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

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U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

IN RE:

BHB ENTERPRISES, LLC, d/b/a
Tycoon's Gallery of Games,

DEBTOR.

Case No. 97-01975-JW

Chapter 11

Adversary No. 97-80201

EN
AUG 28 1997
V.A.

Stanley H. McGuffin, Chapter 11 Trustee
for the Debtor BHB Enterprises, LLC,
d/b/a Tycoon's Gallery of Games,

Plaintiff,

v.

Norman Barman, and Bobby's
Bar B-Q, Inc.,

Defendants.

JUDGMENT

Based on the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Defendants' Motion to Dismiss the above-captioned adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) is denied. Trustee's Motion for a Preliminary Injunction pursuant to 11 U.S.C. §105 and 28 U.S.C. §1334 is granted.


UNITED STATES BANKRUPTCY JUDGE

August 27, 1997
Columbia, South Carolina

97-204 30

UNITED STATES COURT OF BANKRUPTCY

The undersigned clerk for district court of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was

mailed on 8/28/97, to:

DEBTOR, *Strait*

DEBTOR'S ATTY. *Norton*

TRUSTEE *Duncan*

W. C. [Signature]
Deputy Clerk *Hanfeul*

FILED

At _____ O'clock & _____ min M

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

AUG 2 / 1997

BRENDA K. ARGOT
United States Bankruptcy Court
Columbia, South Carolina (2)

IN RE:

BHB ENTERPRISES, LLC, d/b/a
Tycoon's Gallery of Games,

Debtor.

Case No. 97-01975-JW

Chapter 11

Stanley H. McGuffin, Chapter 11 Trustee
for the Debtor BHB Enterprises, LLC,
d/b/a Tycoon's Gallery of Games,

Plaintiff,

v.

Norman Barman, and Bobby's
Bar B-Q, Inc.,

Defendants.

Adversary No. 97-80201

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS
AND ORDER FOR PRELIMINARY INJUNCTION**

This matter is before the Court for two matters: the continued hearing on the motion of Stanley H. McGuffin, Chapter 11 Trustee for the Debtor BHB Enterprises, LLC, d/b/a Tycoon's Gallery of Games ("Trustee"), seeking a preliminary injunction against the defendants Norman Barman ("Defendant Barman") and Bobby's Bar B-Q, Inc. ("Defendant Corporation") (collectively "Defendants"), and the hearing on Defendants' Motion to Dismiss¹ the above-captioned adversary

¹ Defendant Corporation filed an Answer to the Trustee's Amended Complaint but not a separate Motion to Dismiss. However, the Answer raises, as second and third defenses, requests for dismissal of this adversary similar to those raised by Defendant Barman in his Motion to Dismiss. The Court will refer to both Defendants' responsive pleadings collectively as "Defendants'

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proceeding. After reviewing the pleadings in this matter, the briefs submitted, and considering arguments of counsel for the parties, the Court makes the following Findings of Fact and Conclusions of Law²:

FINDINGS OF FACT

1. On or about September 14, 1995, for valuable consideration, Defendant Barman, "on behalf of a corporation to be formed," executed and delivered to Defendant Corporation a land sale contract for the purchase of a parcel of real property, with improvements thereon ("Land Sale Contract"), described as:

ALL AND SINGULAR that certain place, parcel or lot of land situated, lying and being in Socastes Township, Horry County, South Carolina, and being shown and designated as LOT SIX (6) SECTION A on that certain map or plat of PLATT PLAZA prepared by S.D. Cox Surveyors, dated April 20, 1972, and recorded in Plat Book 53 at Page 38A, in the Office of the Register of Mesne Conveyance for Horry County, which said map or plat and recorded thereof is hereby incorporated herein and made a part and parcel of this description by reference.

Tax I.D. No. 191-08-06-064

Street Address: 1900 17th Avenue North
Surfside Beach, SC.

("Real Property").

2. On December 6, 1995, the debtor BHB Enterprises, LLC ("Debtor") was formed for the purpose of "establishing, owning and operating gambling casinos throughout the United States." The Debtor's incorporators and principals include Harold Barman, the Defendant Barman's father.

Motion." This order is intended to be a ruling on the Defendants' Motions.

² The Court notes that, 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.

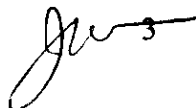


Under the terms of the Debtor's Operating Agreement ("Agreement"), the Debtor's "First Site" for its business was the Real Property. To this end, the Agreement contemplated that Debtor would borrow funds from third parties, and that these funds would be used to purchase the Real Property, make debt service payments thereon, and to construct the Debtor's operation on the Real Property.

3. On or about April 22, 1996, Debtor began operating its video gaming business on the Real Property under the name "Tycoon's." There is no written lease between the Debtor and Defendant Barman. Defendant Barman never transferred his rights under the Land Sale Contract in the Real Property to the Debtor. Defendant Barman remains the named party to the Land Sale Contract and operated the Debtor's business on the Real Property prior to the appointment of the Trustee.

4. On March 5, 1997, creditors of the Debtor filed an involuntary bankruptcy petition against the Debtor. On May 1, 1997, after a protracted hearing, an Order Adjudicating the Involuntary Petition was entered. Thereafter, on May 22, 1997, on motion of the petitioning creditors and the United States Trustee, the Court entered an Order Appointing a Chapter 11 Trustee. On May 23, 1997, Stanley H. McGuffin, Esq. was appointed as Chapter 11 Trustee. The Trustee is in possession of all business assets of the estate and the Real Property, and has been continuously since his appointment.

5. On March 26, 1997, approximately 20 days after the involuntary petition was filed, Defendant Corporation filed a complaint against Defendant Barman captioned, *Bobby's Bar B-Q, Inc. v. Norman Barman*, Case No. 97-CP-26-995 ("State Court Action"). The State Court Action sought damages for breach of the Land Sale Contract and rescission. In addition, the State Court Action asked for the appointment of a receiver to assume control over the Real Property and the business of the Debtor, both of which are presently under the control of the Trustee. It is

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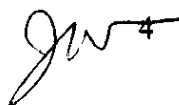
uncontroverted that the State Court Action was filed after the involuntary petition, and that the Defendant Corporation did not seek to have the automatic stay modified prior to filing the State Court Action. The State Court Action does not name either the Debtor or the Trustee as a party.

6. On May 27, 1997, acting pursuant to his powers under 11 U.S.C. §1108³, the Trustee petitioned the State Court to allow the Trustee to intervene in the State Court Action pursuant to South Carolina Rule of Civil Procedure Rule 24(a)(2) ("Rule 24") for the purpose of protecting the estate's interest in the Real Property. At a hearing held on June 23, 1997, and after limited argument, the State Court denied the Trustee's Petition to Intervene upon the stated grounds that the Trustee lacked "sufficient interest in the property or transaction" to support the Petition to Intervene. See State Court Order Denying Petition to Intervene, dated June 24, 1997 ("State Court Order").

7. On June 30, 1997, the Trustee filed the present adversary proceeding seeking a preliminary injunction, declaratory judgment, imposition of an equitable lien, turnover of the Debtor's interest in the Real Property pursuant to §542, avoidance of fraudulent transfers under §548(a)(1) and (2), recovery of fraudulent transfers made to Defendant Corporation pursuant to §550, and an accounting. At the same time, the Trustee filed a motion pursuant to Federal Rule of Civil Procedure 65(b) and Federal Rule of Bankruptcy Procedure 7065, asking this Court to issue a preliminary injunction to prohibit, restrain, and enjoin the Defendants from taking any action affecting or tending to affect the status and subject matter of the State Court Action and the Real Property.

8. At the preliminary hearing on this matter, the parties consented to a Temporary Injunction pending a further hearing on the merits of a portion of the Trustee's requested relief. In addition, at

³ Further reference to the Bankruptcy Code, 11 U.S.C. §101, *et seq.*, shall be by section number only.

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the Court's request, the parties agreed to submit briefs on the issue of the applicability of the *Rooker-Feldman* doctrine, which was raised by Defendant Barman both in his Objection to the Trustee's Motion for a Preliminary Injunction and in his Motion to Dismiss.

CONCLUSIONS OF LAW

Defendants allege that this Court lacks subject matter jurisdiction to consider this adversary proceeding and to issue the preliminary injunction because the Trustee is seeking a federal court review of a state court judgment [*i.e.* the denial of the Trustee's Petition to Intervene], which is barred by the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 US. 413 (1923). Therefore, Defendants argue, the adversary proceeding should be dismissed pursuant to Rule 12(b)(1) and/or 12(b)(6). The Court rejects Defendants' argument that the *Rooker-Feldman* doctrine applies under the circumstances of this case. In reaching this conclusion, the preliminary legal question to be examined is the validity of the State Court order which the doctrine would protect. For the reasons stated herein, the Court finds that because the automatic stay was in effect prior to the filing of the State Court Action, the state court lacked subject matter jurisdiction to consider the issues raised by both the Trustee in his Petition to Intervene and the Defendant Corporation in its complaint. Therefore, the State Court order is void and the *Rooker-Feldman* doctrine does not apply.

A. AUTOMATIC STAY

Section 541(a)(1) defines "property of the estate," as, "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). Case law and legislative history indicate that the scope of §541(a) is broad. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 and n.9 (1988); H.R. Rep. 595, 95th Cong., 1st Sess. 367 (1977), *reprinted*



in 1978 U.S. Code Cong. & Admin. News 5787, 6323 (the estate, "includes all kinds of property . . . tangible or intangible . . ."); see also *In re Connecticut Pizza, Inc.*, 193 B.R. 217, 226 (Bkrcty. D. Md. 1996). In fact, the scope of §541 is so broad that, to be included within the term "property of the estate," the item does not necessarily have to be in the debtor's possession. See *Whiting Pools, Inc.*, 462 U.S. at 205. It therefore follows that there is an abundance of case law which holds that a possessory interest in property, without more, is sufficient as a property interest to be part of the estate, and thus subject to the protections of §362. See *In re Ramirez*, 183 B.R. 583 (9th Cir. BAP 1995) (holding that, for purposes of the automatic stay, estate property includes the beneficial rights and interests of the debtor in property owned by third parties, but which are in the possession of the Debtor); *In re Atlantic Business and Community Corp.*, 901 F.2d 325 (3d Cir. 1990) (holding that debtor's tenancy at sufferance, which gave it access to and use of premises, is a property interest protected by the stay); *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427 (2d Cir. 1987), *cert. denied*, *sub nom. Rockefeller Group, Inc. v. 48th Street Steakhouse, Inc.*, 485 U.S. 1035 (1988); *In re Connecticut Pizza, Inc.*, 193 B.R. 217, 226 (Bkrcty. D. Md. 1996) (holding that a phone number is property of the estate); *In re Wright*, 183 B.R. 541 (Bkrcty. C.D. Ill. 1995); *In re Colonial Realty Co.*, 122 B.R. 1 (Bkrcty. D. Conn. 1990); *In re Turbowind, Inc.*, 42 B.R. 579 (Bkrcty. S.D. Cal. 1984) (holding that, despite the fact that the Debtor had no ownership interest in several wind turbines, because the debtor had possession of the turbines, the automatic stay protected the turbines from seizure by the owner). This Court agrees.

Upon the filing of a bankruptcy petition, the automatic stay of §362 "operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate..." 11 U.S.C. §362(a)(3); see *In re*

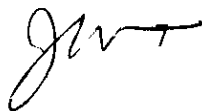
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Clarkson, 168 B.R. 93 (Bkrtcy. D.S.C. 1994); *Citizens and Southern Nat'l Bank v. Brockington (In re Brockington)*, 129 B.R. 68 (Bkrtcy. D.S.C. 1991). One of the purposes of the automatic stay is to:

effect an immediate freeze of the status quo at the outset of the chapter 11 proceeding, by precluding and nullifying most postpetition actions and proceedings against the debtor in a nonbankruptcy forum, judicial or nonjudicial, as well as most extrajudicial acts against the debtor, or affecting property in which the debtor, or the debtor's estate, has a legal, equitable or possessory interest

I.C.C. v. Holmes Transport, Inc., 931 F.2d 984, 987 (1st Cir. 1991); *accord Hillis Motors, Inc. v. Hawaii Automobile Dealers Ass'n*, 997 F.2d 585 (9th Cir. 1993).


The scope of the stay is expansive, and its operation is automatic. As soon as a bankruptcy petition, either voluntary or involuntary, is filed, the stay is activated. Once in place, the stay protects all property of the estate regardless of whether or not notice has been given of the pendency of the case. *See In re Clarkson*, 168 B.R. at 94; *see also, In re Ferebee*, 129 B.R. 71 (Bkrtcy. E.D. Va. 1991); *In re Colonial Realty Co.*, 122 B.R. 1, 4 (Bkrtcy. D. Conn. 1990). While it appears that the Debtor is not a named party to the Land Sale Contract and is not the titled owner of the Real Property, the adversary proceeding brought by the Trustee seeks, in part, a declaratory judgment that the Debtor is the real party in interest in the Land Sale Contract. The Complaint on its face sufficiently alleges that the estate has an interest in the Real Property. Although the Debtor is not the record owner of the Real Property, all parties admit that the Debtor (and the Trustee on behalf of the Debtor's estate) has had actual and exclusive possession of the Real Property. The Court finds that the Debtor estate's possessory rights in the Real Property are sufficient to invoke the protection of the automatic stay and to prevent any party from taking any action to usurp those rights outside of this forum and without prior order of this Court.

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After the filing of an involuntary petition, on March 26, 1997 Defendant Corporation filed the State Court Action against Defendant Barman, the ultimate goal of which was to obtain possession and control of the Real Property from Defendant Barman and the Trustee as representative of the bankruptcy estate.

All activity in the State Court Action, including the June 23, 1997 State Court Order denying the Trustee's Petition to Intervene, occurred after the petition date and without authorization of this Court by way of a modification of the automatic stay. The Court finds that because the automatic stay was in effect, both the filing of the State Court complaint and the entry of the State Court order were done in violation of the automatic stay and are therefore void and without effect.

The automatic stay does not merely prohibit creditors from taking actions against the debtor and the estate. Such actions are void *ab initio*, and of no legal effect. *In re Clarkson*, 168 B.R. 93, 94 (Bkrtcy. D.S.C. 1994); *Brockington v. Citizens & Southern Nat'l Bank (In re Brockington)*, 129 B.R. 68, 70 (Bkrtcy. D.S.C. 1991); *see Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661, 663 - 64 (1993); *see also I.C.C. v. Holmes Transportation, Inc.*, 931 F.2d at 987 (finding that judicial and extrajudicial actions taken in violation of the automatic stay are void and without legal effect). According to the recent ruling of the Supreme Court for South Carolina, the automatic stay deprives the state courts of subject matter jurisdiction to enter judgments against a bankrupt debtor. *Ex Parte Reichlyn*, 310 S.C. at 499, 427 S.E.2d at 663. Such actions are void even if the offending party had no notice of the pendency of the bankruptcy. *In re Clarkson*, 168 B.R. at 94; *In re Brockington*, 129 B.R. at 70. In addition, such actions are void even if they result in a benefit to the debtor or the estate. *See Ellis v. Consolidated Diesel Elec. Corp.* 894 F.2d 371 (10th Cir. 1990) (holding that

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operation of the stay in a non-bankruptcy judicial proceeding is not dependent on the outcome of the proceeding). For these reasons, the Court finds that the State Court Order is void, and without effect.

The Bankruptcy Code allows for no other result. This adversary proceeding is a core proceeding which involves matters directly relating to and affecting the administration of a case arising under the Bankruptcy Code. 28 U.S.C. § 157(b)(2)(A), (E), (F), (H), (K), and (O). Title 28 U.S.C. § 1334 gives this Court original and exclusive jurisdiction over all cases under Title 11, and original jurisdiction over all civil proceedings arising under Title 11. 28 U.S.C. § 1334. A fundamental purpose of the Bankruptcy Code, and the reason for this grant of jurisdiction to this Court, is "to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors" *Straton v. New*, 283 U.S. 318, 320-21 (1931). One of the primary goals of federal bankruptcy laws, of which §362 represents a part, is to bring a debtor and its creditors together before the Bankruptcy Court, where an orderly distribution of estate assets can be made. *See In re Prudential Lines, Inc.*, 119 B.R. 430 (D.S.D.N.Y. 1990), *aff'd* 928 F.2d 585 (2d Cir. 1991); *In re Connecticut Pizza, Inc.*, 193 B.R. at 227. The Bankruptcy Court has the duty and the responsibility to manage the claims of all creditors of the estate. Consequently, a party cannot take any action that may affect a debtor or the estate without first obtaining leave of this Court to do so.⁴ If a party wishes to proceed against a debtor or the estate in an alternate forum, the Bankruptcy Code provides specific procedures whereby relief from the stay can be obtained. *See, e.g.*, 11 U.S.C. §362(d).

⁴ The Court again notes that this rational and logic has been propounded not only by this Court, but by the South Carolina Supreme Court. *See Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993).

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If Defendants' arguments against this Court's jurisdiction are to be accepted and taken to their logical extreme, when the State Court denied the Trustee's petition to intervene, the State Court also, in one fell swoop, also effectively decided for this Court, the Trustee, and all creditors of the estate: (1) the scope of the automatic stay; (2) what is and what is not an asset of the estate; (3) that the automatic stay was not in effect with regards to the Real Property and personal property currently in the possession of a duly appointed trustee; (4) that a receiver could be appointed to take over the Real Property and the operations of the Debtor from the Trustee without his even being a party to the action.

Finally, at the hearing on this matter, a suggestion was made that, when he filed the petition to intervene, the Trustee may have waived the protections of the automatic stay. The Court rejects this argument.

"Waiver" is defined as the voluntary relinquishment of a known right. *Moore v. Wilson*, 296 S.C. 321, 372 S.E.2d 357 (1988); *Gilford v. South Carolina Nat'l Bank*, 257 S.C. 374, 186 S.E.2d 258 (1972). This Court has previously recognized the ability of a debtor to waive the automatic stay under very specific and stringent circumstances. See *In re Darrell Creek Assoc., LP*, 187 B.R. 908 (Bkrtcy. D.S.C. 1995); *In re Cheeks*, 167 B.R. 817 (Bkrtcy. D.S.C. 1994). In these cases, the debtor, as part of a pre-petition workout agreement, agreed that in the event of a bankruptcy, the debtor would not oppose or object to the creditor's motion for relief from the automatic stay. See, e.g., *In re Darrell Creek Assoc., LP*, 187 B.R. at 910 - 11. In this, as in all cases involving waiver, there must be a clear manifestation of the party's intent to waive the automatic stay.

There is no evidence that the Trustee intended to waive the application of the automatic stay. The Trustee has consistently maintained that the estate has an interest in the Real Property and has



alleged such in his Complaint in this adversary proceeding. In fact, both in the pleadings filed in state court and in the state court hearing, the Trustee argued that the Defendant Barman was not protecting the estate's interests by not raising the automatic stay as a defense to the State Court Action. Clearly, this belies any claim that the Trustee waived the protection of the stay.

B. ROOKER-FELDMAN DOCTRINE

If the State Court order is void, the Defendant's arguments regarding this Court's subject matter jurisdiction and the *Rooker-Feldman* doctrine are moot. For the benefit of the parties, however, the Court notes that, even assuming that the state court order is not void, the *Rooker-Feldman* doctrine does not deprive this Court of subject matter jurisdiction to consider the matters raised by the Trustee in this adversary proceeding.

The *Rooker-Feldman* doctrine bars lower federal courts from undertaking appellate review of state court decisions. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 US. 413 (1923). When determining whether the *Rooker-Feldman* doctrine applies, the federal court must first consider whether the federal action seeks redress of an injury caused by the state court judgment, or whether the federal action presents a claim independent of the state court decision. See *Young v. Murphy*, 90 F.3d 1225, 1231 (7th Cir. 1996); *Levin v. ARDC*, 74 F.3d 763, 766 (7th Cir.), *cert. denied*, 116 S. Ct. 2553 (1996); *Gash Assoc. v. Village of Rosemont, Ill.*, 995 F.2d 726, 728 (7th Cir. 1993). If, in its federal action, the federal plaintiff is attempting to redress an injury caused by the state court judgment, the issues raised in the federal complaint are "inextricably intertwined" with the State Court Action so that, in effect, the federal plaintiff is attempting to have the state court judgment set aside. See *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996); *T.W. v. Brophy*, 954 F. Supp. 1306, 1311 (E.D. Wis. 1996) ("An issue in a

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federal case is inextricable from a state judgment if that issue would be a basis for a state appellate court to reverse the state trial court."). In that situation, *Rooker-Feldman* applies and the federal court must dismiss the federal action. See *Gash Assoc.*, 995 F.2d at 728; *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 - 41 (3d Cir. 1996). However, if the federal plaintiff presents an independent claim, then the federal case is not inextricably intertwined and the federal action can proceed. *Garry*, 82 F.3d at 1365-66; *Gash Assoc.*, 995 F.2d at 728.

Considering the facts before it, the Court finds that the *Rooker-Feldman* doctrine does not apply in this case. Initially, a review of the pleadings before the Court indicates that the Trustee is not attempting to attack the state court order. The only issue presented or argued to the state court was the narrow issue of whether the Trustee should be permitted to intervene in the State Court Action. The Amended Complaint, in contrast, seeks different, and much broader relief, including a declaratory judgment that the Trustee is the real party in interest to the Land Sale Contract, imposition of an equitable lien and/or a resulting trust, and recovery of fraudulent transfers. The Amended Complaint does not ask the Court to find that the state court ruling was in error, or to allow the Trustee to intervene in the State Court Action.

Further support for the holding that the Trustee is not seeking to attack the State Court Order is the fact that the two cases are not inextricably intertwined. When deciding the issues raised in the Amended Complaint, this Court will not have to decide that State Court's Order was erroneous, or even consider the State Court Order. See *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d at 84 ("we have no reason to believe that in order for FOCUS to prevail in federal court, the court must decide that the state court decision [on intervention] is wrong."). In other words, before ruling on the merits of the adversary, this Court does not have to find that the denial of the petition

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to intervene was in error. The Trustee's claims against the Defendants are separate and independent, and exist wholly apart from the State Court Order. Trustee's damages and causes of action would exist regardless of whether the petition to intervene was granted, denied, or even brought. The *Rooker-Feldman* doctrine does not prevent this litigation or the issuance of the Preliminary Injunction.

C. PRELIMINARY INJUNCTION

Section 105, in conjunction with Federal Rule of Civil Procedure 65(b), made applicable herein by Federal Rule of Bankruptcy Procedure Rule 7065, gives this Court the power to issue a preliminary injunction⁵ if it clearly appears from specific facts that immediate and irreparable injury, loss, or damage will result to the applicant. 11 U.S.C. § 105; *see Caplan v. Fellheimer Eichen Braverman & Kapskey*, 68 F.3d 828, 839 (3d Cir. 1995) (purpose of a preliminary injunction is to prevent irreparable injury pending a decision on the merits). When considering Trustee's request for a preliminary injunction, the Court must consider:

1. the likelihood of irreparable harm to plaintiff if the preliminary injunction is not issued;
2. the likelihood of harm to defendant if the preliminary injunction is issued;
3. the likelihood that, when the case is finally heard, plaintiff will succeed on the merits; and
4. the public interest.

⁵ See, e.g., *In re Johns-Manville Corp.*, 837 F.2d 89, 91-92 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988) (bankruptcy judge has the power to issue a preliminary injunction in a core proceeding when the res that is the subject of the preliminary injunction is an asset of the estate).

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Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991); *L.J. By and Through Darr v. Massinga*, 838 F.2d 118, 120 (4th Cir. 1988), *cert. denied, sub nom. Massinga v. L.J.*, 488 U.S. 1018 (1989); *Federal Leasing v. Underwriters at Lloyd's*, 650 F.2d 495 (4th Cir. 1981); *Blackwelder Furniture Co. v. Seilig Mfg. Co. Inc.*, 550 F.2d 189, 195 (4th Cir. 1977). The decision to grant or deny a preliminary injunction rests within the sound discretion of this Court. *Hughs Network Systems, Inc. v. Interdigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994).

In *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, *supra*, the Fourth Circuit recognized that, while each of the foregoing elements is important to the Court's decision to issue or deny a preliminary injunction, the order of consideration and importance of each element varies depending upon the stage of the proceeding. When, as in this case, a preliminary injunction is sought at the trial level, the "balance-of-hardship test" is the determining factor. *Blackwelder Furniture Co.*, 550 F.2d at 195; *accord Federal Leasing*, 650 F.2d at 499. Thus, when considering a request for interlocutory injunctive relief, the Court must balance the relative hardships of the plaintiff and defendant and to determine, based on the evidence and testimony before it, whether the likelihood of irreparable harm to plaintiff if the injunction is not issued outweighs the likelihood of harm to the defendant if the injunction is granted. If, after this consideration, the Court finds that "the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation," then the balance tips in favor of the plaintiff and a preliminary injunction should ensue. *Blackwelder Furniture*, 550 F.2d at 195; *accord Rum Creek Coal Sales, inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991); *Federal Leasing*, 650 F.2d at 495.

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Balancing the hardships between the Debtor and Trustee and the Defendants, the Court finds that there is certain evidence of irreparable harm to the Debtor, the estate, and creditors if the injunction is not issued. First and foremost, without an injunction, the possessory rights of the Trustee in the Real Property will continue to be threatened by the State Court Action. Counsel for Defendant Corporation conceded that the Corporation's goal in the State Court Action was to regain possession control of the Real Property and that ultimately, Defendant Corporation would seek to have the Trustee dispossessed. The Court can think of no greater harm to the estate and its creditors than the loss of the Real Property upon which the Debtor has its only operation and source of income.

In addition, §105 and 28 U.S.C. §1334 give this Court the power to stay any litigation that could interfere with the Trustee's efforts at reorganization. *In re A.H. Robins Co., Inc.*, 828 F.2d 1023 (4th Cir. 1987).⁶ The Court finds that continuation of the State Court Action will interfere with the Trustee's efforts at reorganization, and represents an additional harm that would be suffered by the Debtor, the estate and its creditors.

In contrast with the grave harm to the Debtor, creditors, and the estate if the Trustee's request for a preliminary injunction is denied, the Court finds that the harm to the Defendants is minimal. Defendant Barman's complaints regarding the injunction go more to the fact that the Trustee, not he, is now in possession and control of the assets of the Debtor. And, although Defendant Corporation failed to respond to the request for a preliminary injunction, the Court finds that it too, would not be harmed by the issuance of the injunction. In fact, Defendant Corporation may benefit from the

⁶ The Court notes that based upon its previous ruling herein, the automatic stay pursuant to § 362 itself prohibits any further action in the State Court Action.



injunction which may protect the Real Property from foreclosure by the primary lender to whom Defendant Corporation owes funds.⁷ In addition, a timely adjudication on the merits of the Amended Complaint may resolve many of the questions that must be addressed before the Defendant Corporation could repossess the Real Property.

Weighing the relevant factors, the Court finds that the likelihood of irreparable harm to Trustee, the Debtor, the estate, and creditors if the injunction is not issued, outweighs the likelihood of harm to the Defendants if the injunction is granted. The Court further finds that the Trustee's complaint raises questions and issues that are so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation. For these reasons, the Court hereby grants Trustee's request for a Preliminary Injunction to prohibit, restrain, and enjoin Defendants from taking any action affecting or tending to affect the status and subject matter of the State Court Action captioned, *Bobby's Bar B-Q, Inc. v. Norman Barman*, Case No. 97-CP-26-995.

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore

ORDERED, that the State Court order is declared void and without effect. It is further

ORDERED, that the Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure Rules 12(b)(1) and (b)(6) is DENIED. It is further

ORDERED, that the Trustee's petition for a Preliminary Injunction is granted and the Defendants are hereby prohibited, restrained, and enjoined from conveying, encumbering, or otherwise taking any action affecting or tending to affect the status and subject matter [*i.e.* the Land Sale Contract and Real Property] of the State Court Action captioned, *Bobby's Bar B-Q, Inc. v.*

⁷ In a foreclosure, the lender would be seeking possession from the Trustee and would likewise be subject to the automatic stay.

A handwritten signature in black ink, appearing to be "J. J. 10" or similar, written in a cursive style.

Norman Barman, Case No. 97-CP-26-995. This Preliminary Injunction shall remain in full force and effect until further Order from this Court.

AND IT IS SO ORDERED!


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
August 27, 1997

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CERTIFICATE OF MAILING

The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 8/28/97, to:

DEBTOR, *Strait*

DEBTOR'S ATTY. *Norton*

TRUSTEE *Duncan*

Wes *Hampel*
Deputy Clerk