

11 U.S.C. § 105
11 U.S.C. § 542
11 U.S.C. § 549

In re EZ Feed Cube Co., Ltd., BAP No. Or-91-1895-OARs

10/16/92

BAP rev'd AER

unpublished

Although the bankruptcy court had not authorized appointment or compensation for Rookstall & Alter, Rookstall & Alter provided post-petition accounting services for the debtor in possession. After the statute of limitation period described in § 549(d) had run, the trustee filed an action under § 541 and § 105 seeking disgorgement of the unauthorized payments. The bankruptcy court entered a judgment in favor of the trustee based on the failure to obtain court approval under §§ 327 and 330.

The Bankruptcy Appellate Panel reversed. It held when seeking to avoid post-petition professional fees the trustee had to bring an action under § 549 - not § 105. The Panel explained that when a specific statutory provision has specific application a more general statutory provision, such as § 105, cannot provide a different rule.

NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re)
EZ FEED CUBE COMPANY, LTD.,)
Debtor.)

ROOKSTALL & ALTER, Certified)
Public Accountants,)
Appellants,)

v.)
MICHAEL A. GRASSMUECK, INC.,)
Trustee,)
Appellee.)

BAP No. OR-91-1895-ORAs
BK No. 683-08205-R7
AP No. 688-5236-R

MEMORANDUM

Argued and Submitted
July 24, 1992, at Portland, Oregon

Filed: OCT 6 1992

Appeal from the United States Bankruptcy Court
for the Central District of Oregon

Hon. Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: OLLASON, RUSSELL, and ASHLAND, Bankruptcy Judges

~~OCT 6 1992~~

1 The bankruptcy court ordered disgorgement of post-petition
2 professional fees notwithstanding that an avoidance action was
3 beyond the applicable limitations period. This timely appeal
4 followed. We reverse.

5 FACTS

6 Debtor petitioned for relief under Chapter 11 on October 21,
7 1983. Appellants Rookstool & Alter, CPAs ("Accountants"), provided
8 accounting services for debtor in possession from November 14,
9 1983, to March 11, 1985. During that time, they billed and were
10 paid \$8,895 for their services, but neither their appointment nor
11 their compensation was ever authorized by the bankruptcy court.
12 Court approval for the appointment and compensation of
13 professionals is mandated by 11 U.S.C. §§ 327 and 330.¹

14 Appellee Trustee Michael Grassmueck ("Trustee") was appointed
15 on May 15, 1985, and the case was converted to Chapter 7 on
16 September 17, 1986. On December 12, 1988, Trustee filed an
17 adversary proceeding seeking disgorgement of the unauthorized
18 payments.

19 The payments to Accountants were made well beyond the
20 limitations period contemplated in § 549, which governs avoidance
21 of unauthorized post-petition transfers. Trustee did not,
22 therefore, proceed under that section, relying instead on § 542,
23 which concerns turnover of estate property, and § 105, which
24 authorizes orders in support of other provisions of the Bankruptcy
25 Code.

26 ¹Unless otherwise stated, all references to "sections" refer
27 to the Bankruptcy Code, 11 U.S.C. §101 et seq.

1 On April 24, 1991, the bankruptcy court entered judgment in
2 favor of Trustee and against Accountants for the entire \$8,895 plus
3 costs and interest. The judgment was based on § 105 and the
4 failure of Accountants to obtain prior court approval of their
5 appointment and compensation pursuant to §§ 327 and 330. Execution
6 on the judgment was stayed pending a July 10, 1991, hearing on
7 Accountants' application for appointment retroactive to the
8 provision of services. That application was denied for having not
9 been brought in a timely fashion.

10 QUESTIONS PRESENTED

11 We must determine whether § 105 can support disgorgement of
12 fees paid post-petition to a professional who was not appointed by
13 the bankruptcy court. If so, we must consider whether the court
14 properly declined to approve the retroactive appointment under the
15 facts of this case.

16 STANDARD OF REVIEW

17 Whether a bankruptcy court has authority under § 105 to order
18 disgorgement of professional fees is a matter of statutory
19 interpretation subject to de novo review. See In re Holm, 931 F.2d
20 620, 622 (9th Cir. 1991). Denial of retroactive appointment is
21 reviewed for an abuse of discretion. Under that standard, reversal
22 requires clear error in the judgment, fact findings, or legal
23 conclusions of the court below. In re Hammer, 112 B.R. 341 (9th
24 Cir. BAP 1990), aff'd, 940 F.2d 524 (9th Cir. 1991); In re
25 Stolrow's, Inc., 84 B.R. 167, 170 (9th Cir. BAP 1988).

26 DISCUSSION

27 Under § 549, subject to constraints inapplicable in the case
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1 before us, a trustee may avoid post-petition transfers that are not
2 authorized by the court or the Bankruptcy Code. No other Code
3 provision is specifically applicable to avoidance of transfers that
4 occur after commencement of a case. Payment of professionals in
5 violation of §§ 327 and 330 constitutes a post-petition transfer
6 that is not authorized by the court or the Code. Recovery under
7 § 549, however, was foreclosed in the subject case by the two year
8 time-bar found in §549(d).

9 Under § 105, "[t]he court may issue any order, process, or
10 judgment that is necessary or appropriate to carry out the
11 provisions of this title." That section does not, however, create
12 rights otherwise unavailable under applicable law. Southern Ry.
13 Co. v. Johnson Bronze Co., 758 F.2d 137, 141 (3d Cir. 1985).
14 Rather, it authorizes orders that are consistent with the
15 substantive provisions of the Bankruptcy Code.

16 Trustee contends that application of § 105 to the subject case
17 is necessary and proper to vindicate and remedy the provisions of
18 §§ 327, 330 and 503, all governing the payment of administrative
19 expenses. That contention is misplaced. Where a statutory
20 provision has specific application, courts may not invoke a more
21 general statutory provision to obtain a different result. Monte
22 Vista Lodge v. Guardian Life Insurance Company, 384 F.2d 126, 129
23 (9th Cir. 1967), cert. denied, 390 U.S. 950 (1968). The specific
24 statute applicable in the subject case is § 549.

25 Trustee cites Levin & Weintraub v. Rosenberg, 330 F.2d 98 (2d
26 Cir.), cert. denied, 379 U.S. 833 (1964), for the proposition that
27 the avoidance of transfers to professionals by a debtor in
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1 possession is not subject to a time bar during pendency of the
2 case. In Levin & Weintraub, the Second Circuit held that the
3 limitations period applicable to the Bankruptcy Act's version of §
4 549 did not bar disgorgement of professional fees. The bankruptcy
5 court relied upon the Levin & Weintraub rationale, comparing Code
6 §§ 330 and 331 to Act § 60. But a closer reading of Levin &
7 Weintraub reveals that it does not support the disgorgement order
8 entered below:

9 The referee determined that the trustee was
10 barred by the two year limitation period
11 imposed via § 11, sub. e of the Bankruptcy Act,
12 11 U.S.C. § 29, sub. e on causes of action
13 derived from the Bankruptcy Act. See Hergert
14 v. Central Nat. Bank & Trust, 324 U.S. 4, 65
15 S.Ct. 505, 89 L.Ed. 656 (1945). However, the
16 referee held that the 1963 amendment to § 60,
17 sub. d of the Bankruptcy Act, 11 U.S.C. § 96,
18 sub. d, which authorized the court, on its own
19 motion, to reexamine counsel fees paid by a
20 debtor, was not subject to any limitations
21 period imposed by § 11, sub. e.

22 Id. at 99. In Levin and Weintraub, the Act provision requiring
23 court approval of the appointment and payment of professionals did
24 not authorize avoidance of a post-petition transfer without regard
25 to the limitations period contained in the Act. Instead, an
26 amendment to the Act that permitted re-examination of professional
27 fees on the court's own motion was found to be without any
28 limitations period during pendency of the bankruptcy case. Absent
that amendment, the fee disgorgement in Levin and Weintraub would
have been subject to the time bar contained in the Act.

Unlike the Act, the Code has no provision authorizing
reexamination, on the court's own motion, of professional fees paid
by a debtor. Levin and Weintraub would thus suggest that

1 disgorgement of post-petition professional fees under the
2 Bankruptcy Code must be based upon the avoidance provisions found
3 in § 549, and is subject to the time-bar contained therein.

4 In In re Crook, 79 B.R. 475 (9th Cir. BAP 1987), the panel
5 reviewed and reversed an order authorizing retroactive appointment
6 of special counsel. At issue was an award of additional fees
7 rather than disgorgement of fees already paid. Id. at 478.
8 Accordingly, neither Crook nor Levin and Weintraub support the
9 proposition that post-petition professional fees are subject to
10 disgorgement except pursuant to § 549. The trustee's arguments
11 under § 542 are without merit.

12 CONCLUSION

13 An action seeking avoidance of post-petition professional fees
14 must be brought under § 549. The facts of record demonstrate that
15 an action under that section was time-barred. Therefore, the fees
16 paid by the debtor to the Accountants were not subject to
17 avoidance. Because the order of disgorgement must be reversed, we
18 do not reach the other question presented.

19 REVERSED.
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