

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

In re: Case No. 8:99-bk-18423-PMG  
Chapter 7

CAMELOT CASINO CRUISES, INC.,

Debtor.

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**ORDER ON MOTION FOR THE APPOINTMENT  
OF OUTSIDE EXAMINER**

**THIS CASE** came before the Court for hearing to consider the Motion for the Appointment of Outside Examiner filed by Malcolm M. Babb (Babb).

In the Motion, Babb requests that the Court "enter an Order for the appointment of an outside examiner to inquire into the Estate of the Debtor."

**Background**

The Debtor, Camelot Casino Cruises, Inc., filed a petition under Chapter 11 of the Bankruptcy Code on November 15, 1999.

At the time that the chapter 11 petition was filed, the Debtor was engaged in the business of operating a gambling ship. Its primary asset was a vessel known as the M/V Excalibur.

On January 28, 2000, while the Debtor was operating as a Debtor-in-Possession, the Court entered an Order authorizing the Debtor to sell the M/V Excalibur to Bernie Weintraub, as Trustee for Space Coast Cruises. (Doc. 36).

The buyer, Space Coast Cruises, subsequently defaulted under the terms of the sale.

On April 4, 2001, the United States Trustee filed a Motion to Dismiss or Convert the Chapter 11 Case. (Doc. 294).

On June 4, 2001, the case was converted to a case under Chapter 7 of the Bankruptcy Code, and Stephen

Meininger was appointed as the Chapter 7 Trustee. (Docs. 317, 318).

Babb asserts that he is a creditor of the estate by virtue of the Debtor's prepetition lease of certain property, including a pier and dock, for wharfage of its ship.

In the Motion for Appointment of Examiner presently under consideration, Babb asserts that an examiner should be appointed to inquire into certain matters that occurred after the Debtor's sale of the vessel to Space Coast Cruises in 2000.

According to Babb, the specific matters that should be investigated include the disposition of any money earned by Space Coast Cruises from the operation of the vessel, the status of any payments made by Space Coast Cruises on the ship's mortgages, any efforts by the Debtor to collect the purchase price, and the disposition of any money obtained by Space Coast Cruises for the sale of certain gaming equipment associated with the vessel.

**Discussion**

As set forth above, Babb requests that the Court "enter an Order for the appointment of an outside examiner to inquire into the Estate of the Debtor."

**A. Section 1104(c) applies only in Chapter 11 cases.**

Section 1104(c) of the Bankruptcy Code governs the appointment of examiners in Chapter 11 cases.

Generally, §1104(c) authorizes the Court to appoint an examiner to conduct "such an investigation of the debtor as is appropriate," including an investigation into allegations of fraud or mismanagement by the debtor, if the appointment of such an examiner is in the best interest of the creditors, and if the debtor's liquidated, unsecured debt exceeds \$5,000,000.

Section 103(g) of the Bankruptcy Code provides that subchapters I, II, and III of Chapter 11 apply only in cases under Chapter 11 of the Bankruptcy Code. Section 1104(c), cited above, appears in subchapter I of Chapter 11.

Consequently, §1104(c), which authorizes the Court to appoint an examiner under the conditions set forth in that section, applies only in cases under Chapter 11.

**B. The Bankruptcy Code does not authorize the appointment of an examiner in Chapter 7 cases.**

In this case, the Debtor's Chapter 11 reorganization was converted to a case under Chapter 7 on June 4, 2001, and Stephen Meininger was appointed as the Chapter 7 Trustee.

Chapter 7 of the Bankruptcy Code does not contain any provision that authorizes the Court to appoint an examiner in cases under that Chapter. Subchapter I of Chapter 7 applies only in Chapter 7 cases, for example, and is entitled "Officers and Administration." This Subchapter includes separate sections governing the appointment of an interim Trustee, the election of a Trustee, the election of a successor Trustee, and the election of a creditors' committee. Subchapter I of Chapter 7 does not, however, contain any provision relating to the appointment of an examiner. As the Sixth Circuit Court of Appeals recently stated:

Nor may examiners play a role in a Chapter 7 proceeding. In a Chapter 7 liquidation, which occurs (among other times) at the end of an unsuccessful effort to reorganize a company under Chapter 11, a trustee always replaces the debtor in possession, and the Code prohibits the use of an examiner when a trustee has already been appointed.

In re Big Rivers Electric Corporation, 355 F.3d 415, 430 (6<sup>th</sup> Cir. 2004)(Emphasis supplied).

The Bankruptcy Code does not authorize the appointment of an examiner in Chapter 7 cases. Nevertheless, Babb contends that this case represents an exception to the general rule because the alleged fraud occurred while the case was pending as a Chapter 11 case. According to Babb, therefore, the alleged fraud "relates back" to the Chapter 11. (Transcript, pp. 10-13).

Babb's assertion is not persuasive, however, because a Chapter 7 Trustee has been appointed to administer this case and to investigate the financial affairs of the Debtor, including the activities of the Debtor while it operated as a Debtor-in-Possession.

The duties of a Chapter 7 Trustee are set forth, in part, in §704 of the Bankruptcy Code. That section provides in part:

**11 USC § 704. Duties of trustee**

The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

...

(4) investigate the financial affairs of the debtor.

11 U.S.C. § 704. "Other statutes in Chapter 7 grant a Chapter 7 trustee particular rights, powers, functions, and duties. 11 U.S.C. §§ 721, 723, 724, 725, 726 & 727(c)-(e). None of these statutes attempts to set out in detail all the rights, powers, functions, and duties of a Chapter 7 trustee. . . . In particular, a Chapter 7 trustee has control of the property of the bankruptcy estate, including the debtor's pre-bankruptcy causes of action, and the trustee generally has the right to bring suit on those causes of action." In re York, 291 B.R. 806, 812 (Bankr. E.D. Tenn. 2003).

"Further, even though the trustee has no obligation to investigate every matter that is brought to his or her attention, the trustee is statutorily required to look into charges of the concealment of assets, fraudulent conduct, and any other wrongdoing by the debtor or other third parties." In re Chicago Art Glass, Inc., 155 B.R. 180, 187-88 (Bankr. N.D. Ill. 1993).

The Bankruptcy Code provides Chapter 7 Trustees with broad investigatory powers and duties. It is clear, therefore, that the Trustee in this case was charged with the responsibility of investigating the pre-conversion actions of the Debtor, and determining whether any assets could be collected for the benefit of the estate. In other words, a Chapter 7 Trustee, as an officer of the estate, is already in place in this case to inquire into the issues raised by Babb in his Motion.

The Bankruptcy Code does not authorize the appointment of an independent examiner in cases in which a Trustee has been appointed to investigate the debtor's financial affairs. In re Big Rivers Electric Corporation, 355 F.3d at 430.

**C. Rule 2004 does not apply to the appointment of an examiner.**

Finally, the Court notes that Babb's Motion for the Appointment of Outside Examiner was filed "pursuant to Rule 2004."

"Rule 2004 is a procedural device that enables a party in interest to examine any entity" to obtain information about matters relevant to the case. In re Daisytek, Incorporated, 323 B.R. 180, 187 (N.D. Tex. 2005). It is a discovery tool akin to a deposition that allows the moving party to determine if there are grounds for litigation. See In re Bennett Funding Group, Inc., 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996).

Rule 2004 is not a mechanism to obtain the appointment of an independent examiner, however, and does not constitute a proper basis for Babb's request.

**Conclusion**

Babb seeks the appointment of an outside examiner to inquire into certain events that allegedly occurred prior to the conversion of this case from a Chapter 11 to a Chapter 7.

The Bankruptcy Code does not authorize the appointment of an examiner in Chapter 7 cases, and a Chapter 7 Trustee has been appointed in this case who is charged with the duty of investigating the Debtor's financial affairs. Consequently, the Court finds that Babb's Motion should be denied.

Accordingly:

**IT IS ORDERED** that the Motion for the Appointment of Outside Examiner, filed by Malcolm M. Babb, is denied.

**DATED** this 6th day of July, 2005.

**BY THE COURT**

/s/ Paul M. Glenn  
PAUL M. GLENN  
Chief Bankruptcy Judge