

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)

MAROLYN LAJEAN DAY)

Debtor)

TYSON DAVIS)

BRITTANY CONNELL DAVIS)

Movants)

v.)

MAROLYN LAJEAN DAY)

Respondent)

Chapter 7 Case

Number 03-21443

FILED

at 3 O'clock 00 min PM
Date 1-29-04

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia MB

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM AUTOMATIC STAY

On August 28, 2003, Marolyn LaJean Day ("Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On November 10, 2003, Tyson Davis and Brittany Connell Davis ("Movants"), as parents, natural guardians and next of friends of Cooper Connell Davis ("Cooper"), a minor child, filed a Motion for Relief from Automatic Stay to proceed with a pending State Court civil action against Debtor. A hearing in this matter was held on December 3, 2003. This Court has jurisdiction pursuant to 28

24

U.S.C. §157(b)(2)(G) over this core proceeding. Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Prior to Debtor filing for relief and on June 18, 2002, Movants filed Civil Action No. 02-00879 against Debtor in Glynn County Superior Court (“State Court action”). In the action, Movants allege, *inter alia*, that injuries incurred by Cooper were proximately caused by the gross negligence of Debtor. More specifically, Movants contend that Cooper was asphyxiated by the rigid tray on his high chair while he was in the care of Debtor. As a direct result of the asphyxiation, Cooper is now blind, profoundly brain damaged, afflicted with cerebral palsy, and capable of taking nutrition only through a gastric tube. Movants are seeking both punitive and compensatory damages in the State Court action.

Movants contend that they should be granted relief from stay to pursue their State Court action in Glynn County Superior Court. In addition to the current motion, Movants also filed an adversary complaint on November 10, 2003, requesting that this Court enter an Order designating damages awarded in the pending State Court action to be nondischargeable debt as originating from a willful and malicious injury pursuant to 11 U.S.C. § 523(a)(6).

Debtor argues that requiring her to litigate the matter in State Court will

result in a great expense to her and the estate. The parties have stipulated that she has no insurance that would cover any judgment rendered in State Court. Because of this fact, Debtor will receive no outside assistance in defense of the personal injury suit and may be forced to appear *pro se*. Finally, Debtor contends that any litigation will be fruitless since even if Movants obtain a judgment in State Court, the debt will be dischargeable because her actions were not "willful and malicious" as contemplated by 11 U.S.C. § 523(a)(6) and the Supreme Court in Kawaauhau v. Geiger, 523 U.S. 57, 60-61, 118 S.Ct. 974, 976, 140 L.Ed.2d 90 (1998).

CONCLUSIONS OF LAW

Relief from Stay to Pursue State Court Judgment

The Bankruptcy Code provides that the bankruptcy court shall grant relief from the automatic stay "for cause." 11 U.S.C. § 362(d)(1). Section 362(d)(1) does not define "cause," leaving courts to consider what constitutes cause based on the totality of the circumstances in each particular case. *See, e.g. Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3rd Cir. 1997) (holding cause existed to lift automatic stay to permit potential judgment creditor to proceed with appeal). In Alston v. Classic Auto Painting & Bodyworks, Inc. (In re Classic Auto Painting & Bodyworks Inc.), No. 93-40730, 1993 WL 13005113, *1-2 (Bankr. S.D. Ga. Dec. 15, 1993) I adopted a framework to be applied when ruling on whether relief from stay should be granted to allow a movant to proceed to judgment in a State Court as the current Movants are requesting. The following factors were

enumerated:

- 1) Whether any "great prejudice" to either the estate or debtor will result from continuation of the civil suit;
- 2) Whether the hardship to movant resulting from maintaining the stay considerably outweighs the hardship of the debtor; and
- 3) Whether the movant has a probability of prevailing on the merits of its case.

Id.

Having applied the factors from Classic Auto Painting, I hold that Movants' motion for relief should be granted.

1. "Great Prejudice" to the Estate

Debtor has indicated two ways that granting Movants relief from stay will result in prejudice to her or the bankruptcy estate. First, Debtor noted that litigating the State Court action will be very expensive. While litigation is expensive in any forum, no "great prejudice" to Debtor or the bankruptcy estate will result if the automatic stay is modified to allow Movants to establish Debtor's liability, if any, in the State Court action. This Court notes its agreement with the line of cases where courts have held that, "the cost of defending litigation, by itself, has not been regarded as constituting 'great prejudice,' precluding relief from the automatic stay." In re Deep, 279 B.R. 653, 659 (Bankr. N.D. N.Y. 2002) (*citing In re Anton*, 145 B.R. 767, 770 (Bankr. E.D. N.Y. 1992)). *See also Walker v. Wilde (In re*

Walker), 927 F.2d 1138, 1143 (10th Cir. 1991) (“no case has found the cost of defending, by itself, to be ‘great prejudice’ as to bar modification of the [section 362] stay.”); World Bazaar Franchise Corp. v. Benbo of Ga., Inc. (In re Benbo of Ga., Inc.), No. 91-10931, 1992 WL 12004318, *3 (Bankr S.D. Ga. March 2, 1992) (Dalis, J.) (modifying stay to permit creditor to prosecute complaint against debtor in civil action). Accordingly, I hold that the expense incurred by Debtor in defending the State Court action will not result in “great prejudice” to either the estate or Debtor.

Debtor has also argued that Movants civil action is, in light of her bankruptcy, moot for all practical purposes. That is, while Movants may obtain a judgment in State Court, the judgment will be dischargeable in bankruptcy such that Movants will ultimately recover nothing. Thus, defending the State Court action will result in an unnecessary expense. As a matter of first impression, this Court is presented with the issue of whether a determination of nondischargeability must be made prior to granting a creditor relief from stay to pursue an action in state court. While it is true that any State Court judgment may ultimately be found to be dischargeable in the instant bankruptcy case, Movants are requesting punitive damages and the State Court could conceivably rule in such a way that all or part of the judgment is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6) as originating from a “wilful and malicious injury.” In short, there is no way to truly know whether or not the judgment will be dischargeable without allowing the issues of the personal injury suit to be fully litigated somewhere, and the preferable forum is State

Court.

2. Hardship to Movants in Maintaining the Stay

The hardship to Movants by maintenance of the stay considerably outweighs the hardship to the Debtor if the stay is modified to permit Movants to proceed in the State Court action. Courts have regarded the opportunity to litigate the issue of liability as a significant right which cannot be easily set aside, despite the existence of a bankruptcy proceeding. See Hillblom v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 61 B.R. 758, 779 (S.D. Tex. 1986); In re Fernstrom Storage and Van Co., 100 B.R. 1017, 1024 (Bankr. N.D. Ill. 1989), *aff'd* 938 F.2d 731 (7th Cir.1991); In re Parkinson, 102 B.R. 141, 142 (Bankr. C.D. Ill. 1988). The circumstances surrounding the State Court action are very personal to Movants and they have expressed their desire to pursue such action if for no other reason than that they can have their day in Court. I hold that they should be granted relief from stay to pursue the State Court action.

3. Movants' Likelihood of Success on the Merits

Not having heard the merits of Movants' case, this Court is not in a position to make a determination of Movants' likelihood of success. However, there has been no suggestion that Movants' claims are frivolous or otherwise without merit.

4. *Conclusion*

This Court's decision to grant Movants relief from stay is supported by the legislative history of § 362(d)(1), which states in pertinent part:

[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 many duties that may be handled elsewhere.

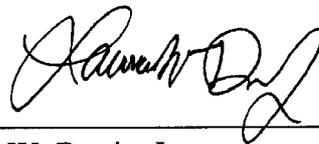
S.Rep. No. 95-989 at 50 (1978), reprinted in 1978 U.S.C.C.A.N 5787, 5836.

There is no great prejudice to the bankruptcy estate in granting relief from the stay. Further, the automatic stay was never intended to preclude a determination of tort liability and the attendant damages. Instead, it was merely intended to prevent a prejudicial dissipation of a debtor's assets. *See, e.g. In re Bock Laundry Machine Co.*, 37 B.R. 564, 567 (Bankr. N.D. Ohio.1984) (holding that creditors entitled to limited relief from stay to pursue products liability actions in state court). Here, allowing Movants to proceed in State Court will undoubtedly effectuate judicial economy as the State Court is better equipped to handle the civil jury trial. *See Shaw v. Ehrlich*, 294 B.R. 260, 272 (W.D. Va. 2003) (listing whether modifying stay will promote judicial economy as factor to be considered on motion for relief). Thus, I hold that the stay should be lifted so that Movants can establish the amount of their claim which already has been made against the estate. In the event Movants do

obtain a money judgment against Debtor, this Court can then determine if such judgment is dischargeable.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the stay pursuant to 11 U.S.C. § 362 be and it hereby is modified to the extent necessary to enable Movants to pursue Civil Action No. 02-00879 in the Glynn County Superior Court. However, if the Movants are successful with the State Court action, they may not attempt to enforce any judgment against the Debtor until this Court determines whether such judgment is dischargeable



Lamar W. Davis, Jr.
Chief United States Bankruptcy Judge

Dated at Savannah, Georgia

This 28th of January, 2004.

cc: Debtor - Day
Debtor's Atty. - Orange
~~Creditor~~
Creditor's Atty. - Wood
Trustee - Scatter
U. S. Trustee - James
D Whitworth
A. Zucker
A. Kent

1/29/04
JP