ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
FEB - 6 2002
TAWANA C. MARSHALL, CLERK
By _____
Deputy

IN RE:	§	
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COLORADO PLACE LIMITED PARTNER-SHIP,	§	CASE NO. 01-34326-SAF-7
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D E B T O R.	§	

MEMORANDUM OPINION AND ORDER

Management Solutions, Inc., moves the court for payment of $69,660.95 as an administrative expense under 11 U.S.C. §503(b)(1)(A). John H. Litzler, the Chapter 7 trustee of the bankruptcy estate of Colorado Place Limited Partnership, opposes the motion. GMAC Commercial Mortgage Corp., the secured creditor, joins in the trustee's opposition. The court conducted an evidentiary hearing on the motion on January 14, 2002.

The allowance of an administrative expense constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§157(b)(2)(A) and (O) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

On May 25, 2001, Colorado Place filed its petition for relief under Chapter 11 of the Bankruptcy Code. On July 10,

104

2001, Colorado Place filed a motion to sell its property to an affiliate of Management Solutions, Inc. The court held a hearing on the motion to sell on July 20, 2001, and granted the motion by an order entered July 20, 2001. In anticipation of the closing of the sale, Management Solutions began managing the debtor's apartment complex on July 23, 2001. On July 25, 2001, GMAC moved the court to reconsider the order granting the motion to sell. On July 26, 2001, GMAC filed a motion to prohibit the use of cash collateral and a motion to employ a different property management company.

On August 1, 2001, Colorado Place filed an amended motion to sell and to employ Management Solutions. The court held a hearing on GMAC's and the debtor's motions on August 1, 2001. The court granted the motion to reconsider the sale order. The court denied the debtor's motion.

The court discussed property management issues with the parties. Management Solutions told the court that it expected to collect $60,000 in rent a month. The court authorized Management Solutions to spend the $60,000 first for property insurance and second for utilities. After paying those expenses, the court authorized payment of employees and security and, if funds remained, plumbing and air conditioning expenses. The court instructed Management Solutions to maintain accurate records of

expenditures and to provide notice by fax to GMAC before making any expenditures.

To memorialize the directive from the bench, on August 14, 2001, the court entered an order authorizing Management Solutions to "make limited use of cash collateral to satisfy the following categories of operating expenses in the order in which they are listed: (1) insurance, (2) utilities, (3) wages of on-site personnel, (4) security services, and (5) emergency maintenance." The court also ordered that, "prior to making any expenditure of cash collateral within the categories set forth in the preceding paragraph, [Management Solutions] shall forward by fax a written notice of each contemplated payee and the amount of each contemplated payment to Debtor's counsel, GMAC's counsel and [Management Solutions'] counsel."

On August 15, 2001, the court converted the case to a case under Chapter 7 of the Bankruptcy Code, following which the Chapter 7 trustee took control of the property.

Management Solutions seeks payment of $69,660.95 for services provided pursuant to the August 1, 2001, hearing and the order entered August 14, 2001. The trustee and GMAC contend that Management Solutions may not be compensated because it: (1) failed to obtain employment under 11 U.S.C. §327(a); (2) failed to comply with the court's order; and (3) failed to establish that it provided a benefit to the estate. The trustee and GMAC

maintain that Management Solutions made a business decision to incur the expenses in contemplation of the purchase of the apartment complex by its affiliated company.

The Bankruptcy Code provides that "[a]n entity may timely file a request for payment of an administrative expense[.]" 11 U.S.C. §503(a). Additionally, §503(b) provides that, "After notice and hearing, there shall be allowed administrative expenses . . . including-(1)(A) the actual, necessary costs and expenses of preserving the estate[;] and (2) compensation and reimbursement awarded under section 330(a) of this title." 11 U.S.C. §503(b)(1)(A) and (2). Management Solutions bears the burden of proving that its claim is for "actual, necessary costs and expenses of preserving the estate." In re Transamerican Natural Gas Corp., 978 F.2d 1409, 1416 (5th Cir. 1992). The words "actual" and "necessary" are to be construed narrowly. "[T]he debt must benefit [the] estate and its creditors." NL Indus., Inc., v. GHR Energy Corp., 940 F.2d 957, 966 (5th Cir. 1991). A prima facie case under §503(b)(1) may be established by evidence that (1) the claim arises from a transaction with the debtor in possession; and (2) the goods or services supplied enhanced the ability of the debtor in possession's business to function as a going concern. Transamerican, 978 F.2d at 1416.

Under §330(a), the court may award compensation and reimbursement of expenses to a professional person employed under

§327 by the trustee or debtor in possession. Section 327(a) requires court approval for the employment of "attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. §327(a). Bankruptcy courts generally consider property managers of commercial real estate professional persons whose employment must be approved by the court before services may be rendered to and compensated by the bankruptcy estate. See Bennett v. Williams, 892 F.2d 822 (9th Cir. 1989); Rosemary Williams, Annotation, Approval of Employment of Professional Persons under 11 U.S.C.A. §327(a) and Bankruptcy Rule 2014 nunc pro tunc, 133 A.L.R. Fed. 465 (2001).

Colorado Place did not obtain court approval before Management Solutions began providing real estate management services to the debtor on July 23, 2001. However, on August 1, 2001, Colorado Place filed a motion to employ Management Solutions. At the hearing on August 1, 2001, the court acted on the assumption that Management Solutions would render property management services on an interim basis. Without expressly approving employment of Management Solutions, the court directed Management Solutions to collect rent and then directed the priority for paying expenses from the rent collected. The court memorialized those directives by an order entered August 14,

2001. The court's directives of August 1, 2001, and the order entered August 14, 2001, constitute the functional equivalent of court approval of the debtor's employment of Management Solutions under §327(a).

The court may, therefore, consider compensation for Management Solutions under §330(a). However, the court neither approved any terms or conditions of employment of Management Solutions nor considered the manner of compensation. The debtor did not enter a contract with Management Solutions, although Management Solutions tendered a proposed contract to the debtor. The court directed that Management Solutions collect rents and further directed the expenses to be paid by Management Solutions following an articulated procedure. That order establishes the criteria to determine reasonable compensation and reimbursement of expenses under §330(a). In making that assessment, the court must necessarily consider the benefit to the estate under §503(b)(1)(A). 11 U.S.C. §330(a)(3)(C).

Management Solutions did not pay for insurance, which was the first item to be paid from rents collected.

Management Solutions did not pay for utilities, which was the second item to be paid from rents collected. Management Solutions made a payment to Southwestern Bell, but Management Solutions has failed to meet its burden of establishing that the payment covered utilities as directed by the court.

Management Solutions made a number of payments to various individual contractors and laborers and made what its books label as payroll expenditures. Management Solutions did not provide GMAC with prior notice by fax of the amounts to be paid to the contemplated payees. In addition, Management Solutions failed to meet its burden of proof regarding which expenditures cover wages of on-site personnel.

But, Management Solutions did establish that it paid some wages for on-site personnel. As the court contemplated rent collection by on-site personnel and as rent collection benefitted both the estate and GMAC, the court assumes that GMAC would have approved payment of reasonable costs for on-site personnel if Management Solutions had complied with the notification procedure. Management Solutions had proposed to the debtor that it be paid the greater of 6% of rents collected or $4,000 per month for management services. Applying that measurement to the anticipated $60,000, the court finds reasonable compensation for on-site management to be $4,000, for the period of July 23, 2001, to August 15, 2001.

Management Solutions paid for some security services. Management Solutions did not provide GMAC with prior notice by fax of the amounts to be paid to these contemplated payees. As the court contemplated payment of security services and as security services benefitted the estate and GMAC, the court

assumes that GMAC would have approved payment of security services had Management Solutions complied with the notification procedure.

Management Solutions made two payments of $575 each to B&B Security and $649.50 to U.S. Patrol Security Service. In addition, Management Solutions paid $739.05 to Hurricane Glass, which the court infers paid for broken glass after the office fire. The court finds that replacement of broken glass is necessary to maintain security. Management Solutions has failed to meet its burden of establishing that any other expenditures covered security services. Therefore, the court finds a total of $2,538.55 for security services.

Finally, the court directed the payment of emergency maintenance. Management Solutions paid a number of individual contractors and laborers as well as a number of suppliers. Again, Management Solutions did not comply with the notification procedure required by the court. But, again, as the court contemplated emergency maintenance and repairs and as emergency maintenance and repairs benefitted the estate and GMAC, the court assumes that GMAC would have approved the following expenditures had Management Solutions complied with the notification procedure.

Management Solutions paid $10,270.74 to Professional Mechanical. The court infers from the invoices and the testimony

that the payment covered sewer and air conditioning repairs. The sewer condition at the premises had to be remedied. Air conditioning in August had to be provided. Management Solutions also paid $750 to Eduardo's Landscaping and $694.54 to Latin Carpet Clean, primarily for bacteria treatment. The court finds that those expenses provided emergency maintenance necessary for municipal code compliance. The court also finds $681 for necessary supplies purchased from Austin. The court excludes from the Austin invoice amounts for a key machine, which does not meet the court's directive for payment of emergency maintenance. These items total $12,396.28.

Management Solutions has failed to meet its burden of establishing that any other expenditures had been made for the court-directed categories of operating expenses. Management Solutions says that it paid to reconstruct the office, which had been damaged by fire. The court did not direct the reconstruction of the office. The reconstruction of the office did not constitute an emergency maintenance matter to be performed by Management Solutions during its limited presumptive engagement. The court has recognized the need to replace the glass for security reasons. Management Solutions may have also needed to close off the office space or board or patch walls or the roof, again for security and safety. But, Management Solutions did not provide the court with evidence to infer limited expenditures for

those type of items. The court infers that Management Solutions did not provide that evidence because it decided to rebuild the office. Given the magnitude of the total of the other expenses requested by Management Solutions, the court has no basis to assume that GMAC would have approved those expenses had Management Solutions complied with the notification procedure. Management Solutions failed to comply with that procedure at its peril. Management Solutions cannot ignore a court directive, as made from the bench on August 1, 2001, and subsequently memorialized by written order, and then expect the court to award compensation and reimbursement of expenses for matters outside and beyond the court's directive. Indeed, for that matter, Management Solutions' own proposed contract to the debtor would have required advanced debtor approval for repair expenditures greater than $5,000.

In summary, Management Solutions did not comply with the notification procedure. The procedure had been designed by the court to protect the secured creditor. At the hearing on August 1, 2001, the debtor conceded that the value of the property would not pay the secured debt. The court could, therefore, deny the motion. But, the court has found a basis to assume that the secured creditor would have approved certain expenditures because those expenditures benefitted the estate and the secured creditor by protecting the property.

To the extent that Management Solutions constitutes a professional person functionally employed with court approval, the court awards compensation and reimbursement of expenses under §330(a) of $18,934.83, payable as an administrative expense under §503(b)(2). Alternatively, the court finds that Management Solutions has established that it should recover administrative expenses of $18,934.83 under §503(b)(1)(A). In all other respects, Management Solutions has failed to meet its burden and its request is denied.

Based on the foregoing,

IT IS ORDERED that the motion of Management Solutions, Inc., for payment of administrative expenses is **GRANTED IN PART** and **DENIED IN PART.** Management Solutions, Inc., shall have a Chapter 11 administrative expense of $18,934.83.

Signed this 5th day of February, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge