

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEBRASKA

IN RE: JAMES C. BAZEMORE and  
JEANINE J. BAZEMORE,

Debtors.

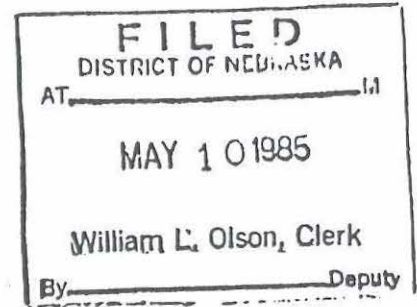
STATE OF NEBRASKA, ex rel  
PAUL L. DOUGLAS, Attorney  
General,

Appellant,

v.

JAMES BAZEMORE and JEANINE J.,  
BAZEMORE,

Appellees.



CV. 84-0-195

MEMORANDUM OPINION

This matter is presently before the Court on appeal from an order of the United States Bankruptcy Court entered on March 21, 1984. Appellant, State of Nebraska (hereinafter State), appeals the Court's decision denying its motion for relief from the automatic stay. The State sought relief under 11 U.S.C. § 362(b)(4) to allow it to proceed with a state court action instituted prior to appellee-debtor's filing of their petition in bankruptcy under Chapter VII of the Bankruptcy Code. At the conclusion of the March 16, 1984, hearing on the State's motion, the Honorable David L. Crawford, bankruptcy judge, held that Section 362(b)(4) of the Bankruptcy Code did not exempt the state court suit from the automatic stay. In addition, the Court held in the alternative that the facts did not warrant relief from such stay.

This Court, after carefully reviewing the record submitted on appeal, and the briefs filed by the respective parties, is of the view that the order of the bankruptcy court should be affirmed for the reasons hereinafter stated.

The facts are these. In 1981, the State filed suit in Douglas County District Court against American Midlands, Inc., and its officers and employees, including appellee-debtors. The suit alleged violations of the Nebraska Consumer Protection Act, Neb.Rev.Stat. § 59-1601, et seq. (Reissue 1984). On January 5, 1983, the State's motion for partial summary judgment was sustained. In conjunction therewith, the state court found that debtors would be liable for corporate debts and that a permanent injunction against further fraudulent activities should issue. Trial on damages was set to commence on February 14, 1984. However, on February 10, 1984, debtors filed their bankruptcy petition and, after they alleged protection of the automatic stay, the state court trial was cancelled.

Following the bankruptcy court's denial of relief from the automatic stay, a timely appeal was filed by the State and is now before this Court.

Before addressing the merits of the appeal, it is prudent to state the general standard of review which guides the Court in matters such as this. Although on appeal the bankruptcy judge's findings of fact are "entitled to stand unless clearly erroneous," where there are presented for consideration mixed questions of law and fact, the clearly erroneous rule is not applicable. In re American Beef Packers, Inc., 457 F.Supp. 313, 314 (D.Neb. 1978), and

the bankruptcy judge's decision cannot be approved without this Court's independent determination of the law. In re Werth, 443 F.Supp. 738, 739 (D.Kansas 1977), citing Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir.), cert. denied, 414 U.S. 944 (1973).

The State raises the following two issues on appeal:

1) Whether the bankruptcy court erred in determining that the state court suit was not exempt under 11 U.S.C. § 362(b)(4) from the automatic stay; and

2) Whether the bankruptcy court erred in finding that there was no cause for relief from the automatic stay under 11 U.S.C. § 362(d)(1).

As a general rule, upon the filing of a bankruptcy petition, such filing operates as an automatic stay against commencement or continuation of any activity against the debtor or the estate. However, Section 362(b) lists several exceptions to the general rule. With regard to the instant appeal, the State alleges that Section 362(b)(4) is the applicable exemption. That section provides:

(b) The filing of a petition under Section 301, 302 or 303 of this title, or of an application under Section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. § 78eee(a)(3)), does not operate as a stay --

\* \* \*

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.



The controlling case on the interpretation of Section 362(b)(4) in this circuit is *Missouri v. United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). In that case, the Circuit Court held:

[w]e believe that the term 'police or regulatory power' refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court.

*Id.* at 776.

See also *In re Rath Packing Co.*, 35 B.R. 615, 621 (Bkrtcy. N.D.Iowa 1983); *In re Powell*, 27 B.R. 146, 147 (W.D.Mo. 1983).

An examination of the Nebraska Consumer Protection Act, Neb.Rev.Stat. § 59-1601, et seq.(Reissue 1984), reveals that the Attorney General is empowered to bring an action in the name of the State against any person acting in violation of the Act. Pursuant to Section 59-1608(1), the Attorney General may obtain injunctive relief, costs of prosecuting the action, and a reasonable attorney's fee. Furthermore, subsection (2) provides that "the court may make such additional orders or judgments as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any act prohibited [by the Consumer Protection Act]". Thus, an action brought under the Consumer Protection Act by the Attorney General serves to protect the welfare of Nebraska citizens by granting authority to enjoin harmful practices and also serves to provide restitution for private individuals who suffer a pecuniary loss due to such activities.

As stated previously, prior to the filing by the debtors of their bankruptcy petition, partial summary judgment was granted in favor of the State of Nebraska through the Attorney General on the action brought in state court. Through that grant of partial summary judgment, a permanent injunction was entered against the continuation of the alleged harmful activities by the debtors, thereby fulfilling the state's interest in protecting the welfare of its citizens. What remained for determination in the state court action was the amount of damages to be assessed against the debtors for eventual distribution to those third-parties injured by the prescribed activities. This remedy does not have as its purpose the protection of public health, welfare, morals or safety; rather, its objective is to aid in the collection of property for third parties. Accordingly, the restitution determination aspect of the state court suit renders the suit outside the scope of the Section 362(b)(4) exemption from the automatic stay. See *In re Charter First Mortgage, Inc.*, 42 B.R. 380 (Bkrcty. D.Ore. 1984). Therefore, the bankruptcy court did not err in its determination that the suit filed by the State of Nebraska against debtors in Douglas County district court was stayed by virtue of debtors' filing of their petition in bankruptcy.

As the second issue raised on appeal, the State argues that the bankruptcy court abused its discretion in determining that there was no cause for relief from the automatic stay. This issue merits only minimal consideration and discussion. Under 11 U.S.C. § 362(d)(1), upon the request of a party in interest, the bankruptcy court shall grant relief from the stay "for cause, including the lack of adequate protection of an interest in property of such party in

interest." The Court has carefully reviewed the rather scant record evidence on this issue and finds that a determination of the bankruptcy court is neither clearly erroneous nor an abuse of discretion.

Accordingly, a separate order is entered herein this date affirming the March 16, 1984, order of the bankruptcy court denying the state's motion for relief from stay.

BY THE COURT:

  
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JUDGE, UNITED STATES DISTRICT COURT