

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:) CASE NO. BK02-81632
)
M & S GRADING, INC.,) CH. 7
)
Debtor(s).)

ORDER

At Filing No. 754, the Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan and the Contractors, Laborers, Teamsters and Engineers Pension Plan (“Plans”) have filed a motion for removal of trustee. An affidavit hearing on the motion was continued at the request of the movants until the court had ruled on their request for authorization to conduct a Rule 2004 examination. The court has now, by separate order, denied the motion to conduct a Rule 2004 examination and has denied a motion to compel discovery.

The motion to remove the trustee is now denied without a hearing.

The motion lists the following “causes” for removal of the trustee:

1. Breach of fiduciary duty in failing to proceed to recover from First National Bank of Omaha amounts due and owing to the bankrupt estate under the provisions of the Bankruptcy Code § 506(c).
2. Breach of fiduciary responsibility and capacity in failing to collect money due and owing M & S Grading, Inc., for work performed during the months of November and December 2004 and January 2005, while at the same time representing to the Court that no payments were being made to the movants herein because of lack of funds.
3. Knowing disobedience and failure to obey the Court Order of December 13, 2004, requiring payment to the Funds of contributions due and owing for health and welfare payments and pension fund payments.
4. Failure to maintain an accounting as to what money was collected by the trustee and a failure to enter any amounts collected for accounts receivable made by the trustee on the books and records of M & S Grading, Inc.
5. Delivery to the First National Bank of Omaha of checks payable to M & S Grading, Inc., for contract work performed before the Stay Order was terminated.
6. Delivering or causing delivery of the shop equipment to the First National Bank without any inventory and no record of the amount received by the First National Bank for the sale of the shop equipment.
7. Making payments to the First National Bank of Omaha in December 2004 and January 2005 during the time the Stay Order was in effect.
8. Failure to file sufficient and accurate operating reports to the U.S. Trustee.

9. Conflict of interest as trustee for Earl Brice Equipment, LLC.

A trustee is not required to bring an action against a secured creditor under § 506(c). That section provides:

The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

In other words, if the secured creditor receives a benefit from the services of the trustee in liquidating the secured creditor's collateral, the trustee has the right to bring an action to "surcharge" the secured creditor for the services rendered. In this case, the trustee was appointed December 21, 2004. He operated the business for a short time thereafter and concentrated his efforts on collecting accounts receivable and selling assets once the business was shut down. He negotiated for the use of cash collateral in January of 2005, and entered into an agreement with the bank concerning the allocation of accounts receivable proceeds, including the use by the debtor of a small percentage of such proceeds. To file or not to file an action under § 506(c) is within the business discretion of the trustee and it is not a breach of fiduciary duty to fail to bring such an action. See PW Enter., Inc. v. State of North Dakota (In re Racing Servs., Inc.), ___ B.R. ___, 2007 WL 704984 (B.A.P. 8th Cir. Mar. 9, 2007) (suggesting in *dicta* that derivative standing is available in the Eighth Circuit if trustee is unwilling or unable to pursue claim); In re Suntastic USA, Inc., 269 B.R. 846, 850 (Bankr. D. Ariz. 2001) (a trustee may refuse to pursue a § 506(c) claim if there is no conceivable benefit to the estate).

Although the Plans' representatives believe the trustee failed to collect accounts receivable for work performed during the months of November and December 2004 and January 2005, the record reflects otherwise. Particularly with regard to the snow removal work in January of 2005, the trustee or the bank collected well over \$100,000 from the City of Omaha and the Airport Authority and Connectivity Solutions. The bank, which had a security interest in all of the accounts receivable, has not complained that legitimate accounts receivable remain uncollected.

The trustee was aware of the court order of December 13, 2004, which directed the debtor to make payments to the Funds. That order, Filing No. 516, stated:

The debtor has a contractual and statutory duty to timely make the contributions. If it is unable to do so, perhaps it should consider closing down. There is a motion to convert this case to Chapter 7 now pending. There is also a confirmation hearing scheduled. The subject of this motion [to compel timely payments] will be considered at the hearing on the motion to convert and at the hearing on confirmation. In the meantime, debtor is ordered to comply with its obligation to the Funds.

It has been the position of the trustee that at the time he was appointed in late December of 2004, and thereafter, there were no unencumbered monies which could have been used to pay the Funds. That is a disputed fact as far as the Plans are concerned. However, even if that order applied to the trustee, and even if there were sufficient monies on hand to make the payments, the trustee's failure to make the payment could make him subject to sanctions in some form, but removal at this late date and under the real circumstances of this case would not benefit any party.

The Plans want money now for amounts that were due in 2004 and early 2005. There is no money which can be distributed to the Plans whether the trustee is removed or not.

Grounds 4-7 suggest the trustee should be removed because he allowed the First National Bank of Omaha, the secured creditor, to take possession of accounts receivable and equipment. The bank had a perfected security interest in all of the assets. The trustee negotiated with the bank with regard to the collection of accounts receivable and the sale of equipment. There is nothing improper about the trustee's actions.

Ground #8, the "failure to file sufficient and accurate Operating Reports to the U.S. Trustee," is not a basis for removal of the trustee. Although late, and obviously not to the satisfaction of the Plans, the trustee did file operating reports which have been considered adequate by the United States Trustee.

Finally, the Plans suggest that the trustee has a conflict of interest because he is also the trustee for a related company, Earl Brice Equipment, LLC. If the two companies were continuing to operate under the authority of the trustee, it is possible that a conflict of interest could arise. However, as mentioned, the trustee did not operate the business for any significant length of time. Earl Brice Equipment, LLC, was the owner of the grading equipment used by this debtor. This debtor leased that equipment from Earl Brice Equipment, LLC. Both Caterpillar Finance Corporation and First National Bank of Omaha had perfected liens in the equipment owned by Earl Brice Equipment, LLC and leased to the debtor. When the trustee closed down the business, he and First National Bank of Omaha, Caterpillar, and Douglas County, Nebraska, which claimed a personal property tax lien, agreed on the procedure for the sale of the equipment and on the division of the proceeds among the lien creditors. No conflict exists.

Removal of the trustee is not in the best interest of the estate and is not of any benefit to the Plans. There is no money available for distribution to the Plans, even if the trustee is removed and another trustee takes every action the Plans have demanded of this trustee.

IT IS ORDERED that the Motion to Remove the Trustee, Filing No. 754, is denied.

DATED: May 24, 2007

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

T. Randall Wright
*Malcolm Young
*David Selby
Robert Lepp
Albert Kerkhove
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.