

07-3058-bk (L)

07-3213-bk-(CON)

IN THE
United States Court Of Appeals
FOR THE SECOND CIRCUIT

In Re: D.A. Elia Construction Corp., Debtor.

D.A. ELIA CONSTRUCTION CORP.,

Debtor-Appellant,

vs.

DAMON & MOREY, LLP,

Defendant-Appellee,

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK
JUDGE RICHARD J. ARCARA, AT DOCKET NUMBERS:
06-MC-71, BK NUMBER: 94-10866-K

**DEBTOR-APPELLANT'S RESPONSE TO APPELLEE'S OPPOSITION TO
SUPPLEMENTING THE RECORD AND APPELLEE'S MOTION
SEEKING AN AWARD OF COSTS AND FEES**

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

07-3058 (Lead)
07-3213 (CON)

L. ANDREW BERNHEIM,
Proposed Intervenor-Appellant,

D.A. ELIA CONSTRUCTION CORP.,
Debtor-Appellant,

v.

DAMON & MOREY, LLP,
Defendant-Appellee.

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This Response and the Declaration of David A. Elia are respectfully submitted on behalf of D. A. Elia Construction Corp. (hereinafter referred to as "Debtor") in further support of its Motion to Supplement the Record on Appeal and in opposition to the Motion of Appellee against record supplementation and for an Award of Costs and Fees.

ARGUMENT
THE COURT SHOULD PERMIT SUPPLEMENTATION OF THE RECORD

This appeal is from the July 2, 2007 Decision and Order of the Honorable Richard J. Arcara granting judgment to the Appellee Damon & Morey, LLP ("Damon & Morey") in the amount of three hundred forty two thousand, five hundred and eighteen dollars and forty nine cents (\$342,518.49). For the reasons stated in Debtor's Brief, the judgment amount is not in accordance with the Mandate of this Court and is consequently in error.

This error is a direct result of false representations made by Damon & Morey that all credits were properly given to Debtor and that no charges were made for conflicted representation. The Bankruptcy and District Courts relied upon these false representations as bases for their Decisions and Orders that awarded Damon & Morey every penny of every fee application that it had ever made in the case, despite the Objections of the U.S. Trustee and the Debtor.

The Courts below could not consider critical issues with regard to the conflicted representation as the Debtor had no opportunity to present them. The incompleteness of the current record is a direct result of Damon & Morey's willful, calculated and wrongful actions to conceal from all of the Courts and from the Debtor itself the extent of its blatantly conflicted simultaneous representation of both the Debtor and its Lead Creditor. The discovery requests of the Debtor were denied by the Bankruptcy Court and the judgment made and affirmed despite the admission, but only partial disclosure, of the conflicted representation by Damon & Morey.

Additionally, the Courts below have never considered the Debtor's claims concerning Damon & Morey's failure to account for fees collected from third parties and for services which were not reasonably expected to benefit the Debtor.

The Debtor has been denied due process. The Debtor has and continues to maintain that Damon & Morey should be ordered to disgorge fees based upon its admitted continual conflicted representation which it only partially disclosed after the Lead Creditor had brought a malpractice action against it, in addition to crediting the Debtor for fees collected from third parties and fees paid in connection with services that were not provided for the benefit of the Debtor.

It is respectfully submitted that Section 10(e)(2) of the Federal Rules of Appellate Procedure which provides for supplementation of the record on appeal was enacted precisely for a case like this.

The rule provides, in pertinent part:

“if anything material to either party is omitted from or misstated in the record by error or by accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded: (A) on stipulation of the parties; (B) by the District Court before or after the record has been forwarded; or (C) by the Court of Appeals.”

Thus, considerable discretion is left to this Court to be exercised on the basis of the facts of each case. Ford v. Bernard Fineson Development Center, 81 F.3d 304, 307 (2d Cir. 1996). It is clear that where, as here, there are indisputable material facts, the existence of which has previously been concealed by Damon & Morey which undermine the propriety of the fee award, this Court should exercise its discretion to allow supplementation of the record in the interest of justice.

It would be manifestly unjust not to allow supplementation of the record with the proffered documents that show that the fee award failed to properly credit the Debtor for billings admitted to be for conflicted representation which were unilaterally and only partially adjusted solely by the wrongdoer itself. Additionally, the Debtor should be allowed to prove that Damon & Morey did not account for fees collected from third parties and fees for services not reasonably expected to benefit the Debtor.

It is well established that this Court may exercise its discretion to expand the record in order to avoid such an injustice. Schwan-Stabilo Cosmetics GmbH & Co. v. PacificLink Int’l Corp., 401 F.3d 28, 35 (2d Cir. 2005). Remedying a manifest injustice that has been worked upon the Debtor by its own attorney can only occur if this Court permits supplementing the record so that, for the first time in the course of this protracted litigation, a court of competent jurisdiction may fully hear all of the facts pertinent to considering Damon & Morey’s fee applications. Only with full and accurate disclosure of such facts, including the extent of the conflicted representation, which Damon & Morey has purposely

concealed, can any court of law make a rational and substantiated decision on the merits of Damon & Morey fee claims.

The gravamen of Debtor's objections include charges for actual conflicted representation by Damon & Morey, which caused definite and ascertainable monetary damage in the amount of at least seventy five thousand dollars (\$75,000) to the Debtor and are set forth in the documents that the Debtor requests be included in the record. It would be manifestly unjust not to supplement the record to include this additional information as to Damon & Morey's one-sided "corrections" that caused the Courts below to enter a judgment in an amount different than this Court's Mandate and bear directly upon the issues raised by the Debtor on appeal.

It is respectfully submitted that justice requires that this Court consider this supplemental information because it bears directly upon the integrity of the Bankruptcy Court and Code. The Bankruptcy Code requires that counsel disclose any conflict to the Court immediately upon discovery, not three (3) years after discovered by counsel or only if raised by others. Had Damon & Morey complied with their lawful obligations and promptly disclosed its conflicts to the Courts below, the record would now be complete. This Court should allow the Motion to Supplement the Record, which it undisputedly has the power to do, for only with a complete and accurate disclosure of the underlying conflicted representation can the merits of the fee application be equitably resolved. The Debtor does not wish to prolong and delay the conclusion of this matter with the present motion, but only seeks all that justice and due process require: a fair decision based upon all admissible probative evidence. This Court should not permit Damon & Morey to succeed in preventing the judiciary from considering its culpatory conduct that directly bears on the value of its services and, therefore, the propriety of the judgment

This Court has the inherent power to modify, set aside, vacate or otherwise reverse a judgment, order or decree on review and can remand same for further proceedings as may be just and proper under the circumstances. See, 28 U.S.C. §2106 (2007). This Court has the power to set aside a judgment where the judgment was procured by fraud. In re Long Island Lighting Co., 197 F.2d 709 (2d Cir. 1952). It is clear that in the present case, the judgment entered in favor of Damon & Morey was in fact procured by fraud and, therefore, it is within the bounds of this Court's inherent power to set aside the judgment. See Greater Boston Television Corp. v. FCC, 463 F.2d 268 (D.C. Cir. 1972).

Damon & Morey only maintained its appointment as counsel in the Bankruptcy Court because of its continued fraudulent misrepresentations which, if known and fully disclosed, would have rendered their continued representation of the Debtor in clear contravention of the Bankruptcy Code. See 11 USC §327 (2007). The Bankruptcy Code states that a trustee, upon court approval, may employ an attorney if that attorney's representation is in the best interests of the estate, and it does not represent or hold any interest adverse to the estate. See 11 U.S.C. §327(e). A patently adverse interest exists when the Debtor's attorney is also involved in the representation of a creditor to the same estate. Debtor asserts that a grotesquely adverse interest exists where its attorney has a contingency interest in an outcome against its client.

The Debtor respectfully submits that Damon & Morey's failure to disclose, let alone its active concealment, of material facts which, if fully disclosed, would have raised insurmountable barriers to its continued representation of the Debtor provide sound bases for this Court to review and vacate the current judgment as procured by fraud. There is no plausible explanation for Damon & Morey's failure to disclose its conflicted representation, as was its duty under the Bankruptcy Code, other than the logical inference that such information was concealed to procure a judgment from this Court by fraud and in an amount in excess of what Damon & Morey was entitled.

It appears that Damon & Morey's primary objections to the Debtor's Motion to Supplement the Record is its timing and supposed *res judicata* implications that approval of this Motion may have. Both of these arguments are without merit and are merely examples of Damon & Morey's continuing efforts to conceal material evidence from this Court. The fact that the Debtor's Motion was filed subsequent to the Bankruptcy Court Order closing the estate has no bearing on the merits of the current Motion. The content and issues involved therein are properly left to the jurisdiction of the District Court taking the appeal thereof which has been filed by the Debtor. Those proceedings are not before this Court and are irrelevant to the current Motion to Supplement. Debtor trusts that this Court recognizes Damon & Morey arguments for what they are: a misguided attempt to influence this Court with peripheral information which is merely presented to cloud the present issue and shield the fee award from critical analysis.

Damon & Morey's argument that the expansion of the record would implicate *res judicata* is similarly unavailing. The Debtor is not attempting to re-litigate the issues ruled upon below. It is merely seeking the due process that it is legally entitled to: an opportunity to be heard and to obtain a reasoned decision based on the merits of the underlying claims. Neither this Court, nor any Court below, can make a fair decision on the basis of a record which omits material facts hidden by Damon & Morey which strike at the very core of its judgment. The evidence that the Debtor now seeks to admit, although contended by Damon & Morey to have been previously known to the Debtor, has actually been only recently discovered. The Debtor was previously unaware that such evidence existed because the true extent of the actual conflict of interest was carefully concealed by a trusted attorney, with whom Damon & Morey admits had enjoyed "a special, long-standing relationship".

It is respectfully submitted that it would be manifestly unjust to allow the Debtor to suffer because of its former counsel's traitorous deception that actually included obtaining a contingent

pecuniary interest against the Debtor. The Debtor implores this Court to allow supplementation of the record directed towards a fair and full adjudication on the merits of the underlying action, which, because of Damon & Morey's nondisclosure or active concealment, has heretofore been unfeasible.

CONCLUSION

Based upon the foregoing it is respectfully submitted that the Motion to Supplement the Record should be granted and the motion of the Appellee be denied in its entirety.

Dated: Buffalo, New York
October 16, 2007

Respectfully submitted,
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