

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
REPUBLIC REALTY CORP., d/b/a : Case No. 88-32-C
REPUBLIC REALTY, : Chapter 11
Debtor. :
- - - - -

ORDER - APPLICATION FOR ORDER APPROVING EMPLOYMENT
OF ATTORNEY FOR DEBTOR AND FOR
ALLOWANCE OF INTERIM ATTORNEY FEES

On July 8, 1988, William Wheatcraft (hereinafter "Wheatcraft") filed an application for order approving employment of attorney for debtor and for allowance of interim attorney fees. On June 30, 1988, Statesman Mortgage Company (hereinafter "Statesman") filed a resistance to said application. On July 5, 1988, the United States Trustee also filed a resistance to said application.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B). The Court, upon review of the file and pleadings, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACT

1. On January 25, 1988, Debtor filed a pro se Chapter 11 petition.
2. After Statesman filed motions on February 9, 1988, to lift stay and to dismiss, Debtor requested Wheatcraft to enter an appearance on behalf of Debtor and resist

Statesman's motions.

3. On February 22, 1988, Wheatcraft did enter an appearance with the Court on behalf of Debtor, and has performed legal services for Debtor since that time.

4. On July 8, 1988, Wheatcraft filed an application seeking court approval of employment as Debtor's attorney and the approval of \$6,727.50 for services rendered from February 19, 1988, through May 27, 1988.

5. Before July 8, 1988, Wheatcraft had neither applied for nor received Court approval of employment as Debtor's attorney.

6. In the July 8, 1988, application, Wheatcraft did not set out any extraordinary circumstances justifying a nunc pro tunc order for appointment of counsel.

7. Wheatcraft's delay in seeking Court approval of employment as Debtor's counsel was not due to hardship beyond his control.

8. On July 21, 1988, the Court entered an Order dismissing Debtor's case. Said Order did not contain any provision providing for the Court's retention of limited jurisdiction to consider Wheatcraft's fee application.

DISCUSSION

Two issues are presented in this case. The first is

whether Wheatcraft is entitled to a nunc pro tunc order of appointment as Debtor's counsel. The second is whether the Court has jurisdiction to consider a professional fee application after a Chapter 11 case is dismissed.

Concerning compensation for attorneys representing a Chapter 11 debtor-in-possession, the Eighth Circuit recently noted:

An attorney hired to represent a debtor-in-possession must give notice to creditors and receive court approval prior to being compensated by the estate. 11 U.S.C. §330; Bankruptcy Rule 2016. Without such prior approval, ordinarily subsequent applications for fees should be denied and the funds received should be ordered returned to the estate. However, 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.

Lavender v. Wood, 785 F.2d 247, 248 (8th Cir. 1986) (emphasis added). Nunc pro tunc relief is limited to cases where extraordinary circumstances are present. Matter of Independent Sales Corp., 73 B.R. 772, 777 (Bankr. S.D. Iowa 1987). Extraordinary circumstances exist "where prior approval would have been appropriate and the delay in seeking approval was due to hardship beyond the professional's control." Id.

In the case at bar, Wheatcraft, in his application, did not set out any extraordinary circumstances justifying the

Court's entry of a nunc pro tunc order. His delay in seeking Court approval of employment, nearly five months after he commenced representing Debtor's estate, was not due to any hardship beyond his control. As a result, the Court concludes Wheatcraft is not entitled to a nunc pro tunc order authorizing his employment and, thus, is not entitled to collect any fees.

Assuming arguendo that Wheatcraft was entitled to a nunc pro tunc order, the Court would still deny his fee application because of a lack of jurisdiction. A bankruptcy court has the power to determine whether it has jurisdiction to proceed in any action. In re Ennis, 50 B.R. 119, 120-21 (Bankr. D. Nev. 1985) (citations omitted). However, the court should not assume jurisdiction over any matter that does not involve the administration or property of a bankruptcy estate. Id. at 121.

The court is not divested of jurisdiction over a professional fee application in a dismissed Chapter 11 case if the Order of Dismissal expressly provides that the court retains limited jurisdiction to consider the fee application. Matter of Mandalay Shores Co-op. Housing Ass'n, 60 B.R. 22, 23 (Bankr. M.D. Fla. 1986).

In the case at bar, Wheatcraft did not request the Court to retain limited jurisdiction regarding the fee application in the event the case was dismissed. As a result, the Order on Dismissal did not contain any provision providing for the Court's retention of limited jurisdiction to consider the fee

application. Therefore, the Court concludes it does not have jurisdiction to consider the fee application.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that Wheatcraft is not entitled to a nunc pro tunc order authorizing employment because in his application, he failed to set out any extraordinary circumstances entitling him to such order.

FURTHER, the Court concludes it does not have jurisdiction to consider the fee application.

IT IS ACCORDINGLY ORDERED that Wheatcraft's application for order approving employment of attorney for debtor and for allowance of interim attorney fees is hereby denied.

Dated this 4th day of August, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE