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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

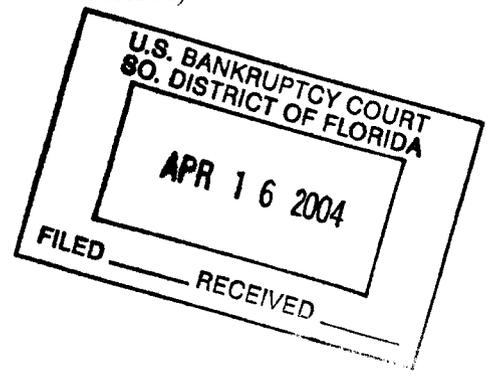
IN PROCEEDINGS UNDER CHAPTER 11
CASE NO. 90-27588-BKC-AJC
(Jointly Administered)

IN RE:

THE HILLARD DEVELOPMENT
CORPORATION, etc.

Debtor,

_____ /



IN RE:

HILLARD DEVELOPMENT CORPORATION,
d/b/a PILGRIM MANOR NURSING HOME,
d/b/a PROVIDENT NURSING HOME,
FEI: 58-1538435

CASE NO. 98-25061-BKC-AJC

Debtor,

_____ /

ORDER APPROVING COLLECTIVE
BARGAINING AGREEMENT NUNC PRO TUNC

THIS CAUSE came before the Court upon the Service Employees International Union, Local 285, AFL-CIO's (the "Union") motion to approve the collective bargaining agreement between Hillard Development Corp. ("Hillard" or "Debtor") and the Union *nunc pro tunc*.

The Union, which represents certain employees of the Debtor, has moved for an order approving the terms of a collective bargaining agreement ("CBA") negotiated during the course of the bankruptcy proceeding. The CBA, which is attached to the Union's Amended Motion to Approve Collective Bargaining Agreement as exhibit A, was executed by the parties on December 13, 2000, post-petition. CBA at 24. The parties agreed that the terms of the CBA would become effective on January 1, 2001 through May 31, 2003. CBA at 23. The parties

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further agreed that the provisions contained in the CBA would become effective upon approval of the Bankruptcy Court. Id.

The only issue before the Court is whether the Union's motion is moot given the CBA's expiration date, and if not, whether the Court has the authority to approve the CBA *nunc pro tunc*. For the reasons articulated below, the Court finds that the Union's motion is not moot, and that the CBA should be approved *nunc pro tunc*.

There is no dispute that the CBA was entered into between the parties post-petition. Under 11 U.S.C. § 363(c)(1), contracts entered into post-petition in the ordinary course of business do not require court approval. Several courts have ruled that post-petition collective bargaining agreements were in the ordinary course of business, and therefore could be entered into by the trustee or debtor-in-possession without court approval. See In re DeLuca Distributing Co., 38 B.R. 588 (Bankr. N.D. Ohio 1984); see also In re IML Freight, Inc., 37 B.R. 556, 559 (D. Utah 1984) (decision to enter into a post-petition collective bargaining agreement falls within debtor-in-possession's discretion to make decisions in the ordinary course of business); In re Illinois-California Express, Inc., 72 B.R. 987, 991 (Bankr. D. Colo. 1987); In re Roth American, Inc., 975 F.2d 949 (3d Cir. 1992). The National Labor Relations Board has also noted that a debtor may enter into a valid collective bargaining agreement in the ordinary course of business. See Sealift Maritime, Inc., 265 N.L.R.B. 1219 (1982).¹ Nevertheless, in the exercise of caution, the parties have applied to the court for approval of the CBA.

Section 105(a) authorizes the court to "issue any order, process, or judgment that is necessary and appropriate to carry out the provisions of [Title 11]." 11 U.S.C. § 105(a). The

¹ The only time post-petition collective bargaining agreements require court approval is when they obligate the debtor to do something "extraordinary, such as giving the union a lien on the debtor's property, or to do an act which is inimical to the theory and philosophy of the Code, such as the payment of pre-petition indebtedness," in which

court has discretionary authority under 11 U.S.C. § 105 to enter an order *nunc pro tunc* under appropriate circumstances. See In re Alafia Land Development Corp., 40 B.R. 1 (Bankr. M.D. Fla. 1984); In re Certain Special Counsel to Boston & Marine Corp., 737 F.2d 115 (1st Cir. 1984); In re Cormier, 35 B.R. 424, 425 (D. Me. 1983). The standard to be used by bankruptcy courts in deciding whether to issue an order retroactively has been stated as follows:

When entering an order retroactively will further the purposes of the Bankruptcy Code without unfairly prejudicing parties-in-interest, *nunc pro tunc* effect may, and should, be provided.

In re Consolidated Auto Recyclers, Inc., 123 B.R. 130, 141-42 (Bankr. D. Me. 1991). Here, equity favors approval of the CBA retroactively to its effective date, January 1, 2001.

The CBA in this case does not affect the rights of creditors in the property of the debtor's estate. It sets forth the conditions of employment to which labor and management have agreed. Given the national labor policy of encouraging collective bargaining agreements and avoiding labor strife, see National Labor Relations Board v. Bildisco and Bildisco, 465 U.S. 513 (1984); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), collective bargaining agreements are often in the best interest of creditors since they help to avoid the disruption of the debtor's business. See In re Deluca at 594. Further, no creditors have objected to the CBA.

In this case, to deny retroactive application of the CBA would be unfair and would result in vitiating the benefits bargained for in the now expired collective bargaining agreement, despite the fact that the parties agreed to its terms and contemplated that it would take effect retroactively to January 1, 2001 since it was only agreed upon two weeks earlier on December 13, 2000. Moreover, because the debtor, who voluntarily entered into the CBA, has accepted the benefit of labor peace and the work of those employees included within the bargaining unit, it

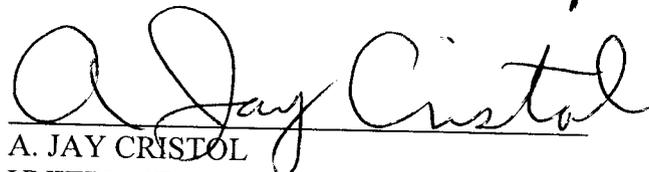
case a notice and hearing is required. In re The Leslie Fay Companies, Inc., 168 B.R. 294 (Bankr. S.D.N.Y. 1994). No such issue has been raised herein by the Debtor or any of the creditors who received notice.

must now accept the burdens also. See id. In In re Deluca, the debtor attempted to disavow a collective bargaining agreement entered into post-petition, claiming that it was not bound to the agreement. Citing with approval the comments of Judge Stewart in In re Isis Foods, Inc., 19 B.R. 329, 330-31 (Bankr. W.D. Mo. 1982), aff'd., 27 B.R. 156 (Bankr. D.C.W.D. Mo. 1982)², the court held that since the debtor voluntarily entered into the collective bargaining agreement, “[e]quity dictat[ed] that the debtor [be] estopped from . . . claiming that it is not bound by [the agreement].” Retroactive application of the CBA is required in this case on the same equitable grounds.

Accordingly, based on the above, it is

ORDERED AND ADJUDGED that the Union’s motion to approve the collective bargaining agreement is **GRANTED *nunc pro tunc*** to January 1, 2001.

ORDERED in the Southern District of Florida on APRIL 16, 2004


A. JAY CRISTOL
UNITED STATES BANKRUPTCY JUDGE

Copies furnished to:

James B. Boone, Counsel for the Debtor
Kathleen M. Phillips, Counsel for the Union

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4/16/04