

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
OPTIMUM MERCHANTS SERVICES, INC.,)	CASE NO. BK93-82092
)	
DEBTOR)	A94-8014
)	
OPTIMUM MERCHANTS SERVICES, INC.,)	
)	CH. 11
Plaintiff)	
vs.)	
)	Filing Nos. 3 & 5
THE ABBOTT BANK,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on February 4, 1994, on the Motion for Expedited Hearing on Plaintiff's Request for Temporary Restraining Order. Appearing on behalf of debtor was David Crawford of Schmid, Mooney & Frederick, P.C., Omaha, Nebraska. Also appearing on behalf of the debtor was David Buelte of Elick, Jones, Buelte, Blazek & Longo, Omaha, Nebraska. Appearing on behalf of the Abbott Bank (Abbott) was Jerrold L. Strasheim of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim of Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b) (2) (A).

Core Proceeding

This adversary proceeding requests a temporary restraining order and preliminary injunction ordering the defendant to comply with the terms of an Agreement. Since the Agreement has been deemed to be an executory contract and assumable by the debtor, the rights under the Agreement and the revenue flowing from it are property of the estate under 11 U.S.C. § 541, and the claims of the parties under the contract specifically impact on the administration of the bankruptcy estate. This matter is related to the bankruptcy case and, therefore, the District Court and this Court by referral from the District Court has jurisdiction of this adversary proceeding pursuant to 28 U.S.C. § 1334(b).

The adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A) because it is a matter concerning the administration of the estate.

Background

The debtor filed a petition under Chapter 11 of the Bankruptcy Code on December 22, 1993. The debtor is an entity that provides various credit card processing services to Abbott Bank, Alliance, Nebraska, (Abbott), pursuant to an written Agreement. Prior to the bankruptcy being filed, a dispute arose between the debtor and Abbott concerning the rights and responsibilities of the parties under the Agreement.

On January 19 and 20, 1994, this Court held a trial on a motion filed by the debtor for authority to assume an executory contract which was the prepetition Agreement between the parties. On January 28, 1994, at Filing Nos. 42 and 43 in the bankruptcy file, this Court entered a memorandum and journal entry which granted the debtor's motion to assume the Agreement, subject to the debtor curing defaults and paying damages, if any. The Court specifically declined to make binding findings concerning any default by the debtor and declined to make any binding determination of damages. However, the Court did recite the evidence that Abbott presented concerning the alleged defaults and the alleged damages. The issues of default and damages were left to a court of competent jurisdiction, other than the bankruptcy court, with regard to state law contract issues.

On January 26, 1994, the debtor filed in the state and federal court a Notice of Removal of the pending state court contract dispute. That contract dispute was removed to the bankruptcy court and is now pending as A94-8011.

On February 1, 1994, Abbott, in the removed case, A94-8011, filed a Motion to Abstain or, in the Alternative, to Withdraw Reference and Request for Expedited Hearing. Also on February 1, 1994, in the removed case, Abbott filed a demand for jury trial.

On or about February 1, 1994, Abbott informed the debtor through counsel that Abbott would no longer make daily payments to the debtor for services rendered. Apparently, since long prior to the date disputes arose over the contractual arrangement between the parties, the debtor has been providing services to Abbott and Abbott, as it receives credit card revenue from various sources, has made daily payments to the debtor. It is Abbott's position that the Agreement between the parties does not require daily payment and that Abbott will now and hereafter strictly enforce the terms of the Agreement.

On February 2, 1994, the debtor filed this adversary proceeding, A94-8014. The complaint in this adversary proceeding requests as relief a temporary restraining order, a preliminary injunction, and a permanent injunction requiring that until confirmation of the debtor's plan of reorganization or until further order of the Court that Abbott perform in a timely manner and in accordance with the course of dealing established by the parties all obligations imposed upon Abbott by the Agreement, at least insofar as those obligations have accrued since the date of bankruptcy. Contemporaneously with such filing, the debtor filed a motion requesting an expedited hearing on the request for temporary restraining order.

Hearing was held on February 4, 1994. The Court heard arguments and received some evidence on the request for temporary restraining order, and on the objection to jurisdiction, motion to abstain, and request for withdrawal of the reference which was filed on February 4, 1994, in this adversary proceeding, and the Court heard arguments on the motion to abstain and, in the alternative, motion for withdrawal of the reference in the removed adversary proceeding A94-8011.

This memorandum and journal entry concern the request for temporary restraining order and preliminary injunction in this adversary proceeding. By separate orders, the Court shall deal with the motions to abstain and the motions to withdraw the reference filed in both adversary proceedings, A94-8011 and A94-8014.

Prior to the bankruptcy filing, the state district judge presiding over the now removed adversary proceeding, A94-8011, entered a temporary restraining order on December 20, 1993, which stated in pertinent part:

IT IS FURTHER ORDERED that, until further order of this Court, the defendant, The Abbott Bank, and its agents, servants, employees, attorneys and those acting in concert with it are hereby restrained from terminating the existing contractual relationship between plaintiff and defendant, as exemplified in Exhibit "A" to the plaintiff's original petition filed herein, and that the defendant shall allow the plaintiff to continue to perform its functions as delineated in that agreement of the parties, and shall continue to compensate the plaintiff in keeping with the terms of the agreement of the parties.

The Agreement between the parties requires that, on a monthly basis, the parties meet and reconcile their books, records and accounts to determine which party owes money to the other. At the time that the state district court judge entered the temporary restraining order, Abbott had refused to meet to reconcile the October and November accounts. Sometime after the bankruptcy was filed, Abbott and the debtor did meet to reconcile the October and November accounts, but Abbott did not pay monies to the debtor as the reconciled accounts showed were due.

As of February 2, 1994, the date this complaint was filed, Abbott had not reconciled the December accounts nor the January accounts. The complaint filed in this case, at Paragraph 8, states:

On February 1, 1994, counsel for the Bank advised counsel for OMS that, effective February 2, 1994, the Bank would no longer authorize daily disbursements from the WIP account and, furthermore, the Bank was unwilling to pay OMS any amounts shown by the monthly reconciliations to be due and owing by the Bank to OMS under the agreement for anytime after the month of September, 1993.

As recited above, the complaint requests this Court to issue a temporary restraining order requiring Abbott to comply with its obligations under the Agreement, which, arguably includes a request to order Abbott to pay the prepetition monies allegedly due pursuant to the reconciliation reports for October and November of 1993.

At the hearing on February 4, 1994, Abbott presented evidence that it has performed a reconciliation of the accounts for December of 1993, and the net result was that the debtor owed Abbott the net amount of approximately \$17,000.00. This netting procedure involved setting off the October and November payments due from Abbott to the debtor against funds shown by the December reconciliation to be due from the debtor to Abbott.

In response to that evidence, the debtor argues that the amounts owed from Abbott to the debtor for October, November, and up through December 22, 1993, for December, were prepetition obligations owed by Abbott to the debtor. If the evidence were eventually to show that there were also prepetition financial obligations running from the debtor to Abbott, those amounts could be set off as mutual prepetition obligations. However, the debtor argues that it is improper for Abbott to be permitted to use a procedure which amounts to a set off of post-petition

monies owed from one party to the other against prepetition monies owed from one party to the other. Such a set off, argues the debtor, is barred by the automatic stay of 11 U.S.C. § 362 which came into effect upon the filing of the bankruptcy case. Although Abbott may have set off rights, such rights cannot be exercised without obtaining relief from the automatic stay, which will presumably be vigorously resisted by the debtor.

Ultimately, what the debtor wants with regard to the reconciliation of accounts is an order of the Court directing Abbott to properly reconcile the post-petition account relationship from December 22 through December 31, of 1993, reconcile the post-petition accounts as of January 31, 1994, and then, if any money is owed from Abbott to the debtor for such post-petition accounts, pay the debtor the amount due. The debtor argues that since it has been authorized to assume the rights and obligations under the Agreement, such authorization by this Court means that the Agreement has been assumed and, therefore, any post-petition funds due from Abbott to the debtor are property of the bankruptcy estate under 11 U.S.C. § 541 and should be made available to the debtor in consideration for the post-petition services rendered.

In addition to the request for injunctive relief directing a payment of the "reconciliation amounts," the debtor has requested injunctive relief to require Abbott to continue the practice of paying revenue to the debtor on a daily basis, instead of awaiting until the end of each month. This Court must, therefore, make a determination of whether the debtor has presented sufficient factual and legal authority for the Court to enter any injunctive relief and, if so, the extent of the relief.

Reconciliation of the Accounts

At the hearing on February 4, 1994, counsel for Abbott denied that part of the allegation in Paragraph 8 of the complaint which alleged that Abbott was unwilling to pay to OMS any amounts shown by the monthly reconciliations to be due and owing by Abbott for any time after the month of September, 1993. Counsel for Abbott specifically stated on the record that the intent of Abbott was to comply with the temporary restraining order issued by the state court district judge and to review the reconciliation requirements on a timely basis. It was the position of Abbott at the hearing that the only change from prior practice that Abbott had instituted as of February 1, 1994, was that it would not make daily payments to the debtor because it was not required to do so either by the contractual language in the Agreement or by the temporary restraining order.

Based upon the representations by counsel for Abbott that Abbott would comply with the contractual obligations as required by the temporary restraining order issued by the state court district judge, this Court finds that the "reconciliation issue" is not one which this Court must, at this point in time, consider with regard to its authority to issue injunctive relief. The injunctive relief issue will be analyzed based upon the request by the debtor for an order directing Abbott to make daily payments.

Daily Payments

The debtor claims that, although there is no specific language in the Agreement that requires Abbott to pay monies to the debtor on a daily basis since Abbott has historically made daily payments, it is required to continue to do so.

The debtor took the position at the hearing for the preliminary injunction and in its complaint that the debtor and Abbott did the following:

developed and consistently adhered to, at least until October 1993, a course of dealing whereby:
(a) daily deposits were made to a bank account ... reflect[ing] the total dollar volume charged by the use of credit cards during the previous day for goods and services purchased from certain of the merchants to whom the Bank agreed to provide credit card processing services under contracts with those merchants... This course of dealing has resulted in OMS receiving most, but not all, the monthly payments which it is entitled to receive from the Bank under the Agreement.

Complaint, Filing No. 1, ¶ 7.

The debtor argued at the hearing that Abbott's conduct of making daily payments to the debtor modified the language of the Agreement to the extent that the Agreement should be interpreted as requiring daily instead of monthly payments as stated in the Agreement. Even though the debtor labeled such conduct as "course of dealing," what the debtor intended was that the Agreement was modified by the "course of performance" of the parties. See Farmers State Bank v. Farmland Foods, Inc., 225 Neb. 1, 7-8, 402 N.W.2d 277 (1987); **E. Allan Farnsworth, Contracts § 7.13**, at 528 n. 3 (2d ed. 1990) (stating that course of dealing relates to conduct that occurs prior to the agreement,

and course of performance relates to conduct that occurs after the agreement is entered into).

The Nebraska Supreme Court has dealt with course of performance through the Uniform Commercial Code and through common contract law. Nebraska U.C.C. § 2-208 states the following:

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.

(3) ... such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

Section 2-208 is an Article 2 rule, but the Nebraska Supreme Court in Farmers State Bank, 225 Neb. at 8, has determined that Section 2-208 applies to non-sales contract cases through Neb. U.C.C. § 1-201(3), which provides:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act (sections 1-205 and 2-208).

The Nebraska Supreme Court in Farmers State Bank also stated that courts may find authority for applying Section 2-208 to non-sales cases under Neb. U.C.C. § 1-103, which provides: "Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract ... shall supplement its provisions." 225 Neb. at 9 (applying Neb. UCC § 2-208(3) to a securities agreement).

Based upon Nebraska authority, the course of performance of the parties should be analyzed under Section 2-208 of the Nebraska Uniform Commercial Code. The Agreement states in the Third Addendum that "Abbott shall pay OMS a service fee each month (the "Merchant Fee") on all existing accounts..." (§ 8 (amending 3.2)). The language of the Agreement is clear and unambiguous. When the language of the agreement is clear,

Section 2-208 applies, and in that instance, the language of the contract takes precedence over the course of performance of the parties. In addition, the language in the Agreement requiring monthly payments is not in conflict with the course of performance because by making payments on a daily basis, Abbott was fulfilling its obligation to make timely monthly payments under the Agreement. Abbott has no contractual obligations to make daily payments.

The debtor's position fails because the language in the contract appears clear. Had the language in the Agreement been questionable, the Court would look at the parties' performance under the contract to determine their true intent. Municipal Energy Agency v. Cambridge, 230 Neb. 61, 66, 430 N.W.2d 44 (1988); Wurst v. Blue River Bank, 235 Neb. 197, 204, 235 N.W.2d 665 (1990).

In certain circumstances, the Court will permit the course of performance to modify terms under an Agreement, but only if the debtor could show that such course of performance created such a representation or reliance that daily payments would continue under the Agreement that Abbott should be estopped from discontinuing daily payments. Andersen v. Blondo Plaza, Inc., 186 Neb. 682, 688, 186 N.W.2d 114 (1971). Because the debtor failed to provide the Court with evidence of its daily cash flow need, the Court cannot find that the debtor relied on daily payments from Abbott. Therefore, the Court has no evidence upon which to find there was a modification of the Agreement by the course of performance of the parties.

Injunctive Relief

In a bankruptcy case, a party may move for a preliminary injunction in an adversary proceeding pursuant to Fed. Bankr. R. 7065.

In the Eighth Circuit, to determine whether a federal court may issue a preliminary injunction, a court should examine the following factors: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (1981). The most important of these factors is the requirement that the movant show a threat of irreparable harm because if this threat is not shown by the moving party, the movant is not entitled to a preliminary injunction. Id. n. 9.

The debtor is not entitled to a temporary restraining order or preliminary injunction at this time because it has failed to demonstrate that it will suffer irreparable harm if this court fails to issue a preliminary injunction. Other than presenting the Complaint and the bankruptcy schedules, the debtor did not submit any evidence that shows that the debtor would suffer irreparable harm if Abbott discontinues paying the debtor on a daily basis or that the debtor has to have payments on a daily basis to avoid irreparable harm.

In the complaint (Filing No. 1, A94-8014), the debtor alleged in Paragraph 10:

OMS will suffer irreparable injury, loss and damage if the Bank, ..., either continues to refuse to make such monthly payments to OMS as are shown to be due and owing as a result of the monthly reconciliation process or refuses to authorize daily disbursements to OMS from the WIP account... The irreparable injury, ..., is the complete destruction of OMS as a business enterprise because such conduct by the Bank will deprive OMS of its sole source of revenue... OMS will be forced to lay off its employees, will no longer be able to perform its obligations under the Agreement, and will have no adequate remedy at law because the damages resulting from the Bank's conduct will be difficult to ascertain, and OMS will suffer the loss of resources necessary to litigate any action to recover damages caused by the Bank's wrongful conduct.

It is debtor's obligation to submit evidence to support these allegations. The Agreement with Abbott apparently is the debtor's sole source of income at this time. However, without a breakdown of debtor's expenses and income and its daily cash needs, it is impossible to determine whether the debtor will suffer irreparable harm from the loss of such daily income.

Debtor alleged that it would have to lay off its employees, but did not submit evidence to the Court of either the amount of payroll, the payroll payment dates, the cash resources of the debtor or the date when it would be no longer able to meet payroll. The debtor's allegation that it would no longer be able to perform under the agreement or litigate any action to recover damages is likewise nebulous.

The problem with these allegations is that this Court has no way of evaluating their accuracy. The Court does not know how

much cash the debtor currently has on hand. In the January 28, 1994 Order, this Court found that the debtor had on the petition date, over \$100,000 cash, \$40,000 of which was subject to a lien. The debtor's schedules do not shed light on this question because in Bankruptcy Schedule B, the debtor lists among its bank accounts a First Westroads Account and a Norwest Account, but in the Statement of Financial Affairs, those accounts appear to have been closed on the eve of this bankruptcy. The debtor has not provided this Court with updated information regarding its cash on hand, or clarified its schedules. Without such current information, therefore, it is impossible for this Court to find any threat of harm to the debtor.

This Court does not know what the debtor's monthly expenses are and when these expenses are due, or in the alternative, why the debtor requires daily payments to meet these expenses as opposed to monthly payments. The debtor's schedules do not provide an accurate picture of what the debtor's cash flow is. It is impossible to determine which creditors represent monthly or daily obligations, and the schedules do not disclose information regarding expenses that are not in default. The only expenses that this Court knows for certain are incurred every month are the lease payments, and considering that four of those leases are for luxury vehicles leased for use by the debtor's officers, the Court finds that the requirement of payment of these obligations is little justification for issuance of a preliminary injunction.

The debtor has represented to this Court on more than one occasion since this case was filed that it will suffer irreparable harm if it does not receive an immediate injunction. In its bankruptcy case, the debtor represented as much in its motions for a servicing order and for permission to assume the Agreement. It was the understanding of this Court during the pendency of those motions, based on the representations of the debtor, that Abbott had stopped making all payments under the Agreement.

For example, in the Request for Expedited Hearing on Debtor's Motion for Interim Servicing Order, the debtor alleged, "All of debtor's income for such [credit card] services flows through The Abbott Bank which disburses income to debtor. Since October 1993, The Abbott Bank has been withholding payment to debtor based upon an alleged breach of the contract ..." (BK93-82092, Filing No. 7, p. 1). This Court was not informed until the current motion was filed that even though Abbott stopped making monthly reconciliation payments, it was making daily payments to the debtor up until February 1, 1994. The debtor may not have intentionally misled this Court, but there certainly has been a

lack of effort on the debtor's part to clarify what the debtor's real financial situation is.

Future Performance

At the hearing on February 4, 1994, Abbott argued that it was entitled to pay the debtor on a monthly, rather than daily basis, leaving ambiguous the question of whether it would make any more payments to the debtor after February 2, 1994. As noted above, the Agreement requires only monthly payments and refusal to make daily payments is not a violation of the Agreement which would entitle debtor to injunctive relief.

Although debtor has been permitted to assume the Agreement, the assumption process cannot be completed until the underlying contractual issues are determined in another forum. If Abbott refuses, during the pendency of the temporary restraining order issued by the state court, or, in violation of the automatic stay, to perform the monthly reconciliation and pay debtor pursuant to the contract for post-petition services rendered, there is authority for the Court to order Abbott to perform the contract and to pay current services rendered by the debtor. In re Whitcom & Keller Mortgage Co., Inc., 715 F.2d 375, 378 (7th Cir. 1983), (upholding the District Court's affirmance of Bankruptcy Court's issuance of restraining order to prevent non-party from ceasing to provide essential computer services to debtor); In the Matter of Chick Smith Ford, Inc., 46 B.R. 515, 518-19 (Bankr. M.D. Fla. 1985), (holding that the debtor, an owner of an automobile dealership, was awarded specific performance of dealership and floor plan contract "until the contract in question is rejected or validly terminated by either of the Defendants.")

In addition to discussing the power of the bankruptcy court to order the non-debtor to perform its part of the contract, the court in Chick Smith Ford, Inc., stated: "Moreover, it is proper to order Ford not to unreasonably withhold payments for warranty work. This relief shall apply at this time prospectively only with the proviso, however, that all warranty work performed in the past which is yet to be paid shall be settled in accordance with the terms of the contract and paid Debtor to the extent they are ultimately established to be valid." 46 B.R. at 519.

The Chick Smith Ford court acknowledged the reality of the situation in which the parties were ordered to continue to perform both sides of the contract. Ford was required to provide vehicles for sale and to permit the debtor to perform warranty work. When such warranty work was performed by the debtor, the debtor was paid for such warranty work pursuant to the terms of

the contract. The court acknowledged that there may be pre-existing disputes over warranty work already performed and that Ford was not ordered to make payments on the prior services performed until it was finally determined that they were valid claims. On the other hand, Ford was ordered to not only allow future warranty work to be performed by the debtor, but to pay for such warranty work as it was performed.

Although the issue of future performance and payment is not directly before the Court at this moment, the Court recognizes that because of the adversarial relationship between the parties, the underlying prepetition contract dispute, and the apparent reluctance of Abbott to perform the reconciliation function required by the Agreement on a timely basis, it is not unlikely that the very issue of reconciliation and payment for services rendered post petition will shortly be before this Court or another court of competent jurisdiction with regard to this adversary proceeding. No advisory opinion is intended. However, the above-listed authorities are cited to put the current and future dispute over payment in perspective with regard to the authority of the Court.

This Court must follow the Eighth Circuit's Dataphase test to determine whether or not to grant a preliminary injunction. Since the key element of that test, a showing of threat of irreparable harm, is missing in this case, this Court must decline to issue a temporary restraining order or preliminary injunction. The motion for temporary restraining order and preliminary injunction is denied. If the debtor desires a final hearing on the motion for preliminary injunction to enable it to present evidence concerning its cash needs, it may request such hearing from the court which ultimately presides over the removed case.

Separate journal entry to be entered.

DATED: February 10, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
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OPTIMUM MERCHANTS SERVICES,)
INC.,)
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DEBTOR(S))
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OPTIMUM MERCHANTS SERVICES,)
INC.,)
Plaintiff(s))
vs.)
)
THE ABBOTT BANK,)
)
Defendant(s))

CASE NO. BK93-82092
A94-8014

CH. 11

Filing No. 3 & 5

JOURNAL ENTRY

DATE: February 10, 1994
HEARING DATE: February
4, 1994

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion for Expedited Hearing on Plaintiff's
Request for Temporary Restraining Order.

APPEARANCES

David Crawford, Attorney for Debtor
David Buelt, Attorney for Debtor
Jerrold L. Strasheim, Attorney for Bank

IT IS ORDERED:

The motion for temporary restraining order and preliminary
injunction is denied. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all
parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other
parties if required by rule or statute.