IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

In the Matter of AARON FERER & SONS CO., Debtor.	)	BK 74-0-482
AARON FERER & SONS CO., Debtor and Debtor in Possession, et al., Plaintiffs,	)	CIVIL NO. 78-0-28
vs	)	MEMORANDUM
WILLIAMS & GLYN'S BANK LIMITED, et al., Defendants.	)	

APPEARANCES: For Plaintiffs - Steven Turner, Omaha, Nebraska

For Defendants - Robert Berry, Omaha, Nebraska

DENNEY, District Judge

This matter comes before the Court on appeal from an order of the Bankruptcy Court entered on December 29, 1977, finding Aaron Ferer & Sons, Ltd. (hereinafter referred to as AFL] and Williams & Glyn's Bank, Ltd. [hereinafter referred to as W & G] in violation of an injunction entered by the Bankruptcy Court on April 24, 1974, enjoining suits against the debtor, Aaron Ferer & Sons Co. [hereinafter referred to as AFO] and its officers, and Rule 11-44 which enjoins suits against the debtor. By reason of these violations, AFL and W & G were determined to be in contempt of the Bankruptcy Court.

On April 24, 1974, a Chapter XI proceeding was filed in Bankruptcy Court. On that date, AFO was authorized to continue its business as debtor in possession. Also, on that date, an order was entered enjoining persons having claims against the debtor and its officers from instituting or pursuing actions against the debtor and its officers. While this proceeding was pending and before confirmation, the Chapter XI rules took effect. Those rules include Rule 11-44 which provides for an automatic stay of court proceedings against the debtor.

On September 8, 1975, an order confirming the debtor's amended arrangement was entered which enjoined creditors whose debts were discharged by the confirmation order from instituting

or continuing actions to collect their debts as personal liabilities of AFO. The debtor's plan which was confirmed provided for retained jurisdiction by the Bankruptcy Court for a period of years. This period has not yet expired.

Thereafter, on April 9, 1976, AFO and the official creditors' committee brought suit in the Bankruptcy Court to determine the rights, as between AFO and W & G or AFL, to certain funds held by Codelco, a Chilean corporation. These funds were transferred to Bankruptcy Court and remain in that court's account in the amount of $125,007.69.

Subsequently, on May 5, 1976, W & G and AFL filed motions to dismiss for lack of jurisdiction. An evidentiary hearing was held on those motions. However, while the motions were under submission, AFL and W & G filed suit in this Court against AFO and Harvey D. Ferer, upon which the contempt citation is premised.[1]

Thereafter, on March 31, 1977, the Bankruptcy Court entered its memorandum and order overruling the motions and concluding that the funds were a receivable of AFO as of April 24, 1974, and thereby passed into the constructive possession of the Bankruptcy Court as of that date. Accordingly, the Court held that it had jurisdiction to consider conflicting claims of third parties to the receivable. No appeal was taken by either W & G or AFL from the Bankruptcy Court's jurisdictional determination and as such that order is now final and binding. See BANKRUPTCY RULE 803.

On April 7, 1977, AFO filed its motion for a show cause order claiming that the District Court action brought by W & G and AFL violated the earlier orders entered by the Bankruptcy Court and Bankruptcy Rule 11-44. A day later, the Bankruptcy Court issued its order to show cause. A hearing was scheduled which eventually commenced on June 27, 1977; however, the hearing was continued until July 27, 1977, when it was concluded. Subsequently, on December 29, 1977, the Bankruptcy Court entered its memorandum opinion and order, holding W & G and AFL in

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[1] It was stipulated by the parties that leave of the Bankruptcy Court was not obtained by AFL and W & G to bring the independent suit in this Court.

contempt of court and further enjoining them from proceeding with the District Court action. AFL and W & G now appeal from that order to this Court.

At the outset, the Court notes that AFL and W & G have spent an exhorbitant amount of time and effort alleging that the Bankruptcy Court lacks jurisdiction over these funds and, therefore, had no power "to punish by contempt for the violation of an order issued without jurisdiction over the subject matter of the parties."

However, as the Court has already mentioned, on March 31, 1977, the parties litigated the question of jurisdiction and the Bankruptcy Court found that jurisdiction existed in that court over the funds. No appeal having been taken from that determination, that order is final and binding. Even assuming that the Bankruptcy Court's determination was erroneous, it is binding on this Court and not subject to collateral attack. Stoll v. Gottlieb, 305 U.S. 164 (1938).

> . . . When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. . . . It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.
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> Stoll v. Gottlieb, supra, 305 U.S. at 172; see also 1 COLLIER ON BANKRUPTCY ¶2.05 at 150-51 (14th ed. 1974).

Thus, any matters brought forth by the appellants which are related to the question of the Bankruptcy Court's jurisdiction are irrelevant and will not be considered by the Court in this proceeding. See also In re Ginger Machine Products Corp., 296 F.2d 107, 107 (6th Cir. 1961); Carpenters Local Union No. 2746 v. Turney Wood Products, Inc., 289 F.Supp. 143, 146-47 (W.D. Ark. 1968).

The order of April 24, 1974, was entered pursuant to §314 of the Bankruptcy Act, 11 U.S.C. §714 (1971). Section 314 is a jurisdictional grant of authority and power to enjoin or stay until final decree any action against the debtor. Rule 11-44 implements the jurisdictional grant of Section 314 and is a specific stay against any action. See 8 COLLIER ON BANKRUPTCY §3.20[3.2], 3.21, at 236-37, 245 (14th ed. 1978). Rule 11-44 provides in part as follows:

> A petition . . . shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor . . . or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property . . ..

The Bankruptcy Court, in its memorandum and order of December 29, 1977, found that the action filed by W & G and AFL in this Court against AFO violated Rule 11-44 and the order of April 24, 1974. Since §314 is a specific jurisdictional grant and the April 24 injunction is supported by that section, the question of whether or not the Bankruptcy Court correctly assumed jurisdiction is again irrelevant. Rather, the only issue before this Court on appeal is whether AFL and W & G violated the order of April 24, 1974, and Rule 11-44. The Bankruptcy Court held that they had; this Court agrees.

Initially, the Court has reviewed the record in this case and finds that the injunction is still in effect. Section 314 authorizes the Bankruptcy Court to enter an injunction or stay until final decree suits against the debtor. A "final decree" is a judicial order which is entered upon the ultimate consummation of a Chapter XI proceeding. Bankruptcy Act §372 (11 U.S.C. §772 (1971)). Since no final decree or modification of the April 24, 1974, order has been entered, the injunction was in effect at the time AFL and W & G filed their suit in this Court and is still in effect at the present time.

This case essentially involves the interrelationship of Rule 11-14 and the exception to that rule contained in 28 U.S.C. §959(a).[2] A consideration of Rule 11-44 makes it clear that

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[2] Section 959(a) provides as follows:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

W & G and AFL are enjoined from bringing suit in this Court. Upon the filing of a Chapter XI proceeding, Rule 11-44 provides for an automatic stay of any court proceedings against the debtor. See 8 COLLIER ON BANKRUPTCY §3.20[3.2], at 236-37 (14th ed. 1978).

> Rule 11-44 bars "the commencement or the continuation of any court or other proceeding against the debtor" after the debtor has filed a Chapter XI petition. It is difficult to conceive of a rule with a more apparent and certain meaning; after the Chapter XI petition has been filed, a debtor cannot be sued.

Fidelity Mtg. Investors v.Camelia Builders, Inc., 550 F.2d 47, 51 (2d Cir. 1976).

Considering this matter, the Bankruptcy Judge stated that "[a] review of §314 of the Act, Rule 11-44 and 28 U.S.C. §959(a) would indicate that there is no statutory exception permitting suits against the 'debtor' as opposed to suits against a 'debtor in possession.'" This Court, having reviewed the applicable provisions, is in agreement with the decision of the Bankruptcy Judge. Section 959(a), the statutory exception to Rule 11-44, refers only to suits against a "debtor in possession", not to suits against a "debtor." Therefore, a suit against a "debtor" is barred by Rule 11-44 without exception.

Thus, the Bankruptcy Judge proceeded to construe the complaint filed by AFL and W & G, and concluded that it was filed against AFO as a "debtor." The judge found that the complaint in no way indicated an attempt to sue AFO as "debtor in possession." The judge also noted that there was no reference in the complaint to AFO acting in a fiduciary capacity.

The Bankruptcy Court's findings are entitled to stand unless they are clearly erroneous. Matter of Terre Du Lac, Inc., 429 F.Supp. 1015, 1017 (E.D. Mo. 1977). This Court's review of the complaint filed by AFL and W & G outside the Chapter XI proceeding indicates that the Bankruptcy Judge's findings that AFO was sued as a debtor is not clearly erroneous. Accordingly, AFL and W & G are barred by Rule 11-44 without exception from filing suit in this Court against AFO outside the Chapter XI proceeding.

Moreover, even assuming that the complaint can be construed as filed against AFO as "debtor in possession", the Court is convinced that the suit is still barred by Rule 11-44.

Rule 11-44 also automatically bars suits against a debtor in possession. Fidelity Mtg. Investors v. Camelia Builders, Inc., supra, 550 F.2d at 50. However, as the Court has already noted, there is the limited statutory exception to the bar contained in 28 U.S.C. §959(a). Relying on that section, AFL and W & G argue that since the independent suit alleges conversion of property to which they lay claim, the action is based in tort. Accordingly,

they contend that any tort action against a debtor in possession may be brought without leave of the court appointing the debtor in possession. However, the Court believes that this suit, in reality, relates to a determination of the title or right to the possession of the property involved which, as the Court has already noted, is within the possession and jurisdiction of the Bankruptcy Court. In effect, the independent suit asserts a claim to those funds held by the Bankruptcy Court and to those funds paid into the estate.

It is well established that the Bankruptcy Court is the exclusive forum for the resolution of claims relating to property in its possession or jurisdiction. In Field v. Kansas City Refining Co., 9 F.2d 213 (8th Cir. 1925), the appellant filed an application in the court appointing the receiver for permission to sue the debtor and its receivers. The application included a request to maintain a cause of action for damages relating to an alleged trespass by the receivers regarding certain property claimed by the appellant. The District Court denied the application and the Court of Appeals for the Eighth Circuit affirmed, concluding:

> Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. . . . The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction.
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> Field v. Kansas City Refining Co., supra, 9 F.2d at 215.

The exclusive jurisdiction of the Bankruptcy Court was also considered by the Supreme Court in Ex Parte Baldwin, 291 U.S. 610 (1934). There, a state court action included a claim for damages against the trustee. However, the Supreme Court held that the damage claim was no bar to a stay of the state court suit. The Court wrote:

> This prayer of the complaint is no bar to staying the suit in the state court. The exclusive jurisdiction of the bankruptcy court is determined by the main purpose of the suit, which is to have the forfeiture declared and the alleged cloud upon title removed. The claim for damages is merely an incident.
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> Ex Parte Baldwin, supra, 291 U.S. at 618.

Other courts which have considered this issue have come to the same conclusion. In American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 10 F.Supp. 512 (S.D. N.Y. 1935), an application was presented for leave to sue the receiver in state court. Admitting that it could not maintain a suit which "intended to establish liens or possessory or ownership rights in receivership rates", the applicant argued that the proposed suit involved only the management and disposition of the property by the receiver. The court dismissed this distinction and concluded:

> These cases are sought to be distinguished, however, on the ground that the suit herein proposed involves the management of the company rather than property rights in its assets. Such a distinction ignores the ratio decidendi of the cases cited. An adjudication by another court on questions of the proper management of property in the custody of this court, unless with the consent of this court, would be as much an interference with the administration of that property as a decision on questions of title and possession of the res.
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> American Brake Shoe & Foundry Co. v. Interborough Transit Co., supra, 10 F.Supp. at 518-19.

Similarly, in Love v. Louisville & Eastern R.R. Co., 178 F. 507 (C. C. W.D. Ky. 1910), an action was brought in state court which included a damage count for alleged trespass by the receiver. Considering the matter, the court wrote:

> We think it obvious as to the first two claims to relief asserted by Gregory in his suit, and which are set forth above, namely, first, his claim to recover certain property in the receiver's hands, and, second, his claim to an injunction against the receiver's refusal to permit Gregory to put that property to certain uses of his own that Gregory's suit in no sense is one "in respect to any act or transaction" of the receiver in carrying on the business connected with the property in his hands, in the language of the statute above copied. And inasmuch as Gregory's third prayer, namely, that for a judgment for $1,000 damages, is plainly dependent upon the other two or at least upon the first of them, and cannot stand without them, and inasmuch as relief under the third prayer is manifestly contingent upon the relief claimed in the first prayer, the third prayer or claim necessarily must fall with the others, however ingeniously it may have been devised to come within the statute.
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> In short, Gregory seeks to recover certain land in the possession of the receiver and damages for its detention. As Gregory may not sue for the principal thing (the land) without leave of the court, so, logically, he cannot without such leave sue for the dependent and incidental

> thing (damages for detaining it), particularly as any right to such damages must depend upon this court's judgment as to whether possession of the land has been wrongfully withheld from Gregory by the receiver while acting under the orders of the court. It would be incongruous and intolerable for this court, which long ago acquired jurisdiction of this action to foreclose certain liens upon property of which, through its receiver, it has possession for the purposes of this cause, to be required to yield to any other tribunal the right to determine whether any part of that property belongs to some person other than those who are parties to this suit. This court is open to all claimants of any part of the property in the possession of its receiver. It has ample and competent jurisdiction to hear and determine all claims to any part of it, and those claims cannot be adjudicated elsewhere without its express permission first obtained.
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> Love v. Louisville & Eastern R.R. Co., supra, 178 F. at 508-9.

In sum, AFL and W & G have tried to disguise the true nature of their action in an attempt to circumvent the exclusive jurisdiction of the Bankruptcy Court. In light of the foregoing discussion, it is clear that this independent suit is not permissible outside of the Bankruptcy Court. See also Securities & Exchange Comm'n v. Lincoln Thrift Ass'n, 557 F.2d 1274, 1277 n.1 (9th Cir. 1977).

Moreover, a further consideration of 28 U.S.C. §959(a) discloses yet another reason why AFL and W & G cannot be permitted to maintain their independent action. Section 959(a) permits suits against the debtor in possession only "with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. §959(a) (1970). "Carrying on business" connotes a continuation of the type of business which existed prior to the appointment of the receiver or the debtor in possession. Vass v. Conron Bros. Co., 59 F.2d 969, 971 (2nd Cir. 1932). In other words, to come within the statutory exception, the independent law suit must relate to a routine ongoing business activity of the debtor which is now carried on by the receiver or debtor in possession. In the Matter of Investors Funding Corp., 547 F.2d 13, 16 (2nd Cir. 1976). However, in Austrian v. Williams, 216 F.2d 278, 285 (2nd Cir. 1954), the court recognized that the "attempt to collect and liquidate assets of a debtor is not to carry on its business in any proper sense of the term." See also Fidelity Mtg. Investors v. Camelia Builders, Inc., supra, 550 F.2d at 57; Vass v. Conron Bros., supra, 59 F.2d 971.

In the present case, the Bankruptcy Judge found that AFO "as debtor in possession was charged with the duty of exercising all the powers of a trustee appointed under the Act under §342.

The collection of receivables claimed by the debtor was merely one of those duties." Accordingly, the judge concluded that the independent suit was not related to acts normally associated with "carrying on business," thereby precluding the application of §959(a).

Upon reviewing the record, this Court is in agreement with the findings of the bankruptcy Court. The action by AFO in collecting the funds from Codelco, the Chilean corporation, was not "carrying on business," but merely the collection of assets claimed by the estate.[3] In re American Associated Systems, Inc., 373 F.Supp. 977, 978-79 (E.D. Ky. 1974). "Hence, a suit . . . which stems from . . . efforts to conduct routine business is permitted under §959. A suit to enhance a creditor's position in the reorganization of the bankrupt is not so authorized." Fidelity Mtg. Investors v. Camelia Builders, Inc., supra, 550 F.2d at 57; see also Matter of Investors Funding Corp., supra, 547 F.2d at 16.

The appellants next argue that since Harvey D. Ferer, who was sued in the independent action, is not a debtor or debtor in possession, he is not protected by the stay order or Rule 11-44. The Court is convinced that this contention must also fail.

The purpose of Rule 11-44 is to insure the orderly administration of the bankrupt's estate in a single forum, the bankruptcy court, and prevent undue interference with the exclusive jurisdiction of that court. Fidelity Mtg. Investors v. Camelia Builders, Inc., supra, 550 F.2d at 55; 8 COLLIER ON BANKRUPTCY ¶3.20[3], at 235 (14th ed. 1978). It seems clear that if AFL and W & G could bring an independent suit against Ferer, an officer of AFO, the administration of the bankrupt's estate could be directly affected and the policy considerations under-

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[3] In view of the foregoing discussion, it is readily apparent that this case is not the type of case which would bring the section 959(a) exception into play. Normally, this exception is applicable to causes of action in tort arising from personal injury actions. See, e.g., American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., supra, 10 F.Supp. at 518. Again, the appellants' suggestion that, since the action is based on a tort, they therefore may bring an independent suit without leave of the Bankruptcy Court, ignores the realities of the situation. AFO was merely carrying out the duties with which it was charged, i.e., the collection of receivables. As the Court has already noted, this conduct does not implicate the section 959(a) exception.

lying Rule 11-44 subverted. The Bankruptcy Court recognized this in its order of April 24, 1974, which expressly precluded suits against AFO and its officers. Significantly, the independent suit was brought against both AFO and Ferer, not Ferer alone.

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.

The appellants also contend that the injunction contained in Rule 11-44 automatically terminates upon confirmation. However, the Court is of the opinion that the stay of Rule 11-44 does not terminate upon confirmation but continues thereafter.

The Advisory Committee's note to Rule 11-44(b) provides: "As provided in subdivision (b), the stay provided by this Rule continues generally during the pendency of the case unless the case is converted to bankruptcy. In the latter event, the stay provisions of Bankruptcy Rules 401 and 601 would become applicable."

> The language of this rule is in keeping with the language of Section 314 of the Act defining the length of time during which the stay provided for by that section shall continue. Rule 11-44(b) is plain on its face. The stay is to continue until the Chapter XI case has concluded and the case is closed or dismissed or converted to bankruptcy.
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> 14 COLLIER ON BANKRUPTCY §11-44.03 at 11-44-16 (14th ed. 1976).

As the Court has already noted, the injunction entered on April 24, 1974, has never been terminated and, pursuant to §314, can continue until final decree. No final decree has been or can be entered in this proceeding until the period of retained jurisdiction expires, which it has not. Thus, the Court is of the view that Rule 11-44 is still in effect. The appellants' argument that confirmation means automatic dismissal, would render meaningless the language of Rule 11-44(b) relating to the closing of the case as an event which terminates the stay. It is the closing of the case as an event which terminates the stay, not the confirmation.

In sum, the Bankruptcy Court was correct in enjoining AFL and W & G from proceeding with their independent suit in this Court. Moreover, the Court agrees that AFL and W & G should

be held in contempt for violating the order of April 24, 1974, and Rule 11-44, regardless of any good faith on their part. See In re American Associated Systems, Inc., supra, 373 F.Supp. at 979.

Lastly, the Bankruptcy Court imposed attorney's fees in conjunction with the contempt proceeding. This Court is of the opinion that the granting of attorney's fees in the context of a contempt proceeding is proper. See In re American Associated Systems, Inc., supra, 373 F.Supp. at 980. Moreover, this Court is convinced that the Bankruptcy Court was correct in its determination of the amounts owed to counsel for AFO for time spent on the case.

An order shall issue contemporaneously with this memorandum opinion.

Dated this 23rd day of January, 1979.