

In the United States Bankruptcy Court

for the Northern District of Iowa

HOVE TRUCK LINE
Debtor(s).

Bankruptcy No. Y82-03064
Chapter 11

MEMORANDUM OF DECISION AND ORDER RE: OBJECTION TO TRUSTEES FINAL REPORT

The matter before the court is the objection of Bronstein Factors, Inc. to the chapter 11 trustee's final report and recommendation for payment of claims. Hearing was held in Fort Dodge, Iowa on April 19, 1990. The court now issues its findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B).

FINDINGS OF FACT

This chapter 11 bankruptcy was filed in 1982. Debtor's schedules included a list of its accounts receivable. on this list was a claim against "Johns Manville." Upon the debtor's application, the court, on August 4, 1982, appointed Robert L. Rich as trustee.

The Unsecured Creditors Committee proposed a "Second Amended Plan of Arrangement" on August 4, 1983. The proposed plan was amended by the Unsecured Creditors Committee on March 16, March 22, and May 22, 1984. The plan proposed the trustee's liquidation of the assets of the debtor, including accounts receivable, and a distribution to creditors. The plan provided (second amended plan filed August 4, 1983, page 3, paragraph 5) that the trustee would make disbursements in accordance with the plan. Article VI of the plan provided that payment of administrative expenses would take place as soon after confirmation as possible from available cash on hand and from the sale of unencumbered assets and from the sale of encumbered assets in which the estate had equity. It further stated: "The remaining assets which will be liquidated by the Trustee will be done so at a date to be determined by the Trustee."

Prior to confirmation of the proposed plan, the bankruptcy court entered an order on March 15, 1984, the full text of which was as follows:

UPON CONSIDERATION OF THE EVIDENCE presented, and upon agreement of counsel, the Court finds that the Farmers State Bank, Stanhope, Iowa has a valid security interest in Debtor's accounts receivable as set forth by prior order of the Court on the 23rd day of September, 1982; that at the time of said Order the Farmers State Bank's security interest was in an amount of not less than \$44,475.97; that since the date of said Order the Farmers State Bank has been paid down to an amount of approximately \$6,500.00 and that there is remaining one account receivable, that being Johns Mansville in the approximate amount of \$19,000.00; finally that there are no other parties of interest, with an interest in said accounts receivable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Bob Rich, Bankruptcy Trustee in the above entitled matter, immediately assign said account receivable to the Farmers State Bank, Stanhope, Iowa and that by said assignment the Farmers State Bank, Stanhope, Iowa have all rights of ownership and collection against said account to the full extent of its remaining secured interest.

IT IS FURTHER ORDERED that any amounts in excess of the value of Farmers State Bank's secured interest which exist after action or collection on said account receivable would be accounted for to the Bankruptcy Court, and that any such excess would be paid to the Internal Revenue Service to offset any tax liability owing to the federal government by the debtor.

The foregoing order was sent to various attorneys including Charles Deppe of Jewell, Iowa. Deppe had appeared in the case for Melford Hove, who was a stockholder and officer of Hove Truck Line.

The committee's amended plan was confirmed by order of the court dated October 30, 1987. Judgment of confirmation was filed November 2, 1987 and entered November 4, 1987. Upon application of the trustee, final decree was entered in the case on May 23, 1988. The decree provided for discharge of the debtor's debts, an injunction against creditors proceeding against the debtor or its assets, and for discharge of the trustee. The decree also stated: "2. Except as otherwise provided in the Plan or in the Order confirming the Plan, all property of the estate is vested in the Debtor." The clerk of court closed the case file in early 1989. In the summer of 1989, the trustee applied to have the case reopened for the administration of assets coming into the trustee's hands subsequent to the case's earlier closure. The trustee alleged he had received the following cash and securities from Johns-Manville Corporation which had been an account receivable of the debtor:

Cash - deposited in Hove Norwest Bank Fort Dodge checking account	\$ 9,965.38
12% Sinking Fund Note due June 30, 1992 - sent to Trustee for partial redemption on June 15, 1989 - No. R376	5,000.00
12% Sinking Fund Note due June 30, 1992 - sent to Trustee for partial redemption on June 15, 1989 - No. AB50	478.00
9% Interest Deferred Sinking Fund Debenture - due 2003 - No. R23	3,000.00
9% Interest Deferred Sinking Fund Debenture - due 2003 - No. AB 25	91.00
Warrant Certificate - 190 warrants - No. W234 - Exercisable only on or after June 6, 1989 and on or before June 6, 1996 - market value on June 16, 1989 - 2 7/8 per warrant	546.25
Common Stock - 299 shares - No. NY235 Market value on June 16, 1989 - 7 3/4 a share	2,317.25
Total	\$21,397.88

The case was reopened, Rich was reappointed trustee, and he subsequently filed his "Final Report and Recommendation for Payment of Claims by Trustee." In the report he alleged that he had received the sum of \$20,410.65. He proposed payment in full of administrative expenses incurred after the reopening of the estate, and pro rata, partial payment of previously unpaid administrative expenses.

The report was objected to by Bronstein Factors, Inc., a Division of Resources Investment Corporation (BRONSTEIN) which alleged that it, not the estate, was entitled to the proceeds of the Johns-Manville account receivable.

Bronstein is in the business of buying receivables from creditors of financially troubled companies. In late 1986, Bronstein obtained an "assignment of claim" which purportedly transferred to Bronstein Hove Truck Line's claim against "Johns Manville Sales Corp." Johns-Manville was then in bankruptcy in the Southern District of New York. The assignment was signed by La Vonne H. Hove and Melford A. Hove. In consideration of the assignment, Bronstein issued a check to Melford A. Hove in the amount of \$16,379.80. The check was dated December 23, 1986 and was negotiated in early 1987. The endorsement on the back of the check was executed by Melford A. Hove as follows: "Pay to the Order of Brekken, Deppe & Wynia, P.C. Trust Account."

Apparently because of some technical difficulty regarding the initial assignment document, Bronstein later requested the execution of a new assignment. Melford Hove had died since the execution of the initial assignment. Attorney Deppe began corresponding with Bronstein representatives with regard to the execution of a replacement assignment. By letter of April 26, 1988, Deppe advised Bronstein that Hove Truck Line had filed bankruptcy years before and the corporation was not in existence. He also advised Bronstein of Melford Hove's death, and requested further instructions from Bronstein as to what would be needed in the way of the execution of a new assignment. Deppe said he would review any forwarded documents with Mrs. Hove and instructed Bronstein not to mail anything further to Hove Truck Line, but to forward "everything" to the law office.

New and satisfactory documents were not executed by the time a distribution was made in the Johns-Manville bankruptcy case. Separate payments were made on account of the Hove Truck Line claim to Farmers State Bank and to the Hove Truck Line bankruptcy estate. The bank had filed a proof of claim to cover its remaining secured claim and Rich had filed a separate claim for the Hove Truck Line estate. Realizing that Bronstein had never been substituted for Hove Truck Line in the Johns-Manville case, Bronstein contacted Deppe by letter in mid-December, 1988, requesting payment to Bronstein of any monies received on account of the Hove Truck Line claim. It provided to Deppe a copy of the original assignment and a copy of the Bronstein check to Melford Hove. In a responsive letter dated December 29, 1988, Deppe explained to Bronstein that neither Mr. Hove nor Hove Truck Line had received monies from Johns-Manville although First State Bank of Webster City may have.

Deppe later corresponded with Kenneth Cesta, an attorney for Bronstein. Deppe told Cesta that in his opinion the trustee in bankruptcy had no interest in the accounts receivable "as the bank at Stanhope had agreed that Hove should have the accounts receivable." Deppe stated that Mr. Hove was deceased and it was not believed that Mrs. Hove had any responsibility to Bronstein.

Neither Rich as trustee nor the bankruptcy estate directly received any money from Bronstein Factors, and there is no evidence that the estate indirectly received any of the \$16,000.00 paid by Bronstein to Hoves. Rich had no knowledge of the assignment by Melford Hove, and he did not hear of it until 1989 when he received a call from Bronstein's lawyers. The only remaining taxes due from debtor to IRS amount to \$7,457.41. Of that amount, the trustee proposes to pay \$4,198.32. The taxes were incurred during the chapter 11 case. Although the final

report provides for other monies to be paid to the IRS, this is a direct payment to IRS of personal tax liability of Mr. Hove. Hove's claim against Hove Truck Line was an administrative claim arising out of a rental agreement between Hove and his company.

DISCUSSION

Bronstein seeks either a distribution from the trustee of the proceeds of the Johns-Manville account receivable or the return of the monies it paid Melford Hove for the purchase of the accounts receivable.

Bronstein makes two arguments in support of its alternative requests for relief. First, it argues that the Johns-Manville account receivable was sold by the estate to Bronstein and therefore the proceeds of the account receivable belong not to the estate but to Bronstein. Bronstein asserts that even if there were a defect in the sale, it was corrected by the closing of the estate without the administration of that asset and that pursuant to 11 U.S.C. § 554(c), the Johns-Manville account receivable was abandoned by the trustee, and having reverted in the debtor, Hove's sale to Bronstein was made retroactively effective. Second, Bronstein asserts that if the account receivable was not effectively transferred to Bronstein, then the estate is not entitled to retain the purchase price and Bronstein is entitled to a return of its money plus interest from the estate.

The trustee counters that neither Hoves nor Hove Truck Lines had any interest in the account receivable which either could sell to Bronstein and that the proceeds of the account receivable are properly a part of the bankruptcy estate to be distributed to creditors. The trustee also contends that since the estate did not receive the payment from Bronstein, it has no obligation to return it. The court agrees.

There was no valid sale of the Johns-Manville account receivable to Bronstein. Neither the corporate debtor nor the Hoves had any authority to sell the account receivable to anyone in late 1986, the time of the Bronstein purchase. Rich had been appointed trustee in this chapter 11 case in August, 1982. The assets of the estate came under his control, and the debtor was no longer a debtor-in-possession. 11 U.S.C. § 1104, In re NRG Resources, Inc., 64 B.R. 643, 646-647 (W.D. La. 1986). See also 11 U.S.C. § 1105.

The account receivable was administered by the chapter 11 trustee. The court, on March 15, 1984 executed an order transferring the account receivable to the Farmers State Bank to the extent of its secured interest. The court also ordered that any amount in excess of that necessary to pay Farmers State Bank would be "accounted for to the bankruptcy court." Because this scheduled asset was administered, 11 U.S.C. § 554(c) is inapplicable, and this asset was therefore not deemed abandoned as a matter of law. Nor did the account vest in the debtor as a result of confirmation, as the plan provided for its liquidation. Bronstein, therefore, purchased the accounts receivable from a person or entity with no authority to sell it. Bronstein thus obtained no rights in the accounts receivable.

Alternatively, Bronstein requests its money back plus interest. Bronstein alleges in its objection that it paid the estate in excess of \$16,000.00 for the assignment. (Paragraph 23, page 11.) There is no evidence to support this allegation. Bronstein may have paid \$16,000.00 to the Hoves or perhaps to the debtor but not to the bankruptcy estate. The estate, therefore, should not be obligated to return money which it did not receive.

Bronstein argues that somehow the estate is receiving a windfall. This is not so. The estate is receiving exactly what it is entitled to receive. It would be inequitable to require the creditors of the bankruptcy estate to suffer by giving up an asset to which the estate has a legal right. It appears that Bronstein may have been the victim of an intentional wrong or a mistake. However, the court sees no reason why the estate should be required to make that right. Bronstein's remedy, if any, lies *with* the Hoves or others, but not with the bankruptcy estate.

ORDER

IT IS ORDERED that the objection by Bronstein Factors, Inc. to the chapter 11 trustee's final report and recommendation is overruled.

IT IS FURTHER ORDERED that ruling on the approval of payments as provided in the final report is reserved so that the court may obtain an explanation from the trustee as to why the proceeds of this account receivable are not being distributed so as to pay the Internal Revenue Service in full, pursuant to the court's March 15, 1984 order. The court shall set further telephonic hearing at which time the trustee and the trustee's counsel may make such explanation. If further evidentiary searing is necessary, it will be set at that time.

SO ORDERED ON THIS 8th DAY OF JUNE, 1990.

William L. Edmonds
Chief Bankruptcy Judge