



IT IS ORDERED as set forth below:

Date: July 29, 2008

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____|
IN RE:

CASE NO. 03-81907

Southern Value Homes, Inc.,

CHAPTER 7

Debtor.
_____|

JUDGE MASSEY

**ORDER DENYING APPLICATION TO EMPLOY BURTON & ARMSTRONG, LLP
AND SETTING A DEADLINE OF AUGUST 15, 2008 TO RE-FILE SUCH AN APPLICATION**

On July 17, 2008, the Court entered a proposed order submitted by the Chapter 7 Trustee in this case that granted the Trustee's objection to the proof of claim of Burton & Armstrong LLP (B&A). B&A's proof of a priority claim in the amount of \$15,721.62 was obviously invalid. It sought the payment of compensation for professional services allegedly rendered to the debtor in possession in this case prior to its conversion to Chapter 7 on February 9, 2004. But as B&A knew, the debtor in possession had not been authorized to employ B&A, and the Court had not awarded compensation to B&A. That there was no legal basis for the claim should have been obvious.

The July 17, 2008 Order granting the Trustee's objection to B&A's priority claim provided that "Burton & Armstrong, LLP has 10 days after the entry of this order, in which to seek the entry of an order nunc pro tunc to December 30, 2003, for its employment as counsel for the debtor as debtor-in-possession."

On July 25, 2008, Southern Value Homes, Inc. (Applicant), which is the debtor in this case, filed such an application. B&A submitted a proposed order on the application that would have approved its employment retroactively to the date of the petition and would have approved a fee arrangement without any notice whatsoever to general unsecured creditors. All of such creditors would presumably be adversely affected by the allowance of any administrative expense claim of B&A since administrative expenses in a superseded Chapter 11 case have priority over claims payable in the subsequent Chapter 7 case. 11 U.S.C. § 726(b). The last interim report of the Trustee filed in late October 2007 showed about \$19,000 on hand. The aggregate amount of allowed general unsecured claims greatly exceeds \$19,000. The application fails to mention that it was not timely filed, offers no excuse for the late filing and does not justify the proposal to keep creditors in the dark.

Whether a bankruptcy court may grant so-called "nunc pro tunc" approval of employment of a professional by a Chapter 11 trustee or debtor in possession years after work began for a trustee or debtor in possession remains an open issue in the Eleventh Circuit. *See McMillan v. Joseph Decosimo and Co. (In re Das A. Borden & Co.)*, 131 F.3d 1459, 1463 (11th Cir. 1997) ("In light of other grounds mandating affirmance of the district court order, we reserve our opinion on the propriety of nunc pro tunc authorizations for another dispute demanding the resolution of this divisive issue.").

This case has one additional wrinkle not present in the *Borden* case. The application to employ was filed not by the debtor in possession. The entity permitted to employ a professional under section 327 of the bankruptcy Code is the “trustee.” Section 1107 bestows on a debtor in possession certain of the powers and duties of a trustee, including the authority to employ professionals. Section 1107(b) draws sharp attention to the difference between a debtor and a debtor in possession in stating that a professional is not disqualified from representing the debtor in possession by reason of having represented the debtor prepetition. There is no longer a debtor in possession in this case. That would appear to preclude a debtor from attempting to hire counsel for the extinct debtor in possession four years after the case was converted to Chapter 7. The application to employ B&A does not address this issue.

The Order entered on February 9, 2004 converting the case from Chapter 11 to Chapter 7 also set a deadline for filing applications for compensation in the Chapter 11 case, stating:

IT IS FURTHER ORDERED that any and all professionals employed by the Debtor in the chapter 11 case shall, within thirty (30) days of the entry of this Order, file an application for compensation and reimbursement of expenses for services rendered in connection with the administration of the chapter 11 case, or, alternatively, shall immediately turn over to the appointed chapter 7 trustee any deposit, fee advance or retainer for which allowance has not already been made by this Court.

In effect, the Court is being asked to ignore or reset, four years after the fact, the deadline for filing applications to pay administrative expenses in the Chapter 11 case. Section 503(a) provides that an entity may tardily file an application for allowance of an administrative expense “if permitted by the court for cause.” The application to employ should have addressed the question of what was the cause of B&A’s failure to timely file the application for compensation because consideration of the application to employ would be futile if an application for compensation would be denied as untimely. (Note that a contention of creditor that timely filing of application

under section 503(a) was not cost effective has been held not to constitute cause. *In re Wilder*, 225 B.R. 600, 602 (Bankr. D.S.C. 1997)).

In short, the application to employ B&A does not state facts that, if true, would entitle the applicant to the relief requested, considering the passage of time, the conversion of the case and the conditions of February 9, 2004 Order. Nor was it accompanied by a brief showing that under applicable law, applicant is entitled to the relief sought.

For these reasons, Debtor's application to employ B&A is DENIED without prejudice to the filing of another application on or before August 15, 2008, if the applicant can allege facts that would entitle the applicant to relief under applicable law.

END OF ORDER