UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: Twin Pines, LLC

Debtor. Case No.: 19-10295-j11

ORDER RESULTING FROM FINAL HEARING ON DEBTOR'S AMENDED MOTION FOR NUNC PRO TUNC APPROVAL OF SMALL BUSINESS SBA LOANS, and DETERMINATION THAT THE SBA LOANS ARE UNSECURED, NON-PRIORITY DEBT PURSUANT TO 11 U.S.C. SECTIONS 364(a) and (b)

On March 30, 2021, the Court held a final evidentiary hearing on Debtor's Amended Motion for Nunc Pro Tunc Approval of Small Business SBA Loans and Determination that the SBA loans are Unsecured, Non-Priority Debt Pursuant to 11 U.S.C. Section 364(a) and (b) (the "Amended Motion"). Doc. 243, 247. Creditor First Alamogordo Bancorp of Nevada, Inc., d/b/a First National Bank ("First National Bank") objected to Debtor's Amended Motion (the "Objection"). Doc. 253. The parties and counsel who appeared at the final hearing are noted in the record. Having considered the evidence and being fully apprised of the facts and the law, the Court will sustain the Objection and deny the Amended Motion.

FINDINGS OF FACT

Debtor filed its chapter 11 small business petition for relief (the "Original Petition") on February 12, 2019. *See* 11 U.S.C.[1] On March 11, 2020, the governor of the State of New Mexico declared a public health emergency and on March 13, 2020, the President of the United States "declared a national emergency due to the COVID-19 pandemic." *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 337 (Bankr. S.D. Fla. 2020); New Mexico Department of Public

[1] All future references to "Code," "Section," and "§" are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated.

Health, Coronavirus Disease 2019 in New Mexico, https://cv.nmhealth.org/public-health-orders-and-executive-orders/ (last visited March 30, 2021). "On or about March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, P.L. 115-136 (the 'CARES Act')." *In re Roman Cath. Church of Archdiocese of Santa Fe*, 615 B.R. 644, 648–49 (Bankr. D.N.M. 2020). "The CARES Act is intended, among other things, to provide stimulus to the economy by distributing approximately $2.3 trillion to various industries, programs, and individuals."[2] Included in the CARES Act is funding for "Economic Injury Disaster Loans" ("EID loans") for small businesses struggling due to the COVID-related restrictions. EID loans are administered by the Small Business Administration (the "SBA"). *See* SBA, COVID-19 Relief Options, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/covid-19-economic-injury-disaster-loan (last accessed April 1, 2021).

In April 2020, Debtor applied online for an EID loan. In early July 2020, the SBA deposited $2,000 into Debtor's debtor-in possession account; Debtor did not sign any documents related to that loan. John Pacheco, Debtor's principal, understood that the $2,000 did not have to be repaid to the SBA. In fact, the $2,000 was advanced as an EID loan. On July 24, 2020, without completing any other application process, Mr. Pacheco received via email a promissory note and "loan authorization and agreement" (collectively, the "Loan Documents") related to an EID loan of $20,900 with instructions to sign and return them to the SBA within two months. Mr. Pacheco signed the documents on Debtor's behalf and, on July 28, 2020, $20,900 was deposited in Debtor's debtor in possession account. The Loan Documents provide that the loan is unsecured and that Debtor must repay the $20,900 loan, plus interest at 3.75%, with payments of

[2] In March 2021, Congress passed the COVID-19 Bankruptcy Relief Extension Act of 2021, which extends certain bankruptcy-related provisions of the CARES Act, including the temporary increase of the debt limit for small business debtors to March 2022. PL 117-5, March 27, 2021, 135 Stat 249.

$102 per month beginning in July 2021. Hereafter, the $2,000 and $20,900 EID loans are called the "EID Loans." EID loan funds may be used as "working capital to alleviate economic injury caused by disaster occurring in January . . . 2020 and continuing thereafter. . . ." There is no provision for forgiveness of an EID loan.

Mr. Pacheco was not aware until sometime in the fall of 2020 that the Bankruptcy Code requires Court approval of post-petition credit incurred outside the ordinary course of business. *See* § 364(b). Debtor filed a motion for nunc pro tunc approval of the loans on October 12, 2020 and amended the motion on February 17, 2021. In the Amended Motion, Debtor requests that the Court 1) approve the EID Loans nunc pro tunc under § 364(b) and 2) allow the SBA a non-priority, unsecured claim that will be repaid under Debtor's plan of reorganization. Consistent with the Court's order entered on February 12, 2021, Debtor sent a copy of the Amended Motion together with notice of the deadline to object and the final hearing on the Amended Motion to the Small Business Administration. Doc. 244. The SBA neither filed a claim nor objected to Debtor's proposed treatment of the EID Loans.

DISCUSSION

"Generally, a debtor may only borrow money outside the ordinary course of business if authorized by the court." *In re Nilhan Devs., LLC*, 620 B.R. 385, 403 (Bankr. N.D. Ga. 2020); § 364(b).[3] By filing the Motion, Debtor concedes that the $20,900 EID Loan was not obtained in the ordinary course of business and that Court approval was required under the Code. *See* § 364(a), (b).

In 2020, the United States Supreme Court stated that "Federal courts may issue *nunc pro tunc* orders, or 'now for then' orders . . . to 'reflect the reality' of what has already

[3] *See also In re Destileria Nacional, Inc.* (Bankr. D.P.R. Feb. 5, 2021) (stating that applications for loans under the CARES Act are "clearly not in the ordinary course of business").

occurred . . . ." *Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696, 701 (2020) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990)). "Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court." *Acevedo*, 140 S.Ct. at 701 (quoting *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 390 (1912)). The Supreme Court went on to state that the court cannot, through a nunc pro tunc order, "make the record what it is not." *Acevedo*, 140 S.Ct. at 701 (quoting *Jenkins*, 495 U.S. at 49). Nunc pro tunc "orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact." *Acevedo*, 140 S.Ct. at 701 (quoting *United States v. Gillespie*, 666 F.Supp. 1137, 1139 (ND Ill. 1987)).

Some courts have concluded that *Acevedo* stands for the proposition that federal courts may issue nunc pro tunc orders only "to reflect events that actually happened." *In re Nilhan Devs., LLC*, 620 B.R. 385, 403 (Bankr. N.D. Ga. 2020).[4] In these courts' view, *Acevedo* states a categorical rule that severely limits use of nunc pro tunc orders.

Debtor argues that the *Acevedo* holding pertained only to the use of nunc pro tunc orders to retroactively restore jurisdiction where it no longer existed and, therefore, *Acevedo* does not state a categorical rule prohibiting nunc pro tunc orders. Debtor's position has some support in

[4] *See also Rohe v. Wells Fargo Bank, N.A.*, 988 F.3d 1256, 1262 (11th Cir. 2021) (stating that "a *nunc pro tunc* order cannot be used to make a court action effective as of an earlier date at which the court did not actually take any relevant action"); *In re Roberts*, 618 B.R. 213, 217 (Bankr. S.D. Ohio 2020) ("[T]he retroactive legal effect of a *nunc pro tunc* order should be reserved for those occasions when the Court has, in fact, already passed judgment that is not reflected in the record."); *In re Keener*, No. 20-60291, 2020 WL 6338023, at *5 (Bankr. N.D. Ohio Oct. 9, 2020) ("The court also does not have authority to grant Debtor *nunc pro tunc* relief because the discharge order was not entered by mistake."); *In re Benitez*, No. 8-19-70230-REG, 2020 WL 1272258, at *1 (Bankr. E.D.N.Y. Mar. 13, 2020) ("The holding in *Acevedo* raises serious questions about the use of *nunc pro tunc* relief for purposes other than to reflect an event that has already occurred but is not accurately reflected in the court's records.").

case law. *See, e.g.*, *In re Merriman*, 616 B.R. 381, 392 (9th Cir. BAP 2020) (concluding that *Acevedo* merely held that "nunc pro tunc orders may not create jurisdiction where none exists").[5]

The Court need not determine whether *Acevedo* precludes the Court from granting the relief Debtor seeks because, even if the Court has authority to issue an order approving Debtor's EID Loans nunc pro tunc, it would not do so. In a pre-*Acevedo* opinion, the Tenth Circuit Court of Appeals held that "nunc pro tunc approval [of employment of an attorney under § 327] is only appropriate in the most extraordinary circumstances." *In re Schupbach Invs., L.L.C.*, 808 F.3d 1215, 1220 (10th Cir. 2015) (quoting *In re Land*, 943 F.2d 1265, 1267–68 (10th Cir. 1991)). The "extraordinary circumstances" requirement has been applied in the context of post-petition financing as well. *See, e.g.*, *In re Nilhan Devs., LLC*, 620 B.R. 385, 403–04 (Bankr. N.D. Ga. 2020) (stating, "[e]ven if no creditors were actually harmed by the unauthorized financing as it turned out, [the lender] failed to demonstrate extraordinary facts existed to prevent it from following the explicit mandates of the Code" in § 364(b)).[6] Other courts have also considered whether the court would have approved the loan if a motion for approval had been timely made, whether creditors have been harmed by the debtor's use of the loan, and whether the debtor and lender acted in good faith in the transaction. *See, e.g.*, *In re Ohio Valley Amusement Co.*, No. 03-50356, 2008 WL 5062464, at *5 (Bankr. N.D.W. Va. Dec. 1, 2008).

Here, Debtor has not shown that extraordinary circumstances exist that justify nunc pro tunc approval of the EID Loans. Even if, as Debtor argues, there was some urgency to apply for the EID loan funds before they were all distributed, Debtor could have sought court approval of

[5] *See also In re Parker*, 624 B.R. 222, 236 (Bankr. W.D. Pa. 2021) ("The Supreme Court's opinion does not preclude *nunc pro tunc* orders on a *per se* basis. Rather, the analysis as to whether the applicable court can issue a *nunc pro tunc* order is nuanced, and is dependent upon the facts and law concerning the particular relief being sought.").

[6] *In re Ohio Valley Amusement Co.*, No. 03-50356, 2008 WL 5062464, at *5 (Bankr. N.D.W. Va. Dec. 1, 2008); *In re Blessing Indus. Inc.*, 263 B.R. 268, 273–74 (Bankr. N.D. Iowa 2001).

the EID Loans in the approximately three months between the application date and the date Mr. Pacheco received the Loan Documents. Moreover, Debtor had two months to return the Loan Documents. If Debtor had perceived an urgent need to obtain Court approval of the borrowings quickly, Debtor could have complied with § 364(b) by requesting an expedited hearing, which the Court regularly provides when warranted, upon receipt of the Loan Documents without jeopardizing its receipt of the funds. The fact that "a transaction has a tight timeframe does not excuse a party from seeking court approval for financing; that a debtor needs funds on an expedited basis does not authorize it to act first and seek approval retroactively later." *In re Nilhan Devs., LLC*, 620 B.R. at 404.

The only other justification Debtor presents for its failure to seek the Court's approval of its EID Loan application was that Mr. Pacheco did not know that approval was required. Lack of knowledge of the Code's requirements does not constitute an extraordinary circumstance. *In re Schupbach Invs., L.L.C.*, 808 F.3d at 1220 ("[S]imple neglect will not justify nunc pro tunc approval." (quoting *Land*, 943 F.2d at 1267–68)).[7] Because Debtor has not shown that there were extraordinary circumstances precluding a motion for approval of the EID Loan, the Court need not address whether the Court would have approved the EID Loan, the harm to creditors by Debtor's use of the EID Loan, or Debtor's good faith in seeking the EID Loan. In addition, the Court need not address the treatment of the EID Loan because the SBA has not filed a claim and Debtor has not yet filed a plan proposing treatment of the EID Loan.

[7] *See also In re Augusta Apartments, LLC*, No. 10-303, 2013 WL 3358002, at *2 (Bankr. N.D.W. Va. July 3, 2013), ("[S]imple oversight or neglect in timely filing an employment application does not warrant retroactive approval of employment.") *aff'd sub nom. Kohout v. U.S. Tr.*, 513 B.R. 675 (N.D.W. Va. 2014), *aff'd,* 610 F. App'x 244 (4th Cir. 2015).

CONCLUSION

For the foregoing reasons, the Court will sustain the Objection and deny Debtor's Amended Motion.

WHEREFORE,

Debtor's Amended Motion for Nunc Pro Tunc Approval of Small Business SBA Loans and Determination that the SBA loans are Unsecured, Non-Priority Debt Pursuant to 11 U.S.C. Section 364(a) and (b) (Doc. 243, 247) is DENIED.

IT IS SO ORDERED.

Robert H. Jacobvitz
United States Bankruptcy Judge

Date Entered on Docket: April 1, 2021

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