IN THE UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF PENNSYLAVANIA

IN RE:	)	Case No. 04-27848-MBM
	)	
ACR MANAGEMENT, L.L.C., *et. al.*	)	Chapter 11
	)	
Debtors.	)	
	)	(Jointly Administered)
	)	
RHEA DOWLING,	)	
	)	Doc. No. _____
Movant,	)	
	)	
v.	)	
	)	
ANTHONY CRANE INTERNATIONAL,	)	
	)	
Respondent.	)	

MOTION FOR RELIEF FROM STAY

COMES NOW Rhea Dowling ("Dowling"), an unsecured creditor, and hereby moves for relief from the automatic stay. She seeks to continue a pre-petition Title VII action against the Debtor Anthony Crane International ("Anthony Crane" or "Debtor") and two (2) other corporations doing business in the Virgin Islands. If successful, she plans to enforce her judgment against the other corporations to the extent of their liability. She intends to recover the balance of her judgment against Debtor from the Debtor's estate to the extent of her *pro rata* share of the distribution made to the class of unsecured creditors. Dowling cites the following points and authorities in support of her motion for relief from the automatic stay.

FACTUAL BACKGROUND

1. Dowling is a citizen of St. Croix, U.S. Virgin Islands.

2. On or about May 18, 1998, she filed a civil action in the District Court of the U.S. Virgin Islands styled *Rhea Dowling v. Anthony Crane International, Hess Oil Virgin Islands Corp., and Amerada Hess*, Civil No. 127/1998. The lawsuit seeks to recover damages suffered by Dowling while employed by Anthony Crane. Dowling asserts that Anthony Crane subjected her to a hostile workplace, to include, but not limited to subjecting here to racial slurs, sexist slurs, and harassment. She further asserts she was retaliated against for complaining to the Equal Opportunity Commission about the illegal discrimination. *See* Complaint attached as Exhibit "1".

3. Dowling has been advised that there is no insurance coverage for her claim. *See* letter from claims adjuster attached as Exhibit "2".

4. The Debtors, including Anthony Crane International, filed the above-captioned bankruptcy case pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Section 101, *et. seq*., on June 14, 2004.

5. This Court entered an order on December 30, 2004, confirming the Debtors' Third Amended Joint Plan of Reorganization.

GROUNDS FOR RELIEF FROM AUTOMATIC STAY

6. Section 362(d)(1) of the Bankruptcy Code permits a court to modify the stay for "cause." The party opposing stay relief has the ultimate burden of disproving the existence of "cause", *see* 11 U.S.C. § 362(g)(2), but the movant has the initial burden to show that "cause" exists. *In re Telegroup, Inc*., 237 B.R. 87, 91 (Bankr. D.N.J. 1999)(citing In re Holly's, Inc., 140 B.R. 643 (Bankr. W.D. Mich. 1992).

7. Lifting the automatic stay to permit liquidation of an unsecured creditor's claim in a forum that is substantially more appropriate than the bankruptcy court is a common and acceptable reason to lift a stay. *See In re Quad Systems Corp*., No. 00-35667F, 2001 WL 1843379, at 6-7 (E.D.Pa. March 20, 2001). In fact, the legislative history surrounding the enactment of section 362(d)(1) provides:

> The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause . . . the facts of request will determine whether relief is appropriate under the circumstances.

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 343-44 (1977)(*cited In re Quad Systems Corp*., at *7)(emphasis added). The legislative history further provides:

> [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 relieve the bankruptcy court from any duties that may be handed elsewhere."

H.R.Rep. No. 95-595, 95th Cong., 1st Session 341 (1977)(*cited In re Rexene,* 141 B.R. 574, 576(Bankr. D. Del. 1992)(emphasis added).

8. Determination of Dowling's employment discrimination claim should be tried in a forum other than this Bankruptcy Court. *See In re Larkham*, 31 B.R. 273, 277 (Bankr. Vt. 1983)(Bankruptcy court permitted plaintiff to pursue employment discrimination action against the debtor)(*cited In re Hohol,* 141 B.R. 293, 297 (M.D.PA. 1992); *see also, Northern Pipeline Const. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982)(Supreme Court addressed what it considered an overly broad grant of jurisdiction to bankruptcy courts and held that private rights between litigants lie at the heart of "judicial power" granted by Constitution to

Article III courts and Congress could not abrogate the rights of said private litigants to have their dispute resolved by an Article III jurist).

9. As a general principle, whether to terminate, modify, condition, or annul the bankruptcy stay under section 362(d)(1) is committed to the bankruptcy court's discretion and is to be determined by examining the totality of the circumstances. *In re Quad Systems Corp*., at *5 (citing In re Sharuyf, 68 B.R. 604 (E.D.Pa. 1986 and Matter of New York, Inc., 52 B.R. 417, 425 (E.D.N.Y. 1985), *aff'd*, 781 F.2d 973 (2d Cir. 1986)).

10. In *Rexene*, 141 B.R. at 576, the court stated that relief from the automatic stay should be granted when the movant can show that:

> (a) Debtor or debtor's estate will not be greatly prejudiced by continuing the civil suit;
> (b) the hardship to movant by maintenance of the automatic stay considerably outweighs the hardship to debtor; and
> (c) the movant has a reasonable chance of prevailing on the merits.

Rexene, 141 B.R. at 576. Applying these factors, this Court lifted the stay in *Rexen* to allow a pending District Court action to proceed.

11. Dowling's claim satisfies the three *Rexene* factors thereby demonstrating "cause" to lift the stay. First, Dowling will make no effort to collect against Debtor in excess of her *pro rata* share under the plan. She seeks to lift the stay to liquidate her employment discrimination claim and will seek to collect against the two (2) other corporations listed as Defendants in the pre-petition action. Because the automatic stay is generally not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor, *Lynch v. Johns-Manville Sales Corp*., 710 F.2d 1194, 1196-97 (6th Cir. 1983)(*cited In re Mid-Atlantic Handling Systems*, LLC, 304 B.R. 111, 128 (Bankr. D.N.J. 2003), this Court should, at the very least, lift the stay to allow

Movant to litigate her action against the two non-bankrupt defendants. In addition, this Court has already confirmed Debtor's Third Amended Joint Plan of Reorganization. The mere liquidation of Dowling's claim is a limited remedy that will not prejudice Debtor, its estate, or it's Reorganization Plan.

12. In balancing the hardship to Dowling by maintenance of the automatic stay against the hardship to Debtor by lifting the stay, it is clear the hardship to Dowling considerably outweighs the hardship to Debtor. The Third Circuit Court of Appeals "has declared that litigation expenses do not constitute an injury sufficient to justify the enjoining of litigation against a debtor." *Matter of Nkongho*, 59 B.R. 85, 86 (Bankr. D.N.J. 1986), *quoting, Matter of Nicholas*, 55 B.R. 212, 217 (Bankr. D.N.J. 1985) *citing, In re Davis*, 691 F.2d 176, 178 (3d Cir. 1982) *quoting, Younger v. Harris*, 401 U.S. 37, 46 (1971). In addition, Dowling's Complaint is properly adjudicated in the District Court of the Virgin Islands where the employment discrimination occurred, where the majority of the witnesses reside, and where Dowling and her counsel are located.

13. Finally, Dowling has a reasonable chance of prevailing on the merits. The required showing under this prong is very slight. *Rexene*, 141 B.R. at 578 (citing Fonseca v. Philadelphia Housing Authority, 110 B.R. 191, 196 (Bankr. E.D.Pa. 1990)("Only strong defenses to state court proceedings can prevent a bankruptcy court from granting relief from the stay in cases where, as here, we believe the decision-making process should be relegated to bodies other than this court."). Extensive discovery has been conducted and depositions have been taken. Moreover, although a motion for summary judgment has been fully briefed since February 21, 2003, the District Court of the Virgin Islands has declined to grant it and instead ordered the parties to continue with discovery and mediation. *See* Exhibit "3", Post-Conference Order dated December

19, 2003; *see also, Rexene Products,* 141 B.R. at 578 ("This slight showing is easily met by the fact that there has already been a denial of debtor's motion for summary judgment in the lawsuit.").

WHEREFORE, Dowling, prays the Court enter an order to lift the automatic stay imposed by 11 U.S.C. § 362(a)(1) so that she may proceed with her pre-petition Title VII action in the United States District Court of the Virgin Islands, Division of St. Croix, and for such other and further relief that this Court may deem just and proper.

Respectfully submitted,

BERNSTEIN LAW FIRM, P.C.

Dated: March 1, 2005

By: /s/ Kirk B. Burkley

Kirk B. Burkley, Esquire
PA I.D. #89511
Suite 2200 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 456-8108
Facsimile: (412) 456-8289
kburkley@bernsteinlaw.com

AND

LAW OFFICES OF ROHN & CAMERON, L.L.C.

Lee J. Rohn, Esquire
I.D. #52 Virgin Islands
1101 King Street, Suite 2
St. Croix, VI 00820
Telephone: (340) 778-8855
Facsimile: (340) 773-2954
lee@rohnlaw.com

Attorneys For Rhea Dowling