

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

IN RE:

CLARK, SR., JAMES M.

CASE NO: 12-30716-KKS
CHAPTER 7

Debtor.

**ORDER APPROVING TRUSTEE'S AMENDED APPLICATION FOR
COMPENSATION FOR SPECIAL COUNSEL FOR ESTATE (DOC. 249)**

THIS CASE came before the Court for hearing on June 17, 2014 upon the Trustee's Amended Application for Compensation for Special Counsel for Estate (the "Application for Compensation," Doc. 249), and the Objection filed by Beach Community Bank ("the bank," Doc. 240). At the hearing, the Court directed the parties to submit further memoranda of law, which they did on June 27, 2014 (Docs. 260 & 261). Having reviewed the pleadings, memoranda and applicable case law, the Court finds that the Application for Compensation should be approved.

On August 12, 2013 the Trustee sought to employ Jodi D. Cooke as special counsel to represent the Trustee on a contingency fee basis ("Application to Employ").¹ Consistent with this Court's standard procedures, the Trustee's Application to Employ was granted by Order dated August 15, 2013.² The Trustee now seeks approval of special counsel attorneys' fees of \$39,960.00 and costs of \$154.62. Attached to the Application to Employ was a complete copy of the "Representation And Fee Agreement" the Trustee had signed with special counsel. The Order approving the Application to Employ was served on all creditors and parties in interest by

¹ Doc. 179, Application for Employment of Special Counsel.

² Doc. 180.

the BNC on August 17, 2013; the bank received copies of this Order at three different addresses.³ Neither the bank nor any other creditor or party in interest objected to the Application to Employ, or moved for reconsideration of or to vacate the order granting that application.

The bank objects to the Application for Compensation on the grounds that the Application to Employ did not mention 11 U.S.C. § 328.⁴ The bank argues that because the Application to Employ did not specifically reference Section 328, the contingency fee was not preapproved under that section and the Court must now review the Application under the general reasonableness standards of 11 U.S.C. § 330.

Section 328(a) provides, in pertinent part: “The trustee ... with the court’s approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title ... on any reasonable terms and conditions of employment, including ... on a contingency fee basis.”⁵ Section 328(c) provides:

Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person’s employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.⁶

In support of its objection to the Application for Compensation, the bank cites dicta in a footnote of a recent opinion from the Middle District of Florida, *In re Pearlman*.⁷ The bank urges that the Middle District of Florida’s footnote should dictate that this Court sustain its

³ Doc. 182, BNC Certificate of Mailing.

⁴The order granting the Application to Employ made no mention of Section 328, although the fee agreement attached to the Application to Employ clearly states, in paragraph 4, that the employment was on an contingency fee basis. Doc. 179, p. 5.

⁵ 11 U.S.C. § 328 (2005).

⁶ 11 U.S.C. § 328(c) (2005).

⁷ *In re Pearlman*, No. 6:07-bk-00761-KSJ, 2014 WL 1100223 (Bankr. M.D. Fla. 2014) (acknowledging a case from the Ninth Circuit that held “[u]nless a professional’s retention application specifically specifies that it seeks approval under § 328 it is subject to review under § 330;” quoting *In re Circle K Corp.*, 279 F.3d 669, 671 (9th Cir. 2002)).

objection. The facts here are different from those facing the court in *Pearlman*. Here, the Application to Employ specified that the contingency fee was to be 33.3%. The order employing special counsel was entered on that basis. In *Pearlman*, the bankruptcy court had “approved a contingency fee framework but never approved a specific contingency fee percentage.”⁸ The Trustee and special counsel in *Pearlman* had agreed to the percentage fee “outside the purview of the Court.”⁹ For that reason, the court in *Pearlman* reviewed special counsel’s application for payment of contingency fees under § 330 and, “resting on its independent judgment,” found the fees to be “reasonable and in line with similar non-bankruptcy rates.”¹⁰

In the Ninth Circuit, parties seeking pre-approval of contingency fee agreements must specifically mention Section 328 in their retention applications and bankruptcy judges and the parties appearing before them are encouraged to ensure that §328 is referenced in the orders.¹¹ The Third Circuit’s requirements are almost as strict.¹² Other courts are not so restrictive, and have held that such a decision should be made based on the totality of the circumstances.¹³

This Court agrees that a determination as to whether a professional’s fees have been pre-approved under Section 328 should be made based on the totality of the circumstances. Nothing in §328 or the Bankruptcy Rules requires or mandates that an application to retain special counsel or the order approving that application specifically mention § 328.¹⁴ Section 328 applies

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *In re Circle K Corp.*, 279 F.3d 669, 671 (9th Cir. 2002); *In re B.U.M. Int’l, Inc.*, 229 F.3d 824, 829 (9th Cir. 2000).

¹² *Zolfo, Cooper & Co. v. Sunbeam–Oster Co., Inc.*, 50 F.3d 253, 261–62 (3d Cir.1995).

¹³ *In re Airspect Air, Inc.* 385 F.3d 915, 922 (6th Cir. 2004); *Donaldson Lufkin & Jenrette Sec. Corp. v. Nat’l Gypsum Co. (In re Nat’l Gypsum Co.)*, 123 F.3d 861, 862 (5th Cir. 1997) (a professional had been employed pursuant to § 328 even though § 328 was not specified in the retention application; the bankruptcy court's order stated that “[t]he Court retains the right to consider and approve the reasonableness and amount of DLJ's fees on both an interim and final basis.”).

¹⁴ *Riker, Danzig, Scherer, Hyland, and Perretti v. Official Committee of Unsecured Creditors (In re Smart World Technologies, LLC)*, 552 F.3d 228, 233 (2nd Cir. 2009).

when the bankruptcy court approves a particular rate or means of payment, and § 330 applies when the court does not do so.¹⁵

Under § 330, when determining the reasonable compensation for professionals a court must take into account factors such as: 1) the time spent on such services, 2) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of the case, and 3) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed.¹⁶ The factors are a part of the court's lodestar analysis, which involves the court multiplying the attorney's reasonable hourly rate by the number of hours reasonably expended and considering the twelve *Johnson* factors.¹⁷ The bank argues that because there was not a detailed itemization of the work performed in this case, including time records of the special counsel, the Court cannot fully evaluate the Application under § 330 and the Application should be denied until such items are filed with the Court. This argument, if accepted, would result in a "gotcha." According to the Trustee at the hearing, because this Court approved the application to employ Ms. Cooke as special counsel on a contingency fee basis, special counsel did not keep contemporaneous time records for the work she has performed for the Trustee.

The bank was active in this case by at least August of 2012, when it filed its first motion.¹⁸ The Application to Employ, along with the complete contingency fee agreement attached as an exhibit, was filed and approved a year later. For nine months, relying on the order

¹⁵ *In re Texas Sec., Inc.*, 218 F.3d 443 at 445 (5th Cir. 2000).

¹⁶ 11 U.S.C. § 330(a)(3)(A)-(F).

¹⁷ *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 879 (11th Cir. 1990) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

¹⁸ See Doc. 53, Motion for Extension of Time for Filing Objections to Debtor's Claim of Exemptions. It is possible, if not likely, that the bank was active before this date, attending the July 11, 2012 § 341 meeting and perhaps taking other action, but that activity is not reflected in the Record.

approving her employment on a 33.3% contingency fee, special counsel worked for the Trustee. Only after special counsel completed the work and recovered an asset for the Estate did the bank object to the contingency fee arrangement.

The totality of circumstances in this case supports a ruling that the Trustee's contingency fee agreement with special counsel was pre-approved. There is no need, nor would it be proper, to review the fee Application under Section 330, as the bank suggests.¹⁹ The Trustee immediately invoked and argued § 328 in response to the bank's objection; in fact, she filed an amended application for approval of special counsel fees referencing § 328. Special counsel has completed the work she was retained to do, she has performed in accordance with the retention agreement approved by this Court, and that agreement did not require her to keep contemporaneous time records. Had she not collected the \$120,000 for the estate, there would be no fee application for consideration because special counsel would have been entitled to nothing.²⁰ The bank was given ample notice of the Trustee's intent to retain and pay special counsel on a 33.3% contingency fee, in accordance with the fee agreement attached to the Application to Employ. As the Trustee points out, although § 328 was not cited in the Application to Employ, the circumstances implicating that section, i.e. pre-approval from the Court, were abundantly clear.

The facts here are very similar to those in a Sixth Circuit case, where that court affirmed a bankruptcy court's ruling that certain fees had been pre-approved pursuant to § 328.²¹ In *Fashion Shop of Kentucky*, the Chapter 11 debtor sought and obtained an order authorizing it to retain a financial advisor and pay it \$10,000.00 per month for post-petition services; no one

¹⁹ See *Liani v. Baker*, 09-CV-2651 (ILG), 2010 WL 2653392 (E.D.N.Y. June 28, 2010).

²⁰ It is worth noting that the bank did not object to the Trustee's settlement of the matter handled by special counsel.

²¹ *The Cadle Company II, Inc. v. Fashion Shop of Kentucky, Inc. (In re Fashion Shop of Kentucky, Inc.)*, 350 Fed. Appx. 24 (6th Cir. 2009) (citations omitted).

objected to the application to employ, which cited to Sections 105(a) and 327(a) of the Code, but not to § 328.²² During the case, the debtor filed two separate applications for compensation of the financial advisor, each requesting payment pursuant to the terms approved by the bankruptcy court.²³ A creditor, Cadle Company, objected to both applications on the basis that the Court did not receive detailed evidence of the services provided in support of the fee applications.²⁴ The bankruptcy court overruled both objections on the basis that the employment and fees of the financial advisor had been approved under § 328, and not under § 330. Ultimately, the Chapter 11 case was dismissed, but the Cadle Company appealed both of the bankruptcy court's orders awarding fees to the financial advisor.²⁵ The district court affirmed the bankruptcy court, finding no abuse of discretion, so Cadle Company again appealed. The Sixth Circuit affirmed, citing to *Pembridge & Chriszt Co., L.P.A. V. Miskovic (In re Airspect Air, Inc.)*, and stating:

Here, while the [bankruptcy] court could have been more precise in its initial order, the totality of the circumstances indicates that it pre-approved RCS's fees. In its ... application, Fashion Shop requested permission to hire RCS at a fixed rate of \$10,000 per month, which it averred was reasonable and appropriate. As the district court noted, no party challenged the request, despite having notice from the bankruptcy court and several weeks to file an objection. The lack of objection may explain the bankruptcy court's failure to state clearly the statutory grounds for its approval of the request. Nonetheless, its September 11 order stated that the application was granted "in its entirety" and authorized Fashion Shop to retain RCS "upon the terms ... set forth in the Application." In other words, the court affirmatively approved the terms of RCS's compensation.²⁶

In the case at bar, the Trustee's application to employ Ms. Cooke as special counsel stated "[t]he terms of employment include, but are not limited to, as [sic] set forth in the attached agreement."²⁷ The entire fee agreement was attached. The fee agreement set out clearly, in bold

²² *Id.* at 25-26.

²³ *Id.*

²⁴ *Id.* at 26.

²⁵ *Id.* at 27.

²⁶ *Id.* at 27.

²⁷ Doc. 179, Application for Employment of Special Counsel for Trustee.

type and tremendous detail, the amount of the contingency fee to be paid and how that fee was to be calculated. The Application and the attached fee agreement were approved by court order. Even though neither the application nor the order referred to Section 328, it is obvious that the Trustee intended, as did special counsel and the Court, to approve employment of special counsel on a 33.3% contingency fee basis.²⁸ The fee agreement emphasized that special counsel was to represent the Trustee “in connection with the investigation and pursuit of potential property of the Estate that was not disclosed, scheduled, or turned over by [the Debtor] upon filing his bankruptcy petition.”²⁹ This language made it obvious that special counsel would be pursuing only possible assets, the value and/or collectability of which were at that point unknown. Under such circumstances, it is common for a Trustee to retain special counsel on a contingency fee basis. Trustees and attorneys know that if there is no recovery for the Estate the trustee will have no funds from which to pay fees to special counsel. In cases like this, where the existence and value of potential assets are unknown, the Trustee might not have been able to retain counsel at all, but for a contingency fee agreement. Under these facts, the Court will not revisit the amount of fees to be awarded to special counsel at this late stage in the game. The bank could have objected to the proposed contingency fee in the beginning, before special counsel performed the legal services that resulted in a \$120,000 gross recovery for the benefit of the unsecured creditors of this Estate, including the bank.

The \$39,960 requested in the Trustee’s Application for Compensation of special counsel is exactly the contingency fee percentage set forth in the fee agreement approved by the Court.³⁰

²⁸ In light of the bank’s objection in this case, and case law precedent in other Circuits, it would be prudent for trustees and debtors in possession to specifically note, in applications to employ professionals and the orders granting them, that the application is being filed, and that the fees are being pre-approved, under § 328.

²⁹ *Id.* at 4-5.

³⁰ 33.3% of the settlement amount of \$120,000.

The Trustee certifies that “the services rendered by the attorney in this matter justify the compensation sought and that compensation is reasonable.”³¹

Under the totality of circumstances, this Court finds that the Trustee’s special counsel 33.3% contingency fee, and her costs, were pre-approved and are reasonable. For these reasons, it is

ORDERED: the Trustee’s Amended Application for Compensation for Special Counsel for Estate (Doc. 249) is APPROVED. The Trustee is authorized to pay special counsel’s fees in the amount of \$39,960.00, and costs of \$154.62.

DONE and ORDERED in Tallahassee, Florida this 28th day of July, 2014.



KAREN K. SPECIE
United States Bankruptcy Judge

cc: all interested parties

³¹ Doc. 224, at 2.