

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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FILED
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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 In re) Case No. 05-07432-B11
12)
13 A TRUCKING CRANE RENTAL &) ORDER ON PROPOSED COUNSEL'S
REPAIR, CO., d/b/a/ RENTALS) MOTION FOR EMPLOYMENT
14 & REPAIRS, INC.,) NUNC PRO TUNC
Debtor.)
15)

16 This case was originally filed as an involuntary Chapter 7
17 by petitioning creditors on August 12, 2005. Attorney Polis
18 filed an answer for the alleged debtor on August 24. The Court
19 set the matter for a status conference, subsequently held on
20 October 3. Mr. Polis appeared on behalf of the alleged debtor
21 and advised that A Trucking was considering converting the case
22 to a voluntary Chapter 11.

23 On October 13, Mr. Polis submitted a motion to convert to a
24 voluntary Chapter 11, and the filing fee difference was paid.
25 The order converting the case was signed and filed on October 18,
26 and entered on October 19. The first meeting of creditors was

1 noticed for November 15. A further status conference on the case
2 was held by the court on November 21, and Mr. Polis filed a
3 status report on November 18.

4 Finally, on December 16, Mr. Polis filed an *ex parte*
5 application to be employed as general counsel for the debtor in
6 the case. With the application, Mr. Polis included his own
7 declaration of disinterestedness, asserting in part that neither
8 he nor any member of his firm was a creditor of the debtor. He
9 did not attach a copy of any retainer agreement although obliged
10 to do so pursuant to Bankruptcy Local Rule 2014-1(c). Nor did he
11 obtain or submit a Statement of Position from the United States
12 Trustee pursuant to BLR 2014-1(d) and 9034-1.

13 Subsequently, Mr. Polis had discussions with the Office of
14 the United States Trustee about his *ex parte* application, and
15 agreed to file a noticed motion for employment and to serve it on
16 all creditors since he was seeking employment *nunc pro tunc* to
17 the date of filing of the order for conversion and order for
18 relief, October 18. That motion was filed January 24.

19 Mr. Polis' application for approval of his firm's
20 employment, retroactive to October 18 drew opposition only from
21 the Office of United States Trustee. That opposition asserted
22 that the motion failed to "satisfactorily explain the firm's
23 failure to obtain prior judicial approval before providing
24 services"; and, second, that the motion was not signed by the
25 debtor's principal, as required by Rule 2014(a), Fed.R.Bankr.P.

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1 The latter objection was remedied by a declaration of the
2 debtor's president submitted with the reply papers.

3 The focus of the argument at the hearing was whether there
4 was a satisfactory explanation of the firm's failure to earlier
5 seek authorization of employment under 11 U.S.C. § 327. The
6 controlling authority, recognized by both sides is In re Atkins,
7 69 F.3d 970 (9th Cir. 1995). There, the court discussed the
8 issue:

9 In bankruptcy proceedings, professionals
10 who perform services for a debtor in
11 possession cannot recover fees for services
12 rendered to the estate unless those services
13 have been previously authorized by a court
14 order. (Citations omitted.) The bankruptcy
15 courts in this circuit possess the equitable
16 power to approve retroactively a
17 professional's valuable but unauthorized
18 services. (Citations omitted.) We have held
19 that such retroactive approval should be
20 limited to situations in which "exceptional
21 circumstances" exist. . . .

22 To establish the presence of exceptional
23 circumstances, professionals seeking
24 retroactive approval must satisfy two
25 requirements: they must (1) satisfactorily
26 explain their failure to receive prior
judicial approval; and (2) demonstrate that
their services benefitted the bankrupt estate
in a significant manner.

69 F.3d at 973-74.

After discussing additional factors which some other courts
have considered, the Ninth Circuit stated:

We conclude that the two requirements of THC
Financial must be met in order for a
professional to establish "exceptional
circumstances." Moreover, the professional
must have satisfied the criteria for

1 employment pursuant to 11 U.S.C. § 327, other
2 than the usual requirement of pre-employment
3 approval. The other factors set forth in
4 Twinton Properties may be, but need not be,
5 considered by the court in exercising its
6 discretion.

7 69 F.3d at 976.

8 There is no issue in this case as to the second element.
9 The Polis firm has rendered valuable and significant services to
10 the estate. The issue in controversy, in a sense, is whether the
11 fact of substantial service can mitigate an arguably less than
12 satisfactory explanation for why court approval of employment was
13 not earlier sought.

14 In the instant case, the only explanation proffered by the
15 firm is that the firm was unfamiliar with this district's
16 requirement for obtaining a Statement of Position from the Office
17 of United States Trustee. But that did not become an issue until
18 December 16, almost two months to the day after the order for
19 conversion and for relief was filed. No explanation whatsoever
20 has been offered for why a firm, employed by the alleged debtor
21 in August, which filed an answer for the alleged debtor in
22 August, which appeared for the alleged debtor at a status
23 conference in early October, and which filed a motion to convert
24 on October 13, waited until December 16 to submit an application
25 for employment. As valuable as the firm's services appear to
26 have been, the Court cannot ignore the requirement of a
satisfactory explanation under the test for retroactive approval
in this Circuit.

1 Consequently, without any explanation at all, the Court
2 cannot, on the present record, approve employment for the firm
3 prior to December 16. The firm is free to supplement its
4 application to offer a satisfactory explanation, with notice and
5 opportunity to be heard afforded to all creditors and to the
6 Office of the United States Trustee.

7 The period from December 16 to January 24, when the present
8 motion was filed, is more difficult. Atkins involved an
9 accounting firm which had been assured an application for their
10 employment would be submitted. Even in that case, fees were not
11 allowed for a period of time after the "emergency" period when
12 their services were immediately needed. Here, the only
13 explanation offered is that the firm never looked at the
14 Bankruptcy Local Rules, nor asked what the district's procedures
15 or requirements are.

16 The United States Trustee, in his opposition seems to
17 conflate the overall requirement of "exceptional circumstances"
18 with the requirement of "satisfactory explanation", which is one
19 of the components of "exceptional circumstances". That does not
20 appear to be the Ninth Circuit's test as defined by Atkins. Nor
21 does Atkins define the minimum threshold for what constitutes a
22 "satisfactory explanation". Rather, Atkins affirmed the
23 circumstances that came to it, holding those circumstances were
24 sufficient, while not speaking to what lesser circumstances
25 might also constitute a "satisfactory explanation". Nor is
26 there any indication that an excusable neglect standard, such

1 as in Pioneer Inv. Services Co. v. Brunswick Associates Ltd.
2 Partnership, 507 U.S. 380 (1993), would fall below the threshold
3 for a "satisfactory explanation".

4 Given the amount and pace of services rendered by Mr. Polis'
5 firm, coupled with the insufficient *ex parte* application filed
6 December 16, the Court would be inclined to approve employment as
7 of December 16 based on the current record, except that during
8 the hearing on the motion Mr. Polis disclosed that his firm
9 advanced the fees paid on October 13 for the conversion. After
10 taking the matter under consideration, and reflecting on both
11 that fact and the fact that the firm worked for A Trucking from
12 early August 2005, providing services both in respect to a
13 foreclosure and the involuntary petition which began this case,
14 the Court now has questions about whether the firm is a creditor
15 of this estate for services rendered before the order for relief.
16 Mr. Polis' declaration of disinterestedness asserts that neither
17 he nor any member of the firm is a creditor of the debtor. That
18 may well prove to be the case. However, the moving papers are
19 silent as to any compensation paid or reimbursement made by or on
20 behalf of the debtor for the two or more months before the order
21 for relief, including dealing with the foreclosure matter in
22 August.

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