

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:04-bk-12648-ABB
Chapter 7

KELLY MICHAEL BENNINGER,

Debtor.

ORDER

This matter came before the Court on the Application for Allowance of Attorneys' Fees and Reimbursement of Expenses as Special Counsel for the Trustee (Doc. No. 35) ("Special Counsel Application") submitted by attorney David J. Volk ("Volk") and the firm of Volk Law Offices, P.A. (collectively, "Applicant") and the Application for Attorney's Fees and Reimbursement of Costs as Administrative Expenses submitted by Poser Investments, Inc. (Doc. No. 39) ("Poser Application"). A hearing on the Special Counsel Application, Poser Application, and the Final Report of the Chapter 7 Trustee was conducted on November 15, 2006 at which Volk and Efrain Apointe, the Chapter 7 Trustee ("Trustee"), appeared. The Court makes the following findings and conclusions after reviewing the pleadings, hearing live argument, and being otherwise fully advised in the premises

Kelly Michael Benninger, the Debtor herein ("Debtor"), commenced this Chapter 7 case on November 22, 2004. Poser Investments ("Poser") is the Debtor's largest unsecured creditor holding an allowed claim (Claim No. 1) in the amount of \$231,068.69.¹ The Debtor listed five creditors in Schedule F holding claims totaling \$454,580.51. Three claims were filed: Claim No. 1 by Poser, Claim No. 2 by Citibank/Choice for \$6,616.70, and Claim No. 3 by Citibank/Choice for \$7,592.88. No claim objections were filed.

Applicant was engaged as counsel for Poser and represented Poser at the onset of this case. As Poser's counsel Applicant attended the Debtor's Section 341 meeting of creditors, objected to the

¹ Applicant represented Poser in Florida state court litigation in which Poser obtained a judgment against the Debtor. Poser's claim is based upon the judgment.

Debtor's claims of exemption, instituted Adversary Proceeding No. 6:05-00098-ABB against the Debtor in which Poser sought denial of the Debtor's discharge pursuant to 11 U.S.C. Section 727, and discussed with the Trustee concerns regarding allegedly transferred or shielded assets. The Trustee lodged an objection to the Debtor's exemptions. The Debtor amended his Schedules.

The Trustee filed an Application to Appoint Attorney (Doc. No. 25) ("Employment Application") seeking to employ Applicant as special counsel for the Trustee pursuant to Section 327(a) of the Bankruptcy Code at an hourly rate of \$210.00 for Volk, \$175.00 for associate attorneys, and \$75.00 for paralegals. The scope of employment included representing the bankruptcy estate in "resolving the bankruptcy estate's interest in the potential recovery of any asset."² No disclosure of fees paid to Applicant by Poser was made in the Employment Application or Declaration.

No objections were filed and the Motion was granted by Order entered on April 25, 2005 (Doc. No. 26). Applicant's employment as special counsel to the Trustee became effective on that date. Applicant proceeded to act as special counsel to the Trustee in the main case and the Adversary Proceeding. The Trustee was substituted as the Plaintiff in the Adversary Proceeding on October 7, 2005.

The Trustee and the Debtor resolved the various issues and claims through a global settlement pursuant to which the Debtor made cash payments totaling \$35,000.00 and surrendered his interest in a company, 702, Inc., to the Trustee. The settlement was approved by Order entered on January 19, 2006. The objections to exemptions were withdrawn and the Adversary Proceeding was dismissed with prejudice by Order entered on February 24, 2006. The Debtor was granted a discharge on April 26, 2006.

² The Employment Application states: "To the best of the trustee's knowledge, the attorney has no connection with the debtors, creditors, and other party in interest, their respective attorneys and accountants . . . except as disclosed in the following declaration." Volk's Declaration accompanying the Employment Application discloses: "Volk Law Offices, P.A. was employed by creditor Poser Investments, Inc. to seek collection of a Judgment against Debtor. In the event termination of this representation is required, Volk Law Offices, P.A. will see such client's consent to same."

Volk seeks payment for fees of \$23,013.00 and costs of \$1,560.01 through the Special Counsel and Poser Applications. He seeks payment from the estate of all fees and costs incurred both as counsel for Poser and Special Counsel for the Trustee, including a reimbursement of fees already paid by Poser. The fees requested are disproportionate in comparison to the benefit to the estate resulting from Volk's efforts and total assets recovered.³

Poser Application: Volk seeks an administrative award of fees of \$11,898.00 and costs of \$982.20 for services performed as counsel for Poser during the period November 22, 2004 through September 8, 2005.⁴ He contends the fees and costs were incurred "in recovering property of the estate. . . ." The Poser Application sets forth time billed at the hourly rates of \$170.00, \$210.00, and \$75.00. It does not delineate total time billed, time billed for each hourly rate, or the blended hourly rate.

Poser paid fees to Volk, but the amount is unknown. The Poser Application states: "Poser incurred expenses of \$12,880.20, for which \$7,252.90 has already been paid. An outstanding balance of \$5,627.30 is owed." The receipts column, however, reflects receipts of \$13,026.89. This discrepancy was not explained by Volk and in open Court he stated he received only \$5,000.00 from Poser: "I've received five. I'm still owed about \$6,500."⁵

Volk cites Sections 327, 330, and 503(b)(3)(B) of the Bankruptcy Code in support of the Poser Application. Sections 327 and 330 are inapplicable since the Poser Application does not involve services performed by a duly employed professional. It involves fees and costs incurred by

Volk as counsel for Poser and not as counsel for the Trustee in accordance with the employment requirements of Sections 327 and 330.

Section 503(b)(3)(B) allows an administrative expense for "the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection incurred by . . . (B) a creditor that recovers, *after the court's approval*, for the benefit of the estate any property transferred or concealed by the debtor."⁶ Section 503(b)(3)(B), by its plain and unambiguous language, requires prior court approval before a creditor may seek allowance of its fees and costs as an administrative expense. Poser did not meet this prerequisite.⁷ The Poser Application is due to be denied.

Special Counsel Application: Applicant seeks an administrative fee award of \$11,115.00 and costs of \$577.81 for services performed as Special Counsel to the Trustee during the period May 5, 2005 through February 13, 2006. The Fee Application sets forth time billed at the hourly rates of \$210.00 and \$75.00. It does not delineate total time billed, time billed for each hourly rate, or Applicant's blended hourly rate. Applicant does not disclose whether any fees were paid by Poser and the "receipts" portion of the Fee Application states "0.00."

The Special Counsel Application was filed pursuant to Section 330(a)(1), which allows for the award "reasonable compensation for actual, necessary services" rendered by a professional person employed pursuant to Section 327. The reasonableness of attorney fees and costs is determined through an examination of the criteria enunciated in In the Matter of First Colonial Corp. of

³ Total assets of \$35,088.46 were recovered, which includes the \$35,000.00 paid by the Debtor and accrued interest. The Trustee seeks statutory Chapter 7 Trustee fees of \$4,258.85 and costs of \$14.04 from the assets recovered.

⁴ Volk explained the difference between the two Applications is that the Poser Application covers "work up to the time that [the Trustee] took over as plaintiff in place of Poser."

⁵ To the Court's question are you asking to be paid twice on the same bill Volk explained: "No. Anything paid on that I think should go back to Poser but I will accept payment under the condition that whatever they paid has to go back to them and the balance settling the bill and then their administrative expense, what they paid to pursue the objection to exemption and to pursue the 727 action. What they actually paid out of pocket I should return to them. I have every intention of doing that."

⁶ 11 U.S.C. § 503(b)(3)(B) (2005) (*emphasis added*).

⁷ In re Romano, 52 B.R. 590, 593 (Bankr. M.D. Fla. 1985); *see also* In re Elder, 321 B.R. 820, 829 (Bankr. E.D. Va. 2005) (holding the plain language of Section 503(b)(3)(B) "means that the recovery must be *after* court approval. The restriction is important and is in accordance with the policy behind the provision."); In re Lagasse, 228 B.R. 223, 225 (Bankr. E.D. Ark. 1998) (holding the "court in any event is without discretion to make the requested award because Section 503(b)(4), read in conjunction with Section 503(b)(3)(B), require that prior approval be given before an award may be made."); Lazar v. Casale (In re Casale), 27 B.R. 69, 70 (Bankr. E.D.N.Y. 1983) (precluding fees and expenses for the bringing of a discharge complaint because, unlike Section 64(a)(3) of the Bankruptcy Act of 1898, the Code requires prior court approval).

America⁸ and Johnson v. Georgia Highway Express, Inc.⁹ This matter has been difficult, with a vigorous defense from the Debtor and his counsel, but not extraordinary. There was minimal litigation, no novel legal issues were involved, and the case moved towards resolution quickly.

Dated this 27th day of March, 2007.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

After consideration of the First Colonial and Johnson factors and all of the facts and circumstances of this case, the fees and costs sought by Applicant in the Fee Application as Special Counsel to the Trustee are reasonable. Applicant is entitled to an award of fees of \$11,115.00 and costs of \$577.81.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Poser Application (Doc. No. 39) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED AND DECREED that the Special Counsel Application (Doc. No. 35) is hereby **APPROVED** and the Applicant, David J. Volk and the firm of Volk Law Offices, P.A., is awarded fees of \$11,115.00 plus \$577.81 in costs, for a total award of \$11,692.81 for services performed as Special Counsel to the Trustee.

⁸ In the Matter of First Colonial Corp. of America, 544 F.2d 1291 (5th Cir.1977) stating:

In order to establish an objective basis for determining the amount of compensation that is reasonable for an attorney's services, and to make meaningful review of that determination possible on appeal, we held in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 717-19, that a district court must consider the following twelve factors in awarding attorneys' fees...

First Colonial at 1299.

⁹ Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The twelve Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; (12) awards in similar cases. Johnson at 714.