

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
 PRIDE FOODS, INC., )  
 )  
 Debtor. )  
 )  
 )  
 DAISLEY PACKAGING CORPORATION, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 PRIDE FOODS, INC., )  
 )  
 Appellee. )

CV. 82-0-466  
BK. 81-1733

MEMORANDUM OPINION

**FILED**  
DISTRICT OF NEBRASKA  
AT \_\_\_\_\_ M  
MAY 26 1983  
William L. Olson, Clerk  
By \_\_\_\_\_ Deputy

This action is presently before the Court on appeal from an order of the United States Bankruptcy Court for the District of Nebraska<sup>1</sup> entered on August 9, 1982. The appellant, Daisley Packaging Corporation (Daisley) appeals the bankruptcy court's order denying Daisley's application for prepetition administrative expenses. The bankruptcy court found that Daisley did not meet the requirements of the definition of custodian under the Bankruptcy Code § 101(10) and therefore, could not be paid administrative expenses pursuant to Bankruptcy Code § 503(b). This Court, after reviewing the record submitted on appeal and the briefs filed by the

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1. The Honorable David L. Crawford, Bankruptcy Judge, presiding.

respective parties,<sup>2</sup> holds that the order of the bankruptcy court should be affirmed for the reasons hereinafter stated.

I.

The central facts are not in dispute. On July 29, 1981, four vehicles belonging to the debtor, Pride Foods, Inc., and subject of a prejudgment attachment order issued by the District Court of Douglas County, Nebraska, were released to the custody of Daisley for storage pending further order of that court. On August 28, 1981, Pride Foods, Inc., filed a petition for relief under Chapter 7 of the Bankruptcy Code. In December, 1981, pursuant to 11 U.S.C. § 543, the vehicles were turned over to the trustee in bankruptcy. Subsequently, Daisley filed application for allowance of the following administrative expenses pursuant to Bankruptcy Code, §§ 503(b)(3)(E) and 543(c)(2). Daisley sought \$3,832 for reimbursement of actual and necessary costs and expenses, \$1,320 for attorney fees, and \$178.56 for costs and reimbursement for legal and professional expenses incurred as a result of obtaining and preserving the subject property of the debtor.

The trustee for Pride Foods, Inc., objected to the application for allowance for administrative expenses. The bankruptcy court overruled the objection because the Bankruptcy Code § 503 does provide that certain qualifying prepetition administrative expenses may be allowed. However,

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2. Although Bankruptcy Rule 809 makes provision for oral argument on appeal, no request was made, and the Court is of the opinion that the issue is well briefed and no argument is necessary.

after a hearing on the matter, the court found that Daisley was not a custodian within the meaning of Bankruptcy Code § 101(10) and denied the application. Thereafter, a timely appeal was filed by Daisley and is now before this Court.

## II.

The sole issue on appeal is whether a prepetition creditor who held property under a state court's prejudgment attachment order is a "custodian" as defined by the Bankruptcy Code § 101(10) for purposes of an administrative expense application.<sup>3</sup> On appeal, the bankruptcy judge's findings of fact are "entitled to stand unless clearly erroneous." However, with respect to the question at issue in this appeal, which is one that involves consideration of a mixed question of law and fact, the clearly erroneous rule is not applicable. *In re American Beef Packers, Inc.*, 457 F.Supp. 313, 314 (D.Neb. 1978). A broader scope of review must be undertaken because mixed questions of fact and law cannot be approved without this Court's independent determination of the law. *In re Werth*, 443 F.Supp. 738, 739 (D.Kansas 1977), *citing Stafos v. Jarvis*, 477 F.2d 369, 372 (10th Cir.), *cert. denied*, 414 U.S. 944 (1973).

Daisley claims custodial status as defined in 11 U.S.C. § 101(10)(C). Subpart (C) defines a custodian as a

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3. The Court is not called upon, nor does it consider, an attaching creditor's status for § 543 turnover purposes.

trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

Daisley's principal argument is that because of the prejudgment attachment order issued by the District Court of Douglas County, it was acting as agent for Pride Foods, Inc., by appointment or authorization through the state court. Daisley claims that it was acting not only for its own benefit but, by statute, for the benefit of all the creditors to prevent Pride Foods from disposing of the property. Further, because of the terms of the state court order, Daisley maintains that it had no permissive authority to use or dispose of the property for its own benefit, and consequently was custodian of the property for the benefit of all creditors. As authority, Daisley relies on a bankruptcy court case which held that an ordinary secured creditor in possession is a "custodian" under the Code for purposes of a § 543 turnover. *In re Williams*, 6 B.R. 789 (Bkrtcy. E.D.Mich. 1980).

The bankruptcy court was not persuaded by Daisley's argument that a court-ordered prejudgment attachment "appoints" or "authorizes" a secured creditor to take charge of the property for the purpose of enforcing a lien. In the memorandum opinion, reported at 22 B.R. 356 (Bkrtcy, D.Neb. 1982), the bankruptcy court found that Daisley was neither trustee, receiver, nor agent under contract or law and that all the actions taken and the money expended by Daisley were solely in its own self-interest. Judge Crawford declined to follow *In re Williams, supra*. Instead, the

bankruptcy court adopted the rationale of *In re Lewis*, 12 B.R. 106 (Bkrctcy. N.D.Ga. 1981), which held that a secured creditor holding repossessed property as a result of self-help enforcement of its security interest was not a custodian. Quoting from *Lewis*, the bankruptcy court expressed concern that:

[I]f the definition of "custodian" . . . is not strictly and narrowly construed, the situations to which it could be applied are limitless . . . there would be little reason from excluding a custodian from . . . § 542 . . . and little reason for § 543 . . . Further, it seems Congress saw a custodian as one who received possession of the property as a custodian, not as a repossessing creditor who, upon the filing of a bankruptcy case by its debtor, suddenly by some metamorphic process became a custodian.

22 B.R. at 358.

A review of the cases and the discussion of the legislative history of the relevant bankruptcy provision supports the bankruptcy court's decision. *In re Lewis* has been affirmed by the Eleventh Circuit Court of Appeals. *Flournoy v. City Finance of Columbus, Inc.*, 679 F.2d 821 (11th Cir. 1982). In that case a secured creditor repossessed a debtor's automobile without legal process as permitted by the state law and the court held that the creditor was not a "custodian" within the meaning of the Bankruptcy Act of 1978. The Eleventh Circuit reasoned that the creditor was not an agent of the debtor and that the legislative history of section 101(10) established that this definitional section did not change substantive bankruptcy law but was intended to facilitate drafting. 679 F.2d at 824.

A similar analysis was relied upon by the Second Circuit Court of Appeals in *United States v. Whiting Pools, Inc.*, 674 F.2d 144 (2d Cir. 1982). In that case, the Court concluded that the Internal Revenue Service, which had seized property pursuant to a levy for unpaid withholding and FICA taxes was not a "custodian." Like the *Lewis* court, the Second Circuit considered whether the IRS was an agent of the debtor and the legislative history of the definitional provision of the Bankruptcy Code. 674 F.2d at 147.

Applying this same analysis to the facts of this case, the Court must consider whether Daisley was acting as an agent of the debtor when it took possession of the vehicles pursuant to the state prejudgment attachment order. The Restatement of Agency 2d § 1 (1958) defines agency as "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." This is the law in Nebraska also. *Reeves v. Associates Financial Services Co., Inc.*, 247 N.W.2d 434, 197 Neb. 107 (1976). Custody of property by a creditor under a prejudgment attachment order is imposed by law but is usually contrary to the debtor's desires. It is possible that a person may be an agent under § 101(10)(C) when the relationship is created by law but it would be a strained reading to interpret this as including an attaching creditor. See *Whiting Pools, Inc.*, *supra*, 674 F.2d at 148. In an attachment proceeding brought pursuant to the Nebraska statute, the creditor is plaintiff and the debtor is the defendant, Neb.Rev.Stat. § 25-1001 (Reissue of 1979), and as such, are adverse

parties. The restrictions placed upon the attaching creditor as to what it may or may not do with the property cannot be construed so as to transform the creditor into the debtor's agent.

Daisley makes the additional argument that as an attaching creditor, it was an agent who took charge of the debtor's property for the purpose of administering it for the benefit of all the debtor's creditors. The bankruptcy court made a factual finding that Daisley was pursuing its own interests solely and this Court cannot say that finding was "clearly erroneous." Further, a creditor acting on his own benefit is not within the ambit of the intent of Congress in defining a custodian.<sup>4</sup>

It would seem that Congress intended that definition to apply to a third-party action, not for the benefit of one creditor, but rather for the benefit of all creditors. See *In re Meyer's Inc.*, 15 B.R. 390, 392 (Bkrtcy. S.D.Cal. 1981). Here, when Daisley attached the debtor's property it acted in its own self interest and the sums expended by it were done so as its own risk and at the risk that the debtor might file a petition for relief under the Bankruptcy Code.

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4. The comment to Section 101(10) is as follows:

Paragraph (11) [now (10)] defines "custodian." There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee. 11 U.S.C.A. § 101(10) (Notes).

Also, it must be noted for purposes of this appeal that the issue of Daisley's custodial status is examined within the context of an application for administrative expenses. Section 503(b)(1)(A) expenses must be the actual and necessary costs and expenses of preserving the estate. Only those expenses incurred to preserve the estate for the benefit of all creditors are compensable as administrative expenses. *In re O.P.M. Leasing Services Inc.*, 23 B.R. 104, 121 (Bkrtcy. S.D.N.Y. 1982). This is consistent with the policy of the Bankruptcy Code to keep fees and administrative expenses at a minimum, so as to preserve the estate for the benefit of all of its creditors. 3 Collier on Bankruptcy ¶ 503.04 at 503-16 (15th Ed. 1982).

For the foregoing reasons, the Court adopts the position of the bankruptcy court that a prepetition creditor who held property under a state court prejudgment attachment order is not a custodian as defined by Bankruptcy Code § 101(10) for purposes of an administrative expense application.

Accordingly, a separate order affirming the August 9, 1982, order of the bankruptcy court and dismissing the appeal will be entered contemporaneously with this memorandum opinion.

BY THE COURT:

*Albert S. Artaz*

JUDGE, UNITED STATES DISTRICT COURT