

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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

MEMORANDUM

Hearing was held in Omaha, Nebraska, on April 20, 2009, regarding Filing #863, Application for Administrative Expenses, filed by Contractors, Laborers, Teamsters and Engineers Health and Welfare Plans; Filing #866, Objection, filed by U.S. Trustee Patricia Fahey; and Filing #869, Objection, filed by Chapter 7 Trustee James Killips. Stacey L. Hines and T. Randall Wright appeared for the Chapter 7 trustee, Jerry Jensen appeared for the U.S. Trustee, and Maynard H. Weinberg appeared for Malcolm Young on behalf of the Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

This case was initiated as a Chapter 11 reorganization. Debtor was a corporation that engaged in commercial earth-moving services. It employed union equipment operators and it entered into one or more collective bargaining agreements and benefit plans with the union members. The debtor was required, pursuant to the various plans, to make monthly contributions to the trustees of the plans for the benefit of the equipment operators. Operations ceased in January of 2005, and the case was converted to Chapter 7 on June 13, 2005. During the Chapter 11 case, the debtor became delinquent on contributions owed to the plans in the amount of \$116,341.63. The Chapter 7 trustee agrees that such amount is an administrative expense under 11 U.S.C. § 503(b)(1) as the Bankruptcy Code read prior to the 2005 amendments.

It is the position of the plans that, in addition to the amount listed above for delinquent contributions, the plans have a right to treatment as administrative expenses under § 503(b)(1)(A), interest on the delinquent contributions, liquidated damages, and attorney fees, all of which are allowed, or mandated, under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(g). In addition, the plans suggest that any such expenses, particularly attorney fees, which were incurred after the conversion to Chapter 7 should be given first priority under 11 U.S.C. § 726(b).¹

I conclude that the claim of the plans includes the amount of the delinquent contributions and the ancillary damages resulting from the delinquency. That is, interest at the rate provided for in the plans, or, if no such rate is provided, the statutory rate provided under § 6621 of Title 26; liquidated damages in an amount not in excess of 20% of the unpaid contributions; and reasonable attorneys' fees and costs. Since the ancillary damages are included as part of the claim, I conclude that they also should be given Chapter 11 § 503(b)(1)(A) administrative expense priority.

¹That section, pre-2005 amendment, provides in relevant part: "[I]n a case that has been converted to this chapter under section 1009, 1112, 1208, or 1307 of this title, a claim allowed under section 503 (b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion[.]"

On the other hand, I deny that portion of the request of the plans which asserts that any portion of the ancillary damages should receive priority under 11 U.S.C. § 726(b).

I. FINDINGS OF FACT

The debtor became delinquent in its plan contributions during the pendency of the Chapter 11 case. During that portion of the case, as well as during the post-conversion portion of the case, the plans vigorously attempted to collect the unpaid contributions and to obtain orders requiring the debtor and/or the Chapter 11 trustee and the Chapter 7 trustee to make the payments or pursue entities that may have received payments which should have gone to the plans as mandatory contractual contributions. The plans filed numerous motions, most of which were objected to either by the debtor or by the Chapter 11 trustee or, eventually, by the Chapter 7 trustee. Hearings were held on all of the motions and objections and after the court rendered its decision on such motions, many of the decisions were appealed by the plans. Several of the decisions were appealed to the Court of Appeals for the Eighth Circuit. The plans were unsuccessful at the trial level, the intermediate appellate level, and at the circuit court level.

All of the attorney fees incurred by the plans arose from the perceived need of the plan trustees to attempt to collect the unpaid contributions which accrued during the pendency of the Chapter 11 case. Some of the fees were incurred during the Chapter 11 case and some were incurred after conversion to Chapter 7. None of the attorney fees were incurred as part of an effort by the plans to aid in the administration of the liquidation of the assets of the debtor in the Chapter 7 context.

Similarly, any interest that the plans have earned on the unpaid contributions has accrued totally as a result of the fact that the debtor became delinquent during the Chapter 11 case. ERISA, at 29 U.S.C 1132(g), provides for interest on the unpaid contributions. Some of that interest accrued during the Chapter 11 case and some accrued after conversion to Chapter 7.

The same is true with regard to the liquidated damages. Those are provided by statute, based totally on the amount of the unpaid contributions which became delinquent during the Chapter 11 case. The liquidated damages have nothing to do with the Chapter 7 case.

II. CONCLUSIONS OF LAW and DISCUSSION

A. Chapter 11 Administrative Expenses per §503(a)(1)

The Bankruptcy Code at § 503 regarding allowance of administrative expenses, as it read prior to its amendment in 2005, provides:

(a) An entity may timely file a request for payment of an administrative expense

(b) After notice and a hearing, there shall be allowed administrative expenses . . . including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, commissions for services rendered after the commencement of the case[.]

The unpaid contributions are part of the compensation package of the equipment operators and therefore fall under § 503(b)(1)(A) as wages. The benefit plans that provided for the employer

to make contributions to the plans are governed by the federal statute known as ERISA, 29 U.S.C. § 1001 *et seq.* Under ERISA, the plan trustees are fiduciaries for the benefit of the employees. Concerning actions brought by the trustee in an attempt to collect unpaid contributions, ERISA, at § 1132(g) of Title 29, provides, in part:

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

- (A) the unpaid contributions,
- (B) interest on the unpaid contributions,
- (C) an amount equal to the greater of –
 - (i) interest on the unpaid contributions, or
 - (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
- (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
- (E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plans, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C. § 1132(g).

That section refers to section 1145 of Title 29, which states:

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145.

The trustee argues that there is no provision in the Bankruptcy Code, and particularly under § 503, that provides for interest, liquidated damages or attorney's fees to be paid on an administrative expense allowable under § 503(b)(1)(A). In addition, the trustee suggests that administrative expenses should be allowed only on claims for activity that benefitted the estate, and not for activities that benefitted only the claimant.

Contrary to the position taken by the trustee, one needs only to look at tax cases and tax claims requesting administrative expense priority to find that ancillary damages, such as interest and penalties, are regularly provided administrative expense priority, even though such interest and penalties did not benefit the estate. See, e.g., United States v. Annett Ford, Inc. (In re Annett Ford, Inc.), 64 B.R. 946 (D. Neb. 1986), where Judge Beam, Chief District Judge, reversed the judgment of the bankruptcy court and held that, like the taxes themselves, penalties and interest on unpaid payroll taxes directly arose from the debtor's post-petition business activities, and were part of the foreseeable risk the creditor accepted when it agreed to let the business continue. The taxes, penalties and interest came as a package. All three operated to the benefit of the secured creditor

and should be paid out of the liquidation fund. Following such guidance, this court in In re Parmenter, 124 B.R. 565 (Bankr. D. Neb. 1990), granted administrative expense priority in the form of interest accruing on post-petition property taxes. Similarly, penalties accrued on post-petition tax liability were granted § 503(b)(1) administrative expense priority in In re Best Refrigerated Express, Inc., 192 B.R. 503 (Bankr. D. Neb. 1996).

There does not appear to be any case law in this circuit concerning the treatment of ancillary statutory damages arising from the failure of a debtor to pay post-petition employee benefit contributions. However, the Bankruptcy Appellate Panel of the Ninth Circuit in Teamsters Industrial Security Fund v. World Sales, Inc. (In re World Sales, Inc.), 183 B.R. 872 (B.A.P. 9th Cir. 1995), dealt with the exact same issue that is before this court, that is, whether the ancillary damages should be granted administrative expense treatment. In the World Sales case, the debtor filed a Chapter 11 petition and ceased business operations eighteen days later. The employees' benefit plan sought administrative priority payment for the debtor's monthly contribution to its employees' health plan and the damages due on default under the terms of the debtor's unrejected collective bargaining agreement and ERISA. The BAP held that the unpaid contribution was an administrative expense and the attorney fees generated in an attempt to collect the unpaid contributions were part and parcel of the claim by virtue of the statutory provision at 29 U.S.C. § 1132(g). The terms of the collective bargaining agreement in that case imposed on the debtor certain obligations if contributions were not timely paid. Those obligations were incurred post-petition. The obligations were governed by ERISA and included the damages which would arise upon failure of the debtor to comply with the terms of the collective bargaining agreement and the plans.

Relying on the analogous treatment of taxes, interest, and penalties and the reasoning of World Sales, supra, I find that the interest which accrued prior to the conversion to Chapter 7; liquidated damages in the amount of \$23,200, representing 20% of the delinquent contributions; and reasonable attorney fees are granted administrative expense status. The plans may supplement the record to calculate interest from the date the contributions became delinquent to the date of conversion.

In support of the allowance of all of the attorney fees incurred in the attempt to collect the delinquent contributions, the plans have provided an opinion of the Department of Labor, Opinion 78-28 A, 1978 ERISA LEXIS 4 (Dec. 5, 1978), and a recent case, Solis v Plan Benefit Services, Inc., ___ F. Supp. 2d ___, 2009 WL 799092 (D. Mass. Mar. 20, 2009), for the proposition that the plan trustees are absolutely required by law to do all in their power to collect the delinquent contributions. It is the position of the plans that the legal requirement to attempt to collect the contributions is the basis for all of the appeals, adversary proceedings, motions to remove the trustee, and the incurrence of more than \$500,000 in legal fees to collect \$116,000 in contributions, plus approximately \$23,000 in liquidated damages, plus interest. However, as shown above, the authorizing ERISA statute allows the award of "reasonable attorney fees," not necessarily "all" attorney fees incurred.

The Department of Labor opinion and the Plan Benefit Services case cited above make it clear the law requires plan trustees to attempt to collect the contributions. Neither the legal opinion nor the case require the trustees to try to get blood out of a turnip, which is exactly what has occurred here. The debtor's assets were encumbered by one or more liens. The debtor, although permitted by the lienholders to use cash collateral to pay the employee wages and make the benefit contributions, breached its duty and paid other operating expenses, but not the plan benefit contributions. It ran out of cash and had no unencumbered assets or income stream. The plans began a litigation war with the trustee and the major secured creditor in an attempt to get those

entities to pay the contributions. As mentioned above, motions, objections, adversary proceedings and appeals have been ongoing since January of 2005, even though the estate had no funds until a relatively recent settlement of some avoidance litigation. The estate, now in Chapter 7, still does not have sufficient funds to pay the Chapter 7 and Chapter 11 administrative expenses in full, no matter the outcome of this contested matter.

The requested fees, although deemed necessary out of an abundance of caution by counsel and the plan trustees, are not "reasonable" as that term is used in the ERISA statutory section authorizing the award of fees for attempts to collect the contributions. Other than interest on the delinquent contribution, the most the collection litigation could have been anticipated to return to the plans was the amount of the delinquent contributions plus 20% statutory liquidated damages. Once the fees incurred reached that maximum, it should have been clear that the pursuit was futile, because there were insufficient funds available to make the plans whole. The plans shall be awarded attorney fees as an administrative expense in the amount of \$138,200, which is the approximate sum of the delinquent contributions and the liquidated damages.

B. Chapter 7 Administrative Expense Claim Per §726(b)

The plans argue that much of their attorney fees and interest have been incurred or have arisen during the Chapter 7 case and should be given priority payment treatment ahead of all Chapter 11 administrative claims per the specific language of §726(b). That section generally provides for distribution to claimants in Chapter 7 cases and gives first priority to administrative expenses awarded under § 503(b) in the Chapter 7 case over administrative expenses awarded in another chapter. In this case, all of the attorney fees and interest are directly related to, and actually a part of, the administrative expense claim of the delinquent contributions, which is an allowed administrative expense against the Chapter 11 estate. There is no legal or factual basis to convert any portion of such claim to one against the Chapter 7 estate. Varsity Carpet Servs., Inc. v. Richardson (In re Colortex Indus., Inc.), 19 F.3d 1371, 1384 (11th Cir. 1994) (interest accruing pre-conversion on administrative claims is entitled to administrative priority but post-conversion interest is not); In re Olympia Holding Corp., 250 B.R. 136, 142 (Bankr. M.D. Fla. 2000) (post-conversion interest on employee benefit plans' administrative expense claim is payable as a general unsecured claim).

Separate order to be entered.

DATED: July 27, 2009

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
Stacey L. Hines
T. Randall Wright
*Maynard H. Weinberg
United States Trustee

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

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ORDER

Hearing was held in Omaha, Nebraska, on April 20, 2009, regarding Filing #863, Application for Administrative Expenses, filed by Contractors, Laborers, Teamsters and Engineers Health and Welfare Plans; Filing #866, Objection, filed by U.S. Trustee Patricia Fahey; and Filing #869, Objection, filed by Chapter 7 Trustee James Killips. Stacey L. Hines and T. Randall Wright appeared for the Chapter 7 trustee, Jerry Jensen appeared for the U.S. Trustee, and Maynard H. Weinberg appeared for Malcolm Young on behalf of the Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan.

IT IS ORDERED: The application for administrative expenses by the Contractors, Laborers, Teamsters & Engineers Health and Welfare Plans (Fil. #863) is granted as explained in the memorandum of today's date. The memorandum filed contemporaneously with this order is not final for appeal purposes. The plans may submit a statement showing the total amount itemizing the allowed attorney fees, the liquidated damages, and interest on the delinquent contributions only, to the date of conversion, with a stated interest rate identified as defined in the plans or the statute. A final order will then be filed.

DATED: July 27, 2009

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

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T. Randall Wright
*Maynard H. Weinberg
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