United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy No. 96 B 00851

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 7
DEMERT & DOUGHERTY, INC.,	)	Bankruptcy No. 96 B 00851
	)	Judge John H. Squires
Debtor.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion to allow in part and deny in part the Debtor's employees' fringe benefit claims and to allow certain employees' unsecured pre-petition claims. The claimants are Kenna Baskerville as Administrix of the Estate of Sharon Bono, Sarah Sayers, Raymond Tira and Douglas J. Baker (collectively the "Objectors"), whose claims have been in part objected to by Alex D. Moglia, as Trustee (the "Trustee") of the Chapter 7 estate of DeMert & Dougherty, Inc. The amount and priority of the severance pay claims are at issue. For the reasons set forth below, the Court grants the Trustee's motion and affords priority only to the prorated portion of pre-petition severance pay for the ninety days prior to the filing of the bankruptcy petition. Hence, pre-petition severance pay shall be allowed and accorded priority pursuant to 11 U.S.C. § 507(a)(3)(A) in the amount of $126.10 for Raymond Tira, $679.04 for Sharon Bono, $177.65 for Sarah Sayers, and $238.64 for Douglas J. Baker. The remainder of each of the Objectors' claims for pre-petition severance pay, $10,613.19 for Raymond Tira, $7,027.15 for Sarah Sayers, and $21,053.06 for Douglas J. Baker, shall be allowed as pre-petition unsecured non-priority claims.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a), formerly known as General Rule 2.33(A), of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(B).

II. FACTS AND BACKGROUND

Many of the facts are undisputed. On January 11, 1996, DeMert & Dougherty, Inc. (the "Debtor") filed a Chapter 11 petition. At the time of the filing of the petition, the Debtor operated as debtor-in-possession and Sid Kulek ("Kulek") remained as president and chief executive officer until his termination on February 9, 1996. On February 8, 1996, a company controlled by Yasar Samarah purchased all of the outstanding stock of the Debtor. On February 29, 1996, the Debtor filed a motion for authority to sell its assets. On April 29, 1996, the Court entered an order approving the sale of substantially all of the Debtor's then remaining assets to Pleasant Green Enterprises, Inc. See Trustee's Exhibit No. 1. The case subsequently converted to Chapter 7 and the Trustee was duly appointed.

There existed before and at the time of the Debtor's filing of its petition, employee severance, vacation and medical payment benefit plans for company employees. All of the Objectors were then employed by the Debtor. On January 11, 1996, Kulek issued a letter to all employees which spoke to expected maintenance of levels of wages and benefits within the context of the Chapter 11 reorganization. See Objectors' Exhibit No. 1. This letter did

not implicitly nor explicitly refer to changing the status, under the Bankruptcy Code, of any benefits or compensation earned by employees in the event of a distribution from the bankruptcy case. Moreover, Kulek informed the Objectors in the letter that court approval was expected to insure that wages, health insurance and other fringe benefits would not be affected. Id.

The Objectors contend that their claims for pre-petition vacation pay, pre-petition severance pay and post-petition vacation pay are entitled to post-petition administrative priority under 11 U.S.C. § 507(a)(1); that the claims of the estate's secured creditors should be equitably subordinated to their claims as against the proceeds of the sale of the Debtor's assets; that their attorneys are entitled to attorneys' fees; and that they are entitled to punitive damages.

Aside from the requested attorneys' fees and punitive damages, the only portion of the claims at issue are the pre-petition severance pay claims.[1] The Objectors contend that their pre-petition severance pay should be allowed in the following amounts and paid in full as post-petition administrative claims: Douglas J. Baker $21,291.70; Sarah Sayers $7,204.80;

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[1] The Trustee does not object to the claims of the Objectors for post-petition vacation pay. In addition, the Trustee has conceded that the Objectors' pre-petition vacation pay shall be allowed and accorded priority pursuant to 11 U.S.C. § 507(a)(3) in the requested amounts. The Court has entered a separate order which allows the Objectors' post-petition vacation pay Chapter 11 administrative priority pursuant to 11 U.S.C. §§ 502, 503 and 507(a)(1) in the amount of $671.20 for Raymond Tira; $636.60 for Sharon Bono; $554.23 for Sarah Sayers; and $982.69 for Douglas J. Baker. The Order further affords the Objectors' claims for pre-petition vacation pay priority pursuant to 11 U.S.C. §§ 502 and 507(a)(3) in the amount of $2,684.80 for Raymond Tira; $636.60 for Sharon Bono; $1,330.15 for Sarah Sayers; and $3,144.62 for Douglas J. Baker. Consequently, only the claims of the Objectors for pre-petition severance pay remain at issue.

Sharon Bono $679.80; and Ray Tira $10,739.29. These figures are based upon the full pre-petition term of their respective periods of employment with the Debtor.

On November 9, 1999, the Court held an evidentiary hearing and thereafter took the matter under advisement. The Court afforded the Trustee and the Objectors the opportunity to calculate the amounts of the pre-petition severance pay claims.

The Trustee calculated the Objectors' pre-petition severance pay entitled to a 11 U.S.C. § 507(a)(3) priority on a prorated basis for the ninety days prior to the filing of the bankruptcy petition as follows: Douglas J. Baker $1,064.59;[2] Sarah Sayers $600.40;[3] Sharon

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[2] The Trustee arrived at this amount based on the following calculation:
- $21,291.70 claimed
- management personnel with 20-24 years of continuous employment are entitled to five months salary as severance pay
- 5 months x 4 weeks/month = 20 weeks
- $21,291.70 / 20 = $1,064.59/week
- severance pay for less than one full year of continuous employment (i.e. 90 days prior to the filing) for management personnel = 1 week
- $1,064.50 / 1 = $1,064.59

[3] The Trustee arrived at this amount based on the following calculation:
- $7,204.80 claimed
- management personnel with 10-14 years of continuous employment are entitled to three months salary as severance pay
- 3 months x 4 weeks/month = 12 weeks
- $7,204.80 /12 = $600.40/week
- severance pay for less than one full year of continuous employment (i.e. 90 days prior to the filing) for management personnel = 1 week
- $600.40 / 1 = $600.40

Bono $679.04;[4] and Ray Tira $335.60.[5] The Trustee maintains that the remaining sums of the claimed severance benefits should only be allowed as pre-petition unsecured non-priority claims in the amount of $10,403.60 for Raymond Tira; $6,604.40 for Sarah Sayers; and $20,227.11 for Douglas J. Baker. The Objectors did not provide the Court with any calculations. Rather, they maintain all their claims are entitled to priority in full.

III. DISCUSSION

A. Administrative Priority Status under 11 U.S.C. § 507(a)(3)

The Objectors argue that all of their respective claims for pre-petition severance pay are entitled to payment in full as administrative priority claims under 11 U.S.C. §§ 507(a)(1)[6]

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[4] The Trustee has not objected to this sum based on the small amount claimed. Therefore, the entire amount will be given § 507(a)(3) priority. It is deemed allowed as filed pursuant to § 502(a).

[5] The Trustee arrived at this figure based on the following calculation:
- $10,739.20 claimed
- clerical personnel with 20-24 years of continuous employment are entitled to 4 months salary as severance pay
- 4 months x 4 weeks/month = 16 weeks
- $10,739.20 / 16 = $671.20/week
- severance pay for less than one full year of continuous employment (i.e. 90 days prior to the filing) for clerical personnel = ½ week
- $671.20 / 2 = $335.60

[6] Section 507(a)(1) provides in relevant part:

> (a) The following expenses and claims have priority in the following order:
> (1) First, administrative expenses allowed under section 503(b) of this title. . . .

11 U.S.C. § 507(a)(1).

and 503(b).[7] The Court rejects this argument and finds that only a portion of

[7] Section 503(b) provides in pertinent part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including–

their respective pre-petition severance claims are entitled to unsecured priority under § 507(a)(3).

Section 507(a)(3) affords priority status to certain claims, including claims for severance pay, and provides in pertinent part:

> (a) The following expenses and claims have priority in the following order:
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> (3) Third, *allowed unsecured claims*, but *only to the extent of $4,300 for each 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, *for*–
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> (A) wages, salaries, or commissions, including vacation, *severance*, and sick leave *pay earned by an individual*. . . .

11 U.S.C. § 507(a)(3)(A) (emphasis supplied). A claim is entitled to priority under this section only if earned during the ninety days prior to the earlier of the filing of the petition or the cessation of the debtor's business. With respect to severance benefits, the better view, consistent with the Objectors' testimony at trial, is that the severance benefits are earned pro-rata over the period of employment. Thus, it is the date that they are earned, not the date on which they are payable, that is important. See 4 Collier on Bankruptcy, ¶ 507.05[5][b] at 507-33-34 n. 23 and 24 (15th ed. rev. 1999) (collecting cases).

> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case . . . .

11 U.S.C. § 503(b)(1)(A).

Initially, the Court notes that the Objectors bear the burden of proving their entitlement to administrative expense reimbursement. See In re Englewood Community Hosp. Corp., 117 B.R. 352, 358 (Bankr. N.D. Ill. 1990). The case law holds that severance claims based upon service prior to the filing of a petition for bankruptcy protection are pre-petition claims. In re Midway Airlines, Inc., 221 B.R. 411, 447 (Bankr. N.D. Ill. 1998) (citation omitted) (a claim is not rendered a post-petition claim merely because the time for payment is triggered by an event that happens after the filing of the petition); In re Dynacircuits, L.P., 143 B.R. 174, 176 (Bankr. N.D. Ill. 1992) (the time at which the services are rendered is dispositive of the issue of whether an administrative expense is allowed); In re Chicago Lutheran Hosp. Ass'n, 75 B.R. 854, 855-56 (Bankr. N.D. Ill. 1987) (the focal point of § 507(a)(3), providing for administrative priority, was not the point at which the right to pay matured, but when it was "earned"); In re Uly-Pak, Inc., 128 B.R. 763, 766-68 (Bankr. S.D. Ill. 1991) (severance pay based on length of service is usually denied post-petition administrative expense status because it was not "earned" pre-petition).

Severance pay claims for periods after the filing of a bankruptcy petition are entitled to administrative priority only to the extent that the severance pay accrued post-petition, and nothing a debtor could do could affect the amount accrued pre-petition. In re Jartran, Inc., 732 F.2d 584, 590 (7th Cir. 1984) (affirming the bankruptcy court's denial of administrative priority status on the grounds that the claim of telephone directory publisher who had contracted to provide services for the debtor, had accrued pre-petition, irrespective of when the publisher was due to be paid); see also In re Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976) (finding that if an employee earned severance pay based on years of service to the

debtor, only the severance pay attributable to post-petition years of service would be granted administrative priority and the employee would be a pre-petition creditor with respect to any severance pay earned prior to filing).

The Objectors have cited no compelling or convincing authority for the proposition that all of their severance pay claims, both for pre-petition and post-petition periods, should be treated and elevated to 507(a)(1) and § 503(b)(1)(A) status. The bankruptcy court can only equitably act within the parameters and confines of the Bankruptcy Code. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

The Court adheres to the view that severance benefits are earned pro rata over the period of the employee's employment. This result tracks with the Seventh Circuit's view on the related category of claimed vacation pay to be computed as earned continuously as work was done. See In re Northwest Eng'g Co., 863 F.2d 1313 (7th Cir. 1988). Thus, administrative priority under § 507(a)(1) and § 503(b)(1)(A) will be granted for that portion of the severance benefits earned only after the filing of the petition. An unsecured pre-petition priority claim under § 507(a)(3) will be granted for that portion of the severance benefits earned during the ninety days prior to the filing of the bankruptcy petition, and a general unsecured claim will be granted for the balance. See generally In re Roth Am., Inc., 975 F.2d 949 (3d Cir. 1992); In re Lykes Bros. S.S. Co., Inc., 213 B.R. 401, 402 (Bankr. M.D. Fla. 1997).

Consequently, the Court holds that only a portion of the Objectors' claims for pre-petition severance pay are entitled to administrative priority status under § 507(a)(3)(A). The Court will afford priority to the portion of pre-petition severance pay for the ninety days

prior to the filing of the bankruptcy petition in accordance with the formula utilized in Roeder v. United Steelworkers of America (In re Old Electralloy Corp.), 167 B.R. 786, 799 (Bankr. W.D. Pa. 1994). Hence, pre-petition severance pay shall be allowed and accorded priority pursuant to § 507(a)(3)(A) in the amount of $126.10[8] for Raymond Tira; $679.04 for Sharon Bono; $177.65[9] for Sarah Sayers; and $238.64[10] for Douglas J. Baker. The remainder of each of the Objectors' claims for pre-petition severance pay, $10,613.19 for Raymond Tira, $7,027.15 for Sarah Sayers, and $21,053.06 for Douglas J. Baker, shall be allowed as pre-petition unsecured non-priority claims.

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[8] The Court arrived at this amount based on the following calculation and based on the claimant's testimony that he was employed with the Debtor for twenty-one years:
- $10,739.20 claimed
- clerical personnel with 20-24 years of continuous employment are entitled to four months salary as severance pay
- 21 years x 365 days per year = 7,665 days (excluding additional leap year days)
- 90/7,665 x $10,739.20 = allowed § 507(a)(3) portion of severance claim
- .0117416 x $10,739.20 = $126.10

[9] The Court arrived at this figure based on the following calculation and without any clear showing of the claimant's exact term of employment with the Debtor:
- $7,204.80 claimed
- management personnel with 10-14 years of continuous employment are entitled to three months salary as severance pay
- 10 years x 365 days per year = 3,650 days (excluding additional leap year days)
- 90/3,650 x $7,204.80 = allowed § 507(a)(3) portion of severance claim
- .0246575 x $7,204.80 = $177.65

[10] The Court arrived at this figure based on the following calculation and based on the claimant's testimony that he was employed by the Debtor for twenty-two years:
- $21,291.70 claimed
- management personnel with 20-24 years of continuous employment are entitled to five months salary as severance pay
- 22 years x 365 days per year = 8,030 days (excluding additional leap year days)
- 90/8,030 x $21,291.70 = allowed § 507(a)(3) portion of severance claim
- .0112079 x $21,291.70 = $238.64

B. 11 U.S.C. § 506(c)

Next, the Objectors maintain that their reasonable attorneys' fees should be taxed as costs under 11 U.S.C. § 506(c). Section 506(c) expressly authorizes the trustee to recover from collateral certain "costs and expenses" related to that collateral "to the extent of any benefit to the holder of [the secured claim]." Specifically, § 506(c) provides:

> (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.

11 U.S.C. § 506(c). This Court has held that parties other than the trustee have standing under § 506(c). In re Evanston Beauty Supply, Inc., 136 B.R. 171, 175-76 (Bankr. N.D. Ill. 1992). Traditionally, the estate and not the secured creditors bears the costs of the administrative expenses of the estate. In re Trim-X, Inc., 695 F.2d 296, 299 (7th Cir. 1982).

In order for a secured creditor to be charged with the costs and expenses of preserving the estate under § 506(c), the applicant must prove three elements: (1) the costs and expenses were reasonable; (2) the costs and expenses were necessary in preserving or disposing of collateral; and (3) the secured creditor received a benefit from such costs and expenses. Id. at 176 (concluding that the attorney for the debtor-in-possession was unable to recover costs and expenses under § 506(c) because he failed to make an adequate showing of a precise quantitative benefit to the secured creditor); see also In re Chicago Lutheran Hosp., 75 B.R. at 857 (the debtor's employees were required to show that the secured creditor received a direct and quantifiable benefit from the employees' services provided post-petition in order for the employees' post-petition claims for vacation and severance pay to be charged against the secured creditor's collateral, but no evidence of any direct benefits was introduced). The

party seeking to recover administrative costs and expenses must show that the secured creditor received a quantifiable benefit. Dozoryst v. First Fin. Sav. & Loan Ass'n of Downers Grove, 21 B.R. 392, 394 (N.D. Ill. 1982).

The Objectors cite In re Hotel Assocs., Inc., 6 B.R. 108 (Bankr. E.D. Pa. 1980) in support of their claim under § 506(c). This case does not support their argument. Hotel Assocs. held that the secured creditor had to bear the expenses incurred by the trustee because by failing to move to lift the automatic stay and by moving to appoint the trustee, the creditor consented by implication to reasonable and necessary expenses of preserving the property. Id. at 114. That situation is inapposite to the facts of the matter at bar.

The Objectors' request for the Court to apply § 506(c) is procedurally deficient. The Objectors have not filed a motion to receive payment under § 506(c) nor have they served such a motion on the secured creditor or creditors they seek to surcharge. The procedural posture of this matter is an objection brought by the Trustee regarding the Objectors' claims. It is inappropriate, without the filing of a separate motion, for the Objectors to seek payment from a secured party they have not joined. Additionally, no evidence was introduced at trial to show the amount of fees sought by the Objectors' counsel or that the fees were necessarily expended to preserve or dispose of the collateral of any identified secured creditor. Further, no evidence of any demonstrable benefit specifically quantified was adduced. For these reasons, the Objectors' request for attorneys' fees under § 506(c) is denied.

C. Equitable Subordination

The Objectors contend that their claims for pre-petition severance pay should be elevated over secured creditors' claims, which should be equitably subordinated. The basis

for this request is the "tortious" conduct of the Debtor in making written and oral representations that "other fringe benefits will not be affected." See Objectors' Exhibit Nos. 1 and 2.

Section 510(c)(1) of the Bankruptcy Code provides:

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may–
>
> > (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest. . . .

11 U.S.C. § 510(c)(1). Although Congress included no explicit criteria for equitable subordination when it enacted § 510(c), the reference to "principles of equitable subordination" in the statute indicates congressional intent to start with the existing doctrine under the case law, leaving it to courts to develop the doctrine in the future. Solow v. United States of America (In re Johnson Rehabilitation Nursing Home, Inc.), 239 B.R. 168, 178 (Bankr. N.D. Ill. 1999) (citations omitted). The exercise of the power of equitable subordination is appropriate only if three conditions are met: (1) the claimant to be subordinated has engaged in some type of inequitable conduct; (2) the misconduct has either resulted in injury to other creditors or conferred some unfair advantage on the claimant; and (3) equitable subordination of the claim is not inconsistent with provisions of the Code. Id. at 179 (citing In re Mobile Steel Co., 563 F.2d 692, 699-700 (5th Cir. 1977)); see also In re Lifschultz Fast Freight, 132 F.3d 339, 344 (7th Cir. 1997) (noting that most courts have uniformly followed and applied the Mobile Steel test). As the Supreme Court has pointedly held in United States v. Noland, 517 U.S. 535 (1996), "the bankruptcy court may not

equitably subordinate claims on a categorical basis in derogation of Congress's scheme of priorities." Id. at 536.

The request for equitable subordination is substantively deficient. The Objectors have not alleged, more or less demonstrated, that any specific claimant has engaged in some type of inequitable conduct which has resulted in injury to them or other creditors or conferred some unfair advantage on such claimants. The Objectors make mention of NBD Bank, but do not specifically pray that its claim be equitably subordinated to their claims. The Court will not engage in speculative guesswork nor act as an advocate for any party.

In addition, Federal Rule of Bankruptcy Procedure 7001 provides: "[t]he following are adversary proceedings. . . (8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination." Fed. R. Bankr. P. 7001(8). Thus, procedurally, the Objectors' request for equitable subordination is deficient in that they have not filed an adversary proceeding seeking the requested relief against a proper party. Consequently, for these reasons, the Court rejects their argument and will not equitably subordinate any claims in derogation of the Objectors' respective claims.

D. Fraudulent Misrepresentation

Next, the Objectors contend that Kulek's letters, coupled with statements of other officers of the Debtor, amounted to fraudulent misrepresentations with respect to the status of their claims for the accrued pre-petition severance pay.

A party alleging fraudulent misrepresentation under Illinois law must prove the elements thereof by clear and convincing evidence. West v. Western Cas. & Surety Co., 846

F.2d 387, 393 (7th Cir. 1988). A fraud claimant must allege "specific, objective manifestations of fraudulent intent--a scheme or device." Hollymatic Corp. v. Holly Sys., Inc., 620 F. Supp. 1366, 1369 (N.D. Ill. 1985). The following elements concerning the alleged fraudulent misrepresentation must be proved:

> (1) the representation must be a statement of a material fact, rather than a mere promise or opinion; (2) the representation must be false; (3) the person making the statement must know or believe that the representation is false; (4) the person to whom the representation is made must reasonably rely on the truth of the statement; (5) the statement must have been made for the purpose of causing
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> the other party to affirmatively act; and (6) the reliance by the person to whom the statement was made [must have] led to his injury.

LaScola v. US Sprint Communications, 946 F.2d 559, 568 (7th Cir. 1991); Runnemede Owners, Inc. v. Crest Mortg. Corp., 861 F.2d 1053, 1058 (7th Cir. 1988); Charles. Hester Enters., Inc. v. Illinois Founders Ins. Co., 114 Ill.2d 278, 288 (1986); Soules v. General Motors Corp., 79 Ill.2d 282, 286 (1980); Chicago Export Packing Co. v. Teledyne Indus., Inc., 207 Ill. App.3d 659, 663, 566 N.E.2d 326, 329 (1st Dist. 1990); Tan v. Boyke, 156 Ill. App.3d 49, 54, 508 N.E.2d 390, 393 (2d Dist. 1987), appeal denied, 515 N.E.2d 127 (1987). A representation is material and therefore actionable if it is such that had the other party been aware of it, he would have acted differently. Mack v. Plaza Dewitt Ltd. Partnership, 137 Ill. App.3d 343, 350, 484 N.E.2d 900, 906 (1st Dist. 1985) (citing Perlman v. Time, Inc., 64 Ill. App.3d 190, 197, 380 N.E.2d 1040, 1046 (1st Dist. 1978)).

In a cause of action for fraudulent misrepresentation, the plaintiff bears the burden of proving that the defendant had the requisite deceptive intent at the time the representations

were made. In Illinois, the actor's intention is an integral part of a fraud claim. Instituto Nacional de Comercializacion Agricola v. Continental Illinois Nat. Bank & Trust Co., 576 F. Supp. 991, 999 (N.D. Ill. 1983); Paskas v. Illini Federal Sav. & Loan Ass'n, 109 Ill. App.3d 24, 32, 440 N.E.2d 194, 199 (5th Dist. 1982). In Illinois, "a promise to perform an act accompanied by an intention not to perform [is] not a false representation upon which a fraud charge could ordinarily be based. . . ." Bank Computer Network Corp. v. Continental Illinois Nat. Bank & Trust Co., 110 Ill. App.3d 492, 501, 442 N.E.2d 586, 593 (1st Dist. 1982) (quoting Vance Pearson, Inc. v. Alexander, 86 Ill. App.3d 1105, 1111, 408 N.E.2d 782, 786 (4th Dist. 1980)). Only one recognized exception has developed: a knowingly false promise of future conduct that amounts to a scheme to defraud. Steinberg v. Chicago Medical Sch., 69 Ill.2d 320 (1977). Claims based on the existence of a scheme to defraud must be pleaded with specificity. See Smith v. Grundy County Nat. Bank, 635 F. Supp. 1071, 1074 (N.D. Ill. 1986).

In determining whether the injured party reasonably relied on the false statement, courts look to all the relevant circumstances surrounding the alleged misrepresentation. Chicago Export Packing, 207 Ill. App.3d at 663, 566 N.E.2d at 329; Chicago Title & Trust Co. v. First Arlington Nat. Bank, 118 Ill. App.3d 401, 409, 454 N.E.2d 723, 730 (1st Dist. 1983). It is only where parties do not have equal knowledge or means of obtaining knowledge of the facts which are allegedly misrepresented that a person may justifiably rely on them. Chicago Export Packing, 207 Ill. App.3d at 663, 566 N.E.2d at 329. A person may not enter into a transaction with his eyes closed to available information and then allege that he has been deceived by another. Central States Joint Bd. v. Continental Assur. Co., 117 Ill.

App.3d 600, 606, 453 N.E.2d 932, 936 (1st Dist. 1983). Justifiable reliance has been explained as follows:

> In determining whether a party justifiably relies on another's representations, all of the circumstances surrounding the transactions, including the parties' relative knowledge of the facts available, opportunity to investigate the facts and prior business experience, will be taken into consideration. Only where the parties do not have equal knowledge, or access thereto, or where there are other peculiar circumstances inducing the injured party to rely solely on the representation of the other will a person be found to have justifiably relied upon the others' representations.

Runnemede Owners, 861 F.2d at 1058 (quoting Luciani v. Bestor, 106 Ill. App.3d 878, 884, 436 N.E.2d 251, 256 (3rd Dist. 1982)); see also Soules, 79 Ill.2d at 286.

The Court holds that the Objectors have failed to demonstrate all of the requisite elements of fraudulent misrepresentation. The Objectors failed to show that the various communications from the Debtor and its representatives, which were introduced into evidence (Objectors' Exhibit Nos. 1-13), constitute false statements of material fact. The letter of January 11, 1996 from Kulek stated that "[l]ikewise, we expect court approval to insure that your wages, health insurance and other fringe benefits will not be affected." See Objectors' Exhibit No. 1. Moreover, the letter from Kulek dated February 8, 1996, stated in part that "with your continued support we still believe that we could emerge from bankruptcy some time between June and August." See Objectors' Exhibit No. 2. These communications are not false statements of material fact. Rather, they are mere expectations of hoped-for future success in the Debtor's Chapter 11 efforts to reorganize, which did not prove fruitful as the resulting sale of its assets and subsequent conversion of the case to Chapter 7 clearly demonstrate. The Debtor's failure to fulfill its contractual obligations to

pay all the employees' fringe benefits as claimed does not, alone, establish misrepresentation for purposes of the fraud exception to discharge under 11 U.S.C. § 523(a)(2). See, e.g., Rezin v. Barr (In re Barr), 194 B.R. 1009, 1017-1018 (Bankr. N.D. Ill. 1996) (collecting cases). That principle is equally applicable here. "There is quite a difference between a misrepresentation of prior fact and a promise for future performance which is not performed." Id. at 1018. To paraphrase this point from the Barr case, the former may be actionable fraud, but the latter, as demonstrated by the record in this matter, ordinarily is not.

Furthermore, the Objectors offered no evidence of fraudulent intent of Kulek or any other officers or representatives of the Debtor with respect to making statements or representations regarding the Objectors' employment or regarding the treatment of their claims. Therefore, the Court rejects the Objectors' contention that the Debtor's officers or representatives made any fraudulent misrepresentations accompanied by the requisite scienter.

E. Attorneys' Fees

The Objectors did not raise a claim for attorneys' fees in their proofs of claim. For the first time, in their findings of fact and conclusion of law, submitted in compliance with the Court's Final Pretrial Order, the Objectors now seek unspecified attorneys' fees pursuant to 705 ILCS 225/1. The Court finds this request untimely at this stage of the proceedings. See In re Interstate Stores, Inc., 1 B.R. 755, 759 (Bankr. S.D. N.Y. 1980) (where the proof of claim did not include an amount for attorneys' fees and where the application for attorneys' fees was not filed until almost four years after the bar date for filing proofs of claim and four months after confirmation of the bankruptcy plan, the claim was time barred).

The Court will not award the Objectors' attorneys' fees on this record. Moreover, there is no provision for allowance of a claimant's attorneys' fees under § 507(a)(3), in addition to the allowed amount of severance pay. The controlling statutory provisions are those of the Bankruptcy Code, which deal with allowance and priority of claims, not the wage claim provisions enacted by the Illinois General Assembly.

F. Punitive Damages

Likewise, the Objectors did not assert claims for punitive damages in their proofs of claim. For the first time, in their findings of fact and conclusion of law submitted in compliance with the Court's Final Pretrial Order, the Objectors seek punitive damages. First, the Court notes that the request is untimely. In addition, because the Court found that there was no evidence presented with respect to fraudulent intent on the part of Kulek or any other officer or representative of the Debtor, or similar egregious conduct, an award of punitive damages would not be proper. Thus, the Court denies the Objectors' request for punitive damages.

G. Pre-Judgment Interest

Pursuant to 11 U.S.C. § 726, interest on any § 507(a) claims cannot be paid until all allowed, timely and tardily filed claims are paid. See 11 U.S.C. § 726(a)(5); see also Geving v. United States (In re Geving), 93 B.R. 741, 741-42 (Bankr. D. Wyo. 1985) (only if there is a surplus after paying all priority claims and all general unsecured claims in full may the trustee then pay interest on such claims). The Objectors have failed to introduce any evidence that all allowed claims will be paid in full, including the pre-petition unsecured portions of their allowed claims. Thus, as a matter of law, they are not entitled to interest on

their allowed claims.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Trustee's motion and affords priority only to the portion of pre-petition severance pay for the ninety days prior to the filing of the bankruptcy petition. Hence, pre-petition severance pay shall be allowed and accorded priority pursuant to 11 U.S.C. § 507(a)(3)(A) in the amount of $126.10 for Raymond Tira, $679.04 for Sharon Bono, $177.65 for Sarah Sayers, and $238.64 for Douglas J. Baker. The remainder of each of the Objectors' claims for pre-petition severance pay, $10,613.19 for Raymond Tira, $7,027.15 for Sarah Sayers, and $21,053.06 for Douglas J. Baker, shall be allowed as pre-petition unsecured non-priority claims.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 7
DEMERT & DOUGHERTY, INC.,	)	Bankruptcy No. 96 B 00851
	)	Judge John H. Squires
Debtor.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 13th day of December, 1999, the Court hereby grants the Trustee's motion to allow in part and deny in part the Debtor's employees' fringe benefit claims and to allow certain employees' unsecured pre-petition claims. The Court affords priority only to the prorated portion of pre-petition severance pay for the ninety days prior to the filing of the bankruptcy petition. Hence, pre-petition severance pay shall be allowed and accorded priority pursuant to 11 U.S.C. § 507(a)(3)(A) in the amount of $126.10 for Raymond Tira, $679.04 for Sharon Bono, $177.65 for Sarah Sayers, and $238.64 for Douglas J. Baker. The remainder of each of the Objectors' claims for pre-petition severance pay, $10,613.19 for Raymond Tira, $7,027.15 for Sarah Sayers, and $21,053.06 for Douglas J. Baker, shall be allowed as pre-petition unsecured non-priority claims.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List