IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In re:

Foods, Inc., **Case No. 14-02689-als7**

Debtor(s)

Barry A. Chatz, **Adv. Pro. 16-30052-als**

Plaintiff(s)

v.

City of Clive,

Defendant(s)

Barry A. Chatz, **Adv. Pro. 16-30087-als**

Plaintiff(s)

v.

Global Spectrum, L.P.,

Defendant(s)

MEMORANDUM OF DECISION
(date entered on docket: June 14, 2017)

Before the Court are issues arising in two adversary proceedings in which the defendants are seeking to strike or dismiss the complaints filed against them by the liquidating trustee appointed pursuant to the confirmed plan in the Foods, Inc. chapter 11 proceeding and objections to a Motion to appear Pro Hac Vice made by attorney Richard Lauter on behalf of the liquidating trustee in Foods, Inc.[1] The Court has jurisdiction of these matters under 28 U.S.C. §§ 157(b)(1) and 1334.

[1] Subsequent to these filings a number of defendants in other pending adversary proceedings filed similar motions or objections.

FACTS

On November 9, 2014, Foods, Inc. filed a voluntary chapter 11 bankruptcy petition. A Notice of Committee Appointment was filed by the United States Trustee on November 18, 2014. Approximately one week later attorneys from Freeborn & Peters, LLP including Lauter, Fawkes, Helton, Janczak and Eggert entered appearances on behalf the Committee. All of these individuals, except Tonita Helton, filed Motions to appear Pro Hac Vice ("PHV"). Each of those Motions stated that counsel were in compliance with the "requirements of LR 83.1.d.4 by associating with Ms. Tonita M. Helton. Ms. Helton is currently in good standing as a lawyer admitted to practice in the state court of Iowa, is admitted to the bar of the district under LR 83.1.b and c, and who has entered an appearance in this case."

Together, Foods, Inc. and the Committee proposed a plan that was confirmed on October 9, 2015 that created a liquidating trust ("Trust"). The purpose of that vehicle was to evaluate creditor claims, distribute estate assets and to pursue litigation in an effort to recover additional funds for unsecured creditors. Upon confirmation of the plan the Committee was dissolved and the Trust replaced it. On November 13, 2015 Lauter, Eggert and Janczak filed appearances on behalf of Barry Chatz the trustee of the Trust. Potential claims that could be asserted on behalf of the estate by the Trust were subject to the time limitations under 11 U.S.C. § 546(a) which would expire on November 9, 2016, two years from the date the Foods, Inc. petition was filed on. In December 2015 Lauter left Freeborn & Peters. On May 4, 2016 Eggert and Janczak filed motions to withdraw their previous appearances on behalf of Chatz which were approved by the Court.

As Chatz's attorney, Lauter filed dozens of adversary proceedings between November 1 and November 8, 2016 that sought to avoid pre-petition transfers made by Foods, Inc. Among the cases filed during that time period were: 16-30052 Chatz v. City of Clive and 16-30087 Chatz v. Global Spectrum. On January 23, 2017 the defendants in both of these adversary proceedings filed pre-answer motions to strike the complaints stating that Lauter had failed to comply with the pro hac vice requirements in the Southern District of Iowa. On January 31, 2017 Lauter filed notices of dismissal in Chatz v. City of Clive and Chatz v. Global Spectrum[2]. On February 1, 2017 Lauter filed a Motion to Appear Pro Hac Vice ("PHV") on behalf of Chatz in the Foods, Inc. case that identified Ronald C. Martin of Day Retting Martin, P.C. as local counsel and requested an order nunc pro tunc from

[2] These motions were later withdrawn in each of the pending adversary proceedings.

November 6, 2015. Objections to the Motion were filed on behalf of the City of Clive, Global Spectrum and Ivie & Associates (collectively "Defendants"). On February 8, 2017 Tonita Helton withdrew her appearance which was granted by the Court.

DISCUSSION

Local Rule 83.1[3] ("LR 83.1") governs lawyers appearing in the Southern District of Iowa. According to LR 83.1(b) a lawyer is qualified for admission to practice in the district if he or she: 1) is admitted to practice in the courts of Iowa and 2) is in compliance with federal continuing legal education requirements. If these conditions cannot be met, then Local Rule 83.1(d) becomes applicable which requires attorneys not licensed in Iowa to file PHV Motions for permission to practice in a "particular case." An association with local counsel is required in each proceeding as follows:

> A lawyer not qualified to practice under section "b" or subsection d.2 of this rule must not tender any document to the Clerk of Court for filing unless, at the time of the tender, qualified associate counsel has entered a written appearance on behalf of the party represented by the nonqualified lawyer and has signed the document.

The crux of the arguments made on behalf of the defendants to strike the complaints is that Latuer did not comply with this portion of the rule when the complaints were filed. It is further argued that the second PVH filed by Lauter must be denied because this violation cannot be corrected nunc pro tunc. Both Lauter and his local counsel advance a number of arguments in opposition to these positions.

1. Motion to Strike Complaint

Federal Rule of Civil Procedure 12, incorporated by Federal Rule of Bankruptcy Procedure 7012, outlines a process for pre-answer filings applicable to adversary complaints. The Court, sua sponte, or pursuant to a filed motion "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Even though "[j]udges enjoy liberal discretion to strike pleadings under Rule 12(f)", in this Circuit, "[s]triking a party's pleading . . . is an extreme and disfavored measure." *BJC Health System v. Columbia Cas. Co.* 478 F.3d 908, 917 (8th Cir. 2007). A Motion to Strike may be granted if the pleading is redundant or it "merely recasts the same elements under the guise of a different theory." *Dethmers Mfg. Co., Inc. v. Automatic Equipment Mfg. Co.*, 23 F. Supp. 2d 974, 1009 (N.D. Iowa 1998). The Court may strike a claim for immateriality if it has "no essential or important relationship to the claim for relief."

[3] http://www.iasd.uscourts.gov/sites/default/files/Rules/2009%20Local%20Rules.pdf.

Resolution Trust Corp. v. Fiala, 870 F. Supp. 962, 977 (E.D. Mo. 1994). A pleading may also be struck if it "consists of statements that do not pertain, and are not necessary, to the issues in question." *CitiMortgage, Inc. v. Just Mortg., Inc.*, No. 4:09 CV 1909 DDN, 2013 WL 6538680, at *7 (E.D. Mo. Dec. 13, 2013) (citation omitted). Finally, a court may strike a pleading because it is scandalous and "it generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." *United States ex rel. K & R Ltd. P'shp v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 51 (D.D.C. 2006). These standards pertain to allegations within pleadings, not the manner in which an attorney filed them. Consequently, they are not applicable to the complaints at issue in this dispute.

Iowa law has also been raised in support of the remedy of striking the pending complaints:

> 602.10111. Nonresident attorney--appointment of local attorney
>
> Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining the attorney's residence in another state, without being subject to this article; provided that at the time the attorney enters an appearance the attorney files with the clerk of such court the written appointment of some attorney resident and admitted to practice in the state of Iowa, upon whom service may be had in all matters connected with said action, with the same effect as if personally made on such foreign attorney within this state. In case of failure to make such appointment, such attorney shall not be permitted to practice as provided in this section, and all papers filed by the attorney shall be stricken from the files.

Iowa Code § 602.10111 (2009). First, it must be noted that L.R. 83.1(d)(3) does not contain similar language or require compliance with this state statute as a condition of appearing in the United States District Court for the Southern District of Iowa. Rather, the applicable local rule only states that attorneys must "submit to and comply with all provisions and requirement of the Iowa Rules of Professional Conduct, or any successor code adopted by the Iowa Supreme Court."

Although state statutes and court rules do not bind this Court those may be reviewed at a court's discretion for guidance in determining issues related to the practice of law and appearances by counsel. See *In re Drevlow*, 221 B.R. at 768–69; *In re Jolly*, 313 B.R. 295, 301 (Bankr. S.D. Iowa 2004) (citing *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. Sturgeon*, 635 N.W.2d 679 (Iowa 2001)). Routinely state law statutes have been applied to address the unauthorized practice of law by non-lawyers filing pleadings. *See Jones v. Corr. Med. Servs. Inc.*, 401 F.3d 950, 952 (8th Cir. 2005) (dismissing a suit because a non-attorney filed a Complaint on behalf of the estate he

administered); *In re Drevlow*, 221 B.R. 767, 769 (8th Cir. B.A.P. 1998) (holding that "actions taken in legal proceedings by non-attorneys are a nullity"); *Yulin Li ex rel. Lee v. Rizzio*, 801 N.W.2d 351, 360 (Iowa Ct. App. 2011) (voiding a personal-injury judgment because the petitioner's father represented him despite not being an attorney).

Notably, Lauter is an attorney licensed in Illinois, not a layperson. Pertinent to this case, the Iowa Supreme Court has held that "substantial compliance" with the requirements of Iowa Code § 602.10111 even absent a formal PHV motion, does not require the Court to strike the offending attorney's filings. *Conkey v. Hoak Motors, Inc.*, 637 N.W.2d 170, 173 (Iowa 2001). Iowa law does not strictly require a PHV motion in every instance (particularly where the attorney believed he acted with the court's permission) and it does not absolutely require state courts to strike the filings for technical violations of the statute.

2. Motion to Appear Pro Hac Vice ("PHV")

The Defendants also contend that the complaints filed by Lauter are defective, or void, because he had not filed a PHV motion to represent Chatz in the adversary proceedings that identified a local attorney. They further argue that the pending complaints cannot be rectified by way of an order nunc pro tunc on the second PHV motion filed on February 1, 2017. *Matthies v. Railroad Retirement Bd*. is referenced. 341 F.2d 243 (8th Cir. 1965). That case stands for the proposition that the function of a nunc pro tunc order "is not . . . to antedate the actual performance of an act which never occurred." *Id. at* 246 (citation omitted). A careful reading of *Matthies* reveals that the facts in that case and the legal authorities cited involve circumstances that are very different from those present this case.

No precedent in the Eighth Circuit has been located for granting a PHV Motion nunc pro tunc. However, there is authority for bankruptcy courts to exercise discretion in permitting nunc pro tunc relief related to attorney employment for the purpose of allowing compensation. *Lavender v. Wood Law Firm*, 785 F.2d 247, 248–49 (8th Cir.1986) ("in limited circumstances, the bankruptcy court as a matter of fundamental fairness may exercise its discretion and enter a nunc pro tunc order authorizing compensation."); *Matter of Triangle Chemicals, Inc.*, 697 F.2d. 1280 (5th Cir. 1983) (rules of equity guide a bankruptcy court's discretion to enter orders nunc pro tunc in appropriate circumstances); *In re NWFX, Inc*., 267 B.R. 118, 247 (Bankr. W.D. Ark. 2001) (approving employment retroactively because all of the parties had been on notice that the firm was representing the trustee). *In re Babies* supports the arguments raised by Lauter and Martin. 315 B.R. 785, 794, 797 (Bankr. N.D. Ga. 2004). In that case, the court retroactively admitted Chicago attorneys based upon their representations "that they proceeded in the good faith belief that their activities were in accordance with applicable

standards, that they received legal advice from counsel with expertise in professional and ethical matters that their conduct was proper, and that they desired to be admitted pro hac vice if the Court determined that it was necessary." Id. at 797–98. Martin represented that Lauter filed the second PHV Motion upon Martin's advice after discussing the City of Clive's position. Nothing in the record establishes that Lauter intentionally failed to take action in violation of the local rule or that he delayed filing the second PHV Motion to correct the situation upon becoming aware of the issue.

CONCLUSION

11 U.S.C. § 105(a) grants a bankruptcy court the inherent power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]" which includes the ability to regulate attorneys appearing before it. There is authority under Fed. R. Bankr. P. 9005 to "order the correction of any error or defect or the cure of any omission which does not affect substantial rights." Rule 9005 incorporates Federal Rule of Civil Procedure 61, which states that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." A court may disregard defects in a complaint as long as the opposing parties were not "surprised or otherwise prejudiced by any deficiency." *Goodman v. United States ex rel. Rineer*, 398 F.2d 879, 879 (9th Cir. 1968).

The Defendants' arguments focus on the viability of the complaint based upon the second PHV motion. While it could be argued that a better practice would be to simultaneously file a PHV motion with an appearance on behalf of a new party there is no statute or rule that absolutely imposes such a requirement and the Court declines to adopt such a policy. To institute such a regular practice would be unnecessary, duplicative, and could substantially increase the costs of administering bankruptcy estates. Nothing in the record suggests that the complaints were not timely filed. Nothing in the record suggests that the complaints were not properly served. Nothing in the record suggests that Lauter engaged in conduct with the intent to violate or circumvent L.R. 83.1. The issues presented by the Defendants do not go to the merits of the claims being pursued by Chatz and do not preclude any available defenses to those claims. Based upon the facts in this case, to grant the relief sought by the Defendants would elevate form over substance to the detriment of unsecured creditors of Foods, Inc.

For the reasons stated,

1. The Motions to Strike the complaints filed by the City of Clive and Global Spectrum, L.P. are denied.

2. The objections to the Motion to Appear Pro Hac Vice filed on February 1, 2017 are overruled.

3. The Motion to Appear Pro Hac Vice filed on February 1, 2017 is construed as an amendment to the appearance filed by Lauter on behalf of Chatz on November 13, 2015 and applies nunc pro tunc to substitute Ronald C. Martin of the firm Day Retting Martin, P.C. as local counsel.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in these Adversary Proceedings
Electronic Filers in this Chapter Case