



SO ORDERED,

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: March 11, 2019**

The Order of the Court is set forth below. The docket reflects the date entered.

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

IN RE:

**EVAN JOHNSON & SONS
CONSTRUCTION, INC.,**

CASE NO. 17-02192-NPO

DEBTOR.

CHAPTER 11

**ORDER APPROVING AMENDED APPLICATION TO EMPLOY ACCOUNTING AND
INFORMATION TECHNOLOGY FIRM**

This matter came before the Court¹ for hearing on February 28, 2019 (the “Hearing”), on the Application to Employ Accounting and Information Technology Firm (the “Application to Employ”) (Bankr. Dkt. 257)² filed by the debtor, Evan Johnson & Sons Construction, Inc. (“the Debtor”), and the United States Trustee’s Response to Application to Employ Accounting and Information Technology Firm (Bankr. Dkt. 276) filed by David Asbach, Acting U.S. Trustee for Region 5 (“the UST”). At the Hearing, Craig M. Geno (“Geno”) argued on behalf of the Debtor,

¹ The above-styled bankruptcy case (the “Bankruptcy Case”) was transferred from the Honorable Edward Ellington, United States Bankruptcy Judge, Southern District of Mississippi to the Honorable Neil P. Olack, United States Bankruptcy Judge, Southern District of Mississippi on December 1, 2018.

² Citations to docket entries in the Bankruptcy Case are cited as “(Bankr. Dkt. ___)”.

and Ronald H. McAlpin argued on behalf of the UST. The Court, being fully advised in the premises, ruled from the bench at the Hearing and approved the Application to Employ. This Order memorializes and supplements the Court's bench ruling.

Facts

1. On June 15, 2017, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. (Bankr. Dkt. 1).
2. On July 26, 2018, the Debtor filed the Application to Employ, seeking permission to employ Advanced Solutions, Inc. ("ASI") to perform the monthly data compilation and accounting procedures needed to operate the Debtor's business.
3. Attached with the Application to Employ and incorporated by reference are the Affidavit of Monty W. Kasselmann (Bankr. Dkt. 257, Ex. B) and the Engagement Letter ("the Engagement Letter") (Bankr. Dkt. 257, Ex. A) entered into by the Debtor and ASI.
4. In the Engagement Letter, ASI acknowledges the Debtor's request for ASI to handle "the accounting and information reporting requirements . . . during bankruptcy proceedings" and to "record and reconcile financial transactions that flow through the Debtor bank account at Regions Bank." (Bankr. Dkt. 257, Ex. A). In addition, ASI states it was also requested to "prepare and submit financial reports to various agencies as required[,] including the U.S. Trustee." (Bankr. Dkt. 257, Ex. A). The Engagement Letter provides that ASI's "engagement will be effective as of the date of bankruptcy filing which was June 15, 2017." (Bankr. Dkt. 257, Ex. A).
5. On July 26, 2018, ASI filed its First Application for Allowance of Compensation and Reimbursement of Necessary Expenses for Accounting and Information Technology Firm

Advanced Solutions, Inc. (“the Fee Application”) seeking fees and expenses totaling \$18,305.00 for services performed between October 1, 2017 and June 15, 2018 (Bankr. Dkt. 260).

6. In the UST’s response, the UST argues the Application to Employ fails to comply with Miss. Bankr. L.R. 2014-1(c) to the extent it seeks approval *nunc pro tunc*. The UST also argues that neither the Application to Employ nor Fee Application discloses that on or about December 4, 2017, the Debtor paid ASI \$17,373.51 in fees for post-petition services.

7. At the Hearing, Geno argued that noncompliance with Local Rule 2014-1(c) is immaterial because ASI is not a “professional person” under 11 U.S.C. § 327(a). According to Geno, the Application to Employ was filed out of an abundance of caution, but is unnecessary. The Debtor’s representative, Melanie Johnson (“Johnson”), and ASI’s Chief Operating Officer, Monty Kasselmann (“Kasselmann”), testified in support of the Application to Employ.

8. Johnson testified that her husband, Evan Johnson (“Evan”), served as the Debtor’s principal until his death in November 2014. Johnson stated that Evan first retained ASI in 1999 to manage the Debtor’s software and computers. After November 2014, Johnson began managing the Debtor. Johnson testified that around the time the Debtor filed its bankruptcy petition in June 2017, its bookkeeper retired, and ASI agreed to service the Debtor’s accounting needs. ASI subsequently balanced the Debtor’s accounts, and prepared and submitted: payroll returns, 941s, sales tax returns, W-2s, 1099s, and monthly operating reports. Johnson testified that she paid ASI \$17,373.51 for post-petition services in the ordinary course of business because she thought Kasselmann with ASI was an employee.

9. On March 6, 2019, after the Hearing and the Court’s bench ruling, the Debtor filed an Amended Application to Employ Accounting and Information Technology Firm (“the Amended Application to Employ”), addressing the issues raised at the Hearing. (Bankr. Dkt. 332).

The Amended Application to Employ conforms to Bankr. L.R. 2014-1(c) and supersedes the original Application to Employ. Aside from its compliance with Bankr. L.R. 2014-1(c), the Amended Application to Employ is substantially the same as the original Application to Employ. This Order reflects the Court’s ruling at the Hearing prior to the filing of the Amended Application to Employ, but ultimately approves the Amended Application to Employ for the sake of judicial efficiency.

Discussion

Section 327(a)³ provides that a trustee, with court approval, may employ professional persons “to represent or assist the trustee in carrying out the trustee’s duties.” 11 U.S.C. § 327(a). Bankruptcy Rule 2014(a) prescribes the procedure to be used and provides that an order approving the employment of professionals shall be made only on the application of the trustee or committee.⁴ When the application for employment is requested *nunc pro tunc*, Miss. Bankr. L.R. 2014-1(c) sets forth certain requirements that must be satisfied. The rule specifically provides that

- (1) If an application for the approval of the employment of a professional seeks to make the authority retroactive to the commencement, the application must include
 - (A) An explanation of why the application was not filed earlier;
 - (B) An explanation why the order authorizing employment is required *nunc pro tunc*;
 - (C) An explanation, to the best of the applicant’s knowledge, how approval of the application may prejudice any parties-in-interest.

Miss. Bankr. L.R. 2014-1(c). Here, the Application to Employ is sought on a *nunc pro tunc* basis, but it does not include any of the three required explanations under Local Rule 2014-1(c). Thus,

³ Hereafter, all code sections refer to title 11 of the U.S. Code unless otherwise noted.

⁴ By virtue of § 1107, a debtor-in-possession has all the rights of a trustee.

if the Court finds ASI is a professional under § 327(a), it must then decide whether the Application to Employ should be granted considering the Debtor's noncompliance with Local Rule 2014-1(c).

While the Bankruptcy Code does not define the term “professional person,” numerous courts have applied a working definition. Some courts have defined the term as an individual who takes a central role in the bankruptcy estate and proceedings, as opposed to one who provides services that are necessary irrespective of bankruptcy. *See In re Bannerman Holdings, LLC*, No. 10-01053-8-SWH2, 2010 WL 2404313 at *2-3 (Bankr. E.D.N.C. June 10, 2010); *In re Century Inv. Fund VII Ltd. P'ship*, 96 B.R. 884, 893 (Bankr. E.D. Wis. 1989); *In re D'Lites of Am., Inc.*, 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989); *In re Seatrain Lines, Inc.*, 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981). Other courts have categorized individuals and entities given broad discretion or autonomy in the administration of the debtor's bankruptcy estate as “professional persons.” *See In re Rusty Jones, Inc.*, 109 B.R. 838 (Bankr. N.D. Ill. 1989); *In re Fretheim*, 102 B.R. 298 (Bankr. D. Conn. 1989).

One of the first and most frequently cited definitions of a “professional person” is from *In re Seatrain Lines, Inc.*, 13 B.R. at 980-81, which found that maritime engineers employed by the debtor were not “professional persons.” The bankruptcy court found that although the engineers were important to Seatrain's business operations, their services did not intimately involve or affect the administration of the bankruptcy estate. *In re Seatrain Lines, Inc.*, 13 B.R. at 981. Hence, the engineers' role could be contrasted with that of an attorney who appears in bankruptcy proceedings, an appraiser required to value property of the estate, a realtor disposing property of the estate, or an accountant responsible for tax and court reporting requirements. *Id.*

In In re First Merchants Acceptance Corp., No. 97-1500 JJF, 1997 WL 873551 (Bankr. D. Del. Dec. 15, 1997), involved a company employed to consult and assist the debtor with its loan

servicing operations. Ultimately, the bankruptcy court determined that the company fell within the definition of “professional persons” because it was afforded a large degree of discretion in performing its work, the work required a specialized skill, and it was important to the administration of the estate. *In re First Merchants Acceptance Corp.*, 1997 WL 873551 at *5.

In the instant case, the Court finds that ASI is a professional within the meaning of § 327(a). The Engagement Letter attached to the Application to Employ clearly indicates that ASI performs not only work pertaining to the Debtor’s ordinary course of business, but significant work relating to the reorganization of the Debtor’s estate. According to the Engagement Letter, ASI records and reconciles the financial transactions that flow through the Debtor’s bank account, and handles the Debtor’s accounting and reporting requirements during bankruptcy proceedings, including the preparation and submission of the Debtor’s monthly operating reports. Thus, the accounting functions ASI performs directly relate to the assets and liabilities of the Debtor’s estate. Notably, these tasks were not part of ASI’s pre-petition services.

Turning to the merits of the Application to Employ, the Court finds that the Application to Employ should be granted based on the equities and circumstances involved in this case. The Fifth Circuit Court of Appeals has held that a bankruptcy court retains “equitable power in the exercise of its sound discretion, under exceptional circumstances . . . [and] upon a proper showing” to approve employment *nunc pro tunc*. *Fanelli v. Hensley (In re Triangle Chems., Inc.)*, 697 F.2d 1280, 1289 (5th Cir. 1983) (noting that a responsible party’s “confusion as to the applicable law” is a basis that may allow a bankruptcy court to approve *nunc pro tunc* employment and award compensation). Here, the Debtor has demonstrated such exceptional circumstances.

The Court is convinced, after hearing Johnson’s and Kasselmann’s testimonies, that it is not within Johnson’s skillset to manage the Debtor’s accounting needs or file the required monthly

operating reports. In addition, the cost to employ a different information technology and accounting firm would be significant, and the loss of ASI could potentially delay or jeopardize the conclusion of the Bankruptcy Case. The Court further finds that the Debtor's neglect to file its Application to Employ in a timely manner was based on a misunderstanding, rather than a blatant disregard of procedural requirements. Regardless, the UST's discussion about the \$17,373.51 payment that the Debtor made to ASI in December 2017 is premature at this stage under these facts, and the only matter before the Court is whether the Debtor's employment of ASI is proper. Since it appears that the Debtor only inadvertently failed to obtain an order approving its employment of ASI, this Court approves the Amended Application to Employ *nunc pro tunc*, to June 15, 2017.

IT IS, THEREFORE, ORDERED that the Amended Application to Employ is approved, *nunc pro tunc*, to June 15, 2017.

IT IS FURTHER ORDERED that ASI shall, within fourteen (14) days of this Order, amend the Fee Application to include all post-petition fees and expenses incurred by the Debtor through February 2019.

##END OF ORDER##