UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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March 26, 2002

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Re: In re Loewen Group International, Inc.
Case No. 99-1244 (PJW)

Dear Counsel:

This is with respect to the request (Doc. # 7754) of Betty Lovette ("Mrs. Lovette") for an order allowing her an administrative expense claim in the amount of $173,822.42. I will deny the request for the reasons discussed below.

The Loewen Group International, Inc. ("LGII") and approximately 830 of its direct and indirect subsidiaries and/or affiliates (collectively, "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on June 1, 1999 ("Petition Date").[1] Debtors' chapter 11 cases were consolidated for procedural purposes and administered jointly. On December 5, 2001, Debtors' Fourth Amended Joint Plan of Reorganization ("Plan") was confirmed (Doc. # 8671).[2]

Prior to the Petition Date, in connection with a share purchase agreement ("Agreement") dated December 10, 1997, Debtor Loewen Group Acquisition Corp. ("LGAC" or "Debtor") executed a promissory note ("Note") in favor of Mrs. Lovette in the amount of $1,100,000.00. (Lovette Req. (Doc. # 7754) ¶ 1.) The Note provided for payment, without interest, in 240 equal monthly installments of $4,583.33, the last installment being due on or before December 10, 2018. (Id.) The Note was secured by an irrevocable standby letter of credit ("LC") issued by Wachovia Bank, N.A. ("Wachovia") on December 5, 1997 in an amount equal to the principal balance due on the Note. (Id. at ¶ 2.) The LC designated Mrs. Lovette as the beneficiary thereunder and provided for an automatic reduction of

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[1] Some of the Debtors filed for bankruptcy subsequent to June 1, 1999.

[2] Nineteen of the Debtors were not included under the Plan due to unresolved litigation that remained pending at the time the Plan was filed. Four additional Debtors were not included because they had no impaired class voting to accept the Plan. See 11 U.S.C. § 1129(a)(10).

$4,583.33 in the LC's face amount on the tenth day of each month, beginning on January 10, 1998 and continuing until the Note was paid in full. (Id.) The LC further provided that it was available for payment by presentation of drafts accompanied by, among other things, (a) an affidavit executed by Mrs. Lovette containing certain language regarding LGAC's failure to make a payment under the Note, (b) a copy of the written notice provided to LGAC describing the event of non-payment, and (c) a copy of the certified mail receipt confirming that LGAC received such notice. (Id., Ex. B at 1.)

LGAC made regular payments under the Note until June 1999. (Lovette Req. (Doc. # 7754) ¶ 3.) Following the receipt by Mrs. Lovette of the last paid installment in May 1999, the remaining balance due under the Note, and on the LC, was $1,022,083.39. (Id.) On June 30, 1999, Mrs. Lovette, by and through her counsel ("Counsel"), made demand upon LGAC for payment of the June 1999 installment. (Id. at ¶ 4.) Thereafter, Counsel made numerous attempts to serve notice ("Notice") of default and acceleration upon LGAC in accordance with the terms of the Note. (Id.) Such Notice was ultimately delivered to LGAC via Federal Express on July 23, 1999. (Id.) Pursuant to the terms of the Note, LGAC was in default thereunder as of August 7, 1999 ("Date of Default"), the fifteenth day following LGAC's receipt of the Notice. (Lovette Req. (Doc. # 7554), Ex. A at 1.)

In accordance with the terms of the Note and the LC, Mrs.

Lovette presented documentation to Wachovia for payment on the LC on August 13, 1999. (Id. at ¶ 7.) On September 3, 1999, Wachovia paid Mrs. Lovette $1,008,333.40, the full remaining balance of the LC at that time. (Id.) Although at the time the balance due under the Note was $1,022,083.39, subsequent to the Petition Date, Wachovia, pursuant to the terms of the LC, made three monthly reductions to the face amount of the LC. (Id. at ¶ 5.) Mrs. Lovette received no payment or benefit in exchange for those reductions. (Id.) The discrepancy between the amount received by Mrs. Lovette on September 3, 1999 and the balance ("Balance") allegedly due under the Note at that time is $13,749.90. (Lovette Req. (Doc. # 7554) ¶ 7.) Mrs. Lovette now seeks payment of the Balance plus accrued interest as an administrative expense[3], as well as additional administrative expenses in the amount of 153,645.91 for attorneys' fees and collection costs to which Mrs. Lovette contends she is entitled under the terms of the Note. (Id. at ¶ 8.) Mrs. Lovette contends that "there can be little question" that she is entitled to attorneys' fees and collection costs under the Note and argues that because the Note was executed in North Carolina, and because she is a resident of North Carolina, the Note should be enforced in accordance with the laws of that state. (Id. at 3-4.) Under North Carolina law, where a debt instrument does not

[3] Mrs. Lovette alleges that interest began to accrue on the balance of the Note on the Date of Default at the rate of 8½ % per year. (Lovette Req. (Doc. # 7754) ¶ 3.)

specify an amount of attorneys' fees or provide a formula for such a determination, the attorney fee provision is to be construed to mean 15% of the outstanding balance owing under the Note. N.C.G.S.A. § 6-21.2(2) (2002). Although Mrs. Lovette contends that her actual attorneys' fees were $250,000.00, fifteen percent of the amount allegedly due and owing under the Note on the Date of Default is $153,312.51. (Lovette Req. (Doc. # 7554) ¶ 8.) Mrs. Lovette argues that her claim qualifies as an administrative expense as defined under 11 U.S.C. § 503(b)[4], and, in addition, contends that fundamental fairness requires that her right to full distribution take precedence over the right of general creditors.[5] (Id. at 3-4.) I find Mrs. Lovette's position to be without merit.

Section 503(b)(1)(A) provides that administrative expenses include "the actual, necessary costs and expenses of preserving the estate". 11 U.S.C. § 503(b)(1)(A). To qualify for administrative priority under § 503(b)(1)(A), a claimant must establish that his or her claimed expenses (1) arose out of a post-petition transaction with the debtor-in-possession, and (2) directly and substantially benefitted the estate. E.g., In re

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[4] Section 503(b)(1) provides in pertinent part:

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

[5] 11 U.S.C. §§ 101 et seq. is hereinafter referred to as "§ __".

Hemingway Transp., Inc., 993 F.2d 915, 929 (1st Cir. 1993); In re Mid-Am. Waste Sys., Inc., 228 B.R. 816, 821 (Bankr. D. Del. 1999) The expenses ("Expenses") for which Mrs. Lovette seeks administrative status satisfy neither of these criteria.

First, Mrs. Lovette has pointed to no post-petition transaction with Debtors that would give rise to an administrative expense obligation as defined under § 503(b). The Expenses arose solely out and in connection to Mrs. Lovette's pre-petition Agreement with LGAC. As such, they constitute a pre-petition claim that does not qualify for administrative expense priority status. In addition, although Mrs. Lovette contends that her Expenses have provided benefit to Debtors' Estate, she has failed to demonstrate how they have done so. Rather, she simply contends that because LGAC refused pay on the Note post-petition, her security was diminished through no fault or reasonable anticipation of her own, to the benefit of Debtor, and she was neither compensated, nor given adequate protection, for such diminution. (Lovette Req. (Doc. # 7754) at 3, 4.) As such, Mrs. Lovette argues, justice and equity demand that her claim be treated as having arisen and been approved

under § 507(a)(1)[6] or § 364(a)[7], and treated under the Plan and paid accordingly. (Id.) I find this argument to be unpersuasive.

Upon the filing of Debtors' bankruptcy petition, Mrs. Lovette could have, and should have, filed a motion for relief from the automatic stay to pursue her options with respect to her collateral or, in the alternative, filed a motion seeking adequate protection thereof. See 11 U.S.C. § 363(e) ("*[O]n request* of an entity that has an interest in property used... or proposed to be used... by the trustee, the court, with or without a hearing, shall condition such use... as is necessary to provide adequate protection of such interest.") (emphasis added); In re Waverly Textile Processing, Inc., 214 B.R. 476, 479 (Bankr. E.D. Va. 1997) ("[T]he language 'on request' in § 363(e) strongly suggests that a secured creditor is entitled to adequate protection only upon a motion and only prospectively from the time protection is sought."); Matter of Continental Airlines, Inc., 146 B.R. 536, 542

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[6] Section 507(a)(1) provides:

> (a) The following expenses and claims have priority in the following order:
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> (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 [28 U.S.C. §§ 1911 et seq.].

[7] Section 364(a) provides:

> If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 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.

(Bankr. D. Del. 1992) ("The Trustees are only entitled to adequate protection if their collateral declined in value *after the adequate protection motion was filed*.") (emphasis added). The fact that she failed to do so does not now entitle her to circumvent the Bankruptcy Code and obtain administrative expense status for what can only be classified as a pre-petition secured claim. Indeed, to allow Mrs. Lovette to assert such a claim would benefit Mrs. Lovette at the expense of the unsecured creditors who, pursuant to the Plan, will recover only a portion of their claims. Such a result is contrary to the principle that similarly-situated creditors be treated equally. Therefore, I find that Mrs. Lovette is not entitled to administrative expense priority for the amount of the Balance.

In addition, I also find that Mrs. Lovette is not entitled to recover the post-petition interest allegedly accrued on the Balance, or the post-petition attorneys' fees and/or other costs allegedly incurred in connection with her efforts to collect on the Note. As a general matter, only oversecured creditors are entitled to recover interest that accrues on their claims after the filing of a bankruptcy petition. 11 U.S.C. §§ 502(b)(2)[8], §

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[8] Section 502(b)(2) provides:

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in lawful currency of the United States in such amount, except to the extent that-

506(b)[9]; United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 372-73, 108 S.Ct. 626, 631, 98 L.Ed.2d 740 (1988) ("Since [§ 506(b)] permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest."); Chemical Bank v. First Trust of New York (In re Southeast Banking Corp.), 156 F.3d 1114, 1119 (11th Cir. 1998); In re Woodmere Investors, Ltd. P'ship., 178 B.R. 346, 355 (Bankr. S.D.N.Y. 1995) ("Case law and section 506(b) of the Bankruptcy Code make it clear that post-petition interest is not permitted unless [insurer] is an over-secured creditor."). This rule avoids the administrative inconvenience of continuous recomputation of claims, and prevents certain creditors from profiting at the expense of others solely as a result of the delay in post-petition repayment caused by operation of law. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 164, 67 S.Ct. 237, 240, 91 L.Ed 162 (1946); see also Bruning v. United States, 376 U.S. 358, 363, 84 S.Ct. 906, 908-09 (1964) ("The basic

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* * *

(2) such claim is for unmatured interest...

[9] Section 506(b) provides in pertinent part:

(b) To the extent that an allowed secured claim is secured by property the value of which... is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

reasons for the rule denying post-petition interest as a claim against the bankruptcy estate are the avoidance of unfairness as between competing creditors and the avoidance of administrative inconvenience."). Because Mrs. Lovette is not an oversecured creditor, I find that she is not entitled to recover post-petition interest on her claim.

For similar reasons, I also find that Mrs. Lovette is not entitled to recover post-petition attorneys' fees and/or other collection costs. Section 506(b) provides that post-petition fees and costs may only be recovered "[t]o the extent that an allowed secured claim is secured by property the value of which... is greater than the amount of such claim". 11 U.S.C. § 506(b). Thus, like post-petition interest, post-petition fees and costs may only be recovered by creditors to the extent their claims are oversecured. See, e.g., In re Woodmere, 178 B.R. at 356 ("Section 506(b) does not distinguish between interest rates and attorney fees."); In re Saunders, 130 B.R. 208, 214 (Bankr. W.D. Va. 1991); In re Sakowitz, Inc., 110 B.R. 268, 275 (Bankr. S.D. Tex. 1989); In re Canaveral Seafoods, Inc., 79 B.R. 57, 58 (Bankr. M.D. Fla. 1987); In re Mobley, 47 B.R. 62, 63 (Bankr. N.D. Ga. 1985). Because Mrs. Lovette is not oversecured, she is not entitled to recover the portion of her alleged Expenses that includes post-petition attorneys' fees and collection costs.

For the reasons discussed above, Mrs. Lovette's request (Doc. # 7754) for an order allowing her an administrative expense claim in the amount of $173,822.42 is denied.

SO ORDERED.

Very truly yours,

Peter J. Walsh

PJW:ipm