IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

IN RE: MICHAEL McNEW **4:00-bk-45393**
CHAPTER 7

ORDER GRANTING MOTION FOR RELIEF FROM STAY

A Motion for Relief From Stay filed by Dan W. Moore, Dennis O'Banion, Construction Invoice Funding, Ltd. and Southwest Construction Receivables, Ltd. (the "**Movants**") was heard on June 25, 2002, and the Court took the matter under advisement. James E. Smith, Jr., Esq. appeared for the Debtor, Michael McNew, who was also present. David A. Brakebill, Esq. appeared for the Movants. The Chapter 7 Trustee, Richard L. Cox, Esq., appeared by telephone. Stephen L. Gershner, Esq. appeared on behalf of Charles W. Richardson, Southwest Financial, Inc., CWR Farms, Inc., CFG, Inc., CAF, Inc. and RB Financial, Inc. (the "**Objecting Parties**"). The Debtor, the Chapter 7 Trustee and the Objecting Parties opposed the Movant's Motion for Relief from Stay. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G), and the Court has jurisdiction to enter a final judgment in this matter.

FACTUAL BACKGROUND

The Debtor filed a voluntary petition under Chapter 11 on November 27, 2000. On March 20, 2002, the Debtor's case was converted to a Chapter 7 proceeding. The Chapter 7 Trustee testified that based on the Debtor's schedules, the only non-exempt assets in the Debtor's chapter 7 case appeared to be some personal property in excess of the applicable exemption amount. The Trustee also testified that he has not yet determined whether the estate may pursue any avoidance claims to bring funds into the estate.

Prior to the Debtor's filing bankruptcy, the Movants sued the Debtor and various other defendants (including at least some of the Objecting Parties) in the District Court of Bowie County, Texas alleging fraud, aiding and abetting a breach of fiduciary duty, and civil conspiracy (the "**Texas Lawsuit**"). Plaintiffs' Fifth Amended Original Petition in the Texas Lawsuit (the "**Texas Petition**") was accepted into evidence at the hearing in this matter. The Texas Lawsuit is scheduled for a two-week trial beginning July 15, 2002 by order dated March 11, 2002. That Order also directed that discovery be completed by June 14, 2002 and that dispositive motions be filed by May 15, 2002, with responses due June 21, 2002. The Movants moved for relief from stay on June 3, 2002 in order to proceed with the Texas Lawsuit against Debtor.

The Debtor was also the defendant in a criminal case brought by the United States. A criminal Information against the Debtor was filed on December 7, 2000 and admitted into evidence at the hearing in this matter. The Information charged Debtor with various counts of wire fraud, bank fraud, making false statements and conspiracy arising out of the same transactions underlying the Movant's allegations in the Texas Lawsuit. The Debtor pled guilty to these crimes in open court before the Honorable Judge George Howard, Jr., Eastern District of Arkansas. A portion of the transcript of the Change of Plea Proceedings before Judge Howard was accepted into evidence as well. The Debtor also stated that all the statements contained in the criminal Information were truthful and accurate in an oral deposition taken July 17, 2001 in the Texas Lawsuit. A portion of this deposition containing such admission was offered into evidence with no objection at the hearing in this matter.

DISCUSSION

Movants allege cause for relief from stay exists because there is an almost absolute certainty

that the Movants will prevail against Debtor in the Texas Lawsuit given his guilty plea in the criminal case and the admissions made in his deposition. The Movants allege that they will suffer hardship if not allowed to proceed against Debtor in the Texas Lawsuit which has been pending for three years and is finally ready to proceed to trial. The Movants assert that they need the Texas jury to adjudicate the Debtor's liability in order to pursue their claims against the other defendants.

The Debtor, Chapter 7 Trustee and Objecting Parties oppose the Movants' motion. They allege that the motion was brought too late, and therefore, they do not have enough time to prepare for trial. These parties contend that the liquidation of the Movant's claim against the Debtor should be made by filing a proof of claim in the bankruptcy case. The Trustee or other interested parties may then file objections to the claim and adjudicate any disputes regarding the claim in the bankruptcy court. The Trustee and Opposing Parties also object to relief from stay because it would allow the Movants to liquidate a claim in the bankruptcy case before a jury in a nonbankruptcy forum when it would not otherwise be entitled to a jury trial in bankruptcy court. The Opposing Parties cite *Langenkamp v. Culp*, 498 U.S. 1043, 111 S. Ct. 721 (1990), and *Grandfinanciera S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989), in support of this argument. Finally, the Trustee argues that allowing the Texas Lawsuit to proceed against Debtor will prejudice the estate by causing the Trustee to incur attorney's fees to employ Texas counsel and to litigate this matter out-of-state.

A. Legal Standard.

Relief from the automatic stay may be granted "for cause" under 11 U.S.C. § 362(d)(1). The stay may be lifted "for cause" to allow litigation involving the debtor to proceed in a nonbankruptcy forum under certain circumstances. *In re Blan (Blan v. Nachogdoches County Hospital)*, 237 B.R. 737 (B.A.P. 8th Cir. 1999) (*citing* H.R. Rep. No. 95-595, at 341 (1977); S. Rep. No. 95-989, at 50

(1978)). Although a creditor moving for relief from stay must make a prima facie case that cause exists, the Debtor has the ultimate burden of proof in opposing motions for relief from stay except where equity in property is at issue. 11 U.S.C. § 362(g). *See In re Anton*, 145 B.R. 767, 769 (Bankr. E.D.N.Y. 1992). The Bankruptcy Court has wide discretion in determining whether or not to lift the automatic stay. *Id.*

"In making the determination of whether to grant relief from the stay, the court must balance the potential prejudice to the Debtor, the bankruptcy estate and to the other creditors against the hardship to the moving party if it is not allowed to proceed in state court." *In re Blan,* 237 B.R. at 739 *(citing Internal Revenue Service v. Robinson* (*In re Robinson*), 169 B.R. 356, 359 (E.D. Va. 1994); *United Imports,* 203 B.R. 162, 166; *In re Marvin Johnson's Auto Service, Inc.,* 192 B.R. 1008, 1014 (Bankr. N.D. Ala. 1996); *Smith v. Tricare Rehabilitation Systems, Inc.* (*In re Tricare Rehabilitation Systems, Inc.*), 181 B.R. 569, 572-73 (Bankr. N.D. Ala. 1994)). Bankruptcy courts routinely use the following factors to balance the hardships between the moving and opposing parties: (1) judicial economy; (2) trial readiness; (3) the resolution of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors. *Id. (citing United Imports,* 203 B.R. at 167; *In re Johnson,* 115 B.R. 634, 636 (Bankr. D.Minn. 1989); *In re Curtis,* 40 B.R. 795, 799-800 (Bankr. D.Utah 1984)). Not all factors must be present, and equal weight need not be given to each factor. *In re Anton*, 145 B.R. at 770. Furthermore, it is not necessary that all factors be found in favor of the movant before the stay may be lifted. *Smith v. Tricare,* 181 B.R. at 577.

B. Analysis.

In this case, application of the factors listed above weighs in favor of granting the relief requested. Judicial economy will be best served by allowing the Texas Lawsuit to proceed against Debtor rather than potentially reserving the issue of Debtor's liability for adjudication in this Court at a later date. The Movants will have to proceed against the other defendants in state court regardless of whether they are allowed to proceed against Debtor there. Potentially forcing them to litigate against Debtor in this Court as well does not serve judicial economy. *See In re Anton*, 145 B.R. at 770 ("Multiplicity of suits involving unnecessary time and expense on the part of Movants should be avoided."). Additionally, the Texas lawsuit does not involve any preliminary bankruptcy issues.

Most importantly, the Movants have shown that they are likely to prevail on the merits of their case. The Debtor has admitted and pled guilty to the specific conduct complained of in the Texas Petition. The Movants are clearly ready to move forward; those Opposing Parties who are also defendants in the Texas Lawsuit are also prepared for trial according to Mr. Gershner's testimony. While the Trustee is certainly not prepared for trial, the Debtor has been aware of the litigation and the complaints against him for several years, and due to his guilty plea in the criminal case and admissions in his civil deposition, it does not appear that Debtor has a viable defense in any case. Likewise, it would appear to be a waste of estate assets for the Trustee to defend the Debtor's estate in the Texas Lawsuit. The Trustee is not obligated to defend a lawsuit which is not likely to benefit the estate in any way. *See In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d 632 (1st Cir. 2000) (in approving trustee's settlement of lawsuit, the court stated that a trustee is obligated to prudently weigh the risks and costs of uncertain litigation before proceeding). Furthermore, the

cost to the estate or other parties of defending the Texas Lawsuit is not sufficient to warrant denial of the Movants' request for relief. *See In re Anton*, 145 B.R. at 770 ("The cost of defending litigation, by itself, has not been regarded as constituting 'great prejudice,' precluding relief from the automatic stay."). Accordingly, the remaining *Blan* factors: trial readiness, and cost and burden on the bankruptcy estate and other creditors, are also controlled by the near certainty of the Debtor's liability. Given the evidence before it, this Court finds that neither time nor money will materially impact the ultimate result on the Debtor's estate.

Finally, the Objecting Parties' reliance on *Langenkamp* and *Grandfinanciera* is misplaced. Those cases hold that where a party has filed a claim in a bankruptcy estate, the party is not entitled to a jury trial in an action brought by the trustee to recover preferential transfers. In determining whether relief from stay should be granted to allow a nonbankruptcy proceeding to take place, a party's right to a jury trial outside bankruptcy court weighs in favor of granting relief from stay. "While, ordinarily, the summary objection to claim process is essential to the smooth and expeditious administration of bankruptcy estates, a claimant's right to a jury trial should be accommodated if circumstances allow it to be done without substantial prejudice to estate administration." *In re Marvin Johnson's Auto Service*, 192 B.R. 1008, 1019 (Bankr. N.D. Ala. 1996).

For these reasons, the Court finds that the hardship facing Movants if relief from the automatic stay is not granted outweighs any potential hardship to the Debtor, Trustee or Opposing Parties. Therefore, cause exists for lifting the automatic stay in order to allow the Movants to proceed against Debtor in the Texas Lawsuit. In their opposition to Movants' motion, and orally at the hearing in this matter, the Opposing Parties also requested relief from stay to assert claims

against Debtor and the estate in the Texas Lawsuit. However, no evidence was presented to the Court to show what those claims are and whether the Opposing Parties would face a hardship if not allowed to pursue those claims in the Texas Lawsuit. Accordingly, the Court finds that the Opposing Parties failed to make a *prima facie* showing that cause exists to lift the automatic stay to allow the Opposing Parties to proceed against Debtor in the Texas Lawsuit.

CONCLUSION

The Court finds that there is cause under 11 U.S.C. § 362(d) to grant the Movants' motion for relief from the automatic stay for the limited purpose of allowing Movants to proceed against Debtor in the Texas Lawsuit, provided that any judgment obtained by the Movants in the Texas Lawsuit may be executed only by way of the filing of proof of claim in this bankruptcy case. Accordingly, it is hereby

ORDERED that the Movants' Motion for Relief from Stay is **GRANTED** to allow Movants to proceed against Debtor in the Texas Lawsuit, and any debt owed by the Debtor for monetary damages resulting from judgment in the Texas Lawsuit shall be collected solely by means of a proof of claim in this bankruptcy proceeding.

IT IS SO ORDERED.

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HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED:_____

cc: Mr. James E. Smith, Jr., Esq. for Debtor
Mr. Richard L. Cox, Esq., Chapter 7 Trustee
Mr. David A. Brakebill, Esq. for Movants
Mr. Stephen L. Gershner, Esq. for Opposing Parties
U.S. Trustee