

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-01150

ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY

The relief set forth on the following pages, for a total of 10 pages including this page, is hereby ORDERED.

FILED BY THE COURT
08/03/2006



Entered: 08/07/2006



US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH CAROLINA

IN RE:

C/A No. 06-01150-DD

Bobby Gene Salinas and
Cindy Dianne Salinas,

Chapter 7

**ORDER GRANTING RELIEF FROM
THE AUTOMATIC SAY**

Debtor(s).

This matter comes before the court on the Motion For Relief From the Automatic Stay (“Motion”) filed by Brenda J. Keisler as the Personal Representative of the Estate of Ernestine B. Corley, Deceased: Brenda J. Keisler as the Personal Representative of the Estate of James W. Corley, Sr., deceased; James W. Corley, Jr.; Brenda J. Keisler, individually; Elizabeth D. Griggs; Sandra P. Stevenson; Richard A. Corley; Debra R. Corley; and Emily Hall (“Plaintiffs”), in order to proceed with state court civil litigation against Bobby Gene Salinas (“Debtor”). American Investors Life Insurance Company, Inc. (“Insurance Company”), a co-defendant in the state court civil litigation, by notice of removal, removed the state court litigation to this Court to be tried (Adversaries 06-80115 and 06-80116). The Insurance Company also filed an additional adversary proceeding (06-80087). The movants asked the Bankruptcy Court to abstain and remand 06-80115 and 06-80116 to state court. A hearing on these matters was held on July 18, 2006 and counsel for all parties appeared to prosecute the case. The Court reviewed the pleadings and considered the arguments of counsel, the exhibits, and the proffered testimony and determined to exercise its discretion to abstain and alternatively to remand the litigation to State Court on equitable grounds by separate orders dated July 21, 2006. Insurance Company withdrew its first (1st) cause of action and subsequently took a Rule 41

dismissal as to the balance of the adversary 06-80087. The only matter left is the present Motion for Relief from Stay. In light of this Court abstaining and remanding the state court litigation, and based on the following findings of fact and conclusions of law,¹ the Plaintiff's Motion for Relief from Stay to continue the previously filed civil litigation against Bobby Gene Salinas in State Court is hereby GRANTED.

FINDINGS OF FACT

1. On June 22, 2004, Ernestine B. Corley and Brenda Keisler as the Personal Representative of the Estate of James W. Corley² filed suit against Debtor and a number of other defendants (together, the "State Court Defendants"),³ one of whom is the Insurance Company, in a suit designated 2004-CP-32-2255 ("the State Court Litigation") in Lexington County, South Carolina, in the Court of Common Pleas for the Eleventh Judicial Circuit ("State Court").
2. Immediately thereafter, on June 22, 2004, James E. Corley, Jr.; Brenda J. Keisler, Elizabeth D. Griggs; Sandra P. Stevenson; Richard A. Corley, Debra R. Corley and Emily Hall filed suit against the same State Court Defendants in a suit designated 2004-CP-32-2256 in State Court.
3. Both of the complaints in the state court litigation (the "State Court Complaints") contain similar allegations and causes of action (That the Debtor advised the elderly Corleys, who are now deceased, and the rest of the State Court Plaintiffs, to take their life savings, invested in secure, stable investments, and invest them in companies which were defunct, bankrupt or in receivership.). The State Court Complaints allege

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

² During the course of the litigation, Ernestine B. Corley died and her estate is one of the Plaintiffs.

³ Bob Salinas; Salinas Financial Associates d/b/a Salinas Associates, Family Trust, Senior Information Services and Salinas & Associates; American Telecommunications Company, Inc., d/b/a ATC, Inc. and Alpha Telcom, Inc.; Family Heritage Portfolio, Inc.; American Investors Life Insurance Company, Inc.; Mobile Cash Systems, LLC; Senior Education Centers, Inc., d/b/a Senior Education Center of America; Resort Holdings International, LLC d/b/a Resort Holdings; HFG, Inc., d/b/a Hayes Financial Group, Inc., HFG and ETS Payphones, Inc.; Sunshine Real Estate Corporation; and AquaDyn Technologies, Inc.

a connection between Debtor and the Insurance Company. The State Court Complaints contain the following causes of action:

- a. Negligence;
 - b. Fraud;
 - c. Constructive Fraud;
 - d. Breach of Fiduciary Duty;
 - e. Breach of Contract Accompanied by a Fraudulent Act;
 - f. Unfair Trade Practices; and
 - g. Negligent Misrepresentation.
4. The State Court Complaints request a jury trial. The State Court Plaintiffs did not consent to a jury trial in the Bankruptcy Court.
5. The State Court Litigation progressed through various pleadings and discovery, including written discovery and several depositions over a period of nearly two (2) years.
6. The State Court Litigation was on the court docket since June 2004. It appeared on trial rosters several times and the State Court was advised that it was ready for immediate trial.
7. By an affidavit considered in connection with the abstention and remand motions, Nancy Ellis, Deputy Clerk of Court in Lexington County, indicates that the cases are subject to being called for trial at any time and that the State Court Litigation would likely have been tried if this bankruptcy had not intervened.
8. The bankruptcy of Bobby Gene Salinas and Cindy Dianne Salinas was filed on March 24, 2006 (Case Number 06-01150) (the “Bankruptcy”).
9. The Chapter 7 Trustee conducted an examination of the Bobby Gene Salinas pursuant to Fed. R. Bankr. P. 2004. On June 20, 2006, the Trustee filed a Report of No Distribution, indicating that there is no property available for distribution from the estate and that the estate has been fully administered. He abandoned all scheduled assets and asked that he be discharged as trustee.
10. On June 9, 2006, the Insurance Company filed a Notice of Removal of the State Court Litigation pursuant to 28 U.S.C. §1452.
11. On June 19, 2006, the State Court Plaintiffs filed a Motion to Remand, seeking to return the State Court Litigation to the State Court for jury trial. They asserted that the State Court Litigation should be remanded or that the Court should abstain.

12. On July 21, 2006 this Court remanded the State Court Litigation to State Court.
13. The United States Trustee has objected to the discharge of Debtor.

CONCLUSIONS OF LAW

The automatic stay imposed by § 362(a) of the Bankruptcy Code is often considered the cornerstone of the bankruptcy system. It promotes successful completion of a bankruptcy case by staying all actions (with a few exceptions) against the debtor and property of the bankruptcy estate. This both provides the debtor relief from harassment and collection of debts, and protects all the creditors by promoting equality in distribution of claims. The Bankruptcy Court, being one of equity, is often called upon to adjust the balance between the rights of the debtor and the rights of creditors. Thus, the Bankruptcy Code allows a creditor to obtain relief from the automatic stay under certain circumstances. The relevant section in the present case is § 362(d)(1), which states,

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 USCS § 362(d)(1).

The first inquiry in the relief from stay analysis is to determine whether the facts and circumstances asserted by the creditor seeking relief constitute “cause.” Congress did not define the term “cause” as used in this section. Numerous courts have developed tests to determine when relief from stay to commence or continue litigation in another forum is appropriate. “Cause (other than lack of adequate protection) is not defined in the Bankruptcy Code; rather, the court is required ‘[to] balance potential prejudice to the bankruptcy debtor's estate against the hardships that will be incurred by the person

seeking relief from the automatic stay...” In re Keane, 2003 WL 22794551 (Bankr. E.D.Va.)(*quoting* Stone St. Servs. v. Granati (In re Granati), 271 B.R. 89, 93 (Bankr.E.D.Va.2001) (*quoting* Robbins v. Robbins (In re Robbins), 964 F.2d 342, 345 (4th Cir.1992)) (*See also* In re Peterson, 116 Bankr. 247, 249 (D. Colo. 1990) (discussing balancing test))).

The 4th Circuit Court of Appeals in *Robbins* provided guidance to assist courts in balancing the equities on a case-by-case basis in the determination of whether “cause” exists: stating,

The factors that courts consider in deciding whether to lift the automatic stay include (1) whether the issues in the pending litigation involve only state law, so 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 In re Mac Donald*, 755 F.2d at 717; In re Holtkamp, 669 F.2d 505, 508-09 (7th Cir. 1982); In re Revco D.S., Inc., 99 Bankr. 768, 776-77 (N.D. Ohio 1989); In re Pro Football Weekly, Inc., 60 Bankr. 824, 826-27 (N.D. Ill. 1986); Broadhurst v. Steamtronics Corp., 48 Bankr. 801, 802-03 (D. Conn. 1985).

Robbins v. Robbins (In re Robbins), 964 F.2d 342, 345 (4th Cir.1992).

The *Robbins* Court also discussed Congressional intent concerning the lifting of the automatic stay by viewing the legislative history. The Court concluded that, while the legislature intended the Automatic stay to apply broadly, Congress did recognize that there would be instances where the lifting of the automatic stay would be appropriate. *Id.* The Court cited the Senate Report pertaining to the Bankruptcy Reform Act of 1978 which states, “It will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to

leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.” *S. Rep. No. 989, 95th Cong., 2d Sess. 50 (1978)*, reprinted in *1978 U.S.C.C.A.N. 5787, 5836*. Thus, Congress has recognized that it “will often be more appropriate” to allow the state court actions to proceed in their original forum *when* there is minimal or no impact on the bankruptcy estate.

The first *Robbins* factor is “whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary.” *Robbins v. Robbins (In re Robbins)*, 964 F.2d 342, 345 (4th Cir.1992). Since the complaint alleges only state law causes of action this factor weighs heavily in favor of granting relief. Therefore, because *all* of the issues involved in the pending state court litigation depend exclusively on state law, the expertise of the bankruptcy court is wholly unnecessary.

The Second *Robbins* factor asks “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.” *Id.* This factor consists of two prongs. Analyzing prong one under the present facts, granting relief from the stay would certainly promote judicial economy. The civil actions have been pending since June 2004 in State Court. Plaintiffs as well as Defendants have commenced and progressed through discovery while in State Court. The case has appeared on trial rosters several times and the State Court was advised that it was ready for immediate trial until this Bankruptcy was filed March 24, 2006 staying the State Court action. Trying the case in bankruptcy court would require me to deal with issues that the State Court has been addressing for nearly two (2) years now. Allowing

the case to proceed in the forum in which it was originally filed and progressed over a two (2) year period promotes judicial economy.

Prong two of the second *Robbins* factor asks whether there will be a greater interference with the bankruptcy case if relief from stay is not granted because matters would have to be tried in the bankruptcy court. *Id.* This inquiry is complicated by the procedural history of the present case. Simply however, in order to accord complete relief in the litigation, the debtor is a necessary party. If the remanded litigation could not proceed with Mr. Salinas in state court it would be necessary to try the case and perhaps other issues in Bankruptcy Court or District Court. The only matter remaining in the bankruptcy case is an objection to discharge filed by the United States Trustee. That adversary will be tried in the next three (3) or four (4) months. It will determine whether or not the pre-petition obligations of Mr. Salinas are discharged. If relief from stay were not granted and if all the litigation took place in the Bankruptcy Court, with delays inherent in a new forum, the estate would remain open for a longer period of time.

The third *Robbins* factor asks “whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court.” *Id.* In the present case this inquiry is easily answered in the affirmative. Relief from stay will be conditioned such that any verdict leading to a money judgment against the debtor must be enforced through the bankruptcy court.

One further factor to be considered is the impact of relief from stay on the debtor. Normally, since this is a no asset chapter 7 case and it appears that the claim is pre-petition, there would be no need to litigate the claim in state court and the debt would be discharged. In such a case the stay would not be lifted. However, in the present case the

discharge of the Debtor has been contested and has yet to be determined. Should it be determined that the Debtor is entitled to receive a discharge, the discharge injunction pursuant to 11 USC § 524 will prohibit further litigation against Mr. Salinas on these claims in state court or otherwise. A balancing of the interests of the Plaintiffs and Debtor is therefore necessary.

In *In re Keane* which involved a will contest in state court, the state court plaintiff sought relief from the stay to pursue the debtor in a state court action for fraud and misrepresentation, fraudulent conveyances, breach of fiduciary duty, and several other causes of actions. In re Keane, 2003 WL 22794551 (Bankr. E.D.Va.). The plaintiff filed the action in state court but the case was stayed because of the debtor's bankruptcy petition. The plaintiff sought abstention or, in the alternative, relief from stay, and the plaintiff filed a complaint to determine dischargeability. The Court retained jurisdiction to determine dischargeability and found abstention to be improper, but granted the state court plaintiff relief from stay. In balancing the prejudice to the debtor against that of the state court plaintiff the court reasoned,

...[I]t is unknown what prejudice may occur to debtor at this point. Whether debtor owes a debt to plaintiff is to be determined, as is the issue of whether the debt was incurred as a result of debtor's fraud. The hardship that may be suffered by plaintiff is also not yet determinable. Until findings are made relating to the will and transfers that are being questioned, this court cannot ascertain whether there would be any hardship or prejudice to either party by keeping the stay in place.

In re Keane, 2003 WL 22794551 (Bankr. E. D. Va.).

In the present case while the facts differ a bit, there are similar issues yet to be determined. It is yet to be determined whether or not the Debtor is liable to the Plaintiffs (whether there is a debt owed), and if so, under what legal theory (whether the debt was incurred as a result of fraud). The hardship the Plaintiffs may suffer is also yet to be

determined. One difference between *Keane* and the present case is that in *Keane* the plaintiff filed a dischargeability complaint alleging fraud as an exception to discharge, and here the Plaintiffs are apparently relying on the general discharge complaint filed by the U.S. Trustee. Regardless, as in *Keane*, the Court is unable at this time to ascertain whether there is any hardship or prejudice to the Debtor or the Plaintiffs. Given the analysis of the *Robbins* factors and the inability of this Court to discern any prejudice against the Debtor at this time, relief from stay should be granted to permit the continuance of the State Court Litigation.

It is Therefore,

ORDERED that the Motion For Relief From the Automatic Stay filed by the State Court Plaintiffs is hereby GRANTED subject to the imposition of the discharge injunction provided by 11 USC § 524, should a discharge order be entered; and it is further

ORDERED that the relief from stay is conditioned such that any State Court verdict may only be enforced in the Bankruptcy Court.

AND IT IS SO ORDERED.

Columbia, South Carolina
August 3, 2006