

Filed at 10 O'clock & 34 min. A.M.  
Date: 3-2-92  
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>91-10931</u>
BENBO OF GEORGIA, INC.	)	
	)	
Debtor	)	
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	)	
WORLD BAZAAR FRANCHISE	)	
CORPORATION	)	
	)	
Movant	)	
	)	
vs	)	
	)	
BENBO OF GEORGIA, INC.	)	
	)	
Respondent	)	

**ORDER**

World Bazaar Franchise Corporation ("World Bazaar") seeks relief from stay to prosecute against the debtor, Benbo of Georgia, Inc., a civil action now pending in the United States District Court for the Northern District of Georgia, Atlanta Division (91-CV-1185JTC). Debtor opposes the motion. Based on the evidence presented at hearing and relevant legal authorities, I make the following findings.

**FINDINGS OF FACT**

On May 23, 1991 World Bazaar filed suit against debtor in

the United States District Court for the Northern District of Georgia, naming Allen B. Moore, Calvin S. Moore and Benbo of South Carolina, Inc. co-defendants in the action. At the time World Bazaar filed its complaint in the district court, none of the defendants was in bankruptcy. On May 24, 1991, the day after World Bazaar filed its complaint in the district court, debtor filed a voluntary Chapter 7 petition in this court. On August 9, 1991 World Bazaar filed an amended complaint in the district court action alleging various claims against the defendants, including debtor, for breach of franchise agreements, notes and line of credit agreements, unauthorized use of trademarks, unfair competition, and deceptive trade practices. Although World Bazaar seeks in its amended complaint a judgment of liability against debtor, no award of damages is sought as to debtor; damages are sought from the other defendants. Allen Moore and Calvin Moore are undisputed guarantors on certain contractual obligations of debtor to World Bazaar, obligations on which World Bazaar seeks through modification of the stay to establish debtor's liability as the basis for the codefendant guarantors' liability. Debtor does not contest World Bazaar's assertion in its motion that debtor's liability on the contractual claims must be established before World Bazaar can prevail against debtor's guarantors in the district court.<sup>1</sup> On

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<sup>1</sup>I am aware that Allen Moore has also filed a Chapter 7 petition. However, as there is an uncontradicted assertion by World Bazaar that debtor's liability on certain contractual obligations

September 26, 1991 World Bazaar filed a proof of claim, which, by attachment, reflects various claims against debtor on specified franchise agreements, line of credit agreements and notes, plus claims for unauthorized use of trademarks and deceptive trade practices, totaling at least Seven Hundred Forty-Four Thousand Eight Hundred Sixty-Nine and 20/100 (\$744,869.20) Dollars, which claims are those World Bazaar seeks to prosecute against debtor in the district court action.

#### CONCLUSIONS OF LAW

Upon the filing of a bankruptcy petition, the Bankruptcy Code imposes an automatic stay against

the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title [11], or to recover a claim against the debtor that arose before the commencement of the case under this title. . .

11 U.S.C. 362(a)(1).

As the automatic stay is broadly designed to protect debtors from all actions taken by creditors to enforce a prepetition claim, the

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must be established before World Bazaar can recover against another guarantor, Calvin S. Moore, who is not in bankruptcy, the fact that Allen Moore is in bankruptcy (and therefore, absent relief from stay in that Chapter 7 proceeding, shielded from World Bazaar's pursuit of its claims against him in the district court action) does not bear on World Bazaar's motion for relief in this Chapter 7 proceeding.

automatic stay applies to World Bazaar's civil action against debtor in the district court. However,

[o]n 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 [362], 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 U.S.C. 362(d) (1).

"Cause" under §362(d) (1) "has no clear definition and is determined on a case-by-case basis." In re: Tuscon Estates, Inc., 912 F.2d 1162, 1166 (4th Cir. 1990). Where a party in interest alleges "for cause" grounds for relief from stay, the debtor bears the burden of proof by a preponderance of the evidence that "cause" does not exist, 11 U.S.C. §362(g) (2), once the movant has established prima facie there is cause for relief from stay. In re: Pioneer Funding Corp., 114 B.R. 45, 47 (Bankr. S.D. N.Y. 1990). World Bazaar has made a prima facie showing that "cause" to modify the stay exists by establishing that prepetition it initiated in another forum an action in which debtor's liability on contractual claims held by World Bazaar must be established in order for World Bazaar to obtain a recovery on those claims from debtor's guarantors, co-defendants in the action. The stay of §362 does not protect guarantors of a debtor's obligation. Credit Alliance Corp. v. Williams, 851 F.2d 119, 121-22 (4th Cir. 1988).

In its motion World Bazaar argues that the district court, unlike this court, has jurisdiction over all the defendants named in World Bazaar's complaint, including debtor, and judicial economy requires that all issues concerning World Bazaar's claim against debtor be resolved in one forum. World Bazaar reasons that if the stay is not modified so that it may establish debtor's liability in the district court action, the same litigation concerning its claim against debtor will take place in this court if debtor objects to World Bazaar's proof of claim.

Debtor argues in opposition to World Bazaar's motion that allowing World Bazaar to litigate its claim against debtor in the district court will prolong indefinitely this Chapter 7 proceeding because this bankruptcy case will have to be kept open until the district court action is finalized. Debtor also asserts that the trustee has the right to bring an action in this court against World Bazaar within the period allowed by applicable law.

In considering whether to modify the automatic stay to permit continuance of an action pending in another forum against a debtor in bankruptcy, courts employ a three-part test:

[whether] (a) [a]ny 'great prejudice' to either the bankrupt estate or the debtor will result from continuation of a civil suit,

(b) the hardship to the [non-bankrupt] party by maintenance of the stay considerably outweighs the hardship of the debtor, and

(c) the creditor has a probability of prevailing on the merits of his case.

In re: Pro Football Weekly, Inc., 60 B.R. 824, 826 (N. D. Ill.

1986). See e.g., Matter of Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991); In re: Bock Laundry Mach. Co., 37 B.R. 564 (Bankr. N.D. Ohio 1984); Matter of McGraw, 18 B.R. 140 (Bankr. W.D. Wis. 1982); In re: Namazi, 106 B.R. 93 (Bankr. E.D. Va. 1989).

In this case, no "great prejudice" to debtor or the bankruptcy estate will result if the automatic stay is modified to allow World Bazaar to establish debtor's liability, if any, in the district court action without permitting World Bazaar to enforce, against the debtor, any judgment obtained. See Bock Laundry Machine Co., supra, at 567. Although debtor will incur litigation expenses if it chooses to defend itself in the district court action, the cost to the debtor of defending an action does not constitute "great prejudice," In re: Winterland, 101 B.R. 547, 549 (Bankr. C. D. Ill. 1988), Bock Laundry Mach. Co., supra, at 567, McGraw, supra, at 142, In re: Parkinson, 102 B.R. 141, 142 (Bankr. C.D. Ill. 1988), rather, "[g]reat prejudice results if the debtor/bankrupt is held personally liable, for purposes of collection, for a civil damage award." McGraw, supra, at 142. "[D]ebtors-defendants suffer little prejudice when they are sued by plaintiffs who seek nothing more than declarations of liability that can serve as a predicate for recovery against . . . guarantors." Fernstrom, supra, at 736.

The hardship to World Bazaar by maintenance of the stay considerably outweighs the hardship to debtor if the stay is modified to permit World Bazaar to proceed against debtor in the

district court. The hardship debtor will suffer if the stay is modified is the expense it will incur in the district court litigation, if it defends in the action, including the cost of traveling to Atlanta, Georgia. However, "the opportunity to litigate the issue of liability [is] a significant right which cannot be easily set aside, despite the existence of a bankruptcy proceeding," Parkinson, supra, at 142, and debtor, who bears the burden to prove "cause" for relief from stay does not exist, 11 U.S.C. 362(g)(2), does not contradict World Bazaar's assertion that liability on the contractual obligations at issue in the district court case must be established against debtor before World Bazaar may obtain a recovery against the guarantors on those obligations. <sup>2</sup>

Based on the undisputed facts before me, if the stay is not

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<sup>2</sup>Under Georgia law (which the parties apparently do not dispute governs the pendent state law claims asserted in the district court action), whether a principal's liability on a contract is a condition precedent to obtaining judgment against a guarantor on a guaranty agreement depends on whether the guaranty is unconditional, which is determined by reference to the language of the guaranty agreement. See e.g., Ford Motor Credit Co. v. Sullivan, 318 S.E.2d 188, 190-91 (Ga. App. 1984); Griswold v. Wells Aluminum. Moultrie, Inc., 274 S.E.2d 7, 9 (Ga. App. 1980); Scales v. Alterman Foods. Inc., 285 S.E.2d 39, 40 (Ga. App. 1981). As debtor bears the burden of proof that cause does not exist to modify the stay, it is for debtor to show that its liability on the contractual claims in the district court action is not a condition precedent to World Bazaar's recovery against the defendant-guarantors and that, therefore, "cause" under 362(d)(1) to modify the stay does not exist. However, debtor has failed to present the guaranty agreements as evidence in opposition to World Bazaar's motion and, therefore, I must assume, based on World Bazaar's uncontradicted allegations in its motion, that under the agreements, World Bazaar must establish debtor's liability on the contractual obligations before it can prevail against the guarantor of each respective obligation.

modified, World Bazaar is precluded from recovering against, at least, Calvin Moore, a guarantor on contractual claims held by World Bazaar. Compare Matter of McGraw, supra, at 142. I find the potential hardship to debtor if the stay is modified is considerably outweighed by the prejudice World Bazaar will experience if the stay is maintained and World Bazaar is thereby precluded from establishing debtor's liability as a basis for the defendant guarantors' liability in the district court action. Compare Namazi, supra, at 94-95.

Concerning World Bazaar's likelihood of success on its contractual claims in the district court case, there is insufficient evidence before me to make that determination with precision; however, World Bazaar has set forth a cause of action which offers some prospect of recovery. Compare Bock Laundry Mach. Co., supra, at 567.

Debtor's argument in opposition to World Bazaar's motion that if World Bazaar is allowed to proceed against debtor in the district court, this Chapter 7 proceeding will be prolonged indefinitely is mere speculation and is unpersuasive. Debtor also states that the trustee should not be precluded from bringing a counterclaim, on behalf of debtor's estate, against World Bazaar. Debtor is correct in this regard; however, modifying the stay to allow World Bazaar to prosecute its contractual claims against

debtor in the district court will not affect the trustee's right under Bankruptcy Rule 6009 to bring an action in the bankruptcy court, within the time allowed by applicable law, against World Bazaar, who has submitted to the jurisdiction of this court by filing a proof of claim. Moreover, judicial economy favors modification of the stay. By modifying the stay to permit World Bazaar to establish in the district court debtor's liability, if any, on all claims asserted against debtor by World Bazaar, there will be no need for further litigation in this court concerning those claims, which World Bazaar also asserts in this Chapter 7 proceeding in its proof of claim. The judgment of the district court will establish the amount of World Bazaar's claim and will be res judicata in this Chapter 7 proceeding.<sup>3</sup> "[I]t 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 any duties that may be handled elsewhere." H.R. Rep. 95-595, 95th Cong. 2d Sess. 50 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5836, 6297.

For the foregoing reasons I find debtor has failed to meet

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<sup>3</sup>Moreover, if the trustee determines that filing a counterclaim against World Bazaar in the district court action is in the best interests of the estate and the district court permits the trustee to file the counterclaim, the judgment of the district court will be res judicata as to the trustee's counterclaim and there will be no relitigation in this court of issues raised in the counterclaim and any defenses thereto.

its burden of proof that "cause" to modify the stay does not exist. It is therefore ORDERED that the stay is modified to the extent necessary to permit World Bazaar to prosecute its complaint against debtor in civil action 91-CV-1185-JTC, pending in the United States District Court for the Northern District of Georgia.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 2nd day of March, 1992.