

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:) Case No. 02-B02474
)
KMART CORPORATION,) Chapter 11
) Hon. Susan Pierson Sonderby
Debtor.) Hearing Date: March 3, 2010
) Hearing Time: 11:00 a.m. (CST)

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **Wednesday, March 3, 2010, at the hour of 11:00 a.m. (CST)** we shall appear before Judge Susan Pierson Sonderby, Courtroom 642, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois, or before any other judge who may be sitting in her place and stead, and shall present the **Kmart's Motion for Order of Abstention and Lifting Plan Injunction re Claims of David Kersh**, a copy of which is attached hereto and herewith served upon you at which time and place you may appear if you so see fit.

PLEASE TAKE FURTHER NOTICE that to appear telephonically at this hearing, please contact Judge Sonderby's courtroom deputy at 312-435-5647 as well as Mark Mackowiak of the law firm below at 312-629-5187.

Dated: February 3, 2010

Respectfully submitted,

/s/ William J. Barrett

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CERTIFICATE OF SERVICE

I, William J. Barrett, an attorney, hereby certify that a true and correct copy of **Kmart's Motion for Order of Abstention and Lifting Plan Injunction re Claims of David Kersh**, was served as indicated to the parties listed below, on the 3rd day of February, 2010.

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/s/ William J. Barrett

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Mailing Information for Case 02-02474

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:

KMART CORPORATION,

Debtor.

Case No. 02 B 02474

Honorable Susan Pierson Sonderby

Hearing Date: March 3, 2010

Hearing Time: 11:00 a.m.

**KMART'S MOTION FOR ORDER OF ABSTENTION AND LIFTING PLAN
INJUNCTION RE CLAIMS OF DAVID KERSH**

Kmart Corporation ("Kmart") moves that the Court abstain from hearing the claims of David Kersh and lift the plan injunction so that Mr. Kersh may pursue his asserted claims in the Michigan courts. In support of this motion, Kmart states as follows:

1. Kmart filed its Chapter 11 petition on January 22, 2002. On April 22, 2003 Kmart confirmed its Joint Plan of Reorganization (the "Plan"), which became effective on May 6, 2003.
2. Under the Plan, Kmart is the party responsible for the resolution of all claims in this case and is the party responsible for disbursements to be made under the Plan. In those capacities, Kmart seeks the following relief. Kmart is working diligently to conclude the bankruptcy case, including the resolution of all claims.
3. All pre-confirmation claims are subject to the discharge injunction of Section 524 of the Bankruptcy Code and injunction provisions of the Plan of Reorganization (the "Plan Injunction").

Kersh Claims

4. Kersh filed a proof of claim, no. 48076, relating to several alleged interactions he had with Kmart in the early 1990's. A copy of the proof of claim is attached hereto as Exhibit A.

Kersh previously sued Kmart twice in Michigan state courts – once in 1997 and once in 1999. The 1997 case, which concerned a coupon book program run by Mr. Kersh, ended with summary judgment in favor of Kmart. Kersh moved for reconsideration and to disqualify the judge, which motion was denied. No further appeal was apparently taken.

5. The 1999 Michigan case, which concerned an allegedly defective automotive part, was dismissed with prejudice and Kersh was sanctioned \$500. Kersh moved to set aside the dismissal and to disqualify the judge, and to disqualify another judge that denied the first disqualification motion. Kersh maintains that his motions, and thus the case, remain outstanding.

6. Kersh's proof of claim also includes a claim related to a lawsuit that Kersh brought in 1990 against the City of Southfield, Michigan arising from a car of Kersh's that disappeared from a Kmart parking lot. Judgment was entered in favor of the City, whereupon Kersh moved for a hearing and to disqualify the judge. The motions were denied. No further appeal was apparently taken.

7. Kmart filed a motion for judgment on the Kersh claims on May 6, 2006. (Docket Nos. 29865, 29866.) Kersh filed a response on May 16, 2006. (Docket Nos. 29882-29884.) In his "Memorandum in Support of Claimant's Motion to Quash Kmart's Motion for (i) Order Granting Partial Summary Judgment on Claim of David Kersh, Claim no. 48076 and (ii) Order Partially Allowing Claim of David Kersh as Class 7 Claim" (Exhibit B hereto), Mr. Kersh clearly believes that he has unfinished business with the Michigan 46th District Court concerning his various disqualification efforts. For many reasons, not the least of which being comity, this Court should not wade into whether one Michigan state judge properly followed the Michigan Rules of Court in acting on Kersh's motion to disqualify another judge.

8. Since the filing of the motion in 2006, the matter has been continued from status hearing to status hearing since that time because of health issues of Mr. Kersh.

9. Kmart nonetheless elected to allow Mr. Kersh's claim in full and make a Class 6 distribution on the claim. Mr. Kersh returned the distribution check.

Requested Relief and Basis Therefor

10. In order to avoid the substantial expense and delay associated with continued litigation between the Debtor and Mr. Kersh in this case, Kmart requests that this Court abstain from hearing matters related to the Kersh Claim and lift the plan injunction to allow Mr. Kersh to return to Michigan to conclude his business there.

11. The predicates for the relief requested in this Motion are 11 U.S.C. §105, 28 U.S.C. § 1334(c)(1) and Federal Rules of Bankruptcy Procedure 5011 and 9014.

12. Under 28 U.S.C. § 1334(c)(1), a bankruptcy court may abstain from exercising its jurisdiction "in the interest of justice, or comity with State courts, or respect for State law." 28 U.S.C. § 1334(c)(1). Twelve factors are considered by the Seventh Circuit and other courts in deciding if abstention is appropriate:

(1) the effect of abstention on the efficient administration of the estate; (2) the predomination of state law issues over issues of bankruptcy law; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding in a state or other nonbankruptcy court; (5) the federal jurisdictional basis other than 28 U.S.C. § 1334; (6) the relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters; (9) the burden on the bankruptcy court's docket; (10) the likelihood of forum shopping; (11) the existence of a right to a jury trial; and (12) the presence of nondebtor parties.

Federalpha Steel LLC Creditors' Trust v. Fed. Pipe & Steel Corp (In re Federalpha Steel LLC), 341 B.R. 872,882 (Bankr. N.D. Ill. 2006) citing *In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993). The relevance and importance of each of the twelve factors

