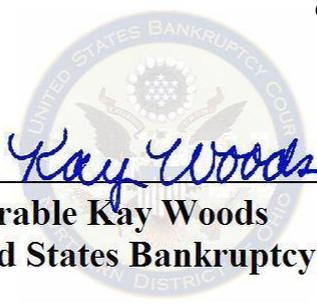


IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

Dated: January 09, 2008
03:29:45 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

ROCO SUPPLY, INC.,

Debtor.

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CASE NUMBER 98-42997
CHAPTER 11
HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING FINAL APPLICATION FOR COMPENSATION
FOR FORMER ATTORNEY FOR DEBTOR AND DEBTOR IN POSSESSION
Not Intended for National Publication

The following Memorandum Opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Final Application for Compensation for Former Attorney for the Debtor and Debtor in Possession ("Final Application for Compensation") filed by Richard G. Zellers ("Zellers") on August 3, 2007 (Doc. # 528). Saul Eisen, the United States Trustee for Region 9 ("UST") filed Objection to Final Application for Compensation ("UST's Objection") (Doc. # 540) on October 1, 2007. Chapter 11 Trustee Richard A. Wilson ("Trustee") filed Objection of Trustee Richard A. Wilson to Final Application for Compensation for Former Attorney for the Debtor and Debtor in Possession ("Trustee's Objection") (Doc. # 542) on October 1, 2007. The Court held a hearing on November 6, 2007, to consider the Final Application for Compensation and the Objections thereto. At the conclusion of the hearing, the Court took the matter under advisement.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 84, which referred bankruptcy cases to Bankruptcy Judges in the Northern District of Ohio. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(A) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

For the reasons set forth below, the Final Application for Compensation will be granted, in part, and denied, in part.

I. BACKGROUND

The instant case was filed on October 9, 1998 ("Petition Date"). At that time, Debtor Roco Supply, Inc. ("Debtor") was represented by Zellers. Although not jointly administered, a related and affiliated entity, R.M.F. Oil, Inc. ("RMF"), also filed a chapter 11 case on the Petition Date. Like Debtor, RMF was represented by Zellers. The principal of both Debtor and RMF, John Ridel ("Ridel"), along with his wife, Jaclynn Ridel, filed a chapter 7 case on November 13, 2000. Ridel was represented by Charles E. Dunlap ("Dunlap") in his bankruptcy case.

Debtor's retention of Zellers was approved by Order dated October 27, 2007 (Doc. # 22). UST and National City Bank ("NCB") filed separate motions to vacate the retention of Zellers as counsel for Debtor, which were heard by the Court on December 1, 1998. The hand-written hearing notes of the courtroom deputy from that hearing state: "Motion of NCB and UST to D's atty. retention, UST is now convinced that it is no longer the case that ZELR had represented principal of D, John Ridel. No showing of actual conflict of interest." Although there does not appear to be an order resolving the UST and/or NCB motions, the fact that Zellers continued representing Debtor and the First and Second Interim Applications were approved by the Court, coupled with the courtroom deputy's notes, indicate that the motions were either denied, withdrawn or deemed moot.

There was no failure to disclose that Zellers was counsel for both Debtor and RMF. It was well known at all times that Zellers represented RMF. The docket does not reflect any motion to disqualify Zellers from the dual representation.

UST appointed Official Committee of Unsecured Creditors ("Committee") in Debtor's case, which was represented by Brouse McDowell, initially through Joseph Hutchinson, Esquire. On July 10, 2000, the Committee moved for the appointment of a chapter 11 trustee or to convert the case to a case under chapter 7. The next day, July 11, 2000, Debtor moved to convert to chapter 7. The Committee's motion to appoint a chapter 11 trustee was granted on July 13, 2000, and Trustee was appointed on July 18, 2000. Trustee also retained Brouse McDowell.

Debtor is administratively insolvent. Debtor's last operating report, dated November 19, 2007, states that Debtor has funds in the amount of \$223,505.70 in its general account. Brouse McDowell has approved and unpaid fees and expenses: (i) in the amount of \$109,387.32, as counsel for the Committee, and (ii) in the amount of \$353,871.82, as counsel for Trustee. Trustee's fees in the amount of \$34,580.00 have also been approved. In addition, FTI Consulting, Inc., financial advisor to the Committee, has approved and unpaid fees and expenses in the amount of \$31,933.00. As a consequence, it is clear that Debtor does not have sufficient funds to pay all professional fees.

As part of the Final Application for Compensation, Zellers asks this Court to apply a "carve out" of \$37,500.00, which was provided for in an Order of the Court dated May 4, 2000 ("NCB Compromise Order") (Doc. # 281). The NCB Compromise Order incorporates and approves a letter agreement dated March 8, 2000, by, between, and among the Committee, Zellers as counsel for Debtor, counsel for National Canada Business Corporation ("NCBC"), and counsel for NCB, which provided for resolution of all disputes about and distribution of the proceeds of certain intercompany checks ("Proceeds") that had been deposited in Debtor's lockbox accounts. Specifically, NCB was granted a security interest in the Proceeds in the amount of \$175,000.00, which was to be allocated equally between the estates of Debtor and RMF and which was superior to all other claims except: (i) NCBC's claim for attorneys' fees and costs in the amount of \$23,335.24; (ii) professionals' fees and expenses of the Committee up to a maximum of \$100,000.00; and (iii) fees of Zellers as counsel for Debtor and as counsel for RMF up to a maximum amount of \$37,500.00 in each case.

As the parties acknowledge, Zellers is the only person who has been associated with Debtor's case since the beginning. Because Joseph Hutchinson is no longer with Brouse McDowell, Alan Koschik filed Trustee's Objection. Moreover, a new attorney for UST is now involved with this case because the attorney who originally represented the UST is no longer in Region 9. As a consequence,

neither the attorney for UST nor the attorney for Trustee has direct, first-hand knowledge of the underlying facts.

II. ARGUMENTS

Zellers filed several prior fee applications, as follows: (i) First Interim Application for \$32,175.00 in fees and \$538.25 in expenses, which was approved by the Court; (ii) Second Interim Application for \$74,377.50 in fees, which was approved by the Court; and (iii) Third Interim Application for \$50,290.00, which Zellers agreed to reduce by \$13,317.50 to resolve the objection of the UST.¹ No hearing was held on the Third Interim Application and it was never approved or disapproved. Zellers represents in the Final Application for Compensation that he was paid all fees and expenses requested in the First Interim Application, but that all fees awarded in the Second Interim Application remain unpaid, due, and owing. At the Hearing, Zellers stated that \$15,517.00 in fees from his First Interim Application, as well as \$74,377.50 in fees from the Second Interim Application, remain unpaid, due, and owing. Koschik countered that Zellers had not previously raised an argument about not being paid in full for the First Interim Application. Based upon lack of evidence about such alleged non-payment, Trustee disputed this new argument.

UST objected to the allowance of all fees and expenses to Zellers other than the amounts approved and paid pursuant to the First Interim Application. UST bases his objection in large part

¹See n.4, *supra*.

on the allegations in Trustee's Objection.² UST urges that the fees and expenses in the Second Interim Application not be paid and that the Third Interim Application (which was refiled as the Final Application for Compensation) be disallowed because (i) Zellers was not disinterested; and (ii) Zellers simultaneously represented materially adverse parties.

Although conceding that it is not only possible, it is a frequent occurrence for the same counsel to represent affiliated debtors, Trustee argues that Debtor and RMF had adverse interests because RMF owed Debtor \$278,000.00 for product sold after the Petition Date. Trustee argues that, as a consequence, Debtor essentially loaned RMF a quarter of a million dollars.

Trustee's Objection argues that, in addition to representing RMF, Zellers also represented Ridel. He postulates that the representation of these entities while Zellers represented Debtor constituted a conflict of interest. Alternatively, Trustee urges that the request by Zellers for compensation should be denied because he did not perform services that were of value to the estate. Trustee further argues that not only should this Court disallow any compensation to Zellers, but that Zellers should be required to disgorge the compensation previously paid to him.

²Trustee and Brouse McDowell may not be entirely objective in this case because of the administrative insolvency of Debtor. To the extent Zellers is denied fees and/or required to disgorge fees previously paid to him, the amount of funds in the estate available to pay allowed fees and expenses of Trustee and Brouse McDowell will increase.

At the hearing, Zellers stated that he never represented Ridel and that a letter in which he referred to Ridel as his client was in error. He stated that he made one appearance in Ridel's bankruptcy case in June 2003 (approximately three years after appointment of Trustee) at the request of Dunlap. Zellers also argued that he never performed work for or billed ALRI. Trustee argued that Zellers represented ALRI and RZRD, which were both owned by Ridel, in situations adverse to Debtor. Trustee states that Zellers represented ALRI in possible scenarios of the sale of certain ALRI real estate upon which Trustee, on behalf of Debtor's estate, had a judgment lien. Trustee sued RZRD on behalf of Debtor's estate; although RZRD defaulted in the adversary proceeding, Trustee alleges that Zellers and his associate, Melody Gazda, were the primary contact and counsel for RZRD in connection with a foreclosure action.

III. DISQUALIFICATION FOR DISINTERESTEDNESS

The Court is troubled by the allegations that Zellers was not disinterested and that he represented interests adverse to those of Debtor during his representation of Debtor. The law is clear that an attorney may not be retained as Debtor's counsel if he or she is not disinterested. In *Hunter Sav. Ass'n. v. Baggott Law Offices Co., (In re Georgetown of Kettering, Ltd.)*, 750 F.2d 536 (6th Cir. 1984), the same attorney represented the debtor as well as the debtor's principal where the principal was a creditor of debtor. The Sixth Circuit found that such dual representation constituted

an actual conflict of interest and held: "Because an actual conflict of interest existed, [the attorney's] application for compensation should have been denied." *Id.* at 540 (emphasis in original). See also *Allied Stores Corp. v. Federated Dep't. Stores, Inc. (In re Federated Dep't. Stores, Inc.)*, 44 F.3d 1310, 1319 (6th Cir. 1995) ("Section 328(c) allows a district court to completely deny compensation 'if, at any time' during the appointment the professional is not disinterested within the meaning of § 327(a).").

However, the Court is not persuaded that Zellers was not disinterested or that he should be denied fees on the basis that he represented interests adverse to Debtor.

It is beyond doubt that UST, Committee, Trustee, Brouse McDowell, and all other interested parties knew or should have known that Zellers not only represented Debtor, but that he also represented RMF. There was no failure on the part of Zellers to disclose his representation of RMF. During the nine years that this case has been pending, no party raised the issue of disqualification of Zellers on the basis of his representation of RMF or any other entity until the Final Application for Compensation was filed and to be considered. As a consequence, the defense of laches is applicable to the Objections of Trustee and UST. The timing of the disqualification issue here is similar to that raised in *In re Level Propane Gases, Inc.*, 2007 Bankr. LEXIS 180 (Bankr. N.D. Ohio 2007), wherein a creditor sought to

disqualify debtor's counsel nearly three and one-half years after retention. The court noted that the movant had been aware, for approximately three years, of the circumstances upon which disqualification was based, during which time the law firm had provided services to debtors. The court stated that disqualification after such delay would result in prejudice to the law firm. "Under the doctrine of laches, a court may dismiss an action where there exists inexcusable delay in instituting an action, resulting in prejudice to the non-moving party." *Id.* at *13.

Zellers argued that he never represented any party adverse to Debtor during his representation of Debtor. This appears to be true. To the extent there was any question about whether Zellers represented Ridel early in the case, it was resolved in favor of Zellers.³ Dunlap, rather than Zellers, filed Ridel's bankruptcy case and Zellers stated that he took no action in Ridel's bankruptcy case until June 2003 - approximately three years after the appointment of Trustee. The alleged involvement with ALRI and/or RZRD also occurred after the appointment of Trustee. To the extent Trustee believed that the estate's interests were being adversely affected by any involvement of Zellers in those matters, Trustee should have raised the issue at that time in order to preserve maximum value for the estate. Trustee did not raise any

³As set forth above, both UST and NCB moved to disqualify Zellers and/or have the Court vacate the retention order based upon allegations that Zellers represented Ridel. These arguments were resolved in favor of Zellers and were never renewed.

such objections.

As a consequence, based on the record before the Court, this Court finds that Zellers is not and has not been disqualified from representing Debtor prior to appointment of Trustee based on his representation of RMF and his alleged actions on behalf of Ridel, ALRI, and/or RZRD.

III. FEE APPLICATIONS

As set forth above, Trustee was appointed on July 18, 2000. The First and Second Interim Applications were approved prior to that time (the Second Interim Application was approved on May 1, 2000). The Final Application for Compensation covers the period February 1, 2000, through January 30, 2001, which spans the period before and after appointment of Trustee.

As an initial matter, this Court rules that Zellers is not entitled to compensation from the estate for the period after appointment of Trustee. The Final Application for Compensation is premised upon Zellers being the former attorney for Debtor and Debtor in Possession. After Trustee's appointment, Zellers no longer represented the Debtor-in-Possession because Debtor was no longer operating as a Debtor-in-Possession. Trustee retained his own counsel and thereafter Trustee and the bankruptcy estate were represented by Brouse McDowell. Accordingly, \$13,467.50 requested in the Final Application is disallowed because such fees are based upon time entries on or after July 18, 2000.⁴

⁴This amount is similar to the amount of \$13,317.50 to which UST objected.

Zellers requests fees of \$3,022.50 for the time period July 10, 2000, which is the date the Committee moved for conversion or the appointment of a chapter 11 trustee, through July 18, 2000, the date Trustee was appointed. The Court disallows these fees on the basis that it was not reasonable for Zellers to perform the work set forth in those time entries after the Committee's motion was filed.

The fees associated with the time period prior to appointment of Trustee do not all relate to work Zellers performed for Debtor. A review of the description of work performed indicates that at least \$1,745.00 in fees is associated with work relating to state court cases and consultation with Dunlap (presumably as counsel for Ridel). Therefore, fees in the amount of \$1,745.00 will be disallowed because they did not benefit Debtor's estate.

Accordingly, fees relating to the period February 1 through July 9, 2000, will be allowed in the amount of \$31,887.50.⁵ The Court will further approve the fees and expenses in the First Interim Application (which amounts the Court finds have been previously paid in full) and the Second Interim Application, as previously allowed. It appears that the retainer of \$20,000.00 received by Zellers from Debtor has been applied to previously approved fees. Thus, Zellers has approved fees in the total amount of \$106,265.00 (\$74,377.50 plus \$31,887.50), which have not yet

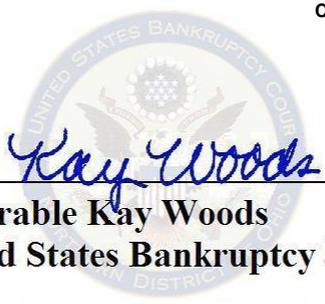
⁵The total billing relating to "Roco Fees and Employment" was \$5,040.00. The Court has deducted \$167.50 from this amount for time entries on August 3 and 11, 2000, and December 14, 2000, because they did not deal with preparation of fee applications, but were for review of documents on behalf of Roco Supply.

been paid. Trustee is authorized to pay Zellers approved, but unpaid, fees and expenses up to a maximum of \$37,500.00. The balance of the approved but unpaid fees (*i.e.*, \$68,765.00) will be paid *pro rata* with all other unpaid administrative expenses.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: January 09, 2008
03:29:45 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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IN RE:	* CASE NUMBER 98-42997
	*
ROCO SUPPLY, INC.,	* CHAPTER 11
	*
Debtor.	* HONORABLE KAY WOODS
	*
	*

ORDER ON MEMORANDUM OPINION REGARDING FINAL APPLICATION FOR
COMPENSATION FOR FORMER ATTORNEY FOR DEBTOR AND DEBTOR IN
POSSESSION

For the reasons set forth in the Court's Memorandum Opinion Regarding Final Application for Compensation for Former Attorney for Debtor and Debtor in Possession of this date, the Court grants final approval for compensation to Richard C. Zellers, Esq. as follows:

First Interim Application: \$32,175.00 in fees plus \$538.25 in expenses, of which \$0.00 remains unpaid.

Second Interim Application: \$74,377.50 in fees.

Third Interim Application: \$31,887.50 in fees.

Total unpaid fees: \$106,265.00

Trustee is authorized to pay fees up to a maximum of \$37,500.00. The balance of the approved but unpaid fees (*i.e.* \$68,765.00) will be paid *pro rata* with all other unpaid administrative expenses.

IT IS SO ORDERED.

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