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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 99-52111
	)	
DEVLIEG-BULLARD, INC.	)	CHAPTER 11
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM

ORDER RE: "MOTION FOR ORDER DIRECTING PAYMENT OF ADMINISTRATIVE EXPENSES PURSUANT T0 11 U.S.C. §503"

This matter comes before the Court on a "Motion for Order Directing Payment of Administrative Expenses Pursuant to 11 U.S.C. §503" filed by Chartwell Group, LLC ("Chartwell") and objections to that motion filed by the United States Trustee and the Official Committee of Unsecured Creditors (the "Creditors Committee"). During the hearing on the matter the Court received evidence in the form of exhibits and in the form of testimony from William P. Nice, Jr. ("Nice"), a principal of Chartwell, and a proffer from debtor's counsel, Sean Malloy. The Court also heard legal argument from counsel. At the conclusion of the hearing, Chartwell and the Creditors Committee were granted additional time in which to respond to an issue raised by the Court during the hearing. Those pleadings were timely filed and the matter was then taken under advisement. (Chartwell's "Motion for Order Directing Payment of Administrative Expenses Pursuant to 11 U.S.C. §503" and its supplemental pleading shall hereinafter be referred to collectively as the "Motion").

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings and the testimony, the evidence presented and the

arguments of counsel during the hearing on this matter, as well as the entire record in this chapter 11 case, the Court makes the following findings of fact and conclusions of law.

FACTS

1. DeVlieg-Bullard, Inc., ("DeVlieg") is a corporation formed pursuant to the laws of the State of Delaware.

2. On September 22, 1998, DeVlieg entered into an "Exclusive Right to Sell Agreement" with Chartwell for the sale or lease of real property owned by DeVlieg and located at 170 East 131st Street, Cleveland, Ohio (the "Property").[1]

3. The Property was difficult to sell given that it was somewhat obsolete for modern manufacturing, required some repair and was believed to suffer from environmental problems.

4. On July 15, 1999 (the "Filing Date"), DeVlieg filed a voluntary chapter 11 bankruptcy petition and has continued in possession of its property and has operated its business as debtor-in-possession, pursuant to §1107 and §1108 of the Bankruptcy Code. (DeVlieg, as debtor-in-possession, shall hereinafter be referred to as "Debtor").

5. Richard Sappenfield ("Sappenfield") was president of DeVlieg and, after the filing of the bankruptcy petition, served as president of Debtor.

6. At all times relevant to this matter, Nice, on behalf of Chartwell, primarily communicated with DeVlieg or Debtor through Sappenfield.

7. Chartwell handled at least three other real estate transactions for DeVlieg or its

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[1] On April 10, 2000, Chartwell filed proposed findings of fact. During the hearing on this matter, Debtor, the Creditors Committee and the United States Trustee stipulated to certain of those proposed findings, including this finding #2. The other findings of fact which were stipulated to by the parties will be denoted herein by reference to this footnote.

affiliate and had a "longstanding" business relationship with Sappenfield.

8. Pursuant to Orders dated, July 28, 1999 and September 24, 1999, John Haggerty ("Haggerty") was appointed as interim chief executive officer of Debtor.

9. In August 1999, Haggerty called Nice to inform him of his position with Debtor and to schedule a meeting. Nice met with Haggerty on August 23, 1999, and during that meeting, Haggerty informed Nice that he should communicate with Sappenfield regarding sale of the Property.

10. Prior to the Filing Date, Chartwell received two offers for the Property, one of which was made by B&W Realty Investors ("B&W"). The offer by B&W resulted in a contingent purchase agreement, which terminated when B&W and DeVlieg were unable to resolve environmental contingencies.

11. On or about September 1, 1999, Nice, on behalf of Chartwell, sent to Debtor a new Exclusive Right to Sell Agreement (the "Post-Petition Exclusive Right to Sell Agreement") that, *inter alia*, provided that Chartwell was entitled to receive a sales commission of six percent of the purchase price if it sold the Property on behalf of Debtor.

12. Nice was aware that, because Debtor had filed for bankruptcy, Bankruptcy Court approval was required for Chartwell's retention on a post-petition basis.

13. On or about October 1, 1999, Sappenfield, on behalf of Debtor, instructed Chartwell to approach B&W and other interested parties with an "as is" offer of the Property at a price of $1,000,000.00. At that same time, Sappenfield informed Nice that he was working on Bankruptcy Court approval of the Post-Petition Exclusive Right to Sell Agreement and that Chartwell should continue to market the Property.

14. In October 1999, B&W made an offer to Chartwell to purchase the Property for $850,000.00.

15. On October 19, 1999, Sappenfield, in his capacity as president of Debtor, executed the Post-Petition Exclusive Right to Sell Agreement.[2]

16. On October 22, 1999, Sappenfield sent a letter to Nice by facsimile instructing Chartwell to accept the offer from B&W with certain conditions. Sappenfield also stated that the Post-Petition Exclusive Right to Sell Agreement "ha[d] been sent to [DeVlieg-Bullard's] attorney's [sic] requesting that they obtain court approval of the agreement."[3]

17. In his October 22, 1999 letter, Sappenfield enclosed the executed Post-Petition Exclusive Right to Sell Agreement.[4]

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[2] *See* footnote 1, *supra*.

[3] *See* footnote 1, *supra*.

[4] *See* footnote 1, *supra*.

18. On November 9, 1999, Sappenfield informed Nice by e-mail that the Post-Petition Exclusive Right to Sell Agreement would be presented to the Bankruptcy Court soon and that it was anticipated that the agreement would be approved ten days later.[5]

19. Throughout November 1999, Chartwell continued to market the property and to negotiate with B&W.

20. Sometime during November 1999, Sappenfield left the employ of Debtor.

21. On December 1, 1999, Nice spoke with Haggerty and during this conversation, Haggerty stated that he had met with B&W regarding the purchase of the Property and that Debtor had entered into a Purchase Agreement with B&W at a price of $700,000, plus assumption of a $100,000 mechanics lien.[6]

22. Pursuant to an Order dated February 29, 2000, the Court approved the sale of the Property to Acme Realty, LLC, an entity related to B&W.

23. Debtor never sought court authorization to enter into the Post-Petition Exclusive Right to Sell Agreement nor did Debtor or any other party in interest file an application to retain Chartwell as a professional pursuant to 11 U.S.C. §327.

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[5] *See* footnote 1, *supra*.

[6] *See* footnote 1, *supra*.

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DISCUSSION

Through the Motion, Chartwell contends that, pursuant to 11 U.S.C. §330(a) and §503(b), the Court should approve allowance of an administrative expense in the amount of $48,000.00, the amount of commission that would have been due Chartwell under the Post-Petition Exclusive Right to Sell Agreement that was entered into by Debtor, but never approved by this Court.[7] Through its objection, the Creditors Committee contends that as broker for the sale of Debtor's property, Chartwell was a professional pursuant to 11 U.S.C. §327 and §330 and that, because Chartwell was never properly retained as a professional and the Post-Petition Exclusive Right to Sell Agreement was never approved by the Court, Chartwell is not entitled to allowance of an administrative expense claim pursuant to 11 U.S.C. §330(a).[8]

Section 327(a) of the Bankruptcy Code permits a debtor-in-possession to retain professionals to assist in the administration of the bankruptcy case. *See* 11 U.S.C. §327(a). Such retention is subject to an application process and approval by the bankruptcy court. If a professional is properly retained, that professional is entitled to receive compensation pursuant to any approved, post-petition contract with debtor-in-possession, subject to the provisions of Section 330 of the Bankruptcy Code. *See* 11 U.S.C. §330. Compensation awarded to professionals pursuant to §330 of the Bankruptcy Code is entitled to administrative expense priority pursuant to §507 of the Bankruptcy Code. *See* 11 U.S.C.

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[7] Pursuant to the Post-Petition Exclusive Right to Sell Agreement, Chartwell was to receive a commission based upon six percent (6%) of the first one million dollars of the gross sales price and four percent (4%) of the balance of the gross sales price. Because the sales price of the Property was $700,000 plus assumption of a $100,000 mechanics lien, Chartwell calculated the commission due at $48,000.00, or 6% of $800,000.

[8] The United States Trustee's objection sets forth essentially the same argument and, as such, need not be separately addressed by the Court.

§507(a)(1).

Despite Sappenfield's representations to the contrary, Debtor never filed an application to retain Chartwell. Nor did Chartwell, after learning that Debtor never sought Court approval of its services, file a post facto application on its own behalf.[9] *See, e.g.*, *Mehidipour v. Marcus & Millichap (In re Mehdipour)*, 202 B.R. 474, 479-80 (B.A.P. 9th Cir. 1996), *aff'd.* 139 F.3d 1301 (9th Cir. 1998) (holding that bankruptcy courts have equitable powers to allow applications for approval of employment filed by professionals themselves). *See also In re Jarvis*, 53 F.3d 416 (1st Cir. 1995) (affirming bankruptcy court's discretionary authority to grant post facto applications for employment of professionals).[10]

Based upon the fact that Chartwell was never properly retained pursuant to 11 U.S.C. §327(a), it is not entitled to an administrative expense priority for the compensation contemplated under the Post-Petition Exclusive Sales Agreement. *Cf. In re Timberline Property Development, Inc.*, 115 B.R. 787 (Bankr. D.N.J. 1990) (holding that real estate broker not entitled to administrative expense priority for its claim against debtor for commission based on sale of debtor's property where broker was not properly employed as

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[9] In its supplemental pleading, Chartwell contends that it was not acting as a professional within the scope of §327(a) of the Bankruptcy Code because it was not involved in the reorganization of Debtor's estate. Although such contention does not appear to be well-supported by either the Bankruptcy Code or related case law, the Court, based upon its findings in this matter, need not further address Chartwell's contention in that regard.

[10] Despite its contention that it was not acting as a professional in this bankruptcy case, footnote 4 of Chartwell's supplemental application sets forth that "Chartwell also meets the exceptional circumstances requirement for a nunc pro tunc entry approving its employment." Other than this cursory reference to a bankruptcy court's equitable power to approve the retention of professionals *after* services have been rendered to the debtor-in-possession, Chartwell does not set forth any analysis or case authority for this contention, nor does Chartwell explain why it did not file an application for retention on its own behalf. *See* "Supplemental Brief of Chartwell Group, LLC in Support of its Motion for Order Directing Payment of Administrative Expenses Pursuant to 11 U.S.C. §503" at pg. 3.

professional pursuant to §327 of the Bankruptcy Code). Compensation for Chartwell's post-petition services to Debtor may, however, be entitled to administrative priority if those services qualify as an administrative expense pursuant to §503(b)(1)(a).

Pursuant to §503 of the Bankruptcy Code, there shall be allowed as an administrative expense, "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after commencement of the case. . . ." *See* 11 U.S.C. §503(b)(1)(A). Although this provision of the Bankruptcy Code cannot be used to circumvent the requirement under §327(a) that professionals must receive court approval before rendering services to a bankruptcy estate, in some limited circumstances, such as when a professional performs post-petition services in reasonable reliance on debtor-in-possession's representation that court approval for such services will be obtained, such professional may be entitled to an award of an administrative expense pursuant to §503(b)(1)(A). Such was the situation in this case given Haggerty's meeting with Nice coupled with Sappenfield's ongoing assurances to Nice and the past relationship between those two individuals on behalf of their respective organizations. *See, e.g., Colish v. Brandywine Raceway Assoc.*, 119 A.2d 887, 891 (Del. Super. Ct. 1955) (doctrine of apparent authority may result from (1) the general manner by which the corporation holds out an officer or agent as having power to act or (2) acquiescence in his acts of a particular nature, with actual or constructive knowledge thereof); *Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co.*, 156 A. 350, 352 (Del. Super. Ct. 1931) (president of corporation has implied power to perform all acts of ordinary nature which are incident to his office and can bind corporation in matter concerning usual course of corporation' business).

For a claim to qualify as an administrative expense, a claimant must prove (1) that

the debt arose from a transaction with the debtor-in-possession as opposed to the preceding entity and (2) that the debt directly and substantially benefitted the estate. *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.)*, 831 F.2d 106, 110 (6th Cir. 1987). The party seeking an administrative expense claim bears the burden of proving entitlement to such a claim by a preponderance of the evidence. *See In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 157 (4th Cir. 1999); *In re Allen Care Centers, Inc.*, 96 F.3d 1328, 1330 (9th Cir. 1996); *In re Mid Region Petroleum, Inc.*, 1 F.3d 1130, 1132 (10th Cir. 1993); *In re Gillette Associates, Ltd.*, 101 B.R. 866, 881 (Bankr. N.D. Ohio 1989).

Whether Chartwell's Services Arose from a Transaction with Debtor as Opposed to a Transaction with DeVlieg: As to the first element that must be demonstrated to qualify a claim as an administrative expense, the Sixth Circuit has set forth that:

> A creditor provides consideration to the bankrupt estate only when the debtor-in-possession induces the creditor's performance and performance is then rendered to the estate. If the inducement came from a pre-petition debtor, then consideration was given to that entity rather than to the debtor-in-possession. However, if the inducement came from the debtor-in-possession, then the claims of the creditor are given priority.

Employee Transfer Corp. v. Grigsby (In re White Motor Corp.), 831 F.2d 106, 110 (6th Cir. 1987) (citations omitted). Although Chartwell had contracted with DeVlieg to sell the Property prior to DeVlieg's bankruptcy filing, Chartwell had not secured a purchaser before the Filing Date. After the Filing Date, Sappenfield, on behalf of Debtor, instructed Chartwell to contact any and all potential purchasers for an "as is" sale of the Property. Sappenfield, on behalf of Debtor, also executed the Post-Petition Exclusive Right to Sell Agreement.

In its objection, the Creditors Committee alludes to a disagreement among Debtor's management regarding whether or not Debtor should enter into the Post-Petition Exclusive Right to Sell Agreement with Chartwell.[11] During the hearing on this matter, no evidence

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[11] In its objection, the Creditors Committee asserted:

> The Post-Petition Contract was not, however, submitted to this Court for approval. The Committee believes that other members of the Debtor's management team did not wish to retain Chartwell on the terms Debtor's President, Mr. Sappenfield, had agreed to and directed Debtor's counsel not to seek approval of the Post-Petition Contract. Chartwell does not indicate in the Motion whether it inquired into the status of the Bankruptcy Court approval process or whether it was aware of the dispute among the Debtor's management. Chartwell does acknowledge, however, that it knew Bankruptcy Court approval was required, yet it continued to provide services without having received an Order from this Court authorizing the Post-Petition Contract.

See "Objection of the Official Committee of Unsecured Creditors to Motion of Chartwell Group, LLC for Order Directing Payment of Administrative Expenses," at ¶3.

was presented to demonstrate that such a disagreement actually existed or that Chartwell was ever informed that Debtor might not wish to utilize Chartwell's services.[12] If that were the case, someone in Debtor's management other than Sappenfield should have contacted Chartwell. "It is the law of this State [of Delaware] that when, in the ususal course of the business of a corporation, an officer or agent has been allowed to manage certain of its affairs, and when this is known to the other party to the contract, the authority of the officer to act for the corporation is implied from the past conduct never challenged by the corporate officials." *Hessler, Inc. v. Farrell*, 226 A.2d 708, 711-12 (Del. 1967) (citations omitted). Based upon the past business relationship between Chartwell and DeVlieg generally, and between Nice and Sappenfield specifically, the Court finds that Chartwell's services after the Filing Date arose from a transaction with Debtor, and not from a continuation of its pre-petition dealings with DeVlieg.

Whether Chartwell's Post-Petition Services to Debtor Directly and Substantially Benefitted the Estate: Although Chartwell's post-petition services were rendered pursuant to a transaction with Debtor, compensation for those services may only be classified as an administrative expense if they directly and substantially benefitted the estate. Benefit to the estate must be measurable in assets distributable to creditors, or through the elimination of claims which would otherwise require creditors to share the assets with others. *See In re Lazar*, 207 B.R. 668 (Bankr. C.D. Cal. 1997).

During the hearing, Nice testified regarding Chartwell's efforts to sell the Property

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[12] Although he was given the opportunity to participate in the hearing on this matter by telephone, the Court was unable to reach Haggerty during the hearing and no other officer or director of Debtor was present to testify regarding Debtor's management's discussions about the Post-Petition Exclusive Right to Sell Agreement.

before DeVlieg filed its chapter 11 petition. Nice explained that those pre-petition efforts included flying over the site and taking photographs, developing a sales brochure, sending that brochure to over 1,000 potential purchasers and contacting other business in the neighborhood to determine if they might be interested in expanding their business locations to include the Property. Nice also testified that those pre-petition efforts resulted in the execution of a purchase agreement with B&W that was never consummated because of unfulfilled environmental contingencies.

After the Filing Date and pursuant to a request by Sappenfield, Nice testified that he re-contacted potential purchasers of the Property to propose an "as is" sale. Pursuant to those efforts, Nice preliminarily negotiated a post-petition sale of the Property with B&W, the same entity that had executed a purchase agreement with Debtor before the Filing Date. Although Debtor, through Haggerty, finalized that ultimate sale of the Property with an entity related to B&W, the Court finds that Chartwell's post-petition, preliminary negotiations with B&W helped to facilitate that sale and that the proceeds derived from sale of the Property directly and substantially benefitted the estate.

The Court's finding that Chartwell's post-petition efforts rendered a benefit to the estate is qualified by the fact that those post-petition efforts were facilitated by work that Chartwell did on a pre-petition basis to market the Property and the fact that administrative expense priority cannot be granted for pre-petition services. The only quantifiable evidence that Chartwell presented to the Court regarding the value of its post-petition services was a computation of the total commission due under the Post-Petition Exclusive Right to Sell Agreement (*see* footnote 7, *supra*). Because Chartwell is not entitled to be compensated pursuant to the Post-Petition Exclusive Right to Sell Agreement and because the 6% sales commission figure in that agreement most likely contemplates compensation for much of the

work that Chartwell did on a pre-petition basis, that evidence alone falls short of the burden Chartwell must meet to demonstrate the value of it post-petition services.

CONCLUSION

Based upon the foregoing, the Court finds that Chartwell's compensation for services it provided to Debtor on a post-petition basis is entitled to an administrative expense priority. However, because Chartwell failed to present the Court with sufficient evidence to determine the value of those services, the amount of its administrative expense priority claim is, at this time, undeterminable.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 9/29/00