

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

APR 3 1981

William L. Olson, Clerk

By _____ Deputy

IN THE MATTER OF:)
AARON FERER & SONS CO.,)
Debtor.)
WILLIAMS & GLYN'S BANK, LTD.,)
and AARON FERER & SONS, LTD.,)
in Liquidation,)
Plaintiffs,)
vs.)
AARON FERER & SONS CO.,)
Debtor and Debtor in)
Possession, and THE OFFICIAL)
CREDITORS COMMITTEE,)
Defendants.)

BK. NO. 74-0-482

CV. NO. 80-0-613

MAGISTRATE'S FINDINGS
AND RECOMMENDATIONS

Plaintiffs William & Glyn's Bank, Ltd. (hereinafter referred to as "W&G") and Aaron Ferer & Sons, Ltd. (hereinafter referred to as "AFL") have appealed to the District Court from a decision of the Bankruptcy Judge, entered on September 11, 1980, which denied plaintiffs' motion for summary judgment in an action brought by them seeking vacation of the Bankruptcy Court's previous order enjoining their pursuit of independent court actions against officers, directors and employees of defendant debtor Aaron Ferer & Sons Co. (hereinafter referred to as "AFO"), and granting summary judgment to defendants AFO and its Official Creditors' Committee with order that the stay remain in effect until further order.

That appeal has been referred to the undersigned United States Magistrate for submission of findings and recommendations. Briefs have been submitted and oral argument was had on March 19, 1981.

This is but one of a series of adversary proceedings in the Bankruptcy Court involving these litigants in the Chapter XI proceedings concerning the defendant debtor in possession.

The chronology of the stay order has been previously set forth in the Memorandum Opinion of District Judge Denney in *Aaron Ferer & Sons Co., Debtor v. Williams & Glyn's Bank, Ltd., CV78-0-28 (D. Neb. Jan. 23, 1979)*.

In that decision the Court found the injunction of April 24, 1974 to have been validly entered and to be of continuing force, unless sooner lifted, until final decree is entered in the Bankruptcy proceeding. An arrangement plan was confirmed by the Bankruptcy Court on September 8, 1975 but no final decree has yet been made. That decision also affirmed the Bankruptcy Judge's determination that W&G and AFL, by filing an independent action in the federal court against AFO and Harvey D. Ferer, its president, were in contemptuous violation of the April 24, 1974 stay order.

The history of the present controversy is this. On May 21, 1975, AFO and W&G entered into a written stipulation in settlement of then pending proceedings in the Bankruptcy Court contesting the amount of W&G's claim, its allowance, a claimed set-off, and the dischargeability of the asserted debt. That stipulation included recitals of factual details concerning the actions of AFO and AFL in purchases of copper from CodeIco, a Chilean firm, and the financing of those purchases by means of letters of credit issued by W&G. At the request of the parties to that proceeding (AFO and W&G), the Bankruptcy Judge incorporated that stipulation in his Memorandum Opinion and Order disposing of that controversy in accordance with the agreement of the litigants. Subsequently, an arrangement plan under which the debtor is now operating was confirmed.

On December 1, 1977, W&G and AFL instituted the adversary proceeding, out of which this appeal arises, seeking the lifting of so much of the April 24, 1974 stay order as prohibited its filing of an independent action against the officers, directors and employees of AFO whom they claim to be liable to them for acts of conversion, breach of trust, and breach of confidential and fiduciary duties. On January 24, 1978, to prevent the running of the statute of limitations on such claims, the Bankruptcy Judge by order authorized the filing of the suit by W&G but denied permission to further proceed. On March 10, 1978, the same relief was accorded to AFL. Such a suit was filed in the District Court of Douglas County, Nebraska on March 14, 1978, against Harvey D. Ferer, President of AFO; Margaret Buckaleu, a Vice-President of AFO; and Gene Miller, Treasurer of AFO.

W&G and AFL then moved for summary judgment on the merits of the adversary proceeding. After hearing, at which various exhibits were offered and the Court was requested to take judicial notice of pleadings and filings

in other proceedings before it, the Bankruptcy Judge denied the motion and the relief from the stay order as sought by W&G and AFL. In the memorandum decision are included the following pertinent findings and conclusions:

The evidence shows that there are presently three adversary proceedings involving the plaintiffs and the debtor-in-possession pending before this Court. One of these cases is currently on appeal from a decision on the merits, and the other two are in the pretrial stages. A comparison of the pleadings in the cases pending here with the pleading filed in state court shows that all of the cases involve the same subject matter, that is, a series of copper contracts. In addition, the cases share the same fundamental issue of ownership of the contracts and are all based upon the same claim for damages. [footnote omitted] The only significant difference is that the proceedings in this Court involve the liability of the debtor-in-possession while the proceeding in the state court concerns the liability of officers of the debtor.

...

Permitting plaintiffs to proceed with their suit in state court at this time could interfere with the orderly administration of the estate in two ways. One question which troubles me is whether the suit in state court could have a *res judicata* effect on the suits pending in this Court. I am also concerned with the propriety of permitting essentially identical lawsuits to proceed simultaneously in independent courts.

...

[T]he prospect of two courts holding parallel trials on identical issues and potentially reaching conflicting results is sufficient to persuade me to keep the stay in effect. Such a spectacle is inconsistent with the preservation of the dignity of either court or with the orderly administration of the debtor's estate.

BK74-0-482, Memorandum Opinion at 2-4 (September 11, 1980).

It is clearly apparent from the provisions of *Bankruptcy Rule 11-44(d)*, that the granting or denial of relief from a stay is discretionary even when cause is shown. At oral argument before me, counsel for plaintiffs correctly conceded that the overriding issue upon this appeal is whether the action of the Bankruptcy Judge in denying the relief sought was so arbitrary and capricious as to constitute an abuse of discretion.

In support of their position that an abuse of discretion has occurred, plaintiffs maintain that no factual showing has been made to justify continuance of the stay, that the stay order cannot be validly effective against the state court action because that suit is not brought against the debtor

and concerns only acts committed by the debtor's officers prior to the bankruptcy proceeding filing, that the stipulation in question is a judicial admission binding both AFO and the Court to a determination that W&G and AFL possess valid claims of conversion and breach of duty against the officers of AFO, and that the ultimate result of the state court suit can have no impact upon the bankruptcy proceedings as to this debtor.

All of those assertions too neatly overlook the inescapable entwinement of the plethora of litigation which continues to flourish in this bankruptcy proceeding. At oral argument one adversary proceeding was identified as "Codelco I" and involves the disposition of proceeds arising from price and quantity adjustments. Decision on the merits in that proceeding is now pending on appeal before Chief Judge Urbom. Additionally, there is pending in that case before the Bankruptcy Judge a Rule 60 motion for relief from the judgment. Another case identified as "Asarco" involves controversy as to entitlement to sales proceeds and is in pretrial proceedings. Yet another is identified as "Codelco II", also involving controversy as to entitlement to sales proceeds and is presently in pretrial proceedings. Finally, there is the state court lawsuit earlier described herein.

Unquestionably, all of this litigation involves the same subject matter; namely, a series of copper contracts. All involve the same fundamental issue of ownership of the contracts and are grounded in the same claim for damages. All will undoubtedly require a judicial interpretation of the terms of the stipulation in question and a determination of the inferences to be drawn from it. The only difference of significance is that the state court case concerns assertions of liability of the debtor's officers while the other proceedings involve liability of the debtor. However, the stay order does not deny ultimate relief against the officers; it only delays its pursuit to insure the orderly administration of the bankrupt's estate.

The reasoning of Judge Denney applied in the early contempt proceeding appealed to him in CV78-0-28, *supra*, is equally appropriate here. There he said:

In the present case, in order to insure the orderly administration of the bankrupt's estate, it is necessary that the Bankruptcy Court have authority over every aspect of this case, including control over matters involving the officers of the debtor which directly affect

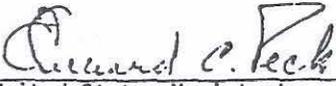
the bankrupt estate. See *In re Bohack*, 17
Collier Cases 284 (E.D. N.Y. 1978). This
Court will not permit the appellants to do
indirectly that which they cannot do directly.

CV78-0-28, Memorandum Opinion at 10 (January 23, 1979).

The likelihood that a state court determination of the claims there made against the officers of AFO could interfere with the Bankruptcy Court's exclusive jurisdiction over the property of this estate is not an imaginary one. I find, therefore, that, in the circumstances presented in the instant case, the determination of the Bankruptcy Judge not to lift the injunction against further pursuit of the state court litigation until the litigation pending in the Bankruptcy Court between plaintiffs and the debtor is finally resolved was not arbitrary or capricious and does not constitute an abuse of discretion.

IT IS THEREFORE RECOMMENDED to District Judge Robert V. Denney that an order be entered affirming the decision of the Bankruptcy Judge.

DATED this 3rd day of April, 1981.


United States Magistrate