

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

OCT 05 01

U.S. Bankruptcy Court
Greensboro, NC

MEL

IN RE:)
)
W. Wayne Transportation,) Case No. 00-10028C-7G
Inc.,)
)
Debtor.)
)

ORDER

This case came before the court on August 14, 2001, for hearing upon the Trustee's objection to the claims of Theodore C. Gallimore, Billy Ray Burge, Larry W. Poole, Albert Wade Parrish, Dwayne Parrish, Donald L. Ferguson and Eddie Parrish ("the Claimants"). The issue raised by the Trustee's objection is whether the claims of the Claimants are entitled to priority treatment under § 507(a)(3) of the Bankruptcy Code. The resolution of this issue turns upon whether the Claimants were employees of the Debtor rather than independent contractors. Having concluded that the Claimants were independent contractors rather than employees, the Trustee's objections will be sustained and the claims of the Claimants will be allowed as general unsecured claims. The findings of fact and conclusions of law upon which this decision is based are as follows:

FACTS

Prior to filing for relief under Chapter 7, W. Wayne Transportation, Inc., the Debtor in this case, was a motor carrier whose primary business involved transporting furniture from

manufacturers to retailers and other purchasers. Each of the Claimants drove and made deliveries on behalf of the Debtor pursuant to an operating contract with the Debtor. The operating contracts signed by the Claimants recite that the Claimants are independent contractors, that the Claimants are to furnish their own tractors, that the Claimants shall, at their own expense, employ all necessary drivers, driver-helpers and laborers, that the Claimants shall direct the operation of their equipment and choose the routes and number of drivers required to make deliveries, that the Debtor shall not be responsible for any wages or expenses of the Claimants or their drivers and helpers, that the Claimants shall pay all operating and maintenance expenses for the equipment utilized by them and that the Claimants are to pay all federal, state, county and municipal taxes, including fuel tax payments. According to the evidence, the relationship and working arrangement between the Claimants and the Debtor were conducted in accordance with the operating agreement except that occasionally the Debtor would provide temporary replacement equipment if one of the Claimants experienced a breakdown with his equipment. Under the operating contract between the parties, the only compensation received by the Claimants was 51% of the revenue generated by the deliveries made by the Claimants. The Debtor did not deduct income taxes or social security from the Claimants' compensation and did not prepare W-2 statements for them.

When this bankruptcy case was filed, the Debtor was indebted to the Claimants in varying amounts for prepetition deliveries made by the Claimants for which they had not been paid by the Debtor. In addition, each of the Claimants had paid the sum of \$2,000.00 to the Debtor to cover any obligations incurred by the Claimants under the operating contract and which was supposed to be refunded to Claimants at the end of their relationship with the Debtor. The escrow payments received from the Claimants were commingled with Debtor's general operating funds, with the result that there was no separate escrow or trust account containing the escrow deposits when this case was filed. The proofs of claim filed on behalf of the Claimants include the \$2,000.00 escrow payment made by each of the Claimants and the amount owed to the Claimants under the operating contract for prepetition deliveries by the Claimants.

CONCLUSIONS OF LAW AND ANALYSIS

Section 507(a)(3)(A) of the Bankruptcy Code gives priority status to amounts owed for "wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual" earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, with a cap of \$4,300.00 per each individual. Section 507(a)(3)(B) provides the same priority to "sales commissions" earned from "the sale of goods or services" on behalf of a debtor. Since the amounts claimed by Claimants clearly

are not "sales commissions" resulting from the sale of goods or services, no contention is made that § 507(a)(3)(B) grants priority. The real issue is the applicability of § 507(a)(3)(A).

The rule adopted in nearly all of the cases interpreting § 507(a)(3)(A) is that a claimant must be an employee of the debtor in order to have a priority claim under § 507(a)(3)(A) and that independent contractors of the debtor do not qualify for priority under that provision of the Bankruptcy Code. See In re Hutchison, 223 B.R. 586 (Bankr. M.D. Fla. 1998); In re Grant Indus. Inc., 133 B.R. 514 (Bankr. W.D. Mo. 1991); In re Saint Joseph's Hosp., 126 B.R. 37 (Bankr. E.D. Pa. 1991); In re Kasson, Inc., U.S.A., 109 B.R. 352 (Bankr. E.D. Wis. 1989); In re Unimet Corp., 100 B.R. 881 (Bankr. N.D. Ohio 1989); In re Dahlman Truck Lines, Inc., 59 B.R. 218 (Bankr. W.D. Wis. 1986); In re Moriarty, 27 B.R. 73 (Bankr. M.D. Fla. 1983).

In adopting the criteria for determining the difference between an independent contractor and an employee, some cases have looked to state law, while others seemingly have treated the issue as a matter of federal law. See In re Kasson, Inc., U.S.A., 109 B.R. at 353-54, and In re Dahlman Truck Lines, Inc., 59 B.R. at 220 (applying state law), and In re Saint Joseph's Hosp., 126 B.R. at 40-43 (apparently relying upon federal law). There appears to be little difference between North Carolina law and federal law regarding the issue. In both instances, the most important single

factor in determining whether an employer-employee relationship exists is whether the employer retains the right to control and direct the manner in which the work is to be performed, as opposed to leaving the worker free to exercise his own judgment regarding the method for doing the work. See Youngblood v. North State Ford Truck Sales, Inc., 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988) (employer-employee relationship exists "[w]here the party for whom the work is being done retains the rights to control and direct the manner in which the details of the work are to be executed."); In re Saint Joseph's Hosp., 126 B.R. at 43 (Bankruptcy Code requires that "a substantial measure of control over the claimant's conduct must be exercised by the employer-debtor before the claimant may be deemed an 'employee' entitled to a priority claim under § 507(a)(3)."). Additional factors that have been articulated include: (a) whether the person or entity performing the work is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his or her special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because one method of doing the work is adopted rather than another; (e) is not in the regular employ of the person contracting to have the work done; (f) is free to use such assistance as he may think proper; (g) has full control over such assistance; and (h) selects his own

time for performing the work. See Hayes v. Board of Trustees of Elon College, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944).

In the present case, it was clear from the evidence that the Debtor did not reserve or exercise control over the manner in which the Claimants performed the work assigned to them. The situation, as disclosed by the evidence, was one in which the Debtor contracted for a result, i.e., the delivery of furniture to a specified destination, while leaving the equipment to be used, the route to be followed and the other details related to how the result would be achieved to the discretion and judgment of the Claimants. The arrangement between the Claimants and the Debtor was not one in which the Claimants were in the regular employ of the Debtor. Instead, Claimants worked for the Debtor only when the Debtor had work available for assignment to the Claimants and were compensated only when they performed the assigned work. Claimants, in effect, did a specified piece of work at a fixed price. They did not receive a weekly or monthly salary or hourly wages, but instead received 51% of the gross revenue derived from each delivery they made, from which Claimants paid their operating and other expenses. The Claimants were paid from Debtor's general account and not from its payroll account. Debtor did not withhold from Claimants' compensation for income taxes or social security and never issued W-2 statements to Claimants. With very few exceptions, Claimants furnished, maintained and used their own

equipment in performing work for the Debtor. The fact that the Debtor occasionally made its equipment available when the Claimants had a breakdown does not change their status as independent contractors. Claimants were free to choose their own assistants, or not to use assistants, and were responsible for paying any assistants who were utilized in performing the work for Debtor. Finally, the contract that each of the Claimants signed reflected unequivocally the parties' intention that Claimants' relationship with the Debtor would be that of independent contractor. The conclusion to be drawn from these facts is that the Claimants were independent contractors and not employees of the Debtor.

A party asserting that its claim has priority status, has the burden of proving that the claim falls within one of the statutory priorities. See In re Commercial Fin. Servs., Inc., 233 B.R. 885, 887 (Bankr. N.D. Okla. 1999); In re Quality Beverage Co., Inc., 181 B.R. 887, 896 (Bankr. S.D. Tex. 1995); In re Heritage Village Church, 137 B.R. 888, 892 (Bankr. D.S.C. 1991). Hence, Claimants had the burden of showing that they were employees of the Debtor. Claimants were unable to carry such burden. Rather than establishing that the Claimants were employees, the evidence showed that they were independent contractors. It follows that the amounts that were owed to the Claimants when this case was filed do not qualify for priority under § 507(a)(3)(A). Claimants therefore will be allowed general unsecured claims in the following amounts:

Claim No. 136 of Theodore C. Gallimore in the amount of \$3,774.54; Claim No. 158 of Billy Ray Burge in the amount of \$5,432.03; Claim No. 188 of Larry W. Poole in the amount of \$6,706.55; Claim No. 261 of Albert Wade Parrish in the amount of \$5,208.57; Claim No. 262 of Dwayne Parrish in the amount of \$3,525.72; Claim No. 292 of Donald L. Ferguson in the amount of \$7,226.05; and Claim No. 349 of Eddie Parrish in the amount of \$5,709.34.

IT IS SO ORDERED.

This 5th day of October, 2001.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge