

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF VIRGINIA  
LYNCHBURG DIVISION**

In re MINOR FAMILY HOTELS, LLC,            )            Case No. 10-62543-LYN  
  )              
  )              
  )              
  )              
\_\_\_\_\_  
Debtor.    )

**MEMORANDUM AND ORDER**

This matter comes before this Court on a motion by the Official Committee of Unsecured Creditors (“the Committee”) for an order permitting the distribution to its counsel of \$13,897.71 from funds now held by the Minor Family Hotels, LLC, (“the Debtor”). The motion will be denied.

***Jurisdiction***

This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(A). This Court may enter a final order. This memorandum shall constitute the Court’s findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, which is made applicable in this proceeding by Fed. R. Bankr. P. 7052.

***Facts***

In 2005, Hotel Charlottesville, LLC, (“the Developer”) began a project (“the Project”) to build a hotel (“the Hotel Property”) on the downtown mall in Charlottesville, Virginia. The Hotel Property consists of both land (“the Project Land”) and improvements (“the Project Improvements”). Halsey Minor is the sole owner of the Debtor. Mr. Minor and the Debtor (collectively “the Owners”) provided equity in the approximate amount of \$7,000,000.00 to

partially finance the project. In March of 2008, Specialty Finance Group (“SFG”) agreed to lend the Debtor \$23.69 million to fund the balance of the Project.

A dispute occurred between the Owners and SFG causing work on the Project to cease. Litigation ensued in multiple venues that eventually included the Owners, SFG, the Developer, Clancy and Theys Construction Company (“the Clancy & Theys”)<sup>1</sup>, and numerous sub-contractors, including R. D. Jones<sup>2</sup>, Southern Air, Inc. (“Southern Air”)<sup>3</sup>, Capital Interior Contractors, Inc. (“Capital Interior”)<sup>4</sup>, Century Concrete, Inc. (“Century Concrete”)<sup>5</sup>, and Bat Masonry Company, Inc. (“Bat Masonry”)<sup>6</sup>. Clancy & Theys and the subcontractors are referred to herein as “the Mechanic’s Lien Holders”.

On September 1, 2010, the Debtor filed a petition in bankruptcy initiating the above-styled case. The Committee was formed and the court approved the employment of Kutak Rock, LLP, as its counsel.

The Court approved the sale of the partially completed Hotel Property at auction for \$6,250,000.00. The Debtor now holds \$6,089,100.34 (“the Escrow Funds”) in escrow from the sale of the Hotel Property. At the hearing on this matter, it was represented by the parties that SFG holds a claim against the Debtor in the approximate amount of \$16,000,000.00, that Clancy

---

<sup>1</sup> Clancy & Theys has filed a proof of secured claim in the amount of \$2,169,776.22, and a proof of unsecured claim in the amount of \$443,423.49. The total amount of the claim is \$2,613,199.71.

<sup>2</sup> R. D. Jones has filed a secured proof of claim for \$176,550.14.

<sup>3</sup> Southern Air has filed a secured proof of claim for \$355,810.00.

<sup>4</sup> Capital Interior has filed a secured proof of claim for \$355,810.00.

<sup>5</sup> Century Concrete has filed a secured proof of claim for \$474,180.56.

<sup>6</sup> Bat Masonry has filed a proof of secured claim in the amount of \$124,005.50.

& Theys holds a claim against the Debtor in the approximate amount of \$2,700,000.00, and that R. D. Jones holds a claim against the Debtor in the approximate amount of \$200,000.00<sup>7</sup>. All of these claims were secured by the Hotel Property and are now secured by the Escrow Funds.

On September 24, 2012, the Committee filed a Second Application for Compensation in the amount of \$24,056.00. The motion was granted. Also on September 24, 2012, the Committee filed a Motion for Distribution that sought an order directing the Debtor to distribute the unpaid portion of Kutak Rock's fees, \$13,897.71, to the Committee from the Escrow Funds.

The General Contractor filed an opposition to the Motion for Distribution. The opposition was joined by SFG and subcontractors R. D. Jones and Associates, Inc., Southern Air, Inc., Century Concrete, Inc., and Bat Masonry Company.

#### *Discussion*

The Committee seeks payment from the Escrow Funds, all of which serves as collateral for the claims of secured creditors. The Committee did not file a brief regarding this matter, but a number of arguments were raised at the hearing. It is important to understand that the issue is whether the Committee may be compensated from the collateral of secured creditors, not whether its fees and costs should be allowed.

The first basis for such a distribution that was discussed by the parties was Section 506(c).<sup>8</sup> Counsel for the Committee, however, conceded that this section is not available

---

<sup>7</sup> The exact amount of these claims is not relevant to the resolution of the matter before the Court.

<sup>8</sup> Section 506(c) provides:

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, including the payment of all ad valorem property taxes with respect to the property.

because only a trustee or debtor-in-possession has standing thereunder. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7, 120 S.Ct. 1942 (2000).

Counsel for the Committee, however, argues that the “Court can look to section 503(b) generally and 507(a)(2) to see that . . . the Creditor’s Committee is entitled to allowance of its fees. There is nothing in those code provisions that says the Committee may not be paid . . . . I believe that this court has authority to make a determination that the Creditors Committee counsel should be compensated and reimbursed for benefit that it has provided in this case. And I believe this Court can do that under 105(a) because there is nothing in the Code that says you can’t do that.”

There are two parts to the argument. First, the Committee asserts that Sections 503(b) and 507(a)(2) provide a general basis that permits the court to pay its expenses from creditors’ collateral. Neither Section 503(b)<sup>9</sup> nor Section 507(a)(2)<sup>10</sup> provides for the payment of fees and

---

<sup>9</sup> Section 503(b) provides:

After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

. . . .

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

- (A) a creditor that files a petition under section 303 of this title;
- (B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;
- (C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;
- (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
- (E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or
- (F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

<sup>10</sup> Section 507(a)(2) provides:

(a) The following expenses and claims have priority in the following order:

expenses to a counsel for an unsecured creditors' committee from collateral of a secured creditor. Section 507 establishes the order of priority among claims. Section 507(a)(2) provides that administrative expenses allowed under section 503(b) are second priority claims. Neither section provides for payment of expenses from, or even concerns, the collateral of secured creditors.

Second, the Committee seems to argue that the Court may use its powers under Section 105(a) to pay its expenses from the collateral of secured creditors because there is nothing in the Bankruptcy Code that prohibits the court from doing so. Section 105(a) provides that a bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title and that the bankruptcy court may raise any issue on its own motion in order to carry out the provisions of the bankruptcy code. Section 105(a), then, allows the court to issue an order or judgment in order to carry out the existing provisions of the bankruptcy code. It does not allow the court to issue an order or judgment that would alter or expand the Bankruptcy Code.

**ORDER**

For the reasons stated above, the motion of the Official Committee of Unsecured Creditors for a distribution from the funds now held in escrow by the Debtor shall be and hereby is, denied.

So ORDERED.

---

...

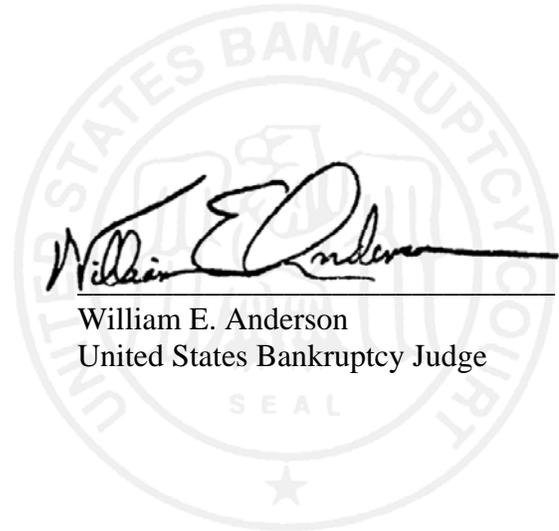
(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

Upon entry of this memorandum the Clerk shall forward copies of this memorandum and order to Craig B. Young, Esq., Richard Maxwell, Esq., William H. Schwarzchild, III, Esq., Nathaniel L. Story, Esq., William E. Schmidheiser, Esq., H. David Gibson, Esq., Dennis T. Lewandowski, Esq., John H. Maddock, III, Esq., and the United States trustee.

Entered on this 30<sup>th</sup> day of November, 2012.



William E. Anderson  
United States Bankruptcy Judge

The seal of the United States Bankruptcy Court is visible in the background. It is a circular seal with the words "UNITED STATES BANKRUPTCY COURT" around the top and "SEAL" at the bottom. A star is positioned at the bottom center of the seal.