

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION**

**ENTERED**

**JAN 14 2005**

**U.S. BANKRUPTCY COURT  
MDNC - BB**

<b>In re:</b>	)	
	)	
<b>Brokers, Inc.</b>	)	<b>Case No. 04-53451</b>
	)	
<b>Debtor.</b>	)	
_____	)	

**ORDER DENYING APPLICATION BY DEBTOR TO EMPLOY  
WILLIAM E. WHEELER AS SPECIAL COUNSEL**

This matter came on for hearing before the court on December 22, 2004, upon the Application by the Debtor to Employ William E. Wheeler of the law firm Wyatt Early Harris Wheeler LLP ("WEHW") as Special Counsel (the "Application"). Christine L. Myatt and David Yarbrough appeared on behalf of the Debtor, Robyn Whitman appeared on behalf of the Bankruptcy Administrator, William West appeared on behalf of Kirby Hodge, and Thompson Wright appeared on behalf of Carlton Anderson. After considering the Application, the arguments of counsel, and the evidence presented, the court makes the following findings of fact and conclusions of law.

The Debtor is a corporation organized and existing under the laws of North Carolina with its principal place of business in Davidson County, North Carolina. Prior to the death of its principal and sole shareholder, Dolen Bowers, the Debtor operated as a real estate holding, management and development company, and its assets consist primarily of real estate located in Davidson, Guilford, Montgomery and Randolph Counties. Dolen Bowers died testate on June 6, 2003. After significant litigation regarding the ownership of the Debtor, the heirs entered into a settlement agreement acknowledging that the estate of Dolen Bowers (the "Bowers Estate") is

the sole shareholder of the Debtor. The Debtor then commenced, and is continuing, the process of an orderly liquidation.

On March 9, 2004, Carlton Eugene Anderson instituted a lawsuit against the Debtor in Guilford County Superior Court. Anderson and the Debtor were parties to a Partnership Agreement dated December 10, 2003 pursuant to which they engaged in numerous real estate projects. Most of the claims asserted by Anderson stem from this partnership. On March 30, 2004, Nelson Kirby Hodge, a former employee of the Debtor, instituted a lawsuit against the Debtor in Guilford County Superior Court. On August 27, 2004, the Superior Court consolidated the two cases (the "Consolidated Case"). On September 10, 2004, the Debtor filed a complaint asserting certain counterclaims. Prior to the Petition Date, William E. Wheeler and the law firm of WEHW represented the Debtor as counsel in this Consolidated Case.

On November 22, 2004, the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Since the Petition Date, the Debtor has continued to operate its business and manage its assets as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. The Debtor filed a Notice of Removal of the Consolidated Case with the United States District Court for the Middle District of North Carolina and requested that the District Court refer the Consolidated Case to this court for resolution and adjudication. Subsequently, the Debtor filed the present application to employ William E. Wheeler and WEHW as special counsel pursuant to 11 U.S.C. § 327(e) in the removed Consolidated Case, which is now an adversary proceeding before this court.

In the Application, the Debtor indicates that neither Mr. Wheeler nor WEHW represent any interest adverse to the Debtor or to the estate. The Debtor requests that the court allow it to

continue to employ Mr. Wheeler to represent it in the Consolidated Case, which is factually and procedurally complex in that it involves substantial litigation history, including a preliminary injunction entered against Anderson and Hodge, discovery requests, joinder of additional parties and counterclaims. Anderson filed an objection to the Application on the basis that the representation of the Debtor by WEHW will result in a conflict of interest.

It is not disputed that members of WEHW have held close ties with both the Debtor and the Bowers Estate for the past several years. In the affidavit attached to the Application, Mr. Wheeler disclosed that a member of his law firm, Calvin B. Bryant, is an executor of the Bowers Estate and an officer and director of the Debtor. Mr. Bryant is a former partner of WEHW, and as of January 1, 2004, became "Of Counsel" with WEHW. Mr. Bryant continues to maintain his office and conduct business at WEHW and receive compensation from WEHW. Mr. Bryant resigned from his position as president of the Debtor just prior the Petition Date, and is currently seeking permission from this court to be employed as a consultant. Mr. Bryant makes most of the management decisions regarding the Debtor and is one of two people who has authority to sign checks on behalf of the Debtor and transfer other property of the Debtor. For example, Mr. Bryant transferred the titles to four vehicles from the Debtor to Hazel Bowers in the month prior to that of the Petition Date.<sup>1</sup>

In addition, WEHW represents Mr. Bryant in his capacity as executor and represents the Bowers Estate. The Debtor listed the Bowers Estate as a creditor on Schedule F of the Petition with a claim in the amount of \$1,501,661.57. Finally, the Debtor disclosed that it paid and

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<sup>1</sup>Mr. Bryant testified that the Debtor received no consideration for this transfer, but that it would be deducted from Hazel Bowers share of the Bowers Estate.

WEHW received approximately \$218,000 within 90 days of the Petition Date. The total amount paid by the Debtor to WEHW in the year preceding the Petition Date was \$220,000.

Section 327 of the Bankruptcy Code authorizes the trustee to hire professionals to assist with the administration of the estate. Section 327(a) provides the standard for hiring general counsel which requires such counsel to be disinterested persons and have no interests adverse to the debtor or the estate. 11 U.S.C. § 327(a). Section 327(e) provides a less stringent means of employment for an attorney that represented the debtor prepetition. Section 327(e) states:

The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327.

Essentially, § 327(e) enumerates three requirements. First, while special counsel need not be disinterested, special counsel may not hold an interest adverse to the debtor or estate with respect to the matters on which counsel is to be employed. Whether an applicant holds an interest adverse to the debtor is a fact specific inquiry. In re Tidewater Mem. Hosp., Inc., 1102 B.R. 221, 228 (Bankr. E.D. Va. 1989). The determination “must finally turn on its own circumstances, based on a common-sense divination of adversity or commonality.” In re Southern Kitchens, Inc., 216 B.R. 819, 827 (Bankr. D. Minn. 1998). In the process of making the determination, the court must consider both actual and potential conflicts that may arise in the future. In re Rabex Amuru of North Carolina, Inc., 198 B.R. 892, 895 (Bankr. M.D.N.C. 1996). Second, employment must be in the best interest of the estate. Finally, the employment must be for a special purpose, and may not involve the general administration of the estate.

In this instance, there is no question the proposed employment of Mr. Wheeler is for a special purpose. The application clearly articulates that Mr. Wheeler would function as counsel for the Debtor in the Consolidated Case, not the general bankruptcy proceeding. Therefore, the court must only determine whether Mr. Wheeler and WEHW hold, or could hold, an interest adverse to the Debtor with respect to this adversary proceeding and whether the employment is in the best interest of the estate.

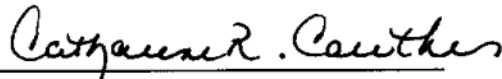
The court concludes that WEHW's various interests and clients preclude Mr. Wheeler's employment as special counsel. There are simply too many circumstances present that cause the court concern. WEHW's represents one of the largest creditors in this case, the Bowers Estate, and represents the executor of the Bowers Estate. The executor is himself associated with the firm and he virtually controls the business affairs of the Debtor. It appears to the court that the line between the Debtor and the Bowers Estate has become somewhat blurred. While the court is aware that the Bowers Estate is the sole shareholder of Brokers, Brokers is now the Debtor in this bankruptcy, and the interests of the Debtor's estate may not align with those of the Bowers Estate.

Furthermore, in the Consolidated Case, Anderson alleges that Brokers has been collecting rents and profits from Partnership Property and intermingling such funds with other corporate funds. Anderson also alleges that Brokers is using Partnership Property to fund other business operations of Brokers, to pay large sums of money on a questionable debt to the Bowers Estate, and to generate cash for the Bowers Estate. WEHW represents the Bowers Estate and a member of the firm is an executor of that estate. The Bowers Estate is not currently a party in the Consolidated Case, but it is still not clear to this court what role, if any, the Bowers Estate

will play in it. If Partnership Property has been intermingled with the Debtor's funds and distributed to the Bowers Estate, it may be in the Debtor's best interest to seek the return of funds distributed to the Bowers Estate by bringing it in as a party, rather than simply absorbing any liability to Anderson at the expense of the Debtor's other creditors.

While the court has no doubt that Mr. Wheeler is well qualified to handle this type litigation, the court simply cannot find that it would be in the best interest of the bankruptcy estate to authorize his employment. Accordingly, the Debtor's Application is denied.

This the 14<sup>th</sup> day of January 2005.

  
Catharine R. Carruthers  
United States Bankruptcy Judge