

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2014

5
6 (Argued: January 15, 2015 Decided: February 5, 2015)

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8 Docket No. 14-1144
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13 IN THE MATTER OF: ROBERT PLAN CORPORATION,
14

15 *Debtor.*
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17 _____

18 KENNETH KIRSCHENBAUM, Chapter 7 Trustee
19 of the Estate of the Robert Plan Corporation,
20

21 *Trustee-Appellant,*
22

23 v.
24

25 UNITED STATES DEPARTMENT OF LABOR,
26

27 *Appellee.*
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29 _____

30 Before:

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32 KATZMANN, *Chief Judge*, and LOHIER and DRONEY, *Circuit Judges*.
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34 Kenneth Kirschenbaum, a Chapter 7 bankruptcy trustee, appeals from
35 an order of the United States District Court for the Eastern District of New
36 York (Feuerstein, *J.*), holding that the Bankruptcy Court (Grossman, *B.J.*) did
37 not have jurisdiction to order that Kirschenbaum and his retained
38 professionals be compensated for their services using the assets of a 401(k)
39 plan governed by the Employee Retirement Income Security Act of 1974. We
40 **AFFIRM** the decision of the District Court.

1
2 STEVEN B. SHEINWALD (Kenneth Kirschenbaum,
3 Stacy R. Spector, Michael A. Sabella, *on the brief*),
4 Kirschenbaum & Kirschenbaum, P.C., Garden City,
5 NY, *for Trustee-Appellant*.

6
7 LEONARD H. GERSON, Trial Attorney (M. Patricia
8 Smith, Solicitor of Labor, Nathaniel I. Spiller,
9 Counsel for Appellate and Special Litigation, G.
10 William Scott, Associate Solicitor for Plan Benefits
11 Security, *on the brief*), United States Department of
12 Labor, Washington, DC, *for Appellee*.

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15 PER CURIAM:

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17 The issue we are asked to consider in this appeal is whether bankruptcy
18 courts have jurisdiction to award compensation to a Chapter 7 bankruptcy
19 trustee and his retained professionals out of assets in a 401(k) plan governed
20 by the Employee Retirement Income Security Act of 1974 (“ERISA”). We
21 conclude that they do not. Accordingly, we affirm the decision of the District
22 Court.

23 **BACKGROUND**

24 On August 25, 2008, The Robert Plan Corporation (“RPC”) and The
25 Robert Plan of New York Corporation (collectively, the “Debtors”) each filed
26 voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On
27 January 19, 2010, the Debtors’ cases were converted to cases under Chapter 7
28 of the Bankruptcy Code and appellant Kenneth Kirschenbaum was appointed

1 the Chapter 7 trustee for both cases.¹ Pursuant to 11 U.S.C. § 704(a)(11),²
2 Kirschenbaum also assumed the role of administrator of RPC's 401(k) plan
3 (the "Plan"), which was sponsored for the benefit of its employees and
4 governed by ERISA.

5 Kirschenbaum announced his intent to terminate the Plan and
6 distribute its funds to Plan participants. He sought authorization from the
7 Bankruptcy Court to retain the services of legal and accounting professionals
8 (collectively, the "professionals") to assist him in doing so and in otherwise
9 administering the Plan. Kirschenbaum and the professionals also sought to
10 be paid for their services using Plan assets.

11 In September 2010 the United States Department of Labor ("DOL") filed
12 an objection to Kirschenbaum's application. DOL argued that the Bankruptcy
13 Court lacked jurisdiction to approve compensation for Kirschenbaum and the
14 professionals using Plan assets. The Bankruptcy Court rejected DOL's
15 argument and held that it had jurisdiction to authorize Kirschenbaum's

¹ The Debtors' cases were substantively consolidated on September 9, 2010.

² Section 704(a)(11) provides in relevant part that "if, at the time of the commencement of [a bankruptcy] case, the debtor . . . served as the administrator . . . of an employee benefit plan, [the trustee shall] continue to perform the obligations required of the administrator." 11 U.S.C. § 704(a)(11).

1 requests. Kirschenbaum and the professionals then submitted fee
2 applications asking that they be paid using Plan assets first. Because the Plan
3 assets were insufficient to cover the full amount of the requested fees, they
4 also asked to be paid the remaining unpaid portion using the assets of the
5 Debtors' bankruptcy estates. The Bankruptcy Court granted the fee
6 applications by opinion dated August 20, 2012.

7 DOL sought leave from the District Court to file an appeal from the
8 interlocutory portions of the Bankruptcy Court's August 20, 2012 decision. In
9 April 2013 the District Court granted DOL's application for leave to appeal to
10 the extent that DOL sought a determination as to whether the Bankruptcy
11 Court had jurisdiction to order that the fee awards be paid from Plan assets.
12 In March 2014 the District Court reversed the Bankruptcy Court's August 20,
13 2012 decision, concluding that the Bankruptcy Court lacked jurisdiction.

14 Kirschenbaum timely appealed to this Court.

15 DISCUSSION

16 A district court's order in a bankruptcy appeal is subject to plenary
17 review. In re Colony Hill Assocs., 111 F.3d 269, 273 (2d Cir. 1997). We
18 undertake an independent examination of the bankruptcy court's findings,

1 reviewing its conclusions of law de novo and its findings of fact for clear
2 error. Id. The bankruptcy court’s jurisdiction is governed by 28 U.S.C.
3 §§ 1334 and 157(a). A bankruptcy court’s power to adjudicate matters in a
4 bankruptcy case turns in part on whether the proceedings are “core” or “non-
5 core.” See 28 U.S.C. § 157(b), (c).

6 Core proceedings are those that are found to be “arising under” the
7 Bankruptcy Code or “arising in” a bankruptcy case. MBNA Am. Bank, N.A.
8 v. Hill, 436 F.3d 104, 108-09 (2d Cir. 2006); see also 28 U.S.C. § 157(b).
9 Proceedings “arising under” the Bankruptcy Code are those “that clearly
10 invoke substantive rights created by federal bankruptcy law.” MBNA Am.
11 Bank, N.A., 436 F.3d at 108-09. Proceedings “arising in” a bankruptcy case are
12 those “claims that are not based on any right expressly created by [the
13 Bankruptcy Code], but nevertheless, would have no existence outside of the
14 bankruptcy.” Baker v. Simpson, 613 F.3d 346, 350-51 (2d Cir. 2010) (quotation
15 marks omitted).

16 In addition to having jurisdiction over “core proceedings,” a
17 bankruptcy court has jurisdiction to “hear a proceeding that is not a core
18 proceeding but that is otherwise related to a case under [the Bankruptcy

1 Code].” 28 U.S.C. § 157(c)(1). The standard for “related to” jurisdiction is
2 “whether the outcome of the proceeding could conceivably have any effect
3 upon the [debtors’] estate being administered.” In re Turner, 724 F.2d 338,
4 341 (2d Cir. 1983) (quotation marks omitted).

5 No “arising under” jurisdiction exists here. The Bankruptcy Court
6 relied on § 704(a)(11) of the Bankruptcy Code to assert that it had jurisdiction.
7 But § 704(a)(11) merely dictates that if the debtor (or an entity designated by
8 the debtor) served as the administrator of an ERISA plan at the
9 commencement of the debtor’s bankruptcy case then the trustee must
10 “continue to perform the obligations required of the administrator” upon his
11 appointment. 11 U.S.C. § 704(a)(11). Section 704(a)(11) neither alters the
12 substantive duties of ERISA plan administrators nor establishes substantive
13 rights regarding ERISA plans. Instead, § 704(a)(11) provides the “procedural
14 vehicle for the assertion of a right conferred by some other body of law” — in
15 this case, ERISA. In re U.S. Brass Corp., 110 F.3d 1261, 1268 (7th Cir. 1997).

16 Similarly, no “arising in” jurisdiction exists here. The payment of
17 compensation for ERISA plan administrators “is typically an issue that arises
18 outside bankruptcy. It does not depend upon bankruptcy for its existence,

1 nor does it involve an administrative matter that arises only in bankruptcy
2 cases.” In re AB & C Grp., Inc., 411 B.R. 284, 292 (Bankr. N.D. W. Va. 2009).

3 Finally, no “related to” jurisdiction exists. Kirschenbaum sought
4 compensation for work that he and his professionals conducted for the Plan,
5 to be paid out of Plan assets. However, 11 U.S.C. § 541(b)(7) explicitly
6 excludes ERISA plan assets from a debtor’s bankruptcy estate. See 11 U.S.C.
7 § 541(b)(7). Therefore, the outcome of the proceeding relating to
8 compensation could not conceivably have had any effect on the Debtors’
9 estates.³

10 CONCLUSION

11 For the foregoing reasons, we **AFFIRM** the decision of the District
12 Court.

³ Because the permission to file the interlocutory appeal was granted on the question of whether the Bankruptcy Court had jurisdiction to order fee awards be paid from Plan assets, we express no view about whether the Bankruptcy Court would have jurisdiction over an application from Kirschenbaum, as ERISA plan administrator, seeking payment from the Debtors’ estates for services rendered in administering the Plan.