

IN RE:

IN BANKRUPTCY NO.:

TAK COMMUNICATIONS, INC.,

MM11-91-00031

Debtor.

FILED

NOV 16 1994

CLERK, U.S.
BANKRUPTCY COURT
CASE NO.

IN RE:

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TAK BROADCASTING CORPORATION,

MM11-91-00032

Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On January 3, 1991, Tak Communications, Inc. and Tak Broadcasting Corporation (collectively "Tak") filed this chapter 11 bankruptcy. Tak is in the broadcasting business and owns and operates several television and radio stations.

2. On November 10, 1992, the unsecured creditors committee (the "committee") and the senior lenders filed a joint plan of reorganization (the "plan"). See Eskridge Ex. 2.

3. The plan provided for the transfer of Tak's FCC license to a single reorganized debtor. After receiving approval for the transfer, ownership of Tak was to be conveyed to the unsecured creditors. The plan's effective date was to be ten days following the FCC approval. See Eskridge Ex. 2.

4. Section 32.13 of the plan provides that:

The Plan shall not be effective and shall be deemed withdrawn if (a) the Confirmation Date does not occur on or before June 30, 1993 or (b) the Effective Date does not occur on or before the first anniversary of the entry of the Confirmation Order; provided, however, that any of such

occurrences may be waived by a majority of the Senior Subordinated Claims. In the event that the Plan is deemed withdrawn, the Plan and the Confirmation Order shall be void and be deemed to be of no force or effect.

5. Under section 25.1 of the plan, an operating agent was to operate Tak from the confirmation date until the plan's effective date.

6. Michael Eskridge ("Eskridge") was selected from among several candidates to be the operating agent. At a hearing on January 6, 1993, this court found Eskridge qualified to serve as operating agent. Some details of the employment agreement were unresolved at the time of the hearing.

7. On January 8, 1993, the plan was confirmed and Eskridge began serving as Tak's operating agent. He continued to serve without a formal operating agent agreement for several months thereafter.

8. Tak filed a formal operating agent agreement between Eskridge and Tak (the "agreement") with this court in July 1993. The agreement had been drafted by the committee. It was executed by Tak and Eskridge sometime in July 1993. See Eskridge Ex. 8. An unexecuted draft of an agreement, which was substantially similar to the final agreement, had been presented to this court prior to confirmation on January 6, 1993. See Eskridge Ex. 4.

9. The agreement provided that Eskridge was to serve for a specified employment term. Section 1.2 of the agreement provides:

Subject to the provisions of Section 2.4 hereof and the Confirmation Order, "Employment Term" shall mean the period from the Confirmation Date up to and including the Effective date; provided, however, that in no event shall such Employment Term be longer than three years from and after the Confirmation Date.

The agreement does not define "Confirmation Date" or the "Effective Date." Capitalized terms not defined by the agreement have the meanings ascribed to them by the plan. The plan defines confirmation date as "the date at which the confirmation order is entered." All parties anticipated that Eskridge would continue to be employed by the reorganized debtor under a different agreement if the confirmed plan became effective.

11. Eskridge's salary was \$275,000 per year for his first 18 months of service and he was eligible to receive a bonus. Section 2.3(b) of the agreement provides:

Eskridge shall be entitled to receive, and the Debtors shall pay no later than fifteen (15) days following the Debtors' receipt of audited financial statements for the prior fiscal year, or as soon thereafter as practicable, an annual bonus (the "Bonus") in respect of each fiscal year of the Debtors in an amount (not to exceed one hundred percent (100%) of Eskridge's salary earned in such fiscal year) upon approval of the Bankruptcy Court or pursuant to applicable provisions of the Confirmation Order, if any; provided, however, that in no event shall the Bonus for the first year of the Employment Term be less than forty percent (40%) of Eskridge's salary if such fiscal year's goals are met. In determining the amount of such Bonus, if any, the following factors and criteria shall be applied: (i) the Debtors' performance in relation to the business plan for such fiscal year; (ii) broadcast cash flow; (iii) cost management; and (iv) with respect to each station and in the aggregate for all stations, the share of market revenue and audience share. At the beginning of each of the Debtors' fiscal years (or as soon as practicable thereafter), Eskridge shall present to the Executive Committee for its review and approval, in its good faith judgment, an annual business plan for such fiscal year. Without limiting the foregoing, in determining the amount of such Bonus for a particular fiscal year, the following additional criteria and parameters shall be applied . . .

13. Eskridge could be terminated under the agreement either "for cause" or "without cause." The circumstances constituting removal for cause are found in section 1.3 of the agreement. None

are applicable to this case.

14. The agreement also contains an integration clause which provides:

This Agreement, together with all documents referred to herein, constitute the entire agreement and supersede all other prior agreements and undertakings, both written and oral, among the parties with respect to the subject matter.

15. The FCC did not approve the license transfer to the reorganized debtor within one year after the confirmation order. Nor is there any evidence that the FCC approval of the transfer was ever obtained. On January 7, 1994, a majority of the holders of the bank claims and a majority of the holders of the senior subordinated claims executed a Notice of Extension and moved this court to extend the deadline for the occurrence of the effective date. That motion was denied on January 31, 1994. On February 1, 1994, Tak resumed the responsibilities as a debtor in possession which it had surrendered upon confirmation of the plan.

16. On February 1, 1994, Tak adopted a corporate resolution removing Eskridge as a corporate officer. Eskridge continued to be employed by Tak and continued to receive the same salary he had previously received while he had operated Tak under the plan.

17. On April 21, 1994, Tak sent a letter to Eskridge terminating his employment by Tak. See Debtor's Ex. 22.

18. Eskridge was terminated after the confirmation date and before any effective date had been reached within three years after the confirmation date.

19. Eskridge was terminated without cause.

20. Section 2.4(c) of the agreement provides certain severance benefits for termination without cause. The section

provides:

The Debtors may terminate Eskridge's employment under this Agreement without Cause and other than by reason of his death or disability; provided, however, that, unless otherwise ordered by the Bankruptcy Court, the Debtors shall be obligated (i) to pay Eskridge his salary for the lesser of twelve (12) months or the remainder of the employment term, (ii) to pay Eskridge a pro rata amount of his Bonus for the current fiscal year, (iii) to provide continued coverage under the Debtors' medical, dental, life insurance and total disability benefit plans or arrangements with respect to Eskridge for a period not less than the period described in subsection (i) of this section 2.4(c), and (iv) to make the Standard Termination Payments. The Debtors' obligation to provide continued coverage in accordance with subsection (iii) of this Section 2.4(c) shall be subject to mitigation to the extent that substantially similar benefits are provided by any successor employer during such continuation period.

21. After his termination, Eskridge requested to be paid the severance benefits provided by the agreement. Tak offered to pay only those severance payments it usually made to other employees.

22. Following Tak's refusal to pay benefits provided by the agreement, Eskridge filed a request for the allowance and payment of the agreement's severance benefits as an administrative expense in this bankruptcy case. The application sought the amount of \$620,042, plus interest at the statutory rate under New York law of nine percent. Only Tak objected to the application.

23. Eskridge's application purported to be calculated on one year's salary at \$275,000, one year supplemental insurance benefits provided for in Section 2.3(c)(iv) of the agreement at \$51,600, unused vacation at \$26,442, a bonus for fiscal year 1993 at 73% consisting of his base salary at \$200,000, and a pro rata bonus for 1994 at one-third of 73% of his 1994 salary at \$67,000. See Eskridge Ex. 20.

24. All of Eskridge's service to Tak was within the first 18 months of the employment term. All salary earned has been paid. There has been no evidence of vacation earned or taken.

25. A 1993 audited financial statement of Tak has been prepared, but the evidence is silent on when it was received by Tak. See Debtor's Ex. 16. The financial statement is dated April 15, 1994 as to all items except note 14. Note 14 is dated June 8, 1994.

26. No audited financial statement for 1994 is in evidence. Nor is it likely that one would have been prepared prior to the close of 1994.

27. Tak did not meet the stated goals in the business plan. Under the business plan, total revenue was to be \$59,021,000 and total costs was to be \$37,962,000. See Eskridge Ex. 16. The audited financial statement shows revenue at \$58,214,500 and total costs at \$40,921,908. See Debtor's Ex. 15. Eskridge's calculations to the contrary are not based on the audited financial statement of Tak. For that and other reasons, the Eskridge calculations substantially lack credibility.

28. As calculated from the audited financial statements, Tak's broadcast cash flow has decreased approximately 15.3%. See Debtor's Ex. 25.

29. With regard to the stations' market and audience share, the record is mixed. Some stations performed better than expected while others performed worse than expected. See Debtor's Ex. 17.

Conclusions of Law

1. The entire agreement under which Eskridge was employed was a contract between Eskridge and Tak. No other party had rights

or duties under the agreement.

2. Under section 32.13 of the plan, the plan and confirmation order became void one year after confirmation. The agreement was not voided by the voiding of the plan. The agreement extended the position of operating agent beyond the one year term detailed in the plan. Eskridge was employed under the agreement to serve from January 8, 1993 until the effective date or three years after the confirmation date, whichever came first.

3. The doctrine of frustration of purpose is not applicable to the facts of this contested matter. See Chicago, M.S.P. & P.R. v Chicago & N.W. Trans., 82 Wis 2d 514, 523 (1977). At the time the agreement was executed, the plan and its voiding provision had been confirmed for almost six months. The possibility of the plan becoming void was foreseeable. By extending the employment term, the parties assumed the risk of its occurrence. The extension appears to be part of the bargain between the parties to the agreement. It is quite possible that the parties anticipated that the plan itself would be extended either on consent or court ordered modification to defer the effective date. One such extension was sought. This anticipation may serve to explain the agreement's provisions regarding the operating agent's term of employment. In any event, the voiding of the plan was not an occurrence of an event the non-occurrence of which was the basic assumption on which the contract was made. RESTATEMENT (SECOND) OF CONTRACTS §265.

4. The integration clause makes the agreement the final expression between the parties regarding the operating agent and, under New York law, makes the agreement completely integrated.

Manufacturers Hanover Trust Co. v Yanakas, 7 F3d 310, 315 (2d Cir 1993). Because the agreement is completely integrated, extrinsic evidence attempting to show that the parties intended for the agreement to be void if the plan became void cannot vary or permit escape from the terms of the contract. Id.

5. Neither termination nor the interpretation of the agreement and its severance provisions required notice and hearing before this court. "[T]he apparent purpose of requiring notice only where the use of property is extraordinary is to assure interested persons of an opportunity to be heard concerning transactions different from those that might be expected to take place so long as the debtor in possession is allowed to continue normal business operations under 11 USC §1107(a) & §1108." In re James A. Phillips, Inc., 29 BR 391, 394 (Bankr D Conn 1989). As of January 6, 1993, all parties were aware of the agreement. The agreement was drafted by the committee. Until this point, no creditor objected to the agreement. Given the lack of objection, as to these creditors the transaction was within what was expected. Nor can it be said that any of the creditors were attempting to gain advantage over the other creditors, therefore, notice and hearing were not required for the severance portion of the agreement.

6. Under section 2.4(c) of the agreement, this court has the authority to determine the amount, if any, of the operating agent's severance benefits.

7. Under section 2.3(c) of the agreement, the only severance available to Eskridge is that available by the agreement. Because Eskridge was terminated during the agreement's employment term

without cause, he is entitled to receive the following severance benefits:

- a. \$275,000 representing the one year's salary;
- b. \$51,600 representing one year of supplemental insurance coverage;
- c. a bonus for the 1993 fiscal year.

8. The bonus provisions of the agreement are not unreasonable under the circumstances. Under the agreement, Eskridge is entitled to a bonus 15 days after Tak's receipt of an audited financial statement. It is proper to infer that the 1993 audited financial statement of Tak was received by Tak three days after the last entry, thereon, to wit June 11, 1994. Because the goals of the business plan were not met, broadcast cash flow decreased, and the results concerning the other two criteria were mixed, Eskridge is entitled to a bonus of no more than 20% of his salary or \$55,000.

9. Because no audited financial statement has been received for 1994, Eskridge is not entitled to receive a bonus for that year.

10. Because there has been no evidence of any vacation earned or taken, Eskridge is not entitled to receive any amount for accrued or unpaid vacation.

11. Under New York law, Eskridge is entitled to receive prejudgment interest calculated at nine percent per annum from the earliest date the cause of action existed. NY CPLR §5004; NY CPLR §5001(b).


12. Eskridge is entitled to the payment of \$326,000 plus nine percent interest from April 21, 1994 for the salary and

supplemental benefits portions of his claim. Eskridge is also entitled to a bonus of \$55,000 plus nine percent interest from June 26, 1994, on the bonus amounts.

13. The amounts due Eskridge under the agreement are reasonable, and are the actual, necessary costs and expenses in preserving the estate. 11 USC §503(b)(1)(A) (1994); In re Chicago Lutheran Hospital, 75 BR 854, 857 (Bankr ND Ill 1988). The payment of the agreement's severance benefits is approved as an administrative expense under section 503(b)(1)(A) of the Bankruptcy Code.

14. An order may be entered consistent with these findings of fact and conclusions of law.

Dated November 16, 1994.



ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

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ORDER

This court having this day entered its Memorandum Decision in the above-entitled matter;

IT IS HEREBY ORDERED that Michael Eskridge is entitled to the payment, as an administrative expense under 11 USC §503(b)(1)(A), the sum of \$399,718.50.

Dated November 16, 1994.



ROBERT D. MARTIN

UNITED STATES BANKRUPTCY JUDGE

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SERVICE LIST

Copies of this Findings of Fact and Conclusions of Law and Order were mailed to the following parties on November 16, 1994:

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