In the United States Bankruptcy Court

for the Northern District of Iowa

DAVID ARLO WIRKLER
Debtor(s).

Bankruptcy No. 98-02886-D
Chapter 13

ORDER RE:

APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE

CLAIM BY UNION PLANTERS BANK AND

CONFIRMATION OF FIRST AMENDED AND SUBSTITUTED CHAPTER 13 PLAN

This matter came before the undersigned on March 11, 1999 pursuant to assignment. Present at the hearing were the following: Rush Shortley for Debtor David Wirkler, Carol Dunbar as Chapter 13 Trustee, Wes Huisinga for AgriCredit Acceptance Co., Ray Terpstra for Union Planters Bank, and Tom McCuskey for Telmark. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B), (G) and (L).

STATEMENT OF THE CASE

Three separate matters were scheduled for hearing: Motion to Modify Stay by AgriCredit Acceptance Co., Application for Allowance of Administrative Expense Claim by Union Planters Bank and Confirmation of First Amended and Substituted Debtor's Chapter 13 Plan. AgriCredit and Debtor reached a resolution of the stay motion prior to hearing. That settlement is now documented in the file.

At the hearing, Debtor presented changes to his First Amended Plan, including incorporation of its settlement with AgriCredit, among other things. The Court ordered Debtor to amend the Plan by March 15, 1999 and send immediate notice of the amendment to creditors. Debtor filed his Second Amended and Substituted Chapter 13 Plan on March 15, 1999. He sent Notice of the Plan with a bar date for objections of April 5, 1999. Union Planters Bank filed an objection to the Second Amended Plan. The Court concludes a hearing is necessary for confirmation of the Second Amended Plan. The evidence presented at the hearing on the First Amended Plan shall be considered part of the record for the hearing on the Second Amended Plan and may be supplemented by the parties at their discretion. Hearing shall be set by separate order.

The final matter is Application for Allowance of Administrative Expense Claim by Union Planters Bank. From the record and subsequent briefs of the parties, it appears that this matter is ready for resolution. The Bank asserts an administrative claim based on Debtor's postpetition use of its collateral machinery and equipment. It seeks reasonable rental value of the collateral. In the alternative, the Bank wishes to recover for postpetition depreciation in the value of its collateral.

Debtor resists. He states use of the Bank's collateral was of minimal benefit compared to the benefit from the use of AgriCredit's collateral. He argues the Bank is not entitled to administrative rent because it has chosen to receive relief from the stay under §362 and surrender of its collateral.

FINDINGS OF FACT

Debtor used the Bank's collateral machinery and equipment postpetition during the harvest season. Through postpetition custom farming, Debtor earned approximately $50,000, which benefitted the bankruptcy estate. Approximately twenty-five percent of these earnings are attributable to Debtor's use of the Bank's collateral. The Bank asserts a claim based on Debtor's use of the machinery and equipment between October 13 and December 16, 1998. Debtor filed his original Chapter 13 Plan on October 13, 1998. He subsequently surrendered the collateral to the Bank on December 16, 1998 in response to the Bank's Motion for Relief from Stay. The Bank filed its Application for Administrative Expense Claim on December 24, 1998.

In his original plan, Debtor proposed paying interest to the Bank through December 31, 1998 and surrendering the collateral on that date. The plan allowed the Bank's claim in the amount of $142,300. On December 10, 1998, Debtor indicated he would amend his plan. The new plan treatment of the Bank allowed its claim in the amount of $87,925 with no payment of interest accruing prior to surrender of the collateral.

At the hearing, the Bank offered testimony of Paul Glenn regarding the amount of its administrative claim. Mr. Glenn testified that the rental value of the collateral is approximately $9,460. He estimated that during Debtor's use of the property, it depreciated in value approximately one-half of that amount, or $4,730. Mr. Glenn admitted that these amounts were estimates and that standard references for the value of such use or depreciation were not readily available.

Debtor presented no testimony to rebut Mr. Glenn's estimates of value. Debtor testified that he used the Bank's collateral although none of the Bank's collateral was required for his custom farming operations. Debtor stated he could have performed his work with borrowed or rented equipment.

CONCLUSIONS OF LAW

Section 503(b)(1)(A) provides administrative expense priority for "the actual, necessary costs and expenses of preserving the estate." Not all postpetition expenses are entitled to administrative priority. In re Ramaker, 117 B.R. 959, 962 (Bankr. N.D. Iowa 1990). The claim must (1) arise from a postpetition transaction with the debtor-in-possession, or from consideration given by the creditor to the debtor-in-possession, and (2) directly and substantially benefit the estate. Id.; In re DAK Indus., Inc., 66 F.3d 1091, 1094 (9th Cir. 1995). The claimant must prove that other creditors received tangible benefits and should not be compensated if the expense solely furthered its own self-interest. In re Bellman Farms, Inc., 140 B.R. 986, 995 (Bankr. D.S.D. 1991). Id. The claimant must show actual use of its property by the debtor which conferred a concrete benefit to the estate. Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 866 (4th Cir. 1994). The policy considerations behind the §503 (b)(1)(A) administrative expense claim include inducing third parties to do business with debtors postpetition. DAK Indus., 66 F.3d at 1097.

The burden to prove an administrative expense claim is on the claimant. DAK Indus., 66 F.3d at 1094. The court has broad discretion to grant or deny an administrative expense claim. Id. Courts construe §503(b)(1)(A) narrowly to keep administrative expenses at a minimum. Id.

The Court concludes that the Bank has shown that Debtor's use of its collateral equipment benefitted the estate. Debtor actually used the equipment during the harvest in his custom farming operation. He earned approximately $50,000 from the harvest. Approximately twenty-five percent of the total earnings resulted from Debtor's use of the Bank's equipment. This satisfies one of the elements of §503(b)(1)(A), direct and substantial benefit to the estate.

The other element of §503(b)(1)(A) requires the Bank to prove its claim arises from a postpetition transaction with Debtor, or from consideration given by the Bank to Debtor. A debtor's use of a prepetition secured creditor's collateral is not generally considered to be a postpetition transaction with the creditor. Courts reason that a secured creditor does not contribute to the estate by allowing a debtor in possession to use collateral the debtor already owns and has the statutory right to use. In re Briscoe Enters. Ltd., II, 138 B.R. 795, 813 (N.D. Tex. 1992), rev'd on other grounds, 994 F.2d 1160 (5th Cir. 1993), cert. denied, 510 U.S. 992 (1993).

Most courts only allow administrative expense claims for prepetition secured creditors when adequate protection is provided and subsequently proves inadequate under §507(b). See In re Robinson, 225 B.R. 228, 233 (Bankr. N.D. Okla. 1998); Briscoe Enters., 138 B.R. at 813; In re Provincetown-Boston Airline, Inc., 66 B.R. 632, 634 (Bankr. M.D. Fla. 1986). A superpriority administrative expense claim is available to secured creditors under §507(b). The elements of such a claim are: 1) the trustee or debtor-in-possession has previously provided the creditor adequate protection which subsequently proved inadequate, 2) the claim is allowable under 503(b)(1)(A) as actual, necessary costs and expenses of preserving the estate, and 3) the creditor's claim arises from the automatic stay under §362, use of collateral under §363, or postpetition financing under §364(d). Dobbins, 35 F.3d at 865. For example, in In re Carpet Center Leasing Co., 991 F.2d 682, 684 (11th Cir. 1993), modified in, 4 F.3d 940 (11th Cir. 1993), cert. denied, 510 U.S. 1118 (1994), a Chapter 11 debtor used collateral tractor/trailers postpetition and the secured creditor had requested adequate protection and received an order requiring the debtor to pay one-half the regular monthly payments. The court granted the creditor a superpriority claim under §507(b) based on the collateral's diminution in value from the debtor's use in the operation of its business in bankruptcy. Id.at 687.

Secured creditors can seek adequate protection of their interests under §361, and §503(b) is not intended as an option to adequate protection. Briscoe Enters., 138 B.R. at 813. Having failed to request or receive adequate protection, a secured creditor may not use §503(b) as an alternate means to the same end. Robinson, 225 B.R. at 233. Section 361(3) governing adequate protection prohibits the granting of an administrative expense claim as adequate protection as an initial matter. See Carpet Ctr., 4 F.3d at 940.

One court noted that where a creditor has not taken advantage of the Code's remedies to receive adequate protection, it may not advantage itself through a back door request for an administrative expense claim under §503(b). In re Advisory Info. & Management Sys., Inc., 50 B.R. 627, 631 (Bankr. M.D. Tenn. 1985) (Chapter 11 case); Robinson, 225 B.R. at 233 (Chapter 13 case following Advisory Info.). A concern expressed by the courts was that creditors could sit back and allow a debtor-in-possession to continue using collateral and later claim an administrative expense in an amount which could derail a reorganization plan. Carpet Ctr., 991 F.2d at 687. One court noted that the cost of a creditor's delay in requesting adequate protection should be borne by the creditor, not by the debtor or the estate. Provincetown-Boston Airline, 66 B.R. at 634.

Pursuant to the foregoing, the Bank cannot be granted an administrative expense claim unless it can show that Debtor provided it adequate protection and Debtor's postpetition use of the Bank's collateral arose from a postpetition transaction between Debtor and the Bank. The Bank points out that Debtor's

original plan proposed to allow the Bank's claim in full and pay interest on the claim preconfirmation. The Bank asserts this plan treatment of its claim appears to adequately protect its secured interest pending plan confirmation. The confirmation hearing was initially set for November 17, 1998, less than 60 days postpetition, as is customary in this district.

Debtor did not propose to amend the plan until December 10, 1998, after the harvest was completed. As soon as the Bank became aware of the change in Debtor's plan treatment of its claim, it filed its motion for relief from stay, on December 11, 1998. Debtor used the Bank's collateral equipment during the harvest season between the petition date, September 25, 1998, and Debtor's announcement of his intent to amend his plan on December 10, 1998.

In order to meet the first element of §507(b), Debtor's initial plan treatment of the Bank's secured claim must be viewed as adequate protection and Debtor's amendment of the plan as a failure of adequate protection. The words "[i]f the trustee . . . provides adequate protection" in §507(b) conveys the sense that the trustee, or debtor-in-possession, is affirmatively taking action by supplying value to the creditor as adequate protection. In re Five Star Partners, L.P., 193 B.R. 603, 610 (Bankr. N.D. Ga. 1996). Courts generally require a court order of adequate protection as one of the requirements of an administrative expense claim under §507(b). In re J.F.K. Acquisitions Group, 166 B.R. 207, 212 (Bankr. E.D.N.Y. 1994); In re McLeod, 205 B.R. 76, 78 (Bankr. E.D. Tex. 1996) (stating failure of Chapter 13 plan payments does not constitute failure of adequate protection under §507(b)). No order of adequate protection was sought or entered in this case.

The Bank relies on Grundy National Bank v. Rife, 876 F.2d 361, 364 (4th Cir. 1989). In that case, the court granted a creditor with a prepetition security interest in the Chapter 13 debtor's vehicles an administrative expense claim. It stated that the debtor was enriched at the creditor's expense through the free use of the cars for nine months while the cars depreciated significantly. Id. The court granted the claim after the debtor had failed to make preconfirmation payments or payments under an approved plan. Id.at 362. The court held the creditor was entitled to the missed payments or the diminution in value, whichever was greater, as an administrative expense. Id.at 364.

Rife is distinguishable. The bankruptcy court in Rife delayed consideration of the creditor's motions for relief from stay more than once on questionable grounds. Id.at 365. Also, the court entered an adequate protection order modifying the stay and ordering monthly payments to the creditor through the plan, after confirming the first Chapter 13 plan. Id.at 362. The creditor requested an administrative expense claim based on the Debtor's failure to make plan payments. Id.at 363.

Some courts have considered secured creditors' requests for §503(b) administrative expense claims without the prerequisite of a request for adequate protection. In re Lovay, 205 B.R. 85, 86 (Bankr. E.D. Tex. 1997); McLeod, 205 B.R. at 79. Without ruling out the availability of such a claim to secured creditors, the courts found the claimants had failed in their burden of proof. In Lovay, the creditor failed to prove the debtor's use of the creditor's collateral truck contributed to the preservation of the estate. 205 B.R. at 87. In McLeod, the court stated the creditor advanced no postpetition costs or expenses or new credit to preserve the estate. 205 B.R. at 79.

This is an unusual case considering the timing of certain occurrences. The Bank's collateral was used and useful in Debtor's farming business for harvest. Debtor petitioned for Chapter 13 relief before the harvest, with his original plan allowing the Bank's claim in full and providing for preconfirmation interest to the Bank. After having the benefit of the use of the Bank's collateral during the harvest, Debtor amended his plan treatment disallowing part of the Bank's claim and providing no preconfirmation interest.

The determinative issue under §507(b) is the requirement that the Bank be provided adequate protection by Debtor. Based on the foregoing law, adequate protection must be provided through a court order. Debtor's proposed treatment of the Bank's claim in his original plan does not constitute adequate protection under §507(b). The Bank did not seek or receive a court order of adequate protection. It is not entitled to an administrative expense claim under §507(b).

Under §503(b)(1)(A), the controlling issue is the requirement of a postpetition transaction between the Bank and Debtor, or consideration given by the Bank to Debtor postpetition. It is doubtful that a §503 (b)(1)(A) expense claim is available to a secured creditor such as the Bank for the use of its collateral postpetition. If such a claim is available to the Bank, it must fail because the Bank has not shown a postpetition transaction with Debtor or consideration given. Debtor merely continued using its property, the Bank's collateral machinery and equipment, postpetition according to the parties' prepetition agreements. No additional consideration or transactions occurred postpetition. The Bank is not entitled to an administrative expense claim under §503(b)(1)(A).

In summary, the Court concludes the Bank is not entitled to an administrative expense claim based on Debtor's use of collateral postpetition. The Bank did not request adequate protection prior to the harvest. Also, it has failed to show it gave consideration to Debtor postpetition. Rather, Debtor was merely using collateral he owned and had the right to use.

WHEREFORE, the Application for Allowance of Administrative Expense Claim by Union Planters Bank is DENIED.

FURTHER, confirmation of the First Amended and Substituted Debtor's Chapter 13 Plan is DENIED.

FURTHER, a confirmation hearing for the Second Amended and Substituted Debtor's Chapter 13 Plan shall be set by separate order. The evidence presented at the March 11, 1999 hearing on the First Amended Plan shall be considered part of the record for the Second Amended Plan and may be further supplemented by the parties at their discretion.

SO ORDERED this 19th day of April, 1999.

Paul J. Kilburg
U.S. Bankruptcy Judge