

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 99-20709

WILLIAM H. WACKERMAN,

Debtor.

DECISION & ORDER

BACKGROUND

On March 16, 1999, William H. Wackerman (the "Debtor") filed a petition initiating a Chapter 7 case, and Peter Scribner, Esq. (the "Trustee") was appointed as the case trustee.

On July 11, 2002, the Trustee filed a Motion (the "Employment Motion") which requested that the Court, pursuant to Section 327, authorize his employment as attorney for the Trustee, *nunc pro tunc*, effective June 24, 1999. The Trustee's Motion asserted that: (1) his failure to have his employment as attorney for the Trustee approved prior to or at the time he began to perform legal services on June 24, 1999 was due to "extraordinary circumstances," as required by the United States Court of Appeals for the Second Circuit in *In re Keren Limited Partnership*, 189 F.3d 86 (2d Cir. 1999) (the "Keren Decision"); (2) the extraordinary circumstances presented were that: (a) his computer records indicated that on June 24, 1999, he drafted an application and proposed order for authority to be appointed as attorney for the Trustee (the "Application and Order"); (b) in

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ten years as a trustee, it was his practice to deliver such applications and orders to the Office of the United States Trustee (the "U.S. Trustee"), rather than directly to the Bankruptcy Court Clerk's Office (the "Clerk's Office"), because this is required by the U.S. Trustee in the Western District of New York; (c) the U.S. Trustee does not log or otherwise docket the receipt of such applications and orders; (d) the U.S. Trustee does not docket or otherwise log that it has forwarded such applications and orders to the Clerk's Office after it has commented on them; (e) the Clerk's Office only docketed such applications and orders once the order has been signed by the Bankruptcy Judge; and (f) it was possible that the Application and Order was delivered to the U.S. Trustee and lost by that office, or lost by the Clerk's Office after it was received from the U.S. Trustee; and (3) if the Application and Order was lost by either the Trustee, the U.S. Trustee or the Clerk's Office, it would have been an unusual occurrence, and certainly the kind of extraordinary circumstance that would meet the requirements of the *Keren* Decision.

On July 25, 2002, the U.S. Trustee submitted opposition to the Employment Motion, which asserted that: (1) the Trustee had not met his burden of demonstrating extraordinary circumstances

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for his failure to obtain prior Court approval for his employment as attorney for the Trustee; (2) even if the Trustee failed to inadvertently deliver the Application and Order to the U.S. Trustee or the Clerk's Office, or the U.S. Trustee or the Clerk's Office failed to properly process it, it was the Trustee's obligation to ensure that his employment as attorney for the Trustee was approved by the Court prior to or shortly after he began performing professional services, which could have been accomplished by the use of a calendaring or tickler system; (3) the extraordinary circumstances requirement for a *nunc pro tunc* appointment was discussed at a Chapter 7 panel trustee's meeting conducted by the U.S. Trustee on July 11, 2000; and (4) on July 11, 2000, the U.S. Trustee sent a memorandum (the "U.S. Trustee Memorandum") to each of the panel trustees, including the Trustee, which: (a) included a copy of the *Keren* Decision; (b) asked that each panel member review all open cases to determine whether there had been a failure to obtain any orders approving the appointment of professionals, and, if there was, to forward *nunc pro tunc* appointments to the U.S. Trustee for review by the end of July 2000; and (c) notified the panel members that after August 1, 2000, the U.S. Trustee would object to any *nunc pro tunc* appointments that failed to demonstrate extraordinary circumstances.

In an August 2, 2002 submission, the Trustee indicated that in the event the Employment Motion was denied, he would take steps in the future to ensure that any applications for appointment were tracked through the offices of the U.S. Trustee and the Bankruptcy Court Clerk.

DISCUSSION

We know from the *Keren* Decision that whether to approve the appointment of a professional under Section 327 on a *nunc pro tunc* basis is a determination to be made in the sound discretion of the Bankruptcy Court, and that such approval should only be granted in narrow situations where: (1) if the application had been timely, the Court would have authorized the appointment; and (2) the delay in seeking Court approval resulted from extraordinary circumstances.¹

¹ The *Keren* Decision set forth the following non-exhaustive list of factors:

1. Whether the applicant or some other person bore responsibility for applying for approval;
2. Whether the applicant was under time pressure to begin service without approval;
3. The amount of delay after the applicant learned that initial approval had not been granted; and
4. The extent to which compensation to the applicant will prejudice innocent third parties.

The failure to have the appointment of a professional approved in a timely manner has not been a serious problem for the Court in the past. Prior to the *Keren* Decision, the Court was often liberal in the exercise of its discretion in granting *nunc pro tunc* orders, where: (1) the Court would have authorized the appointment if it had been timely requested, because no party in interest has raised an issue of disinterestedness or competency; (2) the professional's representation of the debtor-in-possession or a trustee was open and notorious, including the filing of pleadings and appearances before the Court; (3) the professional provided valuable services that benefitted the estate; and (4) there was a reasonable explanation for the failure to timely seek approval of the appointment, which at times constituted less than extraordinary circumstances.²

² The Court considered many of the factors set forth in *In re Martin*, 102 B.R. 63 (Bankr. W.D.Tenn. 1989), as follows:

(1) the application would have been approved if timely filed; (2) knowledge of the court and parties of the employment; (3) the application was filed as soon as the applicant knew of its necessity; (4) the represented party approves the application; (5) notice has been given to parties in interest; (6) there is no objection to the motion; (7) any companion application for compensation is noticed; (8) the compensation is not objected to on a sustainable basis; (9) there is no prejudice to the estate or other parties in interest; (10) the failure to apply timely is satisfactorily explained; (11) the applicant has exhibited no pattern of inattention or negligence; and (12) a failure to employ *nunc pro tunc* would or would not result in a

Presently, the U.S. Trustee, who supervises the Chapter 7 panel trustees and the Chapter 12 and 13 trustee, and administratively oversees all Chapter 11 cases, has indicated that she will object to any *nunc pro tunc* approval requests by professionals that fail to demonstrate extraordinary circumstances, insisting that professionals not only apply for approval of their appointment prior to performing any professional services, or as soon as practical in emergency situations, but also that they follow up and ensure that the approval has been granted by the Bankruptcy Court.

In this case, there is no question that the Trustee's Application for appointment would have been granted if it was timely presented to the Court. However, based upon the facts and circumstances presented by the Trustee, he has failed to demonstrate the extraordinary circumstances required by the *Keren* Decision that would justify the Court exercising its discretion to grant the Employment Motion. The Trustee, who was solely responsible for the preparation and processing of the Application and Order, has not provided: (1) proof that he ever filed the Application and Order with the U.S. Trustee or the Clerk's Office; or (2) an acceptable explanation for why he did

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not follow up to ensure that the Order was signed within a reasonable time after June 24, 1999 or after his receipt of the U.S. Trustee Memorandum.

Although the Trustee never directly asserted that the Application and Order was lost by the U.S. Trustee or the Clerk's Office, even if it were, it is still the professional's responsibility to ensure that approval has been obtained and not just applied for.³

³ For the record, the Bankruptcy Court Clerk's Office has indicated that its procedures for processing such applications and orders in 1999, which would make it unlikely that the Application and Order was lost by the Clerk's Office, were as follows:

The process used to receive and docket an ex-parte application and order for appointment in June of 1999 was the same as it is today. As background, the Court requires the filing of an original and a minimum of two copies of an ex-parte application and order for appointment. The U.S. Trustee generally reviews each application and order prior to submission to the Clerk's Office.

Upon receipt of the application and order from any source, the intake department places a "date-stamped" note on the original and forwards them to the case administrator assigned to manage the specific case number.

The case administrator reviews the application and order, in-part, to insure that the papers contain at least the hand-written initials of the U.S. Trustee. The U.S. Trustee may also provide hand-written comments, as appropriate. The case administrator will then forward the initialed original application and order to Chambers and maintain the copies in a working file.

Occasionally, the Clerk's Office receives an application which does not have the initials of the U.S. Trustee. In these instances, the case administrator contacts the U.S. Trustee and requests review of the application prior to submission to Chambers.

When Chambers returns the application and order, the case administrator docketed the signed order and conforms the copies. The

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CONCLUSION

The Employment Motion is in all respects denied.

IT IS SO ORDERED.

HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: September 19, 2002

Case Trustee and the U.S. Trustee each receive a conformed copy of the order. Any additional copies provided at the time of filing are conformed and given to the Case Trustee. The case administrator places the original order in the case file.