

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
UNITED IMPORTS CORP.,) CASE NO. BK96-81674
)
DEBTOR) CH. 11

MEMORANDUM

Hearing was held on October 7, 1996, on Motion for Relief filed by United Parcel Service. Appearances: Thomas Stalnaker for the debtor and Michael Schleich for the movant. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G) and (E).

Background

United Parcel Service (UPS) filed its motion for relief from the automatic stay to offset what it claims are mutual debts owing to it and the debtor. The debtor has filed a resistance to UPS's motion.

Prior to the bankruptcy, UPS delivered goods shipped by the debtor, collected funds on a cash-on-delivery basis and remitted those funds to the debtor. At the time of filing, the debtor owed UPS approximately \$85,500 in shipping costs and UPS held \$35,087.29 in funds collected after delivery of goods. Of the amount held by UPS, \$12,463.40 was in the form of checks payable to the debtor. The remainder is in cash or cash equivalent.

Decision

The motion for relief from the stay is granted to the extent that the funds held by UPS that are cash or cash equivalent. The funds that are held by UPS in the form of checks payable to the debtor may not be used to set off the debt owed by the debtor to UPS and must be turned over to the debtor as property of the estate.

Discussion

The issue presented is whether funds collected by a shipping company on a C.O.D. basis represent a debt owed by the shipping company to the shipper, thus evidencing a debtor-creditor relationship, or whether such funds are held by the shipping company in trust on behalf of the shipper. If the funds

represent a debt, than the funds may be used to offset a debt owed by the shipper to the shipping company.

In In re W & A Bacon Co., 261 F. 109 (D. Mass. 1919), a number of creditors of the debtor were businesses that delivered goods on a C.O.D. basis for the debtor. The creditors would deliver the goods shipped by the debtor, collect the fees, and remit the fees to the debtor a few days after delivery. The fees collected by the creditors were placed in their general bank accounts, and were remitted to the debtor by check. The remittance of the fees was done separately from the billing for the actual shipping of the goods.

After the debtor filed bankruptcy, the creditors sought to set off the amounts they held as C.O.D. fees. The debtor objected, claiming that the fees had to be returned because the creditors occupied a trust relation to it. The court disagreed, however, holding that the relationship was a purely commercial one, and stating "the fact that one person has collected money for, and has in his possession money belonging to another, does not, without more, establish the relation of trustee and cestui que trust between them." Id. at 111. The court did note that "there was nothing which expressly or impliedly bound the claimants to return the collections in specie . . ."

The reasoning of that case was utilized in Allbrand Appliance & Television Co. v. Merdav Trucking Co. (In re Allbrand Appliance & Television Co.), 16 B.R. 10 (Bankr. S.D.N.Y. 1980). In that case, a trucking company that had delivered electronic goods for the debtor sought to offset C.O.D. fees it had collected. Relying on W & A Bacon Co., the court determined that the funds could be set off.

The court did state that in some cases, a lack of mutuality between the debts has been found "when the creditor of the debtor is in possession of the debtor's property as a bailee 'without color of lien.'" Id. at 13. However, the court explained that such reasoning was inapplicable in that case because "neither in [W.A. Bacon] nor in the case at bar, did the debtor contend that there was a bailment agreement or understanding between it and the carrier with respect to the C.O.D. collection or that such collections were to be segregated or returned by the carrier 'in specie.'" Id.

"Allbrand and [W.A.]Bacon are consistent with those cases ruling that a critical, although not conclusive, factor in distinguishing an ownership interest in funds from a debtor creditor relationship is whether the possessor of the funds could commingle the funds with its general funds." In re Drexel Burnham Lambert Group, Inc., 113 B.R. 830 (Bankr. S.D.N.Y. 1990). The rule therefore is that a shipping company that also collects fees on a C.O.D. basis may set off such fees from a debt owed to

it for transportation charges if the fees are fungible, i.e. cash or cash equivalents, and there is no agreement to the contrary between the parties.

In the case at bar, there is no evidence of an agreement between the parties regarding the funds collected by UPS. Thus, the funds collected by UPS that are cash or cash equivalents may be set off. However, the fees that are in the form of checks payable to the debtor may not be used to set off the amount owed by the debtor for shipping costs. Those checks cannot be commingled with UPS's general funds, and, in the words of the Bacon court, UPS is bound to return such collections "in specie."

Separate journal entry to be filed.

DATED: October 15, 1996

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

STALNAKER, THOMAS	393-2374
SCHLEICH, MICHAEL	341-8290
CAVANAGH, JAMES\DOUGHERTY, SANDRA	344-4006

Copies mailed by the Court to:
United States Trustee

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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UNITED IMPORT CORP.,)	CASE NO. BK96-81674
)	A
<u>DEBTOR(S)</u>)	CH. 11
)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	DATE: October 15, 1996
<u>Defendant(s)</u>)	HEARING DATE: October 7,
)	1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by United Parcel Service.

APPEARANCES

Thomas Stalnaker, Attorney for debtor
Michael Schleich, Attorney for United Parcel Service

IT IS ORDERED:

The motion for relief from the stay is granted to the extent that the funds held by UPS that are cash or cash equivalent. The funds that are held by UPS in the form of checks payable to the debtor may not be used to set off the debt owed by the debtor to UPS and must be turned over to the debtor as property of the estate. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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