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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 99-17499  
)  
TRIANGLE DEVELOPMENT, INC., ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**

On September 28, 1999, the Debtor filed its Chapter 11 case and moved to appoint Joan Kodish as counsel under Bankruptcy Code § 327, which motion was granted.<sup>1</sup> (Docket 2, 8). Prepetition, Ms. Kodish received a \$10,000.00 retainer in connection with the case.<sup>2</sup> On April 17, 2001, the present dispute began when the United States Trustee (“UST”) filed a Motion to Review Retention of Debtor’s Counsel and Request for Disqualification alleging that Ms. Kodish should be removed as counsel and denied fees because she failed to disclose an adverse interest and a connection to the Debtor.<sup>3</sup> (Docket 109). The UST alleged in a supplement that Ms.

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<sup>1</sup> 11 U.S.C. § 327. **Employment of Professional Persons.**

(a) . . . the [Debtor], with the court’s approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the [Debtor] in carrying out the [Debtor’s] duties under this title.

<sup>2</sup> A companion case, TDI Investment Group Partners, Inc., Case No. 99-17500, was filed at the same time. That case was dismissed on March 19, 2001. The retainer received in connection with that case is not at issue here.

<sup>3</sup> See Bankruptcy Rule 2014 **Employment of Professional Persons**, which states in relevant part:

(a) Application for and Order of Employment. An order approving the employment of attorneys . . . pursuant to § 327. . . shall be made only on application of the [Debtor] or committee. The application shall be filed [and]

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Kodish should also be disqualified because she failed to place the retainer in a separate client trust account. (Docket 120).

Ms. Kodish hired Attorney Richard Koblentz to represent her in this dispute and similar ones in other cases. Because Ms. Kodish acknowledged commingling the retainer with her personal and business funds and spending the money without filing a fee application and obtaining a court order, Attorney Koblentz asked at a status conference for leave for his client to file a fee application in an effort to show that she should not be disqualified and should be permitted to keep the retainer and recover fees. The UST did not oppose that request and the Court granted it. (Docket 126).

On September 28, 2001, about two years postpetition, Ms. Kodish filed her first interim application for compensation requesting that the Court approve \$89,150.00 in fees and \$1,938.01 in expenses (the "Application"). (Docket 127, 128). The UST objected to the Application on the grounds that Ms. Kodish had failed to place the retainer in a trust account and had represented insiders of the Debtor without full disclosure. He again asked that Ms. Kodish be denied fees as a sanction. (Docket 129).

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shall state the specific facts showing . . . any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(Emphasis added). There is an ongoing duty to supplement these disclosures. FED. R. BANKR. P. 2016(b).

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The UST's Motion to Review Retention was set for hearing on October 24, 2001. By the time of that hearing, or shortly thereafter, Ms. Kodish had filed disclosures<sup>4</sup> relating to retainers, conflicts of interest, corrections, and fee agreements that stated she had not segregated the retainer; she had spent the retainer shortly after the case was filed; she had obtained a guarantee of her fee from an insider before the case was filed, without timely disclosure; she had represented two of the Debtor's shareholders in their own Chapter 13's while this case was pending without timely disclosure; and, again while the case was pending, she had personally invested in an entity that had also agreed to guarantee her fees in this case, again without timely disclosure. Additionally, the amount of the retainer, the source of the retainer, and the form in which the retainer was paid were described in various ways, some of which were inconsistent.

The October 24, 2001 hearing on the Motion to Review Retention was partially held and adjourned. (Docket entry for 10/24/2001). Between the time of the first hearing and the adjourned hearing, Mr. Koblentz moved without objection to withdraw from representing Ms. Kodish, citing a lack of cooperation. (Docket 135).

The adjourned hearing was a combined hearing on the UST's Motion to Review Retention and the Application. (Docket entry 11/29/01). Ms. Kodish appeared, represented herself, and participated in the hearing, including giving an opening statement and testifying. The hearing was adjourned to December 12, 2001 to permit Ms. Kodish to consider whether she wished to hire another lawyer. (Docket entry 11/29/01).

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<sup>4</sup> See generally, documents listed in Appendix A to this Memorandum of Opinion. Ms. Kodish had also been deposed on July 26, 2001. (Docket 132).

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Ms. Kodish retained Alexander Jurczenko (“New Counsel”) to represent her. New Counsel appeared at the December 12 hearing. That hearing was partially held and adjourned to December 18, 2001. Ms. Kodish:

- (1) filed a Notice withdrawing the Application without prejudice (Docket 154);
- (2) moved to dismiss the UST’s Objection to the Application on the grounds that the objection was moot given the withdrawal of the Application and, in any event, the UST lacked standing (Docket 155); and
- (3) indicated that Ms. Kodish intended to keep the \$10,000 retainer, without an order approving the fees.<sup>5</sup>

The UST:

- (1) opposed Ms. Kodish’s attempt to withdraw her Application;
- (2) objected to the Motion to dismiss his Objection; and
- (3) denied that Ms. Kodish may keep fees without Court approval.

The December 18<sup>th</sup> hearing was further adjourned to January 24, 2002 to allow for briefing.

**ISSUE**

The preliminary issue is whether Joan Kodish has the right to withdraw her Application without prejudice.

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<sup>5</sup> In this time period, Ms. Kodish also asserted a Fifth Amendment privilege against self-incrimination in connection with the UST’s Motion to Review Retention and the Application. (Docket 150, 157). The UST argued that Ms. Kodish did not properly invoke the Fifth Amendment and/or waived it through her participation to date. (Docket 147). It is not necessary to address that constitutional issue at this point.

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**JURISDICTION**

The Court has jurisdiction to determine 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).

**DISCUSSION**

**I.**

As noted, after the first hearing on the Application and the adjourned hearing on the Motion to Review Retention, Joan Kodish filed a Notice of withdrawal of the Application without prejudice. At a later hearing, Ms. Kodish clarified what she meant by “without prejudice”: that while she does not have any present intention of filing a new fee application, she is not foreclosing that possibility and, moreover, intends to keep the retainer.

Ms. Kodish cites Bankruptcy Rule 2016(a) in support of her position. She claims that this is not a “contested matter” under Bankruptcy Rule 9014, that consequently Bankruptcy Rule 7041 governing a party’s right to dismiss an action does not apply, which means that under Bankruptcy Rule 2016(a) she has the right to withdraw the Application on her own terms without agreement of opposing counsel or court order. The UST disagrees, contending that this is a contested matter that cannot be unilaterally withdrawn and that, if the Court permits withdrawal, it should be with prejudice, a disgorgement of fees, and an acknowledgment that the fees will not be paid from any other source. He argues further that a considerable amount of time has already been expended, with the evidence brought out to date showing that the Application should be denied and fees disgorged, and that Ms. Kodish has not explained why she wants to dismiss the Application.

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II.

Bankruptcy Rule 2016(a) provides in relevant part:

**(a) Application for Compensation or Reimbursement.** An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. . . .

When Ms. Kodish filed the Application under this Rule and the UST objected to it, the dispute became a contested matter under Bankruptcy Rule 9014. *In re Laughlin*, 210 B.R. 659, 661 (B.A.P. 1<sup>st</sup> Cir. 1997); *In re The Vogue*, 92 B.R. 717 (Bankr. E.D. Mich. 1988); 10 COLLIER ON BANKRUPTCY, 15<sup>th</sup> Rev. Ed. at ¶ 9014.01 (contested applications for payment of professional fees are contested matters). Bankruptcy Rule 9014 makes Bankruptcy Rule 7041 applicable to contested matters such as this. 10 COLLIER ON BANKRUPTCY, 15<sup>th</sup> Rev. Ed. at ¶ 7041.01. Under Bankruptcy Rule 7041, which incorporates Federal Rule of Civil Procedure 41(a)(2), a plaintiff (in this case, Ms. Kodish as the applicant) may not dismiss an action at this point in the proceedings over the objection of another party unless there is a court order authorizing the dismissal “upon such terms and conditions as the court deems proper.” FED. R. CIV. P. 41(a)(2). The question, then, is whether the dismissal terms proposed by Ms. Kodish are proper.

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Generally, courts look favorably on motions to dismiss without prejudice if other parties will not be prejudiced by the dismissal. Prejudice should consist of something more than the possibility that the opposing party will have to address the same issue at some point in the future. *Grover v. Eli Lilly & Co.*, 33 F.3d 716 (6<sup>th</sup> Cir. 1994). In determining whether a party will be prejudiced, courts are to consider:

. . . the defendant's [here, the UST] effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant.

*Id.* at 718. In this case, the UST's Motion to Review Retention and the Application had been partially heard when Ms. Kodish decided that she wanted to withdraw the Application. She has not really provided an explanation for why she wishes to do so, why it took so long to make the request, or how withdrawing the Application would affect the evidence produced at the joint hearing. The notice to withdraw at this stage appears to be an attempt to both delay and confuse the proceedings based on new litigation strategies. The possibility that New Counsel may not agree with litigation decisions made by Ms. Kodish and her former counsel is not a sufficient reason to derail the proceedings at this point.

Additionally, the attempt to withdraw the Application without prejudice while keeping the retainer does not take into account the controlling law. The Bankruptcy Code provides that lawyers may receive reasonable compensation for their services on application and court order. 11 U.S.C. §§ 328, 329, 330. Thus, Ms. Kodish may only be compensated for her legal work in this case if she has applied for and been awarded fees. Despite this, Ms. Kodish wants to withdraw the Application without intending to refile it and still keep the retainer paid for legal

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services. As the applicable law does not permit her to keep fees without a court order, the Application cannot be withdrawn in the manner proposed by Ms. Kodish. Stated differently, given that Ms. Kodish has already received and spent the retainer, and does not wish to give it up, the fee issues and related problems raised by the UST must be addressed in some fashion and the most appropriate way of doing that is to proceed. On consideration and balance of these factors, the Court finds that the UST would be prejudiced by the withdrawal of the Application without prejudice. The Notice of Withdrawal without prejudice, therefore, treated as a motion under these circumstances, is denied.

The possibility of dismissing the Application without prejudice is only one of the options available at this point in the case, however. The other options include refusing to permit Ms. Kodish to dismiss her Application under any circumstances or permitting her to dismiss it on such terms as are proper under the facts of this case. The Court finds that the latter alternative is the better way to balance the respective right of the parties. Therefore, if Ms. Kodish wishes to dismiss her Application, she may do so under these conditions, which the Court determines are proper under the circumstances:

- (1) the \$10,000 retainer is to be deposited into Court, pending a hearing to determine whether the funds should go to the Debtor or another entity;
- (2) Ms. Kodish is to acknowledge that she will not seek or accept payment of her fees in this case from any source, including any guarantor of the Debtor's obligations; and
- (3) the Application will be dismissed with prejudice.

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**On or before May 16, 2002, Ms. Kodish is to file a notice stating whether she wishes to dismiss her Application under these terms or chooses instead to proceed on the Application as filed.**

**III.**

Ms. Kodish also moved to dismiss the UST's objection to her Application on the alternate grounds that the objection is rendered moot because she withdrew the Application or because the UST does not have standing. (Docket 160). The first argument is resolved by the finding that Ms. Kodish's motion to withdraw her Application is denied. The second ground—lack of standing—is also unavailing because the Bankruptcy Code grants the UST broad standing to be heard:

The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

11 U.S.C. § 307. *See In re Revco, D.S. Inc.*, 898 F.2d 498 (6<sup>th</sup> Cir. 1990) (noting the UST's broad standing to ensure that bankruptcy cases are conducted according to the bankruptcy laws). Fee issues are one of the fundamental areas in which the UST has standing to be heard. Ms. Kodish argues in part that the UST does not have standing to pursue this issue because the retainer did not come from the Debtor. (See, for example, her statement that "it is now undisputed that the payment made to Kodish was by the Edwards Family Trust, and not by the Debtor." (Motion to Dismiss Objection at 5)). This is not a convincing argument for several reasons. First, the Court has not yet issued any findings of fact and conclusions of law with respect to the source of the funds and it would be inappropriate to resolve that issue now based on the arguments of counsel. Second, payments to Ms. Kodish as debtor's counsel are

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reviewable regardless of the source of the funds. *In re Kisseberth*, 273 F.3d 714 (6<sup>th</sup> Cir. 2001).

And third, the Court has inherent authority to address and resolve issues involving allegations that a professional has not followed the rules relating to the retention and compensation of professionals. *Id.*, *In re Downs*, 103 F.2d 472 (6<sup>th</sup> Cir. 1996). The Motion to Dismiss the Objection is denied.

A separate Order will be entered reflecting this decision.

Date: 7 May 2002

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

Served by mail on: Alexander Jurczenko, Esq.  
Joan Kodish, Esq.  
Dean Wyman, Esq.

By: Joyce L. Gordon, Secretary

Date: 5/7/02

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APPENDIX A

- (1) September 27, 1999 Rule 2016(b) and Code § 329(a) Disclosure of Compensation of Attorney for Debtor (Docket 1)

Ms. Kodish certified that she had received a total of \$20,000 prepetition for this case and the TDI case, with the funds coming from “A&A Quality Paving, which is owned by the debtor’s CEO [i.e. Alfred E. Edwards III].”

- (2) September 27, 1999 fee letter from Ms. Kodish addressed to Alfred E. Edwards III

In this letter, Ms. Kodish acknowledges receipt of “your check for ten thousand dollars (\$10,000) from or on behalf of each Corporation as retainers for services to be rendered in connection with our representation.” By signing the letter, Mr. Edwards agreed to guarantee all fees due to Ms. Kodish under the fee agreement.

- (3) September 28, 1999 Motion for Employment of Counsel, signed by Alfred E. Edwards III for Triangle Development, Inc. stating that Ms. Kodish had received \$21,660 as a retainer in the two cases.<sup>6</sup> (Docket 2)

- (4) September 28, 1999 Affidavit of Counsel in Support of Motion to Employ (Docket 2)

Ms. Kodish swore that “she has no connection with the Debtor/Debtor-in-Possession, any Creditors, or other parties in interest or with their respect to [sic] their Attorneys/and/or Accountants.”

- (5) October 26, 1999 Supplement to Disclosure of Compensation of Attorney for Debtor Pursuant to Rule 2016. (Docket 12).

The majority of the shareholders at Triangle Development, Inc. have agreed to and have tendered a retainer in the amount of \$20,000.00 for services performed or to be performed with regard to the Chapter 11 herein as well as that related to TDI Investment Group Partners, Inc. Subject to Court approval, counsel shall apply the retainer towards the first \$20,000.00 of professional services rendered without regard to whether the services are rendered for the benefit of Triangle Development, Inc. or TDI Investment Group Partners, Inc. Thereafter, Joan Allyn Kodish Co., L.P.A. shall present statements of professional services rendered and expenses incurred on a regular basis. However, both Triangle Development, Inc. and TDI Investment Group Partners, Inc. have been specifically advised that those statements are not bills and need not be paid unless or until allowed by this Court.

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<sup>6</sup> Presumably, the \$1,600 variance is attributable to the filing fees in the two cases.

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- (6) May 16, 2001 Supplemental Affidavit of Joan Allyn Kodish, Esq. Pursuant to Rule 2016 of the Federal Rules of Bankruptcy Procedure (Docket 113)

Ms. Kodish disclosed her representation of the Debtor's shareholder Brenda Montgomery between February 23, 2001 and mid-April 2001.

- (7) September 28, 2001 Fee Application filed by Joan Kodish (Docket 127)

The Application states that “[t]he reason said Application was not filed earlier is because I had no desire to press the Debtor/Debtor in Possession with a substantial bill at a time when it was clear that Triangle Development, Inc. could not pay said obligation . . . .”

Additionally, shortly after the hearing, Ms. Kodish filed these documents:

- (1) November 1, 2001 Statement of Counsel regarding retainer and use thereof (Docket 142)

Ms. Kodish stated that she received \$10,000 in cash as a retainer and that “she assumed, but was never told directly, that the source of the funds was the profit from commercial installations undertaken by a sister company and/or relatives of the owners and directors of one or both of the corporations.” She further explained that her then-office manager had accepted the funds and disbursed them for general office expenses, including payroll during the last quarter of 1999.

- (2) November 1, 2001 Supplemental Statement of Counsel Pursuant to Rule 2014 (a) of the Federal Rules of Bankruptcy Procedure (Docket 140)

Ms. Kodish filed an affidavit making these disclosures:

- (A) In May 2000, she entered into an agreement with the Debtor's majority shareholder to deal with TDI informally by providing non-legal services to it;
- (B) She represented two of the Debtor's shareholders in their personal Chapter 13 bankruptcy cases which were filed after this Chapter 11 case was filed: *In re Brenda Montgomery (Lewis)* and *In re Lushion White*; and
- (C) While the case was pending, she made personal investments in a “newly-formed, separate and discrete corporation in hopes of substantial profit and in light of the fact that it agreed to guarantee

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payment, in the long term, of both bankruptcy and non-bankruptcy court related tasks undertaken for the guarantor and all of the above entities [presumably, the majority shareholder, the two named minority shareholders, the Debtor, and TDI].”

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NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 99-17499  
)  
TRIANGLE DEVELOPMENT, INC., ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER FINDING JOAN KODISH IN**  
) **CIVIL CONTEMPT AND SETTING**  
) **ADDITIONAL HEARING ON**  
) **SANCTIONS**

For the reasons stated in the Memorandum of Opinion filed this same date, the United States Trustee's motion to find Joan Kodish in civil contempt for failing to comply with this Court's May 22, 2002 Order requiring her to deposit \$10,000.00 with the Clerk of the Bankruptcy Court is granted.

The Court will provide Ms. Kodish with one final opportunity to comply with the Court's Order before imposing any sanctions. To that end, these dates will apply:

**On or before November 4, 2002, Ms. Kodish is to file these documents:**

- (1) A detailed financial statement of her income and expenses, both business and personal; a detailed statement of her assets and liabilities; and a detailed budget for her office and home; and
- (2) a proposal for paying the \$10,000.00, in installments if necessary, that is consistent with the budget.

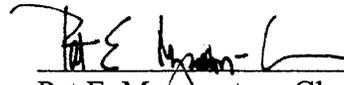
**On or before November 8, 2002,** the UST is to file a position statement with respect to Ms. Kodish's payment proposal.

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A hearing will be held on **November 15, 2002 at 8:30 a.m.** to consider the proposed payment plan and what sanctions, if any, are needed to coerce Ms. Kodish to comply with the Court's May 22, 2002 Order.

IT IS SO ORDERED.

Date: 23 Oct 2002



Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Alexander Jurczenko, Esq.  
Dean Wyman, Esq.  
Joan Kodish, Esq.

By: Joyce R. Gordon, Secretary

Date: 10/23/02