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OCT 22 2007

K.R.W.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
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United States Bankruptcy Court
Columbia, South Carolina (17)

IN RE:

Derivium Capital, LLC,

Debtor(s).

C/A No. 05-15042-JW

Chapter 7

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law made in the attached order of the Court, Alan M. Grayson's and AMG Trust's oral motion to unseal their objection filed October 1, 2007 is granted. Scott D. Cathcart's oral motion to seal the exhibits admitted at the hearing on October 4, 2007 is denied.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
October 22, 2007

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Chapter 7

ORDER

This matter comes before the Court upon the Chapter 7 Trustee’s Notice and Application for Sale of Property Free and Clear of Liens and Settlement of Claims in Connection Therewith (“Application”). Alan M. Grayson and the AMG Trust (“Objecting Parties”) filed an objection under seal to the Application. Scott D. Cathcart (“Cathcart”) orally moved at the hearing on the Application to seal certain exhibits admitted at the hearing on the Application pursuant to certain protective orders entered in this matter. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F), (H), and (O). The Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Bankr. P. 7052.¹

FINDINGS OF FACT

1. Derivium Capital, LLC (“Debtor”) is a limited liability company organized and existing under the laws of the State of South Carolina.
2. Cathcart holds a twenty-five (25%) percent membership interest in Debtor and also has an interest in Veristeel, Inc.
3. On September 1, 2005, Debtor commenced this case by filing a voluntary petition under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. On November 3, 2005, the United States Bankruptcy

¹ To the extent any Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

Court for the Southern District of New York entered an order converting the case to a case under chapter 7 and subsequently transferred venue to this District. Kevin Campbell was appointed as the chapter 7 trustee (“Trustee”) on November 7, 2005.

4. Cathcart and Veristeel, Inc. are the subject of an adversary action by Trustee. These parties are also the subject of various civil actions brought by the Objecting Parties and other creditors of Debtor.

5. To facilitate discovery in this matter, Trustee, Cathcart, and the Objecting Parties entered into three protective orders (“Protective Orders”). The Protective Orders contemplate that Cathcart will produce to the Trustee certain bank account records, financial statements, and other records of accounts in Cathcart’s name and that such records will be shared with the Objecting Parties. Pursuant to the Protective Orders, the records produced may be redacted and used in a legal proceeding before this Court or in a deposition.

6. Trustee’s Application seeks to settle certain causes of action against Cathcart, Veristeel, Inc., and other related parties through a sale of Veristeel, Inc.’s stock and a release by the Trustee and the Objecting Creditors of causes of action they have against Cathcart and others.

7. The Objecting Parties filed an objection to the Application on October 1, 2007. The objection was filed under seal based upon the objection’s reference to certain information contained in the documents that are the subject of the Protective Orders.

8. At the hearing on the Application, Trustee presented several exhibits of documents protected by the Protective Orders. Cathcart’s personal information was redacted from the documents pursuant to the Protective Orders. Many of these documents were also used as exhibits at Cathcart’s deposition. Cathcart did not object to the admission of the documents covered by the Protective Orders.

9. At the hearing, the Objecting Parties moved to unseal their objection and Cathcart moved to seal the exhibits covered by the Protective Orders. The Objecting Parties opposed the sealing of exhibits.

CONCLUSIONS OF LAW

Cathcart's motion to seal is governed by 11 U.S.C. § 107. See In re Tayio Corp., 1993 WL 13003867 (Bankr. S.D. Ga. 1993) (finding 11 U.S.C. § 107 governs hearing exhibits that a party desires to place under seal). This section incorporates the common law presumption that documents submitted to and relied upon by the court are public records and should be open to public examination. See Nixon v Warner Communications, Inc., 435 US 589, 597-598, 55 L Ed 2d 570, 98 S Ct 1306 (1978); F.T.C. v. Standard Financial Management Corp., 830 F.2d 404, 409 (1st Cir. 1987) (holding "relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies."). The burden is on the party seeking to seal the documents to demonstrate some significant interest that outweighs the presumptive right to public access of documents filed with the court. See Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); Joy v. North, 692 F.2d 880, 893 (2nd Cir. 1982) (holding "documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.").

11 U.S.C. § 107 allows this Court to seal documents in certain limited circumstances. 11 U.S.C. § 107(b) allows the sealing of documents to the extent necessary to protect a trade secret; confidential research, development; or commercial information; or protect a person with respect to scandalous or defamatory matters contained in papers filed with the Court. See 11 U.S.C. § 107(b). The Court may also protect certain information of an individual where disclosure

would create an undue risk of identity theft or unlawful injury to the individual or their property. See id. § 107(c).

In this case, Cathcart wishes to seal the admitted exhibits based upon the Protective Orders. However, the basis for entering a protective order under Fed. R. Civ. P. 26(c) is quite different than the ability of a party to seal a filed document under 11 U.S.C. § 107. See In re Gitto/ Global Corp., 321 B.R. 367, 374 (Bankr. D. Mass. 2005). Fed. R. Civ. P. 26(c) provides, for good cause, that parties may be protected from discovery that may cause annoyance, embarrassment, oppression, or undue burden; whereas 11 U.S.C. § 107 does not necessarily protect the same documents once filed with the Court. See id. In remanding the case to the district court to consider the unsealing of documents, covered by a protective order and submitted in support of a motion, the Fourth Circuit has held that “discovery, which is ordinarily conducted in private, stands on a wholly different footing than does a motion filed by a party seeking action by the court.” Rushford, 846 F.2d at 252. As another court has explained;

A sharp distinction has been drawn between rulings concerning confidentiality of discovery materials and documents under protective orders, and rulings on the merits of the underlying litigations themselves based on secret submissions on the other. Once material is used in the judicial decision making function on the merits of controversies (beyond in camera decision as to the status, use or producibility of material), it must absent extraordinary circumstances be open to public inspection; circumstances such as risk to the safety of one or more persons, or threats to the availability of a fair trial as vouchsafed by due process guarantees, were the material revealed.

Without such routine exposure to the sunshine of public scrutiny, what is sometimes called the ‘least dangerous branch’ might tend to acquire or to appear to acquire unfortunate aspects of the Star Chamber courts of old, contrary to the spirit of the First Amendment, Article III, and the public trial concept specifically vouchsafed in criminal cases by the Sixth Amendment but relevant in civil cases as well.

Levy v. Weksel, 143 F.R.D. 54, 56 (S.D.N.Y. 1992) (internal citations omitted).

Under this authority and 11 U.S.C. § 107, the Protective Orders do not provide an independent basis for sealing the exhibits admitted into evidence. See Rushford, 846 F.2d at 253-254 (finding that a protective order was not a sufficient basis to sustain the sealing of documents submitted to the lower court but that the party opposing public access must meet its burden of showing that the documents should be sealed from the public). These orders in fact contemplate that documents produced by Cathcart would be used in “Legal Proceedings”² if certain notice was given to Cathcart and if Cathcart failed to seek another protective order prohibiting the use of such documents. Cathcart has not obtained a protective order prohibiting the admission of these documents in this Court and there is no indication in the record that the conditions for the documents use and admissibility during Legal Proceedings were not met. It appears that the protected documents have been used at Cathcart’s own deposition, which, like the hearing on the Application, is a “Legal Proceeding” under the Protective Orders. Moreover, Cathcart was complicit in the admission of the documents, which were submitted by the Trustee for Cathcart’s benefit in support of a global settlement releasing Cathcart and his related entities from a multitude of complex, protracted litigation without any consideration being paid by Cathcart. Therefore, the Court cannot find that the Protective Orders provide a basis for sealing the exhibits.

Cathcart also argued at the hearing that the exhibits should be sealed because the documents contain personal information. Pursuant to 11 U.S.C. § 107(c), personal identifying information, described in 18 U.S.C. § 1028(d), may be protected when release of the information would create an undue risk of identity theft or harm to the individual or the individual’s property.

² Defined in the Protective Orders to include depositions and hearings before this Court.

Pursuant to the Protective Orders, all protected “means of identification”³ were redacted from the documents. The Court cannot otherwise protect Cathcart from other disclosures contained in the documents, even though such information is personal or may cause Cathcart embarrassment, since such information does otherwise appear to fit within safe harbor of 11 U.S.C. § 107(b) or (c). See In re Fibermark, Inc., 330 B.R. 480, 508-509 (Bankr. D. Vt. 2005) (holding “[t]he exception to public disclosure under § 107 was never ‘intended to save the debtor or its creditors from embarrassment, or to protect their privacy in light of countervailing statutory, constitutional, and policy concerns.’”) (citations omitted). Parties that seek relief in this Court, rich and poor, routinely lay bare sensitive and personal financial information to obtain a release of their debts. There appears to be no basis in 11 U.S.C. § 107 for treating Cathcart differently when he seeks a global release of lawsuits against him and his affiliated companies that have a judgment potential in the tens of millions of dollars.

The Objecting Parties oral motion to unseal their objection was not opposed by Cathcart and is granted. For the reasons set forth in Rushford, Standard Financial, and Levy, a court cannot make a public ruling on documents and pleadings submitted under seal absent some compelling reasons not present in this case. See Rushford, 846 F.2d at 252-253; Standard Financial, 820 F.2d at 411-412; Levy, 143 F.R.D. at 55-57.

³ “Means of identification” is defined by 18 U.S.C. § 1028(d)(7) as: “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any--
(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
(C) unique electronic identification number, address, or routing code; or
(D) telecommunication identifying information or access device (as defined in section 1029(e)).”

Based upon the foregoing, the Objecting Parties motion to unseal their objection is granted and Cathcart's motion to seal the exhibits is denied.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
October 22, 2007