

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: February 10 2006

A blue ink signature of Mary Ann Whipple, written in a cursive style.

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 02-32674
)	
Paige W. Downey,)	Chapter 7
)	
Debtor.)	
)	JUDGE MARY ANN WHIPPLE

ORDER REGARDING APPLICATION FOR ALLOWANCE OF COMPENSATION

This matter is before the court on the Application of Mary M. James for Allowance of Compensation as Attorney for the Trustee for Settlement of Accident Claim ("Application") [Doc. # 36]. The Application indicates that a settlement has been reached regarding Debtor's personal injury claim and seeks payment of attorney fees in connection with representation relating to that claim from the settlement proceeds. Although no objection to the Application was filed, because the Chapter 7 Trustee had not yet filed a motion for approval of such settlement at the time the Application was filed and because the Application proposes to pay not only Mary M. James but also an attorney from a firm whose employment was not approved by the court, the court set the Application for hearing, at which the court indicated it would address these issues. Although the Chapter 7 Trustee has since filed a Motion for Authority to Compromise Claim¹, that did not negate the need for the hearing in light of the court's concerns regarding the application to pay an attorney whose employment was not approved by the court. Both James and the Chapter 7 Trustee received

¹ The Trustee's motion to compromise was filed on January 24, 2006, and is subject to the twenty-day notice requirement in Fed. R. Bankr. P. 2002(a)(3). It is, therefore, not yet ripe for decision.

notice of the hearing; however, there was no appearance by either and the hearing did not go forward. Consequently, the court must determine the merits of the Application on what has been filed in this court and without the benefit of counsel's arguments. For the reasons that follow, the Application will be conditionally granted in part and denied in part.

BACKGROUND

On November 27, 2002, the Chapter 7 Trustee filed an application to approve employment of attorney Mary M. James for the limited purpose of representing the bankruptcy estate in the prosecution of Debtor's personal injury claim that arose prepetition. The application stated that James was well qualified to represent the Trustee in the personal injury case and set forth facts indicating James's disinterestedness. The application also set forth the terms of her employment, indicating that her proposed fee is "one-third of the total recovery, plus the costs and expenses." [Doc. # 24, p.2]. On December 17, 2002, the court approved James's employment "on the terms and at the rate in the application for the limited purpose of prosecuting the certain personal injury claim, with compensation to be paid only upon application and further order of the court." [Doc. # 25]. James was then, and is still, associated with the law firm of Steltenpohl, James & Menacher Co., LPA.

On December 14, 2005, James filed the Application at issue, stating that "she and her agent, Jay Feldstein of Kalniz, Iorio & Feldstein Co., have performed all the necessary legal services required by the Trustee in and about the settlement of the accident." [Doc. # 36]. Attached to the Application is a settlement statement that sets forth the costs and fees requested in the Application. James requests approval of fees totaling \$3,044, which is one-third of the \$9,132 settlement proceeds. She indicates that she is entitled to one-third of the total fee, or \$1,014.67, and that attorney Feldstein is entitled to the remaining two-thirds, or \$2,029.33. James also requests costs advanced by her in the amount of \$200 and by Kalniz, Iorio & Feldstein Co., L.P.A., in the amount of \$82.56. However, the court did not approve the employment of Feldstein in this case, nor did the Trustee request approval of his employment.

LAW AND ANALYSIS

The issue the court faces in addressing James's fee application is whether or not her fee-splitting arrangement with Feldstein and his employment without the court's approval constitutes a bar to the fees requested in the Application. The Bankruptcy Code and Rules specifically address the employment of professional persons, including attorneys, in bankruptcy cases. Section 327 provides in relevant part:

[T]he trustee, with the court's approval may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, 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.

11 U.S.C. § 327(a). In a Chapter 7 case, only the trustee, with the court's approval, may employ or authorize the employment of a professional person under § 327. *See id.* § 328(a); Fed. R. Bankr. P. 2014(a) (providing that "[a]n order approving the employment of attorneys . . . shall be made only on application of the trustee . . ."). However, "if a named attorney . . . is employed, any partner, member, or regular associate of the . . . individual may act as attorney . . . so employed, without further order of the court." Fed. R. Bankr. P. 2014(a). An application for approval of the employment of a professional person must include "any proposed arrangement for compensation and . . . 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." Fed. R. Bankr. P. 2014(a).

The compensation of attorneys employed by the trustee is governed, in relevant part, by §§ 328 and 330 of the Bankruptcy Code. The trustee, with the court's approval, may employ a professional person under § 327 "on any reasonable terms and conditions of employment, including a retainer, on an hourly basis, or on a contingent fee basis." 11 U.S.C. § 328(a). And "the court may award to . . . a professional person *employed under section 327* . . . (A) reasonable compensation for actual, necessary services rendered by the . . . professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses." *Id.* § 330(a) (emphasis added). However, "[e]ven if the trustee and the court 'pre-approve' a professional's compensation pursuant to § 328, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.'" *Nischwitz v. Miskovic (In re Airspect Air, Inc.)*, 385 F.3d 915, 920 (6th Cir. 2004). Accordingly, the bankruptcy court may "disregard an employment agreement where necessary and award compensation more appropriate under the individual circumstances of the case." *In re Omegas Group, Inc.*, 195 B.R. 875, 880 (Bankr. W.D. Ky. 1996).

According to James's Application in this case, Feldstein is not a member or regular associate of James's law firm. Thus, his employment to represent the Trustee in this case could only occur with the court's approval. In this case, the Trustee did not seek or receive such approval. The court only approved the employment of James and had no opportunity to determine Feldstein's disinterestedness as required under § 327 or consider any arrangement for his compensation as required under Rule 2014(a). Not having been approved for employment under § 327, Feldstein is not entitled to an award of attorney fees and

expenses under § 330(a). *See, e.g., DeRonde v. Shirley (In re Shirley)*, 134 B.R. 940, 943 (B.A.P. 9th Cir. 1992) (“Court approval of the employment of counsel for a debtor in possession is *sine qua non* to counsel getting paid”); *Rodriguez Quesada v. United States Trustee*, 222 B.R. 193, 198 (D.P.R. 1998).

The court next considers the compensation to which James is entitled. Although the court approved James’s employment on a one-third contingency fee basis, such approval was based on the representation that James was the only attorney being employed to represent the Trustee in the personal injury case. The Trustee’s application to approve James’s employment did not disclose the fee-splitting arrangement with Feldstein as presented in James’s Application. The court finds that this arrangement constitutes a change in circumstances that was not anticipated by the court when it approved the terms of James’s employment and permits the court to disregard those terms.

In determining the reasonable compensation to which James is entitled, the court considers provisions regarding sharing of compensation under both the Bankruptcy Code and the Ohio Code of Professional Responsibility. Under the Bankruptcy Code, a person receiving compensation or reimbursement awarded under § 330(a) “may not share or agree to share . . . any such compensation or reimbursement with another person” unless the other person is a partner or regular associate of the person receiving the compensation. 11 U.S.C. § 504(a) and (b). The Ohio Code of Professional Responsibility addresses the division of fees among lawyers as follows:

(A) Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

(1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation;

(2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client;

(3) The total fee is reasonable.

Ohio Code of Prof’l Responsibility DR 2-107(A).

The court assumes that James has complied with Ohio’s ethics rules and that the division of fees set forth in her Application is in proportion to the services she and Feldstein performed. According to the Application, she is entitled to receive \$1,014.67 of the settlement proceeds in the personal injury case and

\$200 as reimbursement of costs advanced in the case.² Because § 504 precludes her sharing any compensation or reimbursement awarded with any other person, the court finds that James is entitled to an award limited to those amounts, conditioned on the court's approval of the Trustee's motion to compromise.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Application [Doc. # 36] be, and hereby is, conditionally **GRANTED in part** and **DENIED in part**;

AND IT IS FURTHER ORDERED that Mary M. James is granted fees in the amount of \$1,014.67 and reimbursement of costs in the amount of \$200, conditioned on the court's approval of the Trustee's motion to compromise [Doc. # 42].

² The court is not approving a division of fees, because only James is being paid anything. Under DR 2-107(A), the court has no information whether the Chapter 7 Trustee, who is the client here, gave her prior consent to the division. Even if she had, the Bankruptcy Code requirement that Feldstein's employment be approved by the court in advance cannot be met. Rather, the split is used only as a measure of the amount James is entitled to be paid. The court has no reason to think that either attorney did not do the work or otherwise earn the fees requested. The court simply does not have the discretion to ignore any of the Bankruptcy Code provisions and Bankruptcy Rules regarding employment and payment of counsel.