

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FILANDRO ANAYA and
ODETTE ANAYA,
Debtors.

NO. 7-02-14552 SA

**MEMORANDUM OPINION ON DEBTORS'
OBJECTION TO PROOF OF CLAIM #35
(PUCCINI & MEAGLE, P.A.)**

This matter came before the Court for preliminary hearing on the Debtors' Objection to Proof of Claim #35 filed by Puccini & Meagle, P.A. ("PMPA") (doc 274) and the Response thereto by PMPA (doc 302). PMPA's proof of claim is for attorney fees incurred during this case while it was a Chapter 7, before conversion. The Court requested briefs on whether PMPA's claim can have an administrative priority status. Both parties submitted briefs, and the Court, being otherwise sufficiently advised, issues this Memorandum Opinion. This is a core proceeding. 28 U.S.C. § 157(b) (2) (A).¹

FACTS

1. Debtors filed a voluntary Chapter 7 proceeding in this Court on June 28, 2002. (doc 1).
2. PMPA represented the Debtors in their Chapter 7.
3. PMPA withdrew from representing the Debtors on August 5, 2003. (doc 55).

¹Statutory and Rule references are to the Bankruptcy Code as it existed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

4. On October 1, 2003, Debtors filed a motion to convert their case to Chapter 13. (doc 64).
5. On October 28, 2003, the Court entered an order converting the case from Chapter 7 to Chapter 13. (doc 70).
6. On December 15, 2003, Debtors filed a Motion to convert their case from Chapter 13 to Chapter 11. (doc 93).
7. On January 20, 2004 the Court entered an order converting the case from Chapter 13 to Chapter 11. (doc 104).
8. PMPA filed proof of claim (claim 18) on November 5, 2003 in Debtors' Chapter 13 case, asserting administrative priority status for work performed from the petition date to the day of withdrawal. After conversion to Chapter 11, PMPA filed another proof of claim (claim 35) on July 26, 2004, asserting administrative priority status for work performed from the petition date to the day of withdrawal. PMPA intended that Proof of Claim 35 replace Proof of Claim 18.
9. Debtors confirmed a Chapter 11 plan on June 30, 2005. (doc 253).
10. PMPA was not employed by the Chapter 7 trustee to represent him for a specified special purpose.

CONCLUSIONS OF LAW

1. Debtors converted their chapter 7 case under Section 706(a).

2. Section 348(d) provides special treatment for claims that arise post-petition in chapters 11, 12, and 13. Section 348(d) provides:

A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

Because Debtors converted under Section 706, Section 348 does not apply to the facts of this case. By inference, however, Section 348 would indicate that claims arising in a chapter 7 before conversion are not treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition. That is, chapter 7 post-petition claims remain post-petition claims after conversion from Chapter 7.

3. Section 348(a) provides:

Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and ©) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

Therefore, when this case converted to Chapter 13, the petition date, the commencement of the case, and the order for relief did not change from June 28, 2002.

4. Section 348(b) provides in part:

Unless the court for cause orders otherwise, in section[s] ... 1305(a) of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case to such chapter.

The Court did not order otherwise in this case.

5. Section 1322(b)(6) permits a debtor to provide for payment of certain post-petition claims through the Chapter 13 plan, to the extent that they are filed and allowed under Section 1305(a). Section 1305(a), entitled "Filing and allowance of postpetition claims," provides:

(a) A proof of claim may be filed by any entity that holds a claim against the debtor--
(1) for taxes that become payable to a governmental unit while the case is pending; or
(2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

6. Section 1305(a), as interpreted per Section 348(b), changes the "Order for Relief" date to the date of conversion. In this case, for the purpose of determining what claims are allowable as post-petition claims, the "Order for Relief" date is the date of conversion, i.e., October 28, 2003. This means that the only allowable post-petition claims in the 13 case were governmental claims for taxes and claims for consumer debts arising after October 28, 2003 that were necessary for Debtors' performance of their Chapter 13 plan.

7. To summarize up to this point, PMPA has a post-petition claim for attorney fees, but it is not an allowable chapter 13 claim because it predates October 28, 2003.
8. The only other way PMPA would share in the 13 estate is if it held an administrative expense claim. Section 1322(a)(2) requires a plan to pay in full all claims entitled to priority under section 507. Section 507 provides, in part:

"Priorities"

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, ...

Section 503, in turn, provides in part:

"Allowance of administrative expenses"

...

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

...[and]

(2) compensation and reimbursement awarded under section 330(a) of this title[.]

Therefore, if PMPA's claim is compensation awarded under section 330(a), or if it is an actual, necessary cost or expense of preserving the estate, then it would be an administrative expense payable in full by the Chapter 13.

9. PMPA's claim is not for section 330(a) compensation. PMPA was not employed under section 327. Nor was there a reason

to be; the case was a chapter 7 and no employment is required to represent chapter 7 debtors. See Section 327. And, PMPA did not represent the trustee during the chapter 7 so no compensation would be forthcoming through Sections 327(e) and 330. See generally Lamie v. United States Trustee, 540 U.S. 526, 538 (2004) (“[W]e hold that § 330(a)(1) does not authorize compensation awards to debtors’ attorneys from estate funds, unless they are employed as authorized by § 327.”)

10. It is possible that PMPA’s claim, or a portion thereof, is an actual, necessary cost or expense of preserving the estate under Section 503(b)(1)(A) and therefore a priority under Section 507(a)(1). Because this matter is before the Court on briefs and the Court record the Court must conduct an evidentiary hearing on this point².
11. Next, the Court considers the subsequent conversion to Chapter 11. A Chapter 11 plan can only be confirmed if it meets the requirements of Section 1129. Section 1129(a)(9) provides:

²PMPA should be aware that the Court envisions that this will be an extremely difficult task for PMPA. See, e.g., In re Franklin, 284 B.R. 739, 744 (Bankr. D. N.M. 2002) (Discussing Tenth Circuit’s “benefit to the estate” test; “Absent any showing by a creditor of a direct benefit to the estate, the claim must fail.”) (Emphasis added.)

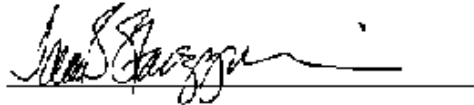
Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that-- (A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim[.]

If PMPA has a Section 507(a)(1) claim, it was due cash on the effective date of the plan.

12. To the extent PMPA's claim is not a Section 507(a)(1) claim, it was discharged upon confirmation. See Section 1141(d)(1)(A) ("Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--(A) discharges the debtor from any debt that arose before the date of such confirmation[.]")

CONCLUSION

The Court will conduct a pre-trial conference to schedule the evidentiary hearing on whether and to what extent PMPA's claim is an actual, necessary cost or expense of preserving the estate.



Honorable James S. Starzynski
United States Bankruptcy Judge

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