

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

ALL IOWA TRANSPORT SERVICES, Case No. 85-364-C
INC., d/b/a Ambulance Services
Company, d/b/a All Iowa . Chapter 7
Ambulance Service Company,

Debtor.

ORDER ON OBJECTIONS TO FINAL REPORT

On March 1, 1988, a hearing was held on creditor's, attorney's, and accountant's objections to final report. Lynne Wallin Hines appeared on behalf of Trustee, Mark S. Lorence appeared on behalf of attorney John J. Gajdel (hereinafter "Gajdel"), and John Waters appeared on behalf of creditor Iowa Department of Revenue and Finance (hereinafter "Department of Revenue"). William E. Woodring, C.P.A., was not present (hereinafter "Woodring").

This is a core proceeding pursuant to 28 U.S.C. section 157(b) (2) (A). The court having heard the arguments of counsel and having reviewed the file now enters its findings and conclusions pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

1. On October 25, 1985, the court entered an order converting Debtor's case from Chapter 11 to Chapter 7, and Trustee was appointed.

2. On December 24, 1987, Trustee filed his final report, account, and petition for allowance, distribution and discharge.

3. On January 19, 1988, attorney Gajdel filed an objection to final report. Gajdel objected to Trustee's disallowance of \$1,665 of the \$8,382.56 in fees Gajdel had applied for on February 21, 1986. Trustee disallowed \$1,665 of fees because they represented services rendered prior to Gajdel's June 3, 1985, order of appointment as attorney for Debtor, who at the time was a Chapter 11 Debtor-in-possession. Gajdel argued that if the June 3, 1985, order did not relate back to February 27, 1985, the date Debtor filed its Chapter 11 petition, then he would request an order nunc pro tunc appointing him as attorney for Debtor as of February 27, 1985.

4. On January 19, 1988, accountant Woodring filed an objection to final report. Woodring objected to Trustee's disallowance of \$1,602 of the \$15,408 in fees Woodring had applied for on February 21, 1986. Trustee disallowed \$1,602 of fees for services rendered prior to Woodring's June 3, 1985, order of appointment as accountant for Debtor, who at the time was a Chapter 11 Debtor-in-possession. Woodring argued that if the June 3, 1985, order did not relate back to February 4, 1985, the date Woodring's employment with Debtor-in-possession began, then he would request an order

nunc pro tunc appointing him as accountant for Debtor as of February 4, 1985.

5. On January 19, 1988, Department of Revenue filed an objection to final report. Department of Revenue objected to Trustee's disallowance of its claim no. 117 for the entire amount of \$4,400.

6. On February 17, 1988, Department of Revenue filed claim no. 136 in the amount of \$23,467.88, which consisted of \$17,420.77 in taxes, \$1,742.08 in penalty, and \$4,305.03 in interest computed to the date of the claim. Said claim amended Department of Revenue's prior claim no. 117, previously disallowed by Trustee and now disallowed by virtue of the amended claim.

7. On February 26, 1988, Trustee filed an amendment to final report and allowed \$19,674.52 of claim no. 136 as a Chapter 11 administrative expense. In said amendment, Trustee noted that interest on the claim was only allowable to October 25, 1985, the date of conversion to Chapter 7.

8. Department of Revenue has not objected to Trustee's treatment of claim no. 136 in his amended final report.

9. Attorney Gajdel and accountant Woodring have not shown any extraordinary circumstances justifying the late filing of their respective applications for appointment as attorney and accountant for Debtor-in-possession.

DISCUSSION

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, there was no showing whatsoever of extraordinary circumstances justifying the late applications for appointment of attorney Gajdel and accountant Woodring. Woodring did not even appear at the hearing. Gajdel's attorney appeared and argued the court should exercise its discretion and enter a nunc pro tunc order because the

services were performed. With all due respect, this argument misses the point because the court does not dispute that Gajdel performed services for Debtor. Rather, the point is that these services were performed without prior court approval. Therefore, since neither Gajdel nor Woodring has shown any extraordinary circumstances justifying a nunc pro tunc order, their objections to final report and requests for nunc pro tunc orders are overruled and denied.

Turning to the objection by Department of Revenue, the court agrees with Trustee's treatment of claim no. 136 because the interest on said Chapter 11 administrative expense claim is only allowable to October 25, 1985, the date of conversion to Chapter 7. See Nicholas v. United States, 384 U.S. 678, 689-90 (1966); Matter of Patch Press, Inc., 71 B.R. 345 (Bankr. W.D. Wis. 1987). While Department of Revenue objected to the disallowance of claim no. 117, its claim no. 136 amended claim no. 117, and it has not objected to Trustee's treatment of claim no. 136. Therefore, since claim no. 136 amended claim no. 117, Department of Revenue's objection to claim 117 is overruled for mootness.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the court concludes neither attorney Gejdal nor accountant Woodring

has shown any extraordinary circumstances justifying a nunc pro tunc order.

IT IS ACCORDINGLY ORDERED, that the objections of Gejdal and Woodring to final report are overruled.

IT IS FURTHER ORDERED, that Trustee shall submit an Order of Final Distribution to the court, and that upon payment of all amounts directed to be paid by said Order, Trustee will be discharged of his duties herein.

Dated this 7th day of April, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE