

**IN THE UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
Eastern Division**

**FILED**  
09 OCT 23 PM 2:10  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

**In Re:**

**In Proceedings Under Chapter 11**

**KIEBLER SLIPPERY ROCK, LLC,**

**Case No.: 09-19087**

**Debtor.**

**JUDGE RANDOLPH BAXTER**

**MEMORANDUM OF OPINION AND ORDER**

Before the Court is the Debtor's Motion for Order: A) Enforcing the Automatic Stay and Requiring Martik Brothers, Inc. To Show Cause Why It Should Not Be Held in Contempt for Violations of the Automatic Stay; and B) Determining that Martik Brothers, Inc. Has No Interest in Disputed Funds and Authorizing Debtor's Use of Disputed Funds as Cash Collateral. Martik Brothers, Inc. opposed the relief sought, and Huntington National Bank filed a Limited Objection to the relief sought. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O) with jurisdiction further conferred by 28 U.S.C. § 1334 and General Order No. 84 of this District. After considering the Debtor's Motion and the responses thereto, the Court denied the Motion from the bench at the October 13, 2009 hearing on the Motion. The Court sustained the objection of Martik Brothers and the Limited Objection of Huntington National Bank. The following findings of fact and conclusions of law are issued consistent with this Court's bench ruling, except that upon further consideration, the Limited Objection of Huntington National Bank is rendered moot:

The Debtor filed its Chapter 11 petition on September 25, 2009. On October 1, 2009, this Court entered an Interim Order Authorizing the use of Cash Collateral and Granting Adequate Protection (“Agreed Order”). The Agreed Order submitted was approved by the Debtor, Huntington National Bank, Huntington Real Estate Investment Company, Martik Brothers, Inc. and the Office of the United States Trustee. The Agreed Order states, in pertinent part:

Martik Brothers, Inc. (“Martik”) has asserted an interest in Cash Collateral. Such interest is disputed by the Debtor. Notwithstanding the foregoing, but subject to the rights of the Debtor and any other party in interest to challenge any asserted interest by Martik, Martik shall be granted a replacement lien in Cash Collateral to the extent of its prepetition interest, if any; Martik shall also be entitled to assert a claim under sections 507(a) and (b) of the Bankruptcy Code to the extent of any diminution in accordance with the terms of those sections. In exchange for this grant of adequate protection to Martik, notwithstanding any writ or order issued by the United States District Court for the Western District of Pennsylvania in Case No. 08-1756, Martik specifically consents to the use of Cash Collateral including any Cash Collateral in which Martik may have an interest.

Agreed Order ¶ 5.

The Agreed Order further states that:

[T]he parties agree that \$71,193.23 (the “Disputed Funds”) held by Huntington in an account of the Debtor is not subject to use as Cash Collateral by the Debtor at this time. Use, ownership and disposition thereof is disputed for various reasons, including but not limited to claims of Huntington and Martik, as well as the requirements of orders or writs issued by the United States District Court for the Western District of Pennsylvania in Case No. 08-1756. All rights of parties in interest in and to the Disputed Funds, including the amount thereof, are reserved. At such time, if ever, that the Court determines that Martik holds no interest in the Disputed Funds and Huntington has nothing other than an interest therein as Collateral (as opposed to such amount constituting funds of Huntington), the Disputed Funds shall be subject to use as Cash Collateral by the Debtor in accordance with the terms of this Order. The Lenders do not consent to the use of Cash Collateral by the Debtor except in compliance with the terms and conditions contained herein, unless prior written approval from Lenders by Debtor is obtained.

Agreed Order ¶ 3.

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The Debtor asks this Court to find that Martik Brothers is in violation of the automatic stay provisions of § 362(a) because, in the District Court Action, it “unashamedly continues to pursue the Debtor’s account at Huntington.” (Brief at ¶ 12). Said account is the one referred to as the “Disputed Funds” in the Agreed Cash Collateral Order. The Debtor further argues that the District Court Action violates the automatic stay because an indemnification provision in the loan documents between it and Huntington will result in the Debtor being held liable for attorneys’ fees in connection with the District Court Action. The Debtor claims that “all fees and costs incurred by Huntington to defend Martik’s groundless contempt proceeding are charged back to the Debtor’s estate as additional indebtedness.” (Brief at ¶ 14). Finally, the Debtor asks this Court to determine that Martik Brothers has no interest in the Disputed Funds because the underlying writ of garnishment was defective. (Brief at ¶ 29).

In response, Martik Brothers alleges that it has taken no post-petition action in the District Court Action with respect to the Disputed Funds, but that it “will, to the extent it deems appropriate, continue to pursue sanctions against Huntington Bank for its violation of the Writ of Execution and Orders entered in the District Court Action.” (Martik Opposition at ¶ 5). Martik further argues that, to the extent the Debtor seeks to stay the litigation between it and Huntington, both non-debtor third parties, the Debtor is seeking relief pursuant to 11 U.S.C. § 105 and such relief must be brought through an adversary proceeding. Finally, Martik alleges that the Debtor’s motion seeking a declaration from this Court that it has no interest in the Disputed Funds is procedurally deficient because such determination must also be made through an adversary proceeding.

In its Limited Objection, Huntington National Bank asserts that it has first right to the Disputed Funds because of an automatic right of set-off that occurred pre-petition when the Debtor became delinquent on its obligations to Huntington. Although Huntington is not the subject of this motion for violation of the automatic stay, it alleges that it believes it will become subject to sanctions in the District Court Action if it adheres to the provisions of the automatic stay.

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The dispositive issues for the Court are whether the Debtor has shown, by a preponderance of the evidence in this Emergency Hearing, that the pending contempt proceeding against Huntington National Bank in the Western District of Pennsylvania is subject to the automatic stay provisions of 11 U.S.C. § 362(a) and whether an emergency motion is the proper procedural mechanism to determine the validity of any interest Martik Brothers may have in certain Disputed Funds.

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The Debtor alleges that Martik Brothers is violating several of the automatic stay provisions of 11 U.S.C. § 362, which states that:

- (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of . . .
  - (2) the enforcement, against the debtor or property of the estate, of a judgment obtained before the commencement of the case under this title;
  - (3) any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate;
  - (4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

The stay provisions of § 362 are “automatic and self-operating and those who have knowledge of a bankruptcy action and stay are bound to honor the stay unless and until it is properly lifted.” *NLT Computer Services Corporation v. Capital Computer Systems, Inc.*, 755 F.2d 1253, 1258 (6<sup>th</sup> Cir. 1985). The debtor bears the burden of proving a willful violation by a preponderance of the evidence. *In re Sharon*, 234 B.R. 676, 687 (BAP 6<sup>th</sup> Cir. 1999). The automatic stay does not, however, apply to non-debtor third parties. *In re Dow Corning Corporation*, 86 F.3d 482, 493 (6<sup>th</sup> Cir. 1996)(“Section 362(a) is generally available only to a debtor.”) A bankruptcy court may, pursuant to 11 U.S.C. § 105(a), enjoin non-debtor third party actions that will have an impact on the estate. *In re Eagle Picher Industries*, 963 F.2d 855, 858 (6<sup>th</sup> Cir. 1992). When “issuing a preliminary injunction pursuant to its powers set forth in section 105(a), a bankruptcy court must consider the traditional factors governing preliminary injunctions issued pursuant to Federal Rule of Civil Procedure 65.” *Id.*

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Herein, the Debtor alleges that Martik is violating the automatic stay by continuing to pursue the Disputed Funds in the District Court Action. However, a review of the docket in that matter shows that the District Court stayed all proceedings against the Debtor after a Suggestion of Bankruptcy was filed. (*See* Doc. No. 75 in 08-1756, Western District Pennsylvania). Furthermore, the only pending matter that appears on the District Court’s docket is a contempt proceeding against Huntington National Bank set for December 8, 2009. Martik alleges that it

does not intend to pursue turnover of the Disputed Funds absent relief from this Court. This is consistent with Martik's agreement in the Cash Collateral Order to allow the Debtor use of the Disputed Funds despite any interest it may have in the funds. (See Agreed Order at ¶ 5). Accordingly, the Debtor has not met its burden to prove that Martik's prosecution of the contempt proceeding is a violation of the automatic stay.

The Debtor also alleges that the District Court Action should be stayed because the estate will be held liable for the attorneys' fees that Huntington incurs in defense of the contempt action. This argument fails for two reasons. First, in order to enjoin an action against a non-debtor third party, the Debtor necessarily must seek relief pursuant to 11 U.S.C. § 105(a). *In re Eagle Picher*, 963 F.2d at 858. Such relief must be brought through an adversary proceeding. Fed. R. Bank. P. 7001(7). Accordingly, the Debtor's Emergency Motion is procedurally deficient.

Second, the Debtor makes the conclusory statement that "all fees and costs incurred by Huntington to defend Martik's groundless contempt proceeding are charged back to the Debtor's estate as additional indebtedness." (Brief at ¶ 14). There is nothing in the record before this Court reflecting any request by Huntington National Bank for indemnification or that the Debtor has expended any funds with respect to Huntington's defense in the contempt proceeding. In its opposition, Martik argues that the indemnification provision would not be applicable to the contempt proceeding because the loan documents state that "Mortgagor shall not be obligated to indemnify or hold Mortgagee harmless from and against any claims directly arising from the gross negligence or willful misconduct of Mortgagee or its employees or agents." (Martik Opposition at fn. 1). Accordingly, it does not appear from the record before this Court that the

Debtor has incurred any expenses related to the contempt proceeding against Huntington National Bank or that the Debtor will be responsible for such expenses.

Finally, to the extent the Debtor asks this Court to determine that Martik has no interest in the Disputed Funds because the underlying writ was defective, such relief is more properly sought through an adversary proceeding. *See* Rule 7001, Fed. R. Bank. P. Therefore, the Debtor's Emergency Motion is procedurally deficient in this respect.

Accordingly, the Debtor's Motion for Order: A) Enforcing the Automatic Stay and Requiring Martik Brothers, Inc. To Show Cause Why It Should Not Be Held in Contempt for Violations of the Automatic Stay; and B) Determining that Martik Brothers, Inc. Has No Interest in Disputed Funds and Authorizing Debtor's Use of Disputed Funds as Cash Collateral is hereby denied. The objection of Martik Brothers, Inc. is hereby sustained. The Limited Objection of Huntington National Bank is hereby rendered moot. Each party is to bear its respective costs.

**IT IS SO ORDERED.**

Dated, this 23<sup>rd</sup> day of  
October, 2009.

  
JUDGE RANDOLPH BAXTER  
UNITED STATES BANKRUPTCY COURT