UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
HARTFORD DIVISION

In re:

Chapter 11

CURTIS JAMES JACKSON, III,

Case No. 15-21233 (AMN)

Debtor.

UNITED STATES TRUSTEE'S OMNIBUS OBJECTION TO (i) THE APPLICATION OF BREWER, ATTORNEYS & COUNSELORS, AS SPECIAL COUNSEL FOR THE DEBTOR, FOR REIMBURSEMENT OF EXPENSES FOR THE TIME PERIOD OF JULY 13, 2015 THROUGH OCTOBER 15, 2015 AND (ii) MOTION OF BREWER, ATTORNEYS & COUNSELORS, FOR RELIEF FROM THE AUTOMATIC STAY TO APPLY PREPETITION RETAINER OR TO EFFECT SETOFF PURSUANT TO 11 U.S.C. § 553

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), through counsel, objects to the fee application filed by Brewer, Attorneys & Counselors ("Brewer") seeking reimbursement of pre-petition and post-petition expenses ("Expense Application") (ECF 215) and objects to the motion filed by Brewer seeking authority to use its pre-petition expense retainer to pay pre-petition expenses ("Stay Relief/Setoff Motion") (ECF 216). The United States Trustee objects to the Expense Application on the grounds that it (i) seeks expenses that exceed the documentation, (ii) seeks reimbursement for unreasonable hotel and airfare expenses, and (iii) lacks justification for certain expenses. The United States Trustee objects to the Stay Relief/Setoff Motion on the grounds that Brewer has not met its burden to show that it is entitled to relief under Sections 362 and 553. In support of this objection, the United State Trustee provides the following:

I. BACKGROUND

A. *The Chapter 11 Filing*.

1. On July 13, 2015 Curtis James Jackson, III (the "Debtor") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code ("Petition Date"). ECF No. 1.

2. Upon information and belief, the Debtor continues to manage his affairs as a debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this case.

3. On August 11, 2015, the Debtor filed a retention application seeking to employ Brewer as counsel to the Debtor in the action of *Leviston v. Jackson* pending in state court in New York and as counsel to the Debtor in the action of *Jackson v. Roberts* also pending in state court in New York ("Retention Application"). ECF 73 at ¶¶ 5, 6 and 9. The Retention Application disclosed that the Debtor had pre-paid Brewer $400,000 in legal fees pursuant to engagement letters between the Debtor and Brewer, and that Brewer was not going to seek further compensation from the Debtor for legal work. *Id*. at ¶¶ 13, 14 and at Engagement Letters attached to ECF 73. The Retention Application sought employment under Sections 327(e) and 328(a). *Id*. at ¶¶ 16, 18 and 20.

4. The Retention Application disclosed that Brewer was holding a pre-petition retainer of $102,603.20 ("Retainer") out of an original $200,000 retainer that was given by the Debtor to Brewer and that Brewer had used this retainer to assure payment of expenses and reimburse itself for expenses pre-petition. ECF 73 at ¶ 14. The Retention Application requested the ability to use the retainer to pay expenses incurred in connection with its future representation of the Debtor. *Id.*

5. After objections filed by creditors Sleek Audio, LLC (ECF 91) and Lastonia Leviston (ECF 95), as well as the United States Trustee (ECF 98) regarding the retention terms, the Court entered an order approving Brewer as counsel under Section 327(e) and requiring Brewer to comply with Sections 330 and 331 ("Retention Order"). ECF 151. The Retention Order did not retain Brewer under Section 328(a). *Id.* The Retention Order also stated that, to the extent of differences between the Retention Application, Engagement Letters and the Retention Order, the Retention Order governs. *Id.*

B. *The Expense Application*

6. On October 30, 2015, Brewer filed the Expense Application seeking reimbursement of $123,455.92 in expenses incurred by Brewer in connection with its representation of the Debtor in the action of *Leviston v. Jackson* pending in state court in New York. ECF 215. The Expense Application provided eight (8) categories of expenses. *Id.* The Expense Application did not include documentation of all of the expenses. Instead, it provided only certain hotel bills.

7. The United States Trustee requested that Brewer provide proof of the majority of expenses contained in the Expense Application. In response, Brewer provided a number of invoices and expense documentation.

8. The United States Trustee also requested that Brewer identify what dates of hotel stays it was seeking reimbursement for, as such information was not easily discernable from the hotel invoices.

9. After a review of the information provided by Brewer, it appears that not all of the requested expenses are properly reimbursable. The United States Trustee objects to the following:

a. Hotel Expenses: The Expense Application seeks reimbursement of $57,241.76 in hotel expenses. After a review of the hotel invoices and taking into consideration the dates of stays that Brewer advised the United States Trustee that it was seeking reimbursement for, it appears that Brewer overstated the hotel expense as discussed below:

i. The United States Trustee calculates that the hotel invoices are $55,766.00, not $57,241.76 as claimed. Second, the figure of $55,766.00 includes $2,267.91 in minibar and other charges that Brewer has now advised the United States Trustee that it will forego reimbursement. After taking into account the voluntary reduction, the amount of hotel invoices is reduced to $53,498.09 ("Revised Hotel Amount").

ii. The foregoing Revised Hotel Amount of $53,498.09 suffers, however, from three other problems. The first issue is that a number of the hotel stays by Mr. Renard at Loews exceeded $500 per night. Such expenses are unreasonable and not appropriate for the estate to bear. The cost of hotel stays that exceed $500 per night is an aggregate of $10,134.91. Second, the hotel invoices contain a number of pre-petition dates of stay. The aggregate amount of pre-petition dates of stay is $34,096.91. Third, there is a charge for $1,490.61 for the Hilton Garden Inn, which charge is a penalty for a room cancellation. Such charge should not be borne by the estate.

iii. The United States Trustee calculates that the hotel reimbursement should be limited to $14,761.82 after the following deductions from the claimed expense of $57,241.76: (a) $1,475.76 for incorrect calculations; (b) $10,134.91 for charges over $500.00 per night; (c)

$2,267.91 for minibar and other charges (reduction agreed to by Brewer); (d) $27,110.75 for pre-petition stays ($34,096.91 minus $6,986.16 already accounted for in calculation of charges over $500 per night); and (e) $1,490.61 for room cancellation at Hilton Garden Inn.

b. Failure to justify or explain expenses: The Expense Application seeks reimbursement for certain expenses that require further explanation and/or justification:

i. Court reporter expense of $20,119.70 for court reporters Stephanie Johnson and William Cardenuto. *See* expense chart attached to ECF 215 at page 3. Such expense is for real time court reporting. The Expense Application fails to explain or justify the need for this expense;

ii. Westlaw expenses of $8,880.18 are claimed but the documentation provided by Brewer to the United States Trustee is confusing and needs further explanation;

iii. $450.00 in parking: The United States Trustee disputes that $450.00 for three days of parking in New York City is reasonable. Brewers should explain and or justify this expense or it should be disallowed;

iv. Airfare of $484.10 (Mr. Renard) and $841.00 (Mr. Brewer): The charge for Mr. Renard was a fee to upgrade to first class. The charge for Mr. Brewer was a one-way first class ticket. Neither expense is reasonable or necessary.

c. Other expenses that Brewer has agreed to forego: Brewer has agreed to the following voluntary reductions: Food of $1,682.72, Airfare of $1,284.10, Valera travel of $355.63.

C. *The Stay Relief/Setoff Motion*

10. The Stay Relief/Setoff Motion seeks to apply the Retainer to pay $32,067.34 in pre-petition expenses that were not reimbursed prior to the petition date. ECF 216 at ¶ 9. The Stay Relief/Setoff Motion seeks this reimbursement under either Section 362 or 553. ECF 216.

11. The Stay Relief/Setoff Motion states that the Retainer is not property of the Debtor's bankruptcy estate. ECF 216 at ¶ 14. This statement is inconsistent with the Retention Application and Retention Order which require court approval to use the Retainer under Section 330 and 331. The Stay Relief/Setoff Motion, however, does not attempt to address the Retention Application and Retention Order.

II. ARGUMENT

A. Standards for reimbursement under Sections 330 and 331.

Section 330 authorizes payment to professionals retained by order of the Court. 11 U.S.C § 330 (a). Section 330(a) allows a court to award "reasonable compensation for actual, necessary services rendered." 11 U.S.C. §330(a)(1)(A). Section 330(a)(1) of the Bankruptcy Code specifically provides that:

> 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, … or 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)(A) and (B).

Pursuant Local Bankruptcy Rules for the District of Connecticut, a fee applicant seeking reimbursement of expenses must also consider and follow Local Rule of Bankruptcy Procedure

2016-1which requires itemization as to purpose, amount, dated incurred and supporting documentation. *See* D. Conn. LBR 2016-1(a)(5). Lastly, when preparing a fee application, counsel must also consider and follow the United States Trustee Fee Guidelines. *See* Appendices A and B to 28 C.F.R. § 58.

Section 330 requires the applicant to establish both reasonableness and benefit to the estate from the professional's services. *In re Lederman Enter., Inc.*, 997 F.2d 1321, 1323 (10th Cir. 1993). To be compensable, the professional's services must have been necessary and beneficial to the estate or its creditors. *In re Engel*, 124 F.3d 567, 573 (3d Cir. 1997).

Each applicant bears the burden of proving the reasonableness of its fees and expenses sought. *Zeisler & Zeisler, P.C. v. Prudential Ins. Co. (In re JLM, Inc.)*, 210 B.R. 19, 24 (2d Cir. B.A.P. 1997); *In re Northwest Airlines Corp.*, 382 B.R. 632, 645 (Bankr. S.D.N.Y. 2008) (citations omitted); *In re Keene Corp.*, 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997). To satisfy its burden, an applicant must justify its charges with detailed, specific, itemized documentation. *In re Baker*, 374 B.R. 489, 494 (Bankr. E.D.N.Y. 2007); *In re Bennett Funding Group*, 213 B.R. 234, 244 (Bankr. N.D.N.Y. 1997). This burden also requires the applicant to "demonstrate – not just recite – that the fees sought are reasonable, necessary and of benefit to the estate." *In re Fibermark, Inc.,* 349 B.R. 385, 395 (Bankr. D. Vt. 2006).

If an applicant fails to sustain its burden on reasonableness, a court may properly deny the application for compensation. *In re Beverly Mfg. Corp.*, 841 F.2d 365, 371 (11th Cir. 1988). Similarly, a court may reduce a professional's fees or expenses when they are disproportionate to the benefit to the estate, even if it already has approved the professional's retention under Sections 327 and 328 of the Bankruptcy Code. *In re Taxman Clothing Co.*, 49 F.3d 310, 316 (7th

Cir. 1995); *Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 262–63 (3d Cir. 1995) (affirming lower court's denial of improperly documented and inadequately detailed expenses). The Court must disallow requests for compensation for services that were not reasonably likely to benefit the debtor's estate or were not necessary to the administration of the case. 11 U.S.C. §330(a)(4)(A).

Lastly, the Court has an independent burden to review fee applications "'lest overreaching . . . professionals drain [the estate] of wealth which by right should inure to the benefit of unsecured creditors.'" *In re Keene Corp.*, 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997) (quoting *In re Busy Beaver Bldg. Ctrs., Inc.,* 19 F.3d 833, 844 (3d Cir. 1994)); *In re CCT Commc'ns, Inc.*, No. 07–10210 (SMB), 2010 WL 3386947, *4 (Bankr. S.D.N.Y. Aug. 24, 2010); *In re Value City Holdings, Inc.*, 436 B.R. 300, 305 (Bankr. S.D.N.Y. 2010). Accordingly, courts serve a vitally important gate-keeping role in enforcing the Code's requirements that only reasonable fees be approved and paid as well as maintaining public confidence in the bankruptcy system itself. *In re Temple Retirement Community, Inc.*, 97 B.R. 333, 337 (Bankr. W.D. Tex. 1989). "[T]he judiciary should retain control of fees, given the sensitivities they generate and the need to promote public confidence in the system." *In re Child World, Inc.*, 185 B.R. 14, 17 (Bankr. S.D.N.Y. 1995) (citation omitted). In particular, "whether interim allowances are awarded, and in what amounts, [are] questions left by Congress to the sound discretion of the bankruptcy court." *In re Barron*, 73 B.R. 812, 814 (Bankr. S.D. Cal. 1987); *see, e.g., In re ACT Manufacturing, Inc.*, 281 B.R. 468, 474 (Bankr. D. Mass. 2002). At the interim fee stage, there is no legal entitlement or requirement for payment prior to the final fee award. *See In re Child World, Inc.*, 185 B.R. at 17.

B. Brewer has not established a right to all of the expenses claimed in the Expense Application.

Brewer has the obligation to demonstrate that the expenses it seeks reimbursement for are expenses that are actual, necessary, and reasonable. As discussed *infra*, Brewer has not met its burden to justify reimbursement of the claimed amounts of expenses for hotels, court reporters, Westlaw, airfare and parking, nor has it demonstrated that it is entitled to pre-petition expenses for the hotels. Absent a resolution of those issues, the Court cannot approve all of the $123,455.92 requested by Brewer.

C. Brewer has not established a right to setoff under Section 553 or a right to use the Retainer to pay pre-petition expenses.

Brewer seeks authority to use the Retainer to pay $32,067.34 in pre-petition expenses that were not reimbursed prior to the petition date. ECF 216 at ¶ 9. Brewer seeks this reimbursement from the Retainer under either Section 362 or 553. ECF 216.

The Bankruptcy Code does not establish a right of setoff, but instead, preserves any right to setoff that exists under applicable non-bankruptcy law, to the extent the conditions of 11 U.S.C. § 553 have been satisfied. *In re Lehman Brothers Holdings, Inc.*, 404 B.R. 752, 757 (Bankr. S.D.N.Y. 2009). An offset of mutual obligations involves a debt and claim, each of which "arose before the commencement of the case." *Id.*; *see also In re Delta Air Lines,* 341 B.R. 439, 443 (Bankr. S.D.N.Y. 2006) ("Section 553 applies only to a right to offset *mutual debts* owing between the debtor and creditor 'that arose before the commencement of the case' . . . [and that] each of the 'mutual debts owing by such creditor to the debtor' and the 'claim of such creditor against the debtor' must be one that arose prior to the commencement of the case") (emphasis added). The Stay Relief/Setoff Motion asserts that Brewer is owed monies for

reimbursement of prepetition expenses, but does not explain what debt Brewer owes the Debtor in order to meet the requirements of Section 553.

The Stay Relief/Setoff Motion goes into great detail discussing various forms of retainers and whether a client retains an interest in the monies, but does not label the Retainer as any particular type of retainer. The Retainer, per the Retention Application, was given by the Debtor to Brewer and that Brewer had used this retainer to assure payment of expenses and reimburse itself for expenses pre-petition. ECF 73 at ¶ 14. The Stay Relief/Setoff Motion states that the retainer provided to Brewer was to be held in trust as an "advance compensation for expenses expected to be incurred," and takes the position that the Retainer is not property of the Debtor's bankruptcy estate. ECF 216 at ¶ 14. This position is not supported by the Retention Application, nor by the Retention Order, which state that any compensation (which would come from the Retainer and directly from the Debtor after the exhaustion of the Retainer) is subject to the procedures set forth in Section 331 and shall be reviewed under the standard set forth in Section 330(a). ECF 151 at ¶ 5. Further, the Retention Order specifically says that, to the extent that any term of the Retention Order is inconsistent with the Engagement Letters or the Retention Application, the terms of the Retention Order will govern. *Id.* at ¶ 7. Based on the foregoing, the Retainer is property of the Debtor's estate and is not appropriate for use to pay pre-petition expenses.

III. CONCLUSION

Wherefore, the United States Trustee respectfully requests that the Court enter an order sustaining this omnibus objection and granting such other relief as is appropriate.

Dated: December 8, 2015
New Haven, CT

Respectfully submitted,

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UNITED STATES TRUSTEE FOR REGION 2

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing objection was served on all parties listed below via the Electronic Case Filing System maintained by this Court, or through such other means of service as noted below.

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