IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
	:	
STONE CREEK MECHANICAL, INC.	:	CASE NO. 04-11255
	:	
DEBTOR	:	CHAPTER 11

OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

Introduction

Melli Walker Pease & Ruhly, S.C., Special Counsel to the Debtor, has filed its First Application for Compensation and Reimbursement of Expenses. The Official Committee of Unsecured Creditors has filed an Objection. For the reasons expressed herein, a further hearing will be held to discuss the deficiencies in the application identified by the Court.

Factual Background

The Debtor hired Special Counsel which was involved in prosecuting an appeal pending prepetition in Wisconsin. *See* Application to Employ Special Counsel, ¶¶ 2-4. The appeal was from a judgment against the Debtor for over $600,000. *Id.* Special Counsel has filed a fee application for about $25,000. The Committee objects for a number of specified reasons.

Legal Standard

Section 330 of the Bankruptcy Code speaks to payment of professionals:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103--
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1). The Third Circuit has stated that bankruptcy courts have a duty to review the fee requests of professionals in chapter 11 cases. *See, e.g., In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir.1994). This duty protects the public interest by monitoring the Debtor's estate and ensuring that all fees assessed are reasonable in light of the benefits received. *Id.* "[A] bankruptcy judge's experience with fee petitions and his or her expert judgment pertaining to appropriate billing practices, founded on an understanding of the legal profession, will be the starting point for any analysis." *Id.* at 854.

The Code sets forth the criteria for the Court's determination of a proper fee:

> In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity,

> importance, and nature of the problem, issue, or task addressed; and
>
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
>
> (4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for--
>
> (i) unnecessary duplication of services; or
>
> (ii) services that were not--
>
> (I) reasonably likely to benefit the debtor's estate; or
>
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(3), (4)(A). And the Local Rule specifies the proper format for the application:

> (a) Content of Application. An application for compensation or reimbursement of expenses required by F.R.B.P. 2016(a) shall, unless the application is governed by L.B.R. 2016-2, include the following:
>
> (1) a description of the services performed that identifies each service separately in sufficient detail to allow evaluation of the benefit derived from the service, the date each service was performed, and the time expended for each service.
>
> (2) the professional time expended shall be set forth either
>
> (A) by each professional or paraprofessional in chronological order, or
>
> (B) by day in chronological order showing all professionals or paraprofessionals that expended time on each day; and
>
> (3) a list by type of the expenses for which reimbursement is sought that includes for each type of expense either

> (A) a statement that the amount of the expense is calculated using the applicant's actual in-house cost or the actual amount billed by a third party provider, or
>
> (B) an explanation of how the amount of the expense is calculated.

L.B.R. 2016-3(a).

The Objections Raised and Special Counsel's Response

The Objection states that the application lacks the requisite detailed description of services rendered. *See* Objection, ¶14. It alleges the "lumping" of disparate tasks into one time entry. *Id.* It objects to payment for work done postpetition but before the date of appointment, for work outside the scope of the engagement, and for duplicative and excessive charges. *Id.* ¶ 15. Finally, it asks the Court to decline to allow Special Counsel to apply even the $15,000 retainer it received because it is remains uncertain whether any of the work performed by this application rendered *any* benefit to this estate. *Id.* ¶ 16

Consistent with *Busy Beaver*, Special Counsel filed a Supplement to the application which sought to address the Committee's concerns. *See* 19 F.3d at 846 (explaining that the applicant should be allowed to supplement the application to address objections or stated concerns). Special Counsel took issue with the statement that the application was not sufficiently detailed. Supplement, 2-3. It also explained how work which might appear unrelated to its engagement was, in fact, germane. *Id.* 3 It explained that the various tasks involved in prosecuting the appeal required three lawyers each with discrete jobs to do. *Id.* 4. Finally, it explained why it took a certain amount of time for cite-

checking. *Id*. And as to work done during the thirty days prior to the appointment, counsel pointed out that the bankruptcy filing did not operate to extend any imminent deadlines. *Id*. 3.

A hearing on this matter was held on September 14, 2004.

Reduction of Fee Award

Upon review of a fee application, the Court may award a lesser amount:

> (2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

11 U.S.C. § 330(a)(2). When it comes to adjusting a fee application, the Third Circuit has explained that:

> [it does] not intend that a district [or bankruptcy] court, in setting an attorney['s] fee, become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It ... is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief.
> *Lindy Bros. Builders, Inc. v. American Radiator & Std. Sanitary Corp*., 540 F.2d 102, 116 (3d Cir.1976) (in banc)
> Because its time is precious, the reviewing court need only correct reasonably discernible abuses, not pin down to the nearest dollar the precise fee to which the professional is ideally entitled

Busy Beaver, 19 F.3d at 845.

Is the Application
Sufficiently Detailed?

Again the local rule requires that the application contain "a *description* of the

services performed *that identifies each service* separately *in sufficient detail* to allow evaluation of the benefit derived from the service … and the time expended for each service." L.B.R. 2016-3(a)(1) (emphasis added). Services must be described with particularity as to purpose. *See In re Meade Land & Dev. Co.*, 527 F.2d 280, 283 (3d Cir.1975); *In re Amatex Corp.*, 70 B.R. 624, 627-28 (Bankr.E.D.Pa.1985); *In re Walnut Assoc*, 1992 WL 361714 *1 (Bankr.E.D.Pa.).

The Court identifies 27 entries in the application for which adequate description is lacking. These fall into two main categories: various communications and "work" on the appeal.

Into the first category the very first time entry falls: on February 2, 2004[1], "PJB …exchanged voice mails with Andy Cohn. (0.2 hrs)" *See* Application, p.1. But there is no description of what was discussed in those voice mails. A similar lack of description occurs on February 10 (twice: 0.5 and 0.8 hrs), on March 30 (three times: 0.4 for 2 calls and 0.2 hrs), on April 2 (.4 hrs), May 24 (0.7 hrs), and June 23 (0.3 hrs). In each case, a communication occurs but the bill does not describe the information conveyed or exchanged.

Regarding the appeal brief, the Court counts twenty entries with the description "Work re: appeal brief" and nothing else. None of these entries describe what the work regarding the brief consisted of. These entries occurred on February 4 (twice:0.6 and 3.2 hrs), February 16 (0.3 hrs), March 1 (1.0 hrs), May 18 (0.3 hrs), May 21 (0.20 hrs), May 24

[1]As the work was limited to 2004, the year will not hereafter be cited.

(0.70 hrs), May 27 (0.3 hrs), June 5 (1.9 hrs), June 6 (2.1 hrs), June 8 (1.0 hrs), June 13 (twice: 0.6 and 6.2 hrs), June 14 (2.5 hrs), June 15 (5.8 hrs), June 16 (2.5 hrs), June 20 (twice: 0.6 and 6.2 hrs).

That makes almost 38 hours in entries for which insufficient detail is provided. The Court therefore concurs with the Committee on the issue of specificity. Due process, however, requires that any deductions be preceded by a hearing at which the applicant may address the concerns the Court may have regarding the fee request. *See Busy Beaver*, 19 F.3d at 846-848.

Were Charges "Lumped" Together in a Single Entry?

The Court turns its attention to the claim of "lumping." Again, the local rule requires "a description of the services performed that identifies each service separately … and the time expended for each service." L.B.R. 2016-3(a)(1). "Lumping" is the term used to refer to entries which contain several services under one general time expenditure. *In re Bible Deliverance Evangelistic Church*, 39 B.R. 768, 777 (Bankr.E.D.Pa. 1984). It is well-settled in this circuit that only time entries separately listed and explained in detail are compensable. *Meade Land*, 527 F.2d at 283; *In re Mayflower Associates*,78 B.R.41, 48 (Bankr.E.D.Pa.1987); *In re Jefsaba, Inc.*, 172 B.R. 786, 801 (Bankr.E.D.Pa.1994). When tasks are lumped, It is impossible for the Court to accurately determine from such entries whether the services were rendered within reasonable time periods. *See Bible Deliverance, supra*.

This application is replete with "lumped" charges. They occur on February 2 (1.2

hrs), February 10 (.8 hrs), February 13 (1 hr), February 23 (2.7), March 2 (twice:2.4 and 1.1 hrs), March 9 (twice: 3.1 and 2.4 hrs), May 26 (0.7 hrs), June 1 (twice:5.8 and 4.1 hrs), June 3 (4.9 hrs), June 4 (0.6), June 10 (twice: 4.9 and 4.6 hrs), June 14 (1.3 hrs), June 18 (4.3 hrs), and June 21 (3.9 hrs). How should the Court address this particular deficiency?

Some courts hold that activities lumped together in a single time entry are not compensable at all. *In re Schachter*, 228 B.R. 359, 367 (Bankr.E.D.Pa.1999). But such a per se rule does not produce the most appropriate result where, as here, the applicant did a substantial amount of work for this debtor. Another approach is to apply an across-the-board reduction of the allowed compensation. *See In re Caribbean Construction Services, Inc.*, 283 B.R. 388, 396 (Bankr.W.D.Pa.2002) ("This flexible approach avoids unduly penalizing professionals who have provided valuable necessary services for which compensation otherwise is appropriate but whose record-keeping skills are deficient.")

The Court identifies almost 50 hours in lumped charges which is close to one-third of the total hours worked. Before any reduction may be made, due process likewise requires that the applicant be allowed to address the Court's concerns on this point.

Does the Application Seek Payment for Work Outside the Scope of the Engagement?

The Committee complains of the application containing work regarding bankruptcy issues and Pennsylvania bond issues. Objection, ¶15(b), (d). None of this, they maintain, has anything to do with why Special Counsel was retained. For that reason, no payment is warranted for work on those matters.

In reviewing the Application to Employ, the Court notes that Special Counsel was "employed for the specified purpose of prosecuting the appeal [of the Carnes judgment in Wisconsin]." *See* Application to Employ, ¶4. That does not mean, however, that Special Counsel would not be required to investigate questions involving bankruptcy or Pennsylvania law. *See, e.g., In re Fretter, Inc.*, 219 B.R. 769, 775 (Bankr.N.D.Ohio 1998) (holding that special counsel retained for real estate and litigation matters would be compensated for researching general bankruptcy issues relevant to its representation) And for its part, Special Counsel offers plausible explanations for why it had to research bankruptcy and state bond law issues. First, Special Counsel researched the effect of the bankruptcy filing upon the appeal. Supplement, 3. Second, Special Counsel investigated how much of the judgment against the Debtor would be covered by a bond under Pennsylvania law. *Id*. Accordingly, the Court does not find that the application seeks payment for work performed outside the scope of the engagement.

Does the Application
Reveal Duplication
of Services?

The Committee also questions why three attorneys were needed to work on the appeal and mediation.[2] Objection, ¶15(e), (f). The statute provides that a Bankruptcy Court "shall not allow compensation" for "unnecessary duplication of services." 11 U.S.C. § 330(a)(4)(A)(i). The fewest number of professionals should be assigned to perform each

[2]Special Counsel explained that a settlement conference was required by the Seventh Circuit. Supplement 3. In their Application, the attorneys use the terms "settlement conference" and "mediation" interchangeably.

task; if it is more efficient and economical to use one professional instead of two, then one should be used. *Jefsaba*, 172 B.R. at 800. Special Counsel has the burden of proving that the number of professionals employed and fees charged for prosecuting the appeal was necessary. *See Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 261 (3d Cir.1995).

Special Counsel has met this burden. Its supplement explains the specific responsibilities assigned to each of the three attorneys working on the appeal. Supplement, 4. Although there is some overlap in regard to research, each lawyer was assigned different tasks. There is no reason to conclude that this delegation of duties was not the most efficient utilization the firm's resources. For that reason, the applicant is not guilty of duplication of services.

Are the Charges Excessive?

The Code provides that "[i]n determining the amount of reasonable compensation to be awarded, the court shall consider the … time spent on such services." 11 U.S.C. § 330(a)(3)(A); *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 840 (3d Cir.1994) (*citing* 11 U.S.C.A. § 330(a)). The Committee complains that an excessive amount of time – 114 hours – is charged for working on the brief. For a brief of less than 50 pages, which contained issues previously raised in a post-trial motion, that number of hours is "grossly excessive." *See* Objection, ¶15(g). And in particular, they note that 20 hours were devoted to "cite-checking." *Id.*

In its supplement, Special Counsel addresses the Committee's claims of excessive

charges:

> As the Committee notes, Melli Walker had previously filed a motion for reconsideration at the district court level on Debtor's behalf. Although we were able to incorporate portions of that brief into the appellate brief, it was not simply a matter of reusing that brief on appeal. Large portions of the brief had to be rewritten, both to comply with the Seventh Circuit's requirements and to provided the proper focus for the Seventh Circuit's review of the numerous issues before the court on appeal. Additional research and cite checking was required. It would have been malpractice to rely on cases cited in the August 2003 brief without updating the research, and citations to the record had to be revised to reference the record on appeal.

Supplement, 4.

This is a reasonable explanation for why the brief-writing took as long as it did. The explanation might have been made unnecessary had the application contained the amount of detail required by the local rule; however, fairness requires that counsel be compensated for work performed for the Debtor's benefit. And on the number of hours devoted to cite checking, the Court notes that all of the twenty or so odd hours of that job were done by the firm's paralegal.[3] As is appropriate, the firm billed him out at a substantially lower hourly rate ($95). In sum, the Court finds neither the total amount of hours generally, nor the time for cite checking in particular to be excessive.

May Special Counsel
Be Paid for Work Performed
Postpetition but Prior to
its Appointment?

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[3]The initials *AMN* are next to every cite checking entry. *AMN* stands for *Andrew M. Norman*, the firm's law clerk. His is listed under *Paralegals Billing for Current Period*. See Application.

The Committee also objects to any payment for work done prior to the date of appointment. Special Counsel is charging approximately $4660 for work performed from February 2 through March 3, 2004.[4] Most importantly, the Committee adds, the order did not apply retroactively. Objection, ¶15(a). For its part, Special Counsel insists that retroactive appointment is implicit where the time between commencement of work and filing of an application is 30 days or less. Transcript, 7. The Committee disputes that there is any such rule or practice. *Id.* 9. Is there any support for Special Counsel's position?

Neither the Bankruptcy Rules nor Local Rules provide for a grace period as to retroactivity. However, the Third Circuit has specifically held that bankruptcy courts have the power to authorize retroactive employment of counsel and other professionals under their broad equity power. *In re Arkansas Company, Inc.*, 798 F.2d 645, 648 (3d Cir. 1986) ("Where equitable concerns weigh in favor of granting retroactive approval to enable deserving professionals to recover compensation for work actually done, we see nothing in the statute that denies the bankruptcy court the power to grant such retroactive approval."). However, "[i]t does not follow that such retroactive approval should be forthcoming merely because the court would have given approval if timely requested." *Id.* The Third Circuit went on to explain when such relief is appropriate:

> To summarize, we hold that retroactive approval of appointment of a professional may be granted by the bankruptcy court in its discretion but that it should grant such

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[4]The case was filed January 30; the application to employ was filed February 17; and the order appointing Special Counsel was granted on March 4. *See* Docket ##1,13,31.

> approval only under *extraordinary circumstances*. Such circumstances do not include the mere neglect of the professional who was in a position to file a timely application. When considering an application, the bankruptcy court may grant retroactive approval only if it finds, after a hearing, that it would have granted prior approval, which entails a determination that the applicant satisfied the statutory requirements of 11 U.S.C. §§ 327(a) and 1103(a) that the applicant be disinterested and not have an adverse interest, and that the services performed were necessary under the circumstances. Thereafter, in exercising its discretion, the bankruptcy court must consider whether the particular circumstances in the case adequately excuse the failure to have sought prior approval. This will require consideration of factors such as *whether the applicant or some other person bore repsonsibility* [sic] for applying for approval; whether the applicant was under time pressure to begin service without approval; *the amount of delay* after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors.

Id. at 650 (emphasis added). Do the factors in this case weigh in favor or retroactive relief?

To begin with, the Court observes that Special Counsel's proffered reason – that imminent appeal deadlines were unaffected by the bankruptcy filing – is simply wrong. The Third Circuit has held that the automatic stay applies to pending appeals whether brought for or against the debtor. *Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir.1982) ("In our view, section 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee."). But all of the other factors lead the Court to conclude that retroactive approval is fair. First and foremost, the amount of time

between commencement of the work on the appeal and filing the application was quite short: 17 days. And Special Counsel relied on the Debtor's Counsel to make the application. Add to this the often hectic time that characterizes the first few weeks of a chapter 11 proceeding and the 2½ week hiatus between the bankruptcy filing and the decision to employ this firm seems reasonable. *See In re Metropolitan Hospital*, 119 B.R. 910, 921 (Bankr.E.D.Pa.1990) (concluding that the extraordinary circumstances for retroactive approval existed for only the first thirty days of the case where there were a period of days for which applicant did not know of the filing and debtor's counsel's stated that it would shortly seek approval of applicant's employment but then never did). For these reasons, the Court will grant nunc pro tunc approval as of February 2, 2004 for the purposes of this fee application.

May Special Counsel
Apply Any of the Retainer?

According to the Committee, Special Counsel sought and was granted a $15,000 retainer at the time of appointment. The Committee objects to any of those funds being applied to Special Counsel's fee because it is unsure if *any* services rendered were a benefit to this estate. Objection, ¶16. It also implies that Special counsel has submitted an inflated fee request in order to secure its prepetition claim with the retainer. *Id*.

The Committee does not explain why it remains undetermined whether the estate received any value whatsoever from this professional. Perhaps it refers to the pending outcome of the appeal. Or it may question why the Debtor would choose to appeal an adverse judgment in the first place when it could have been dealt with in a chapter 11 plan.

The Court will not speculate as to what the Committee's reasons might be.

However, another reason persuades the Court that the retainer should not be applied at this juncture in the case: the Court is unapprised of the specific type of retainer agreement reached in this engagement because it was never attached to the application to employ. It was referenced an exhibit to that pleading, but was never attached. This is significant as retainer agreements take more than one form:

> [A] "classic 'retainer fee' arrangement" is one in which "a sum of money [is] paid by a client to secure an attorney's availability over a given period of time," so that "the attorney is entitled to the money regardless of whether he actually performs any services for the client."
> Classic retainers have been explained both as payment "to bind the attorney from representing another" and simply as payment "for accepting the case." [citiation omitted]. Whatever the explanation, however, an essential characteristic of the classic retainer is that it is entirely earned by the attorney upon payment, with the client retaining no interest in the funds.
> …
> "Security retainers." A second type of retainer agreement between debtors and their attorneys provides that the retainer will be held by the attorneys to secure payment of fees for future services that the attorneys are expected to render. Under such a "security retainer," the money given to the debtors' attorneys is not present payment for the future services. Rather, the retainer remains the property of the debtor until the attorney "applies" it to charges for services actually rendered; any unearned funds are turned over by the attorneys.
> …
> "Advance payment retainers." The third type of retainer that a debtor and attorney might agree upon is one in which the debtor pays, in advance, for some or all of the services that the attorney is expected to perform on the debtor's behalf. This type of retainer differs from the security retainer in that ownership of the retainer is intended to pass to the attorney at the time of payment, in exchange for the commitment to provide the legal services.

> …
> Because the client retains no interest in an advance payment retainer, such a retainer does not become property of the estate and is subject only to disclosure under Section 329 of the Code, rather than to the fee application process of Sections 330 and 331.

In re McDonald Bros. Construction, Inc., 114 B.R. 989, 998-1002 (Bankr.N.D.Ill. 1990). Until the Court knows the type of retainer involved here, it cannot adjudicate Special Counsel's rights in it.[5]

Summary

The application is deficient in two specific respects: it lacks sufficient detail and "lumps" time entries. Special Counsel will be given an opportunity to address the deficiencies identified by the Court. *See Busy Beaver*, 19 F.3d at 847.

An appropriate order follows.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: September 30, 2004

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[5] As to the claim that the fees have been excessively stated for the purposes of ensuring that Special Counsel could apply the full amount of the retainer, the Court finds no evidence of that whatsoever. The application may be deficient in its presentation for the reasons expressed, but it is undeniable that a substantial amount of work was done.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
	:	
STONE CREEK MECHANICAL, INC.	:	CASE NO. 04-11255
	:	
DEBTOR	:	CHAPTER 11

ORDER

AND NOW, this 30th day of September, 2004, upon consideration of the of First Application of Melli Walker Pease & Ruhly, S.C., Special Counsel to the Debtor, for Compensation and Reimbursement of Expenses, the Objection of the Unsecured Creditors Committee, after a hearing , and for the reasons stated in the attached Opinion, it is

ORDERED that a further hearing shall be held on October 28, 2004, at 10:00 a.m., United States Bankruptcy Court, 900 Market Street, 2nd Floor, Courtroom No. 4, Philadelphia, Pennsylvania, 19107, to discuss the deficiencies noted by the Court in the Opinion; and it is

FURTHER ORDERED that Special Counsel may amend its First Application to address the deficiencies noted within 15 days from the date of this Order.

By the Court,

STEPHEN RASLAVICH,
United States Bankruptcy Judge

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