

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

HUNGRY HORSE, LLC,

Case no. 16-11222 t11

Debtor.

**MEMORANDUM OPINION AND ORDER DENYING
MOTION TO REMOVE PILOT FROM UCC**

This matter came before the Court on the Debtor's motion to remove Pilot Travel Centers, LLC ("Pilot") from the Unsecured Creditors' Committee. Debtor asserts Pilot cannot be a member of the committee because its claim is fully secured. The Court addressed the motion at a related hearing on August 2, 2016,¹ and the parties consented to the Court considering certain bonds in connection with its ruling. Having considered the relevant law, evidence, and arguments, and being otherwise sufficiently advised, the Court finds that the motion is not well taken.

I. FACTS

For the limited purpose of ruling on the motion, the Court finds:

Debtor is a limited liability company doing construction work in Hobbs, New Mexico. Debtor filed this Chapter 11 case on May 17, 2016. On schedules E/F, Debtor listed Pilot as an unsecured creditor with a contingent, unliquidated, disputed claim of \$1,200,000. Debtor amended schedules E/F on July 21, 2016 but did not reclassify Pilot's claim. The United States Trustee ("UST") appointed Pilot as a member of the committee on July 29, 2016.

Debtor was the primary contractor to build a new Pilot travel center in Hobbs, New Mexico. Pre-petition, Pilot filed a lawsuit against the Debtor in the United States District Court for the

¹ Parties who appeared at the hearing were noted on the record.

District of New Mexico, alleging breach of the construction contract, negligence, and violation of the New Mexico Construction Industry Licensing Act. Debtor filed counterclaims against Pilot. The lawsuit was pending when Debtor filed this bankruptcy case.

According to Debtor, Pilot also asserted claims against Debtor's surety company, National American Insurance Company ("NAIC"). NAIC issued payment and performance bonds to Debtor in connection with the truck stop project. The bonds were issued on the standard form developed by the American Institute of Architects known as "Document A312." The payment bond provides that if Debtor is unable to pay its subcontractors, NAIC will pay for labor, materials, and equipment used in connection with the construction contract. The performance bond provides that if Debtor is unable to finish construction, NAIC will arrange for the performance and completion of the contract. Neither bond contains language granting a lien or security interest in favor of Pilot or any other party. The Court understands that Debtor may have completed its work on the travel center. If so, Pilot's claims against NAIC may be subject to meritorious defenses.

II. DISCUSSION

The UST has the sole authority to appoint a committee of unsecured creditors. 11 U.S.C. § 1102(a)(1).² The Court may, upon request, order the UST to change the membership of the UCC if a change is necessary to ensure adequate representation of creditors or equity holders. § 1102(a)(4). Such relief is granted sparingly, usually when the inclusion of a particular member will adversely affect the creditor body generally. *In re ShoreBank Corp.*, 467 B.R. 156, 163-164 (Bankr. N.D. Ill. 2012) (collecting cases).

Debtor asks the Court to remove Pilot from the committee because, based on the bonds, Pilot is a secured creditor. This argument lacks merit, for several reasons. First, Debtor averred

² Unless otherwise noted, all statutory reference are to 11 U.S.C.

in its original and amended schedules that Pilot is an unsecured creditor. It is inconsistent to argue now that Pilot is a secured creditor. While Debtor's bankruptcy schedules are not dispositive on the issue whether Pilot is secured or unsecured, they show how Debtor viewed Pilot's claim before it was appointed to the committee.

Second, the bonds do not secure Pilot's claim. The Bankruptcy Code does not define "secured creditor." Most courts look to § 506(a)(1) to determine whether a claim is secured. *In re Singletary*, 354 B.R. 455, 468 (Bankr. S.D. Tex. 2006); *In re Lawless*, 2014 WL 7358945, *1 (Bankr. M.D. Ala.); *In re Cahill*, 503 B.R. 535, 538 (Bankr. D.N.H. 2013); *In re Scotto-DiClemente*, 459 B.R. 558, 564 (Bankr. D.N.J. 2011). Section 506 provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim." A "lien" is defined under § 101(37) as a "charge against or interest in property to secure payment of a debt or performance of an obligation." Some courts also look to whether the creditor has a "security interest," which is defined under § 101(51) as a lien created by an agreement. *See, e.g., In re Hardigan*, 2012 WL 9703097 (Bankr. S.D. Ga.).

Nothing in either bond grants Pilot a lien on property in which the estate has an interest. Instead, the bonds are third party guarantees, ensuring that subcontractors will be paid and the project will be completed. *See Hanover Ins. Co. v. Blueridge General, Inc.*, 2013 WL 4590568, *4 (E.D. Va.) ("Under a payment bond, the surety guarantees that subcontractors, laborers, and materialmen will be paid in the event of the principal's default."); *Paul Reed Const. & Supply, Inc. v. Arcon, Inc.*, 2012 WL 6086915, *7 (D. Neb.) ("[a] labor and material payment bond guarantees the owner that all bills for labor and materials contracted for and used by the contractor will be paid by the surety if the contractor defaults"); *Allen Engineering Contractor, Inc. v. U.S.*, 611 Fed. Appx. 701, 704 (Fed. Cir. 2015) ("Under a performance bond, a surety guarantees that the project

will be completed if a contractor defaults.”). A guarantee to pay a debt does not turn an unsecured claim into a secured claim. *See, e.g., In re Hemsing*, 75 B.R. 689, 691 (Bankr. D. Mont. 1987) (“The guaranty of payment is a promise to pay money, and is not ‘security’ within the definition of the Bankruptcy Code”); *In re Pedigo*, 283 B.R. 493, 498 (Bank. E.D. Tenn. 2002) (citing cases and noting: “A guaranty or a payment bond is not property subject to the beneficiary’s security interest. It is not collateral that makes the beneficiary’s claim ‘secured’ for bankruptcy purposes.”); *Prime Const. Co., Inc. v. Seattle-First Nat. Bank*, 558 P.2d 274, 21 (Wash. 1977) (Miller Act type bond claims are not liens against property of another); *U.S. for Use and Benefit of Consol. Elec. Distributing, Inc. v. J.D. Grainger Co., Inc.*, 945 F.2d 259, 264 (9th Cir. 1991) (letter asserting claim against surety bond did not create a choate lien); *In re Lloyd*, 15 F. Cas. 711 (W.D. Penn. 1877) (the claim of a creditor on a bond is not a secured claim for purposes of bankruptcy law).³

Finally, even if Pilot had an interest in NAIC’s property by virtue of its bond claim, Pilot would be a secured creditor of that entity, not the Debtor. Committee members must hold unsecured claims against the Debtor, which Pilot does.

The bonds do not give Pilot a secured claim against NAIC or the Debtor, so there is no basis upon which to remove Pilot from the UCC.

IT IS THEREFORE ORDERED that that Debtor’s motion to remove Pilot from the UCC is denied.

³ *Cf Matter of Monarch Tile, Inc.*, 219 B.R. 622 (Bankr. N.D. Ala. 1998) (bond claimant, who was unsecured creditor, was not entitled to preferential treatment over other unsecured creditors); *In re Diversified Transp. Resources, Inc.*, 88 B.R. 635, 643 (Bankr. D.N.J. 1988) (laborers and materialmen making claims against surety were “general unsecured creditors whose claims may have been entitled to some priority”); *In re Levitz Elec., Inc.*, 100 B.R. 603, 603 (Bankr. S.D. Fl. 1989) (noting that the sureties paid the claim “of an unsecured creditor on behalf of the debtor who had ... filed a claim against the payment bond.”).



Hon. David T. Thuma
United States Bankruptcy Judge

Entered: August 10, 2016

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