

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Paul Michael Wolsonovich,

Debtor(s).

C/A No. 19-06136-JW

Chapter 13

ORDER

This matter comes before the Court on the Motion for Relief from the Automatic Stay (“Motion”) filed by American Safety & Health Consulting and Training Services, LLC (“Movant”) on January 14, 2020. Paul Michael Wolsonovich (“Debtor”) filed an objection to the Motion. This Court has jurisdiction pursuant to 28 U.S.C. § 1334, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (G). Pursuant to Fed. R. Civ. P. 52, which is made applicable to this proceeding by Fed. R. Bankr. P. 7052 and 9014, the Court makes the following findings of fact and conclusions of law.¹

FINDINGS OF FACT

1. Movant is a Pennsylvania limited liability company in the business of providing safety, training and consulting in multiple business sectors. Debtor is a former 50% owner of Movant. On December 31, 2015, Debtor and Movant executed a Membership Interest Redemption Agreement (“Redemption Agreement”) whereby Debtor’s 50% interest was purchased by Movant for \$340,000. The Redemption Agreement provided that Debtor would be bound to certain restrictive covenants in exchange for the purchase of his interest in the Movant.

¹ To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and vice versa.

2. Debtor has been a resident of North Myrtle Beach, South Carolina since 2016. He also owns real property in Ford City, Pennsylvania.

3. On November 27, 2017, Movant commenced an action against Debtor and GET Safety Consulting, LLC² in the Court of Common Pleas of Allegheny County, Pennsylvania (“State Court”) to recover damages based upon Debtor’s alleged violation of the Redemption Agreement and his conduct in association with GET Safety Consulting, LLC, which interfered with the Movant’s business. The complaint asserts the following causes of action: 1) Breach of the Restrictive Covenants Provision of the Agreement; 2) Misappropriation of Trade Secrets; 3) Tortious Interference with Contractual Relations; 4) Civil Conspiracy; and 5) Accounting. The causes of action all arise under Pennsylvania state law. A jury trial was demanded by Movant.

4. After the completion of discovery and pre-trial motions practice, including motions for judgment on the pleadings and for summary judgment,³ the State Court scheduled the matter for trial on November 26, 2019.

5. On November 21, 2019, Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code in the District of South Carolina.⁴

6. In his schedules, filed on December 13, 2019, Debtor listed Movant as an unsecured creditor, with a disputed claim of \$0.00. The schedules indicate that “[t]he

² Debtor listed 50% ownership of “GET Safety, LLC” in his Schedules.

³ The motions for judgment on the pleadings were denied by the State Court by order entered October 16, 2018. Debtor’s motion for summary judgment on the second, third, and fourth causes of action of the Complaint was denied by the State Court by order entered October 23, 2019. Movant also filed a motion for summary judgment as to the counterclaim for breach of contract asserted by Debtor, which was granted by the State Court.

⁴ The Disclosure of Compensation of Attorney for Debtor(s) filed with the petition indicates that Debtor has agreed to pay counsel \$4,200 for services rendered or to be rendered in connection with the bankruptcy case, but that such amount excludes defense or prosecution of adversary proceedings, motions to modify stay, modification of the plan after confirmation, and any filing or proceeding taking place after confirmation.

debtor is informed and believes he owes no debt to American Safety & Health Consulting & Training Services, LLC, but is listed here because he is a defendant in a pending lawsuit.” Debtor’s mortgage debts in the total amount of \$291,752 are listed in his schedules as current, and Debtor’s other nonpriority unsecured claims total \$25,540.55. He also lists a student loan debt in the amount of \$47,281.00. Debtor’s gross income for 2019 (up through December 13, 2019) (before deductions and exclusions) is \$229,660.63 from his business and \$53,307.64 from wages.

7. On December 13, 2019, Debtor filed a chapter 13 plan (the “Plan”), which proposes that Debtor will maintain direct mortgage payments to his mortgage creditors, value his vehicle creditor’s claim of \$25,245.00 at \$25,000, and make monthly plan payments to the Chapter 13 Trustee in the amount of \$1,900. The plan does not propose to pay 100% of nonpriority unsecured claims.

8. On December 30, 2019, Movant filed a proof of claim, stating an unsecured claim in an unliquidated amount based upon the State Court action.

9. Also on December 30, 2019, Movant filed an Objection to Confirmation of the Plan, asserting that the Plan has not been proposed in good faith, Debtor’s petition was not filed in good faith, and its claim is not subject to discharge under 11 U.S.C. § 1328(a)(2).

10. On January 14, 2020, Movant filed the Motion, seeking relief from stay for cause pursuant to 11 U.S.C. § 362(d)(1). In the alternative, Movant seek abstention by the Court pursuant to 28 U.S.C. § 1334(c)(1)-(2).⁵

⁵ Movant did not present any argument regarding abstention at the hearing on the Motion.

11. On February 20, 2020, Movant commenced an adversary proceeding in this Court, Adversary Proceeding No. 20-80016, seeking denial of discharge of its claim under 11 U.S.C. § 523(a)(4), 11 U.S.C. § 1328(c)(2), and 11 U.S.C. § 523(a)(6).

12. On March 3, 2020, Debtor filed an objection to Movant's proof of claim, asserting that Movant must coherently define the amount of its claim and the claim should be disallowed or the Court should determine the amount of the claim.

13. On March 5, 2020, the Court held a hearing on the Motion and confirmation of the Plan and took the Motion under advisement. The confirmation hearing was continued to April 30, 2020.

CONCLUSIONS OF LAW

Movant seeks relief from the automatic stay for cause pursuant to 11 U.S.C. § 362(d)(1) to complete the State Court litigation and obtain a determination regarding the amount of its claim against Debtor. Section 362(d)(1) allows relief from the automatic stay to be granted "for cause, including the lack of adequate protection of an interest in property of such party in interest." Section 362(d)(1) does not define "cause," therefore, courts determine whether cause exists on a case-by-case basis. *Robbins v. Robbins (In re Robbins)*, 964 F.2d 342, 345 (4th Cir. 1992). The bankruptcy court has "broad discretion to determine what constitutes 'cause' sufficient to warrant relief from stay." *In re Lee*, 428 B.R. 667, 669-70 (Bankr. D.S.C. 2009). "Numerous courts have developed tests to determine when relief from stay to commence or continue litigation in another forum is appropriate." *In re Salinas*, C/A No. 06-01150-DD, slip op. at 4 (Bankr. D.S.C. Aug. 7, 2006). The Fourth Circuit has stated that when making this determination, "the court must 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 if relief is denied.”

Robbins v. Robbins (In re Robbins), 964 F.2d at 345. As observed by the Fourth Circuit in *Robbins*, Congress recognized that the stay should be lifted in appropriate circumstances in the Senate Report accompanying the Bankruptcy Reform Act of 1978, which stated:

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. The Fourth Circuit has considered the following factors when conducting the balancing of hardships inquiry to determine whether cause exists for relief from stay: (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. *Id.* at 345. As the party seeking relief from stay, Movant must make an initial *prima facie* showing that “cause” exists. *See In re White*, 410 B.R. 195, 200 (Bankr. W.D.Va. 2008) (citing authorities). Once Movant has carried this initial burden, the burden shifts to Debtor to show a lack of cause to grant stay relief. *Id.*

Robbins Factors

(1) Do the issues involve only state law, so that the expertise of the bankruptcy court is unnecessary?

Movant argues that the Pennsylvania State Court is the proper forum for this matter because it is already familiar with the issues pending in the action, all of which are non-bankruptcy state law causes of action. A review of the Complaint indicates that all causes of action are state law causes of action: (1) Breach of the Restrictive Covenants Provision of the Agreement; (2) Misappropriation of Trade Secrets; (3) Tortious Interference with Contractual Relations; (4) Civil Conspiracy; and (5) Accounting. These causes of action appear to be governed by Pennsylvania state law since the execution of the Redemption Agreement and the transactions and occurrences at issue in the Complaint occurred in Pennsylvania and the Redemption Agreement provides that it is governed by Pennsylvania law. Movant and Debtor's Co-Defendant in the State Court action, GET Safety Consulting, LLC, are Pennsylvania limited liability companies. Furthermore, since there is a third-party defendant, the State Court appears better situated to afford complete relief to all parties, and allowing the State Court to handle the matter to its conclusion avoids split litigation and the possibility of inconsistent judicial outcomes. *See In re Chatkin*, 465 B.R. 54, 62 (2012) (finding that lifting the stay was warranted where it would eliminate the need for two litigations of the same issues and prevent the possibility of inconsistent judicial outcomes, among other reasons). It does not appear that the expertise of the bankruptcy court is necessary to determine these state law claims. Accordingly, the Court finds that this factor weighs in favor of granting stay relief.

(2) Will modifying the stay promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because the matter would have to be litigated in bankruptcy court?

Movant contends that stay relief is proper because the parties have completed discovery and motions practice in the State Court action and the matter is ready for trial. The matter must be resolved in one court or the other in order to determine whether Movant has a claim against Debtor. Although the timing of the completion of the State Court action is uncertain in light of the present COVID-19 pandemic, it appears that relief from stay would allow for complete resolution of claims, including a determination of damages, by the State Court in a more expeditious manner since the State Court is already familiar with the issues and has indicated its readiness to conduct the trial. To start over the litigation in the bankruptcy court would cause a hardship to the Movant and would be unnecessarily duplicative of the work already done by the State Court. It further appears that the trial in State Court could be completed within a relatively short period of time⁶ and would avoid the unnecessary use of judicial resources in this Court. The “interests of judicial economy and efficiency” are “best-served” by liquidating claims before the court that “knows the parties and the factual and legal issues” and can schedule final hearings “in short order.” *In re Touchstone Home Health LLC*, 572 B.R. 255, 282 (Bankr. D. Colo. 2017).

Debtor argues that he no longer has state court counsel and would have to get new counsel up to speed on the case. It appears that Debtor would have to incur costs to obtain

⁶ The Court observes that any delay caused by the COVID-19 pandemic would likely occur in either forum.

counsel in either forum to represent him in the matter⁷ and counsel in either forum would have to get up to speed on the case.⁸ Based on the Schedules and Statements filed in this case, Debtor appears to have adequate income to pay counsel. The Court finds that any potential prejudice to Debtor caused by granting relief from stay to allow the State Court action to continue does not appear to outweigh the prejudice to the Movant of starting over the litigation in this forum. The more expeditious resolution of the action in State Court will assist in the resolution of this bankruptcy case, as it will allow for the determination of the amount of Movant's claim, so that this Court can focus on the issues of dischargeability of that debt raised in the pending adversary proceeding. Accordingly, the Court finds that this factor also weighs in favor of granting relief from the automatic stay.

(3) Can the estate be properly protected by a requirement that Movant seek enforcement of any judgment through the bankruptcy court?

Under the circumstances of this case, it appears that the estate can be protected by an order that allows the State Court to determine liability and damages, including attorney's fees, but bars recording of any judgment lien on property of Debtor and requires Movant to seek enforcement of judgment through the bankruptcy court's claim process.

At the hearing, Debtor expressed concerns that a State Court judgment might affect his eligibility under Chapter 13 because the determination of Movant's claim might cause his case to exceed unsecured debt limitations for Chapter 13. However, eligibility for Chapter 13 is determined as of the commencement of the case and later liquidation of

⁷ According to the Disclosure of Attorney Compensation filed with the petition, representation of the Debtor in adversary proceedings is excluded from the fee Debtor agreed to pay his counsel for representation in the bankruptcy case.

⁸ Debtor did not present any testimony or other evidence regarding the estimated costs of litigating the matter in the State Court vs. litigating the matter in this Court.

claims does not in and of itself alter eligibility. *In re Wiley*, 288 B.R. 818, 823 n.9 (8th Cir. B.A.P. 2003).

Other Factors

While the foregoing factors are the only factors expressly articulated by the Fourth Circuit for determining whether the circumstances warrant relief from stay to pursue litigation in another forum, other courts, including another judge in this Court, have considered additional factors in their balancing of the hardships inquiry. Those factors include: (1) any great prejudice to either the bankruptcy estate or the debtor that will result from the continuation of the civil suit; (2) the hardship to the non-bankrupt party by maintenance of the stay; (3) the creditor's probability of prevailing on the merits. *See In re Mitchell*, 546 B.R. 339, 344 (Bankr. D.S.C. 2016) (citing *Int'l Bus. Machs. v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731, 735 (7th Cir. 1991)). Consideration of these factors also weighs in favor of relief from stay in this case.

(1) Any great prejudice to either the bankruptcy estate or the debtor that will result from continuation of the civil suit

Debtor argues that he will be prejudiced by the lifting of the stay because he will have to incur the expense of hiring counsel to complete the litigation in State Court. Debtor further argues that the estate will be unfairly disadvantaged by being compelled to engage in costly out-of-state litigation to the detriment of his ability to perform under the proposed plan. He further argues that the State Court litigation will negatively impact the distribution to other creditors by decreasing the amount of the dividend to unsecured creditors. Debtor's arguments are unpersuasive. Debtor will also incur additional costs for defending the litigation in bankruptcy court since representation in adversary

proceedings and defense of motions to modify the stay are expressly excluded from the flat fee on his Attorney's Disclosure of Compensation. The likely prejudice to Debtor of defending litigation in Pennsylvania is further called into question by the fact that he owns real property and conducts business in Pennsylvania. Moreover, other bankruptcy courts have held that the mere cost of defense is an insufficient basis for denying a motion for relief from stay. *See, e.g., In re Wiley*, 288 B.R. at 823; *In re Peterson*, 116 B.R. 247, 250 (D. Colo. 1990); *In re Tricare Rehabilitation Systems, Inc.*, 181 B.R. 569 (Bankr. N.D. Ala. 1994); *In re Anton*, 145 B.R. 767 (Bankr. E.D.N.Y.1992); *In re Horn*, 2012 WL 1978287, slip copy at *3 (Bankr. M.D. N.C. Jun. 1, 2012). The current plan may be confirmed providing payment to other creditors while the State Court litigation is concluded.⁹ The fact that the litigation may dilute the ultimate return to other creditors does not constitute legal prejudice to the rights of such creditors. *In re Horizon Womens Care Profl LLC*, 506 B.R. 553, 559 (Bankr. D. Colo. 2014).

(2) The hardship to the non-bankrupt party by maintenance of the stay

Movant will have to incur costs of pursuing litigation in South Carolina and attorneys' fees for both local counsel and Pennsylvania counsel, while separately continuing or putting on hold its litigation in Pennsylvania against the non-Debtor third party defendant in the State Court action.

⁹ The Court also notes that this case appears to have been filed for the sole purpose of delaying or interfering with the State Court trial. Debtor appears to be current with his mortgage and vehicle creditors and proposes to value his vehicle debt at nearly the same amount as the current debt owed.

(3) *The creditor has a probability of prevailing on the merits.*¹⁰

Based on a review of the State Court pleadings, it appears that Movant has some probability of prevailing on the merits, as evidenced by the State Court’s denial of Debtor’s motion for judgment on the pleadings and its granting of Movant’s motion for summary judgment as to Debtor’s counterclaim for breach of contract. Under Pennsylvania law, “[t]he standard to be applied upon review of a motion for judgment on the pleadings accepts all well-pleaded allegations of the complaint as true. The question presented ... is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.” *Donaldson v. Davidson Bros., Inc.*, 144 A.3d 93, 100 (Pa. Super. Ct. 2016) (citing *Tucker v. Philadelphia Daily News*, 577 Pa. 598, 848 A.2d 113, 131 (2004)). Therefore, in applying that standard to deny the Debtor’s motion, the State Court necessarily concluded that recovery was possible for the Movant.

Other courts have also considered the stage the other litigation has reached and the involvement of third-parties. *See In re Chatkin*, 465 B.R. 54 (Bankr. W.D. Pa. 2012). As discussed above, these factors weigh in favor of relief from stay in this case as well. The State Court action, which involves a non-debtor third party defendant, is ready for trial.

¹⁰ This factor can be dispositive if the creditor has no probability of prevailing on the merits in the non-bankruptcy forum. *See In re Jefferson Cty., Ala.*, 484 B.R. 427, 466 (Bankr. N.D. Ala. 2012) (“Although the weight afforded to each of the three factors varies based on the circumstances of each case, a creditor must have a probability of prevailing on the merits in order for the automatic stay to be lifted to pursue litigation in a non-bankruptcy forum.”)

CONCLUSION

Based on the foregoing, the Court finds that Movant met its burden of demonstrating cause sufficient to support relief from stay under 11 U.S.C. § 362(d)(1), and that Debtor has failed to meet his burden of presenting persuasive evidence indicating a lack of cause to grant stay relief under the circumstances of this case. Therefore, the Court grants relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1),¹¹ subject to the following conditions:

- (a) Relief from stay is granted to allow the State Court to conduct a trial within a six-month period from the date of this Order to determine the amount of Movant's claim against Debtor, if any, including entitlement to any related damages such as attorney's fees. In the event the matter is not completed by the State Court within the six-month period, Movant, upon a showing of cause, may request additional time to conclude the matter.
- (b) In the event an order or judgment is entered against Debtor by the State Court, the automatic stay shall continue to apply to bar the recording of any judgment lien on property of Debtor and Movant must seek any enforcement of such judgment through this Court by further order.
- (c) This Court retains jurisdiction to determine the allowance or disallowance of Movant's claim pursuant to 11 U.S.C. § 502 following the resolution of the matter in State Court. Movant, through counsel, is ordered to timely advise the Chapter 13 Trustee and this Court of the resolution of the State Court action.

¹¹ Based on this ruling, the Court finds it unnecessary at this time to determine whether abstention pursuant to 28 U.S.C. § 1334(c)(1)-(2) is appropriate.

(d) Since the outcome of the pending Objection to Claim and Adversary Proceeding depends upon the determination of the amount and nature of Movant's claim by the State Court, such matters shall be stayed until the entry of a final order or judgment by the State Court or until November 1, 2020, whichever occurs first.

AND IT IS SO ORDERED.

**FILED BY THE COURT
04/01/2020**



Entered: 04/01/2020

US Bankruptcy Judge
District of South Carolina