

MAY 31 2005

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6 In re:) BAP No. NV-04-1388-KMaBm
7)
8 CONTINENTAL RADIO) Bk. No. 03-19200-BAM
9 BROADCASTING ACQUISITIONS,)
10 LLC,)
11)
12 Debtor.)
13)
14)
15 CONTINENTAL RADIO)
16 BROADCASTING ACQUISITIONS,)
17 LLC,)
18)
19 Appellant,)
20)
21 v.) **MEMORANDUM***
22)
23 DAVID J. WINTERTON &)
24 ASSOCIATES, LTD.,)
25)
26 Appellee.)
27)

Argued and Submitted on March 24, 2005
at Las Vegas, Nevada

Filed - May 31, 2005

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Lloyd King,** Bankruptcy Judge, Presiding

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

**Honorable Lloyd King, bankruptcy judge for the District of Hawaii, sitting by designation in the District of Nevada.

1 Before: KLEIN, MARLAR, and BAUM,*** Bankruptcy Judges.
2

3 The reorganized debtor appeals from an order granting the
4 chapter 11 counsel eighty-five percent of its requested
5 attorney's fees. We AFFIRM.
6

7 FACTS

8 The debtor, Continental Radio Broadcasting Acquisitions,
9 LLC, owned and operated a radio station in Las Vegas, Nevada. On
10 July 24, 2003, three creditors filed an involuntary chapter 7
11 bankruptcy petition against Continental Radio.

12 Continental Radio consented to relief under the Bankruptcy
13 Code and the bankruptcy court approved Continental Radio's motion
14 to convert the case to chapter 11. Continental Radio hired David
15 J. Winterton and Associates ("Winterton") as its counsel and the
16 bankruptcy court approved the employment.

17 Two of Continental Radio's largest creditors filed a motion
18 to appoint a trustee. Continental Radio opposed the appointment
19 of a trustee and the bankruptcy court appointed an Examiner to
20 determine the status of post-petition management of Continental
21 Radio and the business' ongoing operations while in chapter 11.

22 On November 14, 2003, the Examiner filed his report. As a
23 result, Continental Radio was allowed to stay in possession of
24 the business. A Creditors' Committee ("Committee") was
25 appointed. The bankruptcy court later approved the Committee's
26 application to employ Lenard Schwartzner as its counsel.

27 ***Hon. Redfield T. Baum, United States Bankruptcy Judge for
28 the District of Arizona, sitting by designation.

1 Winterton continued to represent the chapter 11 debtor-in-
2 possession, and proposed and filed a Disclosure Statement and
3 proposed Chapter 11 Plan of Reorganization. The United States
4 Trustee and the Committee filed objections to the proposed
5 Disclosure Statement.

6 Winterton amended the Disclosure Statement twice before it
7 was approved by the bankruptcy court. Several objections to the
8 debtor's Plan of Reorganization were filed with the bankruptcy
9 court.

10 On April 5, 2004, the Committee filed its own Plan of
11 Reorganization and Disclosure Statement. Continental Radio
12 objected to the Plan and the Disclosure Statement. On May 14,
13 2004, the bankruptcy court approved the Committee's Disclosure
14 Statement, and on June 8, 2004, the bankruptcy court confirmed
15 the Committee's Plan.

16 On June 18, 2004, Winterton filed its first and final
17 application for fees and costs for the period of August 5, 2003
18 through June 15, 2004, requesting \$97,416.25 in fees, and
19 \$8,576.26 in costs. In response, the Committee (now in control
20 of the reorganized debtor under the confirmed plan) filed an
21 opposition to the application on the grounds that less than half
22 of Winterton's services were rendered for the benefit of the
23 estate.

24 On July 13, 2004, a hearing was held. The bankruptcy court
25 found that

26 [t]his was a case in which there was spirited
27 opposition between the debtor and members of the
28 Committee. I think Mr. Winterton was perhaps faced
with some difficult decisions as far as how to proceed;
but the debtor was entitled to representation, and

1 counsel is entitled to be compensated for that
2 representation.

3 So, unless you have something to add, Mr. Winterton, I
4 would adhere to the tentative ruling and ask you please
5 to do the arithmetic and state that your fees are
6 allowed in that amount for the reasons stated in open
7 court pursuant to Rule 7052 of the Federal Rules of
8 Bankruptcy Procedure, and I would like the proposed
9 order to be tendered to Mr. Schwartzner.

10 The bankruptcy court approved eighty-five percent of
11 Winterton's fees and one-hundred percent of its costs.

12 This appeal by the Committee ensued.

13 JURISDICTION

14 The bankruptcy court had jurisdiction over this core
15 proceeding via 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have
16 jurisdiction under 28 U.S.C. § 158(a)(1).

17 ISSUE

18 Whether the bankruptcy court abused its discretion when it
19 approved Winterton's first and final application for fees and
20 costs.

21 STANDARD OF REVIEW

22 We review a bankruptcy court's order granting attorney's
23 fees for an abuse of discretion. Law Offices of David A. Boone
24 v. Derham-Burk (In re Eliapo), 298 B.R. 392, 397 (9th Cir. BAP
25 2003).

1 DISCUSSION

2 Appellant argues that the court erred when it awarded
3 Winterton eighty-five percent of its requested fees because its
4 services were not for the benefit of the estate, but rather for
5 the benefit of Continental Radio's managing member (Peschau).
6 Appellant contends that the majority of Winterton's services were
7 for the purpose of keeping Peschau in control of Continental
8 Radio's business and assets. In effect, it argues that the
9 findings of fact necessarily underlying the bankruptcy court's
10 decision were clearly erroneous.

11 Before addressing the merits, we must first address an
12 incomplete record issue. It is apparent from the bankruptcy
13 court's findings that a tentative ruling was issued before the
14 hearing. Appellant did not include in its excerpts of record a
15 copy of that tentative ruling for our review.

16 Appellant has an obligation to provide a sufficient record
17 so that we can make an informed review of the bankruptcy court's
18 findings. Kyle v. Dye (In re Kyle), 317 B.R. 390, 393 (9th Cir.
19 BAP 2004). The burden is on the appellant to demonstrate that
20 the findings of fact were clearly erroneous. Gionis v. Wayne (In
21 re Gionis), 170 B.R. 675, 681 (9th Cir. BAP 1994).

22 The absence of a tentative ruling, while a handicap, does
23 not preclude us from deciding the appeal. Id. We will review
24 the matter with what record we have been presented.

25 Winterton argues that it provided actual and necessary
26 services for Continental Radio that were for the benefit of the
27 estate and were in the best interests of Continental Radio.

28 Pursuant to 11 U.S.C. § 330(a)(1), the bankruptcy court may

1 award an attorney reasonable compensation for actual and
2 necessary services rendered to a debtor. 11 U.S.C. § 330(a)(1).
3 When determining the amount of reasonable compensation, the court
4 must consider the nature, extent, and value of the attorney's
5 services, and must take into account factors such as:

6 (A) the time spent for such services;

7 (B) the rates charged for such services;

8 (C) whether the services were necessary to the
9 administration of, or beneficial at the time at which
10 the service was rendered toward the completion of, a
11 case under this title;

12 (D) whether the services were performed within a
13 reasonable amount of time commensurate with the
14 complexity, importance, and nature of the problem,
15 issue, or task addressed; and

16 (E) whether the compensation is reasonable based on the
17 customary compensation charged by comparably skilled
18 practitioners in cases other than cases under this
19 title.

20 11 U.S.C. § 330(a)(3).

21 The court cannot allow compensation for:

22 (i) unnecessary duplication of services; or

23 (ii) services that were not -

24 (I) reasonably likely to benefit the debtor's
25 estate; or

26 (II) necessary to the administration of the case.

27 11 U.S.C. § 330(a)(4).

28 Appellant contends that this case involved a fight between
Peschau and the Committee for ultimate control of Continental
Radio's business. Appellant's Opening Brief pg. 12. Appellant
argues that it sought the appointment of a trustee early in the
case, and then was forced to fight over the makeup of the

1 Committee, as well as the employment of the Committee's counsel
2 and appraiser. Appellant contends that such "services" by
3 Winterton were for the sole benefit of Peschau to remain in
4 control and not for the benefit of the estate.

5 Appellant similarly argues that the time and expense that
6 Winterton spent preparing and prosecuting Continental Radio's
7 Plan of Reorganization, and then later opposing appellant's Plan
8 were not reasonable and necessary services. Winterton lost each
9 of those battles and should not be compensated by the appellant
10 (creditor Committee members who now make up the reorganized
11 debtor). Winterton should have "scaled back" its services when
12 it became clear that Continental Radio had no equity and that
13 appellant would be proposing its own Plan of Reorganization.

14 Winterton argues that it acted in the best interests of
15 Continental Radio throughout the bankruptcy case. It argues that
16 from the beginning, appellant wanted to sell Continental Radio at
17 liquidation value, have a trustee appointed and shut the business
18 down. Appellant expended great efforts to take over Continental
19 Radio and Winterton contends that such action was not in
20 Continental Radio's best interests.

21 Winterton argues that appellant sought the appointment of a
22 trustee because of alleged gross mismanagement, fraud, and
23 misrepresentation. As a result, appellant conducted multiple
24 Federal Rule of Bankruptcy Procedure 2004 examinations in an
25 attempt to compile such evidence. The court-appointed Examiner
26 found no evidence of any wrongdoing and recommended that
27 Continental Radio keep the business open for eight months so that
28 it would be sold. Winterton spent many hours defending

1 Continental Radio against appellant's allegations in belief that
2 it was in the best interests of the estate to keep Continental
3 Radio open and in business.

4 Winterton also argues that its representation of Continental
5 Radio complied with the court-appointed Examiner's
6 recommendations and drafted a Plan that would sell Continental
7 Radio at fair market value. The bankruptcy court approved the
8 disclosure statement, and, up until a week before the
9 confirmation hearing, Continental Radio obtained the required
10 number of votes to have the plan approved. However, one week
11 before the confirmation hearing, one voting creditor changed his
12 vote and the plan could not be confirmed. Thus, Winterton argues
13 that all of its services were reasonable, necessary, and in the
14 best interests of the estate.

15 Appellant also alleges that Winterton breached its fiduciary
16 duty towards the estate when it did not report to the court
17 Peschau's breach of fiduciary duty. Specifically, appellant
18 argues that Peschau took unauthorized payments from Continental
19 Radio and that Winterton knew about the payments, yet did not
20 inform the court.

21 Winterton does not deny that Peschau received funds from
22 Continental Radio. However, it contends that the Examiner was to
23 approve all expenses and that Peschau was unclear about those
24 instructions. Peschau apparently used the money to pay the
25 expenses of operating Continental Radio and that even though the
26 Examiner knew about it, he did not report that Peschau's actions
27 were inappropriate. Further, there was no objection brought
28 before the court prior to Winterton's fee application.

1 Winterton contends that it determined in good faith, and in
2 the course of its professional judgment, that Peschau's course of
3 conduct complied with the bankruptcy code, and was in the best
4 interests of the estate. Thus, Winterton argues that it did not
5 breach any fiduciary duty. We agree.

6 The court found that Winterton was faced with some difficult
7 decisions during a case where much opposition was rendered on
8 both sides. Continental Radio believed it was in its best
9 interests to remain open and in control of its assets. Appellant
10 disagreed. Winterton, as counsel for Continental Radio, also
11 believed that keeping Continental Radio open was in its best
12 interests, as did the court-appointed Examiner.

13 The court did not base its decision to grant Winterton
14 eighty-five percent of its requested fees on an erroneous view of
15 the law or clearly erroneous factual findings. Therefore, we
16 cannot say that the court abused its discretion when it granted
17 eighty-five percent of the fees requested in Winterton's first
18 and final fee application.

19 Furthermore, at the hearing on the fee application,
20 appellant requested the court to cut Winterton's fees by fifty
21 percent. Tr. at pg. 14. The court's ruling cut Winterton's fees
22 by fifteen percent. Any error by the court in calculating the
23 fees was invited by appellant. United States v. Benny, 786 F.2d
24 1410, 1417 (9th Cir. 1986); United States v. Alexander, 695 F.2d
25 398, 402 (9th Cir. 1982).

CONCLUSION

The bankruptcy court did not abuse its discretion when it awarded Winterton eighty-five percent of its requested fees.

AFFIRMED.

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