

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
CAPITOL SUPPLY, INC.,)	CASE NO. BK90-81177
)	
DEBTOR)	CH. 7
)	Filing No. 604, 622

MEMORANDUM

Hearing was held on February 1, 1993, on the Objection to Claim of Westco by Thomas D. Stalnaker, Trustee. Appearing on behalf of the Trustee was Thomas Stalnaker of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., Omaha, Nebraska. Appearing on behalf of Westco was Norman H. Wright of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Omaha, Nebraska. This memorandum contains finding of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (B).

The Trustee of this Chapter 7 case has objected to a portion of Claim No. 334 filed by Westco to the extent that it claims administrative expense status for real estate taxes paid by Westco. The amount in question appears to be \$9,271.20. Westco has resisted and alleges that the payments made by Westco, although for real estate taxes, were, by contract between the debtor and Westco, rent pursuant to a real property lease agreement.

The debtor filed a Chapter 11 petition on or about February 8, 1990. Prior to the filing, the debtor had entered into a real property lease with Westco on December 30, 1987. The lease, in addition to normal real estate rental terms, provided, at paragraph 3, for a minimum fixed rent. In addition, the lease agreement provided at paragraph 14.1 the following: "Lessee shall pay as additional rent all taxes and assessments, general and special, and all other impositions, ordinary and extraordinary, of every kind and nature whatsoever which may be levied, assessed or imposed upon the real estate. . .which will become delinquent during the term of the lease." (emphasis added)

At Section 14.2 of the lease agreement the debtor was required to provide photostatic copies of receipts showing the

payment of all taxes within thirty days after the date that such taxes would have become delinquent if not paid.

At paragraph 19 of the lease, the lessor, Westco, was given the right, upon debtor's failure to pay taxes and assessments, to pay such taxes which "shall be considered additional rent due on the next rent date after such payment, together with interest at the rate of sixteen percent (16%) per annum from the date of advancement to the date of repayment by lessee." (emphasis added)

The debtor failed to pay the real property taxes that were due on December 31, 1989, but delinquent, for the second half, on or before August 1, 1990. During July of 1990, the landlord, Westco, paid the real property taxes as authorized by the lease document.

Eventually this case was converted to Chapter 7. A Chapter 7 trustee was appointed and he has objected to the claim for administrative expenses filed by Westco in the amount of the taxes paid in July of 1990 during the Chapter 11 case. It is the position of the Trustee that these taxes were assessed and levied in 1989 and were due on December 31, 1989. Since the taxes were due prepetition, they are a prepetition obligation and Westco, although it should be allowed a prepetition unsecured claim, should not be allowed an administrative expense claim in the Chapter 11 case.

The Court finds no factual basis for determining that Westco has a prepetition unsecured claim. The taxes were not paid prepetition by Westco. As between the debtor and Westco, the taxes were an obligation of the debtor through its agreement to pay them as additional rent. When they were not paid by the debtor pursuant to the terms of the lease agreement, the landlord made an advance for the taxes and treated that advance as additional rent as permitted by the contractual arrangement between the parties.

Every portion of the lease that deals with real estate taxes identifies the obligation for such taxes as rent. The obligation of the debtor to pay the taxes is not in a separate covenant for tax payments. It is in a rent covenant.

A similar factual situation occurred in Allbaugh v. United States, 184 F.2d 109 (8th Cir.), cert. denied, 340 U.S. 905, 71 S. Ct. 281 (1950). In that case, an Indian tribe located in Nebraska had leased certain real property for a particular amount per acre plus real estate taxes. The document, in language somewhat similar to the language of the lease agreement under

consideration in this case, provided that the lessee was to pay all taxes assessed against the land promptly when due and to send the receipts for such payment to a particular official.

The Eighth Circuit, at 112, stated:

By long-settled principles of landlord and tenant law, where a lessee has agreed to pay taxes as rental and does not make payment of them to the proper public authority when they are due, the amount thereof becomes a debt owing to the lessor and is collectible as such, like any other delinquent rent. . . .

We agree with the trial court that the language of the leases here clearly made the taxes a part of the rental.

The court went on to say at 113:

On this language, the provision for payment of taxes in the leases to be executed could no doubt have been drawn up as either a rental obligation or a separate covenant to pay taxes, but so far as appellants' rights are here concerned that negotiative question ceased to have existence when the lessee signed written leases which clearly and expressly made the taxes "rental". . . .

The date the taxes became due under Nebraska law, although having an impact upon the landlord by virtue of the creation of a lien against the real property in favor of the county, is not relevant with regard to what the obligation of the debtor was concerning such taxes. The obligation of the debtor was to pay the taxes as additional rent. When Westco paid the taxes, it was authorized by the contractual arrangement between the parties to treat such payment as an advance of rentals and to be compensated in the form of additional rent for such advance.

The payment was post petition on a post-petition expense. It was for rent and was beneficial to the estate because it cured a post-petition default in the real property lease agreement.

The objection to claim is overruled and the claim shall be allowed as an administrative expense claim in the Chapter 11 case pursuant to 11 U.S.C. § 503(b)(1)(A).

Separate journal entry to be entered.

DATED: March 1, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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)	
CAPITOL SUPPLY, INC.,)	CASE NO. BK90-81177
)	A
<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 604, 622
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: March 2, 1993
<u>Defendant(s)</u>)	HEARING DATE: February
)	1, 1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Objection to Claim of Westco.

APPEARANCES

Thomas Stalnaker, Attorney
Norman H. Wright, Attorney

IT IS ORDERED:

The objection to claim is overruled and the claim shall be allowed as an administrative expense claim in the Chapter 11 case pursuant to 11 U.S.C. § 503(b)(1)(A). See memorandum filed this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge