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Northern District of Illinois
Eastern Division

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 7
)	
Aldo Mandile,)	Case No. 20-04886
)	
Debtor.)	Judge Deborah L. Thorne

**MEMORANDUM ORDER OVERRULING RVM’S OBJECTION TO
TRUSTEE’S FINAL REPORT AND DENYING MOTION TO COMPEL
PAYMENT OF ADMINISTRATIVE EXPENSES**

This is a case that suffered from bad timing and lack of revenue. It was filed days before a scheduled foreclosure sale of the property located at 3201 South Normal Street, Chicago, Illinois (Property) and only weeks prior to the COVID-shutdown of Chicago. The shutdown forced the suspension of Chicago White Sox games at a stadium only blocks away from the Property. The sports bar previously located in the Property needed renovation and without revenue, there was very little hope that a reorganization would be possible. In fact, it was not.

Before the court now is the objection to the Trustee’s final report and renewed motions to compel payment of alleged administrative expenses to RVM LLC 4302 (RVM) on account of alleged super-priority expenses under 11 U.S.C. § 507(b) and its alleged “substantial contribution claim” under section 503(b). For the following reasons, the court overrules the objection and denies RVM’s renewed motions. Simply because the debtor failed to make the adequate protection payment, RVM is not entitled to a section 503(b) expense for the use of its property and does not qualify RVM for an administrative superpriority expense claim under section 507(b). Finally, RVM is not entitled to attorneys’ fees for filing the motion to convert.

BACKGROUND

The facts are relatively straight forward. Prior to filing the voluntary petition, the debtor, Aldo Mandile, borrowed \$300,000 from RVM, signing a note, executing and delivering a mortgage on the Property to secure repayment. In less than a year, Mandile defaulted on payments, failed to pay real estate taxes and otherwise failed to maintain the Property. RVM filed a foreclosure case in the Circuit Court of Cook County in March 2018. Several months later, RVM was appointed mortgagee in possession and operated the Property, collecting rents and providing basic maintenance of the Property. On February 11, 2020, RVM obtained a judgment of foreclosure and authorization to proceed with the sale of the Property.

Several days before the scheduled foreclosure sale, Mandile filed a chapter 11 petition. As a result, RVM tendered possession of the Property back to Mandile and filed a motion to prohibit the use of cash collateral for purposes other than the payment of direct expenses, real estate taxes and maintenance of the property. In addition, RVM asked for adequate protection in the amount of the real estate taxes then due and establishment of an escrow to accumulate funds for accruing real estate taxes. A short time later, on April 9, 2020, an agreed order was entered in which Mandile agreed to pay the first installment of the 2019 real estate taxes in the amount of \$7,493.47 as adequate protection. He also agreed that the rents were the cash collateral of RVM¹

Mandile failed to pay the adequate protection. RVM filed a motion to convert the case to one under chapter 7 and on June 11, 2020 the case was converted. A few days later, the chapter 7 trustee Deborah Ebner inspected the property with RVM's principal, Vince Scalise. Mr.

¹ Although not completely clear to the court, it appears that some rents were collected and turned over to RVM as adequate protection.

Scalise asked the trustee to liquidate the property with his preferred realtor. Ms. Ebner states that she was willing to do so but only with the promise that RVM would guarantee a return to unsecured creditors. When RVM was not willing to do so, Ms. Ebner abandoned the Property, determining that the total encumbrances of \$488,000 did not leave sufficient equity to make a distribution to unsecured creditors. The court entered an order authorizing the abandonment but continued the motion to compel payment of adequate protection.

In early February 2021, the continued motion to compel the trustee to pay adequate protection was denied and a short time later, the trustee filed her final report. RVM has now objected to the final report and renewed its motion to compel the payment of adequate protection by objecting to the proposed distribution contained in the final report, arguing that it is entitled to: (1) a super priority claim under 11 U.S.C. § 507(b); (2) fees for substantial contribution in connection with the motion to convert granted by this court; and (3) adequate protection for the real estate taxes that accrued from the petition date through September 11, 2021².

DISCUSSION

Congress authorized the award of superpriority expense status under section 507(b) to secured creditors who make a contribution to the chapter 11 case which benefits the estate under section 503(b) and who were previously promised adequate protection to protect from diminution in value of the collateral, but where, in the end, the protection failed to protect from the diminution. *In re Energy Co-op., Inc.*, 55 B.R. 957, 963 (Bankr. N.D. Ill. 1985); *In re Colter, Inc.* 53 B.R. 958, 960 (Bankr. D. Colo. 1985); *Matter of Jartran, Inc.*, 732 F.2d 584, 587 (7th Cir. 1984). To sustain the superpriority expense, the creditor must prove that the loss was caused solely by the imposition of the automatic stay. *In re Callister*, 15 B.R. 521 (Bankr. D. Utah

² The Objection states September 11, 2021. The court believes this is a typo as this date has not yet occurred. It assumes that RVM is asking for adequate protection through September 11, 2020.

1981); *In re Falwell Excavating Co., Inc.* 47 B.R. 217 (Bankr. W.D. Va. 1985). As discussed below, RVM is not entitled to a superpriority expense because it has not demonstrated that it provided a benefit under section 503(b) to the estate nor that its alleged injury was caused by the automatic stay.

Section 503(b)

Administrative expenses under section 503(b)(1)(A) must arise from post-petition “actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. § 503(b)(1)(A).

Section 503(b) is to be narrowly construed as the Ninth Circuit explained in *In re Dant & Russell Inc.*

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.

853 F.2d 700, 706 (9th Cir. 1988); *In re ICS Cybernetics, Inc.*, 111 B.R. 32, 36 (Bankr.

N.D.N.Y. 1989); *In re Allen Care Ctrs., Inc.*, 163 B.R. 180, 188 (Bankr. D. Or. 1994)

(“[t]he benefit to the estate must be actual, not potential”); *Broadcast Corp. v. Broadfoot*,

54 B.R. 606, 611 (N.D. Ga. 1985) (“administrative expense scheme does not focus in the

first instance on whether a creditor sustained a loss during this period, but on whether the

estate has received an actual benefit”), *aff'd*, *In re Subscription Television*, 789 F.2d

1530, 1532 (11th Cir. 1986) (“[t]hat which is actually utilized by a trustee in the

operation of a debtor's business ... should be accorded the priority of an administrative

expense”).

Unpaid adequate protection may be the basis of a priority under section 503(b), but the use of the creditor's property must have benefited the estate. In *In re Carpet Ctr. Leasing Co.*, 991 F.2d 682 (11th Cir. 1993), the court found that the secured creditor provided new value to the estate by allowing use of its tractors after considerable negotiations with the chapter 11 debtor. Although the case was ultimately converted to one under chapter 7, the court found that the use of the tractors allowed the debtor to generate revenue for the benefit of the estate and was entitled to an administrative expense claim. *See also In re Mendez*, 259 B.R. 754,757 (Bankr.M.D.Fla. 2001) (treatment of a failed adequate protection order as a superpriority administrative claim under § 503(b) is justified on the basis of the collateral's benefit to the estate).

But what happens when there is an agreement to pay adequate protection, the property was not used for the benefit of the estate and the creditor takes no action to protect its collateral in the absence of the adequate protection payments? Without demonstrating a benefit to the estate, the request for administrative expense must be denied. In this case, the debtor was not able to reopen the tavern and operate the business to bring in revenue or provide value to the estate. Unfortunately, the Property was not used by the debtor and no benefit accrued to the estate. When the case was converted, the Trustee abandoned the Property after several months of investigation. As far as the court is aware, any rents collected were turned over to RVM. There was clearly no benefit flowing to the estate.

RVM has not met the requirements of § 503 and accordingly, the court finds that in this case, the accrued property taxes and missed adequate protection payment are not an allowable administrative expense under section 503(b). Thus, RVM has not met the first hurdle to qualify for a superpriority expense under section 507(b).

Automatic Stay

RVM's argument for a superpriority claim also fails because it has not demonstrated that its loss was the result of the imposition of the automatic stay. When determining whether a loss was caused solely by the automatic stay, courts demand that the secured creditor be vigilant in protecting its rights during the case. If the creditor fails to take appropriate steps when adequate protection is insufficient by, for example, moving for relief from the stay, it may not be entitled to a superpriority for its loss. On the other hand, if the debtor fails to make adequate protection payments, and the secured creditor is denied relief from the stay, a superpriority may be warranted. 3 Norton Bankr. L. & Prac. 3d § 49:4.

In *In re Second Timmon Hotel Co., Ltd.*, 91 B.R. 985, 988 (Bankr. M.D. Fla. 1988), the debtor failed to make court ordered adequate protection payments and the secured creditor sought a superpriority for these missed payments. The court held that the creditor was not entitled to a superpriority claim because the creditor's failure to recover the full value of its collateral was not the result of a miscalculation in the adequate protection ordered by the court, but rather resulted from its own decision not to timely move for relief from the stay in order to foreclose upon the property or to file its affidavit of non-payment once the debtor missed the payment. *Second Timmon Hotel*, 91 B.R. at 988.

In *In re Falwell Excavating Co., Inc.*, 47 B.R. 217 (Bankr. W.D. Va. 1985), the debtor failed to make some of its court ordered adequate protection payments, resulting in a deficiency of \$5,200 even after certain adequate protection payments were made. The secured creditor sought a superpriority claim for this deficiency, but the court pointed to the secured creditor who allowed the defaulted payments to accumulate for several years before requesting relief from the stay. Because this delay in pursuing remedies was the business decision of the secured creditor,

the court held that while the secured creditor “should not be penalized for its delay in seeking relief, neither should it be granted a priority above all other creditors for the payments it did not collect.” *Falwell Excavating*, 47 B.R. at 220.

Similarly, RVM made a conscious decision not to seek relief from the stay. While it is true that the accumulation of unpaid property taxes encumbers RVM’s collateral and potentially diminishes RVM’s interest in the property, this diminution was not a result of the imposition of automatic stay. When the debtor failed to make the court ordered adequate protection payment, RVM took no action to modify the stay or otherwise protect its interest. In fact, it tried to convince the Trustee to liquidate the property for it. The diminution of RVM’s interest in the property was the result of its own inaction, not because of the automatic stay. Had RVM moved to modify the stay in response to the debtor’s failure to make court ordered adequate protection payments or the accrual of unpaid property taxes, this court would have likely granted its motion.³ And if the court had not granted the motion, RVM would then be able to point to the imposition of the automatic stay as the cause of the diminution.

RVM’s motion to compel payment of adequate protection or a section 507(b) expense is denied.

Attorney’s Fees

RVM moves for payment of its attorney’s fees as an administrative expense, arguing that by filing a motion to convert the case to one under chapter 7, it prevented further dissipation of estate assets. While the Bankruptcy Code allows for payment of administrative expenses where a creditor provides services that benefit the entire estate, RVM has not demonstrated a benefit

³ Although the issue did not come before the court, it is very likely that RVM would have been able to demonstrate that there was cause to modify the stay because of the failure of the debtor to pay adequate protection. See 11 U.S.C. § 362(d)(1).

resulting from its motion to convert. Section 503(b)(3) describes activities that may warrant reimbursement of expenses and section 503(b)(4) describes where reasonable compensation may be justified when there is a benefit to the estate.⁴ RVM has not shown that the motion to convert in this case merits reimbursement of expenses or fees as there is no demonstrated benefit to the estate.

On its face section 503(b)(3)(D) applies only in chapter 9 and chapter 11 cases. There is a split in authority regarding whether a creditor may seek a substantial contribution claim in a case under chapter 7, but the Seventh Circuit has not provided any authority on the issue. If a chapter 11 case is converted to chapter 7, the majority view is that a substantial contribution reimbursement may be granted for the period that the case was in chapter 11, but any contributions made thereafter will not qualify for administrative priority status. *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937 (3d Cir. 1994); *In re Memory Lane Assisted Living of Bowdon, LLC*, 2017 Bankr. LEXIS 2252 (Bankr. N.D. Ga. Aug. 11, 2017) (disallowing a substantial contribution claim for services rendered after conversion of the chapter 11 case to chapter 7).

⁴ Bankruptcy Code sections 503(b)(3)(D) and 503(b)(4) provide that:

(b) 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...

(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...

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

Whether or not a substantial contribution has been made is a question of fact and the burden of proof is on the applicant to demonstrate by a preponderance of the evidence that it has made a substantial contribution in the case. *In re Sentinel Mgmt. Grp., Inc.*, 404 B.R. 488, 494 (Bankr. N.D. Ill. 2009). “Substantial contribution” is not a term defined by the Bankruptcy Code, but it is typically narrowly construed because “[t]he integrity of § 503(b) can only be maintained by strictly limiting compensation to extraordinary creditor actions which lead directly to significant and tangible benefits to the creditors, debtor, or the estate.” *Id.* (citing *In re D.W.G.K. Restaurants, Inc.*, 84 B.R. 684, 690 (Bankr. S.D. Cal. 1988)). “Courts have found that an applicant satisfies the test for providing a substantial contribution when it has provided ‘an actual and demonstrable benefit to the debtor’s estate, its creditors, and to the extent relevant, the debtor’s shareholders.” *Id.* (citing *In re United States Lines, Inc.*, 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989)). “Inherent in the term ‘substantial’ is the concept that the benefit received by the estate must be more than an incidental one arising from activities the applicant has pursued in protecting his or her own interests.” *Id.* (citing *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 944 (3d Cir. 1994)). “In this regard, ‘[c]reditors face an especially difficult burden in passing the ‘substantial contribution’ test [because] they are presumed to act primarily in their own interests.’” *Id.* (citing *United States Lines*, 103 B.R. at 430). “When determining whether an entity is entitled to administrative expense priority under these sections, ‘courts consider whether the efforts of the applicant resulted in an actual and demonstrable benefit to the debtor’s estate; services that indirectly, incidentally, or tangentially benefit the estate do not qualify for administrative expense priority.’” *Id.* (citing *Envirodyne Indus.*, 1995 U.S. Dist. LEXIS 10846, 1995 WL 461854, at *3).

RVM has the burden of proof to establish that its motion to convert the debtor's case resulted in a substantial contribution to the estate. While the attorney's fees incurred in preparing the motion to convert were incurred prior to conversion to chapter 7, thus avoiding the circuit split, RVM has still failed to satisfy its burden. RVM claims that by converting the case to chapter 7, it assisted the Trustee in "securing the assets for the benefit of the estate." RVM does not provide any specific instances of assets secured as a result of the conversion.⁵ RVM also claims that converting the case to chapter 7 "prevented the Debtor from dissipating the other assets of the estate." But preventing loss of assets does not qualify as a substantial contribution to the estate. *See In re Grasso*, 519 B.R. 137, 142–43 (Bankr. E.D. Pa. 2014). RVM has simply failed to show this court how its motion to convert benefited the estate. For this reason, it is not entitled to fees or reimbursement of expenses under section 503(b).

CONCLUSION

For the reasons stated above, the objection to the Trustee's final report is overruled and the renewed motions to compel payment of administrative expenses are denied.

Dated: April 23, 2021

Honorable Deborah L. Thorne
United States Bankruptcy Judge

⁵ The only asset that provided a distribution was the result of a wrongful death claim for which the debtor was a beneficiary. There is no proof that this would not have been an asset of the debtor's case had the case remained in chapter 11 or that the debtor would have wasted it. Thus, it is difficult for the court to see how RVM benefited the estate by its motion to convert.