

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

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IN THE MATTER OF: * NO. 06-10179
OCA, INC. *
DEBTOR. *

* * * * *

Transcript of the proceedings taken in the above
captioned matter on **Wednesday, August 2, 2006**, the Honorable
Jerry A. Brown, United States Bankruptcy Judge, presiding.

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Representing Bay Area Orthodontics, P.C.,
Dr. Robert P. Buck, Buck Orthodontic Associates, PC
and Dr. Stephen N. Cole

P R O C E E D I N G S

(Wednesday, August 2, 2006)

THE CLERK: Case Number 06-10179, OCA, Inc.

MR. HORN: Good afternoon, Your Honor; Warren Horn on behalf of the Debtors, OCA, Inc.

I believe the only matter on the docket with respect to this case, Your Honor, is the motion of Drs. Buck and Cole for relief from the stay and I would leave it to the mover to advance that motion.

MR. PINKERTON: Good afternoon, Your Honor; Mike Pinkerton on behalf of Drs. Buck and Cole, and their practices.

Your Honor, we filed a Motion to Lift the Stay to continue with litigation that is pending and has been pending in the Northern District of Texas. In that particular litigation Dr. Buck has actually obtained a judgment, a partial summary judgment on the unenforceability of the BSA. There's an identical --

THE COURT: Excuse me for interrupting you, Mr. Pinkerton. Has that partial summary judgment been certified as the final judgment for --

MR. PINKERTON: No, sir.

THE COURT: Okay.

MR. PINKERTON: So, it's an interlocutory order that would require either a motion to have it certified or resolution of the remaining claims in the case and that's what

1 we're seeking here today is permission to go back to Texas and
2 resolve the rest of the claims in that case.

3 Those claims include Dr. Buck's defense against the
4 Debtors on the Debtors' equitable counterclaims and they also
5 include Dr. Cole's identical Motion for Summary Judgment on the
6 unenforceability issue, as well as the claims against him.
7 Drs. Buck and Cole have also alleged in the alternative motions
8 for material breach of contract that would also void the
9 contract.

10 Your Honor, last week the Court allowed the stay to
11 be lifted for Dr. Turner. He's in the Western District. This
12 case is even more persuasive to go on and lift the stay. We're
13 further along. We even have a judgment for Dr. Buck, albeit it
14 not a final one. But, Your Honor, we're asking that the stay
15 be lifted so that we can go back to Texas, finish this
16 litigation, and of course we would agree not to execute on any
17 money judgment outside the framework of this Court.

18 The Debtors argue that the compulsory counterclaims
19 are stayed. We've asked that the Court either declare them
20 inapplicable or lift them altogether. I mistakenly said in my
21 brief that they don't cite any authority. They actually do.
22 They cite the Epstein case, a relatively new case out of the
23 Southern District of Texas, which I don't think is either
24 correct or applicable. The Epstein court was hesitant to
25 overrule Fifth Circuit precedent, or at least to contradict

1 Fifth Circuit precedent that says that -- generally says all
2 counterclaims by the debtor, any offensive claims by the debtor
3 are not subject to the automatic stay.

4 Regardless, even if it is subject to the stay,
5 Your Honor, we asked that it be lifted so that we can finish up
6 in Texas. And for that matter I don't believe the stay will be
7 in effect that much longer anyway. We have the confirmation
8 hearing next month.

9 THE COURT: I'm prepared to grant you the same relief
10 that I granted to Dr. Parker?

11 MR. PINKERTON: Turner.

12 THE COURT: Turner. Dr. Turner last week, but you
13 have to convince me that you're entitled to the further relief
14 that you ask for which is to lift the stay to permit the Texas
15 court to proceed to try the issue of material breach of the
16 contract and to hold that the automatic stay is inapplicable to
17 the Debtors' counterclaim. Tell me why you think that your
18 client's entitled to that additional relief?

19 MR. PINKERTON: Well, Your Honor, to be perfectly
20 frank, we're trying to complete the litigation in Texas
21 altogether and I guess this gets to the question that I believe
22 hasn't been answered yet as to what effect this assumption
23 litigation that's coming up would have. Are the Debtors trying
24 to preclude any other judgments around the country on the
25 unenforceability issue? Based on their opposition memo they

1 clearly are. We disagree based on the Orion case, and the 611
2 case, and the other cases that suggest that the assumption
3 proceeding is really nothing more than the Court looking at the
4 business judgment rule and predicting that likelihood that
5 another court would rule the contract is unenforceable whereas
6 it would not do a collaterally preclusive judgment on those
7 issues. If that's the case, then there's no reason why we
8 can't go on and finish it up substantively in Texas while the
9 assumption track is going on.

10 Now, if the Court does rule that the litigation does
11 have collaterally preclusive effect, and that would be in
12 contradiction to Orion and 611, then, Your Honor, we would say
13 that it's inequitable to allow the Debtor to get a bad judgment
14 in Texas, to be doing poorly in Texas litigation, and then
15 files bankruptcy, preclude everything from proceeding in Texas,
16 and getting a second bite at the apple on the same issues that
17 have already been heard, at least for Dr. Buck, from doing so.
18 So, we would ask on either way the Court falls down on the
19 effect of the assumption litigation that the litigation in
20 Texas should proceed either because it doesn't matter what
21 happens here, or because it started in Texas and, therefore,
22 that's where it ought to finish.

23 THE COURT: Mr. Horn.

24 MR. HORN: Yes, thank you, Your Honor.

25 With all due respect to Mr. Pinkerton's argument,

1 quite frankly I think it does matter what happens here. I
2 think these assumption issues are core matters. We've argued
3 and briefed these issues ad nauseam. I believe what is
4 happening here is they have taken what you've done in the
5 Turner case and the limited relief you've granted and tried to
6 bootstrap that to get more than they're either entitled to
7 under the Sonex factors, or should be allowed to in the context
8 of the assumption case management order you've already entered.

9 These issues with respect to Drs. Cole and Buck are
10 clearly before the Court in the assumption process. What they
11 want to do is they want to do an end run around the assumption
12 and go have all the issues that are core to these proceedings
13 litigated in state court where he has admitted there's not a
14 final order. No one has asked for that interlocutory order to
15 be made final, and Your Honor has clearly made -- has clearly
16 stated to us and to all the parties in interest, "You're not
17 going to go behind a final order." So, we're not looking for
18 dual decisions on the same issue.

19 What we want to do, the Debtors want to pursue the
20 assumption litigation here. We have filed a Motion to Transfer
21 the Cole and Buck cases here. We are moving forward with the
22 adversary actions here. You're prepared to grant a similar
23 order, a limited lifting of the stay for them to have their day
24 on the legality in Texas. I don't think I can dissuade you of
25 that and I'm not going to try.

1 THE COURT: Well, you made a valiant effort last
2 time --

3 MR. HORN: And I went down in flames.

4 THE COURT: -- and there's no need to repeat it.

5 MR. HORN: But I would strenuously suggest that
6 there's on cause for lifting the entirety of the case. There's
7 no cause for lifting the stay to allow the entirety of those
8 issues that are here in core matters in the assumption process
9 to allow that to proceed in a Texas court. We're going to be
10 back here. We're going to be handling -- that would only
11 create dual work and inconsistent rulings. Consistently
12 keeping your order in place, keeping the assumption process
13 here is the only way to preclude that from happening.

14 Let them go litigate their legality issue if they'd
15 like. It is far along. I'm not going to dissuade you of that.
16 But certainly the core issues should be here and I don't think
17 Mr. Pinkerton in their pleadings or in his argument has raised
18 anything to satisfy the Sonex factors, or proof the Sonex
19 factors are in his favor, or to show that there's cause for
20 lifting the remainder of the case.

21 Anything you have to ask, I'll gladly respond to.

22 THE COURT: All right.

23 MR. HORN: Thank you.

24 THE COURT: Do you wish to respond, Mr. Pinkerton,
25 briefly?

1 MR. PINKERTON: Briefly, Your Honor. We don't
2 dispute that the matters that are going on here are core
3 matters. Orion says that. We only dispute whether they have
4 the collaterally preclusive effect that the Debtor says they
5 do.

6 With regard to the material breach issue, Dr. Buck
7 certainly doesn't care about that issue too much because he's
8 already got a judgment in his favor. The material breach issue
9 is an alternative argument to the unenforceability issue. But
10 with regard to Dr. Cole, he would especially like to have that
11 issue retained and litigated. And as for the counterclaims,
12 the Debtor brought those counterclaims and should be forced to
13 litigate those at some point.

14 THE COURT: Yeah, but the Debtor now chooses to
15 litigate that in this Court, made that choice in effect when
16 they filed the Chapter 11.

17 MR. PINKERTON: Well, it hasn't -- it has moved it --
18 just yesterday moved to transfer these proceedings over. And,
19 you know, I guess the alternative relief I would ask for if the
20 Court isn't inclined to lift the stay for the entire litigation
21 to proceed would be just to clarify that we could also ask the
22 Court to certify the unenforceability issue as a final judgment
23 if the Court were inclined to at least let us complete that
24 issue.

25 THE COURT: You mean you want me to lift the stay to

1 let the Texas Court certify that?

2 MR. PINKERTON: Yes, Your Honor.

3 THE COURT: Okay. All right.

4 All right, I've read the briefs and gone into this
5 matter in depth last week or the week before last when I
6 granted in part the Motion to Lift the Stay as to Dr. Turner.
7 I'm going to grant the Motion for Relief from Stay in favor of
8 Dr. Buck and Dr. Cole to the same extent that I granted the
9 Turner motion to lift the stay, that is they can proceed --
10 either or both can proceed to try in the Texas court the issue
11 of unenforceability of the BSA, and I understand that Dr. Buck
12 already has a partial summary judgment on that issue. I'm
13 lifting the stay to the extent that he can ask the Court to
14 certify that, Texas Court to certify that if he wishes to. As
15 to the other doctor, Dr. Cole, I'm lifting the stay in order to
16 let him proceed to trial in the Texas court the issue of
17 whether the Business Service Agreement is void ab initio or
18 illegal under state law, or whatever other issues are implicit
19 in that.

20 I am not lifting the stay for the Texas court to try
21 the issue of material breach or whether the automatic stay is
22 inapplicable to the Debtors' counterclaim.

23 All right, prepare an order or judgment to that
24 effect.

25 MR. PINKERTON: One clarification, Your Honor.

1 Looking ahead and being optimistic, assuming Cole is able to
2 get the same relief that Dr. Buck did, may Dr. Cole also move
3 the Texas court for a final judgment?

4 THE COURT: Yes.

5 MR. PINKERTON: Yes, Your Honor, I'll prepare the
6 order.

7 MR. HORN: I'd like to see it, please.

8 MR. PINKERTON: Sure.

9 THE COURT: All right, on the portion of the order as
10 to Dr. Cole just say that he's free to -- the stay is lifted so
11 that he can go forward with trying out the illegality issue of
12 the Business Service Agreement, including any certification, or
13 appeal, or whatever on that issue and that issue alone. All
14 right.

15 MR. PINKERTON: Thank you, Your Honor.

16 THE COURT: That's it for OCA, right?

17 MR. HORN: That's it, Your Honor.

18 THE COURT: At least for today.

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20 (Hearing is Concluded)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceeding in the
above-entitled matter.

\S\Dorothy M. Bourgeois
DOROTHY M. BOURGEOIS

8/11/06
Date