



IT IS ORDERED as set forth below:

Date: December 20, 2011

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
MINNIX CONSTRUCTION, INC.,	:	04-17528-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

Theo D. Mann objects to the priority unsecured claim of Murphy & McClendon, PC (hereinafter "M & M") and asserts that it should be allowed as an unsecured claim. This matter constitutes a core proceeding over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(B); 1334.

FINDINGS OF FACT AND PROCEDURAL HISTORY

M & M rendered accounting services to Minnix Construction, Inc. (hereinafter the "Debtor") from July 15, 2003 through November 17, 2005 without receiving payment for its services. The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on November 23, 2004. M & M did not appear on the Debtor's creditors' matrix and, thus, did not receive notice of the commencement of the bankruptcy case from the Clerk of Court.

Theo D. Mann (hereinafter the "Trustee") was appointed as trustee, and a first meeting of creditors was held on January 26, 2005. Upon the Trustee's request, the Court later established May 25, 2005 as the last day for filing a proof of claim in the Debtor's case. The Court's records reflect that M & M did not receive notice of the appointment of the Trustee, the date of the meeting of creditors, or the claims bar date.

M & M filed a proof of claim on November 17, 2005 ("Claim Number 18-1"). Claim Number 18-1 evidences an unsecured priority claim in the amount of \$10,548 incurred for the provision of accounting service to the Debtor during the period July 15, 2003 through November 17, 2005. On May 24, 2011, the Trustee objected to Claim Number 18-1 on the basis that the claim should be allowed as a tardy unsecured claim, rather than a timely priority claim.

On June 23, 2011, M & M filed a second proof of claim ("Claim Number 19-

1"). Claim Number 19-1 evidences a general unsecured claim of \$3,159.75 and a priority unsecured claim of \$7,388.75. Claim Number 19-1 indicates M & M intended Claim Number 19-1 as an amendment to Claim Number 18-1 in response to the Trustee's objection to Claim Number 18-1. Claim Number 19-1 indicates that \$3,159.75 of the fees claimed by M & M were rendered prepetition. The paperwork attached to Claim Number 19-1 also asserts that M & M did not receive notice of the Debtor's bankruptcy filing in time to file Claim Number 18-1 prior to the established claims bar date. During the hearing, M & M made a proffer that it did not receive notice or actual knowledge of the filing of the Debtor's case until after claims bar date.

The Trustee did not seek to employ M & M as a professional of the estate. The Court did not enter an order approving the employment of M & M as a professional of the estate.

CONCLUSIONS OF LAW

A claim is entitled to priority payment under section 507 if the claim is allowable under section 503(b). 11 U.S.C. § 507(a)(2). Under section 503(b), the Court may allow payment of administrative expense claim for "compensation and reimbursement awarded under section 330(a), or for the "actual, necessary costs and expenses of preserving the estate." *Id.* § 503(b)(1)-(2). The claimant bears the

burden of "proving entitlement to administrative expense by a preponderance of the evidence. *Surrey Inv. Services, Inc. v. Smith*, 418 B.R. 140, 146 (M.D.N.C. 2009); *In re Renaissance Residential of Countryside, LLC*, 423 B.R. 848, 859 (Bankr. N.D. Ill. 2010).

Priority payment of compensation to a professional may not be made pursuant to section sections 330 and 503(b)(2) unless the professional has been employed by the trustee with court approval. *See In re Krause*, 349 B.R. 272 (Bankr. D. Kan. 2006). It has also been held that professional fees cannot be paid as administrative expenses pursuant to section 503(b)(1). *Smith*, 418 B.R. at 148 ("Where a subsection of section 503(b) directly addresses the type of administrative expense sought, those restrictions cannot be avoided by appealing to the non-exclusive nature of section 503(b).") (citing *Cushman & Wakefield, Inc. v. Keren Ltd. P'ship (In re Keren Ltd. P'ship)*, 189 F.3d 86, 88 (2d Cir.1999); *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99 (3d Cir. 1988); *In re Albrecht*, 245 B.R. 666, 670–71 (10th Cir. BAP), *aff'd*, 233 F.3d 1258 (10th Cir.2000)). Even if such expenses could be paid under section 503(b)(1), the claimant must establish that the claim arose from a transaction with the estate, rather than with the Chapter 7 debtor. *Renaissance Residential of Countryside, LLC*, 423 B.R. at 859; *In re Rockford Prods. Corp.*, 2009 WL 2707236 *4 (Bankr. N.D. Ill. Aug. 24, 2009) ("[I]nducement of the creditor's performance by the debtor-in-

possession is crucial to a claim for administrative priority."").

Here, there is no dispute that the Trustee did not seek to employ M & M as an accountant for the estate pursuant to section 327. Therefore, the Court cannot award compensation for M & M's postpetition services under section 330, and such fees are not entitled to priority treatment under section 503(b)(2).

During the hearing on this matter, the Court permitted M & M an opportunity to submit further briefing as to whether any other provision of the Code or equitable doctrine would allow the Court to grant administrative priority to M & M's postpetition fees. M & M did not avail itself of that opportunity. Accordingly, M & M has not met its burden, and the Court must agree with the Trustee that M & M's claim for postpetition fees cannot be paid by the Debtor's estate.

It appears that M & M did not receive notice of the Debtor's bankruptcy case or have actual notice of the case in time to file a timely proof of claim. It further appears that M & M filed its proof of claim in time to allow payment of the claim. The Court, therefore, concludes that M & M's claim for fees rendered prepetition shall be paid *pro rata* along with the timely filed unsecured claims, pursuant to section 726(a)(2)(C).

CONCLUSION

For the reasons stated above, the Trustee's objection is SUSTAINED. M & M shall have one unsecured claim in the amount of \$3,159.75. The claim shall be paid *pro rata* along with the timely filed unsecured claims, pursuant to section 726(a)(2)(C). The remainder of M & M's Claim Number 18-1, as amended by Claim Number 19-1, is DISALLOWED.

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