

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:)
)
Air South Airlines, Inc.)
)
)
Debtors.)
_____)

Chapter 7
Case No. 97-07229-W
JUDGMENT

FILED
00 DEC 18 PM 3:04
ENTERED
DEC 18 2000
C-H-B

Based upon the Findings of Fact and Conclusions of Law as stated in the attached Order of the Court, the Trustee's Objection to GE Capital Aviation Services' Claim number 1793 is granted. Furthermore, the objections by the Trustee and the United States Trustee to GE Capital Aviation Services' Application for Allowance and Payment of Administrative Claim No. 1793 pursuant to §503(b)(1)(A) are sustained and the Application is denied. The claim will be allowed as an unsecured non-priority claim.


UNITED STATES BANKRUPTCY COURT

Columbia, South Carolina
December 18, 2000.

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of North Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

DEC 15 1991

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE
CONNIE H. BROOKS
Deputy Clerk

UST + creditor's
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DEC 19 2000

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

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IN RE:

Air South Airlines, Inc.

Debtors.

Chapter 7

Case No. 97-07229-W

ORDER

THIS MATTER comes before the Court upon the Notice of Objection to Claims ("Objection to Claim") filed by the Chapter 7 Trustee, W. Ryan Hovis, on September 25, 2000 and upon the Application for Allowance and Payment of Administrative Claim No. 1793 filed by GE Capital Aviation Services ("GECAS") on October 18, 2000. The Trustee objects to GECAS' claim number 1793 in which the creditor seeks the allowance of an administrative expense in the amount of \$348,451.61 for post-petition lease payments on aircraft leased by Air South Airlines, Inc. ("Debtor") during the Chapter 11 portion of the case, prior to it being converted to a Chapter 7. GECAS filed a response to said Objection to Claim and contemporaneously filed its Application for Allowance and Payment of Administrative Claim No. 1793 pursuant to 11 U.S.C. § 503(b).¹ Objections to GECAS' Application were filed by the Trustee and the United States Trustee. Both objections assert that the claim of GECAS is not entitled to administrative priority status. After considering the pleadings filed with the Court and the arguments of counsel at the hearing, the Court makes the following Findings of Fact and Conclusions of Law

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et. seq.*, will be by section number only.

pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.²

FINDINGS OF FACT

Debtor operated a commercial airline based in Columbia, South Carolina. On August 28, 1997, Debtor filed for relief under Chapter 11 of the Bankruptcy Code. At the time of filing, Debtor had already ceased all business operations, closed all of its business locations, and sent all employees home. Furthermore, the corporation had insufficient cash to carry on operations and had not secured any debtor-in-possession financing.

At the time of filing, Debtor was leasing five Boeing 737 aircraft from GECAS. Three of these aircraft were located in Columbia, South Carolina; one aircraft was located in Miami, Florida, awaiting the repair of an engine in Sweden; and the last one was located in Brunswick, Georgia, where it was undergoing what is known as a "C check."

On August 29, 1997, GECAS filed its Motion for Relief from the Automatic Stay pursuant to § 362(d)(1), alleging lack of adequate protection. The Motion alleged that the leases were in default, that there was a \$1.2 million arrearage, and that Debtor was incapable of maintaining the leases and reorganizing. GECAS asked that the automatic stay be lifted and that the leases be terminated.

At GECAS' request, the Court held an emergency hearing on September 4, 1997. The following parties were in attendance at the hearing on the matter: counsel for GECAS, counsel and officers of the debtor, representatives of the Office of the United States Trustee, counsel for the South Carolina Jobs-Economic Development Authority,

² The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

counsel for NationsBank, and one former employee. No objections nor responses to the Motion for Relief from stay were filed. The Court entered a Consent Order drafted by GECAS on the Motion of GECAS for Relief from the Automatic Stay or Adequate Protection. Counsel for Debtor and counsel for GECAS consented to said Order.

The Consent Order made no reference to lease payments. It provided that Debtor could keep the aircraft but would perform certain functions to constitute adequate protection. These functions included maintaining insurance, storing aircraft in Columbia, completing maintenance, completing a service check, and completing repairs. The Order also provided that the debtor could not fly the aircraft without first obtaining GECAS' consent. The Consent Order provided that it would expire on September 23, 1997, less than thirty days after the case was filed.

Debtor's insurance ultimately expired for non-payment of premium; and, on September 16, 1997, counsel for GECAS filed an affidavit of non-compliance. That affidavit alleged that insurance was not in place as provided for in the Consent Order and alleged that Debtor was in default under the terms of the Consent Order. On the same day, the Court entered an order lifting the stay and allowing GECAS to recover its assets. GECAS promptly recovered the aircraft - only 19 days after Debtor filed its petition.

On motion of the United States Trustee, the case was converted from Chapter 11 to Chapter 7 on October 16, 1997. GECAS was among those parties who argued, prior to conversion, that the case should be dismissed rather than converted, upon the grounds that there was no probability of funds being available for unsecured creditors.

On February 19, 1998, GECAS filed Proof of Claim number 1793 in the amount of \$348,451.61. The claim was filed as a priority claim for post-petition rent on the aircraft for the period of August 28, 1997 through September 16, 1997. On the same

date, GECAS filed claim number 1798 in the amount of \$10,384,852.66, as an unsecured non-priority claim for the balance owed on the leases.

On September 20, 2000, the Trustee served GECAS with his Objection to Claim number 1793. The Trustee objected on the grounds that GECAS had not applied for an administrative claim pursuant to § 503(b) and that the claimed amount did not represent the actual and necessary costs and expenses of preserving the estate as required by § 503(b).

On October 18, 2000, apparently in response to the Objection of the Trustee, GECAS filed its Application for Allowance and Payment of Administrative Claim No. 1793 pursuant to § 503(b). The Trustee filed an objection to this notice alleging that any agreement as to the retention of the aircraft by Debtor was not properly noticed to the creditor body, that there was no agreement for the continuation of lease payments, and that the present application was not timely filed. The United States Trustee also objected to the Application for Allowance and Payment of Administrative Claim No. 1793. GECAS' Application made reference to §1110 of the Bankruptcy Code as further support for its claim, but it conceded in oral argument that there was no agreement pursuant to §1110.³

CONCLUSIONS OF LAW

GECAS argues that the post-petition lease payments from Debtor should be allowed as an administrative expense pursuant to § 503(b)(1)(A). The Trustee and the United

³ Section 1110 of the Bankruptcy Code provides a mechanism for a lessor of aircraft to recover an aircraft 60 days after the order for relief, unless an agreement is entered into by the parties prior to that time allowing the debtor to keep the aircraft or if the debtor cures the default under the lease.

States Trustee objected to such request principally on the grounds that the expenses did not represent the “actual and necessary costs and expenses of preserving the estate” as required by that section of the Bankruptcy Code.

A. Section 503 and Administrative Expenses.

The issue before the Court is whether the GECAS claim should be granted Chapter 11 administrative expense status. Section 503(b)(1)(A) provides that a claim should be allowed administrative expense priority for “actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.” Courts have emphasized that “[t]he modifiers ‘actual’ and ‘necessary’ ‘must be observed with scrupulous care’.” In re Merry-Go-Round Enter., Inc., 180 F.3d 149, 157 (4th Cir. 1999) (quoting Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 866 (4th Cir. 1994)). The purpose of §503(b)(1)(A) is to induce creditors to continue to furnish post-petition goods or services to the debtor so that it may continue its operations for the benefit of the creditor body. See, e.g., In re Southern Soya Corp., 251 B.R. 302 (Bankr. D.S.C. 2000). In this case, GECAS has the burden of proving its entitlement to administrative priority by a preponderance of the evidence. Id.

In order for a claim to be granted administrative status, GECAS must prove the following: “(1) the claim . . . arise[s] out of a *post-petition transaction* between the creditor and the debtor-in-possession (or trustee) and (2) the consideration supporting the claimant's right to payment . . . [is] supplied to and beneficial to the debtor-in-possession *in the operation of the business.*” In re Merry-Go-Round Enter., 280 F.3d at 157 (emphasis added); see also In re Cappellmann, C/A No. 94-75599-W (Bankr. D.S.C. 12/23/1996) (quoting In re Knoth, C/A No. 93-75478-B (Bankr. D.S.C. 2/5/1996)).

GECAS argues that the Consent Order entered into between Debtor and GECAS on September 4, 1997, which made no reference to lease payments, constitutes the requisite post-petition transaction. However, the Court disagrees with that argument in that the Consent Order does not provide the foundation to support the claim of GECAS for lease payments as an administrative claim. In fact, the Order forbids Debtor from actually using the aircraft, unless Debtor receives prior consent by GECAS for such use, and it appears to have been drafted by and entered into by creditor for its sole benefit. Thus, the Court finds that the Consent Order that was entered in this case does not constitute a post-petition transaction for purposes of §503(b)(1)(A).

The next element of § 503(b)(1)(A) requires that the claim represent an actual and necessary expense which benefitted the bankruptcy estate. The case of Ford Motor Credit Co. v. Dobbins, 35 F.3d 860 (4th Cir. 1994) best sums up the requirements under this prong:

This . . . narrow interpretation requires actual use of the creditor's property by the debtor, thereby conferring a concrete benefit on the estate before a claim is allowable as an administrative expense. Accordingly, the mere potential of benefit to the estate is insufficient for the claim to acquire status as an administrative expense. The court's administrative expense inquiry centers upon whether the estate has received an actual benefit, as opposed to the loss a creditor might experience by virtue of the debtor's possession of its property.

Id. at 886. “[T]he principal purpose of according administrative priority to claims for benefit to the estate is to prevent unjust enrichment of the debtor's estate, rather than simply to compensate the creditor.” In the Matter of Strause, 40 B.R. 110, 113 (Bankr. W.D. Wis. 1984).⁴

⁴ See also In re Continental Airlines, Inc. 146 B.R. 520, 527 (Bankr. D. Del., 1992), in which the court awarded an administrative expense where the aircraft was actually used by the debtor noting: “While mere possession is not sufficient to qualify for an

In this case, it cannot be said that Debtor's estate would be unjustly enriched if the Court does not grant GECAS' claim for administrative expenses status. In fact, it is undisputed that Debtor did not use the aircraft in the ordinary course of its business. More specifically, it was not allowed to do so unless GECAS gave express consent to their use. Thus, there was no concrete benefit bestowed upon the estate. See, e.g., Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 867 (4th Cir. 1994) ("In sum, there is a critical distinction between an actual benefit to the estate resulting from the actual postpetition use of collateral and a potential benefit to the estate resulting from a debtors' mere possession of collateral.").

GECAS has cited this Court's decision in In re Southern Soya Corp. 251 B.R. 302 (Bankr. D.S.C. 2000) in support of its position. That case is, however, clearly distinguishable from the present case. In re Southern Soya Corp. involved an application to incur debt filed by the debtor pursuant to § 364(c)(2) which was properly noticed post-petition and approved by the Court, and which was found to be necessary for the debtor to continue its operations and avoid other administrative expenses. The creditor also argued that the outstanding amount of the loan should be allowed as an administrative expense pursuant to § 503(b)(1)(A). The Court held that, despite the fact that the provisions of § 364(c) are in the alternative so that the authorization of any new post-petition credit under one does not imply authorization under another subsection, the creditor should not be precluded from pursuing repayment of the debts as an administrative expenses. Ultimately, the Court concluded that the money utilized by the

administrative expense under section 503(b), neither must the standard be impossible to meet. Movants need not prove, and the court need not determine, that the personalty was put to its highest and best use. (Citation omitted) All that is required is a showing that the personalty was actually used by the debtor post-petition in the ordinary course of debtor's business."

debtor was a necessary cost and expense which warranted the granting of administrative expense status pursuant to §503(b)(1)(A). This case is different from In re Southern Soya for several reasons. First, GECAS did not advance new credit post-petition in the present case. Second, there was no actual use of GECAS' aircrafts by Debtor; therefore, it cannot be said that because the Consent Order was entered into and that Debtor kept the aircraft on ground for approximately 19 days post-petition conferred a concrete benefit on the estate.

In this case, Debtor, a commercial airline, retained aircraft with the consent of the lessor, GECAS, during the first 60 days of the case; however, it was prohibited, pursuant to the Consent Order, from using the aircraft in the ordinary course of business. Furthermore, there was no § 1110 agreement, no adequate protection in the form of lease payments, no formal assumption of the lease, and no administrative claim for lease payments. Thus, the Court finds that, in this case, GECAS' claim did not meet the requirements of §503(b)(1)(A) for it to be granted administrative expense status.

B. Timeliness of Administrative Claim

Section 503(a) provides: "An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause." However, neither the Bankruptcy Code nor the Bankruptcy Rules set forth a deadline for filing such claims, and this Court has held that whether a claim pursuant to § 503(b)(1)(A) is timely is to be determined according to the circumstances of each case. See, e.g. In re Southern Soya Corp., 251 B.R. 302 (Bankr. D.S.C. 2000). The Court does not need to reach the issue of timeliness in this case, but it is worth noting that GECAS filed a Proof of Claim and then did not file its application pursuant to § 503 until

prompted to do so by the Objection to Claim filed by the Trustee more than two years later. It is conceivable that such a situation may cause the creditor's claim to be barred for lack of timeliness.

CONCLUSION

Based on these Findings of Fact and Conclusions of Law as stated above, it is therefore,

ORDERED that the Trustee's Objection to Claim number 1793 is granted.

IT IS FURTHER ORDERED that the objections by the Trustee and the United States Trustee to GECAS' Application for Allowance and Payment of Administrative Claim No. 1793 pursuant to §503(b)(1)(A) are sustained and the Application is denied.

IT IS FURTHER ORDERED THAT the claim will be allowed as an unsecured non-priority claim.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
December 18, 2000

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

CONNIE H. BROOKS

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