

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
RINE & RINE AUCTIONEERS, INC.,)	CASE NO. BK92-80770
)	
DEBTOR)	A95-8025
)	
RICHARD D. MYERS, as Trustee)	
for the Estate of Rine & Rine)	
Auctioneers, Inc.,)	
)	CH. 7
Plaintiff)	
vs.)	
)	
INTERNAL REVENUE SERVICE,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on April 15, 1996, on the Motion of the United States of America to Disqualify Counsel. Appearances: T. Randall Wright for Richard Myers, Trustee; Robert Metcalfe and Henry Carriger for the United States of America. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (O).

The United States of America has filed a motion to disqualify the law firm of Dixon, Dixon & Jessup, Ltd., from representing the trustee in this adversary proceeding because the law firm also represents Thomas Rine, the sole officer and shareholder of the debtor in a parallel action filed in the United States Tax Court against the Internal Revenue Service.

The motion of the United States is granted.

There is an absolute conflict of interest between representation of the trustee in this corporate case wherein the position of the trustee must be that certain payments by the corporation to Thomas Rine were in the nature of wages, salary or compensation, and are, therefore, deductible by the corporation with regard to its tax return and representation of Thomas Rine in a parallel case wherein Thomas Rine claims payments made by

the corporation and received by him were loans and not income to him and, therefore, not deductible by the corporation. If the debtor wins in this adversary proceeding, Thomas Rine loses. If Thomas Rine wins in the tax court, the debtor loses. There may be, because of the timing of the two lawsuits and the timing of trial in each, the possibility that the debtor could win in the bankruptcy court and Thomas Rine could win in the tax court, thereby whipsawing the Internal Revenue Service. There is also, however, the possibility that the Internal Revenue Service can win in each forum. These ultimate outcome possibilities do not affect the conflict analysis.

The Nebraska Code of Professional Responsibility, at DR 5-105(c), permits a lawyer to represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each, and if each consents to the representation, after full disclosure. NEBRASKA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105(c) (1995). In this case, it is asserted by counsel that both clients have consented to the representation after full disclosure. However, it is absolutely clear in this case that if one client wins, the other client loses. The law firm cannot be permitted under the disciplinary rules to represent two clients with adverse interests under these circumstances.

In addition to the disciplinary rules, counsel may represent a trustee only if counsel does not hold or represent an interest adverse to the estate. 11 U.S.C. § 327(a). To summarize the caselaw, holding an adverse interest means:

- (1) to possess or assert any economic interest that would tend to lessen the value of the bankrupt estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or
- (2) to possess a pre-disposition under circumstances that were under such a bias against the estate.

In re Lee, 94 B.R. 172, 177 (Bankr. C.D. Cal. 1988) (citations omitted). In addition, to "represent an adverse interest" means "to serve as agent or attorney for entities holding such adverse interests." Id. Failure to meet the "adverse interest" test results in disqualification. Pierce v. Aetna Life Ins. Co. (In re Pierce), 809 F.2d 1356, 1362-63 (8th Cir. 1987).

In this case, the law firm does not satisfy the requirements of Section 327(a) and the trustee will not be permitted to employ the law firm to litigate with the Internal Revenue Service.

Accord, Sturgeon State Bank v. Perky (In re Perky), 1996 WL 182223 (Bankr. W.D. Mo., April 15, 1996).

Conclusion

The motion by the United States to disqualify counsel is granted.

Separate journal entry to be filed.

DATED: May 7, 1996

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

WRIGHT, T. RANDALL	345-0965
MYERS, RICHARD	493-7005
BARRETT, LAURIE	221-4839

Copies mailed by the Court to:

Henry Carriger, P.O. Box 1500 DTS, Omaha, NE 68102
Robert Metcalfe, Trial Attorney, Tax Division, U.S. Dept. of
Justice, P.O. Box 7238 Ben Franklin Sta., Washington, D.C.
20044-0683
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

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<u>DEBTOR(S)</u>)	
)	CH. 7
RICHARD D. MYERS, as Trustee)	
for the Estate of Rine & Rine)	
Auctioneers, Inc.,)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
INTERNAL REVENUE SERVICE,)	
)	DATE: May 7, 1996
<u>Defendant(s)</u>)	HEARING DATE: April 15,
)	1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion of the United States of America to Disqualify Counsel.

APPEARANCES

T. Randall Wright, Attorney for Trustee Richard Myers
Robert Metcalfe and Henry Carriger, Attorneys for USA

IT IS ORDERED:

The motion by the United States to disqualify counsel is granted. See memorandum entered this date.

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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