



The following constitutes the order of the Court.

Signed January 27, 2006

Barbara J. Houser
United States Bankruptcy Judge

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

IN RE:

**HOME and HEARTH COLORADO
SPRINGS, L.P.**

Debtor.

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CASE NO. 02-34843-BJH-7

**MEMORANDUM OPINION AND ORDER DENYING APPLICATION
TO EMPLOY**

Before the Court is the Application to Employ Special Counsel (the “Application to Employ”) filed by the Chapter 7 trustee of Home & Hearth Colorado Springs, L.P. (the “Trustee”). The Court has core jurisdiction over the Application to Employ in accordance with 28 U.S.C. §§ 1334 and 157(b). This Memorandum Opinion contains the Court’s findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

I. Procedural Background and Contentions of the Parties

In the Application to Employ, the Trustee seeks to retain the law firms of Dady & Garner, P.A. and Stryker Tams and Dill (collectively, the “Firms”) as his counsel in connection with certain litigation pending in New Jersey (the “New Jersey Litigation”) against Villager Franchise Systems, Inc. (“Villager”) pursuant to § 327(e) of the Bankruptcy Code. Not surprisingly, Villager, acting through its successor Knights Franchise Systems, Inc., opposes the Trustee’s retention of the Firms.

While Villager strenuously objects to the Trustee’s retention of the Firms (having filed a 36 page objection), and raises numerous bases for its objection, only one issue raised by Villager is a potentially insurmountable objection to the Trustee’s retention of the Firms. Accordingly, the Court will address that issue first, and will only address the other bases for Villager’s opposition if the first objection is overruled.

Villager contends that the Firms are not eligible for retention under § 327(e) because the Firms have not previously represented the debtor. And, according to Villager, such prior representation is a prerequisite to retention by the Trustee here. In response, the Trustee cites the Court to case law which has not enforced that portion of § 327(e)’s requirements. And, the Trustee contends that the prior representation requirement may be satisfied here.

II. Legal Analysis

The starting point in the Court’s analysis is the statute itself. Section 327(e) of the Bankruptcy Code provides that

[t]he trustee, with the court’s approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e).

While there is a split in the case law regarding whether § 327(e) requires attorneys to have previously represented the debtor when hired for a specified special purpose, “most courts” read the statute literally and conclude that the statute “imposes an express requirement of prior representation.” 3 *Collier on Bankruptcy* ¶ 327.04[9][b], at 327-63 (Lawrence P. King, *et al.*, eds., 15th ed. rev. 2005); compare *In re Abrass*, 250 B.R. 432, 435-46 (Bankr. M.D. Fla 2000), *In re Black & White Cab Co.*, 175 B.R. 24, 26 (Bankr. E.D. Ark. 1994), and *In re Ginco, Inc.*, 105 B.R. 620, 621 (D. Colo. 1988), with *In re Covenant Fin. Group of Am., Inc.*, 243 B.R. 450, 457 n.8 (Bankr. N.D. Ala. 1999). And, according to *Collier*, a literal interpretation of § 327(e) is consistent with the legislative history of that section. See 3 *Collier on Bankruptcy* ¶ 327.04[9][b], at 327-63 (Lawrence P. King, *et al.*, eds., 15th ed. rev. 2005).

After careful consideration of the statute and the conflicting case law, this Court agrees with the majority view and holds that § 327(e) imposes such a prior representation requirement.¹ Because there is no evidence in the record to support a finding that the Firms previously represented the debtor, the Trustee’s request to employ the Firms must be denied. However, this denial is without prejudice to the Trustee’s right to seek to retain the Firms if he can establish that the Firms previously represented the debtor.

SO ORDERED.

End of Order

¹While Congress may have overlooked other instances where a trustee might seek to employ counsel for a specified special purpose under § 327(e) – *i.e.*, like those circumstances present here, the Court must enforce the statute as written. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (stating that “when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms”) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).