows:

Monthly management fees ($2,500 for 7 months):	$17,500
New lease commissions:	$13,297
Lease renewals:	$ 450
Total:	$31,247

These fees comply with the Agreement and the Court finds that nothing for which AK billed the

Debtors contravenes the terms of the Agreement. In fact, AK was charging the Debtors a below-market per-unit fee. Moreover, AK did not even bill the Debtors for accounting services that were beyond the scope of the Agreement, though they may have been of questionable quality at times, according to Perworchik. Furthermore, none of the allegedly excessive maintenance charges about which M. St. Denis complained appear in the Application.

However, the Debtors' objection to the quality of AK's record-keeping services misses the point: AK was not hired to be the Debtors' chapter 11 accountant. Thus, AK should not be deprived of properly earned property management fees solely because it could not produce the number-perfect accounting data required by Perworchik for filing the Debtors' tax returns—it seems the Debtors themselves were deficient in that regard as well.

Without AK's services, the Debtors' fledgling real estate enterprise might have collapsed much sooner. Vanderbilt, caught between warring spouses, did her best to follow the Debtors' conflicting instructions and keep the business afloat while the pitch of their acrimony reached a cacophonous crescendo. Although the Debtors' objection portrays Vanderbilt as an embezzler, it is nothing but a thinly veiled attempt to deny AK compensation to which it was reasonably entitled. Instead of scapegoating Vanderbilt, the Debtors should have pondered the true source of their financial misfortune: their own interpersonal woes and their overextended real estate venture.

Despite the Debtors' contribution to AK's course of conduct, AK cannot expect to emerge from this proceeding without penalty, especially considering its admitted failure to comply with the Court's disgorgement and contempt Orders and the fact that its self-payment violated Code § 330 and § 331 as well as the unequivocal terms of the May 17, 2000 Order. Therefore, the

Court must determine whether to exercise its inherent power to sanction AK. *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1225 (3rd Cir. 1995); *In re Kliegl Bros. Universal Elec. Stage Lighting Co.*, 238 B.R. 531, 550 n.32 (Bankr. E.D.N.Y. 1999). The extent of a court's sanction for violating Code § 330 and § 331 is guided by the willfulness of the professional's conduct. *In re Downs*, 103 F.3d 472, 479 (6th Cir. 1996).

In this case, after AK was terminated by the Debtors, its repeated pleas to Debtors' counsel to prepare a final fee application were ignored, even though he prepared and filed AK's first interim application without qualm. Vanderbilt then claims she sought the advice of three, albeit unnamed and unretained, attorneys as well as Assistant U.S. Trustee Van Baalen, all of whom allegedly led her to believe that is was permissible for AK to pay itself before turning over custody of the Debtors' bank account. She then deducted AK's fee from the Debtor's account in violation of Code § 330 and § 331 as well as the provisions of the May 17, 2000 Order.

At the heart of Vanderbilt's violative conduct is her misguided frugality. She cited economic hardship as the reason why she failed to hire counsel to appear at the hearings on the Debtors' disgorgement and contempt motions; apparently, this is also the reason why she allegedly accepted off-the-cuff free legal advice as a blessing of AK's self-payment. Instead, Vanderbilt could have avoided the dispute *sub judice* by hiring—and paying—a competent bankruptcy attorney to consider AK's issue and file an application for compensation with the Court—a simple procedure, and one that would have cost a mere fraction of AK's fee for the Period.

As irresponsible and misguided as Vanderbilt's behavior was, the Court finds that her conduct was not blatantly willful and will not order full disgorgement of AK's fees. A sanction,

however minimal, regarding AK's conduct is certainly in order, especially considering AK's serial ignorance of the Court's Orders. Therefore, the Court will grant AK's Application in full less a sanction in the amount of $2,500, which shall be payable to the Debtors' attorney within forty-five days of the date of this Order.[1]

IT IS SO ORDERED.

Dated at Utica, New York

this 17th day of May 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[1] On March 25, 2004, the Court heard argument on the U.S. Trustee's motion to convert this case to one pursuant to chapter 7 of the Bankruptcy Code. That motion resulted in a conditional order which has not yet been entered on the docket of this case. In light of the current status of the case, the Court believes the sanction amount should be held by Debtors' counsel pending further orders of the Court.