



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
August 15, 2023

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 18-14089-MKN
)	Chapter 13
ORLANDO ALVAREZ-MONJARAS,)	
)	
Debtor.)	Date: July 26, 2023
)	Time: 2:30 p.m.
)	

(AMENDED) ORDER REGARDING MOTION TO APPOINT SPECIAL COUNSEL NUNC PRO TUNC AND APPROVE SETTLEMENT AND COMPENSATION¹

On July 26, 2023, the court heard the Motion to Appoint Special Counsel Nunc Pro Tunc and Approve Settlement and Compensation (“Special Counsel and Settlement Motion”), brought on behalf of the above-referenced debtor. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On July 12, 2018, Orlando Alvarez-Monjaras (“Debtor”) filed a voluntary Chapter 13 “skeleton” petition, represented by Seth D. Ballstaedt, Esq. (ECF No. 1). A Notice of Chapter 13 Bankruptcy Case was issued. The case was assigned for administration to Chapter 13 bankruptcy trustee Kathleen A. Leavitt (“Trustee”).

On July 26, 2018, Debtor filed his schedules of assets and liabilities (“Schedules”) and statement of financial affairs. (ECF No. 13).

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 On December 4, 2018, Debtor filed an amended voluntary petition along with an
2 amended statement of financial affairs. (ECF Nos. 49 and 50).

3 On December 14, 2018, an order was entered confirming Debtor's amended Plan #3.
4 (ECF No. 51).

5 On March 28, 2022, Debtor filed amended Schedules "A/B" and "C." (ECF No. 62).
6 The amended documents were electronically filed on Debtor's behalf by Attorney Ballstaedt.
7 Amended property Schedule "A/B" discloses at Item 33 a "Personal Injury Claim (DOL
8 5/6/2020); Attorney office: Gold Medal Injury Law."²

9 On November 11, 2022, a Motion to Approve Employment of Randolph Goldberg as
10 Special Counsel ("First Goldberg Employment Motion") was electronically filed for the Debtor
11 by Attorney Ballstaedt and noticed to be heard on December 14, 2022. (ECF Nos. 65 and 66).
12 The motion was prepared by Attorney Goldberg as the principal of Gold Medal Injury Law and
13 is accompanied by a proposed Contingency Fee Agreement signed by the Debtor and the
14 principal, as well as a signed Affidavit of Randolph Goldberg Esq. ("First Goldberg Affidavit").

15 On November 17, 2022, the Trustee filed a motion to modify Plan #3 and noticed it for
16 hearing. (ECF Nos. 68 and 69).

17 On November 29, 2022, the Trustee filed a response to the First Goldberg Employment
18 Motion. (ECF No. 71). The Trustee questioned whether Attorney Goldberg can be employed as
19 special counsel to pursue the personal injury claim as property of the Chapter 13 estate inasmuch
20 as Attorney Goldberg is not permitted to practice law before the bankruptcy court.³

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23 ² Assuming that the disclosure indicates that the Debtor's personal injury claim accrued
24 on June 6, 2020, it was not scheduled when the Debtor filed his Chapter 13 petition on July 12,
2018, but the claim still was property of his Chapter 13 estate under Section 1306(a)(1).

25 ³ In her response to the First Goldberg Employment Motion, the Trustee cited the
26 bankruptcy court's Administrative Order 2014-05, effective April 26, 2014. That order
27 incorporated the disciplinary order entered on August 7, 2014, in In re Randolph H. Goldberg,
28 Attorney at Law, Bar No. 5970, by the U.S. District Court for the District of Nevada, Amended
Order AD-2014-0005. The bankruptcy court's Administrative Order remains in effect because
the U.S. District Court's disciplinary order remains in effect.

1 On December 4, 2022, Debtor withdrew the First Goldberg Employment Motion and the
2 December 14, 2022 hearing was vacated. (ECF No. 72).

3 On December 7, 2022, Debtor filed another Motion to Approve Employment of
4 Randolph Goldberg as Special Counsel (“Second Goldberg Employment Motion”) which was
5 electronically filed for the Debtor by Attorney Ballstaedt and was noticed to be heard on January
6 11, 2023. (ECF Nos. 73 and 74). The motion was prepared by Attorney Ballstaedt and is
7 accompanied by a copy of the same proposed Contingency Fee Agreement that was attached to
8 the First Goldberg Employment Motion as well as a copy of the same First Goldberg Affidavit.⁴

9 On January 11, 2023, a hearing was conducted on the Second Goldberg Employment
10 Motion at which attorney Matthew McArthur appeared telephonically for the Debtor. No other
11 attorneys or parties in interest appeared. At the hearing, the court advised counsel that the
12 motion would be denied because Attorney Goldberg is not permitted to practice before the court
13 and therefore cannot act as special counsel with respect to recovery of property of the bankruptcy
14 estate.

15 On January 19, 2023, an order was entered denying the Second Goldberg Employment
16 Motion. (ECF No. 78).

18 ⁴ Inclusion of the same First Goldberg Affidavit is curious. In her response to the First
19 Goldberg Employment Motion, the Trustee expressly raised her concern that Attorney Goldberg
20 may not be permitted to practice before this court because of Administrative Order 2014-05.
21 Instead of addressing that concern, the Second Goldberg Employment Motion merely submits
22 the same First Goldberg Affidavit. The first paragraph of the First Goldberg Affidavit attests
23 that Attorney Goldberg is “an attorney licensed to practice law **in the State of Nevada**” and that
24 he is “personally aware of the facts and circumstances set forth in the Affidavit.” (Emphasis
25 added.) It apparently is true that Attorney Goldberg is licensed to practice by the State of
26 Nevada, and presumably true that he is personally aware of the matters stated in the Affidavit. It
27 is not entirely clear, however, why Attorney Goldberg would omit a critical detail of whether he
28 is even authorized to practice law before the bankruptcy court. See note 3, supra. Moreover, it is
not entirely clear why Attorney Ballstaedt would draft and submit the Second Goldberg
Employment Motion, fail to address the concern expressly raised by the Trustee, and simply
attach the same First Goldberg Affidavit. As one court has observed, a material omission is
simply a half-truth, which is “one form of lie.” F.D.I.C. v. State Bank of Virden, 893 F.2d 139,
143 (7th Cir. 1990). See also United States v. Norman, 87 F.Supp.3d 737, 745 & n. 5 (E.D.Pa.
2015) (“Omissions can, of course, be intentionally deceptive – as the saying goes, ‘a lie of
omission is still a lie.’”).

1 On February 6, 2023, an order was entered granting the Trustee’s motion to modify Plan
2 #3. (ECF No. 79).

3 On June 24, 2023, the instant Special Counsel and Settlement Motion was filed on behalf
4 of the Debtor along with an attached supporting Declaration of Christian N. Griffin, Esq. (“First
5 Griffin Declaration”).⁵ The motion was noticed to be heard on July 26, 2023. (ECF Nos. 85 and
6 86). In addition to the First Griffin Declaration, attached to the instant motion is a copy of a
7 retainer agreement between the Debtor and attorney Ralph A. Schwartz to prosecute the same
8 personal injury claim on behalf of the estate in exchange for a contingency fee. Attorney Griffin
9 attests that Attorney Schwartz intends to remit to Attorney Goldberg fifty percent of any
10 contingency fee allowed by this court. There is no separate declaration or affidavit, however,
11 from Attorney Schwartz.

12 On July 10, 2023, the Trustee filed opposition to the instant Special Counsel and
13 Settlement Motion. (ECF No. 88). The Trustee seeks to require that the gross proceeds of any
14 settlement be remitted to the Trustee for administration and a clarification regarding the
15 allocation and distribution of settlement proceeds.

16 On July 15, 2022, Attorney Griffin electronically filed on behalf of the Debtor an
17 Amended Supplement to Motion to Appoint Special Counsel Nunc Pro Tunc and Approve
18 Settlement and Compensation (“Settlement Supplement”) along with an attached supplemental
19 declaration of Attorney Griffin (“Second Griffin Declaration”). (ECF No. 91). The Settlement
20 Supplement and Second Griffin Declaration clarify the basis for settling the estate’s personal
21 injury claim, including the available settlement funds and the pro rata allocation of funds among
22 various claimants involved in a common motor vehicle accident. The Second Supplement and
23 Second Griffin Declaration also explain the relationship between Attorney Schwartz, Attorney
24 Griffin, and the bankruptcy estate.

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27 ⁵ Attorney Griffin filed the instant motion on behalf of the Debtor but has not substituted
28 into the Chapter 13 case to replace Attorney Ballstaedt. Attorney Griffin is an experienced
bankruptcy attorney and apparently filed the instant motion merely to assist proposed special
counsel.

1 On July 26, 2023, counsel for the Trustee appeared telephonically at the hearing on the
2 instant motion, along with Attorney Griffin.

3 DISCUSSION

4 The court has reviewed the Special Counsel and Settlement Motion, the materials
5 subsequently filed, and the record in these proceedings. Having considered the written and oral
6 representations of counsel, as well as the factors for approval of a compromise under FRBP
7 9019, see Martin v. Kane (In re A&C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986), the court
8 concludes that the Special Counsel and Settlement Motion should be granted in part and denied
9 in part.

10 In this instance, Debtor apparently was one of four individuals injured in a motor vehicle
11 accident caused by two joint defendants. The defendants have insurance coverage capped at
12 \$50,000 for the same accident. Based on the medical bills incurred by each individual plaintiff,
13 Debtor's pro rata share of the \$50,000 policy limit would be \$4,665.41. In addition to that pro
14 rata recovery on the claim against the two defendants, Debtor also will receive \$25,000 under his
15 separate uninsured/underinsured motorist insurance, for a total recovery of \$29,665.41. From the
16 total recovery, proposed special counsel seeks an allowance of a one-third contingency fee of
17 \$9,888.47 as well as reimbursement of costs in the total amount of \$1,312.50.⁶ For special
18 counsel, contingency fees and costs totaling \$11,200.97 therefore are requested. Additionally, a
19 total of \$7,408.35 would be paid to five separate medical providers. Out of the \$29,665.41 total
20 recovery, a balance of \$11,056.09 would remain for the Debtor. See Second Griffin Declaration
21 at ¶¶ 6 through 9.⁷

22 Under the A&C Properties factors, the gross amounts obtained on the personal injury
23 claim as well as the uninsured/underinsured motorists claim appear to be appropriate. The
24 uncertainty of litigation of the personal injury claim as well as the ability to collect from any

25 ⁶ The majority of the costs are the fees charged by Attorney Griffin for presenting the
26 instant motion.

27 ⁷ It is not clear from the two declarations from Attorney Griffin whether the Debtor's
28 share of the funds from the defendants' insurance carrier and the proceeds from the Debtor's
uninsured motor coverage.

1 other sources certainly support approval of the settlement with the defendants. The delay and
2 additional costs of going to trial or resolving disputes over the allocation of the available funds,
3 also warrant an expeditious settlement. Inasmuch as creditors have not expressed any views to
4 the contrary, the court concludes that settlement of the personal injury and
5 uninsured/underinsured motorist claim should be approved.

6 With respect to the employment of special counsel, however, proposed counsel is
7 required to provide a verified statement “setting forth the person’s connections with the debtor,
8 creditors, any other party in interest, their respective attorneys and accountants, the United States
9 trustee, or any person employed in the office of the United States trustee.” FED.R.BANKR.P.
10 2014(a). No such verified statement – by declaration or otherwise – has been provided by
11 Attorney Schwartz. Proposed special counsel must disclose and identify under penalty of perjury
12 any such connections or must attest that counsel does not have any of the connections in the
13 categories listed in FRBP 2014(a). A conclusory statement that the proposed counsel has “no
14 adverse interests” is insufficient and irrelevant to the disclosures required by rule. Until such
15 disclosure is provided and the employment of Attorney Schwartz can be authorized by this court,
16 none of the \$29,665.41 total recovery can be paid by the Trustee to special counsel.

17 More important, the court also cannot authorize the Trustee to pay any estate funds that
18 Attorney Schwartz would provide to Attorney Goldberg. Attorney Goldberg currently is not
19 authorized to practice before the bankruptcy court. The First Goldberg Employment Motion
20 drafted by Attorney Goldberg was voluntarily withdrawn by Attorney Ballstaedt after the Trustee
21 responded. The Second Goldberg Employment Motion purportedly was drafted by Attorney
22 Ballstaedt but was accompanied by copies of the same proposed Contingency Fee Agreement
23 and the same First Goldberg Affidavit that was attached to First Goldberg Employment Motion.
24 See discussion at note 3, supra. At the hearing on the Second Goldberg Employment Motion, the
25 court expressly advised Attorney McArthur that the Debtor would not be allowed to employ
26 special counsel who is not authorized to practice in this court. The written order entered on
27 January 19, 2023, denying the Second Goldberg Employment Motion was never appealed.

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1 Rather than seeking authority to employ entirely separate special counsel to prosecute the
2 claims of the Chapter 13 estate, it appears that Attorney Schwartz was engaged by the Debtor
3 without prior court authorization,⁸ and he may have agreed to share his contingency fee, if any,
4 with Attorney Goldberg. That arrangement reflects the understanding of Attorney Griffin, see
5 First Griffin Declaration at ¶ 12, but there is no written testimony from Attorney Schwartz
6 corroborating that understanding.⁹ In fact, as also previously mentioned, there is no affidavit or
7 declaration from Attorney Schwartz at all. On its face, however, any such fee sharing
8 arrangement with Attorney Goldberg creates the same inappropriate result: property of the
9 bankruptcy estate would be allocated to an attorney who is not authorized to practice by this
10 court pursuant to an outstanding disciplinary order. Whether the arrangement reflects a poorly
11 disguised attempt to evade or circumvent disciplinary order AD-2014-0005 of the U.S. District
12 Court, or Administrative Order 2014-05 of this bankruptcy court, or both, is not determined at
13 this time.¹⁰

14 Under the circumstances, fifty percent of the \$9,888.47 contingency fee, i.e., **\$4,944.23**,
15 will be awarded provisionally to Attorney Schwartz, along with the costs in the total amount of
16 \$1,312.50. The remaining fifty percent of the contingency fee amount will be held by the
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18 ⁸ The order denying the Second Goldberg Employment Motion was entered on January
19 19, 2023. The retainer agreement between the Debtor and Attorney Schwartz was signed on
20 April 14, 2023. The instant Special Counsel and Settlement Motion was filed more than two
21 months later on June 24, 2023, and seeks to approve special counsel’s employment “nunc pro
22 tunc,” presumably to the date the retainer agreement was signed. Entry of so-called nunc pro
23 tunc orders to retroactively correct now for what should have happened in the past are
24 discouraged. See, e.g., Roman Catholic Archdiocese of San Juan, P.R. v, Feliciano, 140 S.Ct.
25 696, 701 (2020) (“Put colorfully, ‘[n]unc pro tunc orders are not some Orwellian vehicle for
26 revisionist history – creating ‘facts’ that never occurred in fact.”). It does not appear, however,
27 that Attorney Schwartz was made aware of the Chapter 13 proceeding until after he was retained
28 and achieved a settlement with the defendants. See First Griffin Declaration at ¶¶ 6 through 9.

⁹ Similarly, there is no testimony from Attorney Schwartz as to whether he was ever
informed by Attorney Goldberg that Attorney Goldberg is not permitted to practice before the
bankruptcy court.

¹⁰ A copy of this Order will be transmitted to the current chief judge of the U.S. District
Court as well as this bankruptcy court.

1 Trustee for possible distribution in accordance with the confirmed Chapter 13 plan. The Trustee
2 will not be authorized to pay such allowed amounts to Attorney Schwartz unless and until his
3 employment as special counsel is authorized by the court.

4 **IT IS THEREFORE ORDERED** that the Motion to Appoint Special Counsel Nunc Pro
5 Tunc and Approve Settlement and Compensation, brought by Christian N. Griffin, Esq. of
6 Griffin Law Group, on behalf of the above-referenced debtor, Docket No. 85, be, and the same
7 hereby is, **GRANTED IN PART** and **DENIED IN PART**.

8 **IT IS FURTHER ORDERED** that the subject motion is **GRANTED** with respect to the
9 settlement terms discussed in the Amended Supplement to Motion to Appoint Special Counsel
10 Nunc Pro Tunc and Approve Settlement and Compensation, Docket No. 91, filed on July 15,
11 2023. The total amount of the settlement funds described in the subject motion, in the amount of
12 \$29,665.41, shall be remitted to the assigned Chapter 13 trustee, Kathleen A. Leavitt, for
13 administration.

14 **IT IS FURTHER ORDERED** that the subject motion is **DENIED WITHOUT**
15 **PREJUDICE** with respect to the employment of Ralph A. Schwartz, Esq. as special counsel,
16 pending the submission by such counsel of an affidavit or declaration containing the disclosure
17 of connections or other information required by Federal Rule of Bankruptcy Procedure 2014(a).
18 The affidavit or declaration must be filed with the court and served of all appropriate parties **no**
19 **later than August 31, 2023**. Upon review of the affidavit or declaration, the court will
20 determine by supplemental order whether employment of proposed special counsel is
21 appropriate.

22 **IT IS FURTHER ORDERED** that in the event special counsel is authorized to be
23 employed, total attorney's fees in the amount of **\$4,944.23**, will be allowed, in addition to
24 reimbursement of costs advanced in the total amount of \$1,312.50.

25 Copies sent via CM/ECF ELECTRONIC FILING

26 Copies sent via BNC to:
27 ORLANDO ALVAREZ-MONJARAS
28 4622 GRAND ROCK DRIVE
NORTH LAS VEGAS, NV 89081