Dated: November 13 2009

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 09-36464
	)	
Richard A. Davis,	)	Chapter 13
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF OPINION AND ORDER DENYING MOTION FOR RELIEF FROM STAY

This case is before the court on the amended motion for relief from the automatic stay [Doc. # 9] filed by Midwest Vein Treatment Clinic, Inc. ("Movant") and Debtor's response [Doc. #18]. Movant seeks an order terminating the automatic stay imposed by 11 U.S.C. § 362(a) to permit it to pursue equitable relief sought pre-petition in state court for Debtor's alleged violation of a non-competition agreement.

The district court has jurisdiction over this Chapter 13 case pursuant to 28 U.S.C. § 1334(a) as a case under Title 11. It has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings involving motions to terminate, annul, or modify the automatic stay are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(G).

The court held the preliminary hearing on the motion on October 29, 2009. Counsel for Debtor and counsel for affiliated party Midwest Vein and Laser Center of Lima, L.L.C. appeared in person at the hearing. Attorneys for Movant appeared by telephone. The court scheduled a final hearing on the motion

for November 23, 2009, to occur if it determined that there were issues of fact that required presentation of evidence. Having considered the motion, Debtor's response and the arguments of counsel, the court finds that the motion as filed does not raise any issues of fact necessitating a final evidentiary hearing. For the reasons that follow, the final hearing will be vacated and the motion will be denied, without prejudice.

BACKGROUND

The following facts are not in dispute. Debtor is a medical doctor. Movant operated a business in Lima, Ohio, that involved providing vein treatment services. Movant, as seller, Midwest Vein and Laser Center of Lima, LLC ("Midwest Vein of Lima"), as purchaser, and Debtor, individually as the sole owner of Midwest Vein of Lima, entered into an Asset Purchase & Consulting Agreement dated July 1, 2008 ("Asset Purchase Agreement"). [Movant's Ex. A]. Under the Asset Purchase Agreement, Movant agreed to sell certain assets relating to its business in Lima. Specifically, it agreed to sell certain business records, including patient information and files, all equipment used in the performance of its business in Lima, and intangible assets, including the "use of trade names (specifically, continued use of the name "Midwest Vein and Laser Center at Lima") and all goodwill associated therewith." [*Id.* at ¶ 1.1]. In connection with the Asset Purchase Agreement, Midwest Vein of Lima and Debtor executed a Cognovit Promissory Note and Security Agreement, under which they granted Movant a security interest in the business records and intangible assets only. [*See id.*, Schedule 1.4, p. 2 (granting a security interest "in all of the Purchased Assets, except for those listed in the equipment category")].

Also in connection with the Asset Purchase Agreement, Debtor executed a Non-Competition Agreement. [Movant's Ex. B]. That agreement provides that, in the event of a default as defined in the promissory note, Debtor "shall refrain from competing with [Movant and its Lima business]." [*Id.* at Recitals]. Specifically, the agreement provides in relevant part that, for a period of one year from the "Effective Date," Debtor

> shall not in any manner, directly or indirectly, individually or in concert with any entity. . . . [o]wn an equity interest in, or otherwise take any action that may result in owning any interest in, operate . . . or serve as an employee providing professional radiology services at, any medical or non-medical facility that engages [in] vein treatment or other service that is similar to or an alternative to the services provided by [Movant's Lima business] in the Service Area. The "Service Area" shall be defined as Allen County, Ohio. . . .

[*Id.* at ¶ 1(a)]. The agreement further provides that the "Effective Date" of the agreement shall be set by Midwest through written notice delivered to [Debtor] " only if "an Event of Default occurs pursuant to the Note." [*Id.* at ¶ 2]. The agreement also provides that it is to be governed by the laws of the State of Ohio. [*Id.* at ¶ 6].

It is undisputed that Debtor and Midwest Vein of Lima defaulted on the financial obligations under the Asset Purchase Agreement. Thereafter, by letter dated August 18, 2009, Movant provided notice that the Non-Competition Agreement was effective as of the date Debtor received the letter. Debtor does not dispute that he received the letter and that he continues to provide vein treatment services in Lima, Allen County, Ohio.

On August 28, 2009, Movant filed a civil action against Debtor in the Common Pleas Court for Montgomery County, Ohio, ("state court") wherein it seeks (1) a declaration that the Non-Competition Agreement is valid, (2) damages for breach of that agreement and (3) an order enjoining Debtor from continuing to operate Midwest Vein of Lima and provide radiology and vein treatment services in Allen County. [Movant's Ex. D]. Movant also filed in state court a motion for temporary restraining order and preliminary injunction wherein it states that it "intends to resume providing treatment to patients upon return of the Collateral." [Movant's Ex. E, Memorandum in Support, p. 3].

On September 15, 2009, Midwest Vein of Lima filed for relief under Chapter 11 of the Bankruptcy Code. Movant has not filed for relief from the automatic stay in that case.[1] On September 18, 2009, Debtor filed for relief under Chapter 13 of the Bankruptcy Code.

LAW AND ANALYSIS

Movant states that it seeks relief from the automatic stay in order to pursue only its claims for equitable relief in state court. Movant argues that the right to injunctive relief for breach of the Non-Competition Agreement is not a claim that is dischargeable in bankruptcy. It therefore states that the automatic stay arguably does not even apply in this situation but that, to the extent it does, it is entitled to relief for cause under § 362(d)(1). While the court agrees that any right Movant has to injunctive relief for breach of the Non-Competition Agreement is not a dischargeable claim, the court finds that Movant has not met its burden of going forward with a prima facie showing of cause for relief under § 362(d)(1) for relief from the automatic stay.

I. Right to Injunctive Relief for Breach of the Non-Competition Agreement is not a "Claim"

The Bankruptcy Code defines "claim" as a "right to payment" or "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. . . ." 11 U.S.C. § 101(5). In *Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493 (6th Cir. 2001), the Sixth Circuit addressed in a Chapter 7 case the issue of whether an injunction for breach of a covenant not to compete is a claim and, therefore,

[1] At the hearing, the parties agreed that the court could take judicial notice of the contents of the docket in Midwest Vein of Lima's Chapter 11 case, Case No. 09-36361. *See* Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2).

dischargeable in bankruptcy. Agreeing with the Seventh Circuit's holding in *In re Udell*, 18 F.3d 403 (7th Cir.1994), the court held that "[t]he right to equitable relief constitutes a claim only if it is an alternative to a right to payment or if compliance with the equitable order will itself require the payment of money." *Kennedy*, 267 F.3d at 497; *see MCS Acquisition Corp. v. Gilpin (In re Gilpin)*, 391 B.R. 210 (Table), 2008 Bankr. LEXIS 1977, *12-13, 2008 WL 2787520, *5 (B.A.P. 6th Cir. July 17, 2008)(also a Chapter 7 case). Because, under state law governing the agreement at issue in *Kennedy*, an injunction could issue only where money damages for future injuries are inadequate, the court concluded that equitable relief was not an alternative to a right to payment for future injuries. *Id.* at 497-98. And because an injunction against a threatened breach of the covenant not to compete would not require the expenditure of money, the court found that such equitable relief does not constitute a "claim" under the Bankruptcy Code. *Id.* at 497.

In this case, Ohio law determines the nature of Movant's remedies arising from Debtor's breach of the Non-Competition Agreement. Under Ohio law, a party seeking an injunction must show "that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law." *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267 (2000). Thus, as the Sixth Circuit found in *Kennedy*, the equitable relief sought by Movant is not an alternative to a right to payment for future injuries. And, as in *Kennedy*, an order enjoining Debtor from continuing to breach the Non-Competition Agreement would not itself require him to expend money. Therefore, any right Movant has to the equitable relief sought in state court in the form of an injunction is not a "claim" in Debtor's bankruptcy case.

II. Scope of the Automatic Stay Under 11 U.S.C. § 362(a)(1)

Albeit somewhat gingerly, Movant argues that since a right to the equitable relief it seeks would not be a claim herein, the automatic stay does not apply. [Doc. #9, ¶ 20]**.** The court disagrees. Under § 362(a), the filing of a bankruptcy petition operates as a stay of –

> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1). The motion refers only to the last clause of § 362(a)(1) that stays any proceedings "to recover a claim against the debtor that arose before" the debtor filed the petition. [Doc. #9, ¶ 13]. Although certainly included in § 362(a)(1), this provision is not narrowly limited to actions against the debtor to recover a claim as Movant contends but, rather, applies to all proceedings against a debtor unless excepted in § 362(b). *See Int'l Bus. Mach. v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731, 735 (7th Cir. 1991) (stating that § 362(a) "provides for a nearly comprehensive stay

of proceedings against the debtor"); *cf. Udell*, 18 F.3d at 410 (addressing the automatic stay imposed under § 362(a)(2) and stating that the stay applies to judgments obtained before commencement of the case "whether or not the judgment arises out of a "claim"). Movant does not allege that any exception to the stay in § 362(b) applies. As such, the court finds that the automatic stay does apply to the prepetitIon state court action filed by Movant against Debtor.

III. Relief from the Automatic Stay Under 11 U.S.C. § 362(d)(1)

Nevertheless, § 362(d) requires the court "to grant relief from the stay . . . for cause . . . ." The Bankruptcy Code does not define "cause" as used in § 362(d)(1). Therefore, under § 362(d)(1) "courts must determine whether discretionary relief is appropriate on a case-by-case basis." *Trident Assoc. Ltd. P'ship v. Metropolitan Life Ins. Co. (In re Trident Assoc. Ltd. P'ship)*, 52 F.3d 127, 131 (6th Cir. 1995)(quoting *Laguna Assoc., L.P. v. Aetna Casualty & Surety Co.* (*In re Laguna Assoc.L.P.)*, 30 F.3d 734, 737 (6th Cir. 1994)).

Congress set forth burdens of proof applicable to a motion for relief from stay in 11 U.S.C. § 362(g). Specifically, the party seeking relief has the burden of proof on the debtor's equity in property, and the party opposing relief has the burden of proof on all other issues. Notwithstanding these statutory burdens of proof, a party seeking relief from stay still has the burden of going forward to show a prima facie right to the relief requested before the burden shifts to the debtor to disprove that cause exists for relief from stay. *In re Bushee*, 319, B.R. 542, 551 (Bankr. E.D. Tenn. 2004); *In re Cambridge Woodbridge Apts., L.L.C.*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003).

In this case, the only basis articulated by Movant for finding that "cause" exists is that its right to injunctive relief is not a "claim" in Debtor's bankruptcy case. However, that fact alone stops short of entitling Movant to relief from the stay in the context of this Chapter 13 individual reorganization case. *See In re Udell*, 18 F.3d at 410. As discussed above, the stay imposed under § 362(a)(1) applies whether or not the action against the debtor is to recover a "claim." While equitable considerations and a balancing of the interests of the estate against the hardships that will be incurred by the movant can be the basis for finding cause to proceed with litigation outside of bankruptcy court, Movant has neither argued nor shown that any such considerations entitle it to relief. *See Fernstrom Storage & Van Co.,* 938 F.2d at 735 (applying a three-factor test for determining whether "cause" exists that asks whether (1) any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit, (2) the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship of the debtor, and (3) the creditor has a probability of prevailing on the merits); *In re Udell*, 18 F.3d at 410; *In re Indian River*

Estates, Inc., 293 B.R. 429, 432-33 (Bankr N.D. Ohio 2003).

Movant relies heavily on *Kennedy* and *Gilpin*, arguing that they are binding precedents entitling it to relief from stay. Relief from stay was in fact authorized by the appeals courts in those cases. As discussed above, they compel the conclusion that a right to equitable relief established by Movant would not be a claim. But it does not automatically follow from that conclusion that Movant, too, is entitled to relief from stay in this case. Both *Kennedy* and *Gilpin* are Chapter 7 cases in which the procedural goal of the debtors was to obtain a discharge and their post-petition earnings were not property of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(6). Since the right to equitable relief was not a dischargeable claim in bankruptcy, there was no reason in *Kennedy* and *Gilpin* once that determination was made to preclude further state court proceedings to obtain nondischargeable injunctive relief.

The procedural posture of this case materially distinguishes it from *Kennedy* and *Gilpin*. Instead of being a Chapter 7 liquidation case of relatively short duration as far as the Debtor is concerned, this is a Chapter 13 reorganization proceeding with a potential life of five years in which post-petition earnings of Debtor from the business Movant seeks to stop Debtor from engaging in are property of the bankruptcy estate. *See* 11 U.S.C. § 1306(a). In the context of this Chapter 13 case, the proper analysis regardless of whether any right to equitable relief established by movant is a claim is that which was adopted by the Seventh Circuit in *Udell*, 18 F.3d at 410. *See In re Nyren*, 187 B.R. 424, 425 (Bankr. D. Conn. 1995). Also a Chapter 13 case, the Seventh Circuit remanded *Udell* for consideration of the various equitable factors relating to "cause" that movant has not even alleged in its motion. The Sixth Circuit followed *Udell* in *Kennedy*, 267 F.3d at 497, as to whether the right to equitable relief for a breach of a covenant not to compete is a claim, and the court thinks that it would also be likely to do so as to the proper inquiry for relief from stay to enforce such covenants in the context of a reorganization case such as this one.

The court, therefore, finds that Movant has not met its burden of establishing a prima facie right to relief from the stay for cause under § 362(d)(1).

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the final hearing set for November 23, 2009, at 11:00 o'clock a.m. on Midwest Vein Treatment Clinic Inc.'s Amended Motion for Relief From Stay be, and hereby is, **VACATED;** and

IT IS FURTHER ORDERED that Midwest Vein Treatment Clinic Inc.'s Amended Motion for Relief From Stay [Doc. # 9] be, and hereby is, **DENIED**, without prejudice.