UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---|---|---|
| IN THE MATTER OF<br><br>AARON FERER & SONS CO.,<br><br>DEBTOR | ) | CASE NO. BK74-0-482 |
| WILLIAMS & GLYN'S BANK LIMITED and AARON FERER & SONS LIMITED, in Liquidation,<br><br>Plaintiffs | ) | VACATION OF INJUNCTION |
| vs. | ) | |
| AARON FERER & SONS CO., Debtor and Debtor in Possession and THE OFFICIAL CREDITORS COMMITTEE,<br><br>Defendants | ) | |

MEMORANDUM OPINION

I have before me a motion for summary judgment filed by plaintiffs in proceedings to determine whether plaintiffs should be relieved from stay orders or injunctions in the Chapter XI proceeding involving Aaron Ferer & Sons Co., BK74-0-482. The Chapter XI proceedings were filed on April 24, 1974, and this Court confirmed an amended arrangement on September 18, 1975. Plaintiffs' complaint seeking relief from stays and injunctions was filed December 1, 1977. Plaintiffs allege in their complaint that they "presently intend to pursue various causes of action against various officers, directors and employees of the debtor" and seek an order either stating that the stays or injunctions are not applicable to such suits or, alternatively, declaring that plaintiffs may proceed with the suits. Defendants resist the complaint on various grounds.

On January 24, 1978, in order to prevent the running of statutes of limitations, this Court entered an order authorizing the plaintiff Williams & Glyn's Bank to file suit against officers, directors and employees of the debtor but to proceed no further with any litigation. On March 10, 1978, the same relief was accorded to the plaintiff, Aaron Ferer & Sons Co., Ltd. Defendants appealed from these orders and the appeals are presently pending in federal district court.1/

Plaintiffs' motion for summary judgment was filed on October 12, 1979. Defendants filed a resistance to the motion and the matter was set for argument. At the hearing, the parties offered exhibits and defendants requested that I take judicial notice of certain pleadings and other filings in other proceedings involving the plaintiffs.

According to Bankruptcy Rule 11-44(d), granting relief from stay is discretionary with this Court even where cause is shown.

It seems to me that summary judgment may be an appropriate remedy in a discretionary decision if there is no genuine issue as to the facts material to the exercise of my discretion. See 6, part 2, Moore's Federal Practice para. 56.16, at 56-661 (2d ed. 1979). In my view, the only issue material to this decision is whether relief from the stay should be granted when proceedings involving the same or similar subject matter are pending before this Court. Accordingly, the parties were ordered to limit their oral argument and their exhibits to that issue.

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.2/ 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.

Plaintiffs correctly assert that this Court has no power to discharge the debts of anyone but the debtor. Commercial Wholesalers, Inc. v. Investors Commercial Corp., 172 F.2d 800, 801 (9th Cir. 1949). Plaintiffs also assert that enjoining suits against anyone other than a debtor is per se an abuse of judicial discretion. However, In re Laufer, 230 F.2d 866 (2d Cir. 1956), cited for this proposition, is readily distinguishable from the case at hand. In that case, the lawsuit which was stayed was a suit for an injunction against price-cutting in violation of fair trade provisions of New York law. In holding that the stay of this suit was an abuse of discretion, the court commented:

> "The only disadvantage even suggested by the debtor is that the harassment, annoyance, and embarrassment of having to defend against the suit would interfere with her concentration on matters affecting the arrangement proceeding." Id. at 868.

Clearly the lawsuit involved in that case could have had no direct impact upon the orderly administration of the debtor's estate. Where a lawsuit against officers of the debtor or debtor-in-possession will have a direct impact upon the administration of the estate, such lawsuits may be enjoined:

> "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 underlying 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. . . .
>
> "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."
>
> Aaron Ferer & Sons Co. v. Williams & Glyn's Bank, Ltd., Unreported Memorandum Decision, CV. No. 79-0-28 (D.Neb. 1979 - Hon. Robert V. Denney, D.J.).

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.

The doctrine of res judicata may be used to preclude further litigation of claims or of issues. Towee v. Boeing Airplane Co., 364 F.2d 590, 592 (8th Cir. 1966). Under claim preclusion:

> "Whenever a court having jurisdiction has rendered a final judgment upon the merits of a cause of action, that judgment is binding upon the parties and their privies not only as to every matter that was litigated but also to every matter which could have been litigated. In event of subsequent litigation upon the same cause of action, the parties and their privies are precluded from receiving relief."
>
> Id.

Under issue preclusion, also called collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979) (emphasis supplied). Although the question is complicated by the special nature of bankruptcy proceedings, it is clear that these principles may be applicable to such proceedings. See 1B Moore's Federal Practice para. 419[3.-1] at 2961-2968 (2d ed. 1974).

Plaintiffs argue that the judgment in state court could never be binding on the debtor as the debtor is not a party to the state court proceeding. Under the current state of the law, this statement is probably correct. However, given the close relationship between the debtor and its officers combined with the rapidly expanding applications of the doctrine of collateral estoppel, I am unwilling to rely on plaintiffs' premise when litigation of pending matters may well continue for several years. See Montana v. United States, supra, at 155; Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329, 91 S.Ct. 1434, 28 L.Ed. 2d 788 (1971).

As it is the date of entry of judgment rather than the date of the filing of the lawsuit which determines which lawsuit will have estoppel effect, the possibility of that doctrine being invoked in the suits pending before this Court cannot be ruled out. City of Hastings v. Kansas-Nebraska Natural Gas Co., 226 F.2d 419, 421-22, (8th Cir. 1955). This Court will not risk losing the power to determine issues which are at the very heart of major litigation involving the debtor in this Chapter XI proceeding.3/

Even if collateral estoppel is inapplicable, the 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.

For the reasons just discussed, I conclude that the stay must remain in effect at least until the litigation pending in this Court between the plaintiffs and the debtor has been finally resolved. As there is no issue of material fact, and I have concluded that the relief sought by plaintiffs must be denied, I will grant summary judgment to the defendant even though no formal cross-motion is on file. See Morrissey v. Curran, 423 F.2d 393, 399 (2d Cir. 1970), cert. den. 399 U.S. 928 (1970); 6 Moore's Federal Practice, para. 56.12 at 56-331 to 332 (2d Ed. 1971).

A separate order is entered in accordance with the foregoing.

DATED: September 11, 1980.

BY THE COURT:

U.S. Bankruptcy Judge

---

1/ Defendants allege that this Court has no power to consider other matters in this proceeding while the appeals are pending. This rule applies where the order appealed from is dispositive of the case, but does not apply to interlocutory orders except as to matters involved in the appeal. Janousek v. Doyle, 313 F.2d 916, 920 (8th Cir. 1963); 9 Moore's Federal Practice para. 203.11 at 738 (2d ed. 1975).

2/ The events leading up to this litigation are complex and need not be set forth here. See Aaron Ferer & Sons Co. v. Williams & Glynn's Bank, Ltd. (CODELCO I), Unreported Memorandum Decision, No. BK74-0-482 (Bcy. Ct. D. Neb. 1979) for a discussion.

3/ Plaintiffs might argue that, by the application of the same doctrine, they could lose their right to full trial of the issues in State Court. Not only have plaintiffs made no attempt to join the defendants in the suits before this Court, but it is unlikely that the doctrine can be applied where its application would deprive plaintiffs of their right to a jury trial. Rachal v. Hill, 435 F.2d 59, 63 (5th Cir. 1970), cert. den., 403 U.S. 904 (1971).

opies mailed to each of the following:

obert Berry, Attorney, 1900 One First Nat'l. Center, Omaha, Ne. 68102
:even Turner, Attorney, 11236 Davenport Street, Omaha, Ne. 68154
ıy Simon, Attorney, 900 Woodmen Tower, Omaha, Ne. 68102