

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
HANSEL NEIGHBORHOOD SERVICE)	CASE NO. 04-34105 HCD
CENTER, INC.,)	CHAPTER 7
)	
DEBTOR.)	

Appearances:

Rebecca Hoyt Fischer, Esq., Trustee, Laderer & Fischer, P.C., 112 West Jefferson Blvd., Suite 310, South Bend, Indiana 46601;

James R. Byron, Esq., claimant, Thorne Grodnik, LLP, 228 West High Street, Elkhart, Indiana 46516; and

Jamie C. Woods, Esq., attorney for claimant, Thorne Grodnik, LLP, P.O. Box 1210, Mishawaka, Indiana 46546-1210.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 25, 2005.

Before the court are the Proof of Claim Number 5, filed by James R. Byron, Esq. (“claimant”); the Trustee’s Objection to Claim Filed, filed by the Chapter 7 Trustee, Rebecca Hoyt Fischer, Esq. (“Trustee”); and the Response to Trustee’s Objection, filed by the claimant. After a hearing on the matter, held January 20, 2005, the court took the issue under advisement. For the reasons that follow, the court sustains the Trustee’s Objection to Claim Filed and disallows the claim.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(B) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil

Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On August 2, 2004, the debtor Hansel Neighborhood Service Center, Inc., filed its chapter 7 petition in bankruptcy. On October 15, 2004, James R. Byron, Esq., of the firm of Thorne Grodnik, LLP, filed a proof of claim listing an unsecured priority claim in the amount of \$2,790.95. Attached to the claim was his documentation of the services he rendered to the debtor from August 2 through September 14, 2004. *See* Proof of Claim No. 5.

On November 19, 2004, the Trustee filed her objection to Mr. Byron's claim for post-petition attorney fees. She asserted that the claimant had not been retained as debtor's counsel under 11 U.S.C. § 327 and therefore could not be compensated out of chapter 7 estate funds. Relying on *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L.Ed.2d 1024 (2004), she contended that the claim should be disallowed. *See* R. 59.

The claimant responded that he is the attorney for the debtor and that he filed a claim "for services rendered to assist in the identification and collection of assets of the estate." *See* R. 64 at 1. He explained that his attorney fee estimate of \$2,500, which the debtor had paid in July 2004, pre-bankruptcy, was too low; it did not cover the amount of work required in the case. Because he worked with the Trustee in the turnover and liquidation of the estate assets for the benefit of the estate, he asserted, he "should not be penalized for underestimating the fees required in this case." *Id.* He asked that the claim for compensation of his attorney fees be allowed.

On January 20, 2005, the court held a hearing on the Trustee's Objection to Claim No. 5. Present at the hearing were the Chapter 7 Trustee and the attorney for the claimant. The Trustee stated that, although

she did not contest that Mr. Byron rendered legal services to the debtor, he did not seek retention as debtor's counsel. She pointed out that she, as Trustee, normally would not retain chapter 7 counsel unless there was a need for special counsel. Moreover, she stated, the Supreme Court in *Lamie v. U.S. Trustee* forbids attorney compensation out of chapter 7 estate funds when counsel has not been retained. In response, counsel for the claimant requested that the bankruptcy court, as a court sitting in equity, recognize that Mr. Byron assisted the Trustee in disposing of the property on behalf of the debtor and therefore should not be penalized for helping the Trustee administer the case. He admitted that the claimant and his law firm were not retained formally. Nevertheless, he pointed out, he provided services to the debtor that deserved compensation. The court took the issue under advisement.

Discussion

The issue before the court is whether the attorney James R. Byron can collect from the debtor's estate the fees he has requested in his proof of claim. It is undisputed that the claimant represented the debtor pre-petition but did not move to be employed as counsel for the debtor in its bankruptcy proceeding.

Section 327(a) of the Bankruptcy Code requires an attorney to seek judicial approval of his or her retention by the estate before rendering legal services in the bankruptcy action. 11 U.S.C. § 327(a).¹ Section 330 allows the court to award compensation and to reimburse expenses to professional persons employed under

¹ Section 327, "Employment of professional persons," provides in pertinent part:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

...

(e) The 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.

§ 327. 11 U.S.C. § 330.² The Supreme Court, in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L.Ed.2d 1024 (2004), unanimously concluded that § 330(a)(1) of the Bankruptcy Code “does not authorize compensation awards to debtors’ attorneys from estate funds, unless they are employed as authorized by § 327.” *Id.*, 540 U.S. at 538, 124 S. Ct. at 1032. In that case, as in this one, the attorney admitted that he was not employed by the trustee and approved by the court under § 327. Nevertheless, he argued that he should be compensated pursuant to § 330 because he was the debtor’s attorney. The attorney’s application was denied by the bankruptcy court, district court, Fourth Circuit Court of Appeals, and Supreme Court.

The Supreme Court acknowledged that the language of § 330(a)(1), as amended, was awkward and ungrammatical but was not ambiguous. It upheld the lower courts’ conclusion that “the plain language of § 330(a)(1) controlled and that attorneys who provide services to debtors in chapter 7 proceedings must be hired by the trustee under § 327 to be eligible for compensation.” *Id.* at 532-33; 127 S.Ct. at 1029. According to the Court, “[c]ompensation for debtors’ attorneys working in Chapter 7 bankruptcies . . . is not altogether prohibited.” *Id.* at 537, 124 S. Ct. at 1031. It then concluded:

Adhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize compensation awards to debtors’ attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a chapter 7 case, he must be employed by the trustee and approved by the court.

Id., 540 U.S. at 538-39, 124 S. Ct. at 1032. The Seventh Circuit Court of Appeals recently underscored the Court’s mandate in *Lamie*: “In *Lamie v. U.S. Trustee*, . . . , the Court determined that the revised § 330 means

² Section 330, “Compensation of officers,” provides in pertinent part:

(a)(1) After notice . . . , the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 –

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1).

what it says and that §§ 327 and 330, taken together, prohibit compensation awards from a Chapter 7 estate to an attorney unless the attorney is employed as authorized by § 327.” *In re Weinschneider*, 395 F.3d 401, 403 (7th Cir. 2005); *see also In re Griffin*, 313 B.R. 757, 761 (Bankr. N.D. Ill. 2004) (following *Lamie*, finding that the trustee never retained counsel for debtors or authorized counsel to work on redeeming the debtors’ vehicle; concluding that “counsel is not eligible for compensation from the estate under § 330”).

At the hearing and in his written response to the Trustee’s objection, the claimant argued that he should not be penalized for underestimating the attorney fees required in the case. He urged the court, as a court in equity, to recognize his services as a benefit to the debtor’s estate. In cases decided before *Lamie*, this court in its discretion had considered granting retroactive approval of legal representation to a debtor’s counsel. It weighed whether the attorney had demonstrated excusable neglect, under Federal Rule of Bankruptcy Procedure 9006(b)(1), for failing to obtain prior approval of his services. In *In re Cashen*, for example, the court found that the attorney’s ignorance of the rules was not excusable neglect; the Seventh Circuit Court of Appeals upheld that determination. *See In re Cashen*, 56 Fed. Appx. 714, 202 WL 31828435 (7th Cir. 2002) (unpublished) (*citing In re Singson*, 41 F.3d 316, 318-19 (7th Cir. 1994); *In re Grabill Corp.*, 983 F.2d 773, 776 (7th Cir. 1993), and other cases). However, in the view of this court the Supreme Court’s ruling in *Lamie* does not allow an equitable or discretionary softening of the plain meaning of the statute: “If the attorney is to be paid from estate funds under § 330(a)(1) in a chapter 7 case, he must be employed by the trustee and approved by the court.” *Lamie*, 450 U.S. at 538-39, 124 S. Ct. at 1032 (emphasis added).

The court determines that the attorney in this case was not employed by the Trustee or approved by the court and therefore is not entitled to payment of fees from chapter 7 estate funds.³ The fact that his

³ Even if the court were to consider excusable neglect, it would find that the claimant had not justified his failure to seek judicial approval of his retention as debtor’s counsel. An attorney’s inability to estimate his compensation and his failure to seek employment under § 327 are not extraordinary circumstances demonstrating excusable neglect and warranting the authorization of relief. It was incumbent upon counsel to seek employment by filing a verified statement, and upon the trustee to file a motion to employ stating, as two of the criteria, the reasons for
(continued...)

application is presented in the form of a Proof of Claim rather than as a *nunc pro tunc* application for employment or for attorney fees does not change the result dictated by the Supreme Court in *Lamie*. The Trustee's objection is well-founded and is sustained.

Conclusion

For the reasons stated above, the court sustains the Trustee's Objection to Claim Filed and disallows Claim Number 5, filed by James R. Byron, Esq.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

³(...continued)

employing the attorney and the nature of the services to be rendered. *See* § 327; Fed. R. Bankr. P. 2014. The court requires that information in order to determine whether it is in the best interest of the estate to approve counsel's retention as the debtor's attorney. Even if the court retroactively had approved the retention of this claimant as the attorney to provide legal services to the debtor (a request the claimant never made), that approval would not have established a right to be paid out of funds from the chapter 7 bankruptcy estate. The court must find that the services provided by counsel benefitted the estate. The claimant's statement that he helped the trustee in the disposal of the debtor's assets was not a sufficient explanation that his services were necessary and benefitted the estate. The court determines that counsel never sought appointment under § 327 and that, under past precedents and now under *Lamie*, he has no right to claim compensation under § 330.