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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:	)	
	)	
PHELPS BROTHERS, INC.	)	CASE NO. 09-40723
	)	
	)	
Debtor	)	

DECISION, ORDER AND NOTICE OF HEARING
REGARDING CASH COLLATERAL MOTIONS

At Fort Wayne, Indiana, on June 22, 2010.

The debtor in this chapter 11 case operates a waste and trash hauling business. It has contracts to provide its services to four municipalities. It also provides services to individual accounts, both residential and business, for which it is paid a monthly fee. MainSource Bank has a lien upon substantially all, if not all, of the debtor's assets. Shortly after the case began, it filed a motion to prohibit the debtor's use of cash collateral, to which the debtor has responded. The debtor also filed a motion to use cash collateral, asserting that such use was vital to its operations. Both motions were scheduled for a status conference at which they were consolidated and the parties agreed they could be submitted for a decision on stipulations of fact and briefs of counsel.

Although a Chapter 11 debtor in possession is authorized to operate its business, 11 U.S.C. §§ 1107, 1108, and to use, sell or lease property of the estate in the ordinary course of business, 11 U.S.C. § 363(c)(1), that is not so where cash collateral is concerned. 11 U.S.C. § 363(c)(2). Cash collateral consists of:

> cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property . . . . 11 U.S.C. § 363(a).

It may not be used without the lienholder's consent or the court's permission.[1] 11 U.S.C. § 363(c)(2). Pending its disposition, the debtor is to "segregate and account for any cash collateral in [its] possession, custody or control." 11 U.S.C. § 363(c)(4).

When presented with motion concerning the use cash collateral, the dispute is usually about whether the debtor should be allowed to use cash collateral and whether the creditor's interest in it can be adequately protected. While that was how things began here, somewhere along the way the dispute transformed itself from whether the debtor could use the cash collateral into whether the bank has a lien upon cash collateral in the first place. Ordinarily, such a dispute requires an adversary proceeding, see, Fed. R. Bankr. P. Rule 7001(2) (adversary proceeding required "to determine the validity, priority, or extent of a lien or other interest in property); Matter of Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990), but the parties can waive that requirement. See, Matter of Pence, 905 F.2d 1107 (7th Cir. 1990). They have done so here, by both joining in the debate without commenting on its procedural impropriety, and the court is willing to do so as well. See, In re Taylor, 289 B.R. 379, 388 (Bankr. N.D. Ind. 2003) ("unless it has the consent of all concerned, the court should not award relief using the procedures that apply to contested matters when the rules of procedure require an adversary proceeding").

The debtor previously gave the bank liens upon, among other things, all of its existing and after-acquired "accounts," "rights to payment," and "general intangibles," together with "the proceeds and products" thereof. At the time of the petition, the debtor had little in the way of

[1]Since the use of cash collateral is automatically prohibited, a creditor should never need to file a motion to prohibit the use of cash collateral. Unless it has consented or the court has approved the use, the Bankruptcy Code already gives the creditor the relief sought by such a motion. The Code puts the burden upon the debtor of getting the authority it needs to use cash collateral before it proceeds to do so.

accounts receivable – money due for services that had previously been performed – and the debtor does not dispute that the bank had a lien upon those receivables or that, once collected, they constitute cash collateral. What is at issue here is whether the bank has a lien upon the payments the debtor receives, from both the municipalities and its individual customers, for services performed after the date of the petition. The debtor argues the bank's lien does not extend to the payments it receives for services performed after the petition because the bank never took an assignment of any of the debtor's contracts and § 552(a) prevents the lien from attaching to property acquired after the commencement of the case. See, 11 U.S.C. § 552(a).

The question of whether the bank has a lien upon cash collateral is, at least initially, determined by Indiana law. If so, the court must then determine whether anything in the Bankruptcy Code changes that result. See, Butner v. U.S., 440 U.S. 48, 52, 99 S.Ct. 914, 916 (1979).

Indiana's version of the U.C.C. defines an account as "a right to payment of a monetary obligation, whether or not earned by performance . . ." I.C. 26-1-9.1-102(a)(2)(B) (emphasis added). This definition merges what had previously been separate categories of property – "contract rights" and "accounts" – and now gives them a single label. See, Omnibank of Mantee v. United Southern Bank, 607 So.2d 76, 87 n.8 (Miss. 1992) (the official text of the UCC was amended in 1972 "to delete references to contract rights and to coalesce the concept into 'accounts.'"). "General intangibles" is catch-all definition, consisting of "any personal property . . . other than accounts [and other specifically defined categories of personalty]." I.C. 26-1-9.1-102(a)(42).

Debtor's contracts with the four municipalities are accounts. See, In re Taronji, 174 B.R. 964, 970 n.7 (Bankr. N.D. Ill. 1994) ("An unperformed contract for services falls within the U.C.C. definition of an 'account.'"). (To the extent they might not be accounts, they certainly come within

broad catch-all definition of "general intangibles."). Once the debtor gave the bank a security interest in "all" "accounts," both existing and after acquired, it did not need to specifically list those contracts in the parties' security agreement or give the bank a separate assignment of the contracts in order to create an enforceable lien under Indiana law.

The debtor argues that, notwithstanding Indiana law, § 552(a) of the Bankruptcy Code terminates the bank's lien as to collections received on account of services performed after the date of the petition. This section of the Bankruptcy Code provides that "property acquired by the estate . . . after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a). The argument overlooks § 552(b)(1), which is an important qualification upon and exception to § 552(a). It provides that if a pre-petition

> security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring or profits of such property, then such security interest extends to such proceeds, products, offspring or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law . . . . 11 U.S.C. 552(b)(1).

While the court may order otherwise, "based upon the equities of the case," id., see also, J. Catton Farms v. First National Bank of Chicago, 779 F.2d 1242, 1246-47 (7th Cir. 1985); 5 Collier on Bankruptcy ¶552.04[4][a], [b], neither the parties' briefs nor their stipulations address that issue.

On the date of the petition, the bank held a lien not only upon the debtor's accounts but also upon "the proceeds and products" of that property. The debtor's contracts with the four municipalities are pre-petition accounts and the income generated from those accounts constitutes proceeds or products of that pre-petition property. See, I.C. 26-1-9.1-102(a)(64)(B) (proceeds

include whatever is collected on account of collateral). The collections from the debtor's municipal contracts are subject to the bank's lien, regardless of whether those collections represent payment for services the debtor performed before or after the date of the petition. They also constitute cash collateral which cannot be used without the bank's consent or the court's permission, neither of which has been given.

As for the collections from the debtor's individual customers, both business and residential, the parties' stipulations have not given the court the information it needs to properly characterize them. If those collections are the proceeds of pre-petition property, they would be cash collateral, just like the proceeds of the debtor's municipal contracts. What the court cannot tell is whether there is some sort of pre-petition property interest in the debtor to which the bank's lien could have attached. There was clearly an "arrangement" of some sort between the debtor and its individual customers, but the stipulated facts do not indicate whether the nature of those arrangements creates any enforceable rights in either party, or simply unenforceable expectations. Prior to performance by either party, was there an enforceable obligation to accept performance from the other? If the debtor decided not to pick up a customer's garbage, would it be liable for damages? If a customer decided to use another trash collector, would it be liable not using debtor's services? If so, there might be something to which a lien could attach and which might generate cash collateral. But, if those arrangements are terminable at will, by either party at any time, there might be nothing there.

Main Source Bank's motion is granted, in part: (A) The collections derived from debtor's contracts with the municipalities are cash collateral and may not be used without the Bank's permission. (B) Pending further order of the court, the debtor shall segregate and account for all collections received as a result of those contracts since the date of the petition. (C) As for the

collections from debtor's individual customers, the court will hold a hearing on **July 13, 2010 at 3:30 p.m.**, in the Charles Halleck Federal Building, 230 N. Fourth St., First Floor Courtroom, Lafayette, Indiana, in order to receive any additional stipulations, evidence or arguments as to whether the pre-petition arrangements with those customers were of sufficient substance to constitute an interest in property to which the banks's lien could attach. You should be present in person or by counsel if you wish to be heard with regard thereto.

SO ORDERED.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court