

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
PIRNIE BROS. INVESTMENT CO.,)	CASE NO. BK92-82225
)	A
<u>DEBTOR(S)</u>)	
)	CH. 11
)	Filing No. 19, 21
Plaintiff(s))	
vs.)	
)	
)	
<u>Defendant(s)</u>)	DATE: April 22, 1993
)	HEARING DATE: April 16,
)	1993

MEMORANDUM

Hearing was held on Application by Debtor to Employ Accountant and Resistance by the United States Trustee (UST). Appearing on behalf of debtor was Wayne Griffin of North Platte, Nebraska. Appearing on behalf of the UST was Jerry Jensen of Omaha, Nebraska. Appearing on behalf of Dana F. Cole & Co. was Jan Beran of Lincoln, Nebraska. 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).

The debtor-in-possession has filed an application to employ Dana F. Cole & Co., Certified Public Accountants, as accountants for the debtor-in-possession. The application acknowledges that the debtor is obligated to Dana F. Cole & Co. for pre-petition accounting services rendered to the debtor. The United States Trustee has objected on the grounds that an accountant may not "hold or represent an interest adverse to the estate and must be 'disinterested' to represent the debtor in its bankruptcy proceeding."

Hearing was held and the Court was informed it is debtor's position that in this case a plan to be proposed will necessarily provide for payment of all claims because of the significant equity the debtor has in property of the estate. The CPA firm is the pre-petition CPA firm and is extremely familiar with all of the financial and tax matters in which the debtor is involved. To require the debtor to employ the services of another CPA firm during the case, counsel argues, would put an unreasonable burden upon the debtor and be detrimental to creditors because of the increase in administrative expenses involved.

Debtor argues there is authority that a professional may be employed by a debtor-in-possession even if that professional is not "disinterested," notwithstanding the language of Section 327 of the Code. See, for example, In re Best W. Heritage Inn Partnership, 79 Bankr. 736 (Bankr. E.D. Tenn. 1987). In addition, counsel for the debtor suggests that although the Eighth Circuit Court of Appeals in the case of In re Pierce, 809 F.2d 1356, 1362-1363 (8th Cir. 1987), specifically found that a professional who was a pre-petition creditor was not disinterested under 11 U.S.C. § 101(13) (now renumbered as (14)) and was subject to disqualification under Section 327(a), the Pierce case left an opening for the exercise of equitable powers by the Bankruptcy Court to allow such professional employment.

The equitable argument is that the bankruptcy judge in the Pierce case stated in a footnote that under appropriate circumstances perhaps it would be permissible to allow a debtor-in-possession to employ a professional who was a pre-petition creditor. In re Pierce, 53 Bankr. 825, 829 n. 8 (Bankr. D. Minn. 1985). At the circuit level, the court, also in a footnote, acknowledged the footnote in the bankruptcy case. The debtor argues and urges the Court to adopt the theory that by acknowledging the equitable authority of the Bankruptcy Court the Circuit Court has left open the possibility that the Bankruptcy Court, in appropriate circumstances, could allow the appointment of a professional who was a pre-petition creditor.

However, the language in the footnote is not the holding of Pierce at either the bankruptcy court level or the circuit level. The Circuit Court, in disposing of any argument that would overlook the disinterestedness standard, stated:

Despite the express statutory language disqualifying an attorney who is a creditor, McEwen argues that these rules should not be applied blindly, and that the test for disinterestedness should be whether the attorney possesses an interest that would color his independent judgment and impartial attitude. See In re O'Connor, 52 B.R. 892, 899 (Bankr. W.D. Okla. 1985). Although McEwen's argument is not without merit, the intent of the statute is clear; if a professional is a creditor, then that person is not disinterested under 11 U.S.C. § 101(13) and is subject to disqualification under Section 327(a). As this Court recently noted, the professional's complaint in this area lies with Congress, not the courts. In re Daig Corp., 799

F.2d 1251, 1253, n. 5 (8th Cir. 1986), aff'g, 48
B.R. 121 (Bankr. D. Minn. 1985).

809 F.2d at 1362-63.

This Court is bound by the determinations of the Circuit Court with regard to this issue and is further restricted by its own rulings in the case of In re Patterson, 53 Bankr. 366 (Bankr. D. Neb. 1985) and In re Barn'rds Corp., Neb. Bkr. 91:088.

Therefore, the application to employ Dana F. Cole & Co. as certified public accountants for the debtor in these proceedings is denied.

Separate journal entry to be entered.

(X) Clerk to give immediate notice of the Court's ruling to counsel appearing at hearing.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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Before a United States Bankruptcy Judge for the District of Nebraska regarding Application by Debtor to Employ Accountant; Resistance by United States Trustee.

APPEARANCES

Wayne Griffin, Attorney for debtor
Jerry Jensen, Attorney for UST
Jan Beran, Attorney for Dana F. Cole & Co.

IT IS ORDERED:

The application to employ Dana F. Cole & Co. as certified public accountants for the debtor in these proceedings is denied. See memorandum entered this date.

(X) Clerk to give immediate notice of the Court's ruling to counsel appearing at hearing.

BY THE COURT:
/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge