2003 BNH 030 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-12587-JMD
Chapter 7

Michael J. Kiely,
Debtor

Timothy P. Smith,
Chapter 7 Trustee,
Movant

v. Objection to Claim No. 11

Kessler Farm Condo Association,
Respondent

Timothy P. Smith, Esq.
Manchester, New Hampshire
Movant/Chapter 7 Trustee

Mark E. Connelly, Esq.
Concord, New Hampshire
Attorney for Respondent

MEMORANDUM OPINION

I. INTRODUCTION

On August 27, 2003, the Court held a hearing on the Chapter 7 Trustee's objection to the claim of Kessler Farm Condo Association (the "Association") at which the Chapter 7 Trustee and counsel for the Association appeared. After hearing the parties' argument, the Court granted the Association additional time to submit an affidavit setting forth the exact nature of its claim as well as time for the Chapter 7 Trustee to respond. The matter was then taken under submission.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On August 15, 2001, the Debtor filed a voluntary Chapter 13 bankruptcy petition. With the Debtor's consent, his case was converted to Chapter 7 upon the Chapter 13 Trustee's motion to dismiss or convert. The Debtor's Chapter 13 plan was never confirmed.

During the course of the Debtor's Chapter 7 case, the Debtor's condominium was sold upon motion by the Chapter 7 Trustee with the Court's approval. The order approving the sale indicated that any liens on the property would attach to the proceeds of the sale, which were to be held by the Chapter 7 Trustee pending further order of the Court.[1] The sale apparently occurred sometime in December 2002.

On February 13, 2003, the Association filed a proof of claim indicating it was owed prepetition condominium fees in the amount of $704.00. Attached to the proof of claim was a ledger showing unpaid condominium fees for the months of April, May, June, and July 2001, in the monthly amounts of $161.00 plus monthly late fees of $15.00. The Chapter 7 Trustee objected to the Association's claim on the grounds that the Association's claim was paid at the time of the closing on the sale of the condominium. The Association responded to the Chapter 7 Trustee's

[1] The sale order was later amended to reflect changes in the identity of the buyers and the purchase price. The language regarding liens remained the same.

objection indicating that its fees were not paid in full at the closing; rather, $704.00 in postpetition[2] fees remained outstanding.

At the hearing on the Chapter 7 Trustee's objection to the Association's claim, counsel for the Association was unable to establish the nature of the Association's claim, i.e., whether its claim was for prepetition or postpetition condominium fees and, if on account of postpetition fees, whether those fees were entitled to administrative priority under 11 U.S.C. § 503(b). Accordingly, the Court gave the Association an opportunity to file an affidavit setting forth the exact nature of its claim.

On September 5, 2003, the Association filed a motion seeking payment of its claim for condominium fees and assessments on an administrative basis, which motion was supported by an affidavit of the accountant for the Association's management company. The accountant indicated that on December 18, 2002, on or about the date of the real estate closing, $3,990.04 was owed in condominium fees which covered both prepetition and postpetition periods. The accountant indicated that she conveyed this information to the real estate broker at his request. This information was never requested or conveyed to the Chapter 7 Trustee. Despite $3,990.04 being owed to the Association, only $3,286.04 was paid to the Association at the closing. The accountant stated in her affidavit that in accordance with the Association's rules this amount was applied to the oldest balance first. As a result, she indicates that the bankruptcy estate owes $704.00 in condominium fees for the postpetition period from September 2, 2002, through December 1, 2002.

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[2] The Association made this claim even though, as described above, the ledger attached to the proof of claim showed only prepetition amounts outstanding.

The Chapter 7 Trustee filed a response to the Association's motion stating that he has paid all postpetition assessments due the Association. According to the Association's detailed ledger, as of July 13, 2001, prior to the Debtor filing for bankruptcy, $704.00 was owed to the Association. This is the exact amount that the Association is now seeking to recover on an administrative basis.

III. DISCUSSION

The Association has abandoned its argument that its claim is somehow secured. The Association apparently concedes that it failed to give a notice required by section 546(b)(2) of the Bankruptcy Code[3] in order to perfect its condominium lien provided by New Hampshire RSA 356-B:46. Having failed to demonstrate that its claim is secured, the Association now argues that its claim is entitled to priority under section 507(a)(1) of the Bankruptcy Code as an administrative expense under section 503(b)(1)(A) for an actual, necessary cost and expense of preserving the estate.

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[3] Section 546(b)(2) provides:

> If–
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> (A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of such perfection of an interest in property; and
>
> (B) such property has not been seized or such action has not been commenced before the date of the filing of the petition;
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> such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

Having reviewed the parties' submissions, the Court is not persuaded that the Association's claim of $704.00 is for postpetition condominium fees. The proof of claim submitted to the Court in February 2003, after the closing had occurred, indicated that the amount outstanding was for the months of April, May, June, and July 2001. While the Association's policy may be to apply payments to the oldest condominium fees first, it seems more than a mere coincidence that the amount that remains outstanding in this case is the exact amount of the outstanding prepetition condominium fees claimed. For that reason, the Court finds that the Association did not in fact apply the amount received from the closing to its oldest outstanding condominium fees first. Accordingly, the Court holds that the Association's claim shall be deemed a prepetition claim, not entitled to priority as an administrative expense under sections 503(b)(1)(A) and 507(a)(1) of the Bankruptcy Code.

However, even if the Association had applied the amount received at the closing to the oldest fees, it would still not prevail as such application would have contravened the policies and payment scheme set forth in the Bankruptcy Code. The policies governing priority treatment of otherwise unsecured claims reflect basic Congressional judgments on the principal of equality of distribution in bankruptcy:

> Under both the Bankruptcy Act and the Bankruptcy Code, federal bankruptcy law has reflected the policies of "equality of distribution" and the courts have strictly construed federal bankruptcy laws that prefer one claimant over others. Mammoth Mart, 536 F.2d at 953 (citing Nathanson v. NLRB, 344 U.S. 25, 29 (1952)); In re Chateaugay Corp., 102 B.R. 335, 354 (Bankr. S.D.N.Y. 1989). Granting priority status to a claimant not clearly entitled to priority is not only inconsistent with the policy of equality of distribution, but would dilute the value of the priority for those creditors Congress intended to prefer. See Mammoth Mart, 536 F.2d at 953. Accordingly, the burden of proving entitlement to priority payment as an administrative expense rests with the party requesting it. Woburn Assocs. v. Kahn (In re Hemingway Transp., Inc., 954 F.2d 1, 5 (1st Cir. 1992). Notwithstanding the policy of strict construction of federal bankruptcy laws granting priority administrative status to claims, considerations of fundamental fairness and public

> policy have been used to establish administrative expense priority status for claims not meeting the strict provisions of such laws. See Reading Co., 391 U.S. at 478 (fairness required administrative expense priority for claimants with fire losses sustained as a result of a Chapter XI receiver's negligence absent any benefit to the estate); In re Chateaugay, 944 F.2d 997, 1010 (2nd Cir. 1991) (environmental clean-up costs assessed postpetition on account of the prepetition release of hazardous wastes entitled to administrative expense priority based upon need to protect public health and safety); In re Charlesbank Laundry, Inc., 755 F.2d 200, 203 (1st Cir. 1985) (fairness required that postpetition fines arising from a Chapter 11 debtor in possession's intentional disregard of a state court order enjoining local zoning ordinance violations be granted administrative expense priority).
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> The criteria for determining whether a claim qualifies for administrative expense priority in the First Circuit are set forth in Mammoth Mart. Although Mammoth Mart was decided under the Bankruptcy Act, its rationale is equally applicable under the Bankruptcy Code. See Hemingway Transp., 954 F.2d at 5; Chateaugay, 102 B.R. at 354. As a general rule, a claim is entitled to administrative expense priority under section 503(a) of the Bankruptcy Code if "(1) the right to payment arose from a postpetition transaction with the debtor estate, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the right to payment was beneficial to the estate of the debtor." Hemingway Transp., 954 F.2d at 5 (citing Mammoth Mart, 536 F.2d at 954); In re Jartran, 732 F.2d 584, 587 (7th Cir. 1984)).

Commonwealth of Massachusetts Div. of Employment & Training v. Boston Reg'l Med. Ctr. (In re Boston Reg'l Med. Ctr.), 265 B.R. 838, 851-52 (1st Cir. B.A.P. 2001), aff'd on other grounds, 291 F.3d 111 (1st Cir. 2002). The Association's fees for the months of April, May, June, and July of 2001 are clearly prepetition claims under Mammoth Mart. If the Association did not perfect its claim for those fees, which it concedes it did not, the fees can only be paid as an unsecured claim. The Association would not have been entitled to receive payment at the closing on account of any prepetition condominium fees; rather, it would have been entitled to payment only for postpetition fees incurred on an administrative basis. The Association's policy of paying the oldest condominium fees first cannot trump the Bankruptcy Code's payment scheme.

IV. CONCLUSION

For the reasons outlined above, the Court will issue a separate order denying the Chapter 7 Trustee's objection to the Association's claim, allowing the Association's claim in the amount of $704.00 as a general unsecured claim, and denying the Association's motion seeking payment of its claim on an administrative basis. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: September 18, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge