

FILED
DISTRICT OF NEBRASKA
AT _____
FEB 4 1986
William L. Olsen, Clerk
By _____

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

IN RE:)
))
BUD'S FLYING SERVICE,)
LTD.,)
))
Debtor.)

CV. 84-0-725
CV. 84-0-753
BK. 84-1925

IN RE:)
))
EL MARC AIR, INC.,)
))
Debtor.)

MEMORANDUM OPINION
CV. 84-0-726
CV. 84-0-752
BK. 84-1926

This matter is before the Court on appeal from a final order of the bankruptcy court, dated October 23, 1984. Therein, the United States Bankruptcy Judge David L. Crawford, granted creditors William Waara's and Louis Minkoff's motions for relief from the automatic stay, provided under 11 U.S.C. § 362. The Bankruptcy Court's order applied to both of the above-captioned bankrupts. Each debtor filed prompt motions for reconsideration which were denied by the Bankruptcy Court on November 12, 1984. The debtors' appeals from the Bankruptcy Court orders were consolidated by this Court on September 20, 1985. After careful consideration of the record on appeal and the briefs submitted by the parties, this Court finds the Bankruptcy Court properly lifted the automatic stay.

On February 1, 1983, William Waara and Louis Minkoff filed a petition in the District Court of Platte County, Nebraska, naming, among others, Bud's Flying Service, Ltd. (hereinafter Bud's Flying), and El Marc Air, Inc., (hereinafter

El Marc) as defendants. The purpose of the state court action was to determine ownership of an aircraft and to construe the validity of liens on the aircraft. The petition was subsequently amended to include disputes concerning liens on four other aircraft. A trial date was set on the matter for September 14, 1983. That trial date was postponed when Alvin Gruenewald and Geraldine F. Gruenewald, original defendants in the state court action, filed a suggestion in bankruptcy with the state court. The Gruenewalds were ultimately dismissed as to the action, and a second trial date was set for September 14, 1984. The second trial date was subsequently continued to October 17, 1984. The matter was again postponed, however, when Bud's Flying and El Marc filed suggestions in bankruptcy on September 26, 1984.

On October 9, 1984, Messrs. Waara and Minkoff filed a motion for relief from the automatic stay in both Bud's Flying and El Marc bankruptcies. A journal entry dated October 23, 1984, indicates Judge Crawford sustained the creditors' motions. The debtors both filed motions with the Bankruptcy Court to reconsider its order for relief of stay and each motion was denied by the Court on November 11, 1984. A review of the parties' briefs and the debtors' motions to reconsider indicates that the Court's decision to lift the stay was based upon 28 U.S.C. § 1334.

On appeal, Bud's Flying and El Marc strenuously assert Judge Crawford improperly applied Section 1334 to lift the automatic stay and allow the state court action to proceed. Their assertion, however, is only partially correct. Bud's

Flying and El Marc correctly assert that the mandatory abstention provision of Section 1334(c)(2) do not apply to the present dispute. The subsection provides in pertinent part:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

Abstention is mandatory under the foregoing section where the case is (1) based upon a state law claim or cause of action which, although related to a Title 11 case, did not arise under Title 11 or out of a Title 11 case, and (2) the case could not have been commenced in federal court absent the fact of a bankruptcy petition and, finally (3) if the case were commenced in state court, it could be timely adjudicated. A review of the state court petition indicates the action could have been commenced in federal court, thus circumventing the second prong of the Section 1334(c)(2) test. Based upon the allegations set forth in the petition, federal jurisdiction through diversity of citizenship would be proper for the dispute. See, 28 U.S.C. § 1332. The matter in controversy exceeds \$10,000 and the dispute

is between citizens of different states -- Messrs. Waara and Minkoff are both residents of Michigan, and both corporations were incorporated and do business in Nebraska.

On the other hand, it seems apparent to this Court that the provisions of Section 1334(c)(1) do apply to this dispute. Section 1334 is a part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, signed into law on July 10, 1984. The new legislation contains significant amendments aimed at replacing the provisions of the 1978 Bankruptcy Reform act found unconstitutional in **Northern Pipeline Constr. Co. v. Marathon Pipeline Co.**, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). In the **Northern Pipeline** decision, the United States Supreme Court found the provisions of former Section 1471(c) of Title 28 unconstitutional. Section 1471(c) was a broad grant of judicial authority to the bankruptcy courts which allowed them to hear claims based on state law, as well as, those rooted in federal law. It was this jurisdiction which the Supreme Court found unconstitutional and which Section 1334 of the 1984 Act attempts to correct.

While Section 1334(c)(2) calls for mandatory Abstention once the above-outlined prerequisites are met, Section 1334(c)(1) allows for elective Abstention. The subsection reads:

Nothing in this section prevents a district court in the interests of justice, or in the interest of comity with State courts or respect for state law, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11.

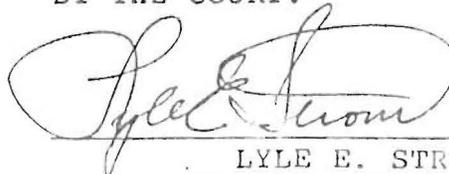
Upon application of this section and the pronouncement set forth in Northern Pipelines, this Court finds that Judge Crawford properly abstained from hearing the dispute between the parties herein.

The dispute in Northern Pipeline arose when Northern, as debtor in possession, brought suit in bankruptcy court against Marathon for an alleged breach of contract and warranty, as well as for misrepresentation, coercion and duress. The Supreme Court held such an action involves a right created by state law, a right independent of and antecedent to, the reorganization petition that conferred jurisdiction upon the bankruptcy court. As such, Congress' authority to determine how or by whom that right to to be adjudicated is at a minimum. The dispute at issue in this appeal also involves a right created by state law which is independent of and antecedent to the petition filed by the debtors. Since a court must draw primarily from state law to determine the outcome of the parties' dispute, and the present state action is at an apparent advanced state, it appears the bankruptcy court properly abstained from hearing the matter, in the interests of justice.

Accordingly, an order will be entered contemporaneously with this memorandum opinion affirming the bankruptcy court's decision and lifting the discretionary stay imposed by this Court on September 20, 1985.

DATED this 4th day of February, 1986.

BY THE COURT:



LYLE E. STROM
UNITED STATES DISTRICT COURT