

**AFFIRM; and Opinion Filed July 14, 2016.**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-15-01242-CV**

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**AKAL IX MANAGEMENT, LLC, Appellant  
V.  
CITY OF MCKINNEY, Appellee**

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**On Appeal from the County Court at Law No. 6  
Collin County, Texas  
Trial Court Cause No. 006-02330-2014**

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**MEMORANDUM OPINION**

Before Justices Francis, Evans, and Schenck  
Opinion by Justice Schenck

Appellee City of McKinney (“City”) sued appellant AKAL IX Management LLC (“AKAL”) to recover unpaid hotel taxes owed by AKAL as the owner of a LaQuinta Hotel & Suites located within the City. Both parties filed motions for partial summary judgment. The trial court granted the City’s motion and denied AKAL’s. Thereafter, the trial court entered a final judgment. On appeal, in five interrelated issues, AKAL argues the trial court erred (1) in granting the City’s motion, (2) in denying its motion, (3) in holding the City’s claim for taxes for the period of June 1 through November 22, 2013 was not barred as having been discharged in AKAL’s bankruptcy proceeding, (4) in failing to hold that the City’s prosecuting its claim for taxes was enjoined under the bankruptcy code, and (5) in entering a final judgment in favor of the City. For the following reasons, we affirm the trial court’s judgment. We issue this memorandum opinion because all issues are settled in law. TEX. R. APP. P. 47.4.

## BACKGROUND

As an owner of a hotel located in McKinney, Texas, AKAL is required to pay the City a tax on its revenues. The hotel tax is seven percent of the revenue from the sale of hotel rooms. The tax is to be paid on a monthly basis. Failure to timely pay results in the assessment of a five-percent penalty on the amount owed, with an additional five-percent penalty on any tax that is past due more than thirty days.

On October 4, 2012, AKAL filed a petition for reorganization under the United States Bankruptcy Code (“Code”). AKAL listed the City in its schedules as holding a claim in the amount of \$37,251—the amount of the unpaid hotel taxes as of the bankruptcy filing date. In August 2013, the City objected to the amount set forth in AKAL’s schedules and asserted a claim in the amount of \$97,302.15—reflecting taxes due pre-petition and post-petition through May 31, 2013—the date through which the City had revenue figures for the hotel. AKAL included this amount as an allowed claim in its Amended Plan of Reorganization dated September 9, 2013 (“Plan”). On October 23, 2013, the bankruptcy court confirmed AKAL’s Plan and the Plan became effective on November 23, 2013.<sup>1</sup>

On December 29, 2014, the City filed suit against AKAL seeking to recover unpaid hotel taxes from June 1, 2013 through November 25, 2013 (the post-petition, pre-confirmation taxes) and taxes due after November 25, 2013 (the post-bankruptcy taxes).<sup>2</sup> AKAL responded claiming the City’s claim for post-petition, pre-confirmation taxes was discharged in bankruptcy.

Both parties filed motions for partial summary judgment. The City sought summary judgment on all of its claims, except the amount of attorney’s fees to be awarded and the amount

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<sup>1</sup> The City cited the effective date of the Plan as November 25, 2013. The variance of the cited effective dates does not affect our decision in this case.

<sup>2</sup> On appeal, AKAL does not contest the trial court’s award of post-bankruptcy taxes and penalties. Therefore, we restrict our appellate review to the trial court’s award of the post-petition pre-confirmation taxes and penalties.

of taxes due after April 30, 2015. AKAL sought summary judgment on its discharge-in-bankruptcy affirmative defense to the City's claim for post-petition, pre-confirmation taxes. On July 9, 2015, the trial court granted the City's motion and ordered that the City recover the sum of \$87,776.59 for unpaid hotel occupancy tax, applicable penalties, and audit fees for the time period from June 1, 2013, through April 30, 2015, plus reasonable attorney's fees and hotel occupancy tax and penalties owing after April 30, 2015, the amount of which would be determined by the trier of fact. On the same day, the trial court denied AKAL's motion.

Thereafter, on September 23, 2015, the trial court entered a final judgment incorporating its grant of the City's motion for partial summary judgment and the parties' stipulation to unpaid hotel occupancy tax and penalties in the amount of \$11,296.16 accruing after April 30, 2015, and to reasonable attorney's fees in the amount of \$33,596.90. In addition, the trial court conditionally awarded appellate attorney fees. This appeal followed.

#### **STANDARD OF REVIEW**

All of AKAL's issues concern the grant and denial of summary judgments and the implicit findings associated with the trial court's rulings.

The standards for reviewing summary judgments are well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). The party moving for summary judgment has the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law. *See id.*; TEX. R. CIV. P. 116a(c). Where both parties file motions for summary judgment and one is granted and one is denied, we may consider all questions presented and render the decision the trial court should have rendered. *See Jones v. Straus*, 745 S.W.2d 898, 900 (Tex. 1988) (orig. proceeding) (per curiam). AKAL concedes that the facts are not in dispute and that the issue before this Court is a pure question of law. That being whether

the City's claim for post-petition pre-confirmation taxes and penalties was discharged in AKAL's bankruptcy proceeding.

#### DISCUSSION

AKAL argues the City failed to assert its post-petition, pre-confirmation claim in the bankruptcy proceeding and therefore the claim was not allowed under the Plan and was discharged by confirmation of the Plan. We disagree. The City's claim for post-petition, pre-confirmation taxes and penalties related to a tax, which is an allowed administrative expense under the Code. 11 U.S.C. §§ 503(b)(1)(B)(i); 503(b)(1)(C); *In re Mort Hall Acquisition*, 181 B.R. 860, 865 (Bankr. S.D. Tex. 1994). No proof of claim or request for payment was required as a condition of the City's claim being an allowed administrative expense. 11 U.S.C. § 503(b)(1)(D); *In re Momenta, Inc.*, 455 B.R. 353, 364 (Bankr.D.N.H. 2011). Moreover, AKAL's bankruptcy Plan itself provided that the holder of an administrative expense claim for a liability incurred in the ordinary course of AKAL's business did not have to file a notice of the claim. The City's claim for post-petition, pre-confirmation taxes and penalties was for a liability incurred by AKAL in the ordinary course of its business. *See In re BH S & B Holdings LLC*, 435 B.R. 153, 161 (Bankr. S.D.N.Y. 2010) (debtors are required to pay most taxes on or before when they are due under non-bankruptcy law while the bankruptcy case is pending). Therefore, under both the Code and the Plan, the City had no obligation to file a further proof of claim or a formal request for payment in order for its claim to be allowed under the Plan. Indeed, it is difficult to conceive of how a taxing entity might present and preserve a claim under the construction AKAL urges. The tax liability is directly and exclusively the function of the hotel's daily receipts, which are known only to the hotel until it files its revenue reports with the Texas Comptroller of Public Accounts. If the City, in addition to presenting its liquidated and updated claim and assuring allowance for forward-looking ordinary course expenditures, were required to

conduct daily audits and file constantly updated claims in anticipation of a confirmable order, the bankruptcy and tax systems would rapidly grind to a halt.

Next, citing section 1141(d)(1) of the Code, AKLA argues the City's post-petition, pre-confirmation claim for taxes and penalties was discharged by the confirmation of its Plan. Section 1141(d)(1) provides, in part, that:

Except as otherwise provided in . . . , the plan, or in the order confirming the plan, the confirmation of a plan-

(A) discharges the debtor from any debt that arose before the date of such confirmation, . . . .

11 U.S.C. § 1141(d)(1). AKAL's Plan specifically provided that liabilities incurred from the petition date through the effective date in the ordinary course of business shall be paid in the ordinary course of business by AKLA. The post-petition, pre-confirmation taxes, penalties and audit fees were expenses incurred by AKAL in the ordinary course of business while AKAL was the debtor in a pending bankruptcy. *In re BH S & B Holdings LLC*, 435 B.R. at 161. In addition to having an obligation to pay its taxes in the ordinary course of business, the Plan provided that all allowed administrative expenses, such as the post-petition, pre-confirmation taxes and penalties, were to be paid upon the effective date of the Plan. Therefore, the City's post-petition, pre-confirmation claim was allowed under the Plan and was not discharged pursuant to section 1141(d)(1).

Because the City's claim for post-petition, pre-confirmation taxes, penalties, and audit fees was an allowed administrative expense under both the Code and the Plan, it was not discharged in AKAL's bankruptcy proceeding. Accordingly, the trial court did not err in granting the City's motion for partial summary judgment and denying AKAL's motion, or in entering a final judgment that included an award for post-petition, pre-confirmation taxes, penalties, and audit fees. In addition, the trial court did not err in concluding the City's post-

petition, pre-confirmation claim was not discharged in bankruptcy, and in not concluding the City was enjoined from pursuing this claim. Consequently, we resolve all of AKAL's issue against it.

**CONCLUSION**

We affirm the trial court's judgment.

/David J. Schenck/

DAVID J. SCHENCK

JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

AKAL IX MANAGEMENT, LLC,  
Appellant

No. 05-15-01242-CV      V.

CITY OF MCKINNEY, Appellee

On Appeal from the County Court at Law  
No. 6, Collin County, Texas  
Trial Court Cause No. 006-02330-2014.  
Opinion delivered by Justice Schenck.  
Justices Francis and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee CITY OF MCKINNEY recover its costs of this appeal from appellant AKAL IX MANAGEMENT, LLC.

Judgment entered this 14th day of July, 2016.