

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

ROSEN NOVAK AUTO CO.,

DEBTOR

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CASE NO. BK82-1788

ORDER RE MOTION FOR RELIEF FROM STAY OF CONNI ST. ANGELO

Preliminary hearing on motion for relief from stay was heard on January 6, 1986. Donald Roberts of Lustgarten & Roberts, P.C., Omaha, Nebraska, appeared on behalf of the moving party. Richard Myers of Schmid, Ford, Mooney & Frederick, P.C., of Omaha, Nebraska, appeared on behalf of the debtor.

Debtor is a partnership. An order for relief pursuant to Chapter 11 of the Bankruptcy Code was entered on or about October 12, 1982.

The moving party is an assignee of an unsecured claim for legal services rendered to the debtor both pre and post petition.

The law firm filed two proofs of claim to which no objection was filed.

The moving party has run into a problem which results from the fact that Nebraska statutes apparently did not contemplate a partnership bankruptcy and the problem that then immediately develops if a creditor of the partnership attempts to obtain a judgment against individual partners.

Section 25-316 of the Nebraska Revised Statutes states:

"If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment in the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them as may appear to have been members of such company, association or firm."

This statute was interpreted by the Nebraska Supreme Court in Security State Bank v. McCoy & Gugelman, 219 Neb. 132, 361 N.W.2d 514 (1985). In that case the Nebraska Supreme Court determined that before a creditor could obtain judgment against individual partners for a partnership debt, the creditor must first obtain a judgment against the partnership and determine and be prepared to prove that the assets of the partnership are insufficient to satisfy the judgment.

In the Rosen Novak Auto Co. case the debtor is a partnership subject to the jurisdiction of the Bankruptcy Court pursuant to its filing under Chapter 11 of the Bankruptcy Code. It has proposed a plan which does not fully provide for the claim of the moving party.

The moving party has filed one or more actions in State Court against the individual partners. The defense of Nebraska Revised Statute §25-316 and the Security State Bank case have been raised in the State Court. Therefore, moving party desires permission to go into State Court and attempt to obtain a judgment against the debtor which is a condition precedent to obtaining a judgment against the individual partners.

Timing is apparently crucial in this matter. The statute of limitations on obligations of the individual partners runs as to part of the claim on July 1, 1986. Therefore, if the moving party cannot bring an action against the debtor in State Court, it will not be able to continue its actions against the partners and the statute of limitations will bar it from pursuing such actions after July 1, 1986.

The debtor objects to the granting of relief to this creditor. The debtor claims that the moving party is simply an unsecured creditor and should be required to stand in line with the other unsecured creditors and take what comes through the bankruptcy proceeding. Further, the debtor claims that if a judgment were entered in State Court against the creditor, it would potentially be a lien or encumbrance upon real property owned by the partnership which could impair the debtor's reorganization possibility.

Section 362 of the Bankruptcy Code provides that relief can be granted to a party in interest for cause. Since the creditor will not receive full payment through the proposed plan of the debtor, it should have the right to proceed against others who may be liable on the debt. If it were not for the State statute prohibiting a creditor from obtaining a judgment against an individual partner without first obtaining a judgment against the partnership, this creditor would be allowed to attempt to obtain a judgment against the partners and perhaps satisfy its whole claim, without looking to the partnership assets. If the claim were satisfied from assets of the individual partners, it is possible that the estate would be benefited.

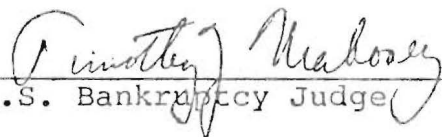
The State law prohibiting the creditor from looking to individual partners to satisfy a claim against the partnership, combined with the fact that this case has been pending since 1982, the proposed plan does not contemplate full payment of the claim and that the creditor's rights against the individual partners may expire as of July 1, 1986, are cause for modifying the automatic stay.

The automatic stay shall be modified as follows:

1. The creditor may be permitted to bring an action in State Court against the partnership.
2. If judgment is obtained against the partnership, the creditor is prohibited from executing against the assets of the partnership.
3. The only funds or assets which can be used to satisfy any such judgment against the partnership are those funds or assets designated in the debtor's plan of reorganization for partial or full satisfaction of creditor's claim.
4. If no such plan is pending or approved as of the date creditor obtains a State Court judgment, creditor is barred from attempting to satisfy the judgment from the assets of the debtor's estate.

DATED: February 26, 1986.

BY THE COURT:



U.S. Bankruptcy Judge

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