NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE FURR'S SUPERMARKETS, INC., a Delaware Corporation, Debtor.	BAP No. NM-06-099
AMPLEX CORPORATION, Appellant, v. YVETTE J. GONZALES, Trustee, Appellee.	Bankr. No. 7-01-10779-SA Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before MICHAEL, BROWN, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument. Amplex Corporation ("Amplex") appeals the bankruptcy court's order denying its request to treat its claim as an administrative expense. We affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

I. ISSUES AND STANDARD OF REVIEW

Many of the facts in this matter were stipulated, and those that were not were determined by the bankruptcy court following an evidentiary hearing. The sole issue on appeal is whether Amplex's claim should receive priority treatment. This Court reviews a trial court's legal conclusions that are based on uncontested facts *de novo*.[1] To the extent that fact findings underlie a legal conclusion, we review those findings under the clearly erroneous standard.[2] A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[3] Additionally, we note that the Bankruptcy Code must be construed liberally in favor of the debtor and strictly against the creditor.[4]

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[5] Because the notice of appeal was timely filed within ten days of a final order, and because neither party to this appeal has elected to have the appeal heard by the district court, this Court has appellate jurisdiction.

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[1] *Hofer v. Unum Life Ins. Co. of Am.*, 441 F.3d 872, 875 (10th Cir. 2006); *In re Thompson*, 240 B.R. 776, 779 (10th Cir. BAP 1999).

[2] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

[3] *Id.* (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

[4] *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292-93 (10th Cir. 1997) (citing *Bank of Pa. v. Adlman (In re Adlman)*, 541 F.2d 999, 1003 (2d Cir. 1976)).

[5] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

III. BACKGROUND

From 1993 to early 2001, appellant Amplex acted as an agent of the United States Postal Service ("USPS") with respect to sales of postage stamps by banks and grocery stores. Under its contract with the USPS, Amplex earned a fee for managing all postage stamp sales at locations other than U.S. post offices. Amplex's duties included such things as contracting with merchants, executing documentation, arranging stamp deliveries, and monitoring payments. In that capacity, Amplex entered into a Stamp Consignment Agreement ("SCA") with Furr's Supermarkets, Inc. ("Debtor") in 1996, pursuant to which, Amplex agreed to supply postage stamps to Debtor for sale in its supermarkets to its customers. Under the SCA, Debtor agreed to both pay and charge face value for the stamps, resulting in no profit on its stamp sales. Debtor also agreed to pay for stamps within 30 days of delivery, whether or not the stamps had been sold. Alternately, Debtor had the option to return unsold stamps.

In January 2001, Debtor received two stamp deliveries, each consisting of stamps having a total face value of $61,200. Payment for both deliveries was due in February 2001, and both invoices were unpaid when Debtor filed its bankruptcy petition on February 8, 2001.[6] No evidence in the record establishes whether or not Debtor had either stamps or identifiable proceeds of stamp sales when the petition was filed. In fact, Amplex conceded at trial that it could not produce such evidence. In any event, the parties agreed that, at least by the time of trial, Debtor had no stamps in its possession.

Amplex filed a proof of claim in the bankruptcy case, seeking to recover $122,400 due on the two invoices. Subsequently, Amplex requested treatment of its claim as an administrative expense, alleging Debtor's "conversion of

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[6] Debtor's initial petition was for Chapter 11 relief and, until December 2001 when the case was converted to Chapter 7 and the Trustee ("Trustee") was appointed, Debtor ran its business as a debtor-in-possession.

consigned collateral." Trustee objected, and trial was held, resulting in the bankruptcy court's memorandum opinion and order denying Amplex's request. Amplex appealed.[7]

IV. DISCUSSION

Section 507(a)(2) grants priority to "administrative expenses allowed under section 503(b) of this title." Section 503(b)(1)(A) defines "the actual, necessary costs and expenses of preserving the estate" as administrative expenses. The Tenth Circuit Court of Appeals ("Tenth Circuit") has held that in order to be treated as an administrative expense, "the expense must: (1) arise out of a transaction between the creditor and the bankrupt's trustee or debtor-in-possession; and (2) benefit the debtor-in-possession in the operation of the business."[8] The party claiming entitlement to administrative expense priority bears the burden of proving that the claim is so entitled.[9] In addition, "[s]tatutory priorities are to be narrowly construed [b]ecause the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among his creditors."[10]

We consider Amplex's claim with these principles in mind. The SCA was executed several years prior to Debtor's filing of its bankruptcy petition. Both of the stamp deliveries for which Amplex seeks reimbursement took place prior to

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[7] In subsequent proceedings, Trustee successfully recovered payments made by Debtor to the USPS, pursuant to the agreement with Amplex, as preferences under 11 U.S.C. § 547. Four companioned appeals arising out of Trustee's adversary action against Amplex are also pending before the BAP (BAP Case Nos. NM-06-109, -110, -112, and -113), along with four appeals arising out of Trustee's similar adversary action against the USPS (BAP Case Nos. NM-06-114, -115, -116, and -117).

[8] *In re Mid Region Petroleum, Inc.*, 1 F.3d 1130, 1133 (10th Cir. 1993) (citing *In re Amarex*, 853 F.2d 1526, 1530 (10th Cir. 1988)).

[9] *Mid Region*, 1 F.3d at 1132.

[10] *Amarex*, 853 F.2d at 1530 (second alteration in original) (internal quotation marks omitted).

initiation of the bankruptcy case as well. Thus, other than its demands for payment, all of Amplex's contractual dealings were with the pre-petition Debtor, rather than the debtor-in-possession. In addition, the consideration supplied by Amplex was tendered pre-petition. Under general principles applicable to administrative claims, such dealings do not qualify for administrative priority.[11]

In order to avoid these deficiencies, Amplex relies on the "fundamental fairness" exception espoused by the United States Supreme Court in the case of *Reading Co. v. Brown*, 391 U.S. 471 (1968). In *Reading*, claims for fire damage that resulted from the negligence of the estate's receiver, while operating debtor's business, were properly treated as administrative expenses. Based on *Reading*, a number of courts have allowed certain claims to be treated as administrative expenses, even though they involve no discernible benefit to the bankruptcy estate, which are limited to instances where fundamental fairness requires that the claimant's rights take precedence over the rights of other creditors.[12] Thus, the injured business owners in *Reading*, unlike holders of pre-petition claims against the debtor, had "an insolvent business thrust upon them by operation of law."[13]

The Tenth Circuit has neither addressed nor applied the fundamental fairness doctrine. However, two courts within the Circuit have refused to apply the doctrine to the claims made therein. In *In re Aspen Limousine Service, Inc.*, 193 B.R. 325, 336-37 (D. Colo. 1996), the court noted that, under *Reading*, "tort claims arising during a reorganization period may be 'actual and necessary' expenses of the reorganization and therefore entitled to the priority status of

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[11] *See, e.g., In re Native Am. Sys., Inc.*, 351 B.R. 135, 139 (10th Cir. BAP 2006) (creditor's consideration must be induced by the post-petition debtor to constitute a "transaction" under § 503(b)(1)(A)).

[12] *See, e.g., In re Hemingway Transp., Inc.*, 993 F.2d 915, 929 n.17 (1st Cir. 1993).

[13] *Reading Co. v. Brown*, 391 U.S. at 477.

administrative expenses." Nonetheless, noting also the Tenth Circuit's narrow construction of administrative expenses, the court refused to allow priority treatment of alleged antitrust damages, finding that they were "speculative as to amount and unrelated to the preservation of the estate."[14]

In *In re Franklin*, 284 B.R. 739, 744-45 (Bankr. D. N.M. 2002), the court described the *Reading* case as having "carved out an exception [to the benefit to the estate requirement] for recovery of postpetition negligence claims as an administrative expense," but denied equitable prioritization of debtor's claim for reimbursement of his own post-petition medical expenses. In so ruling, the court noted that equitable priority has only been granted under "extraordinary circumstances" involving claims that were "incident of or an actual value to the post-petition operation of the estate and the exceptions furthered important bankruptcy policies."[15]

Amplex contends that its claim is entitled to administrative priority because Debtor's conduct with respect to the postage stamps amounts to a conversion. According to Amplex, Debtor held the stamps and any proceeds thereof "in trust" for Amplex's benefit. Under this theory, Debtor's failure to account for either the stamps or the proceeds thereof was a breach of trust and a conversion of collateral such that fundamental fairness requires that Amplex's claim be given priority above the claims of pre-petition creditors. In ruling that the claim was not so entitled, the bankruptcy court first considered whether Amplex had proven the existence of a trust, either express or implied, under Texas law.[16]

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[14] *Aspen Limousine Serv., Inc.*, 193 B.R. at 337.

[15] *In re Franklin*, 284 B.R. at 745.

[16] The SCA does not provide a governing law, while the parties' Security Agreement states that it is governed by the laws of Texas. Nonetheless, both parties and the court deemed Texas law controlling in determining rights and liabilities under the SCA. Based on our holding herein, we need not determine

(continued...)

We need not decide whether Amplex proved the existence of a trust, however, because even if we assume both that Debtor held stamps and stamp proceeds in trust for the benefit of Amplex, and that stamp sales without corresponding payment to USPS amounted to a "conversion," the administrative priority claim still fails. The party claiming administrative priority has the burden to prove its applicability, which requires a showing of benefit to the estate. Even tort claims that have been granted priority under the fundamental fairness exception to this rule have involved post-petition conduct.[17] Amplex failed to prove that any stamps were sold post-petition, and in fact conceded that it could not do so.[18] Amplex also failed to prove that any proceeds of stamp sales were used by Debtor post-petition, wrongfully or not, and again conceded that it could not do so. Accordingly, the bankruptcy court found that Amplex had failed to prove any benefit to the estate, noting that "[i]t is most likely that the stamps were all gone by the end of January. In any event, there is no evidence of the value of stamps on hand on February 8, 2001 [the petition date]. Therefore, there is no proof of the amount of the benefit."[19] On the record before this Court, these findings cannot be said to be clearly erroneous.

Nonetheless, Amplex argues that, even if all of the stamps were sold pre-petition, Debtor necessarily still held the proceeds of those stamps when the

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[16] (...continued)
whether Texas law in fact governs interpretation of the SCA.

[17] See *In re Sunarhauserman, Inc.*, 126 F.3d 811, 817 (6th Cir. 1997) ("*Reading* does not eliminate the requirement that a debt arise post-petition in order to be accorded administrative expense priority.").

[18] At trial, Trustee stated that, based on Debtor's average stamp sales, Debtor probably had sold all or most of the stamps delivered in January by the time it filed its petition.

[19] Memorandum Opinion on Amplex's Application for Order to Pay Secured and/or Administrative Expense Claims Resulting from Conversion of Consigned Collateral at 7, *in* Appendix of Appellant Amplex Corp. at 218.

petition was filed since it had not yet paid for them. This is so, Amplex argues, because Debtor had cash in excess of $122,400 at filing. This argument ignores both the contract and the parties' prior business dealings. Debtor was not required to segregate or to identify proceeds of stamp sales. For several years prior to initiation of the bankruptcy case, the parties engaged in a fairly set pattern of commercial dealing. Amplex delivered stamps to Debtor on a roughly bi-weekly basis. Debtor sold those stamps to customers in its stores. Debtor was not required to pay for stamps until 30 days after they were delivered. At that time, which would ordinarily be some two weeks after the stamps had been sold, Debtor paid the invoice. The only difference with respect to the two January deliveries is that Debtor never paid the invoices.[20] This amounts to nothing more than a breach of Debtor's payment obligation under the SCA, which Amplex seeks to elevate above all other similarly unsecured claims.

Having failed to prove any post-petition benefit to the estate, Amplex characterizes Debtor's ordinary course of business as a tortious conversion. However, simple failure to pay an invoice on the eve of bankruptcy does not constitute a conversion. Further, Amplex did not make any attempt at trial to show that Debtor had any intent to cause harm. Amplex has a claim for breach of contract rather than breach of trust, and such a claim is not entitled to administrative priority.[21]

V. CONCLUSION

For the foregoing reasons, the bankruptcy court's denial of Amplex's

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[20] In fact, when Debtor filed its petition on February 8, one of the invoices was only three days overdue and the other was not due until February 19. Had Debtor paid either of these invoices post-petition, the payments most likely would have been challenged as voidable post-petition transfers pursuant to 11 U.S.C. § 549(a).

[21] We need not, and do not, determine whether proof of a post-petition breach of trust would fall within the parameters of the fundamental fairness doctrine.

request for administrative priority treatment of its claim is affirmed.