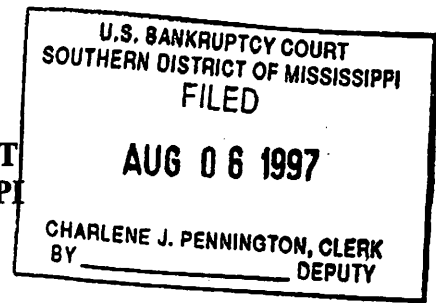


**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**



IN RE:

CHAPTER 11

**NATCHEZ INTERNATIONAL
LIMITED PARTNERSHIP**

CASE NO. 95-03046WEE

**ATLANTIC HOLDINGS LIMITED
PARTNERSHIP AND
GENERAL INNKEEPING ACCEPTANCE
CORPORATION**

PLAINTIFFS

VS.

ADVERSARY NO. 97-0006WEE

**NATCHEZ INTERNATIONAL
LIMITED PARTNERSHIP**

DEFENDANT

Hon. Charles N. Wooten, Sr.
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Attorney for Debtor in Possession

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Attorney for Atlantic Holdings Ltd.
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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

The Court has two interrelated matters before it for consideration in this case: the *First Application for Interim Compensation and Reimbursement of Expenses by Attorneys for the Debtor and Debtor in Possession* and the *Motion of Atlantic Holdings Limited Partnership and General Innkeeping Acceptance Corporation to Compel Debtor to Turnover Funds in the Debtor-in-Possession Account(s)*. The attorneys for the Debtor in Possession seek to use certain funds in the Debtor in Possession account to satisfy their administrative claim for fees and expenses, whereas Atlantic and GIAC seek the turnover of those funds, claiming that the funds constitute collateral of Atlantic Holdings and GIAC and cannot be used to satisfy the administrative claim of the attorneys for the Debtor in Possession. After notice and a hearing, and after considering the evidence and arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor, Natchez International Limited Partnership, owned and operated a Holiday Inn Hotel in Natchez, Mississippi. Beginning in 1988, the Debtor became indebted to Atlantic Holdings Limited Partnership through the execution of a certain promissory note. In order to secure the indebtedness, the Debtor also executed a loan and security agreement and a deed of trust on the hotel naming Atlantic as the beneficiary thereunder. The parties subsequently entered into a series

of modification agreements pertaining to the promissory note, loan and security agreement and deed of trust.

In 1993, the Debtor executed two promissory notes in favor of GIAC. Marvin Glick, who is the president of the Debtor's general partner, also executed the notes as a co-maker. James Conboy, a limited partner of the Debtor, executed a guaranty, wherein Mr. Conboy guaranteed payment of the two promissory notes executed by the Debtor and Marvin Glick. In connection with the execution of the two promissory notes, the Debtor executed a purchase money security agreement granting GIAC a security interest all of the hotel's furniture, fixtures and equipment. Also in connection with the execution of the promissory notes in favor of GIAC, an intercreditor agreement was entered into between Atlantic and GIAC. Pursuant to the intercreditor agreement the deed of trust, which granted Atlantic a beneficial interest in the hotel, was amended to provide that Atlantic and GIAC were co-beneficiaries thereunder.

As a result of the various transactions and instruments, Atlantic and GIAC hold a first priority security interest against virtually all of the assets of the Debtor.¹

The Debtor defaulted in its obligations to Atlantic and GIAC. Atlantic and GIAC scheduled a foreclosure sale in order to foreclose their deed of trust against the hotel. On September 18, 1995, two days before the scheduled foreclosure sale, the Debtor filed its petition for relief under Chapter

¹ See *Stipulation by and Among Debtor, Atlantic Holdings Limited Partnership and General Innkeeping Acceptance Corporation for Use of Cash Collateral and Adequate Protection* dated October 4, 1995 filed in this case on October 19, 1995 as an exhibit to the *Joint Motion and Notice Regarding Stipulation by and Among Debtor, Atlantic Holdings Limited Partnership and General Innkeeping Acceptance Corporation for Use of Cash Collateral and Adequate Protection*.

11 of the Bankruptcy Code ². As of the petition date, the claims of Atlantic and GIAC against the Debtor totaled approximately \$2,400,000.

On October 3, 1995, an order was entered authorizing the Debtor in Possession to employ the law firm of Charles N. Wooten, Ltd. as lead counsel and Mr. Perry Brown as associate local counsel.

Shortly after the Debtor filed its petition for relief, Atlantic and GIAC filed a motion to prohibit the use of cash collateral, resulting in the execution of a stipulation dated October 4, 1995, among the Debtor, Atlantic and GIAC regarding the use of cash collateral.³ Among other things, the stipulation provides:

6. The Debtor and/or the management of the Hotel, may utilize the Secured Parties' Cash Collateral solely to pay the reasonable, ordinary and necessary business expenses of the Debtor, limited to those expenditures specifically set forth in the budgets submitted to the Secured Parties on a monthly basis (the "Budget") and approved by such Secured Parties; the initial budget to be in accordance with those items provided for on Exhibit "A". The Debtor further agrees to provide the Secured Parties with its anticipated monthly expenses for the next succeeding month in the form of a Budget (which Budgets shall also be filed with the Court) at least two (2) weeks prior to the expiration of the current Budget. The Debtor further represents and warrants that the expenditures as set forth in any such Budget will be its reasonable, ordinary and necessary expenses. Further, any Budget submitted to the Secured Parties may be modified by agreement between the Debtor and the Secured Parties and any such modified Budget shall also be filed with the Court.

....
10. The Debtor agrees not to incur any administrative expenses other than as set forth in the Budget, exclusive of any fees payable pursuant to 28 U.S.C. § 1930 as well as professional fees approved by the Court, without the prior written consent of the Secured Parties and a hearing.

....
24. This stipulation shall terminate upon the earlier of either: (a) the occurrence of an Event of Default; (b) the failure of an Approved Replacement

² Hereinafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

³ See *infra* note 1.

Management Firm to assume control over the management of the operations of the Hotel within thirty (30) days of the execution of the within Stipulation unless it is agreed upon by and between the Debtor and the Secured Parties to extend such a date; (c) March 31, 1996, unless agreed upon by and between the Secured Parties and the Debtor to extend such time, which agreement shall be filed with the Court; and (d) an order of the Court.

The Budget referenced in paragraph 6 of the stipulation and attached to the stipulation as Exhibit "A" contains an entry for chapter 11 expenses in the amount of \$5,000 per month through September, 1996.

In January of 1996, Atlantic and GIAC filed a motion for relief from the automatic stay alleging that the Debtor was in default under the terms of the October, 1995 stipulation. On February 6, 1996, an order was entered abandoning all property of the Debtor constituting collateral of Atlantic and GIAC and lifting the automatic stay as to Atlantic and GIAC.

Atlantic and GIAC reinstated foreclosure proceedings, and on June 26, 1996, a trustee's sale of the hotel property, furniture and fixtures took place.

On August 20, 1996, the *First Application for Interim Compensation and Reimbursement of Expenses by Attorneys for Debtor and Debtor in Possession* was filed seeking compensation for the law firm of Charles N. Wooten, Ltd. in the amount of \$67,274 plus expenses in the amount of \$5,005.20, less a retainer of \$10,000 previously paid to Mr. Wooten's firm. The net total Mr. Wooten seeks on his firm's behalf is \$ 62,079.20 The application also seeks compensation for Perry Brown in the amount of \$ 6,630 less a retainer of \$1,500 for a net total of \$ 5,130.

Atlantic and GIAC oppose the application for compensation and reimbursement of expenses only on the basis that any funds available to pay Mr. Wooten and Mr. Brown constitute collateral of Atlantic and GIAC and may not be used to satisfy the claims of Mr. Wooten and Mr. Brown.

On January 9, 1997, Atlantic and GIAC filed their motion to compel the Debtor to turnover funds in the debtor in possession account.

On January 28, 1997, this Court entered an *Order of Allowance of Interim Attorneys Fees and Reimbursement of Expenses to Attorneys for the Debtor and Debtor in Possession*. The order allows the fees and expenses pursuant to §503 of the Bankruptcy Code. Entry of the order approving the fees as an administrative expense under §503 was unopposed by Atlantic and GIAC since they do not oppose the approval of the fees and expenses as an administrative expense of the estate. Atlantic and GIAC do oppose the Debtor's request to pay the administrative expense out of their collateral.

Since the order allowing fees and expenses was entered allowing the amounts requested as an administrative expense under § 503 of the Bankruptcy Code, the only question remaining is whether this administrative expense may be charged against the collateral of Atlantic and GIAC.

CONCLUSIONS OF LAW

Counsel for the Debtor bases his argument on the premise that those fees and expenses approved by the Court as an administrative expense should be charged against the collateral of Atlantic and GIAC pursuant to § 506(c) of the Bankruptcy Code, or, alternatively, on the premises that Atlantic and GIAC agreed to payment of the fees in the October, 1995 stipulation.

Section 506(c) of the Bankruptcy Code provides as follows:

(c) The Trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

Subject to certain limitations, a debtor in possession is provided with the rights, powers

and duties of a trustee pursuant to § 1107 of the Bankruptcy Code. Therefore, a debtor in possession may seek reimbursement for costs and expenses under § 506(c) to which a trustee would be entitled.

Ordinarily, however, administrative expenses must be satisfied out of the bankruptcy estate. French Market Homestead, FSA v. P.C. Ltd. (Matter of P.C. Ltd.), 929 F.2d 203, 205 (5th Cir. 1991), New Orleans Public Service, Inc. v. First Federal Savings and Loan Assoc. of Warner Robbins, Georgia (Matter of Delta Towers, Ltd.), 924 F.2d 74, 76 (5th Cir. 1991)..

To invoke the extraordinary exception to that rule contained in § 506(c), three elements must be shown: (1) the expenditure was necessary, (2) the amounts expended were reasonable, and (3) the creditor benefitted from the expenses. Delta Towers, 924 F.2d at 76. The burden of demonstrating these elements is on the parties seeking recovery.

French Market Homestead, FSA v. P.C. Ltd. (Matter of P.C. Ltd.), 929 F.2d at 205.

In New Orleans Public Service, Inc. v. First Federal Savings and Loan Assoc. of Warner Robbins, Georgia (Matter of Delta Towers, Ltd.), 924 F.2d 74 (5th Cir. 1991) the Fifth Circuit Court of Appeals adopted a narrow interpretation of the benefit element of the three part test, stating:

Courts have construed the benefit element as requiring that the claimant incur the expenses primarily for the benefit of the secured creditor and that the expenses resulted in a quantifiable direct benefit to the secured creditor. . . . Indirect or speculative benefits are insufficient. . . . At the same time, expenses which benefit the debtor or other creditors rather than the secured creditor himself are immaterial.

Id. At 77 (citations omitted).

At the hearing on the fee application and the motion to compel the turnover of funds, Mr. Conboy testified that the purpose of placing the Debtor in chapter 11 was to try to sell the hotel for an amount greater than would be realized upon the foreclosure of the property. Mr. Conboy further testified regarding the Debtor's efforts to sell the property. It was his opinion that an acceptable

sale could have been completed resulting in a greater recovery for Atlantic and GIAC had the secured parties not frustrated the Debtor's efforts.

Counsel for Atlantic and GIAC argues that none of the offers presented to them by the Debtor were acceptable because they were premised on a modification of the rights of Atlantic and GIAC against the guarantors and also required the secured parties to finance the purchase of the hotel.

Counsel for the Debtor argues that Atlantic and GIAC did benefit from the Debtor's efforts to obtain a purchaser for the hotel even though the Debtor's efforts were ultimately unsuccessful. In support of its position, the Debtor cites authorities from the Eighth and Third Circuit Courts of Appeal holding that the debtor's efforts do not necessarily have to yield a quantifiable dollar amount in order to benefit the secured creditor⁴. However, this Court is bound by the authority of the Fifth Circuit Court of Appeals, which has chosen to construe the provisions of § 506(c) narrowly.

In the present case, the efforts of the Debtor were not primarily for the benefit of Atlantic and GIAC. The guarantors of the Debtor had the greatest interest in selling the hotel for an amount greater than would be realized at foreclosure. While Atlantic and GIAC may have benefitted from a sale of the property outside of foreclosure, the it is the Court's opinion that the primary purpose behind the Debtor's efforts was to protect the interests of the guarantors. The Debtor's intention in

⁴ See United States v. Boatmen First Nat'l Bank of Kansas City, 5 F.3d 1157 (8th Cir. 1993). In so holding, the court noted that in the case before the court, the creditor agreed to the post petition efforts to preserve the business in an effort to obtain a better return on the collateral, stating "[a]lthough a trustee or debtor in possession who incurs administrative expenses in the preservation of the estate, but without the approval of the creditor, cannot expect to recover those expenses under section 506(c) when the creditor receives or could expect to receive no benefit" Id. at 1160. See also Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.), 799 F.2d 91 (3rd Cir. 1986).

filing a Chapter 11 petition was to liquidate the estate from the outset. Any sale of the hotel for an amount greater than would have been obtained at foreclosure would provide a pecuniary benefit to the guarantors as well as Atlantic and GIAC, but would not change the status of the Debtor from a liquidating entity.

Additionally, the Fifth Circuit has stated that the expenses must have resulted in a direct and quantifiable benefit to the secured party. In the present case, a foreclosure sale was scheduled to take place when the Debtor filed its Chapter 11 petition for relief. After many months and the accrual of even greater expenses, the property was abandoned and the stay was lifted so that Atlantic and GIAC could foreclose the property.

The Court finds that the Debtors efforts did not result in a direct and quantifiable benefit to Atlantic and GIAC. Had the Debtor's efforts to obtain an acceptable sale of the property been successful, then the outcome may have been different, as Atlantic and GIAC may have received a direct and quantifiable benefit from the efforts of the Debtor.

Citing PSI, Inc of Missouri v. Aguillard (Matter of Senior-G & A Operating Co., Inc., 957 F.2d 1290, 1300 (5th Cir. 1992), the Debtor also argues that while the burden of proving the elements of §506(c) is on the claimant, where the secured creditor consents to the preservation of the collateral, such consent is an advance acknowledgment by that creditor that the costs and expenses are for the benefit of the creditor. The Debtor argues that by entering into the October 4, 1995 stipulation, Atlantic and GIAC impliedly consented to the payment of the fees and expenses out of the collateral of Atlantic and GIAC.

The Debtor's second consent argument is that Atlantic and GIAC expressly consented to the payment of approved attorneys fees and expenses in the October 4, 1995 stipulation. As set forth above, the stipulation provides in part as follows:

10. The Debtor agrees not to incur any administrative expenses other than as set forth in the Budget, exclusive of any fees payable pursuant to 28 U.S.C. § 1930 as well as professional fees approved by the Court, without the prior written consent of the Secured Parties and a hearing.

The Debtor argues that the phrase "exclusive of any fees payable pursuant to 28 U.S.C. § 1930 as well as professional fees approved by the Court" indicates that the parties agreed that the payment of approved professional fees and expenses would not be limited by the budget.

Atlantic and GIAC argue they did not impliedly or expressly agree to pay the fees and expenses incurred by the Debtor in attempting to sell the property. Atlantic and GIAC state that paragraph 10 of the stipulation limits the payment of professional fees to the amount set forth in the budgets that were to have been submitted on a monthly basis, but never were submitted. They take the position that since no budgets were filed as contemplated by the stipulation, the Debtor is not entitled to any payments from the collateral of Atlantic and GIAC.

The Court finds that a budget covering an entire year from October, 1995 through September, 1996, was both attached to the stipulation and referenced in the stipulation. In that budget, an entry was made for each month for chapter 11 expenses in the amount of \$ 5,000. By its own terms, the stipulation was set to expire not later than March 31, 1996.

The Court finds that under the terms of the stipulation, the secured parties agreed to the payment from their collateral of chapter 11 expenses which accrued from October, 1995 through March, 1996 in an amount no greater than \$5,000 per month for an aggregate of \$ 30,000. The

Court finds that Atlantic and GIAC did not impliedly consent to the payment of more than the \$30,000 set forth in the stipulation.

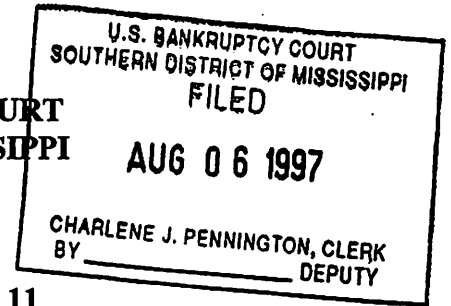
In light of the foregoing, the Court holds that the administrative claim of Charles N. Wooten, Ltd. and Mr. Perry Brown as approved by this Court's order dated January 28, 1997 may be charged against the collateral of Atlantic and GIAC in the amount of \$ 30,000. Additionally, the Court holds that amounts received by counsel for the Debtor prepetition as a retainer may be used to satisfy their administrative claim in addition to the \$30,000 contemplated by the stipulation.

A separate order consistent with the Court's opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 6th day of August, 1997.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION



IN RE:

CHAPTER 11

NATCHEZ INTERNATIONAL
LIMITED PARTNERSHIP

CASE NO. 95-03046WEE

ATLANTIC HOLDINGS LIMITED
PARTNERSHIP AND
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CORPORATION

PLAINTIFFS

VS.

ADVERSARY NO. 97-0006WEE

NATCHEZ INTERNATIONAL
LIMITED PARTNERSHIP

DEFENDANT

FINAL JUDGMENT

ON THE FIRST APPLICATION FOR INTERIM COMPENSATION AND REIMBURSEMENT OF EXPENSES BY ATTORNEYS FOR THE DEBTOR AND DEBTOR IN POSSESSION AND THE MOTION OF ATLANTIC HOLDINGS LIMITED PARTNERSHIP AND GENERAL INNKEEPING ACCEPTANCE CORPORATION TO COMPEL DEBTOR TO TURNOVER FUNDS IN THE DEBTOR IN POSSESSION ACCOUNT(S)

Consistent with the Court's ruling entered contemporaneously herewith on *The First Application for Interim Compensation and Reimbursement of Expenses by Attorneys for the Debtor and Debtor in Possession* and the *Motion of Atlantic Holdings Limited Partnership and General Innkeeping Acceptance Corporation to Compel Debtor to Turnover Funds in the Debtor-in-Possession Account(s)*, it is hereby ordered and adjudged as follows:

1. Attorneys for the Debtor in Possession may retain those amounts paid prepetition by the Debtor in Possession for attorney fees in the amounts of \$10,000 for the law firm of Charles N. Wooten, Ltd. and \$1,500 for Mr. Perry Brown.

2. In addition to amounts received as a prepetition retainer by attorneys for the Debtor, attorneys for the Debtor may charge a portion of the fees and expenses approved by this Court's order entered January 28, 1997, against the cash collateral of Atlantic and GIAC in the amount of \$30,000;

3. All remaining cash collateral in the possession of the Debtor is to be immediately turned over to Atlantic and GIAC.

4. Attorneys for the Debtor are hereby directed to prepare and submit to this Court an order reflecting the pro rata amounts to be paid to the law firm of Charles N. Wooten, Ltd. and Mr. Perry Brown from the aggregate amount of \$30,000;

So ordered this the 6TH day of August, 1997.


UNITED STATES BANKRUPTCY JUDGE