

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re: ) Case No. 02-36432  
)  
Gloria Knowles, ) Chapter 7  
)  
Debtor. )  
) JUDGE MARY ANN WHIPPLE

**ORDER REGARDING APPLICATION BY TRUSTEE  
TO APPROVE EMPLOYMENT OF SPECIAL COUNSEL**

The court held a hearing on the Application by Trustee to Approve Employment of Special Counsel (the "Application"). [Doc. # 19]. The Trustee seeks court approval to employ attorneys Claudia A. Ford and Michael J. Leizerman of the law firm of E.J. Leizerman & Associates as counsel to assist in pursuing a certain personal injury action that is property of the bankruptcy estate. Objections were filed by creditors South Toledo Therapy Services [Doc. # 21] and Promedica Health Systems, Radiological Associates, Anesthesiology Consultants of Toledo, and Consultants in Laboratory Medicine [Doc. # 22]. The Application and the objections raise three issues. First, should the Trustee be permitted to employ any counsel to assist him with respect to the personal injury action? Second, should the Trustee be permitted to employ Attorneys Ford and Leizerman? Third, what are reasonable terms of employment?

Attorneys Ford and Leizerman represented Debtor in the personal injury action before she filed her petition. Where a cause of action is property of the estate, the trustee may generally pursue it or, in his best judgment, compromise, settle or abandon it. *In re American Energy, Inc.*, 49 B.R. 420, 421 (Bankr. D. N. Dak. 1985); *see In re Wells*, 87 B.R. 732, 735 (Bankr. N.D. Ga. 1988)(trustee had statutory and fiduciary duty to analyze debtor's wrongful death claim and to decide whether and how to pursue it on the estate's behalf); *cf. In re Cult Awareness Network, Inc.*, 205 B.R. 575 (Bankr. N..D. Ill. 1997)(noting that trustee has substantial discretion to perform administrative duties, with standard one of sound business judgment made in good faith). The objecting creditors base their objections on the fact that a settlement offer made by a defendant in that action is allegedly sufficient to pay in full Debtor's unsecured claims. They request that the court deny the Application and approve the settlement. At this time, however, a claims bar

date has not been set and only one proof

of claim has been filed. Thus, a determination regarding the extent of the unsecured debt is premature. Moreover, the settlement is not before the court and the objecting creditors cite, and this court is aware, of no authority of the court to compel the Trustee to accept the settlement offer and present it to the court. *See Taylor v. Grant (In re Taylor)*, 196 B.R. 197, 201 (Bankr. M.D. Fla. 1996) (finding that plaintiff's request for injunctions to impede the defendant's duties as trustee and to compel defendant to accept a settlement agreement are meritless prayers for relief unsubstantiated by law). The administrative duties of the Trustee and the judicial functions of the court are separate and distinct. *American Energy*, 49 B.R. at 421. Thus, the court finds that the creditors' objections to the Trustee's request to employ counsel are not well taken.

The Trustee seeks to employ Attorneys Ford and Leizerman for the special purpose of pursuing the personal injury action commenced by Debtor prepetition.<sup>1</sup> The employment of professional persons is governed by 11 U.S.C. § 327, which provides in relevant part:

(a) Except as otherwise provided in this section, the trustee, 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 trustee in carrying out the trustee's duties under this title.

. . . .

(c) 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 any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 323(e).

Although the Trustee states that counsel are "disinterested persons as required by Section 327(a)," (*see* Trustee's Application, Doc. #19), Attorneys Ford and Leizerman were employed prepetition and have incurred expenses totaling \$21,594 in connection with the personal injury case. There is no indication as to the amount, if any, of the expenses that were incurred prepetition. Nevertheless, as a result of their

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<sup>1</sup> The Trustee does not seek to assume the executory contingent fee contract entered into prepetition between Debtor and Attorneys Ford and Leizerman, nor would the Bankruptcy Code allow him to do so at this point in time. *See* 11 U.S.C. § 365(d)(1); *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991) (stating a contingent fee contract is an executory contract "if further legal services must be performed by the attorney before the matter may be brought to a conclusion").

terminated contract, counsel may have a prepetition claim against the estate. If so, they are not “disinterested person[s]” as contemplated by § 327(a). *See* 11 U.S.C.

§ 101(14) (defining “disinterested person” as a person that “is not a creditor. . .”). Thus, on the record before it, the court cannot find that they meet the requirements of § 327(a).

Nevertheless, in light of the scope of representation sought, the court construes the Trustee’s application as being brought pursuant to 11 U.S.C. § 327(e), which addresses employment of counsel “for a specified special purpose.” In making a determination under this section, the court notes the distinction drawn by Congress between the requirements of § 327(a) and § 327(e). As another judge in this district explained:

To be eligible for appointment under 11 U.S.C. § 327(a), a professional must meet two tests: the professional must "not hold ... an interest adverse to the estate" and must be disinterested. Under the more flexible language of 11 U.S.C. § 327(e), a professional may be employed for a specific purpose so long as the professional does not hold an interest adverse to the debtor or the estate "with respect to the matter on which such attorney is to be employed."

*In re Fretter, Inc.*, 219 B.R. 769, 779 (Bankr. N.D. Ohio 1998). Thus, § 327(e) eliminates the disinterestedness requirement for an attorney who has previously represented the debtor and focuses the adverse interest inquiry on counsel’s actual or potential conflicts of interest only as related to the matter for which representation is sought rather than on his interest in the bankruptcy estate. *In re Statewide Pools, Inc.*, 79 B.R. 312,314 (Bankr. S.D. Ohio 1987); *see also DeVlieg-Bullard, Inc. v. Natale (In re DeVlieg, Inc.)*, 174 B.R. 497, 503 (N.D. Ill 1994); 3 Alan N. Resnick, et al., *Collier on Bankruptcy* ¶ 327.04[9][d] (15th ed. 2003). Under § 327(e), there are three requirements for approval of employment of counsel: (1) the employment must be in the best interest of the estate, (2) counsel must not hold an interest adverse to the estate with respect to the matter for which the attorney is employed, and (3) there must be a special purpose for which counsel is employed other than simply conducting the bankruptcy case for the trustee. *DeVlieg-Bullard, Inc.*, 174 B.R. at 502-4.

In this case, the court finds that each of these requirements are satisfied as to Attorneys Ford and Leizerman. First, the Trustee is entitled to seek the expertise of counsel familiar with personal injury law in order to competently evaluate and prosecute the claim. In light of Attorneys Ford’s and Leizerman’s familiarity with both the facts and the law regarding this claim, it is in the best interest of the estate to approve

their employment to assist the Trustee in this regard. Next, as explained above, the fact that counsel may hold a claim as a result of their prepetition employment by Debtor and are, therefore, interested persons whose employment is prohibited under § 327(a) does not prevent their employment under § 327(e). There is no evidence indicating that either Ford or

Leizerman have an actual or potential conflict of interest with respect to the special matter for which they will be employed. *DeVlieg-Bullard, Inc.*, 174 B.R. at 502-5 (N.D. Ill 1994) (finding law firm that had performed legal work for the debtor both before and after its petition was filed and that held an administrative claim against the estate was not a disinterested party but could be employed under § 327(e)). Finally, the Trustee seeks approval of Ford's and Leizerman's employment for a specified special purpose, that is, to represent the estate on the matter of Debtor's personal injury claim.

The final issue is the terms of employment of special counsel. Section 328(a) of the Bankruptcy Code permits the employment of a professional person under § 327 "on any reasonable terms and conditions ... including on a retainer, on an hourly basis, or on a contingent fee basis." 11 U.S.C. § 328(a). The Trustee proposes to employ counsel on a contingent fee basis, with counsel to be paid 40 percent of the net recovery plus actual expenses associated with the investigation and litigation of the claim. These were apparently the terms of employment to which counsel and the Debtor had originally agreed. Generally the court finds a contingent fee of 33.3 percent of any recovery after deduction of expenses to be reasonable and requires the existence of some unusual circumstance before approving an agreement providing for payment in a greater amount. The Trustee has alleged no unusual circumstances that justify the contingent fee agreement proposed. So while the court finds it appropriate to employ Attorneys Ford and Leizerman as special counsel, it will only approve such employment on the basis that they are paid a contingent fee of 33.3 percent of the net (after allowed expenses) recovery in the personal injury case.

The court further notes, however, that although the affidavit of attorney Ford indicates that the law firm of E.J. Leizerman & Associates has already incurred expenses in the amount of \$21,594 relating to Debtor's personal injury claim, the court is not, by this order, approving recovery of those expenses as a term of Ford's and Leizerman's employment by the Trustee. As already noted, the contingency fee agreement between Debtor and Attorneys Ford and Leizerman is not being assumed by the estate. The issue of payment of the existing \$21,594 in costs expended in prosecution of the personal injury claim is

a matter that is subject to further order of the court.

**THEREFORE**, for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that the Trustee's Application to employ Claudia A. Ford and Michael J. Leizerman as special counsel to assist the Trustee in pursuing Debtor's personal injury claim is

approved on the following terms: Attorneys Ford and Leizerman shall be paid a contingent fee of 33.3 percent of the net recovery (after allowed expenses) in the personal injury case.

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Mary Ann Whipple  
United States Bankruptcy Judge