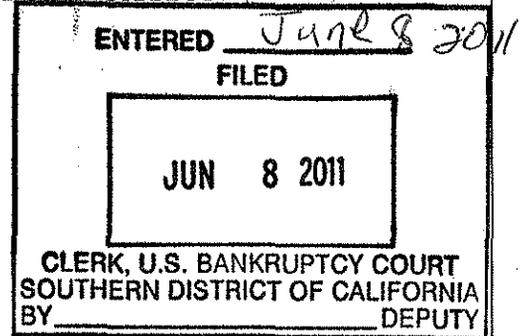


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WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BANKRUPTCY NO: 10-20753-MM11
)
JAVIER ZAVALA,) CHAPTER: 11
)
Debtor,) MEMORANDUM DECISION RESOLVING:
) 1) ORDER TO SHOW CAUSE WHY
) MICHAEL T. PINES ESQ., SHOULD NOT
) BE HELD IN CONTEMPT OF COURT; AND
) 2) DEBTOR'S MOTION TO SELL REAL
) PROPERTY FREE AND CLEAR OF LIENS
)
) DATE: June 9, 2011
) TIME: 2:00 p.m.
) CRTRM: 1
)
) JUDGE: Margaret M. Mann
)

The continued hearing on the Court's Order To Show Cause Why Michael T. Pines Esq., Should Not Be Held In Contempt Of Court and Subject to Sanctions ("OSC") in this Chapter 11 case of Javier Zavala (the "Debtor"), and the initial hearing scheduled for the Debtor's Motion To Sell Real Property Free And Clear Of Liens ("Sale Motion") were scheduled for June 9, 2011 at 2:00 p.m. in this

1 Court. The Court has considered all of the properly admitted evidence, and argument timely submitted
2 in regard to its OSC, as well as the Sale Motion. The Court finds both of these matters are appropriate
3 for resolution without further proceedings, as set forth in this Memorandum Decision. It therefore
4 vacates the June 9, 2011 hearings, including the status conference which will be rescheduled.

5
6 **I. OSC**

7 The OSC was issued on April 13, 2011 after Michael T. Pines, principal of Pines & Associates
8 (collectively "Mr. Pines"), had been replaced as counsel of record for the Debtor in this case. Evidence
9 was presented to the Court that Mr. Pines was not cooperating with the Debtor's current counsel to
10 satisfy his professional responsibilities to his former client, the Debtor, regarding the transfer of client
11 files and an accounting of the retainer paid by the Debtor.

12 In response to the OSC, Mr. Pines claimed that events in his personal current bankruptcy case
13 pending in this Court, *In re Michael T. Pines*, 10-00296-LT7, in which Leslie A. Gladstone is the
14 trustee, had rendered it impossible for him to comply with his professional responsibilities to the
15 Debtor in this case.

16 At the first OSC hearing held on May 5, 2011, the Court limited the scope of the proceedings to
17 matters over which it had jurisdiction, *i.e.*, this bankruptcy case. The Court declined to consider or
18 address any matter over which it lacked jurisdiction, *i.e.*, Mr. Pines' bankruptcy case, or the state court,
19 state bar, district court and criminal proceedings which are or have been contemporaneously pending.
20 The Court took testimony at this hearing from Mr. Pines regarding his ability to turn over the client
21 files to current counsel and to ascertain the facts to enable an accounting to be performed of the
22 retainer. The Debtor's current counsel also confirmed that the client files had been reconstructed by
23 the Debtor and their production need not be compelled pursuant to the OSC.

24 After this hearing, on May 11, 2011 the Court issued a Scheduling Order after Hearing on OSC
25 ("Scheduling Order") continuing the OSC hearing to May 26, 2011. The Scheduling Order also
26 ordered Mr. Pines to submit additional information, as confirmed by his testimony he was able to
27

1 provide, to comply with the OSC as to the retainer. On May 24, 2011, the Court entered its Order
2 Continuing Hearing on Order To Show Cause and Status Conference, Dismissing Third Party
3 Complaint and Denying Related Motions ("Second Scheduling Order"), dismissing the collateral
4 matters filed in his personal bankruptcy case as to which the Court lacked jurisdiction, and continuing
5 the hearing on the OSC to June 9, 2011, at 2:00 p.m., to be heard at the same time as the Sale Motion.

6 In response to the Second Scheduling Order, Mr. Pines filed a Supplemental Report To Court
7 on June 2, 2011 ("OSC Report"). This OSC Report responds to information requested by the Court
8 either by providing the information or explaining why it is not available. No party has filed any
9 response to the OSC Report, which also offers to provide the Wells Fargo Bank Records as well.

10 Based upon the evidence before it, including its review of the form retainer agreements that Mr.
11 Pines believes to be substantially similar to the one he entered into with the Debtor, the Court
12 concludes the \$10,000 initial retainer, plus the \$4000 additional monthly retainer, provided by the
13 retainer agreement was a true, or "earned on receipt" retainer. This type of retainer is one permitted by
14 California law, and is not prohibited by 11 U.S.C. § 328, as long as the arrangement is reasonable.
15 Cal. Code Civ. Proc. §1021; *In re Dividend Dev. Corp.*, 145 B.R. 651, 656 (Bankr. C.D. Cal. 1992).

16 "The burden to establish that the proposed terms and conditions of professional employment
17 in a bankruptcy case are reasonable is on the moving party." *In re NBI, Inc.*, 129 B.R. 212, 219
18 (Bankr. D. Colo. 1991). The key feature of an "earned on receipt" retainer is that it is given in
19 exchange for an attorney's commitment to represent a client, not to secure payment for services. As
20 such, an intention to deduct future fees as incurred excludes a retainer from this category. *Dividend*
21 *Dev. Corp.*, 145 B.R. at 656.

22 The reasonableness of an "earned on receipt" retainer must meet the standards identified in *In*
23 *re Heritage Mall Assocs.*, 184 B.R. 128, 134-135 (Bankr. D. Or. 1995): the nature of the
24 representation must be unique, the professional must have expertise, and that portion of the retainer
25 which is "earned on receipt" is reasonable in its amount anticipating awards of additional fees. The fee
26 agreement must be adequately disclosed to the court and other interested parties.

1 The bulk of these standards are met here, and on balance the terms of this retainer appears to be
2 one "earned on receipt." The nature of the representation and the experience of the professional were
3 disclosed to the client. The retainer amount, \$10,000, is not unreasonable given the breadth of the
4 services to be provided, which included litigation as well as representation in the bankruptcy case.
5 Additional monthly retainer amounts were required to be paid. The retainer terms were also very clear
6 that the retainer was not to serve as security for future services to be charged against the retainer.
7 There is no reason for further OSC proceedings to require a better accounting for the services provided
8 after the retainer was paid, since all services were pre-paid by the retainer, and then spent on office
9 expenses as the retainer terms anticipated. In short, the retainer provided to Mr. Pines has been
10 accounted for in accordance with the "earned on receipt" terms under which it was provided. The OSC
11 obligation to account for the retainer has thus been satisfied.

12 The Court recognizes that the retainer terms were not disclosed in a proper application brought
13 under Bankruptcy Rule 2014 before issuance of the OSC, causing the Debtor's counsel to incur
14 unnecessary fees. A party in interest may bring a motion to challenge the reasonableness of the
15 retainer paid. The Court is not by this ruling resolving any issue other than the narrow one before it;
16 the accounting for the pre-petition retainer. If any interested party has any requests for fees, or seeks
17 any other remedy in state or federal court against Mr. Pines, including but not limited to the costs
18 incurred to secure the belated accounting of the retainer or challenging the retainer, these parties can
19 seek these remedies in other proceedings. These later proceedings, which are not now before the
20 Court, may be sought without prejudice to any party's rights.

21 **II. SALE MOTION**

22 On May 11, 2011 the Debtor filed the Notice of Hearing and Motion to Sell Real Property Free
23 and Clear of Liens, and to Employ and Compensate Real Estate Brokers ("Sale Motion"). The Sale
24 Motion was not served in accordance with Bankruptcy Rule 6004(c), which required service in
25 accordance with Bankruptcy Rule 7004 for the lienholders whose liens are to be removed from title.
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1 Nevertheless, this Court finds this error to be of no consequence since the Motion does not truly
2 remove the liens from title without these lienholders' consent.

3 The known liens on the Subject Property based upon the evidence and as reflected on the
4 escrow company's "Settlement Statement" are:

5	a. Chase Bank	\$2,395,894.00
6	b. U.S. Trustee Fees	\$ 9,750.00
7	c. Escrow and Title Changes	\$ 10,746.00
8	d. Recording Fees	\$ 3,217.50
9	e. Additional Charges/HOA Fees	\$ 9,142.50
10	f. Commissions	\$ 146,250.00
11	g. Gugulu (second)	<u>\$ 350,000.00</u>
12	TOTAL	\$2,925,000.00

13 The Debtor proposes in the Sale Motion to pay these identified liens in these approximate
14 amounts from the proceeds of the sale. The actual amounts are to be determined prior to the time of
15 sale based on the creditor's pay off requests. Since the Court will reserve jurisdiction over any disputes
16 that arise from this procedure, at which time the service issue can be readdressed if necessary, the
17 Court finds the service deficiency for the Sale Motion is not prejudicial to the grant of the Sale Motion
18 at this time.

19 The only objection to the Sale Motion was filed by Mr. Pines. However, Mr. Pines is not a
20 creditor of this case, as he has already earned his fees based upon the terms of his "earned on receipt"
21 retainer and has no conceivable claim in this case based upon the record before the Court. He thus has
22 no standing to object to the sale. *In re Scott*, 437 B.R. 376, 379-80 (B.A.P. 9th Cir. 2010). While Mr.
23 Pines may believe that the secured creditors' claims can be further compromised, that is not his
24 decision to make. If there was support for this belief, Mr. Pines' financing sources could have overbid
25 the sale.

1 Other than the service issue and the objection of Mr. Pines, the Sale Motion is otherwise well
2 taken and will be granted.

3
4 **III. CONCLUSION**

5 The hearings on the Sale Motion and the OSC are vacated. The Debtor is to submit an order on
6 the OSC and the Sale Motion consistent with this Memorandum Decision.

7 IT IS SO ORDERED

8 Dated: June 8, 2011


MARGARET M. MANN, JUDGE
United States Bankruptcy Court