

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
RINE & RINE AUCTIONEERS, INC.,)	CASE NO. BK92-80770
)	A95-8050
<u>DEBTOR(S)</u>)	
)	
RICHARD D. MYERS, TRUSTEE,)	CH. 7
Plaintiff(s))	
vs.)	
)	
NATKIN & COMPANY,)	
)	
<u>Defendant(s)</u>)	

MEMORANDUM

Hearing was held on motion for temporary restraining order on June 26, 1995. Appearances are as follows: Christopher Curzon of Schmid, Mooney & Frederick, P.C., Omaha, Nebraska, for plaintiff; T. Randall Wright and Steven Schaal of Dixon, Dixon & Jessup, Omaha, Nebraska, for defendant. 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), (E) and (G).

This matter is before the Court on motion for a temporary restraining order. The trustee of Rine & Rine Auctioneers, Inc., has filed this adversary proceeding against Natkin & Company (Natkin) because Natkin has levied against an account of the trustee at a bank in New York. The trustee asserts that such a levy is a violation of the automatic stay and, in particular, a violation of 11 U.S.C. § 362(a)(3) which prohibits Natkin from taking any act to take possession of property of the estate or of property from the estate. The trustee suggests that the money in the account in New York is either property of the estate or, if it is not, it is property over which the estate exercises control and possession and, therefore, the levy is an act to obtain "property from the estate," which act is prohibited without first requesting relief from the automatic stay.

In the underlying dispute between these parties, the trustee has possession of certain funds which represent the proceeds of an auction held by the debtor on behalf of Natkin. The funds were still in the general operating account of the debtor when the petition was filed. The trustee claimed the funds as property of the debtor and, therefore, property of the estate. Natkin claimed that the debtor was an agent of Natkin and the

funds, representing the proceeds of the auction of Natkin's property, were, therefore, property of Natkin and should be turned over.

This court entered judgment in favor of Natkin and determined that the proceeds belonged to Natkin and were not property of the estate.

The trustee appealed and obtained an order from this court staying the judgment pending appeal to the district court. The district court affirmed in December of 1994. The trustee then appealed to the Eighth Circuit Court of Appeals, but did not obtain any further order regarding a stay pending appeal.

The original order in the bankruptcy court concerning the stay pending appeal directed the trustee to hold the funds in an account at interest pending a final determination in the district court.

With no stay pending appeal in place after the decision of the district court and during the pendency of the appeal to the court of appeals, Natkin levied on the account in which the proceeds were deposited. The trustee brought this adversary proceeding asserting that the automatic stay of Section 362(a)(3) protected the trustee from such levy litigation, at least until Natkin came before the bankruptcy court with a motion for relief from the automatic stay.

There does not appear to be any case law which focuses on the phrase prohibiting actions to obtain possession "of property from the estate." Most, if not all of the published case law deals with prohibitions against actions to obtain possession of property of the estate.

In this bankruptcy case, the issue which was decided by the bankruptcy court and affirmed on appeal to the district court and which is on appeal at the court of appeals is whether or not the property held by the trustee is property of the estate. Both the bankruptcy court and the district court held adversely to the trustee. The court of appeals has not yet heard argument.

It is the position of Natkin that since the trustee failed to obtain a stay pending appeal from the district court or from the Eighth Circuit Court of Appeals, Natkin was free to exercise its rights and execute upon the judgment. Natkin argues that it makes no sense to require it to come back before the bankruptcy court to obtain relief from the automatic stay when it already had an order of the bankruptcy court finding that the property

did not belong to the trustee or the estate and directing the trustee to turn the property over.

The record in this adversary proceeding does not include a copy of the levying documents in New York. Therefore, this court does not have the benefit of reviewing what Natkin claims from the account of the trustee in New York. This may or may not be significant. However, the order entered by the bankruptcy court originally determining that the proceeds were not property of the estate and directing turnover to Natkin required the trustee to turn over the net amount of the funds received from the auction plus Natkin's proportionate share of interest earned by the trustee in the estate's account since taking possession of the funds. In addition, interest at the federal judgment rate would accrue after the entry of the judgment. Since there has been no accounting of the proportionate share of interest earned by the trustee between taking possession of the funds and entry of the judgment, it appears to this judge that it would be difficult to determine in levying documents exactly how much Natkin had a right to.

Separate, however, from the issue of the exact amount that Natkin has a right to, is the apparent conflict between the civil litigation procedures which permit execution upon a judgment if a stay is not obtained from the appropriate court, which in this case would be the district court or the court of appeals, and the automatic stay which, on its face, protects the trustee and the estate from actions such as the levy in question without a claimant first coming before the bankruptcy court and requesting relief from the automatic stay.

Natkin takes the position that if the automatic stay truly applies in a situation such as this, no litigant would ever be required to obtain a stay pending appeal, because the automatic stay would effectively stay the judgment during the pendency of the appeal.

Although the argument of Natkin has some logic to it, the language of the statute, 11 U.S.C. § 362(a)(3), is fairly clear. It prohibits an action to obtain property from the estate until relief from the automatic stay is granted. There is nothing in the bankruptcy rules, at Rule 8005 or 8017, which implies that the automatic stay of Section 362 does not have to be recognized by a successful litigant in an adversary proceeding or a contested matter. Even if one could infer from the language of the rules concerning obtaining stays pending appeal that the automatic stay could be ignored, when there is a conflict between the statute and the rules, the statute should take precedence.

In addition to the statute versus rules hierarchy, there is some logic to requiring a successful litigant such as Natkin to come back before the bankruptcy court with a motion for relief from the automatic stay before proceeding against property which is in the possession of the trustee. This case is a good example of one of the problems that the automatic stay attempts to mitigate. The trustee is litigating the question of whether certain property the trustee holds is or is not property of the estate. In the meantime, the trustee has deposited such property, money, with a depository bank which happens to be located in the state of New York. Natkin has levied upon that account in the state of New York. In order to defend the rights of the estate from such a levy if the automatic stay is not in effect, the trustee will be required to expend estate assets to employ the services of counsel and litigate the appropriateness of the levy in New York state courts.

It would appear that one of the purposes of the automatic stay is to prohibit the various parties in a bankruptcy case from obtaining property in possession of the trustee without at least showing the bankruptcy judge with jurisdiction over the case that cause exists for taking such property from the trustee.

It is a simple matter for Natkin to come before the bankruptcy court with a motion for relief from the automatic stay and inform this court that it has cause for relief from the automatic stay. That cause may include the failure of the trustee to obtain a stay pending appeal pursuant to the bankruptcy rules. By taking such a relatively simple action and receiving, within a very short period of time, a determination by the bankruptcy court, Natkin can avoid additional litigation and the trustee can assert his rights in the bankruptcy court which has jurisdiction over the whole case, rather than expending estate funds in some distant court to assert his legal position.

Therefore, as a preliminary matter, the court finds generally that the automatic stay is applicable and does protect the trustee from a levy by a party attempting to obtain property from the estate.

The matter before the court is not, however, whether the automatic stay applies in this situation, but is a request for injunctive relief in the form of a temporary restraining order to stop further action by Natkin concerning the New York levy until this court can make a final determination of the applicability of the automatic stay. In considering a request for injunctive relief, the court must review four factors:

- (a) the threat of irreparable harm to the movant;

(b) the state of balance between this harm and the injury that granting the injunction will inflict upon other party's litigant;

(c) the probability that the movant will succeed on the merits; and

(d) the public interest.

Dataphase Systems, Inc. v C.L. Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981).

The threat of irreparable harm to the trustee is present in this case. If Natkin is successful in levying upon funds held by the trustee and receiving those funds, it is possible that the appeal of the trustee could be deemed moot. Even if the appeal is not deemed moot, this court does not have before it any evidence that Natkin, were it to lose in the court of appeals, would have the ability to repay more than \$35,000.00 which is the subject of the levy. Were it unable to repay, the estate would be irreparably harmed.

By the original decision of this court, the trustee was ordered to retain the funds at interest in an account and not distribute the funds from the bankruptcy estate. The harm to Natkin from being unable to complete the levy is its inability to use the funds and its loss of some amount of interest on those funds. The potential injury to the estate, on this record, if a temporary restraining order is not entered, is far greater than the potential injury to Natkin if a temporary restraining order is entered.

As indicated above, this court finds that the automatic stay generally protects property held by the trustee and, therefore, the probability is that the trustee will succeed on the merits in this adversary proceeding concerning a request for an injunction.

Finally, the public interest is not affected.

Weighing all of the above factors based upon the record submitted, the court finds that a temporary restraining order should issue and prohibit further action by Natkin with regard to the levy of funds in the possession of the trustee in the New York account, or in any other account, pending a final hearing.

Technically, a final hearing on a preliminary injunction must be scheduled within ten days after the entrance of a temporary restraining order. In this case, it probably is not even necessary to issue a temporary restraining order because of

the finding that the automatic stay generally protects the trustee from the levy. However, in an attempt to comply with all of the procedural rules concerning the entry of a temporary restraining order and preliminary injunction, the court does hereby schedule a hearing on the issuance of a preliminary injunction for July 10, 1995, at 2:30 P.M. This court is well aware that July 10 is more than ten days from today's date. The schedule of the court does not permit an earlier hearing date. It is the belief of this court that the automatic stay generally applies in situations such as this and, therefore, a delay of a few days for the hearing will not impose an undue hardship on Natkin. If the parties agree, the pending motion in the bankruptcy case for contempt for violation of the automatic stay may be held at the same time. In addition, if Natkin, between now and such hearing date, files a motion for relief from the automatic stay, that motion, by consent of the parties, may be heard at the same time.

In other words, all three of these motions have to do with exactly the same subject matter and perhaps should be heard at the same time.

A separate order shall be entered.

DATED: June 28, 1995.

BY THE COURT:

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

Copies faxed by the Court to:

CURZON, CHRISTOPHER	493-7005
WRIGHT, T. RANDALL	345-0965
SCHAAL, STEVEN	345-0965

Copies mailed by the Court to:

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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) DEBTOR A95-8050
)
RICHARD D. MYERS,)
)
) Plaintiff CH. 7
)
vs.)
)
)
NATKIN & COMPANY,)
)
)
) Defendant)

ORDER

The motion for temporary restraining order is granted. The defendant is hereby enjoined from taking any further action against property held by the trustee in bank accounts or otherwise, pending a hearing on the request for a preliminary injunction. Such hearing is scheduled for July 10, 1995, at 2:30 P.M. See memorandum entered this date.

DATED: June 28, 1995

BY THE COURT:

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

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