UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Plastic Technologies of Vermont, Inc., **Chapter 11 Case**
Plastic Technologies of Maryland, Inc., **# 13-10729**
Plastic Technologies of New York, LLC, **Jointly Administered**
Debtors-in-Possession.

ORDER
DENYING DEBTOR'S APPLICATION TO EMPLOY DONALD MOORE *NUNC PRO TUNC*

On December 11, 2013, the Debtor moved to employ investment banker Donald Moore, effective as of the petition date of October 20, 2013 (the "Application") (doc. # 134). The Official Committee of Unsecured Creditors filed an objection on December 17, 2013 (doc. # 138), and the Office of the United States Trustee (the "UST") filed an objection on December 19, 2013 (doc. # 139). On January 9, 2014, Mr. Moore filed a proposed order (1) indicating that he had recently obtained counsel to represent him in this matter, (2) proposing deadlines for his filing of a supplement in support of the Application and for any responses thereto, and (3) setting a continued hearing on the Application on February 7, 2014 (doc. # 150). The Court held a hearing on the proposed order and the Application on January 10, 2014, at which it approved the proposed order. Thereafter, the parties filed a supplement and response (doc. ## 166, 167). THE COURT HEREBY FINDS that the filed pleadings adequately present the facts and arguments with respect to this contested matter, and that it is appropriate to enter an Order resolving the Application without further hearing.

In bankruptcy cases, court approval of employment must be obtained prior to professional services being performed. In re Northeast Dairy Co-op. Federation, Inc., 74 B.R. 149, 154 (Bankr. N.D.N.Y. 1987). Second circuit law is clear that nunc pro tunc approval of a professional's employment should only be granted in narrow situations where (1) if application had been timely, the court would have authorized the appointment, and (2) the delay in seeking court approval resulted from extraordinary circumstances. In re Keren Ltd. Partnership, 189 F.3d 86, 87 (2d Cir. 1999). If the Court denies nunc pro tunc appointment, then the Applicant cannot be paid for services performed pre-application. See generally Lamie v. United States Trustee, 540 U.S. 526, 124 S.Ct. 1023 (2004).

In the Application, the Debtor failed to articulate any extraordinary circumstances – or any circumstances at all – that explain the delay in seeking court approval of Mr. Moore's employment. In his supplement, Mr. Moore alleges that he had advised the Debtor's counsel of his agreement with the Debtor, but they did not timely file an application to hire him because of the "exigencies of getting the case filed" and "numerous expedited actions" that were required when it appeared the sale of substantially all of the Debtor's assets might not occur and the business might close. These general statements are insufficient to demonstrate "extraordinary circumstances." This is especially so since most Chapter 11 bankruptcy cases are filed as a result of dire circumstances, when businesses are on the brink of failure, and often envision a prompt sale of assets. If the Court were to allow nunc pro tunc employment of professionals in all such cases, the requirement for pre-approval of professionals' employment in Chapter 11 would have no effect. For these reasons, THE COURT FINDS Mr. Moore has failed to establish facts sufficient to demonstrate the extraordinary circumstances required for nunc pro tunc employment under the Keren standard.

The Application and the supplement state that Mr. Moore is seeking employment pursuant to 11 U.S.C. §§ 327(e) and 329, however he is not entitled to relief under these statutes as they apply only to attorneys. When this Court granted employment applications of investment bankers in the past, it did so based upon applications made under 11 U.S.C. § 327(a). See, e.g., In re FiberMark, Inc., et al., Case No. 04-10463, doc. # 63. Pursuant to this provision, courts may only allow employment for applicants that are "disinterested persons." 11 U.S.C. § 327(a). The Bankruptcy Code defines "disinterested person" as "a person that… is not a creditor, an equity security holder, or an insider." 11 U.S.C. § 101(14)(A). Taken together, sections 327(a), 101(14) and 101(10)(A) of the Code "unambiguously forbid a debtor in possession from retaining a pre-petition creditor to assist it in the execution of its Title 11 duties." In re Kings River Resorts, Inc., 342 B.R. 76, 88 (Bankr. E.D. Ca. 2006).

Even if Mr. Moore had filed the Application under § 327(a), the Court would be compelled to deny it because the Applicant is not "disinterested." Although Mr. Moore agreed to waive his pre-petition claim of $3,500 originally included in the Application, his claim for the success fee of $25,000 also existed, albeit contingently, prior to the petition date, and Mr. Moore is seeking payment of that sum. In light of this pre-petition claim, Mr. Moore is not disinterested, and thus not eligible for employment, under § 327(a). See, e.g., In re Ginaldi, 463 B.R. 314, 319 n.11 (Bankr. E.D. Pa. 2011) (noting that real estate broker's claim made the broker a "contingent creditor" and disqualified it from employment); see also In re Griffin, 313 B.R. 757, 763 n.4 (Bankr. N.D. Ill. 2004) (dependency of post-petition event does not prevent a debt from arising pre-petition).

Therefore, THE COURT FURTHER FINDS Mr. Moore is not eligible for appointment under either §§ 327(e) and 329, as requested in the Application, nor under § 327(a), which is the applicable provision for employment of investment bankers.

Therefore, IT IS HEREBY ORDERED that the Application is DENIED.

IT IS FURTHER ORDERED that the hearing on the Application, set for February 7, 2014, is cancelled.

SO ORDERED.

February 3, 2014
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge