UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 04-24041
	)	Case No. 04-24042
PINZONE ARMBRUSTER, INC.	)	
	)	Jointly Administered
ARMBRUSTER ENERGY	)	Under Chapter 11
ENTERPRISES, LLC	)	
	)	Judge Arthur I. Harris
Debtors.	)	

MEMORANDUM OF OPINION

These jointly administered cases are currently before the Court on a motion for relief from stay filed by creditor Equilon Enterprises, LLC (hereinafter "Shell") (Docket #28 in Case No. 04-24042). Shell seeks relief from stay to terminate a lease and related agreement with debtor Armburster Energy Enterprises, LLC, (hereinafter "debtor"). The Court conducted an evidentiary hearing on the motion on March 23 and March 24, 2005. For the reasons that follow, the motion for relief from stay is granted conditionally. Should the debtor fail to meet any of the requirements set forth below, the stay will be lifted according to the procedures set forth below and in the accompanying order.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court

for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). This memorandum constitutes the Court's findings of fact and conclusions of law as required by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[1]

FINDINGS OF FACT

The debtor operates eighteen Shell service stations and convenience stores in the Columbus, Ohio, metropolitan area. The principals of the debtor, including Jeff Armbruster and Lee Armbruster, have extensive experience in the operation of service stations and convenience stores. The two principal agreements between the debtor and Shell are a "multi-site contractor operated retail outlet agreement" (MSO agreement) and a "multi-site non-petroleum facility lease" (lease agreement). The lease agreement expires on August 31, 2006. Under the MSO agreement, ownership of the fuel and fuel proceeds remains with Shell, and Shell has the right to make electronic fund transfers from the accounts in which the debtor deposits

[1] The findings of fact contained in this memorandum reflect the Court's weighing of the evidence and credibility. In so doing, the Court considered the witnesses' demeanor, the substance of their testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language, or nuance of expression. Even if not specifically mentioned in this decision, the Court has considered the testimony of all the witnesses at trial, as well as all exhibits admitted into evidence and all stipulations.

the fuel proceeds.

In October 2004, creditor Fifth Third Bank noticed irregularities in the debtor's accounts at Fifth Third Bank. As a result of these irregularities, Shell was unable to make electronic fund transfers from the accounts in which the debtor had deposited the proceeds from selling Shell's fuel. In addition, Fifth Third froze the debtor's accounts. Shell then turned off or otherwise disabled the pumps at the debtor's service stations. The debtor filed its Chapter 11 case on November 3, 2004. The fuel operations were restored shortly after this Court entered an agreed order involving the debtor and Shell (Docket #6 in Case No. 04-24042).

On December 3, 2004, Shell filed its motion for relief from stay to terminate the MSO and lease agreements with the debtor. Shell asserts that the debtor is in default under the MSO and lease agreements. The debtor has not paid the November rent payment to Shell of about $93,000, although the debtor asserts that a representative of Shell orally agreed to a one month rent reprieve. Shell asserts that the debtor currently owes Shell about $247,000, even after deducting the $122,000 Shell received from the debtor's accounts that had been frozen by Fifth Third Bank. Should the stay be lifted, Shell intends to have another entity take over operation of the eighteen service stations and convenience stores as quickly as possible.

DISCUSSION

Section 362 of the Bankruptcy Code provides in pertinent part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if--
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

A bankruptcy court may lift the automatic stay "for cause." 11 U.S.C. § 362(d)(1). Because the Code provides no definition of what constitutes "cause" under § 362(d), courts must determine whether discretionary relief is appropriate on a case-by-case basis. *See In re Trident Associates Limited Partnership*, 52 F.3d 127, 131 (6th Cir. 1995) (holding that a bankruptcy court must consider the "totality of the circumstances" when deciding to lift the automatic stay for cause); *In re Laguna Associates Limited Partnership*, 30 F.3d 734, 737-38 (6th Cir. 1994).

One of the factors to consider is whether there is a possibility of reorganization. As the United States Supreme Court noted in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365,

375-76 (1988), the phrase "necessary for an effective reorganization" in section 362

> is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect*. This means, as many lower courts . . . have properly said, that there must be "a reasonable possibility of a successful reorganization within a reasonable time."

(citations omitted). What this means is that a creditor may be entitled to relief from stay as soon as it becomes evident that there is no "reasonable possibility of a successful reorganization within a reasonable time." For example, even within the first four months of a Chapter 11 case, "lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." 484 U.S. at 376.

In the present case, the Court believes that there is still a reasonable possibility of a successful reorganization within a reasonable time, although the window of opportunity is closing quickly. The Court sees no reason why these service stations and convenience stores cannot be operated at a profit by the debtor or any other entity with similar experience. The key question is whether the debtor can take the necessary steps to dig out from the hole that was created when the debtor's previous controller embezzled funds or otherwise created the financial problems leading up to Shell's turning off the pumps in October 2004. These steps need to be taken quickly if the debtor is to successfully reorganize under Chapter 11. These steps will require major effort by the debtor, the debtor's

principals, the debtor's counsel, and the debtor's accountants. If the debtor is to successfully reorganize, its efforts going forward must also be significantly greater than the efforts made during the first four months that the debtor was in Chapter 11.

Accordingly, the Court will grant relief from stay conditionally. Should the debtor fail to meet any of the requirements set forth below, the stay will be lifted according to the procedures set forth below and in the accompanying order.

A. Debtor shall comply with each of the following requirements:

1. Monthly rent payments shall be paid by the debtor and received by Shell by the 1st and 15th of each month.

2. Debtor shall file the monthly operating report by the 20th day of the following month as required by the Office of the U.S. Trustee.

3. Debtor shall file a disclosure statement and proposed plan by May 16, 2005.

4. Debtor shall file all of its 2004 tax returns by June 15, 2005.

5. Debtor shall file a motion by May 16, 2005, for an order setting a bar date for filing proofs of claim.

B. Should the debtor fail to comply with any of the deadlines set forth above, Shell's counsel may send debtor and counsel for debtor a 10-day notice of

movant's intent to file an affidavit and proposed order granting relief from stay. If the default is not cured within the 10-day period, then upon the filing of an affidavit by movant attesting to the default by the debtor, an order shall be entered without further hearing, terminating the stay imposed by section 362(a) of the Bankruptcy Code with respect to the movant, its successors, and assigns.

C. In addition, should the Court decline to approve the disclosure statement and decline a request for additional time to seek approval of a disclosure statement, or should the Court deny confirmation of a proposed plan and deny a request for additional time for filing another plan or a modification of a plan, then Shell may submit a proposed order terminating the stay to the Court, without notice to the debtor and without filing or serving an affidavit. The Court may then enter an order terminating the automatic stay with respect to Shell, subject only to the 10-day stay provided under Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure.

CONCLUSION

For the foregoing reasons, the motion for relief from stay filed by creditor Equilon Enterprises, LLC, (Docket #28 in Case No. 04-24042) is granted conditionally. Should the debtor fail to meet any of the requirements set forth above, the stay will be lifted according to the procedures set forth above and in the

accompanying order.

IT IS SO ORDERED.

/s/ Arthur I. Harris 4/15/2005
Arthur I. Harris
United States Bankruptcy Judge