

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEBRASKA

In the Matter of )  
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 MAHLOCH FARMS, INC., and )  
 HARVEY and ALICE MAHLOCH, )  
 )  
 Debtors. )  
 )  
 ROSENBERG, GIBSON & TAUTE, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 MAHLOCH FARMS, INC., and )  
 HARVEY and ALICE MAHLOCH, )  
 )  
 Appellees. )

CV. 83-0-92

BK. 82-0-669 & 670

MEMORANDUM AND ORDER

<p><b>FILED</b> DISTRICT OF NEBRASKA</p> <p style="text-align: center;">JAN 5 1984</p> <p style="text-align: center;">William L. Olson, Clerk</p> <p>By _____ Deputy</p>
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This action is presently before the Court on appeal from an order of the United States Bankruptcy Court for the District of Nebraska<sup>1</sup> entered on January 24, 1983. Rosenberg, Gibson & Taute, a law firm (hereinafter appellant), appealed the Bankruptcy Court's order denying its application for attorney fees. Because no court approval of employment of the appellant had been obtained pursuant to 11 U.S.C. § 327(a), the bankruptcy court found that it could not allow any compensation. This Court, after reviewing the record submitted on appeal and the briefs filed by the respective parties,<sup>2</sup> holds that the order of the bankruptcy court must be vacated and remanded to the bankruptcy court for the proceedings consistent with this opinion.

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1. The Honorable David L. Crawford, Bankruptcy Judge, presiding.
  2. Although Bankruptcy Rule 809 makes provision for oral argument on appeal, no request was made and the Court is of the opinion that the issue is well briefed and no argument is necessary.

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The central facts are not in dispute. In February of 1982, Mahloch Farms, Inc., and Harvey and Alice Mahloch (hereinafter Mahlochs), engaged the professional services of the appellant lawfirm in connection with the Mahlochs' financial problems. Appellant served as pre-petition attorney for the Mahlochs for a few months. Then in April the appellant prepared and caused to be filed two petitions seeking orders of relief pursuant to Chapter XI of the Bankruptcy Code on April 9, 1982, on behalf of the Mahlochs.

Through an oversight by appellant, no application seeking the bankruptcy court's prior authorization to be employed as Mahlochs' counsel during the Chapter XI proceedings was made. Despite this oversight, and without prior court approval, appellant represented the Mahlochs who were debtors-in-possession at that time in the Chapter XI proceeding.

Appellant continued to represent the Mahlochs as debtors-in-possession until August 31, 1983, when the bankruptcy court appointed a trustee. Thereafter appellant continued counseling the Mahlochs and attended meetings on their behalf until November 29, 1982, when Harvey Mahloch terminated appellant's employment as counsel. Appellant formally withdrew as debtors' attorney by filing an application to withdraw as attorney, and the bankruptcy court entered an order on December 15, 1982, sustaining appellant's application to withdraw.

Appellant applied for fees in the amount of \$14,036 and expenses in the amount of \$3,806.71. A hearing was held on the appellant's application for fees in the bankruptcy court on January 24, 1983. The Creditor's

Committee objected to the fees sought by the appellant on the grounds that no application was filed nor ordered or obtained for the employment of the firm in the initial stages of the case. Appellant conceded that through a procedural oversight, an application to employ the firm and court authorization to employ the firm as counsel was not obtained, but suggested to the Court that the possibility of *nunc pro tunc* order of appointment. The bankruptcy court considered the language in Section 327(a),<sup>3</sup> and reasoned that the statute required an order authorizing the employment. Because no order had been entered in the case, the bankruptcy court denied the application for fees.

Thereafter, a timely appeal was filed by the appellant and is now before this Court.

The narrow issue on appeal is whether a bankruptcy court is prohibited, as a matter of law, from allowing compensation for services rendered by attorneys who inadvertently fail to obtain court approval prior to their employment by debtors-in-possession. By its ruling in this matter,

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3. Section 327 ("Employment of Professional Persons") pertinently provides:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

the bankruptcy court reflected its adherence to the *per se* rule that no compensation may be allowed for attorney fees in the absence of a prior court authorization of the attorney's employment.

This Court finds that such a narrow approach to the bankruptcy court's power is not mandated by the Bankruptcy Code of 1978 or the Rules. Rather, this Court finds that a bankruptcy court has some discretion, upon proper showing and good cause, to enter an order *nunc pro tunc*, approving the employment of the attorney, as the Court might routinely have done, had the court's approval been sought prior to the performance of the services by the attorney. This equitable approach has been adopted by the Fifth Circuit, *In the Matter of Triangle Chemicals, Inc.*, 697 F.2d 1280 (5th Cir. 1983), and recently followed by Judge Beam in *In re Olson*, Nos. 83-0-277 and 279 (D.Neb. Dec. 23, 1983). This Court, too, is persuaded by this more flexible approach.

This Court agrees that a bankruptcy court has the discretionary power to compensate a debtor's attorney who has been retained and has served without judicial authorization for services rendered in connection with the Chapter XI proceedings. However, in so holding this Court makes no determination with respect to whether the circumstances of this case warrant the granting of a *nunc pro tunc* order. *Nunc pro tunc* appointments are permissible only in rare and exceptional circumstances, and this question on remand is addressed to the discretion of the bankruptcy court as are all questions of compensation. Like the Fifth Circuit in *Triangle Chemical*, this Court

holds only that, "where through oversight the attorney has neglected to obtain such prior approval but has continued to perform services for the debtor/debtor-in-possession (many of them as here under the eye of the court itself), the bankruptcy court retains equitable power in the exercise of its sound discretion, under exceptional circumstances, to grant such approval *nunc pro tunc*, upon proper showing, and to award compensation for all or part of the services performed by such attorney that have subsequently benefited the debtor's estate and, consequently, its creditors." 697 F.2d at 1289. Accordingly,

IT IS HEREBY ORDERED that the bankruptcy court's order denying fees to the appellant is vacated. This matter is remanded to the bankruptcy court for it to determine in the exercise of its sound discretion, if appropriate showing is made as required by Section 327(a) of the Code, 11 U.S.C. § 327(a) and Interim Rule 2006, whether to enter a *nunc pro tunc* order, and if it does so determine, to award such compensation it deems appropriate as within its sound discretion.

BY THE COURT:

*Alton E. King*

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JUDGE, UNITED STATES DISTRICT COURT