

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

Hearing was held in Omaha, Nebraska, on May 7, 2007, regarding Filing No. 766, Motion for Approval of 2004 Examination, filed by Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan and Contractors, Laborers, Teamsters and Engineers Pension Plan (“the Plans”); Filing No. 764, Motion for Approval of 2004 Examination, filed by the Plans; Filing No. 772, Resistance, filed by First National Bank of Omaha; Filing No. 779, Resistance, filed by M & S Grading, Inc., by and through its Trustee; Filing No. 777, Resistance to the Motion for 2004 Examination of Trustee, filed by M & S Grading, Inc., by and through its Trustee; and Filing NO. 778, the Plans’ response to the debtor’s resistance. Malcolm Young and David Selby appeared for the Plans; T. Randall Wright appeared for James Killips, Trustee; Robert Lepp appeared for First National Bank of Omaha; and Albert Kerkhove appeared for the Internal Revenue Service.

The Plans have pending a motion for removal of the Chapter 7 trustee, Filing No. 754. In addition, the Plans have filed an amended motion to compel production of documents, Filing No. 768. The amended motion to compel has been deferred pending a resolution of the motion now before the court, which is a request by the Plans to take a Rule 2004<sup>1</sup> examination of the trustee, officers of the debtor, and employees of First National Bank of Omaha. The hearing which was scheduled on the motion to remove the trustee has been continued pending completion of discovery.

In this case, First National Bank of Omaha was the main equipment lender and operating

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<sup>1</sup>Federal Rule of Bankruptcy Procedure 2004 states, in relevant part:

**Rule 2004. Examination**

**(a) Examination on motion.** On motion of any party in interest, the court may order the examination of any entity.

**(b) Scope of examination.** The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan....

lender. It obtained perfected security interests in all of the assets of the debtor. On the petition date, First National Bank of Omaha was owed millions of dollars. During the case, with notice to all parties, the court authorized the use of cash collateral in which First National Bank of Omaha had an interest, and authorized the payment of adequate protection to First National Bank of Omaha.

On the petition date, the debtor was delinquent with regard to various taxes owed to the Internal Revenue Service and, during the case, the debtor became further delinquent.

On the petition date, the debtor was delinquent on payments to the Plans. During the case, although the pre-petition delinquency to the Plans was cured, debtor became delinquent again and as of this date there is a post-petition delinquency of more than \$100,000.

The trustee was appointed in late December of 2004, during the pendency of this case as a Chapter 11 case. He collected some accounts receivable, operated the business for a short period of time, negotiated with First National Bank of Omaha for the continued use of cash collateral, and paid the December and January wage payments. He did not, however, make the December, January or February contributions to the funds. Representatives of the Plans believe that the trustee had monies available to make the payments to the funds and that he should have done so. The Plans have filed a number of motions in addition to the motion to remove the trustee, the motion to compel production of documents, and this motion for a Rule 2004 examination in an attempt to determine what happened to the money that they believe the trustee had and should have applied to the plan contribution obligations.

First National Bank of Omaha admits that it got the money. It is the position of the First National Bank of Omaha that it has a perfected security interest in all of the assets of the debtor and that it had an absolute right to stop the use of cash collateral, collect the receivables, demand payment of money in the debtor's checking accounts, sell the equipment, and apply the proceeds to the debt. All of the above would be subject only to relief from the automatic stay being granted, and the trustee agrees and acknowledges that he authorized payments to the bank, authorized withdrawals by the bank from the debtor's checking account, authorized accounts receivable to be collected by the bank and authorized sale of assets with the proceeds payable to the bank.

The Internal Revenue Service, a significant pre- and post-petition creditor with priority over the Plans' rights of distribution from the estate, along with the trustee and the First National Bank of Omaha, resists the motion filed by the Plans with regard to the Rule 2004 examination. Representatives of the Internal Revenue Service have reviewed the security documents of the First National Bank of Omaha and other documents with regard to the source and use of funds and the application of proceeds. The Internal Revenue Service is satisfied that the money that came to the trustee or directly to the bank was properly applied to the bank notes. It is satisfied that the trustee and/or the bank made good-faith attempts to collect accounts receivable.

It is the position of the trustee that he has done his job and made the funds available to the First National Bank of Omaha. He does not believe he should be subjected to further examination on the issue.

A movant requesting authorization to conduct a Rule 2004 examination must show good cause for such authorization. Official Comm. of Unsecured Creditors v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.), 169 B.R. 130, 134 (Bankr. S.D. Ohio 1994); In re Wilcher, 56 B.R.

428, 434-35 (Bankr. N.D. Ill. 1985). I conclude, after considering the argument presented by the Plans, and after reviewing all of the exhibits submitted by the Plans in support of the motion, that there is no good cause to allow a Rule 2004 examination. Everyone knows where the money went. Everyone knows that the First National Bank of Omaha has a security interest in all of the assets of the debtor which is superior to any interest claimed by the Plans. After applying all of the money received by the First National Bank of Omaha from all of the sources to the debt, the bank still has come up short millions of dollars.

The Internal Revenue Service, which has priority over the Plans for distribution purposes, has come up short millions of dollars.

The representatives of the Plans, which are general unsecured creditors, simply cannot accept the facts. The Plans are not going to get any money unless and until First National Bank of Omaha and the Internal Revenue Service are paid in full. The estate does not have sufficient assets to pay either the First National Bank or the Internal Revenue in full. To allow the Plans to proceed with Rule 2004 exams is a waste of time and money. The motions are denied.

THEREFORE, IT IS ORDERED that the Motions for Approval of 2004 Examinations, Filings No. 764 and 766, are 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.