

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
UNITED IMPORTS CORP.,) CASE NO. BK96-81674
)
DEBTOR) CH. 11

MEMORANDUM

Hearing was held on April 29, 1997, on a Renewed Motion for Relief from the Automatic Stay. Appearances: James Cavanagh and Sandy Dougherty as attorneys for the debtor; Mike Washburn as attorney for the Creditors' Committee; Robert Bothe, Matt McGrory, Judy Archer and Donald Lefkowitz as attorneys for Time Warner; and Robert Ginn as attorney for First USA Merchant Services. 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)(G).

Background

In a memorandum opinion dated October 30, 1996, this court denied a motion for relief from the automatic stay by Time Warner Cable of New York City (Time Warner). In re United Imports, Inc., 203 B.R. 162 (Bankr. D. Neb. 1996). Its motion for reconsideration of the denial was denied by an order of this court dated November 26, 1996. Time Warner filed a renewed motion for relief from the automatic stay on February 25, 1997, and the debtor filed a resistance, joined by the Official Creditors Committee.

Time Warner's renewed motion seeks relief from the automatic stay to continue litigation against the debtor that it began pre-petition in the United States District Court for the Eastern District of New York. The litigation concerned allegations that the debtor had violated 47 U.S.C. §§ 553 and 605 by selling and distributing cable television descrambling equipment which is used to steal Time Warner's cable signals.

The initial motion for relief from the automatic stay was denied for two principal reasons. First, Time Warner had not, as of the date of the memorandum opinion, filed a proof of claim in the debtor's bankruptcy case. Second, Time Warner

sought the imposition of a constructive trust on all of the debtor's assets as a remedy for the alleged violations of federal law. This court found that a constructive trust "would greatly prejudice the bankruptcy estate, and by extension, the debtor's other creditors, if it were imposed in the New York litigation." Id. at 170.

Since the time its initial motion for relief was denied, Time Warner has sought to remedy both concerns of this court. On December 3, 1996, it filed a proof of claim in the debtor's bankruptcy for its claim stemming from the New York litigation. Second, Time Warner filed an amended complaint in the New York litigation on December 26, 1996, in which the remedy of a constructive trust was dropped. A notice of dismissal with prejudice of the constructive trust claim as against the debtor's assets was filed on January 7, 1997, and the notice was endorsed by the New York court on the same day. Time Warner's filed proof of claim specifically states that "[n]o constructive trust against the assets of the bankruptcy estate is claimed by [Time Warner]."

Decision

Having complied with the orders of this court, and having rectified the concerns previously expressed by this court, Time Warner's motion for relief from the automatic stay to continue its pre-petition litigation against the debtor in the Eastern District of New York is granted, contingent upon paying sanctions for violation of the automatic stay.

Discussion

Time Warner seeks relief from the automatic stay for cause pursuant to 11 U.S.C. § 362(d)(1). "Although cause is not defined in the Code, Congress did intend that the automatic stay be lifted to allow litigation involving the debtor to continue in nonbankruptcy forums under certain circumstances." United Imports, 203 B.R. at 166. "'Cause' for granting relief from the stay may exist if the equities in a particular case dictate that a lawsuit . . . should proceed in a forum other than the bankruptcy court for the purpose of liquidating the claim on which the lawsuit is premised." In re Marvin Johnson's Auto Service, Inc., 192 B.R. 1008 (Bankr. N.D. Ala. 1996). Five factors relevant to the consideration of the equities of whether the automatic stay should be lifted in this particular case have been previously identified by

this court as: (1) judicial economy; (2) trial readiness; (3) the resolution of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors.

1. Judicial Economy.

It has previously been determined that this factor weighs in favor of allowing the litigation to continue in New York. The litigation was begun in New York, and the New York court has jurisdiction over all of the parties, while this court lacks jurisdiction over Joseph Abboud, the president of the debtor, in his personal capacity.

2. Trial Readiness.

In the earlier opinion, this factor did not favor granting relief from the stay because the case was not ready for trial nor for a motion for summary judgment. That is no longer true. But for the deposition of a records clerk, the discovery has been completed. Counsel for Time Warner indicated at the hearing on this motion that following the deposition, a motion for summary judgment could be submitted shortly. This factor now favors granting Time Warner's motion.

3. The Resolution of Preliminary Bankruptcy Issues.

There were two preliminary bankruptcy issues identified in the earlier opinion that required resolution before relief from the stay would be granted. The first involved a declaratory judgment action filed by the debtor against Time Warner in the United States District Court for the District of Nebraska. That case was dismissed on February 14, 1997.

The second issue involved Time Warner's failure to file a proof of claim in the bankruptcy case. As discussed supra, Time Warner filed a proof of claim on December 3, 1996.

As both preliminary bankruptcy issues have been resolved, this factor now favors the granting of Time Warner's motion.

4. The Creditor's Chance of Success on the Merits.

This factor was previously found to favor Time Warner. Nothing has happened to change that finding.

5. The Cost of Defense or Other Potential Burden to the Bankruptcy Estate and the Impact of the Litigation on Other Creditors.

In the previous opinion, it was determined that this factor weighed against Time Warner's motion because of the constructive trust remedy it sought in the New York litigation. As discussed supra, Time Warner no longer seeks a constructive trust on the debtor's assets. Accordingly, this factor no longer weighs against the motion.

Although the debtor has previously stated that the cost of defending the New York litigation would exceed \$300,000,

[t]he cost of defense is, standing alone, ordinarily considered an insufficient basis for denying relief from the stay. If Time Warner's claim is to be liquidated, the suit will have to be defended, and the debtor will have to expend monies defending it either in New York or Nebraska.

United Imports, 203 B.R. at 168 (citation omitted).

However, the issue of cost of litigation is very important in this case. In a separate memorandum and order being filed today, Time Warner is found to have violated the automatic stay by continuing to pursue relief in the New York court after litigating in this court the issue of the applicability of the automatic stay to the New York litigation. Damages, representing the actual costs incurred by the debtor as a result of the violation of the automatic stay, are determined in that memorandum and order. Since Time Warner caused the monetary damages and since the debtor has represented in other hearings that it cannot afford the New York litigation, the debtor should not be required to defend in New York until, and unless, Time Warner pays the damages assessed.

After reviewing the various factors and balancing the equities of the case, it is apparent that cause does exist to grant Time Warner relief from the stay to continue the New York litigation. Relief is granted, contingent on payment by

Time Warner to the debtor-in-possession the full amount of damages determined for violation of the automatic stay. Time Warner may not, however, seek to execute or collect on any judgment it may receive in the Eastern District of New York, but rather must go through the bankruptcy process and receive a distribution via its proof of claim.

Separate journal entry to be filed.

DATED: May 23, 1997

BY THE COURT:

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

Copies faxed by the Court to:

ROBERT GINN	348-1111
JAMES CAVANAGH/SANDRA DOUGHERTY	344-4006
MICHAEL WASHBURN	390-7137
ROBERT BOTHE, MATT MCGRORY, JUDY ARCHER and DONALD LEFKOWITZ	341-0216

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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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
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UNITED IMPORTS CORP.) CASE NO. BK96-81674
) A
DEBTOR(S))
)
) CH. 11
) Filing No.
Plaintiff(s))
vs.) JOURNAL ENTRY
)
)
)
Defendant(s)) DATE: May 23, 1997
HEARING DATE: April 29,
1997

Before a United States Bankruptcy Judge for the District of Nebraska regarding Renewed Motion for Relief from the Automatic Stay.

APPEARANCES

James Cavanagh and Sandy Dougherty, Attorneys for debtor
Mike Washburn, Attorney for Creditors' Committee
Robert Bothe, Matt McGrory, Judy Archer and Donald Lefkowitz,
Attorneys for Time Warner
Robert Ginn, Attorney for First USA Merchant Services

IT IS ORDERED:

Time Warner's motion for relief from the automatic stay to continue its pre-petition litigation against the debtor in the Eastern District of New York is granted, contingent upon paying sanctions for violation of the automatic stay. See memorandum entered this date.

BY THE COURT:

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

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