

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. MB 00-027

**IN RE: MOLTEN METAL TECHNOLOGY, INC., MMT TENNESSEE INC.,
MMT FEDERAL HOLDINGS, INC., M4 ENVIRONMENTAL
MANAGEMENT, INC., and M4 ENVIRONMENTAL L.P.,
Debtors.**

**CHARLES SHAVER,
Appellant,**

v.

**MMT RECOVERY, LLC,
Appellee.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts (Eastern Division)
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)**

**Before
VOTOLATO, GOODMAN, DeJESUS, U.S. Bankruptcy Judges**

Charles R. Dougherty, Esq., Anne L. Showalter, Esq., Hill & Barlow, for the Appellant.

**Steven T. Hoort, Esq., James M. Wilton, Esq., D. Ross Martin, Esq., Ropes & Gray, for
the Appellee.**

March 21, 2001

VOTOLATO, C.J.

Before the Panel is the appeal of Charles Shaver, from an Order of the bankruptcy court granting MMT Recovery LLC's (hereinafter the "Lender") motion for summary judgment denying Shaver's Section 503(b) administrative claims. Initially, Shaver raised two issues: (1) the bankruptcy court's denial of his administrative claim against the Lender under Section 506(c) of the Bankruptcy Code; and (2) the denial of his administrative claim against the bankruptcy estate under Section 503(b). Since the filing of the notice of appeal, however, the 506(c) claim became moot in light of the recent Supreme Court decision in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000),¹ so the only issue now before this Panel is the order granting the Lender's motion for summary judgment, resulting in the denial of Shaver's 503(b) administrative claim.

Upon consideration of the arguments, the extensive record, and for the reasons discussed below, we conclude that summary judgment should not have been granted in favor of the Lender on Shaver's 503(b) administrative expense claim, as that ruling was made in the

¹ In *Hartford Underwriters* the Supreme Court held that an administrative creditor does not have standing to bring suit against a secured creditor under Section 506(c). "The question becomes whether it is a proper inference that the trustee is the only party empowered to invoke the provision. We have little difficulty answering yes." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000) (emphasis added). After that decision, Shaver voluntarily withdrew the 506(c) part of his appeal.

context of a court ordered summary judgment proceeding concerning Section 506(c) claims *only*. This unannounced, and surprise,² action by the bankruptcy court amounted to a denial of due process regarding Shaver's Section 503(b) claim.

BACKGROUND

In August 1996, Charles Shaver was employed by Molten Metals Technology, Inc. (MMT), as President and Chief Operating Officer. MMT is a corporation engaged in the business of processing and recycling low-level radioactive waste, environmental technology, and the development and commercialization of mixed (hazardous and radioactive) waste processing and recycling technologies. At the time of his employment, Shaver entered into an Employment Agreement with MMT which provided that upon a change in control of the company, wherein Shaver did not continue his service with the successor corporation, Shaver would receive a severance equal to one year of his base salary. On December 3, 1997, MMT filed a petition under Chapter 11 of the Bankruptcy Code, and Shaver continued as President and Chief Operating Officer of MMT until December 4, 1998, when MMT's operating businesses were sold.

On February 3, 1998, as an incentive for its employees, including Shaver, to continue post-petition services, MMT filed a Motion for Authority to Enter Into Employee Retention Plan. (App.,

² If the bankruptcy court had reasons for ruling as it did, those reasons do not appear in the record.

Vol. V, Ex. U). On March 12, 1998, the bankruptcy court granted the motion, limiting the aggregate amount of severance available to the two top executives, F. Gordon Bitter and Charles Shaver.

The Order stated:

"Severance pay to the chief executive officer and the chief operating officer shall not, in the aggregate, exceed \$397,500, allocated between them as determined by MMT's board of directors."

Order Granting Executive Retention Plan, App., Vol. V, Ex. K.

As efforts to reorganize continued, on August 21, 1998, at the request of the Lender, a Chapter 11 Trustee was appointed and the Trustee retained Shaver to remain in place as Chief Operating Officer, while certain other officers were terminated. Soon thereafter, the Trustee determined that a reorganization was not possible and that the only way to realize any value from MMT's assets was to sell the company.

On November 25, 1998, the bankruptcy court authorized the sale of MMT's assets to ATG, Inc. and Quantum Catalytics, LLC. To facilitate the transfer all remaining employees, including Shaver, were retained through December 4, 1998, and also on November 25, 1998, Shaver received an offer from Quantum Catalytics to stay on, but at a reduced annual salary of \$150,000. This offer was subsequently withdrawn on January 4, 1999. Shaver argues that because the offer was not the equivalent of his current employment arrangement with the company, he was entitled to a lump sum equal

to his then yearly base salary.³ See Employment Agreement, App., Vol. I, Tab 16, Ex. A at 4. Upon Shaver's release from MMT, he received a letter stating that information regarding his severance would be forthcoming, see Letter from MMT to Shaver, App., Volume V, Ex. B, Tab C, but neither the information nor any severance payments were ever received.

On January 25, 1999, eleven former MMT employees, including Shaver, filed a motion seeking payment of their severance claims under Section 503(b), requesting immediate payment ahead of all other administrative creditors.⁴ The employees argued that if the court did not grant relief under Section 503, it should allow their claims under 11 U.S.C. § 506(c), surcharging the Lender's

³ Shaver's pre-petition Employment Agreement Section 7(c) provides:

In the event of a Change in Control of the Company, the successor company shall have the option of hiring me pursuant to an employment agreement containing such terms as the company and I may agree (provided that any such employment agreement must, unless I agree otherwise, be for at least a five-year term) or electing not to hire me whereupon the Company shall pay to me a lump sum equal to my then current yearly base salary (the "Lump Sum"). Notwithstanding the foregoing, if the successor company offers to hire me on terms at least equivalent to my then current employment arrangement with the Company (including equivalent salary and benefits) and I elect not to accept such offer, I shall not be entitled to payment of the Lump Sum.

Employment Agreement, App., Volume I, Tab 16, Ex. A at 4.

⁴ Shaver and the ten other employees are all represented by the same law firm. Because the questioned order dealt *only* with Shaver's 503(b) claim, this appeal concerns only that claim.

collateral. All of the employee claims arise out of the same circumstances, i.e., their continued post-petition employment with MMT, with the promise of severance.

Objections to the motion were filed by the Lender, Fluor Daniel Inc., and the Creditor's Committee. The Chapter 11 Trustee filed a "response," and all of the above expressed concern about the employees' request for priority status over other administrative claims. None have objected to the administrative expense status of the claims. On March 7, 1999, the bankruptcy court held a preliminary hearing on the employees' original motion and ordered that the 506(c) and 503(b) claims be separated, and that consideration of the 503(b) administrative expense claims be postponed until the § 506(c) claims were adjudicated. On April 16, 1999, the court entered a procedural order saying, *inter alia*:

"In order to expedite resolution of the § 506(c) portion of this motion, the Court hereby ORDERS as follows: On or before May 17, 1999, the Lender may, if it sees fit, file a motion for summary judgment as to the § 506(c) portion of the Employees' motion."

Order dated April 16, 1999, App., Volume I, Tab 12.

On May 10, 1999, in compliance with a separate Administrative Claim Deadline set by the court, see Notice dated March 15, 1999, App., Volume I, Tab 11, the employees, including Shaver, filed a Proof of Claim and Request for Payment of Administrative Expenses. See Administrative Expense Proof of Claim, App., Volume 1, Tab 14. On the same day Shaver filed a separate proof of claim asserting

separate grounds for his administrative expense claim, based on his pre-petition Employment Agreement.⁵ See Administrative Expense Proof of Claim, App., Volume I, Tab 16.

On May 17, 1999, in accordance with the court's April 16, 1999 Order, the Lender filed its motion for summary judgment with respect to the employees § 506(c) claims. See Order Dated April 16, 1999, App., Volume I, Tab 12. However, in addition to requesting summary judgment on the § 506(c) claims, the Lender also sought summary judgment on the Section 503(b) administrative claim of Charles Shaver. On June 24, 1999, the employees, including Shaver, filed oppositions and cross-motions for summary judgment against the Lender, but all addressed the Section 506(c) issue only. The Lender responded by filing a motion to strike the cross-motion for summary judgment and a motion to strike portions of the employees' affidavits and statement of disputed facts. At no time was any objection raised by the Lender to Shaver's two Administrative Expense Proofs of Claim filed on May 10, 1999.

On January 28, 2000, the bankruptcy court granted the Lender's summary judgment motion on all § 506(c) claims. In addition, however, and the reason we are here, the court granted summary judgment to the Lender, denying Charles Shaver's "administrative

⁵ These claims filed by Shaver and the ten other employees were separate and apart from the motion filed by the same employees on January 25, 1999, seeking payment under Sections 503(b) and 506(c).

claim.”⁶ See Order dated Jan. 28, 2000, at 21. The Court, as a matter of law, held that because MMT’s board of directors never allocated severance amounts between Shaver and MMT’s CEO, F. Gordon Bitter, Shaver wasn’t entitled to any severance. *Id.* at 21-23.⁷ Prior to the filing of the bankruptcy court’s order, there was neither a hearing nor a request that the parties address the 503(b) issue.

DISCUSSION

A. Jurisdiction

A bankruptcy appellate panel has jurisdiction to hear appeals from final orders, judgments, and decrees, see 28 U.S.C. §§ 158(a) & (b), and a final order or decision “ends the litigation on the merits and leaves nothing for the court to do but execute the

⁶ Although the court was not explicit as to whether it was ruling on Shaver’s 503(b) claim, because it dealt with the Section 506(c) claims in a separate section of the Order, and since the original motion filed by Shaver and ten other employees on January 25, 1999, claimed relief under both sections, the bankruptcy court, by its action, if not in words, clearly ruled on Shaver’s Section 503(b) claim.

⁷ Shaver argued to the bankruptcy court and before the Panel that the allocation between Bitter and Shaver by MMT’s board of directors was a genuine issue of material fact in dispute that precluded summary judgment. Shaver included a supporting affidavit by Bitter stating that the board of directors informally allocated \$250,000 to Shaver. The bankruptcy court did not consider the affidavit to be probative evidence because Bitter did not state that he had personal knowledge of the board’s actions, that the term “informally” was not defined, and concluded as a matter of law that Shaver did not sustain his burden of demonstrating a valid allocation by the board. For reasons that follow, we need not address the correctness of that ruling.

judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The bankruptcy court's January 28, 2000 order granting the Lender's motion for summary judgment as to Charles Shaver's 503(b) claim is a final order.⁸ *Weiss v. Blue Cross/Blue Shield*, 206 B.R. 622, 623 (B.A.P. 1st Cir. 1997).

B. Standard of Review

The bankruptcy court's order granting summary judgment is reviewed *de novo*. *Cumberland Farms, Inc., v. Florida Dept. of Environmental Protection*, 116 F.3d 16, 18 (1st Cir. 1997); *Adams Coop. Bank v. Greenberg (In re Greenberg)*, 229 B.R. 544, 545 (B.A.P. 1st Cir. 1999). However, the bankruptcy court's decision to deal with Shaver's "administrative claim" in a proceeding supposedly limited to Section 506(c) claims only, is reviewed under the abuse of discretion standard. See *Neal Mitchell Assocs. V. Braunstein (In re Lambeth Corp.)*, 227 B.R. 1, 7 (B.A.P. 1st Cir. 1998) (finding that a bankruptcy court's disallowance of a claim based on a procedural default was an exercise of the court's general equitable powers and as such required review under an abuse of discretion standard). See *In re Sun Pipe Line Co.*, 831 F.2d 22, 25 (1st Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). As to that

⁸ Although the bankruptcy court stated that it did not "*sua sponte* enter a separate and final order at this time on the adjudicated portions of the Employees' Motion for Payment of Priority Basis of Administrative Expenses because some claims in the motion have not yet been adjudicated," as to Charles Shaver the Order is final, as the court did adjudicate finally his administrative claims. See Order dated Jan. 28, 2000, at 24.

standard, the First Circuit has stated: "Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Independent Oil & Chem. Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988).

In *Lambeth*, the Chapter 7 Trustee objected to a creditor's proof of claim and the creditor filed a timely response. *Lambeth*, 227 B.R. at 2-3. A preliminary hearing was held on the objection, and the court directed the creditor to file an amended proof of claim containing specific information. *Id.* at 3-4. At the close of the preliminary hearing, the bankruptcy judge informed the parties that if the Trustee objected to the amended claim, another hearing would be scheduled. *Id.* The creditor complied in part by timely filing the amended claim, but failed to include therein all the information required by the court. *Id.* at 4. The Trustee objected to the claim as filed and the court issued its notice of "Nonevidentiary Hearing and Response Deadline," *id.*, which contained its standard language: "If no objection or response is timely filed, the court, in its discretion, may cancel the hearing and rule on the motion without a hearing or further notice." *Id.* The creditor, relying on the bankruptcy judge's comments at the preliminary hearing, let the deadline pass for filing a response to

the Trustee's objection. *Id.* at 5. The bankruptcy court, by endorsement order, canceled the hearing, sustained the Trustee's objection, and disallowed the claim. *Id.* at 4.

On appeal, the Bankruptcy Appellate Panel held that the bankruptcy court abused its discretion by disallowing the creditor's claim, considering the court's own instructions and the history of the dispute, *id.* at 10, i.e., that all parties had intended that these matters would be set for hearing, and that any response filed to the Trustee's objection would not have further enlightened the Trustee or the court as to the position of the creditor. *Id.* at 9.

Similarly here, the bankruptcy court overlooked the prior history and its own administrative orders. When the court received the motion of Shaver and the ten other employees seeking payment of administrative expenses both under Sections 503(b) and 506(c), it entered a procedural order severing the two classes of claims, in order to expedite the resolution of the Section 506(c) claims, and to determine whether the claimants needed to file a separate adversary proceeding with regard to such claims. See Procedural Order dated April 16, 1999, App., Volume I, Tab 12. The procedural order was clear, stating that "the Lender may, if it sees fit, file a motion for summary judgment *as to the 506(c) portion of the Employees' motion.*" *Id.* (emphasis added). The lender saw fit to do so, and on May 17, 1999, filed its Summary Judgment Motion. In

the process of seeking summary judgment as authorized, however, the Lender went beyond the scope of the Procedural Order and sought denial of Shaver's administrative claim in toto. The bankruptcy court likewise exceeded the scope of its own order, without giving Shaver notice of its intention to consider and adjudicate his 503(b) claim. To the contrary, the Order advises that it is limited to the employees' claim under 506(c), saying: "In the alternative, the Employees seeks [sic] priority over the Debtors' other administrative creditors. *The present motion for summary judgment concerns only the Employees' claim under 506(c).*" Order, January 28, 2000, at 2, n.3, App., Volume II, Tab 7 (emphasis added). The bankruptcy judge then discussed the Procedural Order severing the 503(b) claim from the 506(c) claims, stating:

Because the § 506(c) portion of the Lender's objection derives from concerns unique to itself, and because the lender argued, correctly, in its initial response to the motion that, insofar as the motion sought relief under § 506(c), the § 506(c) claim should have been brought in an adversary proceeding, the Court entered a Procedural Order permitting the Lender to file a motion for summary judgment as to the § 506(c) portion of the motion, contemplating that if the motion were allowed, the need for a complex adversary proceeding would be obviated.

Id. at p.3 (footnote omitted).

Based on the record and the relevant facts about which there is no dispute, we conclude that the bankruptcy court should not have ruled upon Shaver's § 503(b) administrative claim, in the context of what was supposed to be a § 506(c) summary judgment proceeding, and that in doing so, abused its discretion. By this

action, which came as a complete surprise to him, Shaver was denied both notice and a hearing on his § 503(b) claim. See *Doral Mortgage Corp. v. Cruz Selenia (In re Cruz Selenia)*, __ B.R. __, BAP No. PR 99-006 (B.A.P. 1st Cir. March 7, 2001). Section 503(b) states: "After notice and a hearing, there shall be allowed, administrative expenses...." Shaver received neither of the requirements of due process that his § 503(b) claims would be adjudicated. Indeed, also pending before the court were two separate 503(b) administrative expense proofs of claim filed by Shaver that were unopposed and not ever referenced in any filings by the Lender.⁹ See Administrative Expense Proof of Claim, App., Volume 1, Tab 14; Administrative Expense Proof of Claim, App., Volume 1, Tab 16. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). That did not happen here.

⁹ We also question the Lender's standing to object to an administrative proof of claim in a Chapter 11 proceeding where a trustee has been appointed. See *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1147 (1st Cir. 1992) ("absent leave of court, the chapter 7 trustee alone may interpose objections to proofs of claim"); 11 U.S.C. §1106 (Chapter 11 trustee's duties include those listed in §704(5)-- reviewing and objecting to claims).

Accordingly, for the foregoing reasons, that portion of the bankruptcy court's January 28, 2000 order denying Shaver's "administrative claim" is VACATED, and the matter is REMANDED to the bankruptcy court for further proceedings consistent with this opinion.