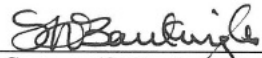




SO ORDERED.
SIGNED this 11th day of May, 2017

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.


Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

PAUL W. HASH
EMILY W. HASH

Case No. 3:14-bk-30325-SHB
Chapter 13

Debtors

**MEMORANDUM AND ORDER ON MOTION
TO HIRE REALTOR AND AMENDED MOTION TO SELL
DEBTOR'S [sic] REAL PROPERTY NUNC PRO TUNC**

On December 15, 2016, Debtors filed the Motion to Hire Realtor [Doc. 34], seeking to employ Joann Hanko and Coldwell Banker Wallace and Wallace as realtors, and the Motion to Sell Debtor's [sic] Real Property [Doc. 35]. On January 5, 2017, Gwendolyn M. Kerney, the Chapter 13 Trustee, filed her Objection to the Motion to Hire Realtor and the Motion to Sell [Doc. 36], through which she objected to both motions and raised the issue of *nunc pro tunc* relief. Following the Chapter 13 Trustee's Objection, Debtors filed the Amended Motion to Sell Debtor's [sic] Real Property Nunc Pro Tunc ("Amended Motion to Sell") [Doc. 37] on January

6, 2017, through which Debtors seek retroactive approval of the sale of their residence. The Motion to Hire Realtor was not amended to ask for *nunc pro tunc* approval.¹

At the hearing on the Motion to Hire Realtor and Amended Motion to Sell held February 8, 2017, it was determined that, because the issues to be decided are matters of law, an evidentiary hearing was unnecessary. Pursuant to the February 8, 2017 Order [Doc. 42] setting a briefing schedule, Debtors filed their brief on April 6, 2017 [Doc. 44], and the Trustee filed her brief on April 14, 2017 [Doc. 45]. The motions are now ripe for adjudication.

Debtors commenced this Chapter 13 bankruptcy case on February 7, 2014, and their Chapter 13 Plan was confirmed on April 8, 2014, by entry of the Order Confirming Chapter 13 Plan (“Confirmation Order”) [Doc. 25]. The confirmed plan provided for direct payment by Debtors of the mortgage on Debtors’ principal residence located at 7613 Wilderness Path Road, Corryton, Tennessee (the “Property”), which is the property at issue in the Amended Motion to Sell. As reflected in the documentation attached to the Motion to Hire Realtor, Debtors entered into an Exclusive Right to Sell Listing Agreement with JoAnn Hanko with Coldwell Banker Wallace & Wallace on April 15, 2014,² for the sale of the Property. [Doc. 34-2.] The Property was sold on July 11, 2014, for a purchase price of \$172,000.00. At closing, Debtors received the net proceeds of \$4,317.76, and Ms. Hanko received \$6,192.00 of the 6 percent real estate broker fees totaling \$10,320.00, with the buyers’ agent receiving \$4,128.00 at closing (which included retention of the \$500.00 earnest money deposit). [Doc. 35-1 at p. 2.]

¹ The Motion to Hire Realtor does not comply with E.D. Tenn. LBR 2014-1, which provides: “An application to employ requesting entry of an order authorizing employment retroactive to the date services were first begun other than as provided in the foregoing sentence must include the request in the title of the application, be set for hearing in accordance with E.D. Tenn. LBR 9013-1(f), and be served along with the proposed order upon all creditors and other parties in interest.” Such noncompliance, alone, suffices to deny approval of the Motion to Hire Realtor *nunc pro tunc*. Indeed, the motion does not request *nunc pro tunc* approval at all.

² Notably, the listing agreement was entered into by Debtors a mere thirteen days after completion of their meeting of creditors and only seven days after entry of the Confirmation Order.

Debtors did not request approval either for employment of Ms. Hanko or sale of the Property until December 15, 2016, some two years and eight months after contracting with Ms. Hanko to sell the Property and two years and five months after the sale was consummated.

The Bankruptcy Code requires court approval to employ and compensate professionals, *see* 11 U.S.C. §§ 327, 330; Fed. R. Bankr. P. 2014, and to dispose of property of a bankruptcy estate, 11 U.S.C. § 363. When Debtors filed their bankruptcy case on February 7, 2014, **all** property interests of Debtors, including their residential real property, became property of their bankruptcy estate. 11 U.S.C. § 541(a). Additionally, pursuant to the Confirmation Order entered on April 8, 2014, in Debtors' case – as in all Chapter 13 bankruptcy cases in this district – “[p]roperty of the estate **does not** vest in the debtor(s) until completion of the plan[.]” [Doc. 25 (emphasis added).]

For these reasons, Debtors' sale of the Property in July 2014, retention of \$4,317.76, and payment of the \$10,320.00 commission under the contract with Ms. Hanko without approval of the Court violate the Bankruptcy Code and binding orders of this Court. Through the Motion to Hire Realtor and the Amended Motion to Sell, Debtors attempt to cure those violations and validate the sale of the Property, payment of the real estate sales commission, and their retention of funds from the closing.

The Court possesses an inherent equitable power to authorize employment and approve the sale of estate property *nunc pro tunc* “under extraordinary circumstances and upon a proper showing.” *In re Carter*, 533 B.R. 632, 636 (Bankr. S.D. Ohio 2015) (citation omitted). “‘Exceptional circumstances’ in this context have been interpreted to require a satisfactory explanation for the failure to receive prior judicial approval and a determination such services benefitted the bankruptcy estate.” *In re Greektown Holdings, LLC*, No. 08-53104-wsd, 2010 WL

7343848, at *3 (Bankr. E.D. Mich. Mar. 26, 2010) (citations omitted). As clearly explained by one bankruptcy court:

The procedure for obtaining approval of employment of a professional is governed by Fed. R. Bankr. P. 2014 and requires, among other things, that the trustee or committee file an application requesting Court approval of the employment. Rule 2014 also requires the application set forth certain facts regarding the need for and the terms of the employment and establish that the applicant is disinterested. “The purpose of the rule requiring prior court authorization of a professional's employment is to prevent volunteerism and to assist the court in controlling administrative expenses.” *In re McDaniels*, 86 B.R. 128, 129 (Bankr. S.D. Ohio 1988) (citation omitted).

A professional failing to comply with the requirements of the Code or Bankruptcy Rules may forfeit the right to compensation. . . . The services for which compensation is requested should be performed pursuant to appropriate authority under the Code and in accordance with an order of the court. Otherwise, the person rendering such services may be considered an officious intermeddler or a gratuitous volunteer.

3 L. King, *Collier on Bankruptcy* P 327.03[2][b], at 327–18 (15th rev. ed.2009). In this case, the Trustee never filed an application seeking to employ USLS pursuant to 11 U.S.C. § 327, Fed. R. Bankr. P. 2014, and Local Bankruptcy Rule 2014–1. Thus, the Court has never approved USLS' retention as a professional. Accordingly, USLS is not entitled to receive an administrative expense claim for compensation pursuant to § 503(b)(2) and § 330(a) as requested in its Application for Compensation.

In some instances, however, a court may grant an application for employment *nunc pro tunc*. “[B]ankruptcy courts, possessing equitable powers, have the inherent power to issue an order *nunc pro tunc* . . . under extraordinary circumstances and upon a proper showing.” *In re McDaniels*, 86 B.R. 128, 131 (Bankr. S.D. Ohio 1988) (citation omitted).

To establish the basis for a *nunc pro tunc* order of employment, an applicant must demonstrate each of the following requirements and, all evidentiary matters must be established by clear and convincing evidence:

1. The application must be one which would have been approved originally by the Court, measured by the requirements of 11 U.S.C. § 327 and Bankruptcy Rule 2014 at or before the time the services were actually commenced;

2. Evidence must appear in the record of the case which demonstrates that the Court and other interested parties had actual knowledge of the legal services being rendered by the applicant;
3. An application seeking an order nunc pro tunc must be filed as soon as the matter is brought to the attention of the applicant;
4. The party for whom the work was performed approves the entry of the nunc pro tunc order;
5. The applicant has provided notice of the application for the nunc pro tunc order to creditors and parties in interest and has provided an opportunity for filing objections;
6. No creditor or party in interest offers reasonable objection to the entry of the nunc pro tunc order;
7. If the applicant is also seeking compensation at this point, the applicant must have provided notice of the application for fees to any parties in interest, thus providing an opportunity for objections as provided in 11 U.S.C. § 330;
8. A sustainable objection must not be filed to the applicants [sic] request for attorney fees;
9. No actual or potential prejudice will inure to the estate or other parties in interest;
10. The applicant's failure to seek pre-employment approval is satisfactorily explained;
11. The applicant exhibits no pattern of inattention or negligence in seeking judicial approval of employment of professionals, measured in some degree by the applicants [sic] experience in this field of law.

In re Integrity Supply, Inc., 417 B.R. 514, 518–19 (Bankr. S.D. Ohio 2009) (footnote omitted) (quoting *In re McDaniels*, 86 B.R. 128, 129 (Bankr. S.D. Ohio 1988)); see also *In re Carter*, 533 B.R. 632, 637 (Bankr. S.D. Ohio 2015) (adopting the foregoing factors).

These factors are similar to the nine criteria described in *In re Twinton Properties Partnership*, 27 B.R. 817 (Bankr. M.D. Tenn. 1983), and adopted as “solid guidelines” by the

district court in *Farinash v. Vergos (In re Aultman Enters.)*, 264 B.R. 485, 489 (E.D. Tenn. 2001). As the court noted in *In re Twinton Properties*:

The scheme for court approval of the employment of professional persons . . . functions most efficiently and effectively if court review and approval is realized before services are performed. The professional who commences efforts on behalf of a trustee or debtor-in-possession without first getting court approval of employment does so at the substantial risk of forfeiting compensation. However, the Bankruptcy Code neither expressly requires pre-employment approval nor prohibits *nunc pro tunc* appointments. This court is thus constrained to apply the rule that the issuance of *nunc pro tunc* orders of employment is vested in the sound discretion of the bankruptcy court. *Nunc pro tunc* applications must be the extraordinary exception rather than an accepted practice. The court will carefully scrutinize all *nunc pro tunc* requests under strictly interpreted criteria.

27 B.R. at 819. Further, “[s]imple neglect or mere oversight are insufficient reasons to grant *nunc pro tunc* relief.” *In re Alexander*, 469 B.R. 684, 687 (Bankr. W.D. Ky. 2012); *see also In re Aultman Enters.*, 264 B.R. at 493 (“Courts applying the *Twinton Properties* criteria and other versions of the extraordinary circumstances test have consistently held mere oversight is not enough to justify a professional's failure to obtain prior approval.” (citing *In re Jarvis*, 53 F.3d 416, 421 (1st Cir. 1995); *Land v. First Nat’l Bank of Alamosa (In re Land)*, 943 F.2d 1265, 1265 (10th Cir. 1991); *In re Arkansas Co.*, 798 F.2d 645, 651 (3d Cir. 1986); *In re B.E.S. Concrete Products, Inc.*, 93 B.R. 228, 233 (Bankr. E.D. Cal. 1988)).

Here, Debtors have not amended the Motion to Hire Realtor to ask for approval of Ms. Hanko’s employment *nunc pro tunc*. Instead, the Motion to Hire Realtor requests to employ Ms. Hanko as if the sale had not already occurred almost three years ago, and Debtors have provided no reason or explanation as to why they did not seek approval of Ms. Hanko’s employment prior to the sale or prior to December 15, 2016. Because they have neither requested approval *nunc pro tunc* nor provided any explanation or reason for the delay in seeking to employ Ms. Hanko

sufficient to meet the extraordinary circumstance requirement, the Motion to Hire Realtor shall be denied.

As for their request to sell the Property, the Court is concerned that an outright denial of the Amended Motion to Sell would work an injustice on what appear to be bona fide purchasers for value of the Property nearly three years ago because it might result in a cloud on the purchasers' title to the Property. Debtors, however, offer no explanation or extraordinary circumstances sufficient to explain why they should be entitled to approval of the request to sell the Property – which very clearly was property of the estate – nearly three years after the fact. Debtors cite to *In re Ash'Shadi*, No. 04-55924, 2005 WL 1105039, at *3 (Bankr. E.D. Mich. May 6, 2005), for the following proposition:

“The proceeds from the sale of a pre-petition asset do not become property of the chapter 13 estate, therefore the debtor does not have to exempt the property and any objection to an exemption is irrelevant. Under a Chapter 13 plan, the debtor is entitled to keep all of the debtor's pre-petition property, whether or not it qualifies under the applicable exemption laws.”

[Doc. 44 at p. 2.] The issue in *Ash'Shadi*, however, was whether proceeds from the court-approved, post-confirmation sale of the debtors' residence were disposable income. In this district, pre-petition assets do not re-vest in debtors until after completion of the plan, not upon confirmation.

All property owned by Debtors at the commencement of their case became property of their bankruptcy estate under § 541(a) and, as clearly provided in the Confirmation Order, such property continues to remain property of the bankruptcy estate. The fact that Debtors altered the form of the property from real property to cash proceeds – without Court permission – does not alter the inclusion of the cash proceeds within their bankruptcy estate.

Accordingly, the Court will approve the Amended Motion to Sell only to the extent that such approval authorizes, after the fact, the transfer of ownership of the Property for the total sum of \$172,000.00, but approves the distribution of proceeds from such sum only of (1) the payoff of the first mortgage to Nationstar Mortgage (in the amount of \$156,244.25); (2) the payoff of property taxes owed to the county (in the amount of \$482.99); (3) the payment of Debtors' share for title services and lender's title insurance (in the amount of \$240.00); and (4) the payment of the home warranty expense to First American Home Buyer Protection (in the amount of \$395.00).

What remains is the question of distribution of the real estate broker fees to Coldwell Banker Wallace and Wallace (in the amount of \$6,192.00) and Realty Executives Associates (in the amount of \$4,128.00 (which includes the \$500.00 earnest money deposit)) and the net proceeds to Debtors³ (in the amount of \$4,317.76). Given the procedural posture of the matters before the Court, the Court will issue separate orders for Coldwell Banker Wallace and Wallace and Realty Executives Associates to show cause why the Court should not order disgorgement of the sale proceeds distributed to them in July 2014 and payment of the same to the Chapter 13 Trustee for distribution to creditors. *See Landwest, Inc. v. Coldwell Banker Commercial Group, Inc. (In re Haley)*, 950 F.2d 588 (9th Cir. 1991); *In re Avon Townhomes Venture*, No. 05-53243-RLE, 2010 WL 4498854 (Bankr. N.D. Cal. Oct. 13, 2010); *In re Michener*, No. 98-02184, 1999 WL 33486722 (Bankr. D. Idaho Mar. 17, 1999). The Court will also issue a separate order to Debtors to show cause why they should not be sanctioned for their conduct regarding the sale of the Property without Court approval.

³ It might be that Debtors are entitled to retain the net proceeds because of their exemption claim of \$7,500.00, which has been acknowledged by the Chapter 13 Trustee. Under the circumstances, however, the Court wants to question Debtors about the sequence of events regarding the sale in order to determine whether some monetary sanction against Debtors for their violations of the Bankruptcy Code and binding orders of this Court is appropriate.

For the foregoing reasons, the Court directs the following:

1. The Objection by Chapter 13 Trustee to Debtor's [sic] Motion to Sell Debtor's [sic] Real Property & Motion to Hire Realtor filed by the Chapter 13 Trustee on January 5, 2017, is SUSTAINED IN PART and OVERRULED IN PART.

2. The Motion to Hire Realtor filed by Debtors on December 15, 2016, is DENIED.

3. The Amended Motion to Sell Debtor's [sic] Real Property Nunc Pro Tunc filed by Debtors on January 6, 2017, is GRANTED IN PART and DENIED IN PART. The sale is deemed authorized with approval of the following distributions, but no other: (1) the payoff of the first mortgage to Nationstar Mortgage (in the amount of \$156,244.25); (2) the payoff of property taxes owed to the county (in the amount of \$482.99); (3) the payment of Debtors' share for title services and lender's title insurance (in the amount of \$240.00); and (4) the payment of the home warranty expense to First American Home Buyer Protection (in the amount of \$395.00).

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