

In the United States Bankruptcy Court

for the Northern District of Iowa

COMMERCIAL MILLWRIGHT SERVICE CORP.

Debtor.

Bankruptcy No. 95-60007KW

Chapter 11

ORDER RE MOTION FOR MODIFICATION OF JANUARY 24, 1994 ORDER NUNC PRO TUNC

On August 23, 1995, the above-captioned matter came on for hearing pursuant to assignment. Debtor Commercial Millwright Service Corp. was represented by Tom Fiegan. The United States was represented by Ana Maria Martel. Also present was Attorney Gerald Monk representing Lincoln Savings Bank (the "Bank"). The matter before the Court is a Motion for Modification of January 24, 1994 Order Nunc Pro Tunc filed by the United States on behalf of the IRS (the "IRS"). After hearing arguments of counsel, the Court took the matter under advisement. The time for filing briefs has now passed and the matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A) and (D).

STATEMENT OF THE CASE

The Court approved Debtor's application to grant the Bank a superpriority lien under 364 on January 24, 1995 after hearing. Through an admitted oversight by the Debtor, the IRS did not receive notice of the hearing at the office of the U.S. Attorney for the Northern District of Iowa prior to the hearing. The IRS states it has liens on Debtor's property which are affected by the 364 order granting the Bank a superpriority. It asserts it is entitled to adequate protection of these liens under 364(d)(1)(B). The IRS requests modification of the January 25, 1995 order in order to give it adequate protection of its senior interest.

Debtor admits that the office of the U.S. Attorney was inadvertently left off the notice list. However, it states that it has made payments under an Installment Agreement with the IRS which it understood would satisfy the IRS liens. It also asserts that the IRS is adequately protected because the postpetition advances by the Bank will generate additional collateral for the IRS.

CONCLUSIONS OF LAW

Integral to the 364 authority to obtain credit is the requirement of notice to interested parties. In re Blumer, 66 B.R. 109, 113 (Bankr. 9th Cir. 1986), aff'd, 826 F.2d 1069 (9th Cir. 1987). Pursuant to 364(c)(1), "the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt" with a superpriority lien. The phrase "after notice and a hearing" is defined in 102(1) as requiring "such notice as is appropriate in the particular circumstances". Under 102(1)(B), the court may dispense with a hearing under certain circumstances not pertinent here. But, although a hearing can sometimes be avoided, nowhere does the Code expressly annul the requirement of notice. In re Monach Circuit Indus., Inc., 41 B.R. 859, 862 (Bankr. E.D. Pa. 1984).

According to the Bankruptcy Rules and applicable Federal Rules of Civil Procedure, an order of a bankruptcy court is void if it is issued in a manner inconsistent with the due process clause of the 5th Amendment. In re Manchester Ctr., 123 B.R. 378, 381 (Bankr. C.D. Cal. 1991). In order to warrant relief from such an order, the moving party must both identify the technical inadequacies and establish a denial of its right to due process. Id.; Blumer, 66 B.R. at 113. Due

process requires that interested parties have meaningful notice with adequate opportunity to object. In re Adamson Co., 29 B.R. 937, 939 (Bankr. E.D. Va. 1983) (citing Mullane v. Central Hanover Bank, 339 U.S. 306, 318 (1950)).

The IRS has identified Debtor's technical inadequacy and Debtor appears to concede that notice was inadequate because it failed to send notice of the hearing on its application to incur secured debt to the office of the U.S. Attorney for the Northern District of Iowa. Because of this lack of notice, the IRS's due process rights were denied. Debtor's failure to give correct notice precluded the IRS from having the opportunity to object to the application.

The IRS has an interest in the matter because of its purported lien on the property. The record does not adequately establish that Debtors satisfied that lien prior to the hearing on incurring secured debt. The parties' dispute of this factual issue underscores the importance of protecting the IRS' right to have an opportunity to object to Debtor's application. The Order granting Debtor's application to incur secured debt denied the IRS due process and is void.

The Court will not merely order that the Bank's lien arising from the Order granting the application to incur secured debt is junior to the IRS's lien. This result does not appear to have been within the contemplation of Debtor and the Bank when the agreed order was entered. Instead, the Court finds it necessary to conduct further hearing on Debtor's application to incur secured debt on the issue of adequate protection of the IRS's lien, especially in light of the disagreement between Debtor and the IRS as to the extent of that lien.

WHEREFORE, the Motion for Modification of January 24, 1994 Order Nunc Pro Tunc is GRANTED in part and DENIED in part.

FURTHER, the Order Granting Application of Debtor-in-Possession for Authority to Incur Debt Secured By Property of the Estate is hereby rescinded.

FURTHER, a hearing will be set on Debtor's Application for Authority to Incur Debt upon application of any party.

FURTHER, if such hearing is set, an included issue to be addressed is the extent of the IRS's lien on Debtor's property as well as adequate protection of that interest.

SO ORDERED this 18th day of September, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge