ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
AUG 27 2002
TAWANA C. MARSHALL, CLERK
BY _____
Deputy

IN RE:	§	
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ARLINGTON AUTOMATICS, INC.,	§	CASE NO. 01-36287-SAF-11
	§	
D E B T O R.	§	

MEMORANDUM OPINION AND ORDER

Mark Layton has filed a final application for allowance of fees and expenses. Shawn K. Brown, the plan trustee under the confirmed liquidating plan of reorganization of Arlington Automatics, Inc., the debtor, JDD Partners-II, Ltd., and the United States Trustee oppose the application. The court conducted a hearing on the application on July 24, 2002.

On September 14, 2001, while operating as a debtor-in-possession, Arlington Automatics filed an application to employ Layton as a professional person under 11 U.S.C. § 327(a). JDD Partners opposed the employment application. At a hearing on the application on October 22, 2001, the debtor requested that the court carry the application on its docket. The court granted that request. The debtor thereafter did not prosecute the

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employment application and did not request that the application be reset for hearing.

The court approved a sale of the debtor's assets and, by order entered May 16, 2002, confirmed the debtor's first amended liquidating plan of reorganization. Brown became the liquidating trustee.

At the hearing on the compensation application on July 24, 2002, the court, *sua sponte*, reset the employment application. Arlington Automatics is no longer a debtor-in-possession and consequently lacks standing to prosecute the employment application. No one appeared on behalf of the debtor to suggest otherwise or even to request consideration of the employment application under any theory. Brown stated that the liquidating trustee has succeeded to the debtor's remaining assets and has no desire either to employ Layton or to seek approval of his employment during the debtor's time as debtor-in-possession. Brown requested that the court deny the employment application under § 327(a). As only a trustee may employ a professional person under § 327(a), the court thereupon denied the employment application.

With the employment application denied, Layton requested compensation under 11 U.S.C. § 330(a) either as a professional not requiring employment approval under § 327(a) or as an administrative expense under 11 U.S.C. § 503(b)(1).

Professional persons regularly employed on salary by a debtor-in-possession may be retained if necessary in the operation of a business without court approval. 11 U.S.C. § 327(b). Professional persons employed under § 327(b) may be compensated under § 330(a). Layton testified that he had not been employed on salary by Arlington Automatics. Layton had been employed by a corporation that offered consulting services. The corporation contracted with the debtor. Accordingly, § 327(b) does not apply.

That leaves Layton's request for compensation as an administrative expense under § 503(b)(1). The parties agree that Layton may only seek compensation under § 503(b)(1) if he is not a professional person required to be employed under § 327(a), § 327(b) being inapplicable. If Layton is a professional person under § 327(a), then he may only be compensated by the bankruptcy estate pursuant to § 330(a), which requires court approval of retention on a request of a trustee, which Layton lacks. 11 U.S.C. § 503(b)(2).

The parties have submitted briefs on whether Layton is a professional person under § 327. Section 327(a) provides that "the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons. . . ." Layton is not an attorney, accountant, appraiser, or auctioneer. Thus, the issue is whether

Layton is an "other professional person."

To determine whether a person is a professional under § 327, courts have looked beyond labels to ascertain the role the person plays in the administration of the bankruptcy case. A person who assists the debtor in the administration of the bankruptcy is usually considered a professional person, as contrasted with a person who is hired by the debtor in the ordinary course of the debtor's business. In re Bicoastal Corp., 149 B.R. 216, 218 (Bankr. M.D. Fla. 1992). Regardless of title, the term professional person is a term of art under § 327 reserved for a person who plays a central and intimate role in the administration of a bankruptcy estate. In re United Color Press, Inc., 129 B.R. 143, 145 (Bankr. S.D. Ohio 1991). Courts have also considered the autonomy of the person's function in the administration of the estate. In re Bartley Lindsay Co., 137 B.R. 305, 308 (D. Minn. 1991). The court in In re First Merchs. Acceptance Corp., No. 97-1500, 1997 WL 873551 (Bankr. D. Del. Dec. 15, 1997), discussing these cases, articulated several factors for a court to weigh in determining whether a person performs as a professional for purposes of § 327. This court considers those factors.

Layton performed accounting and asset sale services for Arlington Automatics while it was a debtor-in-possession. Layton is not an accountant. Generally, a professional is a "person who

belongs to a learned profession or whose occupation requires a high level of training and proficiency." Black's Law Dictionary 1226 (7th ed. 1999). Not an accountant, Layton does not belong to that "learned profession." Layton does hold an engineering degree, but this case does not involve his engineering experience. Layton, however, also holds a Master of Business Administration. After earning that degree, he obtained actual accounting experience. With that degree and experience, he has developed a consulting business, that includes designing and installing accounting systems for companies. In fact, he testified that he had developed Arlington Automatic's accounting system prior to its bankruptcy. His training and proficiency gained from experience places him, therefore, in the accounting consulting profession. Thus, regardless of his lack of a license, through education and experience Layton has the special knowledge and skill to be considered a professional person. First Merchs., at *3.

Layton prepared the debtor's budget for its cash collateral order with its secured creditor. He prepared cash flow statements, monitored compliance with the budget, reviewed accounts receivable, and prepared monthly financial statements and other similar documentation required by the secured creditor. Several of these functions constitute routine business tasks required by the debtor's operations and a secured creditor. But,

as a result of the bankruptcy case, the functions became central to the administration of the estate, namely, the debtor's ability to obtain a cash collateral order and then to operate under the cash collateral order. Thus, the work became crucial to the administration of the case. First Merchs., at *4.

Layton also did the work necessary for the debtor to file its schedules and statement of financial affairs as well as an operating report, all required for the administration of the bankruptcy case. As such, he performed tasks central to the administration of the case.

In addition, Layton testified that he played a central role in the marketing of the debtor's assets for the bankruptcy sale approved by the court. He worked with prospective buyers. He worked with the debtor's attorney regarding the negotiations for an asset purchase agreement. He worked on financial data for the buyer's due diligence analysis of the debtor's assets. Like a financial advisor employed to market a debtor's assets, Layton performed similar pivotal services for the sale under 11 U.S.C. § 363. First Mechanics, at *4.

The debtor believed that these functions made Layton a professional person requiring court approval for employment under § 327(a). Layton understood that requirement and he knew that the debtor filed the application. However, he neither pursued the application nor obtained court approval before performing his

tasks. The court cannot speculate on the reasons that the debtor did not prosecute the application. Yet, the court notes the contentions stated in the objection to the application.

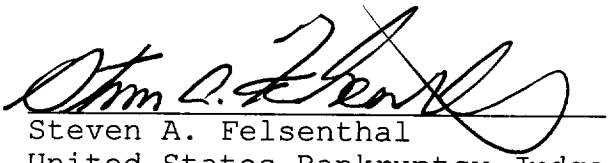
Layton states that his employment pre-petition through a separate corporation had been arranged because of personal family needs. Layton argues that he should be considered an employee performing ordinary business tasks because, except for the bankruptcy requirements and procedures, he performed similar functions pre-petition. Section 327(b) addresses professional persons employed by a debtor for ordinary business needs. Layton concedes that he did not have a salaried position with the debtor. The court cannot re-write the statute to address the particular circumstances of an individual.

Weighing these factors, the court concludes that Layton constitutes a professional person under § 327. By skill and experience, he performed tasks similar to those of an accountant and a financial advisor employed to aid in the sale of assets, all critical and central to the administration of the bankruptcy case. Layton may therefore only be compensated by the bankruptcy estate under § 330(a). As § 327(b) does not apply and as the court has denied the application under § 327(a), Layton may not be compensated under § 330(a). In re Southmark Corp., 181 B.R. 291, 295 (Bankr. N.D. Tex. 1995)(stating that a professional

person not employed under § 327 may not be compensated under § 330(a)). Accordingly,

IT IS ORDERED that the final application for allowance of fees and expenses of Mark Layton is **DENIED.**

Signed this 22nd day of August, 2002.



Steven A. Felsenthal
United States Bankruptcy Judge