UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1856

BYRON F. DAVID,

Appellant,

v.

DONALD F. KING,

Appellee.

Appeal from an Order of the United States District Court for the Eastern District of Virginia Case No. 1:22-cv-01053-PTG

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal presents the discrete question of whether a former Chapter 11 Trustee may file a motion to approve a professional retention application under 11 U.S.C. § 327(a) when the former Chapter 11 Trustee did not do so at any point in time during the Chapter 11 phase of the bankruptcy case, and filed such a motion after conversion to Chapter 13 (when the former Chapter 11 Trustee's fiduciary office had terminated pursuant to 11 U.S.C. § 348(e)). As set forth in the Opening Brief of the Debtor-Appellant, Byron F. David ("Mr. David"), upon conversion of his case from Chapter 11 to Chapter 13, the services of Donald F. King ("Mr. King") as Chapter 11 Trustee terminated. *See* 11 U.S.C. § 348(e). Further, under 11 U.S.C. § 327(a), and Fed. R. Bankr. P. 2014(a), only an actively serving trustee (not a former trustee) may move the Bankruptcy Court to approve a professional retention. Critically, Mr. King moved the U.S. Bankruptcy Court for the Eastern District of Virginia (the "Bankruptcy Court") to approve his retention of Odin, Feldman & Pittleman, P.C. ("OFP") 4 months and 22 days after his fiduciary office as Chapter 11 Trustee terminated (i.e. at a time when he lacked fiduciary office to bring that Motion before the Court). *See* 11 U.S.C. § 327(a), and

Fed. R. Bankr. P. 2014(a). The Bankruptcy Court erred when granting a Motion that was not properly before it.

Mr. King's opposition to Mr. David's appeal largely ignores these critical aspects of the Bankruptcy Code and instead conflates fiduciary duties with fiduciary powers, and contends that these issues were matters committed to the Bankruptcy Court's discretion. Mr. King also argues that the case law applying *San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (per curiam) supports him, and that a "duplicative" employment application was unnecessary.

II. ARGUMENT

For the reasons set forth herein and in Mr. David's Opening Brief, Mr. King's arguments must be rejected, and this Court should reverse the Order of the U.S. District Court for the Eastern District of Virginia (the "District Court") entered on August 4, 2023, affirming the Bankruptcy Court's approval of Mr. King's retention of OFP in the Chapter 11 phase of the case.

A. The District Court improperly affirmed the Bankruptcy Court's approval of Mr. King's Motion to retain OFP when Mr. King filed that Motion after his fiduciary office had terminated

Under the plain language of 11 U.S.C. § 327(a), and Fed. R. Bankr. P. 2014(a), only actively serving trustee, ***not a former***

trustee, may move the Bankruptcy Court to approve a professional retention. Here, Mr. King filed his Motion to Approve the retention of OFP 4 months and 22 days after his fiduciary office as Chapter 11 Trustee terminated (i.e. at a time when he lacked fiduciary office). Under 11 U.S.C. § 327(a), and Fed. R. Bankr. P. 2014(a), Mr. King could not bring that Motion before the Bankruptcy Court, and the Bankruptcy Court committed plain error when granting a Motion that was not properly before it.

In his opposition to Mr. David's appeal, Mr. King largely ignores these issues and, in fact, does not address the language of Fed. R. Bankr. P. 2014(a) whatsoever. Instead, he attempts to couch these issues as matters of the Bankruptcy Court's discretion, and conflates fiduciary "duties" with fiduciary "powers."

As to discretion, the District Court in the first appeal correctly held that the question presented was not in the nature of a factual determination committed to the Bankruptcy Court's discretion, but rather was "a purely legal question that asks whether 11 U.S.C. § 327(a) permits a former trustee, with the court's approval, to 'employ one or more attorneys' on behalf of the bankruptcy estate," and that this purely legal question was subject to *de novo* review on appeal. *David v. King*, 638 B.R. 561, 566 (E.D. Va. 2022) (Nachmanoff, J.) (JA 248). The plain language of Fed. R. Bankr. P. 2014(a)

did not permit Mr. King, as a former trustee, to move the Bankruptcy Court to approve his retention of OFP 4 months and 22 days after his fiduciary office as Chapter 11 Trustee terminated.

Next, Mr. King cites to a former trustee's continuing fiduciary duties following the termination of his office, and then conflates those duties with grants of power. There are, however, important distinctions between "powers" and "duties." A "power" is "[t]he ability to act or not act." *Black's Law Dictionary Deluxe* at 1189 (7th ed. West Group 1999). Conversely, a "duty" is "[a] legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right." *Id.* at p. 521. Mr. King's Opposition argues that, because he had fiduciary duties following conversion of the case from Chapter 11 to Chapter 13, it follows that he had the power to move the Court to approve his retention of OFP. This is not so. Under 11 U.S.C. § 348(e), conversion of the case from Chapter 11 to Chapter 13 terminated Mr. King's office as a Chapter 11 Trustee. At that point, he was no longer a Trustee. Fed. R. Bankr. P. 2014(a) permits a "trustee" to move the Bankruptcy Court to approve a professional retention. Mr. King, therefore, could not properly move the Court to approve his retention of OFP after his office had terminated, and the Bankruptcy Court erred in approving a Motion that was

not properly before it. Any fiduciary duties Mr. King had as a former trustee did not, by themselves, grant any powers to him. The required powers are conferred by 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014(a) and they certainly did not extend to him as a former trustee.

B. The Bankruptcy Court's approval of a Motion filed by a former trustee made the record something it was not in violation of *San Juan v. Acevedo Feliciano*, and the cases cited by Mr. King are distinguishable

Next, Mr. King contends that the Supreme Court of the United States' holding in *San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (per curiam) narrowly prohibits retroactive orders to cure jurisdictional bars, and that Bankruptcy Courts applying *Acevedo* support Mr. King's position. Mr. King further contends that Mr. David is pushing "for a sweeping change in bankruptcy law, [by] asking the District Court to adopt a new standard to prohibit the approval of employment applications for bankruptcy professionals after those professionals begin providing professional services." Appellee Opposition Brief at p. 31 (dkt. no. 20) (alteration to original in brackets). This is not so.

Mr. David concedes that if a Bankruptcy Trustee validly obtains court approval of a professional retention, a bankruptcy court may approve fees the Trustee incurred before the Order approving the retention. That is not the issue in this case. Instead, the issue is that Mr. King moved to retain

counsel at a time when he was not a trustee. Without a valid retention in place, the Court could not approve fees. *See In re Benitez*, Case No. 8-19-70230-reg, 2020 Bankr. LEXIS 661, at *3 (Bankr. E.D.N.Y. Mar. 13, 2020) (unpublished). If Mr. King had moved the Bankruptcy Court to approve his retention when he still held a fiduciary office as trustee, the Bankruptcy Court could have approved compensation of his professionals for a date preceding that approval. The distinguishing feature of this case, however, is that Mr. King never moved the Bankruptcy Court to approve his retention of OFP at any point in time when he held fiduciary office as the Chapter 11 Trustee.

Not a single case cited by *Acevedo* involved a case in which a bankruptcy court approved a retention application filed by a former trustee. *See In re Hunanyan*, 631 B.R. 904, 908 (Bankr C.D. Cal. 2021); *In re Ramirez*, 633 B.R. 297,306 (Bankr. W.D. Tex. 2021); *In re Oaktree Med. Ctr., LLC*, 634 B.R. 465,471 (Bankr. D.S.C. 2021); *In re Mohiuddin*, 627 B.R. 875, 882 fn.5 (Bankr. S.D. Tex. 2021); *In re Moore*, No. 6:21-bk-70299, 2021 WL 3777538, *5 (Bankr. W.D. Ark. Aug. 25, 2021) (unpublished); *In re Mallinckrodt PLC*, Case No. 20-12522-JTD (Jointly Administered), Civ. No. 21-268-LPS, 2022 U.S. Dist. LEXIS 54786 *1-*6, *21-*28 (D. Del. Mar. 28, 2022) (unpublished); *Haigler v. High Tension*

Ranch, LLC, Civil Action No. 3:20-CV-00564-GCM, 2021 U.S. Dist. LEXIS 153278, at *10-*12 (W.D.N.C. Aug. 16, 2021) (unpublished); *In re Miller*, 620 B.R. 637, 642 (Bankr. E.D. Cal. 2020). Instead, all cases cited by the parties (and known to the undersigned) applying *Acevedo* to professional compensation issues in bankruptcy cases have involved situations in which a trustee possessing fiduciary office (or a debtor in possession) validly obtained the Bankruptcy Court's approval to retain a professional, and *then* sought to approve compensation of fees incurred prior to the retention approval under 11 U.S.C. § 330. *See, e.g., id.* Again, that scenario does not apply in this case. Aside from this case, the undersigned is unaware of a single case in which a Bankruptcy Court held that a Bankruptcy Court could approve a retention application filed by a former trustee.

The pertinent language of *Acevedo* is not limited to jurisdictional issues, but rather broadly declares that courts cannot use a *nunc pro tunc* order to "'make the record what it is not.'" 140 S. Ct. at 700 (quoting *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990)). Here, by approving Mr. King's motion to approve the retention of OFP when Mr. King filed that Motion at a time when he was not a trustee, the Bankruptcy Court made the record what it was not. It treated Mr. King's motion as one that had been

filed when he held the fiduciary office of Chapter 11 Trustee when he in fact never filed the Motion when holding that office. By making the record what it is not, the Bankruptcy Court's November 24, 2020 Order violated the prohibitions of *Acevedo*. Thus, Mr. David is not pushing "for a sweeping change in bankruptcy law." Appellee Opposition Brief at p. 31 (dkt. no. 20). To the contrary, Mr. King seeks to do so by urging this Court to affirm the approval of a retention application filed by a former trustee. Such an approval is unprecedented, and unsupported by 11 U.S.C. § 327(a), Fed. R. Bankr. P. 2014(a), or any other aspect of the Bankruptcy Code or Bankruptcy Rules. Accordingly, reversal is appropriate.

C. The Bankruptcy Court correctly concluded that Mr. King was required to file a separate employment application to retain OFP following conversion from Chapter 7 to Chapter 11, and that issue was un-appealed by him, and is now the law of the case

Finally, Mr. King contends that this Court may affirm the District Court and the Bankruptcy Court on the alternative grounds that a "duplicative" employment application was not required. Mr. King's reasoning is that, because the Bankruptcy Court approved his retention of OFP when he served as Chapter 7 Trustee, he should not have been required to file a Motion to retain OFP following the conversion of the case from Chapter 7 to Chapter 11 when he served as Chapter 11 Trustee.

As a threshold matter, this very question was litigated in the Bankruptcy Court, and decided against Mr. King. In its Order entered on September 30, 2020 (JA 50), the Bankruptcy Court observed that, "[u]pon conversion of the case from chapter 7 to chapter 11, the Chapter 7 Trustee's services were terminated," and "[i]t follows that OFP's retention, as special counsel to the Chapter 7 Trustee, was also terminated. *Id.* (citing . 11 U.S.C. § 348(e); *In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 901 (Bankr. S.D. Fla. 2017)). While the Bankruptcy Court's November 24, 2020 Order reconsidered some aspects of the September 30, 2020, Order, it did not alter this finding. *See* Bankruptcy Court, Order Granting Motion to Reconsider, Approving Application to Employ Counsel, and Approving Requested Compensation and Expense Reimbursement at p. 1 (Nov. 24, 2020) (JA 168-69).

Mr. King did not appeal the Bankruptcy Court's conclusion that the retention by Mr. King as a Chapter 7 Trustee had terminated upon the conversion of the case to Chapter 11, and that conclusion is now settled and the law of the case. *Accord Babb v. United States Drug Enforcement Agency*, 146 F. App'x. 614, 622 (4th Cir. 2005) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (holding that "[t]he law of the case doctrine, too, proscribes relitigation of issues that were

previously settled; however, the focus is on ensuring that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'"); *see also TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009). Mr. King failed to challenge this issue in an appeal of his own. His failure to do so constitutes a waiver of the issue in this appeal. A*ccord Williams v. Lynch (In re Lewis)*, 611 Fed. App'x. 134, 137 (4th Cir. 2015) (citing *In re Wallace & Gale Co.*, 385 F.3d 820, 835 (4th Cir. 2004)). This issue does not provide an alternative basis for affirming the Bankruptcy Court.

In addition, even if the Court were to consider Mr. King's arguments on this topic, they fail on the merits. Mr. King's arguments proceed in part from the false and flawed premise that a Chapter 11 Trustee appointed after conversion of a case from Chapter 7 to Chapter 11 is a "successor trustee." The term "successor trustee" is defined in 11 U.S.C. § 703, as a person appointed to fill a "vacancy in the office of the trustee" in the event that a trustee "dies or resigns during a case, fails to qualify under [11 U.S.C. § 322], or is removed under [11 U.S.C. § 702]." This Code section does not mention or address trustees that are appointed following a conversion from one chapter to another.

Notably, this Code section applies only in a Chapter 7 case, and the term "successor trustee" does not appear under the Code sections applicable to Chapter 11. *See* 11 U.S.C. § 103(b). The references in the *Handbook for Chapter 7 Trustees* to "successor trustees," therefore, cannot be read to apply to a trustee that is appointed after conversion from Chapter 7 to Chapter 11, and instead that term would only apply to a new trustee that assumes office following a vacancy that occurs while a case remains pending in Chapter 7. This is sound because when a "successor trustee" fills a vacancy while a case remains pending within a single chapter, the nature of the bankruptcy proceeding is the same, the duties of the trustee are the same, and the need for counsel is the same. In addition, the force of 11 U.S.C. § 348(e) would not apply.

The conversion of a case from Chapter 7 to Chapter 11, however, presents an entirely different scenario. First, a Chapter 7 Trustee is automatically appointed in every Chapter 7 case. *See* 11 U.S.C. §§ 701 (Interim Trustee), 702 (Election of Trustee). In contrast, trustees are not automatically appointed in a Chapter 11 case. To the contrary, the appointment of a Chapter 11 Trustee is an extraordinary remedy. *In re St. Louis Globe-Democrat*, 63 B.R. 131, 138 (Bankr. E.D. Miss. 1985) (citing *Matter of Anchorage Boat Sales, Inc.*, 4 B.R. 635 (Bankr. E.D.N.Y. 1980);

In re Loyd W. Ford, 36 B.R. 501 (Bankr. E.D. Ky. 1983)). Further, the duties and responsibilities of a Chapter 7 Trustee and a Chapter 11 Trustee are distinct. *Compare* 11 U.S.C. § 704 (establishing the duties of a Chapter 7 Trustee) *with* 11 U.S.C. § 1106 (establishing the duties of a Chapter 11 Trustee). In summary, Chapter 7 Trustees are appointed automatically in Chapter 7 cases, but only in extraordinary circumstances in Chapter 11 cases, and the duties of trustees appointed under each Chapter differ. A person appointed as a Chapter 11 Trustee following conversion from Chapter 7 is not merely a "successor trustee," as contended by Mr. King, but rather is entering into and fulfilling an entirely new and distinct office. Given these stark differences, circumstances and responsibilities, the need for counsel in each instance will necessarily be different. In point of fact, the *Handbook for Chapter 7 Trustees* on which Mr. King relies confirms this distinction as it states that, "[u]pon conversion of a chapter 11 case in which a trustee was serving, the United States Trustee will assess the advisability of reappointing the Chapter 11 trustee to serve as the chapter 7 trustee." U.S. Department of Justice, *Handbook for Chapter 7 Trustees* at 2-5 (Oct. 1, 2012), available at https://www.justice.gov/ust/page/file/762521/download (last accessed Dec. 19, 2023). The *Handbook* does not refer to the trustees of these distinct offices as "successor trustees" in relation to one another, but

rather as a "chapter 7 trustee" and as a "chapter 11 trustee." Such a treatment is consistent with the concept embodied in the Bankruptcy Code that a trustee appointed following conversion from one chapter to another is not a "successor trustee," but rather is entering a separate and distinct office.

Mr. King also argues that, because 11 U.S.C. § 348(e) addresses only the termination of any trustee or examiner, and does not address the termination of the employment of professionals, that statute cannot serve to terminate professionals. This argument is flawed by the fact that a professional can only be employed by a trustee. *See* 11 U.S.C. § 327. If a trustee's office is terminated upon conversion, obviously, no person holds an office to employ any professional. Thus, the termination of the only person who can employ a professional necessitates the termination of the professionals employed by that person. In this same vein, the Bankruptcy Court's Order authorizing the Chapter 7 Trustee to employ OFP authorized "Donald F. King, Trustee" to employ OFP. Order at p. 1 (JA 004). It did not authorize any other officeholder to employ OFP, and OFP could not provide any service without employment by Mr. King as the Chapter 7 Trustee. Thus, without Mr. King as Chapter 7 Trustee, OFP could not provide services and, following conversion from Chapter 7 to Chapter 11, any services provided by OFP were not approved or authorized

by the Court. Including a specific reference in 11 U.S.C. § 348(e) to persons other than trustees or examiners would be pointless.

In *Lamie v. United States Trustee*, a case emanating from the Western District of Virginia, the Supreme Court of the United States held that conversion of a case from Chapter 11 to Chapter 7 and appointing a Chapter 7 Trustee "terminated ESI's status as debtor-in-possession ***and so terminated petitioner's service under § 327 as an attorney for the debtor-in-possession***." 540 U.S. 526, 530 (2004) (emphasis added). The Supreme Court further held that "[a] debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation." *Id.* at 533. *Lamie* thus stands for the proposition that when cases are converted from one chapter to another, the termination of status (such as the termination that occurs when a debtor goes from being a debtor in possession under Chapter 11 to a debtor in a liquidation proceeding) impacts and terminates employment authorizations that existed when the case was in another chapter prior to conversion.

Here, when this case was converted from Chapter 7 to Chapter 11, any authorization that Mr. King had as Chapter 7 Trustee to employ counsel terminated. *See* 11 U.S.C. § 348(e). Thus, following conversion of this case from Chapter 7 to Chapter 11, OFP was not employed with the Bankruptcy

Court's authorization, and it was indeed necessary for Mr. King in his separate and distinct office as a Chapter 11 Trustee to move the Bankruptcy Court for approval of OFP's retention pursuant to 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014(a). Because Mr. King never moved the Court to approve his retention of OFP at any time when he served as Chapter 11 Trustee, the Bankruptcy Court erred when granting his Motion filed by him, as a non-trustee, to approve OFP's retention during the Chapter 11 Phase of the case, and that error must be corrected on appeal.

III. CONCLUSION

WHEREFORE, your Appellant, Byron F. David, by counsel, respectfully requests that this Honorable Court enter an Order:

(a) reversing the District Court's Order entered on August 4, 2023, which affirmed the Bankruptcy Court's Order entered on September 2, 2022;

(b) awarding judgment in favor of the Appellant by (i) vacating the Bankruptcy Court's November 24, 2020, Order granting Mr. King's Motion under 11 U.S.C. § 327(a) to retain OFP as his counsel, and (ii) disgorging the fee award to OFP from the Bankruptcy Estate in the amount of $43,590 in legal fees and costs in the amount of $70; and

(c) granting such other and further relief as this Court deems appropriate.

IV. RENEWED REQUEST REGARDING ORAL ARGUMENT

Counsel for the Appellant renews its request for oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The length of foregoing Reply Brief, excluding the cover and tables, is 16 pages.

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I certify that on the 20th day of December, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system and on Counsel for the Appellee as follows:

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