

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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

ORDER

Hearing was held in Omaha, Nebraska, on February 26, 2007, on a motion to commence litigation (Fil. #729) by the Contractors, Laborers, Teamsters & Engineers Health and Welfare and Pension Plans, and resistances by First National Bank of Omaha (Fil. #731) and the debtor’s Chapter 7 trustee (Fil. #732). T. Randall Wright appeared for the Chapter 7 trustee, Malcolm Young & David Selby appeared for the plans, Richard Myers & Robert Lepp appeared for First National Bank of Omaha, Albert Kerkhove appeared for the Internal Revenue Service, and Jerry Jensen appeared for the United States Trustee.

The union’s health & welfare and benefit plans seek permission from the court to pursue litigation against First National Bank of Omaha to equitably subordinate the bank’s claim, set aside allegedly excessive adequate protection payments, and recover money for the plans and for the bankruptcy estate. Their authority for this is Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000), where the Supreme Court stated that only trustees or debtors-in-possession may bring an action under 11 U.S.C. § 506(c) to recover from property subject to a security interest the administrative expenses of preserving property of the estate.

The Supreme Court declined to consider the question of whether a court could grant a derivative right to act in the trustee’s stead to other interested parties. 530 U.S. at 13 n.5. Existing Eighth Circuit precedent regarding other causes of action belonging solely to the trustee recognizes a creditor’s standing to pursue the claims upon a showing “that the trustee cannot be relied upon to assert such claims[.]” Nangle v. Lauer (In re Lauer), 98 F.3d 378, 388 (8th Cir. 1996) (avoidance of a preferential transfer). See the discussions in PW Enter. Inc. v. North Dakota (In re Racing Servs., Inc.), ___ B.R. ___, 2007 WL 704984, at *2-4 (B.A.P. 8th Cir. Mar. 9, 2007), and In re Newcorn Enter. Ltd., 287 B.R. 744, 747-50 (Bankr. E.D. Mo. 2002).

The trustee, the Internal Revenue Service, the United States Trustee, and the bank all oppose the motion. As the holder of the right to prosecute a cause of action, the trustee must weigh the merits of the action, the likelihood of success, the litigation costs, and the net benefit to the estate. Cambridge Tempositions, Inc. v. Cassis (In re Cassis), 220 B.R. 979, 983 (Bankr. N.D. Iowa 1998) (citing In re Feldhahn, 92 B.R. 834, 836 (Bankr. S.D. Iowa 1988)). Here, the trustee has evaluated those factors and, exercising sound business judgment and in consultation with competent bankruptcy counsel, has concluded that litigation against the bank is unlikely to be successful. The IRS, which holds a large priority claim and would receive the bulk of any recovery by the estate, has reached the same conclusion. The trustee and other parties have expressed weariness with the

seeming onslaught of documents filed by the plans in numerous attempts to recover funds from the debtor, principals of the debtor, and certain creditors of the debtor, and believes this to be yet another attempt to browbeat someone into giving them money without regard for the statutory distribution scheme.

When presumably objective parties such as other creditors and the U.S. Trustee agree with the Chapter 7 trustee that an action against the bank is ill-advised because it is unlikely to benefit the bankruptcy estate, it weighs heavily in favor of denying the plans' motion.

To the extent that the plans are seeking equitable subordination of the bank's claims, § 510 does not limit who may file such an action, and court authorization to do so is unnecessary. Racing Servs., Inc., 2007 WL 704984, at *5.

IT IS ORDERED: The motion to commence litigation (Fil. #729) by the Contractors, Laborers, Teamsters & Engineers Health and Welfare and Pension Plans is denied.

DATED: April 24, 2007

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Malcolm Young & David Selby
T. Randall Wright
Albert Kerkhove
Richard Myers & Robert Lepp
United States Trustee

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