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

ENTERED
JAN 17 2003
TAWANA C. MARSHALL, CLERK
BY

IN RE:	§	
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RFM KING, INC.,	§	
Debtor.	§	CASE NO. 401-47823-DML-11
	§	

MEMORANDUM OPINION AND ORDER

Before the court is the Motion to Surcharge Sales Proceeds Under § 506(c) (the "Motion") filed by the above-named Debtor as a debtor in possession ("Debtor"). The United States Trustee ("UST") and Bay View Franchise Acceptance Company as Special Servicer for FMAC Loan Receivables ("FMAC") filed responses to the Motion. On January 9, 2003, the court held a hearing on the motion, at which time Debtor presented evidence in support of the Motion through the testimony of Richard Myers ("Myers"). Debtor, FMAC and the UST also argued to the court. This memorandum opinion represents the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014. This matter is within the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (K) and (O).

Background

Debtor was an operator of three Burger King Restaurants. On October 29, 2001, Debtor commenced the instant chapter 11 case. At the time of filing of the chapter 11 petition, Debtor owed approximately $850,000 to FMAC, which debt was secured by the personalty located at Debtor's restaurants.

It soon became clear that Debtor could not effect a reorganization and that, in fact, the value of Debtor's restaurants was substantially less than the amount owed to FMAC.[1] Myers, who was the owner of Debtor, testified that he was prepared to close the restaurants by the end of July 2002. However, in an effort to maximize the value of the restaurants as going concerns, Debtor continued operations for two more months. The restaurants were finally sold as going concerns, and the estate received approximately $112,000 in net proceeds.[2] Since all of these proceeds are from the sale of FMAC's collateral, Debtor now seeks by the Motion to surcharge FMAC (i.e., deduct from the sale proceeds) $51,594.71[3] pursuant to 11 U.S.C. § 506(c).[4]

II. Discussion

Though this case is a failed chapter 11 case, it has not been converted to chapter 7, and there is no trustee. Thus Debtor, in its capacity as debtor in possession, is the proper party to make a claim on behalf of the estate under 11 U.S.C. § 506(c). *See Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S.Ct. 1942 (2000).

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1 In December 2001, Debtor terminated operations at one of its three locations. FMAC apparently ultimately took possession of the personalty at that location.

2 Though the purchase price was substantially higher, it was offset by the cost of work required by the franchisor to maintain the restaurants' franchises.

3 Originally, Debtor sought $62,540.04, but abandoned its claim to the extent of $10,945.33.

4 Section 506(c) reads:

> (c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

In the Motion, Debtor seeks to assess against the proceeds of sale charges for thirty-seven (37)[5] items. These items may be divided into broad categories for purposes of analysis. First, there are charges related to the maintenance, repair or protection of FMAC's collateral. Second, there are charges pertaining to the conduct of the business at the restaurants at which FMAC's collateral was located. Third, there are charges related to Debtor's administrative operations and chapter 11 UST fees. Finally, there are several items that Myers was unable to explain.

The test for assessing or surcharging the proceeds of sale of an undersecured creditor's collateral is that the charge must have been (1) necessary; (2) reasonable in amount; and (3) of benefit to the secured creditor. *Matter of Senior – G&A Operating Co., Inc.*, 957 F.2d 1290, 1298-9 (5th Cir. 1992); *Matter of Delta Towers, Ltd.*, 924 F. 2d 74, 77 (5th Cir. 1991). The benefit to the secured creditor (here FMAC) must be direct. "Courts have construed the benefit element as requiring that the. . .expenses [be incurred] primarily for the benefit of the secured creditor and that the expenses resulted in a quantifiable [sic] direct benefit to the secured creditor." (*Delta Towers*, 924 F. 2d at 77).

Under the foregoing test, it is clear that the unexplained charges may not be recovered from the proceeds of FMAC's collateral. Thus the court concludes that Debtor has failed to meet its burden under 11 U.S.C. § 506(c) with respect to $169.19 owed to AT&T (as Myers could not identify the charges); $70.96 owed to Consolidated Communications; $6.38 owed to Federal Express; and $94.84 owed to Pro Tech Communications.

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5 Originally, Debtor sought payment of thirty-nine (39) items but later abandoned its claim to two (2). See note 3, above.

On the other hand, expenses incurred for the repair, maintenance or protection of FMAC's collateral clearly meet the requirements to be assessed against sale proceeds. They were necessary, reasonable and unquestionably benefited FMAC. Thus, payment of the sale proceeds to FMAC should be reduced to account for $145.09 owed to Frontline Systems for cash register maintenance; $3,076.00 owed to Arthur J. Gallagher for insurance; $162.36 owed to Stainless, Inc. for upgrades required by the frachisor;[6] $4,037.19 owed to Rowe Miller for maintenance and repair; and $119.08 owed to Tri-County Welding for repairs.

The remaining two categories of charges—costs of keeping Debtor's restaurants open and administrative costs (including the UST's fees)–are more difficult to deal with. The expenses were necessary and reasonable. The question is whether they benefited FMAC. The court finds credible Myers' testimony that the value of FMAC's collateral was enhanced by keeping the restaurants open. Had they been closed and the franchises been lost, the equipment subject to FMAC's lien would have had much less value. Moreover, by the end of July 2002, it was clear that any sale of the restaurants would provide a return only on the debt of FMAC. Thus, the restaurants were kept open primarily to the benefit of FMAC.[7] Under these facts, the court finds charges appropriate to the operation of the restaurants recoverable under 11 U.S.C. § 506(c). *See Delta Towers*, 924 F.2d at 72-8; *In re James E. O'Connell Co., Inc.*, 893 F.2d 1072, 1074 (9th

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6 This expense might belong in the category of maintaining restaurant operations. Given the court's decision regarding those costs, it is not material if this expense is misclassified.

7 FMAC argued that invocation of section 506(c) requires a showing that the secured creditor was the intended beneficiary—perhaps the only beneficiary—of the expenditures. The law is not so strict. Here, there is a clear, quantifiable, benefit to FMAC that was foreseeable at the time the charges were incurred to maintain operations. That is enough to warrant reimbursement pursuant to section 506(c) when no other source of payment is available.

Cir. 1990); *United States v. Boutuen's First National Bank*, 5 F.3d 1157 (8th Cir. 1993). Those cases in which going concern value was held not to justify invocation of section 506(c) typically involve a failure to show that the benefit of continued operations accrued to the secured creditor. *See, e.g., In re Cascade Hydraulics and Utility Services, Inc.*, 815 F.2d 546, 548-49 (9th Cir. 1987). In the case at bar, the court finds that (1) FMAC's recovery was greater because Debtor's restaurants were in operation; (2) operations were continued, with the knowledge of FMAC, to maximize a recovery that would primarily benefit FMAC; and (3) the benefit to FMAC exceeded the costs of keeping the restaurants open.

The charges necessary for the operation of the restaurants are therefore properly deductible from the sale proceeds. The same cannot be said of administrative charges for Debtor's business office or those due to the UST. Had FMAC foreclosed on its collateral and maintained operations at the restaurants to improve its recovery, it would have had to pay the former charges but not the latter. It would exceed the scope of section 506(c) and of controlling precedent to require that FMAC be charged for these items.

Accordingly, the Motion must be denied with respect to TXU Electric ($377.53—office); Hood County News ($29.70); McBee Systems ($269.23—checks); office rent ($600.00); office telephone ($150.00); record storage ($4,860.00); post sale payroll ($4,471.19); payroll taxes regarding that payroll ($1,702.52); and $12,500.00 in UST fees.

The remaining expenses (excluding the amounts owed to Steve Reed and Josephine Garrett, P.C., both being attorneys' fees of which Debtor was not seeking payment) are directly related to continued operation of the restaurants. As discussed above, the continued operations

of the restaurants provided a direct, quantifiable[8] benefit to FMAC. Accordingly, the following expenses should be deducted from proceeds of the sale of those restaurants:

City of Weatherford	$ 929.78
Coca-Cola Financial	$ 3,579.02
City of Granbury (Final Electric Bill)	$ 3,453.77
Ecolab Pest Elimination	$ 430.62
Liberty A/C Heating	$ 262.51
Liberty A/C Heating	$ 974.36
L.W. Basham	$ 315.00
Massey's Septic Tank	$ 22.74
NUCO2, Inc.	$ 105.83
NUCO2, Inc.	$ 105.52
NUCO2, Inc.	$ 1,218.92
FUTA Taxes (940) 3rd and 4th Qtr. 2002	$ 1,050.00
Texas Workforce Commission – 3rd and 4th Qtr. 2002	$ 1,050.00
Terminix	$ 243.57
Tri-County Welding	$ 119.08
City of Weatherford (Electric)	$ 2,847.67
Pro-Am	$ 1,656.00

III. Conclusion

Except as set forth above, the Motion will be DENIED. As specified above, the Motion will be GRANTED and payment of the sales proceeds to FMAC shall be made to the extent consistent with this memorandum opinion, the amounts deducted therefrom to be applied by Debtor to satisfy obligations as to which the Motion is granted.

It is so ORDERED.

Signed this the 17th day of January 2003.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

8 Having determined the benefit exceeded the costs, the court need not establish the value of the benefit with greater precision.