

SO ORDERED.

SIGNED this 2nd day of August, 2024.



Dale L. Somers

Dale L. Somers
United States Chief Bankruptcy Judge

Designated for online publication only

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

Rocking M Media, LLC, et al.,

Debtors.¹

Case No. 22-20242

Chapter 11

**Memorandum Opinion and Order Addressing
Debtors' Emergency Motion for an Order Modifying, Nunc Pro Tunc,
Final Order Granting Emergency Motion to Use Cash Collateral**

Debtors seek an order modifying the final cash collateral order effective February 1, 2024, to remove the obligation to make monthly adequate

¹ The debtors in these Chapter 11 cases, their case numbers, and acronyms are: Rocking M Media, LLC (RMM), case no. 22-20242 (lead case); Rocking M Media Wichita LLC (RMMW), case no. 22-20243; Rocking M Radio, Inc. (RMR), case no. 22-20244; and Melia Communications Inc. (MCI), case no. 22-20245.

protection payments of \$5000 to creditor Belate, LLC.² Debtors contend from and after that date Belate's claim was no longer secured and the cash collateral order may be amended nunc pro tunc. Belate opposes the motion. The matter was placed under advisement following a hearing on July 17, 2024. For the reasons discussed below, the Court rules that retroactive relief is not available, but the cash collateral order may be amended prospectively such that no payments are due on and after July 15, 2024, the date the motion was filed.

Background Facts

The background facts are undisputed. The final cash collateral order was filed on August 31, 2022.³ The order provides "Debtors shall pay Belate \$5,000 per month beginning July 15, 2022 and the 15th day of each month thereafter until further Order of this Court"⁴ as adequate protection payments. On February 1, 2024, an auction sale of three radio stations, the only "hard" collateral then securing Belate's claim, was held.⁵ The winning

² Doc. 625.

³ Doc. 204.

⁴ *Id.* at 6.

⁵ Seven additional stations were sold at the same auction for \$2,100,000. The liens in those stations were as follows: First priority lien held by Kansas State Bank in the principal amount of \$1,461,072.03, plus allowable postpetition interest and legal fees; second priority lien held by Bank of Commerce in an amount not to exceed

bid was \$610,000.⁶ On February 6, 2024, Belate filed a motion objecting to the manner in which the auction was conducted.⁷ The objection was denied at a hearing on February 15, 2024,⁸ and the sale was approved on March 1, 2024.⁹

Debtors did not make adequate protection payments to Belate for the months of February, March, April, May, or June 2024.¹⁰ Debtors had not objected to Belate's claim, moved to amend or terminate the cash collateral order, or moved to value Belate's claim, all of which would have been sufficient to obtain a Court order terminating Belate's adequate protection payments.

On January 11, 2024, Debtors filed a motion for entry of an order establishing priority of claims for purposes of distribution of the auction sale proceeds.¹¹ The order requested a ruling that the amount of Belate's claim

\$46,694.99; and third priority lien held by Kansas State Bank in the principal amount of \$1,019,145.34. Belate had a fifth priority lien in the additional stations, but the sale proceeds were insufficient to cover even the liens of higher priority. The sale of these additional stations is not relevant to the issue before the Court.

⁶ Doc. 644.

⁷ Doc. 564.

⁸ Doc. 576.

⁹ Doc. 579.

¹⁰ Doc. 644.

¹¹Doc. 551.

was \$6,141,752.44, secured by a second priority lien in the sale proceeds, junior to the lien of Farmers & Merchants Bank (Farmers). Belate's objection to the requested order was resolved by agreement with Farmers.¹² On April 19, 2024, an order was entered finding the net proceeds of the sale would be distributed first to Farmers in an amount not to exceed \$550,349.99, plus allowable postpetition interest and fees, and second to Belate in an amount not to exceed \$6,141,752.44.¹³

The sale closed on July 8, 2024. Although the record does not include the net amount of sale proceeds or the interest and fees claimed by Farmers, the parties agree that Belate is not entitled to share in the sale proceeds.

The Parties' Positions

Debtors request the Court to amend the cash collateral order, nunc pro tunc, to at least February 1, 2024, to remove the requirement of making adequate protection payments to Belate. The predicate for the request is the contention that Belate's claim become wholly unsecured as of February 1, 2024, when the auction price established the value of the collateral securing Belate's second priority lien. Debtors argue making adequate protection payments to Belate after February 1, 2024, would be contrary to the Code

¹² Doc. 595.

¹³ *Id.*

priorities and the principle of equal treatment of similarly situated creditors. According to Debtors, a nunc pro tunc order is appropriate because such an order is designed to give retroactive effect to a court order and is a “powerful tool to achieve justice.”

Belate objects. It argues Debtors by unilaterally ceasing adequate protection payments violated the cash collateral order, which provides Debtors shall pay Belate \$5000 on the 15th day of each month “until further order of this Court.” Further, Belate argues that pursuant to the sale order, the sale closing date is the trigger date for changes to the parties’ interests and that a nunc pro tunc order is inappropriate in this case.

Analysis

A. The Court finds the requested relief cannot be granted by a nunc pro tunc order.

Nunc pro tunc orders may be issued in very limited circumstances, and the current situation is not one of them. Contrary to Debtors’ position, such an order is not a vehicle for doing equity. The phrase “nunc pro tunc” literally means “now for then.”¹⁴ It “refers to situations in which the court’s records do not accurately reflect its actions.”¹⁵ A nunc pro tunc order “reflects

¹⁴ *In the Matter of Singson*, 41 F.3d 316, 318 (7th Cir. 1994).

¹⁵ *Id.*

the ‘reality’ of what has already occurred;” it “presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court.”¹⁶ But this is not what Debtors want. They want a brand new order amending the cash collateral order, not a correction of the record to reflect what the Court ordered on August 31, 2022, when the cash collateral order was entered.

Moreover, if nunc pro tunc relief were available, the factual basis for such relief as of February 1, 2024, the date Debtors assert Belate’s claim became unsecured, is not supported by the record. Assuming the February 1, 2024 auction sale established \$610,000 as the value of Belate’s collateral, that fact alone would not support the conclusion that Belate held an unsecured claim on such date. It was not until April 19, 2024, that the Court held Belate’s claim in the collateral was a second priority lien behind Farmer’s first priority interest securing \$550,349.99, plus allowable post petition interest and fees. When the value of the collateral and the amount of Belate’s and Farmer’s principal claims became known, the likelihood of Belate receiving any sales proceeds was remote, but it was not certain.¹⁷ The

¹⁶ *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Feliciano*, 589 U.S. 57, 140 S. Ct. 696, 701 (2020).

¹⁷ Assuming Belate’s status as an unsecured claim holder is based upon the actual allocation of the net sale proceeds, that allocation could not take place until after the sale closed on July 8, 2024.

principal of Farmer's first priority claim was approximately \$60,000 less than the \$610,00 collateral value.

B. Prospective termination of adequate protection payments to Belate is granted.

For purposes of Debtors' motion, the Court regards the cash collateral order as a final order.¹⁸ Relief from a final order is governed by Rule 60.¹⁹ There is no applicable subsection allowing for retrospective relief. But subsection (b)(5) of Rule 60 allows for prospective relief from a judgment on the grounds that "applying it prospectively is no longer equitable." The one-year limit on relief under some subsections does not apply. Rather, relief must be sought within a reasonable time. A motion under Rule 60(b)(5) "applies to any judgment that has prospective effect,"²⁰ and is addressed to the discretion of the issuing court.²¹

The cash collateral order has prospective effect, since it orders adequate protection payments from July 2022 and each month thereafter. Amendment

¹⁸ See *In re Bluejay Props., LLC*, 512 B.R. 390 (10th Cir. BAP 2014) (observing that whether cash collateral orders are final orders for purposes of appeal has not been addressed by the Tenth Circuit, but treating such an order as final because of the plethora of cases treating them as final, appealable orders).

¹⁹ Fed. R. Bank. P. 9024 provides Fed. R. Civ. P. 60 (Rule 60) applies in cases under the Code.

²⁰ 11 Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed.).

²¹ *Id.*

is therefore governed by Rule 60(b)(5). It is no longer equitable to require such payment. Debtors filed their motion to amend the cash collateral order on July 15, 2024. By that date, all of the significant collateral securing Belate's claim had been sold, and the allocation of sale proceeds could be calculated. The parties agree that Belate is not entitled to any proceeds. Belate's entitlement to adequate protection payments ceased. The cash collateral order should be amended terminating such payments effective July 15, 2024.

Conclusion

In conclusion, the Court denies Debtors' request for retroactive modification of the cash collateral order terminating payment of adequate protection payments to Belate, effective January 1, 2024. Rather, the Court orders prospective relief terminating the obligation to make such payments from and after July 15, 2024.

It is so ordered.

###