

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY DIVISION**

In re:)	
)	
JOHN Q. HAMMONS FALL 2006, LLC, <i>et al.</i>,)	Case No. 16-21142-11
)	
Debtors.)	(Jointly Administered)
)	

JOINT RESPONSE OF DEBTORS AND JD HOLDINGS, L.L.C. IN OPPOSITION TO AMERICAN TOWERS, LLC’S MOTION TO LIFT OR MODIFY THE AUTOMATIC STAY PURSUANT TO U.S.C. § 362(d)(1) AND FED. R. BANKR. P. 4001

The above-captioned Debtors (“Debtors”) and JD Holdings, L.L.C. (“JD Holdings”) hereby object to American Towers, LLC’s Motion to Lift or Modify the Automatic Stay Pursuant to U.S.C. 362(d)(1) and Fed. R. Bankr. P. 4001 and Memorandum of Law in Support Thereof [ECF No. 1998] (the “Motion”). The grounds for Debtors’ and JD Holdings’ objection to the Motion are set forth below.

PRELIMINARY STATEMENT

1. The Debtors' bankruptcy cases have been pending for 22 months. Throughout the almost two years of the bankruptcy cases, American Towers, LLC ("American Towers") did not once ask this Court for stay relief. American Towers did, however, file proofs of claim against several of the Debtors on December 21, 2016. Thus, for almost two years, American Towers has been content to rely on the resolution of its claims against the Debtors in the claims resolution process. Now, when the Debtors and JD Holdings, L.L.C. ("JD Holdings") are on the eve of confirmation of JD Holdings' Plans, American Towers has changed its position, requesting that this Court remove itself from the process of resolving the American Towers’ proofs of claim and instead permitting those claims to be resolved by the Circuit Court of Greene County, Missouri. Despite American Towers' claims that much has been done in the State Court Action, a closer

examination of the record shows that the Circuit Court has not been presented with any substantive and/or dispositive motions by American Towers on which to rule, and there is simply no reason why the Circuit Court would be in a better position to resolve the American Towers' proofs of claim. Application of the factors set forth in *In re Curtis*, 40 B.R. 795, 800 (Bankr. D. Utah 1984), clearly establishes that there is no reason to lift the stay at this late stage in the bankruptcy process to permit American Towers to litigate its contractual claim in state court.

BACKGROUND

2. American Towers, LLC is a creditor with pending claims against debtors Hammons, Inc. and Hammons of Sioux Falls, LLC (collectively "Debtor Defendants") for purportedly \$923,584.81 (Claims 447, 450) (the "American Towers Claims"). American Towers' unliquidated claims arise out of litigation that was pending in the Circuit Court of Greene County, Missouri at the time the bankruptcy petition was filed (the "State Court Action"). The State Court Action involves claims brought by American Towers against the Debtor Defendants, as well as several Atrium entities that owned or leased hotels throughout the country (collectively "Atrium Defendants"),¹ jointly and severally, for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and promissory estoppel. The Atrium Defendants are all current affiliates of JD Holdings. JD Holdings is the Plan proponent in this bankruptcy and JD Holdings contends that it is the largest creditor.

3. Under the terms of the proposed Plan, JD Holdings will, among other things, acquire the Debtors' Assets, pay all Allowed Claims in full (except Assumed Loans), and establish and fund a charitable trust to carry out the intent of Mr. Hammons, all to fully resolve this bankruptcy (Doc. 1948, at 7). Thus, to the extent Allowed, American Towers will recover as

¹ Those entities include: John Q. Hammons Hotels, Inc. n/k/a Atrium Hotels, Inc, Atrium TRS II, LP, Atrium TRS III, LP, Atrium TRS IV, LP, Atrium TRS V, LP, Atrium Finance II, LP, Atrium Finance V, LLC, John Q. Hammons Hotels, LP, and John Q. Hammons Two, LP.

an Allowed Claim all damages it could recover in the State Court Action. *See* JD Holdings’ Mod. Am. Plan, Art. I (A), at ¶5 (defining “Allowed” claims).

4. In the State Court Action, American Towers alleges that all defendants failed to pay American Towers fees that were collected on cell phone tower leases procured by American Towers on behalf of Hammons, Inc. Some of these cell phone towers were placed on hotels owned or leased by the Atrium Defendants, but they were managed by an affiliate of Hammons, Inc. at the time they were placed. Hammons, Inc. filed a cross-claim in the State Court Action against the Atrium Defendants for common law indemnity and unjust enrichment.

5. On June 26, 2016 (the “Commencement Date”), the Debtor Defendants, along with 70 affiliated debtors, commenced these jointly administered bankruptcy cases and, pursuant to section 362 of the Bankruptcy Code, the State Court Action was stayed. The Debtor Defendants filed a Notice of Bankruptcy in the State Court Action on July 6, 2016. As of the Commencement Date, the State Court Action had been pending for approximately two years, limited written discovery had occurred, and two corporate representative depositions had been taken. No fact witnesses had been deposed in an individual capacity. At that time, the parties were still engaged in discovery, there were no pending motions, and there was no scheduling order or trial setting in place. At no time did American Towers take the position that the State Court Action was ready for summary disposition. The status of the State Court Action has not changed since July 2016.

6. American Towers filed its claims in this bankruptcy case on December 21, 2016, thereby submitting itself – and resolution of the American Towers Claims – to the jurisdiction of the Bankruptcy Court.

7. After taking no further action in the Bankruptcy Case or the State Court Action for sixteen months, American Towers now moves the Court, on the eve of Plan confirmation, for stay relief pursuant to section 362(d)(1) of the Bankruptcy Code on grounds that American Towers should be permitted to proceed with its claims against Debtor Defendants in the State Court Action. American Towers now argues for the first time that stay relief is warranted because American Towers' claims against Debtor Defendants are ready for summary proceedings in the State Court Action, because the State Court is more familiar with the case, and because "if stay relief is not granted, American Towers will, in effect, be precluded from pursuing its claims and seeking recourse against the non-debtor Defendants." Motion, at ¶¶ 13-19. These arguments do not justify stay relief and, for the reasons set forth herein, the Motion should be denied.

ARGUMENT

I. THE STANDARD FOR GRANTING STAY RELIEF AND BURDEN OF PROOF

8. The automatic stay generally prohibits litigation which would affect or interfere with property of the estate, of the debtor, or which is in the custody of the estate. 11 U.S.C. § 362(a); *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). The stay allows the bankruptcy court to retain control over the resolution of all claims pertaining to the debtor and the bankruptcy estate. *Pursifull*, 814 F.2d at 1504; *In re Davis*, 2005 Bankr. LEXIS 1165 at *8 (Bankr. D. Kan. June 17, 2005). This permits the debtor to marshal its affairs and ensures an orderly resolution to all claims. *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1330 (10th Cir. 1984); *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003). Courts are to be mindful that the "process of determining the allowance of claims is of basic importance to the

administration of the bankruptcy estate." *Davis*, 2005 Bankr. LEXIS 1165 at *11, quoting *In re Curtis*, 40 B.R. 795, 800 (Bankr. D. Utah 1984).

9. Because "cause" is not defined beyond adequate protection of property interests, relief from stay for cause involves a discretionary determination by the bankruptcy court made on a case-by-case basis. *Pursifull*, 814 F.2d at 1506; *Busch*, 294 B.R. at 140.

10. The movant has the burden to show that such "cause" exists to lift the stay and, if met, the burden shifts to a debtor to demonstrate why the stay should remain in place by consideration of various factors. *Busch*, 294 B.R. at 140-41; *Davis*, 2005 Bankr. LEXIS 1165 at *13-14; 11 U.S.C. § 362(g); *see also Sonnax Indus., Inc. v. Tri Component Prods. Corp.*, 907 F.2d 1280, 1285 (2d Cir. 1990). If the movant fails to make an initial showing of cause, the court should deny relief without requiring any showing by the debtor that it is entitled to continued protection. *Sonnax*, 907 F.2d at 1285

11. This Court previously outlined the standard for lifting the automatic stay under section 362(d)(1) of the Bankruptcy Code based on litigation in a separate forum in the Court's order denying JD Holdings' request for stay relief. *See In re John Q. Hammons Fall 2006, LLC*, Case No. 16-21142, 2017 WL 4620872, at *3 (Oct. 13, 2017).

12. Where the movant seeks relief from the stay to continue with litigation in a separate forum, the court will look to the twelve non-exhaustive *Curtis* factors.² *Id.* "In considering these factors, courts must bear in mind that the process of determining the allowance

² *In re Curtis*, 40 B.R. 795, 800 (Bankr. D. Utah 1984). The twelve factors identified by *Curtis* are: (1) whether the relief will result in partial or complete resolution of the issues; (2) the lack of any connection with or interference with the bankruptcy case; (3) whether the foreign proceedings involve the debtor as a fiduciary; (4) whether a specialized tribunal has been established to hear the case and whether it has the expertise to hear such cases; (5) whether the debtor's insurance carrier has assumed full financial responsibility for the defense; (6) whether the action essentially involves third parties; (7) whether the litigation would prejudice the interests of other creditors and interested parties; (8) whether any judgment in another forum is subject to equitable subordination under § 510(c); (9) whether the movant's success in a foreign proceeding would result in a judicial lien avoidable by debtor under § 522(f); (10) judicial economy; (11) the degree to which the parties are prepared for trial; and (12) the impact of the stay on the parties and the balance of the hurt.

of claims is of basic importance to the administration of the bankruptcy estate.” *Id.* (internal quotations omitted).

II. THE *CURTIS* FACTORS SUPPORT DENIAL OF STAY RELIEF

13. American Towers has not carried its initial burden to show that cause exists to lift the stay. The bankruptcy court is the recognized central forum for litigation against debtors and the adjudication of creditor claims is a core function of the bankruptcy court. *Id.* at *41 n.39, *7 n.62 (collecting cases). Not only are proceedings in the bankruptcy court generally more efficient and cost-effective, but the bankruptcy court is also uniquely positioned to resolve creditor claims in the context of the overall estate. American Towers cites no reason why the State Court is in a better position, or better equipped, than this Court to rule on the claims at issue.

14. American Towers argues that “[g]iven the State Court’s familiarity with the case and its procedural posture, it serves judicial economy to have it continue in that forum.” Motion, at ¶14. First, American Towers does not articulate a basis for concluding the State Court judge is materially more familiar with American Towers Claims than is this Court. During the two years the case was pending before the State Court judge, the judge denied some simple motions to dismiss at the pleading stage, deferred ruling on a motion to substitute parties, and ruled on a few discovery disputes. Thus, the State Court judge had very little involvement in the case. Given that the State Court Action was stayed nearly two years ago, it is likely that any familiarity the State Court judge at one time had is now gone. Moreover, this Court has expertise ruling on claims based on breach of contract and could easily adjudicate the merits of the American Towers Claims.

15. Even assuming that the State Court has more familiarity with the American Towers Claims, that does not alone justify stay relief. This Court previously rejected in this case a similar “familiarity” argument based on stronger facts. *See id.* at *8 (acknowledging the Delaware court’s familiarity with claims where the case had been ongoing for four years and was stayed on the eve of trial, but nonetheless rejecting JD Holdings’ motion to lift stay).

16. Contrary to American Towers’ argument, judicial economy is better served by litigating the claims in this Court. First, as described above and as previously explained by this Court: “[R]uling on the validity, extent, and dischargeability of the debtors’ obligations to a prepetition creditor is the *raison d’être* of bankruptcy courts.” *Id.* at *4. Second, judicial economy is better served by litigating the claims only once. American Towers recognizes that it cannot recover its damages twice and that its full damages can be recovered to the extent its claims are Allowed. A full and fair resolution of the claims is likely to occur in this Court because the interests of all parties to the State Court Action are represented here, because American Towers’ causes of action in the State Court case are brought against the defendants jointly and severally, and because American Towers’ claims will be paid in full to the extent Allowed. Thus, a resolution in this Court will fully resolve this dispute and American Towers will receive all the damages to which it is entitled.

17. American Towers next argues that the procedural posture of the State Court Action justifies lifting the stay because discovery was underway at the time the State Court Action was stayed and because American Towers is ready to proceed to summary proceedings against the Debtor Defendants. Motion, at ¶¶ 14-16. American Towers does not explain what it means by “summary proceedings” or the basis for why it believes the case is ready for “summary proceedings.” To be clear, at the time the State Court Action was stayed, no motion for

summary judgment had been filed or briefed. American Towers has never before asked the State Court or this Court to lift the stay on the basis that the claims are ready for summary proceedings. JD Holdings disagrees that the claims are ready for summary proceedings. Regardless, even assuming they were, such facts do not weigh in favor of lifting the stay. *See In re John Q. Hammons Fall 2006*, 2017 WL 4620872, at *5. American Towers can file a dispositive motion in this Court. The Debtors were parties to and participated in all discovery taken in the State Court Action. That discovery can be put to the same use before this Court as it could in the State Court Action. As previously explained by this Court, any discovery that was undertaken in the State Court Action can be used here and any motion for summary judgment can be filed here. *See id.* (“In addition, any discovery that was undertaken in the Delaware court can be used here; this Court would not permit the parties to start over, but would require the parties to merely update the discovery undertaken in Delaware, or engage in new discovery only as to any new issues. This factor does not weigh in favor of lifting the stay.”). American Towers will be in the same litigation position in either forum.

18. American Towers argues it will be harmed if it is not allowed to proceed in State Court because “if stay relief is not granted, American Towers will, in effect, be precluded from pursuing its claims and seeking recourse against the non-debtor Defendants.” Motion, at ¶ 17. This is not true. American Towers’ causes of action, which are brought jointly and severally against all defendants in the State Court Action, will be fully resolved by the Court’s ruling on the American Towers Claims against the Debtor Defendants. This is especially true because the only party that allegedly contracted with American Towers is debtor Hammons, Inc. Undersigned counsel, on behalf of JD Holdings and the Atrium Defendants, will consent to have

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of May, 2018, a true and correct copy of the foregoing document was electronically filed with the court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

/s/ Kirk T. May

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