

1 WRITTEN DECISION -- NOT FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA
BY <u>104</u> DEPUTY

8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 In re) Case No. 07-00725-B11
12 NEWTRAC PACIFIC, INC.,)
13) ORDER ON MOTION FOR
14 Debtor-in-Possession) RELIEF FROM ORDER APPROVING
15) SALE

16 Previously, the Court approved a sale of the Debtor's real
17 property. The Court, however, denied the request to pay a
18 commission to the brokers as an administrative claim on the
19 ground that their employment had not been approved by the Court.
20 Brokers have moved for relief from the order. Because the Court
21 finds that, to the extent the brokers earned a commission they
22 did so pre-petition, they are not employable by the estate as
23 professionals and are not otherwise entitled to an administrative
24 claim for their post-petition services.

25 This Court has subject matter jurisdiction pursuant to 28
26 U.S.C. § 1334 and General Order No. 312-D of the United States

1 District Court for the Southern District of California. This is
2 a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (G).

3
4 **BACKGROUND**

5 On May 17, 2005 Newtrac Pacific, Inc., (Debtor) and Ashwill
6 Associates Commercial Real Estate (Ashwill) entered into an
7 Owner-Agency Agreement (Agency Agreement) whereby Ashwill was
8 engaged to find a buyer for Debtor's real property (Property).
9 The Agency Agreement provided for a commission of 3% of the total
10 sale price payable "for a transaction consummated as a result of
11 the efforts of Agent, Owner or some other person or entity ... if
12 ... a buyer is procured who is ready, willing and able to buy the
13 Property at the price and on the terms stated herein, or on any
14 other price and terms agreeable to Owner..." The term of the
15 Agency Agreement began on May 15, 2005 and provided in part:

16 ... in no event shall the Term be so extended beyond
17 one year from the date the Term would have otherwise
expired.

18 The original expiration date was November 16, 2005. Therefore,
19 according to Ashwill, the Agency Agreement expired by its terms
20 on or before November 17, 2006.

21 In mid-January 2007, Debtor and Greens Valencia, LLC (GVL)
22 executed an Agreement of Purchase and Sale and Joint Escrow
23 Instructions (Sale Agreement) whereby Debtor would sell the
24 Property to GVL. It appears undisputed that Ashwill and/or co-

1 movant Voit Commercial Brokerage (Voit)¹ had procured GVL as a
2 potential buyer.

3 On February 15, 2007 Debtor filed the petition commencing
4 this bankruptcy case. According to Movants, as of that date
5 (1) neither Debtor nor GVL were bound under the Sale Agreement
6 due to conditions precedent to GVL's obligation to buy; (2) there
7 was no existing Agency Agreement; and (3) much remained to be
8 done before Debtor and GVL were obligated to go forward with the
9 sale.

10 Movants contend that on March 12, 2007, the Debtor again
11 agreed to retain Ashwill as agent under the terms of the Agency
12 Agreement. Indeed, David Brackmann, Senior Vice President of
13 Ashwill, confirmed in a letter to Mark Hoffman, president of the
14 Debtor, that the expiration date of the Agency Agreement had been
15 extended to September 1, 2007.² However, four days earlier, on
16 March 8, 2007, Debtor had filed its motion for authority to sell
17 the Property to GVL and requested therein that the Court
18 authorize a commission to Ashwill of \$225,000 and \$38,000 to
19 Voit. The sales motion provided:

20
21 ¹ The current motion is brought by Ashwill and Voit and refers to them as "Moving
22 Parties." It appears that Voit represented GVL in the sale and that Ashwill agreed to split its
commission with Voit. For the purposes of this Order they are at times referred to as Movants.

23 ² Pursuant to Local Bankruptcy Rule 9034-1 Counsel for the Debtor apparently
24 prepared an application to employ Ashwill under Code § 327. The United States Trustee
25 opposed on the ground that Ashwill was a pre-petition creditor and hence not "disinterested".
26 Neither the application nor the UST's statement of position were filed with the Court and
Ashwill's employment was never authorized by the Court. The declaration of Philip Giacinti in
support of the current motion has attached as exhibits "various pleadings filed with the Court in
connection with efforts to retain Ashwill" including an ex parte application to employ broker and
supporting documents. However, the Court has reviewed the record and finds no evidence that
any such pleading was filed with the Court.

1 NPI had a broker working for it to find a buyer.
2 Through that broker, GVL was procured.

3 The United States Trustee (UST) opposed the proposed sale to
4 the extent it provided for payment of commissions on the ground
5 that Movants' employment by the estate had not been authorized
6 under § 327. The UST also argued that based upon Debtor's
7 schedules it appeared Ashwill had a pre-petition claim and thus
8 could not be employed by the estate and was limited to its
9 general unsecured claim, citing this Court's ruling in In re HSD
10 Venture, 178 B.R. 83 (Bankr.S.D. 1995).

11 At a hearing on March 19, 2007, the Court approved the sale
12 to GVL. Debtor submitted a proposed order which provided for
13 commissions to Ashwill (\$112,500) and Voit (\$150,500).³ However,
14 the order entered by the Court did not include commissions -- the
15 Court used the form of order submitted by Debtor but struck the
16 commission provisions (Sale Order).

17 Movants now seek relief from the Sale Order and
18 reinstatement of the stricken commission provisions.

20 DISCUSSION

21 Movants seek relief from the Sales Order under Rule 9024 on
22 the ground that they, through inadvertence and mistake, "did not
23 present evidence at the hearing on the sale to demonstrate to the
24 Court's satisfaction that ¶ 19. p. 20 of the Purchase and Sale

25 ³ As noted above, the Motion sought commissions of \$225,000 and \$38,000. For some
26 reason known presumably to Movants, the division is different, however, the total commissions
requested in the Motion and the Order were the same.

1 Agreement calling for the payment of a broker commission on the
2 Debtor-in-Possession's sale satisfied federal bankruptcy law
3 requirements." The Court has reviewed the evidence which Movants
4 have submitted in support of the current motion and remains
5 convinced that its decision to strike the commission provision
6 was correct. First, the record is clear that Movants' employment
7 by the estate had not been approved by the Court at the time the
8 Sales Order was entered. Second, as this Court has already
9 ruled, a real estate broker who was a pre-petition creditor is
10 not disinterested and thus cannot be employed by the estate.
11 In re HSD Venture, 178 B.R. 831, 834 (Bankr.S.D.Cal. 1995). The
12 record before the Court, even as supplemented by the current
13 motion, indicates not only that Ashwill, at least, was employed
14 pre-petition, but also that to the extent Movants earned a
15 commission, they did so pre-petition and thus could not have been
16 employed even had the application been properly filed.

17 Movants argue that "the day after Newtrac and Ashwill
18 executed the commission agreement post-petition, the Estate
19 immediately sought Court approval to retain Ashwill." However,
20 as noted above, the application to employ was never filed with
21 the Court. Consequently, to date, and certainly as of the date
22 the Sale Order was entered, the Court has not approved Movants'
23 employment. As the Court had not authorized their employment as
24 of the date the sale was approved, Movants were properly denied a
25 commission at that time. See In re Haley, 950 F.2d 588, 590 (9th
26 Cir. 1991) (affirming bankruptcy court and BAP rulings that real

1 estate broker that had not been employed under § 327 cannot
2 receive its commission).

3 As noted above the Court finds that even had the application
4 been filed, it would have been denied. A trustee (or debtor-in-
5 possession) may employ a professional only so long as they are
6 "disinterested." 11 U.S.C. § 327. A "disinterested person" is,
7 among other things, one who "is not a creditor." 11 U.S.C.
8 § 101(14)(A). The record before the Court indicates not only
9 that Ashwill was employed pre-petition, but also that to the
10 extent Movants earned a commission, they did so pre-petition.
11 The Sales Motion, which was filed on March 8, 2007, provides that
12 "Prior to the filing of this case, NPI negotiated the sale of the
13 Property to GVL." The Sales Motion also provides "NPI had a
14 broker working for it to find a buyer. Through that broker, GVL
15 was procured." Thus, it is clear not only that Ashwill obtained
16 the buyer, but that it did so pre-petition. This conclusion is
17 consistent with Debtor's schedules which list Ashwill as an
18 unsecured creditor with a claim of \$225,000 for "sales
19 commissions." The Sales Agreement, attached to the declaration
20 of Mark Hoffman as Exhibit C, is dated January 1, 2007 and Mr.
21 Hoffman declared "Exhibit C contains the fundamental agreement
22 between NPI and GVL" and that there was only "one additional
23 provision that has been negotiated since the contract was
24 entered."

25 In his declaration in support of the current motion
26 Mr. Brackmann declares that Ashwill was retained to procure a

1 buyer for the Property and that "Ashwill did, in fact, procure a
2 buyer, [GVL] and an agreement of purchase and sale was entered
3 into in the first week of January, 2007." This is all that was
4 required to earn the commission under the terms of the Agency
5 Agreement. He goes on to argue that the Sale Agreement provided
6 that the payment of commissions was conditioned upon satisfaction
7 of various conditions. However, Ashwill's entitlement to a
8 commission, if any, is based upon the Agency Agreement which was
9 between Debtor and Ashwill, not the Sale Agreement. Those terms
10 were not changed and no conditions were added thereto. Ashwill
11 was not, nor was Voit for that matter, a party to the Sale
12 Agreement. The Sale Agreement, therefore, could not have added
13 additional conditions to Movants' entitlement to commission under
14 the Agency Agreement.

15 Movants argue that the Sale Agreement did not become binding
16 until post-petition because various conditions precedent to GVL's
17 duty to buy had not been met. Accordingly, argue Movants, they
18 could not have earned their commission pre-petition and are thus
19 "disinterested" for purposes of § 327. However, as noted above,
20 Movants' sole obligation under the Agency Agreement was to find a
21 buyer "who is ready, willing and able to buy the Property at the
22 price and on the terms stated herein, or on any other price and
23 terms agreeable to Owner..." There is no dispute that Ashwill,
24 with or without the assistance of Voit, "procured" GVL as a buyer
25 of the Property prior to the filing of the petition. Thus,
26 either Movants earned the commission pre-petition based upon the

1 ultimate sale to GVL, or the post-petition sale somehow fell
2 beyond the scope of the initial Agency Agreement, in which case
3 they would be entitled to nothing. Either way, Movants are not
4 entitled to a post-petition administrative claim.

5 Movants also contend that the "Agency Agreement was not
6 resurrected until March 12, 2007..." However, in the Sales
7 Motion filed four days earlier on March 8, 2007, the Debtor seeks
8 authority to pay a commission to Movants. Mr. Hoffman declared
9 that he had "worked since the filing of the case to obtain court
10 approval of the employment of Ashwill and Associates. This has
11 not happened as of March 8, due to the need to prepare and file
12 pleadings to preserve and advance the sale." Clearly then, the
13 commission cannot be based upon the March 12, 2007 post-petition
14 resurrection of the Agency Agreement.

15 After all is said and done, the facts before the Court are
16 not importantly different than the facts of this Court's prior
17 case, In re HSD Ventures. Movants attempt to distinguish that
18 case on the ground that in HSD Ventures there was no attempt to
19 obtain authority to employ. However, the holding in HSD Ventures
20 was not a punishment for failure to obtain employment. Rather,
21 the Court held as a matter of law the brokers, as pre-petition
22 creditors, were unemployable -- "the realtors in this case are
23 pre-petition creditors and are therefore not disinterested as
24 § 327(a) requires. Therefore, they could not be employed by the
25 estate post-petition." 178 B.R. at 834. As in the case at hand,
26 the brokers argued that they had performed substantial post-

1 petition services. Also, as in the case at hand, several of the
2 sales agreements in HSD Ventures had been modified post-petition.
3 However, the Court found, as it does in this case, that the
4 brokers had done all that was necessary to earn their commissions
5 pre-petition. In HSD Ventures the Court concluded:

6 The issue posed by the debtor's argument can be phrased
7 several ways. One way is to ask whether a pre-petition
8 unsecured creditor may render post-petition services to
9 a bankruptcy estate without prior court authorization
10 of employment and thereby elevate a pre-petition
11 general unsecured claim to administrative expense
12 priority. Another way would ask if the same creditor,
13 by rendering post-petition services, may properly
14 present a claim for the reasonable value of those post-
15 petition services which, in this case, equals the
16 amount of the pre-petition general unsecured claim.
17 Regardless of how the issue is posed in this case,
18 where the pre-petition creditor is a real estate agent
19 or broker who has not been employed by the estate post-
20 petition [and cannot be so employed under 11 U.S.C. §§
21 327 because not "disinterested" within the meaning of
22 11 U.S.C. §§ 101(14)], the answer is that such a
23 creditor may not be allowed administrative expense
24 priority.

16 178 B.R. at 834.

17 In support of the current motion Movants submit several
18 declarations to the effect that numerous items had to be
19 addressed before the sale could be finalized. However, none of
20 the declarations contradict the Agency Agreement, extended to
21 September 2007 or not, under which the sole task Movants had to
22 accomplish to earn the commission was to obtain a buyer.

23 Accordingly, the Court finds that Movants are not entitled
24 to a commission as a post-petition administrative claim in
25 connection with the sale of the Property to GVL as approved in
26 the Sales Motion.

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CONCLUSION

For the reasons set forth above the Court denies Movants' motion for relief from the Sale Order.

IT IS SO ORDERED.

DATE: SEP 14 2007

A handwritten signature in black ink, appearing to read "Peter W. Bowie", is written over a horizontal line.

PETER W. BOWIE, Judge
United States Bankruptcy Court