

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
CENTRAL STEEL TUBE COMPANY, : Case Nos. 83-856-D H
and THE DONOVAN WIRE & IRON : 83-857-D H
COMPANY, :
Debtors. : Chapter 11

- - - - -
**ORDER--APPLICATION TO DEMONSTRATE IMPLEMENTATION
OF THE CONFIRMED PLANS, REQUEST FOR PAYMENT OF
ADMINISTRATIVE EXPENSE, AND APPLICATION TO WITHDRAW
AS ATTORNEY FOR THE REORGANIZED DEBTOR**

On September 15, 1988, a hearing was held on the following matters: 1) application to demonstrate implementation of the confirmed plans; 2) request for payment of administrative expense; and 3) application to withdraw as attorney for the reorganized debtor. The following attorneys appeared on behalf of their respective clients: Michael P. Mallaney for the reorganized debtor Central Steel Tube Company (hereinafter "Central Steel"); Carlton G. Salmons and Lee H. Gaudineer for Kenneth E. Weaver, Treasurer of Clinton County, Iowa, James Vining, Sheldon Rittmer and Kenneth Ruggberg, Clinton County Board of Supervisors (hereinafter "Clinton County"); Thomas Kiriakos for the Unsecured Creditor's Committee of Central Steel; and Mark D. Walz and Elizabeth E. Goodman for Kal & Co. (hereinafter "KAL"). At the conclusion of said hearing, the Court took the matters under advisement

upon a briefing deadline of October 15, 1988. Briefs were timely filed and the Court considers the the matters fully submitted.

These are core proceedings pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings, arguments of counsel, evidence presented and briefs submitted, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACTS

1. On June 14, 1983, Central Steel Tube Company (hereinafter "Central Steel") filed a Chapter 11 petition.

2. Clinton County was a scheduled creditor in Central Steel's Chapter 11 proceeding and received notice of proceedings including the bar date for filing proofs of claims and the confirmation hearing.

3. On January 25, 1985, Kenneth E. Weaver, Treasurer of Clinton County, Iowa, filed a proof of claim for \$453,874.21 in delinquent property taxes due by Central Steel. On April 26, 1985, Weaver filed a second proof of claim for \$462,396.73.

4. On May 13, 1985, Central Steel filed an objection to Clinton County's claims.

5. On November 14, 1985, Central Steel filed a second amended disclosure statement and second amended plan of reorganization (hereinafter "Plan").

6. On November 5, 1985, the Court held a confirmation hearing on the Plan. Donald Neiman appeared on behalf of Clinton County and the Clinton County Treasurer.

7. Central Steel's objection to Clinton County's claims was settled by the parties, through their respective counsel, by the stipulation on the record at the confirmation hearing of the treatment said claims would receive under the Plan.

8. The parties agreed to the allowance of Clinton County's pre-petition tax claim in the amount of \$418,570.00 payable as follows:

One-sixth of that amount will be payable on the effective date and the balance will be payable in annual installments together with interest thereon at the rate of 11 per cent and will be paid annually commencing the first anniversary of the effective date.

9. The parties agreed to the allowance of Clinton County's post-petition, pre-confirmation tax claim in the amount of \$131,000.00 payable as follows:

\$18,895.00 payable on the effective date. The balance will be payable in 12 equal installments without interest, the first installment to commence then January 1, 1986.

10. The settlement made at the confirmation hearing was approved by Clinton County.

11. Clinton County did not file any objection to Central Steel's Plan.

12. On November 27, 1985, the Court entered an Order confirming Central Steel's Plan which incorporated the stipulated settlements of Clinton County's claims.

13. The Order of Confirmation provided in part that:
The Debtors be and hereby are, discharged and released from any and all debts which arose before the date of confirmation of the Plans...

And

[T]hat all property assets, and effects of the Debtors, as debtors-in-possession, be and hereby are revested in the Debtor, free and clear of all liens, claims, and interests of creditors and of equity security holders, except to the extent liens exist in favor of J. L. International as contemplated by the Central Plan....

14. In Central Steel's amended disclosure statement, second amended disclosure statement and Plan, as confirmed on November 27, 1985, Clinton County's claims are treated as tax priority claims, not as secured claims. No provision is made for the retention of a lien to secure the payment of Clinton County's claims in either the Plan or the confirmation order.

15. The alleged tax liens which are the subject of this action accrued pre-confirmation.

16. Clinton County did not appeal the Order confirming Central Steel's Plan.

17. Central Steel's second amended disclosure statement and Plan provided for Central Steel's reorganization and emergence from Chapter 11 as a viable business entity rather

than a liquidating corporation.

18. Pursuant to the terms of its confirmed plan, Central Steel made the following post-confirmation payments to Clinton County:

	<u>Date</u>	<u>Amount</u>
a.	1/7/86	\$88,656.66 (\$18,895 & \$69,761.66 which is 1/6 of \$418,570)
b.	1/28/86	\$ 9,390.91 (1/12 of \$131,000 less \$18,895)
c.	2/24/86	\$ 9,390.91 (1/12 of \$131,000 less \$18,895)

19. After making the above three payments, Central Steel went into default and remains in default on its obligations under its confirmed Plan. In addition, Central Steel is currently without assets.

20. Manufacturers National Bank of Detroit, the Royal Bank of Canada, and Bank Hapoalim made a post-confirmation loan to Central Steel secured by all of its assets, including its real property. KAL is a Michigan co-partnership formed to act as a nominee for Manufacturers National Bank of Detroit.

21. KAL, acting as nominee for Manufacturers Bank of Detroit and as agent for the three banks and the second mortgagee, J. L. International, was the recipient of a conveyance in lieu of foreclosure of certain real property in Clinton County, Iowa, from Central Steel on or about March 13, 1987, by warranty deed.

22. On October 15, 1987, Clinton County commenced an adversary proceeding against Central Steel and KAL (hereinafter "Adversary No. 87-0213") and requested the Court to declare and order that: 1) Central Steel is in violation of its Plan; 2) Central Steel's Plan be amended or revised to exclude the claims of Clinton County; 3) Central Steel's property was released from the jurisdiction of this Court and thereby subject to the laws of the State of Iowa, including any and all liens, penalties and interests for delinquent property taxes; and 4) Central Steel's Plan is null and void.

23. On January 28, 1988, KAL filed an answer, affirmative defenses and counterclaim stating that: 1) Clinton County's alleged claims and liens are barred by the November 27, 1985, confirmation order under the doctrine of *res judicata* and pursuant to Bankruptcy Code §1141; 2) Clinton County lacks standing to request a modification of the confirmed plan under §1127; 3) Clinton County is barred from seeking revocation of the confirmation order by the period of limitations set forth in §1144; and 4) requesting this Court to dismiss Clinton County's complaint and enter a declaratory judgment that Clinton County's claims against Central Steel are not a lien on the property conveyed by Clinton County to KAL.

24. On April 25, 1988, Clinton County filed its application to demonstrate implementation of the confirmed plans. In said application, Clinton County requested the Court to order Donovan Wire

and Central Steel to demonstrate to the Court at a Rule 2004 examination that their confirmed Chapter 11 plans were, in fact, implemented to include that Central Steel actually commenced doing business as required by law and contemplated by the Plan. Clinton County's stated purpose for requesting such information was its alleged relevancy to their Adversary No. 87-0213 against Central Steel and KAL.

25. On July 13, 1988, Clinton County filed a request for payment of administration expenses. In said request, Clinton County argued: 1) its post-petition, pre-confirmation tax claim was not provided for in Central Steel's Plan; and 2) said claim is an administrative expense under §503(b)(1)(B)(i) and entitled to first priority payment under §507(a)(1) in the amount of \$786,242.92 which includes the amount of the post-petition, pre-confirmation taxes plus interest and penalties.

26. On August 17, 1988, KAL filed a response to Clinton County's application to demonstrate implementation of the confirmed plans and request for payment of administrative expense. In said response, KAL argued: 1) the Court should not grant the relief requested because it may impact on the issues presented in Adversary No. 87-0213; 2) Clinton County's post-petition, pre-confirmation tax claim was treated in Central Steel's Plan; and 3) Clinton County's request for payment is merely an alternative theory upon which to seek the relief requested in Adversary No. 87-0213.

27. On June 16, 1988, Michael P. Mallaney filed an application

to withdraw as attorney for the reorganized debtor. In said application, Mr. Mallaney stated his desire to withdraw as attorney for Central Steel and that Central Steel had consented to the same.

28. On June 21, 1988, Clinton County filed a resistance to said application and argued it would be seriously prejudiced by such a withdrawal because it would have absolutely no contact person with Central Steel since Central Steel's registered agent, Robert Lardon, withdrew as agent on November 30, 1987.

DISCUSSION

The matters under advisement are directly related to Clinton County's Adversary No. 87-0213 against Central Steel and KAL which concerned the effect of Central Steel's November 27, 1985, confirmation order on the continued validity of Clinton County's statutory tax lien upon property which was part of Central Steel's estate. The Court issued a ruling in Adversary No. 87-0213 on May 1, 1989, granting KAL's motion for summary judgment and holding that: 1) Clinton County was barred by the operation of 11 U.S.C. §1141 and the doctrine of *res judicata* from asserting a lien on the property of Central Steel transferred to KAL; and 2) Clinton County was not entitled to either modify Central Steel's Plan or revoke the order confirming the Plan. The findings and conclusions in Adversary No. 87-0213 are incorporated herein.

The Court's ruling in Adversary No. 87-0213 basically renders Clinton County's matters under advisement in the case at bar moot. The Court, however, will expand on its reasoning for each matter.

A. Application to Demonstrate Implementation of the Confirmed Plans

Bankruptcy Code §1142 aids in the implementation of a plan and provides:

- (a) Notwithstanding any otherwise applicable non-bankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.
- (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or the delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. §1142. Section 1142(a) directs the debtor to carry out the plan and comply with any orders of the Court as well as gives the debtor the authority to implement the plan regardless of any non-bankruptcy limitations. Section 1142(b) gives the Court power to compel the debtor and any other necessary party to perform any act that is necessary for the consummation of the plan.

In its application, Clinton County prays for the authority to require both Central Steel and Donovan Wire to attend a Rule 2004 examination and demonstrate implementation of their respective confirmed plans. Clinton County's stated purpose in filing the application was to get access to information it considered relevant for purposes of Adversary No. 87-0213. KAL, on the other hand,

argues such an act would be futile because it freely admits Central Steel ceased doing business in February of 1986, and has been in default under its Plan since that time.

Upon review of the arguments, the Court concludes Clinton County's application must be denied for the following reasons. Initially, the Court notes Clinton County's assertion that the information regarding implementation of the Plan or the transactions referred to in the disclosure statement is relevant to Adversary No. 87-0213 is unsupported. Adversary No. 87-0213 concerned the effect of the November 27, 1985, confirmation order on the continued validity of Clinton County's statutory tax lien upon property which was part of Central Steel's estate. Whether or not the financial commitments between Central Steel and other entities were honored post-confirmation, or whether Central Steel engaged in business post-confirmation has no bearing whatsoever on the confirmation order's effect on the post-confirmation validity of Central Steel's pre-confirmation tax lien. And since the Court has already ruled in Adversary No. 87-0213 that Clinton County was divested of its tax lien pursuant to 11 U.S.C. §1141 and the doctrine of *res judicata*, Clinton County's argument is meritless. Moreover, the Court questions whether §1142 even applies. Clinton County's application makes no reference to 11 U.S.C. §1142(b) nor does it request the Court to direct Central Steel, Donovan Wire or any other party to perform any act other than attend a Rule 2004 examination and demonstrate implementation of their confirmed plans. And even

assuming it did apply, the Court's use of §1142(b) to compel Central Steel to comply with the payment provisions contained in its confirmed Plan would be a futile exercise because Central Steel is without assets, ceased doing business in February of 1986 and has been in default under its Plan since that time.

B. Request for Payment of Administrative Expense

Clinton County's request for payment of administrative expense is an alternative theory upon which to seek the relief requested in Adversary No. 87-0213. Clinton County argues its claim for post-petition, pre-confirmation taxes, plus penalties and interest, was not provided for in Central Steel's Plan and thus is an administrative expense under §503(b)(1)(B)(i) and entitled to first priority payment under §507(a)(1).

The Court addressed this very issue in Adversary No. 87-0213 and stated:

The Court need not engage in an analysis of whether or not [Clinton County's] claims were properly treated under the Bankruptcy Code in Central Steel's Plan. The record clearly establishes that the contest over allowance of [Clinton County's] claims was settled by stipulation between the parties at the confirmation hearing. The terms of the stipulation were incorporated into Central Steel's Plan as confirmed on November 27, 1985. The confirmation order now binds [Clinton County] to the agreed-upon terms and is *res judicata* for all questions related to the amount in terms of payment for [Clinton County's] claims. Arctic Enterprises, 68 B.R. at 79; Penn-Dixie Industries, 32 B.R. at 177; American Properties, 30 B.R. at 246. While Central Steel's Plan may have improperly classified [Clinton County's] claims, and perhaps should not have been confirmed over a timely objection on that ground, [Clinton County] is nonetheless

bound by the Plan's terms, even if the Plan provides [it] with less than [it is] otherwise legally entitled. In re St. Louis Freight Lines, Inc., 45 B.R. 546, 552 (Bankr. E.D. Mich. 1984); see also Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp., 60 B.R. 412 (Bankr. D.V.I. 1982). The Court is constrained to merely interpret and enforce the terms of Central Steel's confirmed Plan, and the terms clearly indicate [Clinton County] stipulated to the very treatment [it] now argues against.

Matter of Central Steel Tube Co., Case No. 83-856-D H, Adv. No. 87-0213, slip op at 15-16 (Bankr. S.D. Iowa May 1, 1989). As a result, the Court concludes Clinton County's request for payment of administrative expense is barred by the doctrine of *res judicata*.

C. Application to Withdraw as Attorney for Reorganized Debtor Central Steel

While Central Steel has consented to Mr. Mallaney's application to withdraw, the Court agrees with Clinton County that granting the application would result in serious prejudice to Clinton County because it would have absolutely no contact person with Central Steel should any further proceedings be necessary. Therefore, the Court will not allow Mr. Mallaney to withdraw until such time as another competent attorney appears on behalf of Central Steel.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Clinton County is not entitled to the relief it requests and Michael Mallaney cannot withdraw as counsel until such time as another competent attorney appears on behalf of Central Steel.

IT IS ACCORDINGLY ORDERED that Clinton County's application to demonstrate implementation of the confirmed plans is denied.

IT IS FURTHER ORDERED that Clinton County's request for payment of administrative expense is denied.

IT IS FURTHER ORDERED that Michael P. Mallaney's application to withdraw as attorney for the reorganized debtor is denied.

Dated this 1st day of May, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE