

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
: :
COUNTRYSIDE INVESTMENT COMPANY, : Case No. 88-0554-C
a Partnership, : Chapter 11
: :
Debtor. :
: :
- - - - -

**ORDER--APPLICATION FOR APPROVAL AND PAYMENT OF
INTERIM FEES AND EXPENSES**

On August 16, 1989, a hearing was held on Michael P. Mallaney's application for approval and payment of interim fees and expenses. The following attorneys appeared on behalf of their respective clients: Donald F. Neiman as Chapter 7 Trustee; Michael P. Mallaney ("Mallaney") as special counsel for Chapter 7 Trustee; Charles M. Thomson for HFC Commercial Realty, Inc. ("HFCCR"); and Terry L. Gibson as U.S. Trustee. At the conclusion of said hearing, the Court took the matter under advisement, with Mallaney given 15 days to supplement his application. Mallaney has submitted a supplemental application and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A). The Court, upon review of the application, supplemental application, arguments of counsel, and briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On March 14, 1988, Countryside Investment Company ("Countryside") filed a voluntary Chapter 11 petition.

2. On December 19, 1988, the Court entered an order on motion to convert, converting the Chapter 11 Countryside case to a Chapter 7 case.

3. Between March 14, 1988 and December 19, 1988, Countryside, a partnership, had continued to operate as a debtor-in-possession pursuant to 11 U.S.C. §1107. During this period, Vinod M. Vashi and Sureka B. Vashi ("Vashi") were the general partners of Countryside.

4. Michael P. Mallaney was counsel for the Chapter 11 debtor-in-possession.

5. On December 21, 1988, the Court appointed Donald F. Neiman as Chapter 7 Trustee in this case.

6. On January 4, 1989, the Court entered an order vacating the automatic stay to permit HFCCR to foreclose on certain collateral in possession of Countryside including a promissory note in the original amount of \$1,424,000.00 payable to Countryside ("the Virginia Note").

7. HFCCR subsequently foreclosed on such collateral in proceedings in the Iowa District Court for Polk County, Iowa.

HFCCR also pursued an action against Vashi, guarantor of the indebtedness for which the collateral was held, for the

deficiency. Vashi was represented in the action in the deficiency by Paula Jacobi and the law firm of Schwartz, Cooper, Kolb and Gaynor ("Jacobi").

8. On January 10, 1990, Chapter 7 Trustee filed an application to employ special counsel, praying that it be authorized to employ Mallaney and Jacobi in this case to recover the Virginia Note, the monies collected therefrom, and to recover on any and all other claims that the bankruptcy estate may have against HFCCR with respect to the manner in which it dealt with collateral pledged by Countryside. The application to employ special counsel asserts that Trustee desires to employ Mallaney as special counsel for the reason that he was counsel for debtor-in-possession during the Chapter 11 proceeding and is familiar with the facts and circumstances surrounding Countryside and HFCCR. The application to employ special counsel also asserts that the Trustee desires to employ Jacobi as special counsel for the reason that she was counsel of record for the general partners of Countryside, Vinod M. Vashi and Sureka B. Vashi, in the deficiency action.

9. On January 16, 1990, the Court entered an order approving the application to employ special counsel.

10. On March 14, 1990, special counsel filed its complaint in Neiman vs. HFC Commercial Realty, Inc. (In re Countryside Investment Company), Case No. 88-554, Adversary

No. 90-00061, initiating the action against HFCCR.

11. On May 15, 1990, Mallaney filed an application for approval and payment of interim fees and expenses.

12. On June 14, 1990, U.S. Trustee filed an objection to the application for approval and payment of interim fees and expenses.

13. On June 15, 1990, HFCCR filed an objection to application for approval and payment of interim fees and expenses.

14. On August 16, 1990, the Court held a hearing on Mallaney's application for approval and payment of interim fees and expenses. The Court overruled U.S. Trustee's paragraph 11 objection, but took U.S. Trustee's paragraph 9 and 10 objections and the HFCCR objection under advisement. Mallaney was given 15 days to supplement his application for interim fees and expenses.

15. On August 22, 1990, Mallaney filed an amendment to his interim fee application.

DISCUSSION

I. HFCCR OBJECTION

In its objection, HFCCR asserts that compensation should not be awarded to Mallaney because Mallaney's representation of the Trustee violates the provisions of the Bankruptcy Code governing the employment of professionals by the Trustee,

specifically 11 U.S.C. §327. While the HFCCR objection focuses on the professional person employment standards set forth in 11 U.S.C. §327(a) and cases interpreting 11 U.S.C. §327(a), the applicable bankruptcy code provision is 11 U.S.C. §327(e).

11 U.S.C. §327(e) provides in pertinent part:

- (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee 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 an interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

Therefore, for an attorney to qualify for employment as special counsel under 11 U.S.C. §327(e): (1) the attorney's employment must be in the best interest of the estate, and (2) the attorney must 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. See In re G & H Steel Service, Inc., 76 B.R. 508, 511 (Bankr. E.D. Pa. 1987). 11 U.S.C. §327(e) does not require special counsel to be a "disinterested person" as required for professionals appointed under 11 U.S.C. §327(a). In re Tidewater Memorial Hospital, Inc., 110 B.R. 221, 227 (Bankr. E.D. Va. 1989). In re Film Ventures, Int'l, Inc., 75 B.R. 250, 252 (9th Cir. BAP 1987).

11 U.S.C. §327(e) authorizes 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. 2 Collier on Bankruptcy, ¶327.03[6], p. 327-50 (15th ed. 1990).

In the instant case, employment of Mallaney is in the best interest of the estate in that he is familiar with the facts and circumstances surrounding Countryside and HFCCR, including various bankruptcy proceedings, the proceeding in the Iowa District Court of Polk County, and the deficiency proceeding. In addition, the Court finds that Mallaney does not represent or hold any interest adverse to the Debtor or to the estate with respect to the manner in which Mallaney is employed. Attorney fees of Mallaney and Jacobi in excess of a \$15,000.00 maximum will be paid personally by Vashi, and to the extent of recovery against HFCCR, be reimbursed to Vashi prior to payment of any claims in the bankruptcy estate. Thus, potentially Mallaney will receive compensation from the general partners of Countryside and guarantors of Countryside debt. However, there is no indication that Mallaney represents an interest adverse to the Debtor or to the estate with respect to the matter in which he was employed--recovery of the Virginia Note, the monies collected therefrom and recovery on any and all other claims that the bankruptcy

estate may have against HFCCR with respect to the manner in which it dealt with collateral pledged by Countryside. Therefore, Mallaney qualifies for employment under 11 U.S.C. §327(e), and the HFCCR objection is overruled.

II. U.S. TRUSTEE OBJECTION

In paragraph 9 of its objection, Trustee asserts that Mallaney has not provided sufficient detail within the itemizations attached to the application for approval and payment of interim fees and expenses so as to indicate whether the services primarily benefitted the bankruptcy estate and not Vashi. The Court has reviewed Mallaney's amendment to interim fee application and finds that said application substantially complies with Matter of Pothoven, 84 B.R. 579 (Bankr. S.D. Ia. 1988), the services itemized relate to the matter in which Mallaney is employed and the services primarily benefit the bankruptcy estate. U.S. Trustee's objection in paragraph 9 is overruled.

In paragraph 10 of the U.S. Trustee objection, U.S. Trustee asserts that the application for approval of interim fees and expenses requests compensation for services rendered prior to the U.S. Trustee's submission of the application to employ special counsel pursuant to Local Administrative Order X-6(b), and as such, should not be compensated from the

bankruptcy estate.

A professional can be compensated out of the bankruptcy estate's assets only if employment is authorized by the court prior to the services being rendered. In re Southern Diversified Properties, Inc., 110 B.R. 992, 996 (Bankr. N.D. Ga. 1990). In re William A. Smith Construction Co., 92 B.R. 757, 759 (Bankr. N.D. Ohio 1988). In re WHET, Inc., 62 B.R. 770, 777 (Bankr. D. Mass. 1986). Indeed, 11 U.S.C. §327(e) specifically provides that the trustee, with the court's approval, may employ an attorney for a specified special purpose.

There is authority for the exercise of the court's equitable powers to authorize the appointment of a professional person nunc pro tunc under exceptional circumstances. In re Southern Diversified Products, 110 B.R. at p. 996. In re Independent Sales Corp., 73 B.R. at p. 777.

However, Mallaney has made neither a request for such appointment nor a showing of exceptional circumstances. Therefore, services performed prior to the January 16, 1990 order approving employment of special counsel are not compensable from the estate and the application for approval of interim fees and expenses as amended is reduced \$887.50 for services performed from 10/14/89 through 1/2/90.

ORDER

IT IS ACCORDINGLY ORDERED that Mallaney's application for approval of interim fees and expenses is approved, with compensation for services reduced \$887.50. Mallaney is entitled to compensation for services in the amount of \$1,458.30 and expenses of \$30.42.

Dated this 28th day of December, 1990.

Russell J. Hill
U.S. Bankruptcy Judge