UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
MAHONEY HEATING & COOLING,	)	
INC.,	)	CASE NO. BK93-80762
	)	CH. 7
DEBTOR(S)	)	Filing No. 42, 45, 46

MEMORANDUM

Hearing was held on December 20, 1993, on the Trustee's Motion to Pay Into Registry of the Court and objections thereto. Appearing on behalf of the trustee was Christopher Curzon of Schmid, Mooney & Frederick, P.C., Omaha, Nebraska. Appearing on behalf of Small Business Administration was Gregg Stratman of Omaha, Nebraska. 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)(A).

Facts

On May 6, 1993, the debtor, Mahoney Heating & Cooling, Inc., filed a voluntary bankruptcy petition in Chapter 11. At the first meeting of creditors the debtor-in-possession was advised that insurance must be maintained on the property. The debtor continued his contractual arrangement with Minnesota Mutual Insurance Company (MMI), the prepetition insurance carrier. During the bankruptcy's pendency, MMI agreed to provide coverage for property, inland marine and liability in the amounts of $95,000, $113,000 and $500,00, respectively.

On July 2, 1993, the Chapter 11 bankruptcy was converted to a Chapter 7. The debtor's assets were liquidated, and the proceeds distributed to the debtor's secured creditors, the Small Business Administration (SBA) and Enterprise Bank, both of which had a secured lien on the debtor's personal property. MMI seeks to surcharge the secured creditors for the unpaid premium accumulation from May 6, 1993, to September 2, 1993, in the amount of $1,790.00.

However, the SBA and Enterprise Bank argue that the insurance expense is not a reasonable and necessary cost of preserving the estate and should not be charged against the proceeds of the property pursuant to 11 U.S.C. § 506(c). Enterprise Bank further argues that it obtained its own casualty insurance on May 6, 1993, and did authorize MMI to provide coverage. The SBA states that it is SBA policy to bear the risk

of loss and thus, it did not obtain or want insurance. It is the SBA's and Enterprise Bank's position that although MMI may have an administrative expense claim, the claim should not be charged against proceeds of the secured collateral.

On December 20, 1993, the trustee made a motion to pay the disputed funds into the registry of the court until entitlement to the funds can be determined.

Discussion

As a general rule, "administrative expenses are not chargeable against a secured creditor's collateral." Hospitality, Ltd. v. Fidelity Savings and Loan Co., (In re Hospitality, Ltd., 86 B.R. 59 (Bankr. W.D. Pa. 1988) (citing In re Trim-X, Inc., 695 F.2d 296 (7th Cir. 1982)). Historically, the reasoning supporting the rule has been that a trustee does not act with the authority of the secured creditor or with the interest of the secured creditor in mind, but acts for the interest of the unsecured creditors. In re Trim-X, Inc., 695 F.2d at 300.

The cases recognize that an exception to that policy has been statutorily created by 11 U.S.C. Section 506(c) which states:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the holder of such claim.

In re Hospitality, Ltd., 86 B.R. at 63. Section 506(c) has been interpreted to mean that when the "trustee or the debtor-in-possession expends money to provide for the reasonable, necessary cost and expenses of preserving. . .a secured creditor's collateral, the trustee. . .is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party." In re Trim-X, Inc., 695 F.2d at 299 (quoting 124 Cong. Rec. H11089 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. 6451 (statement of Rep. Edwards); 124 Cong. Rec. S17406, reprinted in 1978 U.S.C.C.A.N. 6505, 6520 (statement of Sen. DeConcini)). Another exception to the general rule would allow the administrative expense to be surcharged against the proceeds of the collateral, if the secured creditor caused or consented to the expense. Id. at 301.

The party seeking to surcharge the administrative expense against the proceeds of the collateral has the burden of demonstrating that the expense was reasonable, necessary, and beneficial to the secured creditor. Central Bank of Montana v. Cascade Hydraulics and Utility Service, Inc. (In re Cascade

Hydraulics and Utility Service, Inc.), 815 F.2d 546 (9th Cir. 1987). Since the "reasonable" and "necessary" requirements are factually less troublesome to determine, many courts have spent more energy discussing the meaning of "beneficial."

For example, Guy v. Grogan (In re Staunton Industries, Inc.), 75 B.R. 699 (Bankr. E.D. Mich 1987), held that for the trustee to recover an expense from the secured creditor, the expense must be a direct quantifiable benefit enabling the creditor to "realize as much or more than the creditor would have by enforcing his own security." Id. at 702 (quoting In re Wyckoff, 52 B.R. 164, 167 (Bankr. W.D. Mich. 1985)). See also Brookfield Production Credit Ass'n. v. Borron, 738 F.2d 551 (8th Cir. 1984).

The insurance expense incurred by the debtor in this case was necessary. It is the standard policy of the United States Trustee to instruct the debtor-in-possession to acquire insurance. The debtor continued the insurance coverage with the prepetition carrier under the same policy. Of course, prepetition expenses are generally not recoverable under Section 506(c). Boyd v. Dock's Corner Assocs. (In re Great Northern Forest Productions, Inc.), 135 B.R. 46 (Bankr. W.D. Mich. 1991). Thus, only post-petition administrative expenses which benefitted the secured creditor may be charged against the collateral. No party to the bankruptcy has disputed the reasonableness of MMI's rates.

The secured creditor was primarily benefitted by the insurance coverage. If a casualty would have occurred, the secured creditor would have received the insurance proceeds. The proceeds would have benefitted the estate only to the extent that the unsecured creditors would not have been required to contribute a percentage of their share of any distribution to the secured claimholders.

Furthermore, although Enterprise Bank did obtain some of its own property insurance from Grace Mayer Insurance beginning May 6, 1993, that coverage was secondary, and its limits of liability were $40,000. The Grace policy contains an "other insurance clause" which states, if other insurance is available, Grace will "pay the amount of loss that is left after the other insurance has been used up." The policy also specifies that the limits of liability are $40,000 regardless of the availability of other insurance.

On the other hand, MMI supplied coverage for property in the amount of $95,000.00. The amount of the secured creditors' claims was approximately $152,000.00, and the estimated value of the collateral ranged from $100,000.00 to $150,000.00. These figures indicate that the secured creditor did receive a quantifiable benefit from additional insurance protection.

The fact that the case was converted from a Chapter 11 to a Chapter 7 on July 2, 1993, during the coverage period is of no great significance. The secured creditors continued to benefit from the insurance coverage. The benefit would cease to exist upon the sale or disposition of the collateral.

The secured creditors' argument that they did not expressly consent or authorize MMI to provide coverage is unpersuasive. The case law indicates that the expense must be incurred primarily for the benefit of the creditor or that the expense be consented to by the creditor. Thus, MMI administrative expense may be charged against the proceeds of the secured creditors' collateral. However, only that portion of the premium earned between May 6, 1993, and September 2, 1993, and attributable to the property damage portion of the insurance can be said to have provided a direct benefit to the secured creditors.

Conclusion

MMI's insurance coverage cost was a necessary and reasonable expense, which benefitted the secured creditor and hence, may be charged against the proceeds of the collateral pursuant to Bankruptcy code Section 506(c). The insurance agent is granted twenty-one days to inform the United States Trustee and the secured creditors of the final allowed amount representing the pro rated share of the post-petition earned premium attributable to the property damage policy. If no different objections are filed within ten days thereafter, the trustee shall submit an order which will be the final order authorizing the surcharge and the payment. This memorandum is not a final appealable order.

BY THE COURT:

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

CC: Christopher Curzon, Attorney
Gregg Stratman, Attorney
Arnold Jochim of Associated Underwriters, Inc.
Law Clerk