UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re:	
NOVINDA CORP.,	Bankruptcy Case No. 16-13083 EEB
Debtor.	Chapter 11

ORDER DENYING AMENDED APPLICATION SEEKING *NUNC PRO TUNC* EMPLOYMENT

THIS MATTER comes before the Court on the Amended Application to Employ Brownstein Hyatt Farber Schreck, LLP ("BHFS") as Counsel for Debtor in Possession *Nunc Pro Tunc* to April 1, 2016 ("Amended Application"). In the Amended Application, BHFS requests that the Court retroactively approve its employment as counsel for the Debtor for the seven-day period between the Debtor's petition date and the date BHFS filed its original application to employ. For the reasons set forth below, the Court concludes that BHFS has failed to demonstrate the extraordinary circumstances necessary to permit *nunc pro tunc* employment.

I. BACKGROUND

The Debtor filed its chapter 11 petition on April 1, 2016 with the assistance of BHFS. One week later, on April 8, 2016, BHFS filed its original application to be employed as counsel for Debtor, *nunc pro tunc*, or retroactively, to the petition date (the "First Application"). No party objected to the First Application. After waiting the twenty-one days required by Fed. R. Bankr. P. 6003, the Court entered an order on April 25, 2016, that approved the First Application as of the date BHFS filed it, but denied approval *nunc pro tunc* to the petition date. The Court's order noted that BHFS failed to make the required showing of "extraordinary circumstances" necessary to obtain *nunc pro tunc* approval, but indicated BHFS could file an amended application if it felt such circumstances existed.

In its Amended Application, BHFS argues there were "unforeseen and extraordinary circumstances" beyond its control that prevented it from filing its application on the petition date. Those circumstances are that, in the days leading up to the petition date, Debtor's chief financial officer ("CFO") announced he would be resigning from the company. Because the CFO had the most knowledge about Debtor's books and records, he had been compiling information for Debtor's schedules, including its list of creditors. Finding a substitute to complete these tasks was difficult because the Debtor's few remaining employees, with the exception of the CEO, were scientists, engineers and salespeople. Because of the disruption caused by the CFO's resignation, the Debtor did not provide a full creditor list to BHFS until April 4. After receiving the list, BHFS then completed an internal conflict-clearing process. Only after it completed that process, did BHFS feel it could file its First Application and accurately represent to the Court that it held no conflicts. BHFS further states that, at the time, it

was focused on finalizing debtor-in-possession financing and other initial filings for the Debtor, which delayed filing of the First Application.

II. DISCUSSION

Section 327 of the Bankruptcy Code allows a debtor-in-possession to employ professional persons, including attorneys, to assist in a bankruptcy case. Once a bankruptcy court approves employment, the debtor may compensate the professional using estate assets. 11 U.S.C. § 330.[1] Without approval under § 327, a professional is considered merely a volunteer. *Lazzo v. Rose Hill Bank (In re Schupbach Investments, LLC)*, 808 F.3d 1215, 1219 (10th Cir. 2015). Nothing in § 327 or in Fed. R. Bankr. P. 2014, which implements § 327, sets forth timing requirements for an application to employ. However, courts require that approval precede the attorney's engagement as a matter of judicial administration. *In re Schupbach*, 808 F.3d at 1219. This allows a court to review conflicts and competency before the professionals begin work, to control administrative expenses, and to eliminate volunteerism. 3 *Collier on Bankruptcy* ¶ 327.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016).

If a professional fails to file a prior employment application, a court has some discretion to approve the application retroactively. However, the Tenth Circuit has significantly curtailed this discretion. In the case of *In re Schupbach Investments, LLC*, the Tenth Circuit held that retroactive approval of an attorney's employment is appropriate only "in the most extraordinary circumstances." *In re Schupbach*, 808 F.3d at 1220. Simple neglect or inadvertence will not suffice. *Id.*

In considering applications for *nunc pro tunc* employment, courts typically apply a two-part test. *In re Arkansas Co., Inc.*, 798 F.2d 645, 650 (3d Cir. 1986). First, the court must determine if it would have approved the application under § 327 had it been timely filed. This includes consideration of whether the applicant is disinterested, as defined by § 327(a). Second, courts consider whether the particular circumstances are so extraordinary as to justify retroactive employment. This typically involves consideration of a variety of factors, including but not limited to: whether the applicant or some other person bore responsibility 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; and the extent to which compensation to the applicant will prejudice innocent third parties. *Id.*

In this case, there is no question that BHFS met the requirements of § 327(a) and that this Court would have granted the First Application had it been filed on the petition date. Thus, BHFS clearly meets the first part of the test. Nor has there been any suggestion that innocent third parties would be prejudiced by retroactive approval. Of course paying an applicant more in fees will leave less money for other creditors, but if that alone were sufficient to constitute prejudice, then prejudice would always exist. So the prejudice must be something more and yet there was no suggestion of any here.

[1] All references to "section" or "§" hereafter shall refer to Title 11, United States Code, unless expressly stated otherwise.

As to extraordinary circumstances, BHFS's Amended Application addresses two of the four factors listed above—time pressure to begin service without approval and the amount of delay. First, BHFS argues that the delay was out of its control because the resignation of the Debtor's CFO delayed completion of a full creditor list, which in turn prevented BHFS from completing a conflicts check necessary for completing the First Application. The Court finds this explanation dubious. Debtor first paid a retainer to BHFS on February 4, 2016, two months prior to the petition date. BHFS performed enough work in that two-month period to deplete $130,000 in prepetition retainers. This work clearly contemplated a bankruptcy filing, including the negotiation of postpetition financing. Yet, BHFS would have the Court believe it did not complete a conflicts check prior to being hired by Debtor, or in the two months leading up to the petition date, despite performing an extensive amount of work for the Debtor. BHFS, as experienced bankruptcy counsel, is well versed in the necessity of checking conflicts in order to meet the § 327 disinterested standard. On the petition date, BHFS was comfortable enough with its conflicts situation to file the chapter 11 case on behalf of the Debtor, along with several first-day motions. It should have also been comfortable enough to file an application for employment.

BHFS points out that, during this timeframe, it focused on other important tasks, such as negotiating and documenting postpetition financing. The resignation of the CFO and the Debtor's precarious financial situation further complicated BHFS's efforts. BHFS argues it felt obligated to prioritize these tasks over preparation of its own employment application. The Court is sympathetic to the exigencies involved in filing chapter 11 cases, especially those involving first-day motions. But such circumstances are not "extraordinary" in the chapter 11 arena. If this Court were to grant *nunc pro tunc* employment every time counsel felt pressure to complete other tasks before filing an employment application, it would completely undermine the extraordinary circumstances test. The postpetition financing in this case was not complex or unusual. This was a highly contentious case, with one insider creditor fighting the Debtor at every turn, but it was not a complex case.

Moreover, filing an employment application is a relatively simple process, utilizing forms and filling in the blanks for the particular case. It is a task routinely delegated to paralegals. Thus, even if the attorneys are busy negotiating postpetition financing, the paralegal can easily prepare the application and its attachments for attorney signatures. The only task that involves attorney time is the need to speak with other partners in the firm, who have represented creditors of the Debtor on unrelated matters in the past, to allow those partners to smooth matters over with creditor clients before they receive paperwork from their own law firm, showing their firm is potentially adverse to them on the new matter.

Next, Debtor focuses on the shortness of its delay in filing the First Application—only seven days—as a reason for granting *nunc pro tunc* employment. Most published opinions on this issue involve longer delays. In the *Schupbach Investments* case, for example, the delay was three and one-half months. *In re Schupbach Investments, LLC*, 808 F.3d at 1218. BHFS attempts to further distinguish the *Schupbach Investments* case by pointing out that the parties in that case were bound by a local Kansas bankruptcy rule that required attorneys to file employment applications on the petition date. In Colorado, our local rules do not set forth a filing deadline. *See* L.B.R. 2014-1. To avoid this problem in the future, perhaps they should. Finally, given that Fed. R. Bankr. P. 6003 restricts a court from approving any application for

employment of a professional in the first twenty-one days of a case absent extenuating circumstances, BHFS argues that the Court should consider timely any application filed within that twenty-one day period.

While the Court acknowledges that the amount of BHFS's delay is relatively short, that is only one possible factor in determining if extraordinary circumstances exist. In essence, BHFS is asking this Court to adopt for a more lenient standard, such as that adopted by the Seventh Circuit in *In re Singson*, 41 F.3d 316 (7th Cir. 1994). In that case, the Seventh Circuit acknowledged that prior approval of an employment application is preferred, but reasoned that because there is no filing deadline for applications in the Code or Rules and because "errors and oversights" are common in bankruptcy cases, professionals should not be forced to exercise "extraordinary care" in ensuring authorization precedes the rendition of services and instead "[o]rdinary care-that is, cost-justified precautions-ought to suffice." *Id.* at 319.

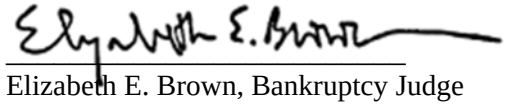
If it were up to this Court to define the standard, it would agree with the Seventh Circuit. The Tenth Circuit, however, specifically rejected its approach in favor of the extraordinary circumstances test. *In re Schupbach Investments*, 808 F.3d at 1220. The stricter test is undoubtedly harsh, but "a more lenient approach would reward laxity by counsel and might encourage circumvention of the statutory requirement." *In re Arkansas Co., Inc.*, 798 F.2d 645, 649-50 (3d Cir. 1986). Given that the other circumstances presented by BHFS are not extraordinary, the shortness of the delay in filing the First Application is insufficient by itself to justify *nunc pro tunc* employment.

The Court's decision on this matter is in no way a judgment on the quality of BHFS's work in this case. BHFS's attorneys have displayed a high level of professionalism and competence throughout the case and have very capably represented the Debtor. The Court is also sympathetic to BHFS's desire to receive the $35,000 in fees it accrued in the seven-day period between the petition date and filing of the First Application. However, the extraordinary circumstances test is meant to counteract such sympathies, and prevent bankruptcy courts from granting relief based purely on "claims of hardship due to work already performed." *In re Arkansas Co.*, 798 F.2d at 649.

For all these reasons, the Amended Application is DENIED.

DATED this 17th day of March, 2017.

BY THE COURT:



Elizabeth E. Brown, Bankruptcy Judge