

of 11 U.S.C. Section 507(a)(3) which states as follows:

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay--

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of \$2,000 for each such individual;¹

Debtor's case was filed under Chapter 11 on April 29, 1993, and converted to Chapter 7 on September 9, 1994. To prevail, each claimant must show that the wages accrued within ninety days of either (1) Debtor's bankruptcy filing or (2) cessation of its business.²

Evidence submitted at the hearing established that some of the above claimants left Debtor's employ in 1992. Subsequent to their departure, claimants hired attorney Michael Lewanski early in 1992 to assert wage and hour claims against Debtor and in fact a lawsuit was filed in 1992 seeking recovery of unpaid overtime and other benefits. Since the wage claims accrued prior to early-1992, I hold that claimants have not

¹ The Bankruptcy Reform Act of 1994 amended Section 507(a)(3) to increase the allowed amount to \$4,000 and permit claims by independent sales representatives; however, those changes only affect cases filed after October 22, 1994, and, therefore, are not relevant to this matter. See Bankruptcy Reform Act of 1994, Pub.L.No. 103-394, §§ 207, 702 (1994).

² The claim of Michael Lewanski is for attorney's fees rendered on behalf of these claimants and shall be addressed separately at the conclusion of this Order. Thus, for the purposes of this Order, "Claimants" refers to all of the above listed individuals, except Michael Lewanski.

shown that the wages accrued within ninety days of Debtor's bankruptcy filing, in April 1994.

Claimants contend further, for the purposes of allowance of these claims as a wage priority, that Debtor ceased doing business within ninety days after the accrual of their respective wage claims. Specifically, claimants' counsel contends that within ninety days of each claimant's final performance of service, Debtor ceased doing business and thus claimants satisfy the second criteria for allowance of a priority claim. Thus, the sole issue is whether Debtor ceased to operate its business earlier than April 29, 1993, when it filed for Chapter 11 protection.

On that issue, at least one of the claimants testified that he had seen Debtor's business open and apparently in operation as late as August 1992 - more than ninety days subsequent to the final performance of services by each claimant, who had hired counsel to pursue their wage claim in early 1992. Therefore, their claims fail to meet the second prong of Section 503(a)(3).

Claimants' counsel cites authority for the proposition that cessation of business is a fact-based inquiry in that it depends on the facts and circumstances of a particular case and that cessation of business in one division of a company while the rest of the company remains in business is deemed to constitute cessation of business insofar

as wage and benefit claims of those divisions' employees. *See In re Davidson Transfer & Storage Company*, 41 B.R. 805 (Bankr.D. Md. 1984). Claimants' counsel asserts that the claimants worked for the Debtor's wrecker service and car rental business which were, in effect, divisions of the Debtor and that those divisions ceased operation with ninety days of claimant's service. However, the evidence further revealed that the employees worked not only for the divisions which ceased doing business during early 1992, but also for others which remained in operation during the latter part of the year. This contention is overruled.

Claimants' counsel also cites authority for the proposition that a corporation which is winding down its functions may be deemed to have ceased doing business at a date earlier than the date when it finally ceases any discernable activity. *See In re Bodin Apparel, Inc*, 56 B.R. 728 (S.D.N.Y. 1985). Case law cited by claimants' counsel supports a broad interpretation of the term "cessation of the debtor's business." Here, evidence revealed that long prior to filing Chapter 11 Debtor was not paying bills on a current basis and claimant's contention is that the business should be deemed to have ceased when it became insolvent. I find no authority for such a broad interpretation, particularly when the Debtor's business continued to be open, accepting new customers, and apparently conducting normal, though perhaps reduced, operations until the case was converted to Chapter 7 on September 9, 1994.

Based on the facts before me, I conclude that the date of cessation of business relevant to this case did not occur until September 9, 1994, and, therefore, the claims, all of which accrued more than ninety days prior to that date, are disallowed as priority claims and allowed as unsecured claims. Accordingly, Trustee's objection to the status of each former employee's above listed claim is sustained.

Finally, Claimants' counsel Michael Lewanski has submitted a claim for \$6,200.00 representing time spent pursuing this matter. Although Mr. Lewanski has failed to identify the Bankruptcy Code provision that justifies his proof of claim, he has indicated "attorney fees" on his proof of claim and presumably requests fees for pursuing pre-petition wage claims. However, because Mr. Lewanski was not employed by the Debtor pursuant to Section 327 and because he has not rendered to the Debtor any actual, necessary services pursuant to Section 330, I hold that Bankruptcy Code provides no basis to compensate him from assets of the estate. See In re Ames Department Stores, Inc., 76 F.3d 66, 72 (2nd Cir. 1996); Matter of Taxman Clothing Co., 49 F.3d 310, 315 (holding that only services of debtor's attorney that are reasonably likely to benefit the estate are compensable). To the extent he might claim \$2,000.00 of his fees as being in the nature of wages for his pursuit of the wage and hour claims of employees, his claim is disallowed on the same ground as applicable to his clients, *supra*. Therefore, Mr. Lewanski's claim is disallowed.

O R D E R

IT IS THEREFORE THE ORDER OF THE COURT that Trustee's objection to the status of the above listed claimants is hereby sustained.

IT IS THE FURTHER ORDER OF THIS COURT that the claim of Michael Lewanski is disallowed.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1997.