UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-88-3885

JOSEPH HIXON WHITNEY,

MEMORANDUM ORDER

Debtor.

At Minneapolis, Minnesota, November 6, 1990.

The above-entitled matter came on for hearing before the undersigned on the 9th day of August, 1990 on a motion by the Federal Deposit Insurance Corp. (the "FDIC") for determination of the secured and unsecured portions of its claim pursuant to 11 U.S.C. Section 506(a) and on its request for allowance of administrative expenses pursuant to 11 U.S.C. Section 503(a). The appearances were as follows: James Rubenstein for the FDIC; Steven Kluz for the Committee of Unsecured Creditors (the "Committee"); and T. Jay Salmen for the Debtor. This Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate these motions because their subject matters render such adjudication a "core" proceeding pursuant to 28 U.S.C. Section 157(b)(2)(A) and (K).

FACTS AND PROCEDURAL POSTURE

In the A-2 Schedule filed along with the petition commencing this Chapter 11 case, Debtor listed Regency Savings Bank (the "Bank") as having a claim in the amount of $104,400 secured by property valued at $85,000. The schedule did not indicate that the claim was contingent, unliquidated or disputed.

By order entered June 6, 1989, I amended the bar date for filing claims in this case, making said date August 4, 1989. On August 3, 1989, the Federal Savings and Loan Insurance Corp. (the "FSLIC"), as receiver for the Bank, filed a claim in the amount of $117,575.68, which included late fees and prepetition interest accrued through September 27, 1988.(FN1) The claim filed characterized the FSLIC's claim as a "secured" claim. The FDIC subsequently succeeded to the interest of the FSLIC.

The FDIC's claim is based on a contract for deed on a condominium (the "Property") in which the FDIC held the vendor's interest and Debtor held the vendee's interest. Said contract for deed was subject to a mortgage on the Property held by Ruben Vodovoz (the "Mortgagee"). The Property is also subject to liens for unpaid dues assessed by the Kenwood Estates Condominium Association (the "Association") and to liens for unpaid real estate taxes. Thus, the Mortgagee's and the Association's interests in the Property are both superior to that of the FDIC.

During the pendency of the case, Debtor used the Property to generate revenue for the estate by renting it to a tenant. At the hearing, however, Debtor testified that his precarious hold on the Property rendered him unable to lease the Property for what otherwise would have been its market value, and that he has been

unsuccessful in collecting from the tenant the full amount of the rent he charged. Debtor also testified that he repeatedly offered to relinquish possession of the Property by giving the FSLIC a deed

(FN1) The agent for the FSLIC had been added to the Clerk's A Schedule Addendum Sheet on March 7, 1989.
END FN

in lieu of foreclosure, which offers the FSLIC never accepted.

Debtor's Second Amended Plan of Reorganization (the "Plan") valued the Property at $124,000 and provided that the FDIC would receive the Property as satisfaction in full of its claim:

> Debtor does not dispute the characterization of [FDIC's] . . . secured claim[]. Debtor believes that the market value of the Property is approximately $124,000.00, and exceeds the amount of [FDIC's] . . . claim[] filed in the amount[] of $117,575.68 . . .. Debtor will abandon and/or deed the Property to [the FDIC] . . . in lieu of [its] claim[] on or before the Effective Date . . ..

In addition, the Plan made no provision for the allowance of administrative expenses for postpetition real estate taxes on the Property which were paid by the Mortgagee and for unpaid postpetition condominium dues for the Property. On May 7, 1990, the FDIC filed an objection to confirmation of the Plan. The Plan was confirmed by Order entered May 11, 1990.

By Order entered May 22, 1990, the FDIC's objection to confirmation was overruled, but the Order provided that the FDIC would have 30 days to file a deficiency claim and to request allowance of administrative expenses, both of which would be entitled to distribution if allowed. The Order also provided that the FDIC would be required to file motions for hearings on said claims within 60 days after entry of the Order. In addition, the Order preserved the Debtor's and the Committee's objections to allowance of said claims.

The FDIC filed the claims and scheduled both for hearing on August 9, 1990. At the conclusion of the hearing, I determined the value of the Property to be $103,000.00.

DISCUSSION

The Debtor objects to allowance of the deficiency claim because the FDIC's claim form characterized its claim as "secured." The Debtor objects to allowance of the administrative expenses based on its assertion that the real estate taxes and condominium dues were not actual and necessary costs of preserving the estate. In addition, counsel for the Committee asserted at the hearing that the FDIC lacks standing to request allowance of the administrative expense claim, since it is requesting allowance on behalf of the Mortgagee and the Association. I find no merit in the Debtor's or the Committee's objections, and therefore I will allow the deficiency claim and administrative expenses.

A. Deficiency Claim

Debtor asserts that the FDIC is not entitled to allowance of an unsecured claim for the deficiency because it interprets the FDIC's claim form as constituting an admission that the FDIC's claim is fully secured. The claim form characterized the FDIC's claim form as "secured."(FN2) The FDIC responds that the designation

(FN2) Under the local rules applicable to cases filed in this district, the filing of such a claim in a Chapter 7 case would have constituted an admission that the claim was fully secured:

> Any claim, except a claim for taxes secured by a tax lien, which states that the claim is secured without designating any part thereof as being unsecured is deemed filed and allowed as a fully secured claim and no payment shall be made on such claim under 726(a) of the Code and Rule 3002(a).

Local R. Bankr. P. 114(d) (D. Minn.). There is no corresponding local rule applicable in a Chapter 11 case, which omission appears intentional.
END FN

"secured" merely indicated that the FDIC asserted a claim secured by some collateral, and that said designation was not intended to communicate any position the claimant had regarding the value of the collateral. I conclude that the FDIC's interpretation of its claim is the only reasonable interpretation possible given the process the Bankruptcy Code and Rules establish for determining the treatment of secured claims in a Chapter 11 case.

The FDIC was not required to file a claim, since without doing so it was entitled to allowance of an unsecured claim for the deficiency in the amount of $19,400 based upon Debtor's A-2 schedule. Fed. R. Bankr. P. 3003(b)(1). If no claim had been filed, and Debtor's Plan had not provided for allowance of a $19,400 deficiency claim but instead had treated the claim as fully secured, the FDIC would still have been entitled to object to confirmation of the Plan. It would have made no sense for the FDIC to admit that its claim was fully secured when the Debtor had provided for a deficiency claim in his schedules.(FN3) Consequently, I cannot agree with Debtor's assertion that the characterization of the FDIC's claim constituted an admission that its claim was fully secured.

The FDIC's claim, however, did create confusion as to whether it was challenging the $85,000 value the A-2 schedule listed for the Property. Section 506(a) of the Code explicitly permits a

(FN3) The FDIC may have been entitled to elect to have its claim treated as fully secured under 11 U.S.C. Section 1111(b), but the filing of a claim form characterizing a claim as "secured" cannot be interpreted to constitute such an election.
END FN

secured creditor to seek determination of the value of its interest

in the estate's interest in the collateral "in conjunction with any hearing . . . on a plan affecting such creditor's interest." 11 U.S.C. Section 506(a). A secured creditor must file a timely claim in order to preserve its right to seek such a determination and allowance of any resulting unsecured claim for the deficiency. Appeal of Commonwealth Credit Corp. (In re Tarnow), 749 F.2d 464 (7th Cir. 1984). Such a claim was timely filed on behalf of the FDIC, and consequently the FDIC was entitled to seek determination of the value of its collateral in conjunction with the confirmation hearing and to have an unsecured claim allowed for the deficiency. If Debtor found it difficult to structure the treatment of the FDIC's claim because he did not know the value of the unsecured claim the FDIC was asserting, Debtor could have brought a motion to determine the value of the Property under section 506(a) prior to filing his Plan.

B. Administrative Expenses

Counsel for the Committee asserted at the hearing that the FDIC lacked standing to request allowance of administrative expenses on behalf of the Mortgagee and the Association. Section 503 of the Bankruptcy Code, however, broadly provides that "[a]n entity is entitled to file a request for an administrative expense." 11 U.S.C. Section 503(a) (emphasis added). Under the appropriate circumstance, if administrative claimants have failed to request allowance, an adversely affected entity may be permitted to do so on their behalf. C.f. McKeesport Steel Castings Co. v. Equibank, N.A. (In re McKeesport Steel Castings Co.), 799 F.2d 91, 94 (3d Cir. 1986) (administrative claimant has standing to request surcharge of collateral under 11 U.S.C. Section 506(c) where debtor in possession has no incentive to make request on claimant's behalf). Neither the Mortgagee nor the Association had any incentive to request allowance on their own behalf, since allowance of their expense claims is secured by their superior interests in the Property. There is no indication in the language of section 503 that an entity other than the administrative claimants is prohibited from requesting allowance on the claimants' behalf in such a situation.(FN4)

Thus, the FDIC has standing to request allowance of administrative expenses on behalf of the Association and the Mortgagee. This Court has discretion to determine if the expenses of the Association and the Mortgagee constitute administrative expenses. In re Moore, 109 B.R. 777, 780 (Bktcy. E.D. Tenn. 1989).

1. CONDOMINIUM ASSOCIATION FEES

Debtor purchased the Property subject to a recorded Declaration of Condominium (the "Declaration") which provided that the Association would provide certain services and the Debtor would

(FN4) In contrast, section 506(c) appears to limit standing to surcharge collateral explicitly to the trustee and, by extension, the debtor in possession. Central States, S.E. & S.W. Areas Pension Fund v. Robbins (In re Interstate Motor Freight System IMFS, Inc.), 71 B.R. 741, 743 (Bktcy. W.D. Mich. 1987). Nonetheless, the McKeesport court and many others throughout the nation have held that, under the appropriate circumstance, other entities besides a trustee or debtor in possession have standing to

move for surcharge of collateral under section 506(c). See, e.g., In re DLS Indus., Inc., 71 B.R. 679 (Bktcy. D. Minn. 1987).
END FN

pay a fee for said services. The Declaration also provided that unpaid fees would become a lien against the Property. Thus, the Declaration was analogous to a prepetition contract for services. Debtor did not "agree" to the Declaration postpetition, and he neither assumed nor rejected it. Consequently, the Association has no contractual administrative expense claim. In re Intran Corp., 62 B.R. 435 (Bktcy. D. Minn. 1986); United Trucking Service, Inc. v. Trailer Rental Co. (In re United Trucking Service, Inc.), 851 F.2d 159, 162 (6th Cir. 1988).

Expenses incurred without authorization or approval of the debtor in possession, however, can still qualify as an administrative expense if they meet three criteria:

> (1) they must be actual expenses[;] (2) they must be necessary expenses[;] and (3) the creditor must have undertaken the expenses in order to benefit the estate as a whole, not to further his own self-interest.

In re Hayes, 20 B.R. 469, 472 (Bktcy. W.D. Wis. 1982). These criteria are derived from the section of the Bankruptcy Code which provides for allowance of administrative expenses:

> After notice and a hearing, there shall be allowed administrative expenses . . . including:
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

11 U.S.C. Section 503(b)(1)(A). Bankruptcy courts should narrowly construe "actual" and "necessary", and the administrative claimant has the burden of proving that its expense constitutes an administrative expense. In re Moore, 109 B.R. at 780. the services the Association performed in exchange for its fees:

> Section 503(b)(1)(A) looks at the use of property [or service] from the perspective of the debtor and requires the debtor to pay only for the use and benefit it obtained from the leased property [or service].

In re Intran Corp., 62 B.R. at 436. In the Intran case, the debtor made no use of the leased property postpetition, and consequently no administrative expense claim based on actual benefit to the estate could be allowed. In contrast, in the instant case, the estate actually benefited from the services provided by the Association because it leased the Property to a tenant while said services were being provided. Debtor could not have leased the Property, or at least not at the rent he charged, if those services had not been provided.

Similarly, Debtor's reliance on the Moore case is misplaced, since in said case the trustee made no use of certain unimproved lots while said lots were being serviced by a property owners

association:

> [N]o evidence was introduced demonstrating that any benefit (e.g., increased resale or rental value of the lots) flowed to the estate from the services provided by the Association.

In re Moore, 109 B.R. at 784 (emphasis added). In the instant case, Debtor did actually lease the Property to a tenant, and the services provided by the Association did increase the rental value.

At the hearing, Debtor testified that his precarious hold on the Property rendered him unable to lease the Property for what otherwise would have been its market value, and that he has been unsuccessful in collecting from the tenant the full amount of the rent he charged. But Debtor, with the tacit consent of the Committee, took a business risk by continuing to use the Property for generating income. Consequently, the estate, rather than the FDIC, should bear the loss from what now appears to be a poor business decision. If the returns did not justify the expenses incurred, Debtor should have left the Property vacant, in which event he and the Committee could have argued forcefully that the estate received no actual benefit from the services provided by the Association.

Finally, Debtor asserts that the FDIC's administrative expense claim for the Association's fees should not be allowed because the FDIC did not seek relief from the automatic stay, accept Debtor's offer of a deed in lieu of foreclosure, or otherwise affirmatively seek to protect itself. In the Intran case, on which Debtor relies, Judge Kressel concluded that it was fair to limit allowance an administrative expense to the value of the debtor's actual use of leased property, since a lessor who anticipated such allowance would be inadequate could move for relief from stay 11 U.S.C. Section 362(d) or seek adequate protection under 11 U.S.C. Section 363(e). In re Intran Corp., 62 B.R. at 436. In the instant case, however, the FDIC is seeking allowance for no more than the value to the estate of the services the Association actually provided. The Intran decision does not support the proposition that the FDIC should be allowed less than such value because it did not affirmatively seek to protect itself.

2. REAL ESTATE TAXES

Debtor concedes that the real estate taxes paid by the Mortgagee meet the criteria for allowance under 11 U.S.C. Section 503(b)(1)(B)(i). Nonetheless, Debtor relies on the Intran case in asserting that said expense should not be allowed because the FDIC did not affirmatively seek to protect itself. As I have concluded above, the discussion of self protection in the Intran decision did not place an additional limit on the allowance of an administrative expense, but merely supports the fairness of the limits that already existed in the Code. Consequently, the FDIC is entitled to allowance of an administrative expense for the real estate taxes.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The FDIC shall be allowed an unsecured claim for that

portion of its claim which exceeds $103,000.00;

2. Debtor's objection to allowance of the unsecured portion of the FDIC's claim is overruled;

3. The Kenwood Estates Condominium Association shall be allowed an administrative expense in the amount requested by the FDIC on its behalf;

4. Ruben Vodovoz shall be allowed an administrative expense in the amount requested by the FDIC on his behalf;

5. Debtor's objection to allowance of said administrative expenses is overruled; and

6. The Committee's objection to allowance of said administrative expenses is overruled.

Nancy C. Dreher
United States Bankruptcy Judge