

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

In re:

Bk. No. 00-12342-JMD

Chapter 7

Sprague Floor Coverings, Inc.,  
Debtor

*Peter N. Tamposi, Esq.*  
*NIXON PEABODY LLP*  
*Attorney for Debtor*

*Steven M. Notinger, Esq.*  
*Chapter 7 Trustee*

**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

The Court has before it an application filed by Nixon Peabody LLP (“Debtor’s Counsel”) on October 16, 2000 seeking compensation and reimbursement of expenses in connection with a Chapter 7 case filed by their client, Sprague Floor Coverings, Inc. (the “Debtor”) on August 17, 2000. Steven M. Notinger, Chapter 7 Trustee (the “Trustee”), filed an objection to the application on the grounds that Debtor’s Counsel is not entitled to compensation under the Bankruptcy Code because Debtor’s Counsel provided no substantial contribution which benefitted the estate. The Court held a hearing on the application on November 15, 2000 and took the matter under advisement.

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**

On August 17, 2000, the Debtor filed a skeleton Chapter 7 petition with the Court. On September 1, 2000, the Debtor filed its schedules and statements of financial affairs as well as a

statement under Federal Rule of Bankruptcy Procedure 2016, signed by Debtor's Counsel, which indicated that Debtor's Counsel had been paid \$2,793.49 for services in connection with the case. The statement did not indicate that further compensation would be owed by the Debtor.

On October 16, 2000, Debtor's Counsel filed an application seeking compensation in the amount of \$4,432.00 for 27.6 hours of services rendered during the period of August 2, 2000 through August 31, 2000. Debtor's Counsel attached to the application copies of time sheets itemizing the services rendered by Debtor's Counsel. A review of the time sheets reveals that \$2,960.50 in fees were incurred for 15.8 hours of services rendered prepetition and \$1,471.50 in fees were incurred for 11.8 hours of services rendered postpetition. It is apparent that the bulk of the fees represent services related to bankruptcy counseling and the preparation of the Debtor's petition, schedules, and statements. However, some of the services appear to be related to customer and lease issues. In their application, Debtor's Counsel also seeks reimbursement of expenses in the amount of \$55.11. The expenses include \$35.20 for copier charges, \$12.00 for domestic fax charges, and \$7.91 in long distance calls.

The record is clear that Debtor's Counsel has not been retained by order of the Court, upon either their own application or an application by the Trustee. At the hearing, the Trustee represented that, as of the hearing date, the bankruptcy estate contained assets totaling \$4,870.51 and that the estate may be administratively insolvent.

### **III. DISCUSSION**

Debtor's Counsel seeks approval of their fees and expenses and authorization for payment from assets of the estate to the extent that their fees and expenses exceed their prepetition retainer. The Trustee objects to the application to the extent that it seeks authorization of payment from estate assets. Neither party has raised the issue of whether a debtor's attorney in a Chapter 7, or Chapter 11 case where a trustee is appointed, may be compensated at all in light of the 1994 revisions to section 330(a) of the Bankruptcy Code which deleted the words "the debtor's attorney" from the first clause. The Fifth and Eleventh Circuits

have held that such attorneys are no longer entitled to compensation from the estate while the Second, Third, and Ninth Circuits have held to the contrary. See In re Top Grade Sausage, Inc., 227 F.3d 123, 130 (3<sup>rd</sup> Cir. 2000) (debtors' attorneys may still receive compensation because the statutory scheme would be rendered inconsistent if section 330(a) were read to omit debtors' attorneys and because the legislative history does not manifest an intent by Congress to change the long-standing practice of compensating debtors' attorneys); In re American Steel Prod., Inc., 197 F.3d 1354, 1357 (11<sup>th</sup> Cir. 1999) (the plain language of section 330 precludes an award of attorney's fees to the debtor's attorney from the Chapter 7 bankruptcy estate); In re Century Cleaning Servs., Inc. 195 F.3d 1053, 1058 (9<sup>th</sup> Cir. 1999) (Chapter 7 debtor's attorney awarded fees where statute was found to be ambiguous due to a grammatical error in statute coupled with conflicting lists of persons who may be compensated); Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.), 157 F.3d 414, 424-25 (5<sup>th</sup> Cir. 1998) (statute is clear on its face and precludes award of compensation to debtor's counsel after appointment of a Chapter 11 trustee); In re Ames Dep't Stores, Inc., 76 F.3d 66, 71-72 (2<sup>nd</sup> Cir. 1996) (omission of debtor's attorneys from revision to statute inadvertent). Since the issue of whether a Chapter 7 debtor's attorney is entitled to compensation under section 330 of the Bankruptcy Code was not raised by the parties and is not necessary to Court's decision in this case, the Court will leave that issue for another day.

When a debtor files bankruptcy, a bankruptcy estate is created. See 11 U.S.C. § 541(a). In cases under Chapter 7, a trustee is appointed. See 11 U.S.C. §§ 701 and 702. The trustee's duties under the Bankruptcy Code are outlined in section 704, which provides in relevant part that the trustee must:

1. Collect and reduce to money the property of the estate;
2. Close such estate as expeditiously as is compatible with the best interests of parties in interest;
3. Be accountable for all property received;
4. Investigate the financial affairs of the debtor; and
5. Furnish such information concerning the estate and the estate's administration as is requested by a party in interest.

See 11 U.S.C. §§ 704(1), (2), (4), and (7). The trustee is obligated to minimize the administrative claims asserted against the estate. See 11 U.S.C. § 503.

In a Chapter 7 case, debtor’s counsel’s obligations are limited. When counsel undertakes representation of a debtor, counsel assumes certain minimum obligations to prepare the debtor’s petition, schedules, and statements and to attend the first meeting of creditors.<sup>1</sup> Knowing these obligations, counsel for Chapter 7 debtors should endeavor to obtain a sufficient retainer to complete the required work. In this case, Debtor’s Counsel failed to obtain a retainer sufficient to cover the cost of the minimum services to be provided.

Unlike a case converted from Chapter 11, fees payable to counsel for a Chapter 7 debtor would be of the same priority as the Chapter 7 trustee’s fees. See 11 U.S.C. § 726(a)(1) (“[P]roperty of the estate shall be distributed . . . (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title . . .”); 11 U.S.C. § 507(a) (“The following expenses and claims have priority in the following order: (1) First, administrative expenses allowed under section 503(b) of this title . . .”); 11 U.S.C. § 503(b) (“After notice and a hearing, there shall be allowed administrative expenses . . . including (1)(A) the actual, necessary costs and expenses of preserving the estate . . . ; (2) compensation and reimbursement awarded under section 330(a) of this title; (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph of this subsection, incurred by . . . a creditor . . .”); 11 U.S.C. § 726(b) (“Payment on claims of a kind specified in paragraph (1) . . . of section 507(a) of this title, shall be made pro rata among claims of the kind specified in each particular paragraph, except that in a case that has been converted to this chapter under section 1009, 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed

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<sup>1</sup> Pursuant to 11 U.S.C. § 521, a debtor has several obligations upon the filing of a bankruptcy case. Specifically, the debtor must file lists of creditors and assets and liabilities. See 11 U.S.C. § 521(1). The debtor must also cooperate with the trustee as necessary to enable the trustee to perform his duties, which includes surrendering all property of the estate and all books and records relating to property of the estate. See 11 U.S.C. § 521(3) and (4).

under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.”).

Under the Bankruptcy Code, the Chapter 7 trustee is charged with responsibility for administration of the estate including collection of property of the estate and reducing such property to money and closing the estate “as expeditiously as is compatible with the best interests of the parties in interest.” See 11 U.S.C. § 704(1) (emphasis added). Since the Chapter 7 trustee is responsible to creditors and other parties in interest for such administration, he or she must have the authority to determine to incur, or not to incur, administrative expenses. If the debtor’s counsel in a voluntary Chapter 7 proceeding could seek additional attorney’s fees without notice to or consent by the Chapter 7 trustee, the Chapter 7 trustee may be put in a position where significant administrative expenses are being incurred without his knowledge. At a minimum, counsel for Chapter 7 debtors should seek consent from the trustee, or approval by the Court with notice to the Chapter 7 trustee, before performing services for which counsel intends to seek payment from the bankruptcy estate. That was not done in this case.

It would not be fair and equitable to place the Trustee’s fees, as well as any administrative expenses incurred by the Trustee, at risk solely because Debtor’s Counsel did not obtain an adequate retainer to compensate them for work which was required and reasonably predictable. The Court does not believe that the Trustee’s fees should be jeopardized where his involvement in the case is involuntary and Debtor’s Counsel’s involvement is voluntary. A Chapter 7 trustee’s ability to pay administrative expenses, including his own fees and attorney’s fees, depends on his expertise and administration of the case. The Chapter 7 trustee is subject to involuntary financial risks which flow from his or her performance in the case. Counsel to a Chapter 7 debtor knows the scope of his or her responsibility in a Chapter 7 proceeding, is in a position to evaluate the time and expenses involved in representing the debtor and can choose to represent the debtor or not. When that choice proves to be improvident, the bankruptcy estate should not become the involuntary surety of fees for the debtor’s counsel. Absent unusual circumstances, those risks should not be

transferred to a bankruptcy estate without the consent of the Chapter 7 trustee.<sup>2</sup> No such circumstances are present in this case.

In this case (1) the Trustee's consent was not obtained prior to the rendering of services by Debtor's Counsel, (2) the Trustee objects to the payment of fees and expenses beyond the retainer received by Debtor's Counsel and (3) the amount requested is large relative to the bankruptcy estate. Accordingly, the Court is not required to determine if any fees may be awarded under the provisions of section 330 of the Bankruptcy Code or whether the services in this case otherwise meet the requirements set forth in that section. On the facts of this case, the Court will not approve the payment of fees and expenses from the bankruptcy estate to Debtor's Counsel. Debtor's Counsel is free to apply their retainer against their fee request as counsel in a Chapter 7 case need not file an application seeking approval of fees and expenses to be paid from a prepetition retainer. However, the balance of Debtor's Counsel's fees and expenses will not be payable from the bankruptcy estate.

#### **IV. ORDER**

For the reasons discussed in this opinion, it is hereby ORDERED:

1. The application for compensation and reimbursement of expenses in the amount of \$4,487.11 filed by Debtor's Counsel is denied to the extent that Debtor's Counsel seeks payment from the estate;
2. Debtor's Counsel may apply its retainer of \$2,793.49 to the fees and expenses;
3. The balance of \$1,693.62 may not be paid from the bankruptcy estate.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 7<sup>th</sup> day of December, 2000, at Manchester, New Hampshire.

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<sup>2</sup> Where the Chapter 7 debtor's counsel files a petition and schedules without an adequate retainer in order to preserve a trustee's ability to recover avoidable transfers which are beneficial to the estate, and promptly advises the trustee of his actions, a fee award might appropriate. Similarly, where the fees sought reflect work not reasonably foreseeable and are modest in relation to the size of the estate, a fee award might be appropriate. However, the Court need not decide what circumstances might warrant approval of such fees because they are not present in this case.

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J. Michael Deasy  
Bankruptcy Judge