

IN RE

Hearing Date: 10/20/03 @ 2:00 p.m.
Objections Due: 10/13/03 @ 4:00 p.m.

2. At the time of the Petition Date, the Movants were actively pursuing a state court action filed on January 18, 2002, in the Circuit Court of Chambers County, Alabama, captioned “Givorns Foods, et al. v. KLS Management Group, Inc., et al.” (CV-02-017) (the “State Court Action”). The Givorns are Plaintiffs in the action. There are six defendants in the case, one of which is one of the Debtors, the Fleming Companies, Inc. (“Fleming”). The State Court Action seeks recovery based

upon breach of guaranty, conversion, fraud, promissory and equitable estoppel arising from failed negotiations for the sale of three grocery stores owned by the Givorns. In addition, substantial cross-claims have been raised by the other defendants against Fleming.

RELIEF REQUESTED

3. Movants respectfully request that this Court grant relief from the automatic stay to permit the State Court Action to go forward; to allow the claims and cross-claims asserted therein to be liquidated and reduced to judgment; and to permit the parties to pursue such appeals therefrom as the parties may be entitled to pursue. Movants submit that the interests of judicial economy and fairness weigh heavily in favor of modifying the automatic stay to permit the State Court Action to continue in its original forum and to relieve the Court from the burden of adjudicating an action which can and should be resolved in the State of Alabama. Furthermore, it is in the interests of all parties to liquidate Movants' claims rather than hold them in abeyance.

4. The Circuit Court for Chambers County, Alabama has been involved in the case since its inception and is fully familiar with the facts and circumstances of the dispute. During the course of the proceedings in Alabama, the parties engaged in extensive litigation activity including the substantial completion of discovery wherein the depositions of all the parties had been taken. Discovery has been largely completed and the case had been set for trial at least once before the Debtors commenced these cases.

BASIS FOR RELIEF REQUESTED

5. Relief from the automatic stay is authorized under 11 U.S.C. § 362(d)(1), which provides:

(d) On 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, such as 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;

(emphasis added).

6. The Bankruptcy Code does not define “cause.” Accordingly, the determination of what constitutes “cause” to modify the automatic stay must be made on a case-by-case basis. *In re Rexene Products Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992). The legislative history of § 362 explains that “cause may be established by a *single factor* such as ‘a desire to permit an action to proceed . . . in another tribunal,’ or ‘lack of any connection with or interference with the pending bankruptcy case.’” *Id.* at 576 (citing H.R. Rep. 95-595, 95th Cong., 1st Sess., 343-44 (1977) (emphasis added)).

7. Indeed relief from the automatic stay is particularly 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.” *Id.*

8. This Court has held that relief from the automatic stay should be granted if the Movants can establish “cause” based on the following criteria:

- a. [Whether] any great prejudice to either the bankrupt estate or the debtor will result from the continuation of the civil suit;
- b. [Whether] the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor; and
- c. [Whether] the creditor has a probability of prevailing on the merits.

In re Unidigital, Inc., Case No. 00-3806 (MFW), 2000 WL 33712306, at *1 (Bankr. D. Del. Dec. 8, 2000); *Rexene*, 141 B.R. at 576. All three factors weigh heavily in favor of modifying the automatic stay to permit the State Court Action to proceed to completion in Alabama.

9. First, Fleming will suffer no “great prejudice” by lifting the stay. The State Court Action

has been pending since January 18, 2002. Discovery has been substantially completed and the case is largely ready for trial. Under these circumstances, courts routinely grant relief from the automatic stay. *See In re Levitz Furniture Inc.*, 267 B.R. 516, 523 (Bankr. D. Del. 2000) (no prejudice where, *inter alia*, the state court had “already scheduled an expedited hearing on the equitable issues . . . and all indications are that it will be promptly decided”); *Rexene*, 141 B.R. at 577 (debtor will not suffer great prejudice by modification of the stay where “[d]iscovery is nearly complete”); Collier on Bankruptcy ¶ 362.07[3][a] (2003) (“relief also may be granted when necessary to permit litigation to be concluded in another forum, particularly if the nonbankruptcy suit. . . is ready for trial”).

10. In addition, there is no prejudice to Fleming because it is represented by separate local counsel in the Circuit Court of Chambers County and the State Court Action will not require any significant commitment of resources from bankruptcy counsel or employees involved in the Debtors’ reorganization effort. *See Rexene*, 141 B.R. at 577 (the parties’ retention of separate local counsel weighed in favor of modifying the automatic stay). Accordingly, analysis of the first prong weighs heavily in favor of modifying the stay.

11. Second, the hardship to Movants of continuing the stay outweighs the hardship to the Debtor in lifting the stay. Movants have already spent considerable resources in litigating the case in Alabama and further delay will only serve to increase the costs of litigation. As the *Rexene* court noted, duplicative litigation is burdensome both to Movants and the courts involved ... [and] [j]udicial economy dictates a prompt resolution in a single forum and with the same judge who was originally assigned to the case.” 141 B.R. at 577. Indeed, “one of the primary purposes in granting relief from the stay to permit claim liquidation is to economize judicial resources.” *Id.* In view of the procedural posture of the State Court Action and this Court’s crowded docket, this factor weighs heavily in favor of modifying the automatic stay.

12. The third factor -- the creditor's probability of prevailing on the merits -- also weighs heavily in favor of finding "cause" to modify the automatic stay. This prong "merely requires a showing that the claim is not frivolous." *Levitz Furniture*, 267 B.R. at 523; *In re Continental Airlines, Inc.*, 152 B.R. 420, 425 (Bankr. D. Del. 1993) ("Even a slight probability of success on the merits may be sufficient to support lifting an automatic stay in an appropriate case."). Given that substantial discovery has occurred, the State Court Action is advanced well beyond the stage of a dismissal motion. Consequently, it can hardly be argued that the action is frivolous. *Cf. Rexene*, 141 B.R. at 578 (requisite "slight showing" of success on the merits is met by virtue of the fact that the defendants' motion for summary judgment was denied).

13. Upon information and belief, the Debtors are believed to have insurance to cover the costs of defense and coverage for at least some of the claims alleged in the State Court Action. At a minimum, Movants should be entitled to proceed at least to the extent of the Debtors' insurance to satisfy any judgment which might be awarded in the State Court Action. To the extent that coverage exists, there is no threat of any depletion of the Debtors' estates from the continued prosecution of the State Court Action.

14. Also, it is Movants' understanding that the other defendants in the State Court Action support the relief requested.

15. Notice of this Motion is being provided to counsel for the Debtors, to the Office of the United States Trustee, counsel for the Official Committee of Unsecured Creditors, and counsel to the debtor-in-possession lenders. The Movants respectfully submit that no other notice should be required.

WHEREFORE, Movants respectfully request that this Court grant relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to permit the state court action to proceed in Chambers County, Alabama to allow the claims and counterclaims asserted therein to be liquidated and reduced to judgment, to permit the parties to pursue such appeals therefrom as the parties may be entitled to pursue, and that the Court grant to the Movants such other and further relief as is just.

Dated: Wilmington, Delaware
October 3, 2003

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