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**In re Carol B. MUZZEY, Debtor.**

**Bankruptcy No. 89-00149.**

United States Bankruptcy Court, D. Vermont.

May 14, 1990.

J. Foley, Lynch & Foley, P.C., Middlebury, Vermont, for Lawes Agriculture Service, Inc. (Lawes).

G. Glinka, Glinka & Palmer, Cabot, Vermont, for Carol B. Muzzey (Muzzey).

T. Maikoff, Rutland, Vermont, Chapter 12 Trustee, pro se (Trustee).

MEMORANDUM OF DECISION ON APPLICATION FOR ADMINISTRATIVE EXPENSE PRIORITY

FRANCIS G. CONRAD, Bankruptcy Judge.

**\*1** This matter [FN1] involves the question of whether fertilizer and other goods and services supplied post-petition to a Chapter 12 debtor qualify as priority administrative expenses. Based on the evidence presented, we hold that they qualify as priority administrative expenses because they arose from transactions with the debtor-in-possession and directly benefitted the estate.

Muzzey filed, on June 5, 1989, for bankruptcy relief under Chapter 12 of Title 11, 11 USC §§ 101, et seq. We confirmed Muzzey's Chapter 12 Plan on July 31, 1989.

On March 5, 1990, Lawes filed a "Petition for Payment of Administrative Expenses" (Application) with an affidavit from its president. Lawes' application also included an Exhibit A, containing ten (10) pages, which presented six (6) sales invoices, four (4) of which were accompanied by corresponding sales orders. Lawes claims it supplied \$9,008.35 [FN2] worth of fertilizer and other goods and services for Muzzey's post-petition farming operations. Lawes' application includes "applicable interest" for a total of \$9,204.64.

Often in bankruptcy, because of money constraints, the parties present incomplete evidence on their position. Lawes' application is no exception because it presents us with contradictory

evidence about whether its services were ordered pre- or post-Muzzey's Chapter 12 plan confirmation.

All the invoices show a printed order date which is post-plan confirmation. Lawes' affidavit states the services provided were after Muzzey's bankruptcy filing, but fails to distinguish services provided pre- and post-confirmation. Four (4) of the invoices have attached documents, untitled, which show a handwritten order date post-petition and pre-confirmation. Each handwritten order date differs from the printed order date on the invoice. The remainder of the invoices appear to be for services provided post-confirmation.

Muzzey doesn't help us. Muzzey acknowledges the services were provided and that they will be paid, she just doesn't say when. Nor does she object to Lawes' affidavit statement that the services were beneficial, necessary, and essential to her farming business.

Finally, like a mushroom, we are left in the dark about Lawes' claimed entitlement to interest on its provable claims. The four (4) untitled documents attached to the printed invoices reveal that there are terms and conditions on the reverse side, but we are not provided with the reverse side. We are not presented with any evidence about a contract for interest.

Based on the evidence, and the application of a little fertilizer of our own, we find that Lawes provided post-petition pre-confirmation services of \$8,628.75. [FN3] Such services benefitted the estate. All other claims are denied because of lack of evidence.

## CLAIMS OF THE PARTIES

Lawes claims Muzzey obtained unsecured credit and incurred unsecured debt in the ordinary course of business "in compliance with and as authorized by said Plan and Order" [FN4] under 11 USC § 364(a). [FN5] Lawes argues that § 364(a) debt is allowable under 11 USC § 503(b)(1) [FN6] as an administrative expense which is accorded a priority status under 11 USC § 507(a)(1). [FN7] Lawes also argues that under Muzzey's Chapter 12 plan, we retained jurisdiction to adjudicate claims arising out of purchases by Muzzey while its Chapter 12 case is pending and may provide for payment of administrative expenses. [FN8] Lastly, Lawes claims payments received by Trustee and available for payment to creditors under Muzzey's Chapter 12 plan must be paid first to Lawes as a priority claimant under 11 USC § 1226(b)(1). [FN9] We interpret this argument to be a request that Trustee pay Lawes from Muzzey's plan payments.

**\*2** Trustee objected to Lawes' claimed administrative expense status and argues Lawes' post-petition claims should be paid by Muzzey in the ordinary course of business. We interpret this objection to mean he has no objection to the expenses, he just doesn't want to pay them through the plan.

## DISCUSSION

The importance of the timing of post-petition services and goods ordered by a Chapter 12 farmer cannot be understated. If a debtor orders services and goods outside and after the confirmation of a Chapter 12 plan, the fate of the post-confirmation creditor is not determined either by the confirmed plan or by us. Instead, that debt must be paid in the ordinary course of business. Conversely, if post-petition services and goods are ordered pre-confirmation, they may qualify for priority treatment as administrative expenses and, if so qualified, must be paid before plan confirmation or be dealt with under the plan.

Plan confirmation binds a debtor and its creditors, and, subject to terms of the plan, reverts estate property in the debtor. 11 USC § 1227. [FN10] This allows the debtor to use revested property, to the extent it is not encumbered by the plan or order of confirmation, to secure post-confirmation credit. H.R.Conf.Rep. No. 958, 99th Cong., 2d Sess. 50-51 (1986). A confirmed plan also frees a debtor, subject to the plan or order of confirmation, to operate its business as it deems appropriate. Post-confirmation contracts are enforceable like any other contract, and unless the plan provides otherwise, they are enforceable outside the jurisdiction of the Bankruptcy Court.

If Lawes has any post-confirmation claims that are enforceable under our jurisdiction, he has failed to prove them. Thus, it is not necessary for us to address this issue.

The principal question now arises how we treat Lawes' post-petition pre-confirmation claims that were supported by evidence. Before we decide the issue, we digress to discuss whether a Chapter 12 debtor is similar to a Chapter 11 debtor-in-possession.

A debtor who files a Chapter 12 petition becomes a debtor-in-possession as of the filing date of its petition under 11 USC § 1207(b). Section 1207(b) provides:

(b) Except as provided in section 1204, a confirmed plan, or an order confirming a plan, the debtor shall remain in possession of all property of the estate. *Id.*

Although the title in 11 USC § 1203 refers to "debtor," § 1203 provides the scope of a Chapter 12 debtor-in-possession's powers and rights. 11 USC § 1203, Rights and powers of debtor, provides:

Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm. *Id.*

Unlike a Chapter 11 debtor-in-possession, [FN11] there is no specific definition in the Bankruptcy Code for a Chapter 12 debtor-in-possession. Subject to the limitations expressed in 11 USC § 1203, i.e. prescribed by Court, §§ 330, 1106(a)(3) and (4), we hold a Chapter 12 debtor has the powers and rights of a Chapter 11 debtor-in-possession to operate the debtor's farm under 11 USC §§ 1106(a) [FN12] and 1108 [FN13] as of the commencement of the Chapter 12 case. Hence, it is more accurate to refer to the farmer who files a Chapter 12 petition as a Chapter 12 debtor-in-possession.

\*3 11 USC § 1203 is also similar to 11 USC § 1107(a). [FN14] Although § 1203 refers to "[r]ights and powers of debtor" and § 1107 refers to "[r]ights, powers, and duties of debtor in possession," they mandate the same basic rights and duties. For § 1203 purposes, we see no reason to differentiate a Chapter 12 debtor from a Chapter 12 debtor-in-possession, as we would, for instance, a Chapter 11 debtor-in-possession from a Chapter 11 trustee. 11 USC §§ 1203; 1204; 1207; 1106(a); 1107(a); 1108.

As an example of the debtor-in-possession's power, we recently held that prior to confirmation, and without consent of creditors, a Chapter 12 debtor-in-possession may avail itself of the power of a Chapter 11 trustee under 11 USC § 1206 [FN15] and sell farmland free and clear of liens. *In re Brileya*, 108 BR 444, 20 BCD 1 (Bkrcty.D.Vt.1989). We reached this conclusion despite the absence of an express reference to debtor-in-possession. We noted that § 1203 provides a debtor-in-possession with all of the rights and powers of a Chapter 11 trustee except to compensation under 11 USC § 330 and except certain duties under 11 USC §§ 1106(a)(3) and (4). We further noted Congressional history supported our view of Congress' intent that the reference to a "trustee" in § 1206 be a reference to a debtor-in-possession, namely the "family farmer." *Id.*, 108 BR at 447, 20 BCD at 3.

Thus, like the debtor-in-possession under Chapter 11, a Chapter 12 debtor-in-possession has the power and right to operate the family farm under Chapters 3 "Case Administration" and 5 "Creditors, the Debtor, and the Estate" of the Bankruptcy Code. 11 USC § 1203.

A very important power under Chapter 3 of Title 11 for the operating Chapter 12 family farmer debtor-in-possession is the obtaining of credit. 11 USC § 364, Obtaining credit, provides in pertinent part:

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1304, 1203, or 1204 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense. *Id.*

Although we do not agree with everything Collier has to say about the family farmer vis a vis its debtor-in-possession status, [FN16] Collier has this to say in regard to § 364 and the Chapter 12 debtor-in-possession:

The [Chapter 12] debtor in possession is also authorized to obtain credit or borrow money pursuant to section 364. As provided in section 364, the debtor in possession may obtain unsecured credit and incur unsecured debt in the ordinary course of business, without notice and a hearing, and such debt will be allowable as an administrative expense under section 503(b)(1). This would allow the debtor to obtain basic farm supplies or services on credit, such as seed, fertilizer, pesticides, water, labor, equipment repair, and the like, and to pay such debts as they become due.

5 Collier on Bankruptcy, Paragraph 1203.01[2], pages 1203-2-1203-3 (15th Ed.1990) (footnotes omitted; brackets supplied).

**\*4** Applying § 1203 and § 364 to the post-petition and pre-confirmation services in issue, Lawes clearly extended "unsecured credit" and Muzzey undoubtedly incurred "unsecured debt in the ordinary course of [operating its] business [of farming]" as a Chapter 12 debtor-in-possession. 11 USC § 364(a). Upon a finding that § 364(a) has been satisfied, § 364(a) directs us to 11 USC § 503.

Section 503, Allowance of administrative expenses, provides in pertinent parts:

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

As we have previously indicated, a Chapter 12 farmer is a debtor-in-possession upon the filing of a Chapter 12 petition. Also upon filing a Chapter 12 petition, the Chapter 12 farmer "shall remain in possession of all property of the estate." 11 USC § 1207. Muzzey does not dispute that Lawes' services were necessary and benefitted the estate. See, *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir.1976) and *In re White Motor Corp.*, 831 F.2d 106 (6th Cir.1987) (claimant must prove debt arose post-petition with a debtor-in-possession and substantially benefitted the estate). Thus, we find Lawes' post-petition pre-Chapter 12 Plan extension of unsecured credit in the form of fertilizer and like-kind goods and services to Muzzey is an allowed administrative expense that was necessary to preserve and continue Muzzey's debtor-in-possession's estate.

11 USC § 507 tells us that allowed administrative expenses under § 503(b)(1)(A) are entitled to first priority.

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

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28. Id.

The Chapter 12 plan must provide for the payments of § 507 priority administrative expenses. 11 USC § 1222(a)(2) states that a Chapter 12 plan shall "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title..." 11 USC § 1222(a)(2).

For Chapter 12 purposes, § 507 priorities must be paid either before the plan, "or at the time of each payment to creditors under the plan." 11 USC § 1226(b). [FN17] Compare, In re Cannon, 93 BR 746, 749 (Bkrtcy.N.D.Fla.1980) (direct payments to unsecured creditor impermissible unless creditor agrees to it).

Muzzey says she will make the payments outside the plan. This she cannot do unless Lawes agrees. If the § 507 priority expenses are not paid prior to confirmation, then they must be paid within the plan. Muzzey may not avoid Trustee's entitlement to "the percentage fee fixed for such standing trustee under section 1202(e) of this title" because there is a standing Chapter 12 trustee serving in this Case. 11 USC § 1226(b)(2). In re Rott, 94 BR 163, 167-68 (Bkrtcy.D.N.D.1988); Greseth v. Federal Land Bank of St. Paul (In re Greseth), 78 BR 936, 940-941 (Bkrtcy.D.Minn.1987).

**\*5** Lawes' post-petition pre-confirmation unsecured claims for \$8,628.35 are allowable administrative expenses entitled to first priority status, 11 USC §§ 364(a); 503(b)(1); 507(a)(1); 1222(a)(2); 1226(b)(1), and are required to be paid through the plan.

An appropriate order will be entered.

FN1. We have jurisdiction to determine this matter under 28 USC § 1334(b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This is a core proceeding under 28 USC § 157(b)(2)(A). This Memorandum of Decision constitutes conclusions of law and findings of fact under F.R. Civ.P. 52, as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

FN2. The total is misfooted. The actual amount is \$9,007.35.

FN3. Invoice ## 10775, 10774, 10773, 10776.

FN4. This argument, of course, makes no sense because the post-petition pre-confirmation services would have been delivered before we ordered plan approval.

FN5. 11 USC § 364, Obtaining credit, provides in pertinent part:

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1304, 1203, or 1204 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

FN6. 11 USC § 503, Allowance of administrative expenses, provides in pertinent parts:

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

FN7. 11 USC § 507 Priorities, provides in pertinent parts:

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

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

FN8. "Plan of Reorganization Under Chapter 12 Proposed by Carol B. Muzzey dated July 18, 1989," paragraph 11.9, page 19 provides:

11.9 To determine the reasonableness of and make any award for administrative expenses, including attorney's fees applied for before or after the Plan is confirmed, and to provide for payment of these fees (sic).

Id. See, Order Confirming Chapter 12 Plan, filed July 31, 1989.

FN9. 11 USC § 1226 Payments, provides in pertinent parts:

(b) Before or at the time of each payment to creditors under the plan, there shall be paid--

(1) any unpaid claim of the kind specified in section 507(a)(1) of this title; and

(2) if a standing trustee appointed under section 1202(d) of this title is serving in the case, the percentage fee fixed for such standing trustee under section 1202(e) of this title.

FN10. 11 USC § 1227 Effect of Confirmation, provides:

(a) Except as provided in section 1228(a) of this title, the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in section 1228(a) of this title and except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

FN11. 11 USC § 1101(1) provides: In this chapter--

(1) 'debtor in possession' means debtor except when a person that has qualified under section 322 of this title is serving as trustee in this case.

FN12. 11 USC § 1106, Duties of trustee and examiner, provides in pertinent parts to Chapter 12 debtors-in-possession that are not excluded by § 1203:

(a) A trustee shall--

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9), of this title;

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

[ (3) and (4) are excluded under § 1203]

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental



unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

FN13. 11 USC § 1108, Authorization to operate business, provides:

Unless the court, on request of a party in interest and after notice and hearing, orders otherwise, the trustee may operate the debtor's business.

FN14. 11 USC § 1107, Rights, powers, and duties of debtor in possession, provides in pertinent parts:

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

FN15. 11 USC § 1206, Sales free of interests, provides:

After notice and a hearing, in addition to the authorization contained in section 363(f), the trustee in a case under this chapter may sell property under section 363(b) and (c) free and clear of any interest in such property of an entity other than the estate if the property is farmland or farm equipment, except that the proceeds of such sale shall be subject to such interest.

FN16. In *Brileya*, we rejected Collier's conclusion held at paragraph 1206.01, page 1206-2, that 11 USC § 1206's reference to a "trustee" cannot be read as a debtor-in-possession and we held § 1206 can be read in that manner. In re *Brileya*, supra, 108 BR at 447, 20 BCD at 3 (Bkrtcy.D.Vt.1989).

FN17. 11 USC § 1226 Payments, provides in pertinent parts:

(b) Before or at the time of each payment to creditors under the plan, there shall be paid--

(1) any unpaid claim of the kind specified in section 507(a)(1) of this title; and

(2) if a standing trustee appointed under section 1202(d) of this title is serving in the

case, the percentage fee fixed for such standing trustee under section 1202(e) of this title.

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