

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PETER'S GROCERIES, INC.

CASE NO. 03-60668

Debtor

Chapter 11

IN RE:

THE PETER FAMILY IRREVOCABLE TRUST

CASE NO. 03-60669

Chapter 11

Debtor

Jointly Administered

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On May 6, 2004 Capital Crossing Bank (“CCB”),¹ successor-in-interest to KeyBank N.A., filed a motion pursuant to § 363(e) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”), for an order amending a cash collateral stipulation, dated March 7, 2003, previously approved by an Order of this Court, dated April 11, 2003, and give CCB (1) authorization to use rents received from tenants of Skytop Plaza to pay unpaid postpetition taxes owed by The Peter Family Irrevocable Trust (the “Trust”), (2) authorization to make payment of postpetition premiums due on a collateral life insurance policy (“Insurance Policy” or “Policy”) with said premiums to be treated as an administrative expense pursuant to Code § 503(b), and (3) additional adequate protection for the continued use of its cash collateral. Opposition to the motion was filed on May 20, 2004, on behalf of Peter’s Groceries, Inc. (“Groceries”) and the Trust (hereinafter the “Debtors”). Opposition was also filed on behalf of The Penn Traffic Company (“Penn Traffic”), a secured creditor in Groceries’ case.

The Court heard oral argument on the motion at its regular motion term on May 25, 2004, in Utica, New York. On June 7, 2004, the Court signed an Order granting CCB’s motion in part, allowing *inter alia* CCB to use the rents paid by the tenants in the Skytop Plaza to pay the real property taxes on the property.

At the hearing on May 25, 2004, the Court expressed its reservations concerning CCB’s request for additional adequate protection in the form of payments of premiums on the Insurance

¹ CCB allegedly is the servicer for MTGLQ Investors, L.P. See CCB’s Motion at 1.

Policy, indicating that it seemed unfair to require the Debtors to expend monies from their estates to preserve collateral which is not property of those estates and the preservation of which will have no impact on the Debtors' reorganization, other than to dissipate funds that might otherwise go to the unsecured creditors. The Court pointed out that if the Policy was not property of the estate, as the Debtors contend and CCB does not dispute, then there is no requirement that the Debtors make the premium payments. Although not memorialized in the Order of June 7, 2004, the Court denied CCB's request that the payments of the premiums be made by the Debtors as additional adequate protection of CCB's collateral pursuant to Code § 363(e).

The Court reserved decision, however, on the issue of whether CCB could include the premium payments on the Insurance Policy in its administrative expense claim against the Debtors or include them in its secured claim and recoup the payments from property of the estates in that manner. The parties were afforded an opportunity to file memoranda of law, and the matter was submitted for decision on June 15, 2004.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (B) and (O).

FACTS

The Debtors filed voluntary petitions pursuant to chapter 11 of the Code on February 6,

2003. Groceries is the largest tenant of the Skytop Plaza, which is located on Nottingham Road, Syracuse, New York, and is owned and operated by the Trust. According to the Debtors, the Trust owes CCB approximately \$2,100,000 in principal, secured by a first mortgage on the Skytop Plaza, valued at approximately \$3,000,000. CCB also has a security interest in the inventory and supplies of Groceries, subordinate to the secured claim of Penn Traffic of approximately \$550,000. In addition, CCB has a first lien on the equipment and machinery located at the Skytop Plaza supermarket operated by Groceries. *See Debtors' Opposition at ¶¶ 5 and 18.*

On April 29, 1998, Groceries, as well as John J. Peter and Joseph E. Peter,² individually executed and delivered to KeyBank their guaranty under which they, among other things, unconditionally guaranteed the prompt payment when due of all present and future obligations and liabilities of the Trust to KeyBank. *See Exhibit "A" attached to the Debtors' Opposition.* On March 25, 1999, John Peter and Joseph E. Peter individually executed and delivered to KeyBank their guaranty under which they, among other things, unconditionally guaranteed the prompt payment when due of all present and future obligations and liabilities of Groceries to KeyBank. *See id.* Allegedly at the request of KeyBank, a life insurance policy with a face death benefit of \$1 million was assigned to it as additional collateral in connection with the guaranties. *Id.* The Policy is a "second-to-die" policy by which both of the insureds, John Peter and his wife, Charlotte, must pass away prior to expiration of the Policy in 2011 in order for there to be a one

² Joseph E. Peter is the son of the founder and former president of Groceries, John J. Peter. It was Joseph E. Peter who signed Groceries' and the Trust's petitions as president and trustee, respectively.

million dollar payment by the insurance company.³ *See* Memorandum of Law of CCB, filed June 14, 2004, at n.1.

Allegedly, either Groceries or John Peter paid the quarterly premiums on the Insurance Policy of approximately \$12,000 to \$15,000 until late 2001 or early 2002. According to Debtors' counsel, thereafter the premiums were deducted from the cash value of the Policy. However, in late 2003 or early 2004 John Peter was notified by the insurance company that the Policy was about to lapse due to non-payment. It was represented to the Court that neither the Debtors, nor John Peter, can afford to continue making the quarterly premium payments.

According to Debtors, John Peter agreed to reaffirm his pledge of the Policy with the understanding that CCB would be responsible for the payment of the premiums and that "any premium amounts advanced would be recovered by CCB from the insurance proceeds ultimately collected."⁴ Debtors' Opposition at ¶ 15. CCB allegedly commenced remitting the premium payments sometime in late 2003 or early 2004 in order to prevent the Policy from lapsing. *See* Debtors' Memorandum at 2.

³ John Peter is 91 years old and his wife, Charlotte, is 88 years old. The Policy is owned by the John J. and Charlotte E. Peter Survivorship Trust. According to Debtors' counsel, neither of the Debtors holds an ownership interest in the Policy and neither is a beneficiary of it. *See* Debtors' Memorandum, filed June 15, 2004, at 2.

⁴ CCB's counsel takes exception to the Debtors "claimed 'understanding'" asserting that it is without support "and, more importantly, legally irrelevant to the determination of whether such post-petition payments by CCB shall be deemed a part of CCB's secured claims in Debtors' cases." CCB's Memorandum of Law, filed June 14, 2004, at 4.

ARGUMENTS

In support of its request for an administrative expense claim pursuant to Code § 503(b), CCB argues that maintaining the Insurance Policy confers a benefit on the Debtors' estates to the extent that any policy proceeds will serve to reduce CCB's claims against the Debtors. According to CCB, this will provide unsecured creditors with the improved possibility of a dividend on their claims.

In the alternative, CCB takes the position that if the Court determines that it is not entitled to an administrative expense claim, CCB should be allowed to include the postpetition payments of the premiums as part of its secured claim against the Debtors. CCB contends that the payments represent the cost of preserving the status quo which existed at the time the Debtors filed their petitions with respect to its collateral, given that it is stayed from exercising its contractual remedies against the Debtors.

The Debtors take the position that the Insurance Policy is not property of the Debtors' estates. Contrary to the assertion made by CCB's counsel that the Debtors have a contractual obligation to make the payments, Debtors' counsel indicated that it is not clear that it is the Debtors' obligation, pointing out that the Insurance Policy is owned by John Peter, a nondebtor party and that Groceries previously made some of the premium payments as an accommodation to John Peter. The Debtors contend that CCB, in continuing to make the payments, is doing so in its own self-interest and such payments do not provide any benefit to the Debtors estates. Furthermore, the Debtors argue that any premium payments made by CCB ultimately should be recovered from the proceeds of the Policy, not from the Debtors' estates.

Penn Traffic takes the position that the premium payments provide no benefit to the Debtors' estates. Furthermore, if the Court were to grant CCB an administrative expense claim, Penn Traffic points out that it would be subject to and subordinate to the administrative expense claim granted to it pursuant to the cash collateral stipulation of February 13, 2003, as amended February 26, 2003, which was approved by this Court in the Order, dated April 11, 2003.

DISCUSSION

“The burden of proving entitlement to an administrative expense rests with the applicant, who must do so by a preponderance of the evidence.” *In re Indiana Walnut Products, Inc.*, 136 B.R. 522, 523 (Bankr. N.D. Ind. 1991). In order for a claim to be given priority as an administrative expense, it must arise from a transaction with the debtor-in-possession and be beneficial to the debtor-in-possession in the operation of its business. *Id.* at 523-524. Furthermore, the expense must have been incurred *primarily* to benefit the estate as a whole and not simply to further the administrative creditor's own self-interest. *Id.* at 524.

In this case, the transaction for which CCB seeks approval of an administrative expense claim is not one between the Debtors and CCB. Rather, it is between CCB and the insurance company to whom the premiums are being paid. Arguably, the transaction also indirectly involves John Peter, the insured nondebtor who guaranteed the obligations of the Debtors to CCB. In this regard, payment of the premiums entitles CCB to full recovery of the \$1 million only in the event that both Mr. and Mrs. Peter die prior to 2011 and arguably only if CCB finds

it necessary to pursue John Peter on his guaranty.⁵

CCB argues that at least in the Groceries' case, the policy proceeds "could be the only tangible hope of a meaningful distribution for some creditors." CCB's Memorandum of Law at 4. Thus, CCB would have the estates expend approximately \$48,000 - \$60,000 annually in the hope that both Mr. and Mrs. Peters will die prior to 2011, and that there will be \$1 million in life insurance proceeds to offset the debt owed to CCB. This is far too speculative to justify the expense in the opinion of the Court. Maintenance of the premiums provides no direct benefit to either the Debtors in their efforts to reorganize or John Peter. It is clear that CCB is the entity that will be primarily benefitted from the payments on the Policy. Accordingly, CCB has failed to meet its burden to establish entitlement to an administrative expense claim pursuant to Code § 503(b) in the Debtors' cases.

CCB relies on *In re McK, Ltd.*, 14 B.R. 518 (Bankr. D. Colo. 1981) in support of its request that it be permitted to include its premium payments under the Insurance Policy in its secured claim against the Debtors. As in the case herein, the court in *McK* denied the creditor's request for administrative expense claim status to the cost of insuring the debtor's real and personal property postpetition. *See id.* at 520. The court did allow the creditor to include the cost of insuring the real property as a part of its secured claim against the debtor. *Id.*

CCB's reliance on *McK* is misplaced, however, in the view of this Court. CCB is not seeking to insure property of the Debtors' estates, as was the case in *McK*. Nor has CCB

⁵ The Debtors' counsel has represented to the Court that CCB is actually oversecured with respect to the collateral belonging to the estates, including the Skytop Plaza owned by the Trust and the equipment and inventory belonging to Groceries. The Court has not been provided with a copy of the guaranties to make any determination regarding the circumstances under which CCB can recover on them.

established that the Debtors have any obligation, contractually or statutorily, to make the premium payments on the Policy. While there is no apparent dispute that Groceries made some of the premium payments in the past prior to filing its petition, it appears from what has been presented to the Court that Groceries was under no obligation to do so and merely made the payments as an accommodation to John Peter. Under those circumstances, the Court agrees with the Debtors that CCB must look solely to the proceeds of the Policy to recover any premium payments it makes.

Based on the foregoing, it is hereby

ORDERED that CCB's motion insofar as it seeks to have the Debtors make the payments on the Policy postpetition as additional adequate protection pursuant to Code § 363(e) is denied; it is further

ORDERED that CCB's motion insofar as it seeks an administrative expense claim pursuant to Code § 503(b) is denied; and it is finally

ORDERED that CCB's motion insofar as it seeks to have its premium payments on the Policy included in its secured claim against the Debtors is denied.

Dated at Utica, New York

this 20th day of August 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge