UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

D.A. ELIA CONSTRUCTION CORP. Case No. 94-10866 K

Debtor

By previous Order of the Court, the Debtor and/or its principals were to submit any further objections that they had to the Damon & Morey final fee application by October 18. They did so.

Now, for the first time, the Court finds out what this fee objection is really about. At paragraph 224 of the Affidavit of David A. Elia in Reply to the Response of Damon & Morey to Elia's Objection to Damon & Morey's Final Fee Application, Elia responds to Damon & Morey's question "If the alleged malpractice by Damon & Morey with damages almost $1 million began as early as 1992 with the Oswego Lock Project, why did the Debtor continue to use Damon & Morey for the next decade? Why didn't the Elias discharge this firm? Why after the Elias had won the crucial liability portion of the bifurcated trial with USF&G, did they formally retain Mr. Savino in December of 1996 to handle the damages portion? Why did they let the Statute of Limitations run on all alleged malpractice before September 7, 2001?"

Elia's answer is that "There was agreement between Elia and Savino to defer resolution of Elia's malpractice issues until after the USF&G settlement and then later until the end of Damon & Morey LLP's bankruptcy engagement (as it made no sense [financially or strategically] to either party to address these matters any earlier). Further, it was always agreed between Elia and Savino that the Bankruptcy Court ultimately would continue the obligation to review fees for reasonableness including, the request for disgorgement . . . as a result, Elia continued to use Damon & Morey, LLP after malpractice and didn't discharge the firm, because it had no practical alternative and it reasonably believed that compensation would eventually be made for the malpractice and negligence of Damon & Morey, LLP as it related to their

performance as counsel for the estate. More importantly, Elia let the Statute of Limitations run on alleged malpractice because it believed that the Statute was tolled by express agreement between Elia and Damon & Morey, LLP and, furthermore mooted by the Court's inherent power to adjust compensation to Damon & Morey, LLP pursuant to the Bankruptcy Code to reflect the reasonable value of the actual services provided to benefit the Estate."

The Court hears this position loud and clear. There will be no evidentiary hearing, nor will there be any further hearing of Elia in regard to this fee application in this Court. Elia's Affidavit is carefully drafted and contrived to create the impression that Savino agreed to waive any Statute of Limitations on malpractice and let the Bankruptcy Court decide pre-petition malpractice issues between Elia and Damon & Morey. The Court has no doubt that there was no such agreement by Savino or Damon & Morey, as any such agreement would be completely improper and would turn this Court into a Federal forum for State Law matters, merely by agreement of the parties.

This gambit by Elia will not succeed. The Damon & Morey fee applications are all approved in full under 11 U.S.C. § 330. This is a Final Decision as to the Bankruptcy Law matters presented by these fee applications.

If Elia believes that it can even now bring a malpractice action against Damon & Morey arguing equitable estoppel as to the malpractice Statute of Limitations, it is for the State Courts to hear that argument.

SO ORDERED.

Dated: Buffalo, New York
October 19, 2004

/s/Michael J. Kaplan

U.S.B.J.