

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11090-JMD
Chapter 11Stephen Camann,
Debtor

George J. Marcus, Esq.
MARCUS, GRYGIEL & CLEGG, P.A.
Attorney for Debtor

Andru H. Volinsky, Esq.
STEIN, VOLINSKY & CALLAGHAN, P.A.
Proposed Special Counsel for Debtor

John M. Sullivan, Esq.
SULLOWAY & HOLLIS
Attorney for Gregory Camann

Geraldine B. Karonis, Esq.
Attorney for United States Trustee

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Court has before it a motion for authority to retain and employ Robert A. Stein, Andru H. Volinsky, and the law firm of Stein, Volinsky and Callaghan, P.A. (collectively, "SVC") as special counsel for Stephen Camann, the Debtor. Both Gregory Camann, the Debtor's son, and the United States Trustee filed objections to the motion. After conducting a hearing on the motion on May 1, 2000, the Court took the matter under advisement. For the reasons outlined below, the Court denies the motion without prejudice.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The facts as represented by the parties in their pleadings and at the hearing are as follows. The Debtor and his former wife, Joan Camann, have been engaged in divorce litigation since 1989. From 1989 through the present, Joan Camann has been represented by attorneys at the firm of Orr & Reno. The Debtor was initially represented in his divorce by Robert Stein of SVC. In late 1995, the state court issued a decree granting the divorce and approving an agreement that the Debtor and Joan Camann had entered into. Part of their agreement was that they would continue to negotiate certain property settlement issues during 1996.

After entry of the final decree, in 1996, Stein concluded his representation of the Debtor in his divorce, and Attorney Luke O'Neill, general counsel for Camco, Inc., became the Debtor's personal counsel. During the period of O'Neill's representation, the Debtor and Joan Camann allegedly reached an agreement regarding the sale of certain marital assets, specifically, the sale of the Debtor's stock in Camco, Inc. to Gregory Camann for \$2.5 million. The deal was supposed to close sometime during the spring or summer of 1999. For whatever reason, the deal did not close and proceedings commenced, or resumed, in state court to enforce the alleged agreement regarding the sale of Camco, Inc.'s stock. SVC became involved in the case, and in July 1999, SVC undertook representing the Debtor again in his divorce. As part of that representation, SVC has completed significant discovery and factual investigations.

On April 12, 2000, the Debtor filed for bankruptcy protection. SVC has not filed any withdrawal of its representation of the Debtor in the pending state court litigation. To date, SVC has been paid approximately \$25,000 to represent the Debtor in his divorce action since July 1999. SVC also holds a claim of \$100,000 for outstanding pre-petition legal fees.

In addition to representing the Debtor in his divorce proceedings, SVC has represented Camco, Inc. since 1995 with respect to its labor and employment matters. Attorney Luke O'Neill has served as general counsel for the corporation. Camco, Inc. is owned jointly by the Debtor and his former wife, who holds a 50% equitable interest in the corporation as a result of the parties' divorce. In addition, Camco, Inc. is a 50% owner of Drewmas, LLC, which is owned jointly with Gregory Camann.

It was further revealed at the hearing that Volinsky and his wife own a company called HR Hotline, Inc., which has provided non-legal, employment related services to Camco, Inc. Specifically, HR Hotline, Inc. provided a telephone hotline and Internet web site for Camco employees to lodge complaints about fellow employees and managers. According to Volinsky, the hotline vendor contract expired in April 2000.

III. DISCUSSION

The Debtor proposes to retain SVC as special counsel to assist and advise the Debtor and general bankruptcy counsel as to the Debtor's business affairs. According to the application, SVC will provide:

- a. Advice and representation concerning the Debtor's ownership and operation of various business entities;
- b. Advice and representation regarding the sale or other disposition of such business entities;
- c. Advice and representation regarding the Debtor's contractual disputes; and
- d. Other services as requested by general bankruptcy counsel.

See Motion to Employ at ¶¶ 4 and 8. The Debtor indicated that employment of special counsel is in the best interest of the estate because "it will result in substantial economies, and will obviate duplication by general counsel of efforts previously undertaken." Id. at ¶ 4.

Gregory Camann filed an objection to the motion requesting that it be denied because SVC failed to disclose its connections to Camco, Inc., Drewmas, LLC, and Gregory Camann. In addition, he suggests that SVC's services to the Debtor will likely be in conflict with the interests of Camco, Inc., Drewmas, LLC, Joan Camann and Gregory Camann. The UST also filed an objection to the motion stating that if the facts as represented by Gregory Camann are true (i.e., that SVC represents both Camco, Inc. and Drewmas, LLC, that SVC failed to disclose those connections, and that those connections are material), then SVC's employment should not be approved.

The Debtor filed a response to Gregory Camann's objection to the motion admitting that SVC has represented and continues to represent Camco, Inc., but only with respect to labor and employment issues, and disputing Gregory Camann's allegations that SVC has represented Drewmas, LLC or Gregory Camann.

In addition, the Debtor attempted to clarify the scope of SVC's services in his response to Gregory Camann's objection. The Debtor stated that SVC's services will be primarily limited to litigating whether there is a valid and enforceable contract between the Debtor and Joan Camann, pursuant to which the Debtor allegedly agreed to sell his stock in Camco, Inc. to Gregory Camann for \$2.5 million. However, at the hearing, counsel for the Debtor also indicated a desire to utilize the services of SVC for filing pleadings and attending routine non-evidentiary hearings.

A. SVC's Failure to Disclose Connections

Federal Rule of Bankruptcy Procedure 2014(a) provides:

An order approving the employment of attorneys . . . or other professionals pursuant to § 327 . . . of the Code shall be made only on application of the [debtor in possession] or committee. . . . The application shall state the specific facts showing the necessity of the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a) (emphasis added). "Complete disclosure is for the court's benefit so that it can conveniently and carefully scrutinize any adverse interest of the attorney." Film Ventures Int'l, Inc. v. Asher (In re Film Ventures Int'l, Inc.), 75 B.R. 250, 253 (B.A.P. 9th Cir. 1987). "The purpose of the disclosure requirements is to provide the court with information necessary to determine whether the professional's employment meets the broad test of being in the best interest of the estate." In re Lincoln North Assocs., Ltd. Partnership, 155 B.R. 804, 807-08 (Bankr. D. Mass. 1993). See also In re Filene's Basement, Inc., 239 B.R. 850, 855-56 (Bankr. D. Mass. 1999). "The burden is on the person seeking employment to come forward and make full, candid, and complete disclosure." Lincoln North, 155 B.R. at 808. See also Filene's Basement, 239 B.R. at 856.

It is undisputed that neither the motion nor the supporting affidavit disclose SVC's connections to Camco, Inc., the Debtor's second largest creditor, or the nature of SVC's prior relationship with the Debtor.

Rather, Volinsky disclosed only that SVC is a creditor of the Debtor, which is owed \$100,000 for pre-petition services related to litigation in the Debtor's divorce. At the hearing, Debtor's counsel explained the omission as inadvertent.

The Court notes that “[f]ailure to be forthcoming with disclosure provides the bankruptcy court with an independent ground for disqualification.” Filene's Basement, 239 B.R. at 856. See In re Filene's Basement, 239 B.R. 845, 850 (Bankr. D. Mass. 1999). However, the Court has wide discretion in deciding whether to approve retention of professionals. See In re D.L. Enters., 89 B.R. 107, 110 (Bankr. C.D. Cal. 1988). The failure to disclose in this case is unlike other cases in which the failure to provide proper disclosure was not discovered until some point after the Court had already approved retention of professionals. See Rome v. Braunstein, 19 F.3d 54, 59 (1st Cir. 1994) (noting that court-appointed counsel proceed at their own risk if they fail to spontaneously, timely, and completely make disclosures required by the Bankruptcy Code and Rules). Here, the relevant information has been brought to the Court's attention in the course of deciding whether to approve employment. For that reason, the Court finds the instant case distinguishable from cases such as Filene's Basement. Accordingly, the Court will not deny retention on the basis of SVC's failure to disclose all connections with creditors and other parties in interest in its original pleadings. See Film Ventures, 75 B.R. at 253 (noting that “[i]f the very court for which the statute was intended to aid finds no need to take remedial measures [for counsel's inadequate disclosure], we see no reason to second guess that court's broad discretion in this area”). However, if retention were approved, the risk of incomplete disclosure, or a failure to satisfy its obligations for further disclosure if circumstances change, remains with SVC. See Rome, 19 F.3d at 59. See also King et al., Collier on Bankruptcy at ¶ 327.04[5][c] (15th rev. ed. 1999) (“Attorneys should supplement their affidavits if circumstances change or new information is discovered.”).

B. Effect of Section 327(c) of the Bankruptcy Code

Section 327(c) of the Bankruptcy Code provides as follows:

In a case under chapter 7, 11 or 12 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a

creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

11 U.S.C. § 327(c). In discussing section 327(c), Collier on Bankruptcy observes:

Section 327(c) provides that, in a case under chapter 7, 11, or 12, a professional person's previous or concurrent employment by or representation of a creditor is not, by itself, a bar to employment by the trustee, absent an actual conflict of interest. However, if any attorney is the creditor of the debtor, the attorney may be ineligible for general employment by the [debtor in possession] by virtue of sections 101 and 327(a). The attorney may be employed for a special, limited purpose pursuant to section 327(e).

...

Upon an objection by another creditor (or the United States trustee), other than the creditor who is or was a client of the professional, the court must disapprove the employment if an actual conflict exists or the professional's engagement would be tainted with the appearance of conflict. Something more than the mere fact of dual representation must be demonstrated if there is to be disapproval of engagement by the [debtor in possession]. Thus although section 327(c) permits retention by the estate of a professional person whose client is or was a client of the professional person, it does not authorize representation of that creditor vis-a-vis any asserted claim against the estate.

Collier at ¶¶ 327.04[7] and [7][a] (15th rev. ed. 1999) (emphasis in original) (footnotes omitted).

In the instant case, SVC is both a creditor of the Debtor as well as an attorney for another creditor of the Debtor, namely, Camco, Inc. Both Gregory Camann and the UST have objected to retention of SVC. Given the facts as currently understood by the Court, the Court finds that no actual conflict of interest exists. All parties agree that SVC is not disinterested, and for that reason, cannot be appointed as counsel under section 327(a) of the Bankruptcy Code. However, this fact does not preclude its retention as special counsel under section 327(e) as more fully discussed below in section III.C of this opinion.

With respect to SVC's past and continued representation of Camco, Inc., the Court notes that SVC's representation of Camco, Inc. is limited to labor and employment matters. To the extent that SVC's proposed services will be limited to litigation with Joan Camann and/or Gregory Camann regarding ownership and transfer of a marital asset (i.e., the Debtor's stock in Camco, Inc.), the Court finds on the current record that SVC does not have an actual conflict of interest.¹

¹ Rule 1.7 of the New Hampshire Rules of Professional Conduct provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

The proposed employment is similar to the situation where creditor's counsel is retained to serve as counsel to a creditor's committee. While counsel may continue to represent the individual creditor in other matters, it may not represent the creditor with respect to its claim against the bankruptcy estate. Similarly, in the instant case, SVC would not be authorized to represent Camco, Inc. with respect to any asserted claim against the Debtor's bankruptcy estate. As long as SVC's services to Camco, Inc. are limited to labor and employment matters, the Court finds no actual conflict of interest in representing both the Debtor and Camco, Inc. Accordingly, the Court finds that section 327(c) does not prevent retention of SVC as special counsel to the Debtor.

C. Retention under Section 327(e) of the Bankruptcy Code

Section 327(e) of the Bankruptcy Code provides:

The [debtor in possession], with the court's approval, may employ, for a specified special purpose, other than to represent the [debtor in possession] in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e). "Section 327(e) contains less restrictive requirements than [s]ection 327(a) which governs the employment of general counsel as there is no requirement of disinterestedness." Film Ventures, 75 B.R. at 252. "Section 327(e) contemplates that an attorney who is not disinterested may be needed to

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation and with knowledge of the consequences.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is under taken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

represent the debtor for a special purpose.” D.L. Enters., 89 B.R. at 110. As noted above, the Court has great discretion in this area. See id. at 111.

Although an attorney’s lack of disinterestedness may preclude employment by the estate for general purposes in conducting a bankruptcy case, the attorney may still be retained by the estate for a “special purpose.” Thus, section 327(e) provides that, when it is in the best interest of the estate, the trustee may employ, for a “specified purpose,” other than to represent the trustee in “conducting the case,” an attorney who has represented the debtor. Such attorney need not be “disinterested,” as is otherwise required by section 327(a), provided that the attorney represents or holds no interest adverse to the debtor or the estate in respect of the matter upon which the attorney is to be engaged.

Collier at ¶ 327.04[9] (footnotes omitted).

Section 327(e) permits post-petition representation by a debtor’s pre-petition attorney for a special purpose where he holds no adverse interest to the debtor within the scope of his representation. See Film Ventures, 75 B.R. at 252.

An example of the “specified special purpose” referred to in section 327(e) would be a situation in which it is advisable to retain an attorney who has been employed by the debtor to handle a specific legal action for which that attorney may be particularly suited (e.g., securities litigation, personal injury lawsuits, labor negotiations, etc.). The “special purpose” must be unrelated to the reorganization of the debtor and must be explicitly defined or described in the application seeking approval of the attorney’s employment. . . . [T]he subsection authorizes the employment of an attorney in certain cases, notwithstanding the attorney’s prior connection with the debtor, in order to permit the utilization of special knowledge and experience which may be of substantial benefit to the estate. “[Section 327(e)] will most likely be used when the debtor is involved in complex litigation, and changing attorneys in the middle of the case after the bankruptcy case has been commenced would be detrimental to the progress of that other litigation.”

Collier at ¶ 327.04[9][b] (footnotes omitted). The “specified special purpose” to be served by counsel appointed under section 327(e) must not be related to the Debtor’s reorganization since this is tantamount to representing the Debtor in the conduct of the case. See In re Tidewater Memorial Hospital, Inc., 110 B.R. 221, 228 (Bankr. E.D. Va. 1989).

In the motion before the Court, the Debtor proposes to retain SVC for a broad range of services, including advising and representing the Debtor concerning his ownership and operation of various business entities, the sale or other disposition of such business entities, and various contractual disputes. While the Debtor attempted to narrow the scope of these services in its response to Gregory Camann’s objection, the Court finds that the Debtor has failed to articulate a “specified special purpose” within the meaning of

section 327(e). In addition, the Court finds that the motion before the Court contemplates retention of SVC, in part, to represent the debtor in possession “in conducting the case.” Such representation is prohibited by section 327(e). For these reasons, the Court must deny the Debtor’s motion to retain SVC as special counsel.

Additionally, the Court finds that the Debtor has failed to demonstrate that SVC’s services are in the best interest of the estate. The only justification for SVC’s retention is that “it will result in substantial economies, and will obviate duplication by general counsel of efforts previously undertaken.” This is insufficient to satisfy the requirement of section 327(e) because some of the services contemplated in the motion involve matters outside the narrow exceptions to the disinterestedness exception in section 327(e). To the extent that the Debtor needs to economize in the general conduct of the case due to general counsel’s location in Portland, Maine, retention of local counsel may be appropriate. However, SVC cannot serve as local counsel as it is not disinterested and cannot be retained under section 327(a). The Debtor cannot use section 327(e) to end run the explicit requirements of the Bankruptcy Code.

IV. CONCLUSION

For the reasons outlined above, the Court denies without prejudice the Debtor’s instant motion to retain and employ SVC as special counsel under section 327(e) of the Bankruptcy Code. If the Debtor chooses to file another motion proposing to retain SVC under section 327(e), the Debtor must meet the explicit requirements of the statute. First, the Debtor must explicitly detail the “specified special purpose” for which SVC will be retained. Second, the Debtor must demonstrate that SVC’s retention is “in the best interest of the estate.” Third, the Debtor must show that SVC “does not represent or hold any interest adverse to the debtor or the estate with respect to the matter on which [SVC] is to be employed.” Unless the Debtor can satisfy each of these three requirements, SVC’s retention cannot be approved by the Court. This opinion and order constitute the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 2nd day of May, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge