

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33186

FULTON BELLOWS & COMPONENTS, INC.
f/k/a JRGACQ CORPORATION

Debtor

NOTICE OF APPEAL FILED: April 28, 2004

DISTRICT COURT No.:

DISPOSITION:

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33186

FULTON BELLOWS & COMPONENTS, INC.
f/k/a JRGACQ CORPORATION

Debtor

**MEMORANDUM ON MOTION FOR PAYMENT OF EXPENSES DUE
PURSUANT TO COLLECTIVE BARGAINING AGREEMENTS**

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The contested matter presently before the court is the Motion for Payment of Expenses Due Pursuant to the Provisions of a Collective Bargaining Agreement filed by the United Steelworkers of America, AFL-CIO-CLC (Steelworkers Union) on March 10, 2004, and the Joinder in Motion for Payment of Expenses Due Pursuant to the Provisions of Collective Bargaining Agreement (collectively, Motion for Vacation Pay) filed by the International Association of Machinists and Aerospace Workers Union (Machinists Union) on March 11, 2004. The Unions seek payment of vacation pay due under the terms of a Collective Bargaining Agreement between the Debtor and the Steelworkers Union dated October 16, 1999, and a Collective Bargaining Agreement between the Debtor and the Machinists Union dated October 26, 1999 (collectively, Agreements).

The Debtor filed the Objection of Debtor, Fulton Bellows & Components, Inc., to Motions of Unions for Payment of “Expenses” (Objection) on March 19, 2004, arguing that the bankruptcy court is without jurisdiction to hear this issue because an appeal is currently pending before the United States District Court concerning rejection of the Agreements. In the event that the court determines it has jurisdiction, the Debtor argues that the Motion for Vacation Pay should be treated as a reconsideration of the Debtor’s interim relief granted in July 2003, and requests an evidentiary hearing because there are no changed circumstances and requiring payment of vacation pay would lead to the immediate demise of the Debtor.

The court held a preliminary hearing on the Motion for Vacation Pay and Objection on April 8, 2004, and reserved its ruling thereon. Resolution of the Motion for Vacation Pay is a core proceeding pursuant to 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

I

The Debtor, located in Knoxville, manufactures bellows, devices used, for example, in jet engines and medical equipment to sense changes in temperature. The Debtor employs members of both the Steelworkers Union and Machinists Union to produce the bellows and operate and maintain the equipment and machinery necessary for production. The terms of employment with the Union members are governed by the Agreements, which address all aspects of the employer-employee relationship, including the issue of vacation pay. The Agreements expire in October 2004 and, therefore, currently remain in effect.

In recent years, the Debtor has faced financial challenges. In an attempt to alleviate a portion of the financial stresses, in late 2002 through early 2003, the Debtor and the Unions conducted negotiations in an attempt to agree upon modification of the Agreements; however, in February 2003, the Debtor's proposed modifications were voted upon and rejected by the Unions. The Debtor filed the Voluntary Petition commencing its Chapter 11 bankruptcy case on June 10, 2003.

On June 16, 2003, the Debtor filed a motion seeking interim modification and relief from the Agreements concerning the lump sum payments of vacation pay due to each Union member for the entire upcoming year, in the aggregate sum of \$628,000.00, which was due

and payable on July 3, 2003. After a hearing, the court entered an Order on July 2, 2003, modifying the Agreements and allowing the Debtor to pay only 25% of the entire amount due, in the amount of approximately \$157,000.00.¹ The court granted this relief based upon the Debtor's proof that requiring it to pay the full amount would force the Debtor to close its doors due to an inability to make payroll the following week. Additionally, the court ordered the parties to continue their negotiations towards a resolution. The interim relief was in effect through August 8, 2003, at which time the Debtor was required, pursuant to its post-petition lending agreement, to have either executed modified Agreements with the Unions or to have filed a motion to reject the existing Agreements.

On August 6, 2003, the Debtor filed a motion seeking to reject the Agreements (First Motion to Reject). After a two-day trial, the court entered an Order on August 29, 2003, denying the Debtor's First Motion to Reject, based upon a finding that the Unions were being asked to bear a disproportionate amount of the burden during the Debtor's attempted reorganization, that the proposed reorganization did not treat all parties fairly, and that a balance of the equities weighed heavily in favor of denying the Debtor's motion. Additionally, the court questioned the Debtor's good faith in making its proposals, while finding that the Unions had good cause for declining to accept the proposals.² The August 29, 2003 Order was not appealed.

¹ This Order followed a bench opinion delivered by the court that was transcribed and filed on July 3, 2003.

² This Order followed a bench opinion delivered by the court that was transcribed and filed on September 2, 2003.

Thereafter, on September 29, 2003, the Debtor filed a second motion to reject the Agreements (Second Motion to Reject), again requesting court approval to reject the Agreements following counter-proposals made to and declined by the Unions. The court sua sponte entered an Order on October 29, 2003, denying the Second Motion to Reject on the basis that the August 29, 2003 Order was res judicata, and that the Debtor could not raise the same issues for litigation. The court reasoned that it defeated the purpose of the statute to allow the Debtor to repeatedly make proposals to the Unions and then seek rejection of the Agreements if not accepted by the Unions. *See In re Fulton Bellows & Components, Inc.*, 301 B.R. 723 (Bankr. E.D. Tenn. 2003). On November 5, 2003, the Debtor appealed the court's October 29, 2003 Order to the United States District Court (District Court) pursuant to 28 U.S.C.A. § 158(a) (West 1993), and the appeal is currently pending before that court.

As a result of the court's denial of the Debtor's motions to reject the Agreements, they have remained in effect. Accordingly, the Unions filed the Motion for Vacation Pay, seeking the balance due under the Agreements dating back to July 2003, plus all subsequently earned but unpaid vacation pay since July 2003. The Unions argue that vacation pay is an actual, necessary cost and expense of preserving the Debtor's bankruptcy estate, due for services rendered after the commencement of the bankruptcy case. In opposition, the Debtor argues that if it is required to pay the balance due for the July 2003 vacation pay, it will be forced to immediately close its doors. Additionally, the Debtor avers that its appeal of the court's October 29, 2003 Order precludes the bankruptcy court from deciding the Motion for Vacation Pay because there is a possibility that the Second Motion to Reject will be remanded

and subsequently granted, whereby the Debtor would not owe any vacation pay to the Union members. Alternatively, if the bankruptcy court does possess the jurisdiction to decide the Motion for Vacation Pay, the Debtor argues that the Unions must prove the existence of changed circumstances and requests an evidentiary hearing for such proof.

II

The post-petition modification and/or rejection of an existing collective bargaining agreement between a Chapter 11 debtor and a union is governed by 11 U.S.C.A. § 1113, which provides in material part:

(b) (1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession . . . shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d) (3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d) (1), the [debtor in possession] shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the [debtor in possession] has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b) (1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

....

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. . . .

(f) No provision of this title shall be construed to permit a [debtor-in-possession] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C.A. § 1113 (West 1993).

The purpose behind § 1113 is “to encourage collective bargaining and create[] an expedited form of collective bargaining with a number of safeguards designated to insure that employers cannot use Chapter 11 solely to rid themselves of unions, but only propose modifications that are truly necessary for the company's survival.” *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 370 (Bankr. N.D. Ill. 1990). Section 1113 is also intended “to preclude debtors or trustees in bankruptcy from unilaterally terminating, altering, or modifying the terms of a collective bargaining agreement without following [the statute's] strict mandate.”

Airline Pilots Association v. Continental Airlines (In re Continental Airlines), 125 F.3d 120, 137 (3d Cir. 1997).

In order to initially obtain interim relief under § 1113(e), the Debtor was required to prove that its “short term survival . . . [was] threatened unless immediate changes to the collective bargaining agreement [were] authorized.” *Shugrue v. Air Line Pilots Ass’n, Int’l (In re Ionosphere Clubs, Inc.)*, 139 B.R. 772, 782 (S.D.N.Y. 1992). The Debtor offered uncontroverted proof that interim relief was “essential to the continuation of the Debtor’s business” and that it would suffer “irreparable harm” if the relief was not granted. See § 1113(e). At the time, it was facing a severe cash shortage, and forcing payment of the entire \$628,000.00 vacation pay due would create a \$28,000.00 deficit in the following week’s payroll. Accordingly, the Debtor met its burden of showing that “interim relief [was] essential, either financially or administratively, to the continuation of the debtor’s business, [and] not merely that compliance with the terms of the collective bargaining agreement [was] uneconomical or burdensome.” 7 COLLIER ON BANKRUPTCY ¶ 1113.04[4][b] (citing *In re Wright Air Lines, Inc.*, 44 B.R. 744, 745 (Bankr. N.D. Ohio 1984)). However, the court’s July 2, 2003 Order expressly provided that the interim relief was in effect only until August 8, 2003. Accordingly, the Unions do not, as the Debtor argues, bear the burden of showing that circumstances have changed. Necessity of relief from the Agreements has at all times fallen

squarely on the shoulders of the Debtor, who has consistently argued that it would be forced to close its doors if its requested relief was not granted.³

III

The Unions argue that by not paying the vacation pay, in violation of the Agreements, the Debtor has unilaterally modified the Agreements, an action which is expressly prohibited by § 1113(f), irrespective of the requirements of § 503 of the Bankruptcy Code.⁴ As a basis for this argument, the Unions rely upon the decision of the Sixth Circuit in *United Steelworkers of Am. v. Unimet Corp. (In re Unimet Corp.)*, 842 F.2d 879 (6th Cir. 1988), wherein the court stated that “§ 1113 unequivocally prohibits the employer from unilaterally modifying any provision of the collective bargaining agreement. Accordingly, we hold that [the debtor] cannot escape its obligations in this regard merely because the requirements of section 503 arguably have not been satisfied.” *Unimet Corp.*, 842 F.2d at 884 (footnote omitted).

Additional support within the Sixth Circuit for the Unions’ position is found in *Int’l Union, UAW, Local 2194 v. Alcorn Bldg. Components, Inc. (In re Alcorn Bldg. Components, Inc.)*, 170 B.R. 317, 321 (E.D. Mich. 1994), in which the court held, as follows:

³ In every instance concerning these Agreements, the Debtor has argued that it will be forced to close its doors if the court does not grant its requested relief. However, the court notes that the Debtor is still operating, and in fact, has sought approval to pay its attorneys and other professionals more than seven times since the commencement of this bankruptcy case in June 2003.

⁴ Section 503 provides for the allowance of administrative expenses. See 11 U.S.C.A. § 503(b) (West 1993 & Supp. 2004).

To subject Appellant's claims to the priority schedule of § 507^[5] would result in the permission of a unilateral termination or modification of the terms of the agreement without meeting statutory requirements. Some of the employee benefit claims in question would be reduced, and others denied, despite the contract under which those employees had continued to work for the Debtor.

Ultimately, this Court finds that compelling [the debtor] to pay both pre- and post-petition wages and benefits under the agreement at the level of an administrative expense priority is consistent with the plain intent of Congress.

Alcorn Bldg. Components, Inc., 170 B.R. at 321 (footnotes omitted).

Similarly, the *Unimet* decision was analyzed in *In re Typograph Co.*, 229 B.R. 685 (Bankr. E.D. Mich. 1999), which held that

While this Court might, on the strength of the indicated opposing views, conclude to the contrary, a fair reading of *Unimet* indicates that § 1113(f) in effect precludes the applicability or relevancy of the assumption analysis espoused by cases in other circuits, which interprets the language of § 1113(f) to only preclude unilateral termination or alteration by a trustee (debtor) of the provisions of a CBA until its rejection under § 1113. This reading also means and produces the necessary result that (1) a failure to make payments under that CBA (of pre-petition obligations) is tantamount to an attempt to alter or terminate that CBA and (2) those unpaid pre-petition obligations achieve the status of Chapter 11 administrative expenses.

Typograph Co., 229 B.R. at 691.

Other circuits have not adopted this reasoning, and instead, have analyzed this question in the context of whether vacation pay may be paid as an administrative expense pursuant to 11 U.S.C.A. § 503(b), which provides that “the actual, necessary costs and

⁵ Section 507, which lists the priority for payment to unsecured creditors under the Bankruptcy Code, affords a first priority to administrative claims under § 503(b). See 11 U.S.C.A. § 507(a)(1) (West 1993 & Supp. 2004).

expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case” are administrative expenses. 11 U.S.C.A. § 503(b)(1)(A) (West 1993 & Supp. 2004). Under this line of cases, “in order to demonstrate the priority of an administrative claim [under § 503(b)(1)(A)], the debt must (1) arise out of a transaction with the debtor-in-possession and (2) benefit the operation of the debtor’s business.” *In re Pre-Press Graphics Co., Inc.*, 300 B.R. 902, 910 (Bankr. N.D. Ill. 2003) (citing *In re Jartran, Inc.*, 732 F.2d 584, 586-87 (7th Cir. 1984)). These cases, however, have no precedential value to this court as it is bound by *Unimet*, the controlling authority in the Sixth Circuit.

IV

The Debtor’s primary argument in its Objection is that the court does not have the jurisdiction to decide the Motion for Vacation Pay because the appeal of its October 29, 2003 Order is presently pending before the District Court. The Debtor argues that because there is a possibility that the District Court will remand the Second Motion to Reject, followed by the possibility that the bankruptcy court will then grant it, no vacation pay would be due under the terms of the Agreements, and the court’s decision in this instance would be rendered moot.

The Debtor is correct that, “[a]s a general rule, an effective notice of appeal divests the district court [or the bankruptcy court] of jurisdiction over the matter forming the basis for the appeal.” *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987); *see also In*

re Davis, 160 B.R. 577, 581 (Bankr. E.D. Tenn. 1993). In other words, the court lacks “jurisdiction to modify or interfere with an order that has been appealed or to decide an issue that is identical to one appealed.” *In re Allen-Main Assocs., L. P.*, 243 B.R. 606, 608 (Bankr. D. Conn. 1998). Additionally, the court may not “exercise jurisdiction over those issues which, although not themselves on appeal, nevertheless so impact those on appeal as to effectively circumvent the appeal process.” *In re Strawberry Square Assocs.*, 152 B.R. 699, 701 (Bankr. E.D.N.Y. 1993).

On the other hand, “that rule of exclusive jurisdiction is based on judicial prudence and is not absolute.” *Jankovich v. Bowen*, 868 F.2d 867, 871 (6th Cir. 1989). “[T]he mere pendency of an appeal does not, in itself, disturb the finality of a judgment.” *Cincinnati Bronze*, 829 F.2d at 588 (quoting *Wedbush, Noble, Cooke, Inc. v. S.E.C.*, 714 F.2d 923, 924 (9th Cir. 1983)). Instead, “this judicially-created doctrine is designed to avoid the confusion and inefficiency of two courts considering the same issues simultaneously.” *Jankovich*, 868 F.2d at 871. Accordingly, as long as the judgment at issue has not been stayed, and as long as the court does not attempt to “alter or enlarge the scope of its judgment pending appeal, [the court] does retain jurisdiction to enforce the judgment.” *Cincinnati Bronze*, 829 F.2d at 588. Moreover, the fact that the end result “might moot the appeal is not controlling.” *Strawberry Square Assocs.*, 152 B.R. at 702.

Here, the Debtor has appealed the court’s October 29, 2003 Order denying the Second Motion to Reject. The issues presented in that Order concern whether the August 29, 2003

Order was entitled to res judicata effect, thus precluding the Debtor from filing subsequent motions to reject the Agreements, after the First Motion to Reject was denied. While the bankruptcy court acknowledges that it is precluded from taking any action to enlarge the scope of that October 29, 2003 Order pending the appeal to the District Court, the fact that an appeal is pending on those issues does not preclude the court from enforcing its August 29, 2003 Order which was not appealed.

The problem with the Debtor's argument on jurisdiction is that it is attempting to use its appeal of the October 29, 2003 Order to stay the effect of the August 29, 2003 Order denying its First Motion to Reject. That Order is final and unappealable. In effect, the Debtor would have the court ignore the August 29, 2003 Order denying the First Motion to Reject by giving deference to the Second Motion to Reject. To accomplish what the Debtor wants, the court would be required to completely ignore the res judicata effect of the August 29, 2003 Order. *See Fulton Bellows*, 301 B.R. at 725. This the court cannot do.

In summary, the court has jurisdiction of the Motion for Vacation Pay. Because the First Motion to Reject was denied and the interim relief granted the Debtor on July 2, 2003, has expired, the Steelworkers Union and Machinists Unions members are entitled to their vacation pay. The Motion for Vacation Pay will accordingly be granted.

An order consistent with this Memorandum will be entered.

FILED: April 21, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33186

FULTON BELLOWS & COMPONENTS, INC.
f/k/a JRGACQ CORPORATION

Debtor

ORDER

For the reasons set forth in the Memorandum on Motion for Payment of Expenses Due Pursuant to Collective Bargaining Agreements filed this date, the court directs the following:

1. The Objection of Debtor, Fulton Bellows & Components, Inc., to Motion of Unions for Payment of "Expenses" filed March 19, 2004, is OVERRULED.

2. The Motion for Payment of Expenses Due Pursuant to the Provisions of a Collective Bargaining Agreement filed March 10, 2004, by the United Steelworkers of America, AFL-CIO-CLC, which was joined by the International Association of Machinists and Aerospace Workers Union pursuant to its Joinder in Motion for Payment of Expenses Due Pursuant to the Provisions of Collective Bargaining Agreement filed March 11, 2004, is GRANTED.

3. All vacation pay, both pre-petition and post-petition, due under the terms of the Debtor's October 16, 1999 Collective Bargaining Agreement with the United Steelworkers of America, AFL-CIO-CLC, and its October 26, 1999 Collective Bargaining Agreement with the International Association of Machinists and Aerospace Workers Union is due and payable pursuant to the terms of the respective Collective Bargaining Agreements.

SO ORDERED.

ENTER: April 21, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE