


ORDERED.

Dated: July 27, 2020



Karen S. Jennemann  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re	)	
	)	
Melbourne Beach, LLC,	)	Case No. 6:17-bk-07975-KSJ
	)	Chapter 11
Debtor.	)	
	)	

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**ORDER GRANTING  
BRIAN WEST’S MOTIONS FOR ALLOWANCE AND PAYMENT  
OF PROPERTY MANAGEMENT FEES AS AN ADMINISTRATIVE EXPENSE**

Brian West or his wholly owned entities (“West”) have managed the Debtor’s shopping center for years. He now seeks payment for his post-petition management services. Pirogee Investments, LLC and Yellow Funding Corp. (the “Disputed Owners”) object to these fees, even though they previously consented to his retention as property manager (the “Objections”).<sup>1</sup> The Objections are overruled.

Debtor owns and operates a large shopping center in Melbourne Beach, Florida. West, an experienced real estate developer, is a founding member of the Debtor. In July 2002, the Debtor purchased additional real property adjacent to the shopping center to increase its retail space. With

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<sup>1</sup> West’s Motions for Allowance and Payment of an Administrative Expense Claim are Doc. Nos. 295 and 556. The Objections are Doc. Nos. 308, 557 and 635. A trial was held on May 18, 2020.

the purchase, and assumedly for supplying needed capital, David Kalichman and Ilya Palinsky acquired interests in the Debtor. West, Kalichman and Palinsky then signed a Second Amended and Restated Operating Agreement (the “Operating Agreement”) of the Debtor.<sup>2</sup> Under the Operating Agreement, West would provide property management services for a fee, payable monthly in arrears, calculated at 4.5% of the base rent collected from almost all Debtor’s tenants.<sup>3</sup> The Operating Agreement further clarified this fee is an expense of the Debtor to be paid before any distributions to its members.<sup>4</sup>

On July 30, 2003, the Debtor sought to refinance an existing loan and concurrently amended its Operating Agreement to add provisions requested by the lender and signed a management agreement with Westco Development Corp. (the “Management Agreement”).<sup>5</sup> The Management Agreement provided Westco Development Corp.—a corporation owned by West—would serve as property manager and, in exchange for these services, receive a reduced percentage of 4% of the gross income, payable monthly.<sup>6</sup>

Later, the Disputed Owners *perhaps* acquired the ownership interests of Palinsky and Kalichman in the Debtor.<sup>7</sup> West and the Disputed Owners then spent the next several years engaged in aggressive and expensive litigation relating to their ownership interests and management for the Debtor.

On December 26, 2017, West filed this Chapter 11 case, hoping to resolve the parties’ differences.<sup>8</sup> Contested disputes quickly arose (and sadly continue) between West and the

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<sup>2</sup> West Ex. 1.

<sup>3</sup> West Ex. 1, Article 7.4.

<sup>4</sup> West Ex. 1, Article 7.4.

<sup>5</sup> West Ex. 2.

<sup>6</sup> West Ex. 2.

<sup>7</sup> The Court makes no finding whether the Disputed Owners have any interest in the Debtor, reserving that dispute for another day and perhaps another court.

<sup>8</sup> Doc. No. 1.

Disputed Owners. Trying to defuse these tensions, I entered an order directing the parties to mediation. The mediation succeeded, and the Debtor, West, and the Disputed Owners (collectively the “Parties”) signed a Partial Settlement Agreement (the “Settlement Agreement”), which this Court approved.<sup>9</sup>

Although not a global resolution, the Settlement Agreement was extensive. The Parties agreed, among other items, to the appointment of a chief restructuring officer (“CRO”) for the Debtor. And subject to the acceptability of West’s performance, the Parties agreed the CRO would hire West as property manager for the Debtor.<sup>10</sup> By agreeing in the Settlement Agreement that West would continue as property manager, the Parties by extension agreed to pay him for his work, assuming he did a good job. West performed his property management duties well during the CRO’s tenure.

In August 2019, Jules S. Cohen was appointed as the Chapter 11 Trustee, replacing the CRO.<sup>11</sup> He agreed West was doing a good job and wanted to hire Westco, LLC—another entity owned by West—as his property manager (the “Trustee Management Agreement”).<sup>12</sup> Similar to the earlier Management Agreement, the Trustee Management Agreement provides Westco, LLC would serve as property manager for the Debtor and, in exchange for these services, receive compensation of 4% of the gross monthly rental income collected on all leases, paid monthly in arrears.<sup>13</sup> The Chapter 11 Trustee sought approval of the Trustee Management Agreement and for

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<sup>9</sup> The Settlement Agreement is dated May 23, 2018 and attached as Exhibit A to the Joint Motion to Approve Settlement Agreement. Doc. No. 163. On June 26, 2018, the Court entered the Order Granting Joint Motion to Approve Settlement Agreement. Doc. No. 174.

<sup>10</sup> Doc. No. 163, Ex A. at ¶ 2.

<sup>11</sup> Doc. Nos. 383 and 406.

<sup>12</sup> West Ex. 7.

<sup>13</sup> West Ex 7, pg.2.

authority to pay Westco LLC for services rendered onwards from November 1, 2019, which this Court recently approved.<sup>14</sup>

West now asks this Court to allow him an administrative expense claim for *all* post-petition property management services provided to the Debtor and then to direct the Chapter 11 Trustee to pay him.<sup>15</sup> After the bankruptcy filing through March 2020, Debtor collected rental income totaling \$2,648,747.31,<sup>16</sup> which West alleges entitles him or Westco LLC to a management fee of \$105,949.71, which is 4% of the rental income collected.<sup>17</sup>

The Disputed Owners object arguing West and Westco, LLC are professionals not employed under § 327 of the Bankruptcy Code<sup>18</sup> and who cannot be employed under § 327 because they are not “disinterested.” To summarize, the Disputed Owners argue that, because West is an insider, he cannot be retained as a professional or receive payment for his services as an administrative expense under Section 503 of the Bankruptcy Code.<sup>19</sup>

Section 503 of the Bankruptcy Code allows entities to request payment of an administrative expense,<sup>20</sup> and provides under subsection (b)(1)(A) that “...there shall be allowed administrative

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<sup>14</sup> The Chapter 11 Trustee’s Motion to Approve Property Management Agreement and for Authority to Pay Westco, LLC is Doc. No. 551. The Court entered the Order Granting Chapter 11 Trustee’s Motion to Approve Property Management Agreement and for Authority to Pay Westco, LLC on June 2, 2020. Doc. No. 717.

<sup>15</sup> Doc. No. 295 and 556.

<sup>16</sup> West Ex. 13. Debtor collected rents totaling \$1,126,940.80 for 2018, \$1,193,716.35 for 2019, and \$328,090.16 for January 2020 through March 2020. West Ex. 13 also provides a monthly itemization of rents collected from January 2018 through March 2020.

<sup>17</sup> West Ex. 13. The management fee is 4% of the total collected rents, or \$45,077.65 for 2018, \$47,748.45 for 2019 and \$13,123.61 for January 2020 through March 2020. West Ex. 13 also provides the 4% management fee on a monthly basis from January 2018 through March 2020.

<sup>18</sup> All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et. seq.*

<sup>19</sup> Doc. No. 635. The Disputed Owners further argue West, through Westco, LLC should not be permitted to gain financially from the Debtor by payment of an administrative expense claim while other creditors and equity holders must wait to receive funds. This equitable argument attempts to circumvent the priorities established under Section 507 of the Bankruptcy Code, which I decline to allow. And Disputed Owners’ argument that I lack jurisdiction over the Debtor is unpersuasive for the reasons stated in the Order Denying Disputed Owners’ Motion to Dismiss and Directing Appointment of a Chapter 11 Trustee. Doc. No. 383.

<sup>20</sup> 11 U.S.C. § 503(a).

expenses,...” including “the actual necessary costs and expenses of preserving the estate...”<sup>21</sup> Nobody disputes the Westco entities signed the Management Agreement and later the Trustee Management Agreement to provide property management services for the Debtor. Nobody disputes West or his companies provided these services. And, most significantly, nobody disputes West did a good job. The Court expressly finds West’s property management services were necessary and preserved (and likely enhanced) the Debtor’s estate.

And the Chapter 11 Trustee—an independent third-party with fiduciary duties to the estate—believes Westco, LLC should continue providing property management services for the Debtor and get paid. Even the Disputed Owners agreed to West’s retention in the Settlement Agreement, so their objection is disingenuous. They agreed to hire West and allow him to manage the Debtor’s shopping center for over two years but now object to paying him?

So, the only issue is whether West is precluded from receiving payment for his agreed valuable services to the Debtor because, as an interested insider, West cannot be retained as a “professional.” Section 327(a) of the Bankruptcy Code requires a debtor in possession or trustee to obtain Court approval before employing professional persons.<sup>22</sup> “The purpose for requiring court approval of professional persons is to avoid the enormous potential for abuse in the hiring of consultants, appraisers, business advisors, and others who offer their professional services and expertise to beleaguered Chapter 11 debtors.”<sup>23</sup> A person who is not a professional, however, may be employed without court approval.<sup>24</sup> And if court approval is not required under Section 327, neither is disinterestedness.<sup>25</sup>

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<sup>21</sup> 11 U.S.C. § 503(b).

<sup>22</sup> 11 U.S.C. § 327(a).

<sup>23</sup> *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010)(internal quotations omitted)

<sup>24</sup> *See In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010).

<sup>25</sup> *See In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010).

The Bankruptcy Code does not define professional persons. Several courts define a professional person under Section 327 as “one who takes a central role in the administration of the bankruptcy estate and in the bankruptcy proceedings, as opposed to one who provides services to the debtor that are necessary regardless of whether a bankruptcy petition is filed.”<sup>26</sup> Other courts categorize professional persons as “individuals and entities given broad discretion or autonomy in the administration of the debtor’s bankruptcy estate.”<sup>27</sup> No matter the definition or factors considered, courts agree persons providing property management services are not professionals under Section 327 requiring court approval.<sup>28</sup> And this remains true even if the person providing the property management services is an interested insider.<sup>29</sup>

Here, the Court finds West and Westco, LLC, by providing property management services, are not professional persons under Section 327 of the Bankruptcy Code. They provide the Debtor with traditional property management services, such as collecting rents, maintaining the shopping center, and other day-to day business operations. These services were provided to the Debtor long before the bankruptcy filing. No evidence of self-dealing is present. And, with the early appointment of a CRO and later Chapter 11 Trustee in this case, West and Westco, LLC do not have broad discretion or autonomy in the administration of the Debtor’s bankruptcy estate.

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<sup>26</sup> *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010) citing *In re Bannerman Holdings, LLC*, 2010 WL 2404313 \*2–3 (Bankr.E.D.N.C. June 10, 2010); *In re Century Inv. Fund VII Ltd. P'ship*, 96 B.R. at 893; *In re D'Lites of America, Inc.*, 108 B.R. 352,355 (Bankr.N.D.Ga.1989); *In re Seatrain Lines, Inc.*, 13 B.R. 980, 981 (Bankr.S.D.N.Y.1981).

<sup>27</sup> *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010) citing *In re Rusty Jones, Inc.*, 109 B.R. 838 (Bankr.N.D.Ill.1989); *In re Fretheim*, 102 B.R. 298 (Bankr.D.Conn.1989).

<sup>28</sup> See *In re Bannerman Holdings, LLC*, Case No. 10-01053-8-SWH, 2010 WL 2404313 (Bankr. E.D. N.C. June 10, 2010)(debtor’s member-manger and partial owner providing property management services to the debtor under a contract agreement is not a professional within the meaning of § 327); *In re Park Ave. Partners Ltd. Partnership*, 95 B.R. 605 (Bankr. E.D. Wis. 1988)(interested entity providing property management services to the debtor is not a professional person and § 327(a) does not apply). See also *Kaufman v. S & C Corp.*, 171 B.R. 38 (S.D. Tx. 1994)(affirming bankruptcy court judgment providing hotel management company an administrative expense claim under § 503(b)(1)(A)); *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918 (Bankr. D. N.D. 2010)(dairy management company is not a professional person under § 327 and therefore disinterestedness is not at issue).

<sup>29</sup> See *Bannerman*, 2010 WL 2404313; *Park Ave. Partners Ltd. Partnership*, 95 B.R. 605.

Because West and Westco LLC are not professional persons under Section 327 and the plain language of Section 503(b)(1)(A) does not require an entity to be employed under Section 327 to be allowed an administrative claim, West and Westco, LLC are entitled to payment.

In conclusion, West and his companies are entitled to payment as an administrative expense for their post-petition property management services to the Debtor. Westco Development Corp., the entity who signed the Management Agreement, may have an administrative claim for property management services provided to the Debtor from January 2018 through October 2019, for \$82,197.28, which is 4% of the rental income collected during this period. Westco, LLC, the entity who signed the Trustee Management Agreement, may have an administrative claim for property management services provided to the Debtor from November 2019 through March 2020, for \$23,752.43, which is 4% of the rental income collected during this period.

Accordingly, it is **ORDERED**:

1. The Objections (Doc. Nos. Doc. Nos. 308, 557 and 635) are **OVERRULED**.
2. The Motions for Allowance and Payment of an Administrative Expense Claim (Doc. Nos. 295 and 556) are **GRANTED**.
3. Westco Development Corp. may have an administrative claim for \$82,197.28 for property management services provided to the Debtor from January 2018 through October 2019, which the Chapter 11 Trustee may pay immediately.
4. Westco, LLC may have an administrative claim for \$23,752.43 for property management services provided to the Debtor from November 2019 through March 2020, which the Chapter 11 Trustee may pay immediately, provided such payment already has not been made under the Order Granting Chapter 11 Trustee's Motion to Approve Property Management Agreement and for Authority to Pay Westco, LLC entered on June 6, 2020 (Doc. No. 717).

5. The Chapter 11 Trustee further may disburse future property management fees to Westco, LLC as provided in the Trustee Management Agreement, without further court order and in the normal course of business.

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Attorney, Richard B. Weinman, is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of the order.