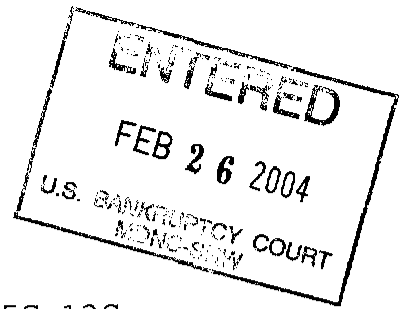


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:)
)
James Robert Allred and) Case No. 03-11315C-13G
Cynthia Taylor Allred,)
)
Debtors.)
)
)

ORDER

This case came before the court on February 17, 2004, for hearing upon a motion by Tatum Toomey & Whicker, Inc. for relief from stay. John H. Boddie and Harry G. Gordon appeared on behalf of the Debtors, James R. Hundley appeared on behalf of Tatum Toomey & Whicker, Inc. ("TT&W") and Anita Jo Kinlaw Troxler appeared as Chapter 13 Trustee. Having considered the motion, the objection filed on behalf of the Debtors and the other matters of record and having heard the arguments of counsel, the court finds and concludes as follows:

1. This Chapter 13 case was filed on April 14, 2003, at which time the male Debtor ("the Debtor") was employed by TT&W.

2. When this case was filed, the Debtor and TT&W were parties to a Nondisclosure and Noncompete Agreement ("the Agreement") containing provisions under which the Debtor agreed not to disclose proprietary information, not to solicit or otherwise divert any clients or customers of TT&W and not to render services on behalf of a competitor of TT&W following the termination of his employment.

3. On October 7, 2003, the Debtor's employment with TT&W was terminated. Following the termination of his employment, the Debtor became employed by Widner Photography, Inc., an alleged competitor of TT&W.

4. TT&W's motion for relief was filed on January 21, 2004. The motion asserts that the Debtor has breached the Agreement since his employment terminated and that TT&W has the following claims against the Debtor:

(a) A claim to recover damages for breach of the Agreement;

(b) A claim for damages for misappropriation of trade secrets;

(c) A claim for damages for civil conspiracy;

(d) A claim for damages for unfair and deceptive trade practices; and

(e) A claim to enjoin the Debtor from using, disclosing or misappropriating trade secrets, from competing with TT&W for a period of two years in violation of the non-compete provisions of the Agreement and from contacting, soliciting or selling to any of TT&W's customers or former customers in violation of the Agreement.

5. In the motion, TT&W questions whether the automatic stay is applicable to a suit asserting the above-described claims because, according to TT&W, such claims are post-petition claims and hence not encompassed by § 362(a) of the Bankruptcy Code. See 3 COLLIER ON BANKRUPTCY ¶ 362.03[3][c] (15th ed. rev. 2003). However, to the extent that the stay may be applicable, TT&W

requests in the motion that the automatic stay be modified to permit TT&W to commence a suit in state court asserting its claims against the Debtor.

6. Section 362(a)(1) of the Bankruptcy Code deals with the commencement or continuation of litigation against a debtor who has filed a bankruptcy case. This provision stays the commencement or continuation of a judicial, administrative or other action or proceeding against the debtor "that was or could have been commenced before the commencement of the case. . . ." This provision thus "is limited to actions that could have been instituted before the petition was filed or that are based on claims that arose before the petition was filed . . . and does not include actions arising post-petition." Bellini Imports, Ltd. v. Mason and Dixon Lines, Inc., 944 F.2d 199, 201 (4th Cir. 1991). However, under § 362(a)(3) and (4), "the stay is also applicable to 'any act to obtain possession of property of the estate or of property from the estate' and to 'any act to create, perfect or enforce any lien against property of the estate'." Id. Because attachment or execution of a judgment would fall within the stay provisions of subsections 362(a)(3) and (4), "a creditor must obtain relief from the stay to satisfy a judgment against property of the bankruptcy estate" even if such judgment is based upon a post-petition claim. Id.

7. The record, although sparse, reflects that the claim for misappropriation of trade secrets, the claim for civil conspiracy and the claim for unfair and deceptive trade practices are claims for damages which are based entirely upon post-petition conduct and therefore must be regarded as post-petition claims. As such, these claims do not fall within the reach of § 362(a)(1). See Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 200 (4th Cir. 1988). Nor does the commencement of a suit on these claims fall within § 362(a)(3), since merely seeking damages does not amount to an act to obtain possession of property of the estate or to control property of the estate. See Larami Ltd. v. Yes! Entm't Corp., 244 B.R. 56, 58 (D.N.J. 2000) (action seeking damages from Chapter 11 debtor for post-petition infringement of a patent was not stayed by § 362(a)(3)). It follows that TT&W is not barred by the automatic stay from commencing an action in state court against the Debtor to recover a judgment for damages based upon the claims for misappropriation of trade secrets, civil conspiracy and unfair and deceptive trade practices, although the stay will be applicable to collecting on any judgment obtained in such an action from property of the bankruptcy estate.

8. TT&W's remaining claims are contract claims which are based upon alleged breaches of the Agreement. In one of the claims TT&W seeks to recover damages. In the other, TT&W seeks injunctive relief under which the Debtor would be enjoined from conduct

prohibited by the Agreement, i.e., soliciting customers, disclosing trade secrets and confidential information, and employment with a competitor of TT&W. The critical factor in deciding the status of these claims is when the contract was entered. Most courts have concluded that if a claim is based upon a pre-petition contract, the claim will be treated as a pre-petition claim even if the time for performance, and hence the breach, occurs post-petition. The rationale is that "a claim for breach exists once a contract is executed, although it may be inchoate and contingent." In re Trans World Airlines, Inc., 275 B.R. 712, 723 (Bankr. D. Del. 2002) (citing In re Remington Rand Corp. Inc., 836 F.2d 825, 830 (3rd Cir. 1988), and In re Continental Airlines, Inc., 146 B.R. 520 (Bankr. D. Del. 1992)). "Once the contingency occurs, even if it occurs post-petition, the contingent claim simply becomes a liquidated one; it, however, is not thereby elevated to the status of a post-petition claim." Trans World Airlines, 275 B.R. at 723 (citing In re Chateaugay Corp., 102 B.R. 335, 352 (Bankr. S.D.N.Y. 1989)). In accord In re Dornier Aviation (North America), Inc., 2002 WL 31999222 (Bankr. E.D. Va.); In re Granati, 271 B.R. 89, 94 (Bankr. E.D. Va. 2001); In re May, 141 B.R. 940, 944-45 (Bankr. S.D. Ohio 1992); In re Peltz, 55 B.R. 336, 338 (Bankr. M.D. Fla. 1985). See also In re Stewart Foods, Inc., 64 F.3d 141, 146 (4th Cir. 1995); Grady, 839 F.2d at 202-03. Since both of TT&W's contract claims are based upon a pre-petition contract, the court

concludes that they must be regarded as pre-petition claims which are stayed pursuant to § 362(a)(1) of the Bankruptcy Code. The remaining question is whether TT&W should be granted relief from the stay to pursue such claims in the state court as requested in TT&W's motion.

9. Subsection (d) of § 362 sets forth the procedure and criteria for the lifting or modification of the stay. Under this provision, the court may grant relief from the automatic stay by terminating, annulling, modifying or conditioning the stay "for cause." Deciding whether cause exists for the modification of the stay is a matter within the discretion of the bankruptcy court. See In re Robbins, 964 F.2d 342, 345 (4th Cir. 1992). Because the Bankruptcy Code "provides no definition of what constitutes 'cause,' courts must determine when discretionary relief is appropriate on a case-by-case basis." Id. See also In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985); In re Davis, 91 B.R. 470, 471 (Bankr. N.D. Ill. 1988).

10. In the absence of a statutory definition, the courts have recognized certain standard factors to be considered in deciding whether to modify or lift the stay with respect to pending lawsuits. The Court of Appeals for the Fourth Circuit has focused primarily upon the following factors: (1) whether the issues in the pending litigation involve only state law, so that the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay

will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court. See Robbins, 964 F.2d at 345. In applying these factors and reaching a decision regarding the stay, the court should balance potential prejudice to the debtor's estate if the stay is lifted and litigation is permitted to proceed in another forum against the hardships that will be experienced by the party seeking relief from the stay if relief is denied and that party is required to pursue the litigation in the bankruptcy court. Id.

11. As the party opposing the request for relief from the automatic stay, the Debtor had the burden of persuasion (or risk of non-persuasion) as to whether the stay should be left in effect¹, which the Debtor failed to sustain. Taken as a whole, the record before the court was insufficient to show that the balance of harm significantly tilted in favor of the Debtor or that the factors outlined in Robbins weighed in favor of leaving the stay in effect.

¹Under § 362(g), while the party seeking relief from the stay has the initial burden of production or going forward with the evidence to establish a prima facie case for relief, the burden of proof, i.e., the burden of persuasion, rests on the party opposing relief on all issues except the existence of equity. See In re Busch, 294 B.R. 137, 140-41 (10th Cir. B.A.P. 2003); In re Property Technologies, Ltd., 263 B.R. 750, 753-54 (Bankr. E.D. Va. 2001); In re Self, 239 B.R. 877, 880 (Bankr. E.D. Tex. 1999); In re 234-6 West 22nd St. Corp., 214 B.R. 751, 756 (Bankr. S.D.N.Y. 1997).

The claims alleged by TT&W all involve solely state law issues. There are no issues in any of the claims that require bankruptcy expertise. Issues have been raised by the Debtor regarding whether the non-compete provisions of the Agreement are valid and enforceable under North Carolina law. These issues revolve around North Carolina public policy and are particularly suited for determination by the state courts. Additionally, lifting the stay and permitting an action to be brought in state court will enable TT&W's claims against the Debtor as well as the claims TT&W is asserting against his present employer to be pursued in a single action, thereby promoting judicial economy. The number and nature of the claims involved admittedly are such that the litigation is going to be somewhat complex and burdensome, but no more so if pursued in state court rather than the bankruptcy court. This court also must consider whether the Debtor and the bankruptcy estate can be protected adequately by a requirement that TT&W seek enforcement of any judgment obtained through the bankruptcy court. This factor can be satisfied in the present case. The modification of the stay will permit TT&W only to reduce its claims to judgment and will specifically provide that any judgment against the Debtor obtained in the state court may not be enforced against the Debtor or property of the bankruptcy estate unless and until further relief from the automatic stay has been granted by the bankruptcy court. Allowing the claims to be pursued in this fashion will not

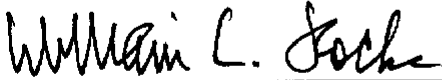
change the status or priority of the claims but will result in a determination of the nature and amount of the Debtor's liability and should disclose whether TT&W has rights under the non-compete provisions of the Agreement which fall outside the definition of "claim" under § 101(5) and hence are not affected by discharge. See generally Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493, 496-97 (6th Cir. 2001).

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The automatic stay is hereby modified to the extent of permitting TT&W to commence a civil action in the state court against the male Debtor alleging any or all of the claims contained in the copy of the complaint that was attached to the motion for relief from stay and to pursue such action to final judgment; and

(2) The automatic stay shall remain in effect with respect to the enforcement of any order or judgment that is obtained against the male Debtor or any property of the bankruptcy estate pending further orders of this court.

This 24th day of February, 2004.



WILLIAM L. STOCKS
United States Bankruptcy Judge