UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 94-12622
	)	
WIT & WISDOM CORPORATION,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
	)	**MEMORANDUM OF DECISION**

This matter is before the Court on two related matters: (1) the Application of Meaden & Moore, Inc. for Payment of Administrative Claim (the "Application"); and (2) Meaden & Moore, Inc.'s Motion for an Order (i) Authorizing its Retention as Accountants to the Debtor *Nunc Pro Tunc* and for Reconsideration of the Court's Order denying Retention, or (ii) in the alternative, for Relief from Judgment Pursuant to Federal Rule of Bankruptcy Procedure 9024, with supporting affidavit (the "Motion"). Meaden & Moore, Inc. seeks compensation for accounting work done for Debtor during the Chapter 11 case. The United States Trustee opposes the Application and the Motion on the ground that the Court previously denied Debtor's Application to Retain Meaden & Moore,Inc. as professionals in this case. For the reasons stated below, Meaden & Moore, Inc.'s Application and Motion are denied.

JURISDICTION

This Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), and (O).

FACTS

The Court held a hearing on the Application at which time Debtor presented the testimony of Robert Ciesick, a former partner with Meaden & Moore, Inc., and Joan Hulbert, Debtor's President and majority shareholder, in support of the Application. The hearing concluded, with Meaden & Moore, Inc. being granted leave to file a supplemental brief. Meaden & Moore, Inc. then retained counsel to represent it in this matter and counsel filed the Motion. (Docket 213). Additional briefs and related materials followed. (Docket 214, 215, 218, 224, 229).

The facts are undisputed based on the testimony at the evidentiary hearing:

Meaden & Moore, Inc. (the "Firm"), with 70 professionals in its Cleveland office, ranks in the top 10 accounting firms in the city. The Firm provided accounting services to Debtor for approximately three years before Debtor filed for protection under Chapter 11 of the Bankruptcy Code on June 22, 1994. The Firm had some experience in Chapter 11 proceedings, having been retained to provide services in one such case before Debtor's filing. (Corrected Transcript of Proceedings filed May 28, 1996 ("Tr.") 7, 10-11). (Docket 237). At the time of filing, Debtor owed the Firm $32,340 for accounting services rendered pre-petition. (Affidavit in Support of Application, Docket 166).

Debtor requested that the Firm continue to provide accounting services post-petition and the Firm agreed to do so. Mr. Ciesick and Debtor both understood that court approval had to be obtained before the services could be provided and they both understood that Debtor's then-counsel, Rubinstein, Novak, Einbund & Pavlik, would seek that approval. (Tr. 8, 14).

On July 18, 1994, Debtor filed an Application to Employ Meaden & Moore, Inc. as accountants under 11 U.S.C. § 327(a). The United States Trustee (the "UST") opposed the

application on the ground that the Firm was a pre-petition creditor and, therefore, not "disinterested" within the meaning of 11 U.S.C. § 101(14)(A). (Docket 25). Judge William J. O'Neill, the Bankruptcy Judge then responsible for this case, denied the application on August 10, 1994, finding that the Firm did not meet the "disinterested" requirement of 11 U.S.C. § 327(a) due to the pre-petition debt.(Docket 30).

Rubenstein, Novak, Einbund & Pavlik ("Former Counsel") told Mr. Ciesick about the ruling, informed him that the pre-petition debt would have to be waived by the Firm before the Court would approve the retention, and obtained the Firm's agreement to waive those fees. (Tr. 8). Former Counsel had a similar conversation with Ms. Hulbert. (Tr. 14-15). Both Mr. Ciesick and Ms. Hulbert were later told by Former Counsel that a second application had been filed and that the Court had approved the Firm's retention. (Tr. 8-9; 15). In fact, a second application had not been filed and the Court never approved the Firm's retention as professionals in this case. The Firm never signed or filed a waiver of its pre-petition debt.

Unaware that its retention had not been approved, the Firm provided accounting services to Debtor throughout most of its reorganization proceedings. The Firm apparently billed Debtor on a monthly basis post-petition without realizing that bills for professional services rendered to a debtor are subject to prior court approval. Debtor paid one such bill in the amount of $2,500 in mid-1995 before learning from the UST that payments could not be made in that manner. The Firm retained that payment, but did not file a fee application. (Tr.11-12; 17-18).

On August 21, 1995, the Court authorized Debtor to engage McDonald Hopkins Burke & Haber as new counsel ("New Counsel") due to Debtor's dissatisfaction with Former Counsel. (Docket 110). In the course of assuming responsibility for the case, New Counsel discovered that

the Firm had not been retained pursuant to court approval and so advised the Firm in early December 1995. (Tr. 9). A confirmation hearing was held on December 5, 1995 and the Order of confirmation was entered on December 7, 1995. (Docket 147).

On January 8, 1996, the Firm filed the Application for the payment of administrative expenses in the amount of $35,000 for accounting services performed for Debtor post-petition. (Docket 166). The Firm had incurred more than $64,000 in post-petition fees, with the $35,000 reflecting a compromise number agreed to by Debtor and the Firm. Debtor supports the Application and the UST opposes it. The Firm's Motion also seeks payment of the fees, with the UST opposing the Motion and Debtor not taking any position. The Firm did not support either its Application or Motion with any time records or other similar documentation.

DISCUSSION

The Firm makes essentially the same factual argument in support of both the Application and the Motion; that is, Former Counsel misled the Firm into thinking it had been appropriately retained and the Court should exercise its equitable powers to compensate the Firm despite the fact that Judge O'Neill expressly denied retention. The Firm seeks to accomplish this through various legal theories: either payment as an administrative expense under 11 U.S.C. § 503; relief from Judge O'Neill's Order under Federal Rule of Civil Procedure 60(b); or reconsideration of Judge O'Neill's Order and then a *nunc pro tunc* order approving the Firm's retention as of the beginning of this case. The UST argues that all professionals must be retained under 11 U.S.C. § 327(a) before they are eligible for compensation from the estate and that absent such an order here, the Firm cannot be compensated by making a claim for an administrative expense.

Additionally, the UST contends that the Firm has not met the requirements for Rule 60(b) relief or for entry of a *nunc pro tunc* order.

I.

The Bankruptcy Code provides that the debtor:

> . . . with the court's approval, may employ . . . accountants . . . or other professional persons, that do not hold . . . an interest adverse to the estate, and that are disinterested persons, to represent or assist the [debtor] in carrying out [its] duties under this title.

11 U.S.C. § 327(a). Professionals employed under this statute may be awarded reasonable compensation for actual, necessary services performed and expenses incurred. 11 U.S.C. § 330(a)(1)(A). The Sixth Circuit has held that "a valid appointment under § 327(a) is a condition precedent to the decision to grant or deny compensation under § 330(a) . . . ." *In re Federated Dep't Stores,Inc.*, 44 F.3d 1310, 1320 (6th Cir.1995). In this case, the Firm was not validly appointed under § 327 and so it is ineligible to receive compensation under § 330(a).

Debtor's counsel acknowledged at the evidentiary hearing that the Order denying retention under § 327 presented an obstacle to an award under § 330. Debtor and the Firm sought to overcome this barrier by framing the Application as a request for payment of administrative expense under 11 U.S.C. § 503. The Firm does not identify any specific part of § 503 on which it is relying and does not offer any authority or analysis under this section other than a general appeal to equity. Presumably, the Firm is attempting to come within § 503(b)(1)(A) by claiming that its fees are actual, necessary costs of preserving the estate. The Code, however, has specific provisions for retaining and compensating professionals who wish to

assist the estate. A professional must (1) be retained under § 327; (2) a retained professional may apply for compensation under § 330; and (3) compensation awarded under § 330 is then entitled to administrative expense priority under § 503(b)(2). Allowing § 503(b)(1)(A) to be used to circumvent those express provisions would be contrary to the system established by Congress for compensating the estate's professionals. *In re Singson*, 41 F.3d 316 (7th Cir. 1994); *In re F/S Airlease II, Inc.*, 844 F.2d 99 (3d Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *In re Channel 2 Associates*, 88 B.R. 351 (Bankr. D. N.M. 1988). The Application is, therefore, denied.

II.

Alternatively, the Firm argues that the Order denying retention should be vacated under Federal Rule of Civil Procedure 60(b)(6), which applies to this case under Federal Rule of Bankruptcy Procedure 9024. The Firm contends that the Rule should apply because Former Counsel breached a duty to advise the Firm as to the true status of the retention application and misled it into thinking that retention had been approved. The UST's position is that the motion is untimely and does not come within the grounds available for relief.

Rule 60(b) provides in relevant part :

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

Such a motion must be filed within a reasonable time, and for reasons (1) and (3) not more than one year after the challenged order was entered. Rule 60(b). The Order at issue in this case was

entered on August 10, 1994 and the Firm did not file its Motion until April 3, 1996, well beyond the one year limit. The Firm is, therefore, barred by the terms of Rule 60(b) from pursuing its argument under (b) (1) and (3) of the Rule.

Perhaps in recognition of that time bar, the Firm seeks relief under the general provision of 60(b)(6). Relief is only available under that part of the rule "in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). Both of the grounds on which the Firm seeks relief--a mistaken belief that it had been retained and misrepresentations by Former Counsel--are covered by (b)(1) and (3). In an effort to show the "something more" required to invoke (b)(6), the Firm argues that the docket does not contain a certificate of service for the Order denying retention. At most, this is evidence that the Firm mistakenly believed it had been retained because it did not receive an order to the contrary, a ground under (b)(1) and/or (3), rather than something new in support of a (b)(6) argument. Moreover, while a certificate of service with respect to the Order should be in the record, the absence of the certificate does not help the Firm's case. The Firm appears to argue that it did not know about the denial because it was not served with the Order. Mr. Ciesick, the Firm's partner involved in this engagement, testified, however, that:

> . . . we were informed that when the application was filed, it was originally objected to *and denied* because we had a pre-petition debt related to the company, and we were told that in order to proceed, that we would have to waive that if we wanted to continue to represent Wit and Wisdom.

(Tr. 8; emphasis added). Debtor's President testified to the same scenario. (Tr. 14-15). Whether the Firm knew about Judge O'Neill's Order from Former Counsel, which is what the testimony

indicated, or from seeing a copy of the Order itself, the fact remains that the Firm had knowledge early on that the application filed on its behalf had been denied.[1] The lack of a certificate of service does not, therefore, provide that "something more" needed to obtain relief under Rule 60(b)(6).

Additionally, to come within Rule 60(b)(6) the Firm must show that the Motion was filed within a "reasonable time" considering "the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." *Id.* Here, the Firm knew from the beginning of the case in 1994 that it had not executed a waiver of its pre-petition claim (although it had offered to do so) and had not received a copy of an order allowing its retention. Despite that, the Firm never checked the court docket to determine whether a favorable order had been entered on the retention application. New Counsel informed the Firm of the situation in December 1995. Even with this direct knowledge of the problem, the Firm did not file its Motion until April 3, 1996. That Motion was filed almost two years after the case commenced, eight months after Former Counsel had been discharged and replaced by New Counsel, four months after New Counsel advised the Firm that its retention had never been approved, and well after all work had been performed. Considering all of these circumstances, the Firm did not file its Motion under Rule 60(b)(6) within a "reasonable time".

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[1] One week after the hearing, the Firm submitted an affidavit in support of the Motion in which Mr. Ciesick stated that he did not know Judge O'Neill had denied the application until November 21, 1995. (Docket 218). This directly contradicts his sworn testimony at the hearing. The affidavit does not acknowledge any inconsistency between the testimony and the affidavit and it is possible that the affidavit simply inadvertently contained incorrect information in light of the Firm's rush to file the Motion shortly after the hearing. To the extent that the Firm stands by the affidavit, the Court finds Mr. Ciesick's sworn testimony at trial to have been credible.

III.

The Firm next contends that Judge O'Neill's Order should be reconsidered, and upon reconsideration, an order entered approving the retention *nunc pro tunc.* Motions for reconsideration are akin to motions to alter or amend judgments under Federal Rule of Civil Procedure 59(e), made applicable to this proceeding by Bankruptcy Rule 9023. *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed* 444 U.S. 986 (1979). Rule 59(e) states that a motion to alter or amend must be filed within 10 days after entry of the disputed order. The Order at issue here became final over a year before the Firm filed its Motion for Reconsideration. That procedure cannot, therefore, be used to obtain review of the ruling.

Even if the merits of the argument are considered, the Firm still cannot prevail. While the Sixth Circuit has not addressed the propriety of employment *nunc pro tunc,* it is clear that a bankruptcy court's equitable power to approve the appointment of a professional *nunc pro tunc* and to award compensation is circumscribed by the confines of the Bankruptcy Code and the requirement that a professional be disinterested. *In re Federated Dep't. Stores, Inc.*, 44 F.3d 1310 (6th Cir. 1995); *In re Middleton Arms Ltd. Pshp.*, 934 F.2d 723 (6th Cir. 1991). The cases cited by the Firm in support of its argument for *nunc pro tunc* relief are not factually similar to the present case. In the cases cited, retention was overlooked, services were rendered and relief was granted to rectify the overlooked retention. They do not raise the issue of whether a professional who failed to meet the statutory requirements for employment may be approved retroactively. In contrast, a valid Order exists in this case denying retention on the ground that the Firm was not a "disinterested person" as required by the Code. The Firm failed to meet the "disinterested" requirement throughout the entire time it rendered services to the Debtor. Although the Firm

offered to waive the conflict, such an offer does not in and of itself erase the conflict. Under these circumstances, it is not appropriate to enter an order authorizing retention *nunc pro tunc.*

* * * * * *

Running throughout the Application and the Motion is the theme that it would be inequitable to deny compensation to the Firm because it provided services to the estate and Former Counsel misled it. An accountant who seeks to render services in a bankruptcy proceeding has an independent obligation to become familiar with the Code sections governing the retention of professionals. While it is important for debtor's counsel and the accountants to enjoy a close working relationship, it is also important to note that debtor's lawyer is not the accountant's lawyer; at the end of the day, it is the accountant who must insure that its appointment has been approved. The accountant can do this by reviewing the court docket and obtaining a copy of the appointment order at the time the engagement begins or shortly after. This is not to say that the Court condones any misrepresentation that may have taken place between Former Counsel and the Firm. The remedy for any such problem cannot, however, be fashioned by ignoring the Bankruptcy Code and the law of the Circuit.

CONCLUSION

For the reasons stated above, the Application of Meaden & Moore, Inc. for Payment of Administrative Claim and the Motion for an Order Authorizing Retention or for Relief from Judgment are denied. A separate Judgment in accordance with this decision will be entered.

Date: 23 August 1996

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served on: Harry Greenfield, Esq. (by mail)
Andrew Vara, Esq. (by mail)
Shawn Riley, Esq. (by mail)

By: Joyce L. Gordon, Secretary

Date: 8/23/96

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 94-12622
	)	
WIT & WISDOM CORPORATION,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
	)	**JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this date,

IT IS ORDERED that Meaden & Moore, Inc.'s Application for Payment of Administrative Claim and Motion for an Order Authorizing its Retention as Accountants or for Relief from Judgment are both denied.

Date: 23 August 1996

Pat E Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Harry Greenfield, Esq.
Andrew Vara, Esq.
Shawn Riley, Esq.

By: Joyce L. Gordon, Secretary
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