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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	**Case No. 04-35113-HDH-11**
CEI Roofing Inc., et al.	§	**(Jointly Administered)**
	§	
	§	**Hearing Date: June 16, 2004**
Debtors	§	**Time: 1:30 p.m.**

RESPONSE IN OPPOSITION TO DELMER LIMITED PARTNERSHIP'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

COME NOW, CEI Roofing, Inc. and its affiliated Debtors and Debtors in possession (collectively, the "Debtors") and file this Response in Opposition to Delmer Limited Partnership's Motion for Relief from the Automatic Stay (the "Response"). In support of the Response, the Debtors respectfully show the Court the following:

I. JURISDICTION

1. This Court has jurisdiction to hear this Motion pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. BACKGROUND

2. On March 3, 2004 (the "Petition Date") the Debtors as debtor in possession, commenced a case under chapter 11 of the Bankruptcy Code in this Court.

3. The Debtor continues to operate its business and manage its properties as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

4. GRS is a Florida corporation founded in 1998 to acquire closely held roofing companies nationwide, including CEI Roofing. Since its formation, GRS has become the nation's leading comprehensive provider of commercial roofing solutions in the United States. The Company has a national presence through twenty-seven operating and nonoperating subsidiaries and thirty-six operating locations in twenty-three states. GRS's services include: (i) new roof construction; (ii) replacement or restoration of existing roofing systems; and (iii) emergency and proactive maintenance services. GRS provides these services primarily to commercial property owners and to commercial facility managers in a variety of industries. The service segment of the business provides on call repairs as well as proactive repairs, proactive inspection and maintenance (approximately 13% of 2003 revenues). The construction segment provides roofing systems for new buildings, replacement of significantly damaged roofs, and restoration of existing, mature roofs (approximately 87% of 2003 revenues).

5. On May 18, 2004, Delmer Limited Partnership ("Movant") filed its Motion for Relief from the Automatic Stay (the "Motion") to continue its litigation against Roofers, Incorporated in Maryland state court (the "Maryland Lawsuit").

III. RESPONSE

6. Each of the allegations of the Movant's Motion are denied unless explicitly admitted herein.

7. The Debtors admit the allegations contained in paragraphs 1, 3-13, and 16 of the Movant's Motion.

8. The Debtors deny the allegations contained in paragraphs 14-15, and 17-21 of the Movant's Motion.

9. The Debtors are without sufficient information to admit or deny the allegations contained in the paragraph 2 of the Movant's Motion, and therefore deny the allegations.

IV. OBJECTION

A. The Debtors Need Breathing Space

10. The legislative history of Section 362 of the Bankruptcy Code explains the purpose behind granting the automatic stay:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296.

11. Courts have consistently cited to the legislative history of Section 362 when determining whether to allow debtors time to effectively reorganize. *See, e.g., Browning v. Navarro*, 743 F.2d 1069, 1083 (5th Cir. 1984); *In re Eagle Bus Mfg., Inc.,* 158 B.R. 421, 428-9 (Bankr. S.D. Tex. 1993); *In re United States Brass Corp*., 176 B.R. 11, 12 (Bankr. E.D. Tex. 1994); *Eastern Refractories Co. Inc. v. Forty Eight Insulations, Inc.,* 157 F.3d 169, 172 (2nd Cir. 1998); *In re Krystal Cadillac Oldsmobile GMC Truck, Inc.,* 142 F.3d 631, 637 (3rd Cir. 1998). The underlying purpose for applying Section 362 clearly applies in this case as this is a complex case where the Debtors need time to put together an effective plan of reorganization. If the stay is lifted, the Debtors will be forced to focus their time and efforts to defending the Maryland Lawsuit, resulting in time and energies which cannot be used toward reorganization.

B. Cause Does Not Exist to Lift the Stay

12. Section 362(d)(1) of the Bankruptcy Code permits a bankruptcy court to lift the automatic stay "for cause, including the lack of adequate protection of an interest in property . . ." The term "cause" is not defined in the Bankruptcy Code. "In the case of a relief-from-stay motion in which a creditor seeks leave to continue pending . . . litigation, against the debtor, the decision whether to terminate the stay is discretionary with the Bankruptcy Court . . . The decision is made on a case-by-case basis, on the unique circumstances of each case." *In re Johnson*, 115 B.R. 634, 635-36 (Bankr. D. Minn. 1989) (citations omitted). Courts must balance the equities to determine whether "cause" exists. *In re Piperi,* 133 B.R. 846, 849 (Bankr. S.D. Tex. 1990). In the early stages of a case, relief to pursue litigation should not be granted unless extraordinary circumstances are shown. *In re I. Burack, Inc*., 132 B.R. 814, 817 (Bankr. S.D. Tex. 1981); *In re Keene Corp.*, 171 B.R. 180, 185 (Bankr. S.D. N.Y. 1994).

13. The factors that courts routinely rely upon in evaluating whether or not cause exists to allow litigation to proceed in a separate forum were promulgated in *In re Curtis*, 40 B.R. 795 (D. Utah 1984), and then approvingly set forth by the Second Circuit in *In re Sonnax Industries, Inc.*, 907 F.2d 1280 (2nd Cir. 1990). *See In re Mazzeo*, 167 F.3d 139, 142-3 (2d. Cir. 1999); *In re Fowler,* 259 B.R. 856, 859 n.1 (Bankr. E.D. Tex. 2001); *In re Vivax Medical Corp.,* 242 B.R. 211, 214 (Bankr. D. Conn. 1999); *In re Cummings*, 221 B.R. 814, 818 (Bankr. N.D. Ala. 1998).

14. In *Sonnax,* the Second Circuit followed *Curtis* and identified the following factors to be weighed in deciding whether litigation should be permitted to continue in another forum: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding

involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movants' success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economic resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

15. Some of the factors overlap one another; thus, it is important to evaluate the overall impact on the Debtors and the Movant. "These factors need not be assigned equal weight and only those factors relevant to the particular case need to be considered." *In re United States Brass Corp.,* 176 B.R. at 13. The Debtors submit that each of the identified factors is either not applicable or warrants against lifting the automatic stay. Most importantly, lifting the stay in order to allow this lawsuit to proceed to judgment would have a substantial negative effect on these bankruptcy cases.

16. The "most important factor in determining whether to grant relief from the automatic stay to permit litigation against the debtor in another forum is the effect of such litigation on the administration of the estate. Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit." *In re Curtis*, 40 B.R. at 806. "Interference by creditors in the administration of the estate, no matter how small, through the continuance of a preliminary skirmish in a suit outside the Bankruptcy Court is prohibited." *Id.* at 807. Allowing the Maryland Lawsuit to proceed at this early stage of the

Debtors' bankruptcy cases would be burdensome to the Debtors and would interfere with the administration of the estates. The Debtors would be forced to retain counsel in the bankruptcy cases to defend the Maryland Lawsuit and would consequently incur considerable legal expenses. The issue to be tried in the Maryland Lawsuit can be adjudicated through the claims process in a timely manner without prejudicing the Movant.

17. The Debtors have more important uses for their limited resources, and the Movant has not shown how it will be prejudiced if its claims are not resolved through the claims objection process. Thus, at this time, there is no reason that litigation take the place of the claims process. *See In re El Paso Pharm., Inc*., 130 B.R. 492, 496 (Bankr. W.D. Tex. 1991) (litigation not usually allowed as claimants are unable to satisfactorily show that "state court litigation will be as fast, as inexpensive, or as fair to the estate as would the claims allowance process in the bankruptcy court itself.").

18. Judicial economy weighs against lifting the stay. There is no need for the Movant's claim to proceed in any forum other than the Bankruptcy Court. The trial court in the Maryland Lawsuit was reversed on appeal because it applied the incorrect damage standard. All that remains in the Maryland Lawsuit is a determination of damages. The claims resolution process is the appropriate forum for such a determination. *In re Telegroup, Inc.,* 237 B.R. 87, 92 (Bankr. D. N.J. 1999) (refusing to lift stay to allow liquidation of post-petition claim in state court action).

19. Not allowing the stay to be lifted, in this instance, is completely consistent with the policies of the bankruptcy stay, which has been described as a policy "to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to

avoid interference with the orderly liquidation or rehabilitation of the debtor." *In re Rexene Prods. Co.,* 141 B.R. 574, 576 (Bankr. D. Del. 1992) (quoting *Borman v. Raymark Indus., Inc*., 946 F.2d 1031 (3rd Cir. 1991)). Quite simply, there is absolutely no reason that the Debtors should be forced to proceed with the Maryland Lawsuit, when the Movant's claim should be handled by the Bankruptcy Code's claims administration process.

WHEREFORE, the Debtors respectfully request entry of an order denying Delmer Limited Partnership's motion for relief from the automatic stay and granting such other and further relief as is just and proper under the circumstances.

Signed this 1st day of June, 2004.

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By: */s/ Keith Miles Aurzada*

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ATTORNEYS FOR CEI ROOFING, INC., ET AL., THE DEBTORS AND DEBTORS IN POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the attached Service List via first class mail on the 1st day of June, 2004.

/s/ Keith Miles Aurzada
Keith Miles Aurzada