

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
MBA POULTRY, LLC,) CASE NO. BK00-40122
)
Debtor(s).) CH. 7

ORDER

Hearing was held in Lincoln, Nebraska, on August 17, 2005, on an application for compensation by the attorney for The Money Store Commercial Mortgage, Inc. (Fil. #263) and objections by the Small Business Administration (Fil. #267) and DAPEC, Inc. (Fil. #268). Emmet Childers appeared for The Money Store, Gregg Stratman appeared for the Small Business Association, and Gerald Laughlin appeared for DAPEC, Inc.

The movant seeks approximately \$32,000 from the estate for attorney fees and costs. The Money Store had a claim of nearly \$850,000 secured by a first-priority deed of trust on the debtor's real property. The property was sold, and the claims of Johnson County, the City of Tecumseh, The Money Store, American National Bank, and the Small Business Administration ("SBA") were paid from the \$2.4 million in proceeds, pursuant to an order of the bankruptcy court. DAPEC, Inc., appealed, *inter alia*, the portion of the order dealing with the City of Tecumseh's lien priority, and the Eighth Circuit Court of Appeals ultimately reversed the decision and remanded the matter. The City of Tecumseh then disgorged the proceeds it had received; those funds are currently being held by the Clerk of the Bankruptcy Court.

The Money Store asserts that it is entitled to recover fees and costs under 11 U.S.C. § 506(b) because it is oversecured and the funds disgorged by the City of Tecumseh constitute part of its collateral as the proceeds of the sale of the real estate. The SBA objects because the issue of lien priority in the superstructure as between SBA and DAPEC is unresolved, so the SBA wants a ruling on this matter deferred until the litigation is complete. In addition, the SBA is seeking equitable subordination of The Money Store's lien in the real estate proceeds based on The Money Store's conduct in assigning a deed of trust to SBA.

DAPEC objects to the fee application on the grounds that the funds are no longer The Money Store's collateral as The Money Store waived whatever interest it might have in the funds when it did not appeal the bankruptcy court's order overruling DAPEC's objection to

the City of Tecumseh's claim. DAPEC argues that because it was the only party to appeal the ruling on the City's claim, the Eighth Circuit's decision reversing the finding that the City's lien has priority has the effect of directing the disgorged money to DAPEC on its claim rather than being put back into the pot for other secured creditors to share.

The Eighth Circuit's opinion, however, clearly indicates that DAPEC's lien may or may not have priority over the City's liens. See Fil. #204 at 16. The City of Tecumseh concedes that DAPEC's construction lien has priority over the City's sewer and water lien, but takes no position as to the interests of other parties in the funds. See Fil. #215. The court order authorizing the City's payment of the funds into the court registry specifically acknowledges that other creditors, as well as the debtor, may have an interest in the funds. See Fil. #229. Distribution of the funds to The Money Store at this point in the proceedings would be premature because the litigation concerning lien priorities is not complete.

IT IS ORDERED: The application for compensation by the attorney for The Money Store Commercial Mortgage, Inc. (Fil. #263) is denied without prejudice.

DATED: September 2, 2005

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Emmet Childers
Gerald Laughlin
Gregg Stratman
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.