

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) In Proceedings  
 ) Under Chapter 7  
KEVIN McFARLAND, )  
 ) No. BK 92-50074  
Debtor(s). )

OPINION

The instant bankruptcy proceeding was filed on January 24, 1992 under chapter 11 of the Bankruptcy Code. The case was subsequently converted to chapter 7. On March 4, 1993, debtor's former counsel, H. Carl Runge,<sup>1</sup> filed a petition for payment of attorney's fees. In the petition, counsel requests payment of \$4,831.00 in attorney's fees and \$613.00 in expenses. Mr. Runge, however, failed to file an application for approval of his employment prior to seeking compensation. At a hearing on the petition for fees held April 22, 1993, the Court granted counsel five days to submit authority in support of his position that he is entitled to compensation despite having failed to obtain approval of his employment. In response, counsel filed a motion for leave to file petition for approval of employment nunc pro tunc.

The Bankruptcy Code requires that an attorney file an application for employment before rendering the services for which he or she expects to be compensated. Section 327 provides, "Except as otherwise provided in this section, the trustee, **with the court's approval**, may employ one or more attorneys ... that do not hold or represent an interest adverse to the estate, and that are

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<sup>1</sup>Mr. Runge withdrew as debtor's attorney on February 2, 1993.

disinterested persons...." 11 U.S.C. § 327(a) (emphasis added).<sup>2</sup> Rule 2014 sets forth the procedure for obtaining approval of employment, and provides in part as follows:

An order approving the employment of attorneys ... or other professionals pursuant to § 327 ... shall be made only on application of the trustee.... The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, [and] any proposed arrangement for compensation....

Bankr. R. 2014(a). "Without court approval of employment, an application for compensation for professional services may be denied." In re Grabill Corp., 113 B.R. 966, 971 (Bankr. N.D. Ill. 1990), **aff'd**, 135 B.R. 835 (N.D. Ill. 1991). **See also** Lavender v. Wood Law Firm, 785 F.2d 247, 248 (8th Cir. 1986). "Noncompliance with section 327(a) and Bankruptcy Rule 2014(a) generally leads to forfeiture of compensation even to professionals who furnished valuable services to the estate." In re Grabill Corp., 113 B.R. at 971.

Nevertheless, a number of decisions have held that a bankruptcy court may, in its discretion, issue a nunc pro tunc order of appointment. **See, e.g.,** Matter of Triangle Chemicals, Inc., 697 F.2d 1280 (5th Cir. 1983); Stolkin v. Nachman, 472 F.2d 222 (7th Cir. 1972). While the Court agrees that it has discretion to do so, the Court also agrees that "nunc pro tunc approval is only appropriate in the most extraordinary circumstances." In re Land, 943 F.2d 1265, 1267 (10th Cir. 1991). "Such circumstances do not include the mere neglect of the

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<sup>2</sup>Section 327 is made applicable to a debtor-in-possession pursuant to 11 U.S.C. § 1107(a).

professional who was in a position to file a timely application." Ibbetson v. U.S. Trustee, 100 B.R. 548, 550 (D. Kan. 1989). Factors that the Court will consider in determining whether nunc pro tunc approval is justified include, but are not limited to, the following: (1) whether the applicant or some other person bore responsibility for applying for approval; (2) whether the applicant was under time pressure to begin service without approval; (3) the amount of delay after the applicant learned that initial approval had not been granted; and (4) the extent to which compensation to the applicant will prejudice innocent third parties. **Id.** at 550-51.

In the instant case, Mr. Runge states that the failure to file a petition for approval of employment "was due to inadvertence." Mere inadvertence is clearly not the type of "extraordinary circumstance" that would justify entry of a nunc pro tunc order approving counsels employment. In the absence of other circumstances, the Court cannot and will not grant counsel's untimely application for employment and request for attorney's fees.

Accordingly, IT IS ORDERED that counsel's petition for payment of attorney's fees filed March 4, 1993, and motion for leave to file petition for approval of employment nunc pro tunc are DENIED.

/s/ Kenneth J. Meyers  
United States Bankruptcy Judge

ENTERED: May 7, 1993