

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**SESCO, INC.,
DEBTOR.**

**CASE NO. 03-05675-NPO
CHAPTER 7**

**ORDER GRANTING IN PART AND DENYING IN PART APPLICATION
FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES BY COUNSEL**

On November 21, 2006, there came on for hearing (the “Hearing”) the Application for Compensation and Reimbursement of Expenses by Counsel (Dk. No. 82)(the “Application”) and the Trustee's Objection to Application for Compensation and Reimbursement of Expenses requested by Dove & Chill (Dk. No. 84)(the “Objection”) in the above-styled bankruptcy proceeding. Luke Dove represented the Debtor, SESCO, INC. (the “Debtor”), and Eileen N. Shaffer represented the Chapter 7 Trustee, J. Stephen Smith (the “Trustee”). At the conclusion of the Hearing, the Court took the matter under advisement. The Court, having considered the pleadings, exhibits, and arguments of counsel presented at the Hearing, finds that the Application should be granted in part and denied in part. Specifically, the Court finds as follows:¹

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of the proceeding. This matter is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A). Notice of the Application was proper under the circumstances.

¹ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Rule 9014 of the Federal Rules of Bankruptcy Procedure.

Facts

1. This bankruptcy case was commenced by the filing of a voluntary petition (Dk. No. 1) under chapter 11 on September 30, 2003 (the "Petition Date"). Counsel for the Debtor received a \$15,000 security retainer for its fees and expenses (the "Retainer").²

2. On July 6, 2004, the chapter 11 case was converted to a chapter 7 case (the "Conversion Date") by Order of this Court (Dk. No. 66).

3. On October 21, 2004, Debtor's Counsel filed the Application,³ and on October 29, 2004, the Trustee's Counsel filed the Objection. The Application and Objection were originally set for a hearing on December 14, 2004 (Dk. No. 85). Counsel for the parties attempted to resolve their dispute over an almost two (2) year period.

4. The Application covers the period from the Petition Date to the Conversion Date, as well as for certain fees and expenses incurred on behalf of the Debtor after the Conversion Date. Debtor's Counsel was never retained by the Trustee.

5. Counsel for the Debtor and the Trustee agreed to the reconciliation of the fees and expenses attached to this Order as Exhibit "A."

6. There is no dispute that Debtor's Counsel should receive compensation for fees in the amount of \$12,992.50 and reimbursement of expenses in the amount of \$1,416.55 for the period up

² Application of Debtor to Employ Attorneys, and Disclosure of Compensation at ¶ 3 (Dk. No. 16).

³ The Application resulted from an Agreed Order on Motion to Examine Professional Fees (Dk. No. 79) entered on September 22, 2004. That Agreed Order provided: "Dove and Chill shall file an application for compensation and expenses for services performed and expenses incurred in the chapter 11 aspect of this case within thirty (30) days from entry of this Order." Despite that language, Debtor's Counsel included in the Application compensation for post-conversion fees and expenses.

to the Conversion Date. Accordingly, Debtor's Counsel should be awarded \$14,409.05 for those amounts from the Retainer.

7. The only dispute before this Court is whether Counsel for the Debtor should be awarded any fees and expenses from the balance of the Retainer, in the amount of \$1,420.95, for the fees of \$2,060 and expenses of \$98, totaling \$2,158, incurred after the Conversion Date.⁴

Conclusions of Law

Prior to 1994, 11 U.S.C. § 330(a) authorized a court to “award to a trustee, *to* an examiner, *to* a professional person employed under section 327..., *or to the debtor's attorney*” reasonable compensation for services. 11 U.S.C. § 330(a) (1988 ed.) (emphasis added to highlight text later deleted).⁵ In 1994, Congress amended the Bankruptcy Code and altered § 330(a) by deleting “or to the debtor's attorney” from what was § 330(a) and is now § 330(a)(1). Bankruptcy Reform Act of 1994, § 224(b), Pub. L. 103-394 (Oct. 22, 1994). The 1994 amendment to § 330(a) confused the issue of whether and when a debtor’s attorney might be entitled to compensation under § 330(a).

Based on its interpretation of § 330(a)(1), the Fifth Circuit held in In re Pro-Snax Distributors, Inc., 157 F.3d 414 (5th Cir. 1998), that debtor’s counsel could not be compensated from the estate for work performed after the appointment of a chapter 11 trustee. Pro-Snax, 157 F.3d at 425. Subsequently, in Lamie v. United States Trustee, 540 U.S. 526 (2004), the U.S. Supreme Court addressed the question of whether a chapter 11 debtor's counsel could be paid from chapter 7 estate funds post-conversion. In Lamie, the Supreme Court adopted the rationale of the Fifth Circuit set

⁴ Though the fees and expenses exceed the balance of the Retainer, Debtor's Counsel is only seeking an award of the balance of \$1,420.95.

⁵ Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code, unless otherwise noted.

forth in Pro-Snax, finding that under the plain language as revised in 1994, § 330(a)(1) mandates that the services of chapter 11 counsel are terminated upon conversion to a chapter 7 case and that counsel cannot be paid for any services rendered post-conversion unless properly appointed pursuant to § 327. Lamie, 540 U.S. at 538-39.

Thereafter, in the case of CK Liquidation Corp., 343 B.R. 376 (D. Mass 2006), the district court found that the retainer paid by the debtor in the chapter 11 case became property of the chapter 7 estate upon conversion. CK Liquidation, 343 B.R. at 385. Yet, in accordance with Lamie, the debtor's counsel could not be compensated from the retainer for post-conversion services because the attorney had not been reappointed as counsel for the chapter 7 trustee with the approval of the bankruptcy court. Id.

In the case at bar, the issue before the Court is whether Debtor's Counsel can be awarded compensation from the balance of the Retainer for fees and expenses incurred after the Conversion Date. Application of the above-referenced case law to that issue persuades the Court that the Retainer became property of the chapter 7 estate on the Conversion Date. Because Debtor's Counsel was not appointed as counsel for the Trustee with the approval of this Court in accordance with Lamie, Debtor's Counsel cannot apply the Retainer toward payment of the post-conversion services.⁶ Accordingly, that portion of the Application should be denied.

A separate final judgment consistent with this Order will be entered by the Court in

⁶ As noted in CK Liquidation, a "flat fee" retainer is an unqualified prepayment for services whereby counsel takes title of the retainer fee on the date of payment. In contrast, a "security" retainer is held by counsel but remains property of the client until it is earned by counsel's performance. CK Liquidation, 343 B.R. at 379, n. 3. While Lamie does recognize an exception to the application of § 330(a)(1) where a flat fee retainer has been paid by the debtor, *see* Lamie, 540 U.S. at 537-38, in the case before this Court, the pleadings establish that the retainer was paid as security to be held by counsel and earned at an hourly rate. *See* Application of Debtor to Employ Attorneys, and Disclosure of Compensation at ¶ 3 (Dk. No. 16).

accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

IT IS THEREFORE ORDERED that the Application for an allowance of compensation for professional services and reimbursement of expenses is hereby allowed as an expense of the administration of the chapter 11 from the Retainer for the allowed fees and expenses of \$12,992.50 and expenses of \$1,416.55 for a total of \$14,409.05.

IT IS FURTHER ORDERED that the balance of the Application for fees and expenses after the Conversion Date is hereby denied.

IT IS FURTHER ORDERED that the balance of the Retainer in the amount of \$1,420.95 shall be turned over to the Trustee and disbursed upon further Order of this Court.

SO ORDERED, this the 12th day of January, 2007.

/s/ Neil P. Olack
NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE