

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
JUDITH K. ROGAN,) CASE NO. 08-23221 JPK
) Chapter 13
Debtor.)

ORDER CONCERNING DEXIA CREDIT LOCAL'S SECOND
MOTION TO MODIFY THE AUTOMATIC STAY ("SECOND MOTION")

The Second Motion was filed by Dexia Credit Local ("Dexia") on August 4, 2009. The motion seeks relief from the automatic stay with respect to specifically designated assets, generically described in the motion as "Unstayed Assets". Those assets are the following:

1. The Peter G. Rogan Irrevocable Trust;
2. Bank accounts at HSBC in Vancouver, British Columbia, Canada;
3. The proceeds from the sale of 476 Wexford in Valparaiso, Indiana;
4. 55 East Erie in Chicago, Illinois; and
5. The John Rogan Note.¹

By order entered on August 21, 2009, the court scheduled a preliminary pre-trial conference in the contested matter arising from the Second Motion. On August 31, 2009, the debtor Judith Rogan ("Rogan") filed a pre-trial statement, including documents she deemed responsive to the Second Motion (record entry #201), and also a response to the Second Motion (docket record entry #204). An evidentiary hearing was held on September 2, 2009 with respect to the Second Motion. Pursuant to the court's docket order entered on September 8, 2009, the debtor filed a memorandum with respect to the issues arising from the evidentiary hearing on October 5, 2009;

¹ The items designated as numbers 1-4 are specifically subject to the Preliminary Injunction Order with Asset Freeze and Other Equitable Relief Directed to Judith K. Rogan entered in case number 02-C-8288 in the United States District Court for the Northern District of Illinois; designated item number 5 may be within the general "catch all" provisions of that order. The interests of the children of Judith and Peter Rogan in designated item number 1 have been determined in case number 02-C-8288 by the order of the Honorable Matthew F. Kennelly dated July 7, 2009.

Dexia filed its memorandum on October 5, 2009; each party filed reply memoranda on October 26, 2009.

The Second Motion initiated a contested matter pursuant to Fed.R.Bankr.P. 9014. The court has jurisdiction to enter a final judgment in this matter pursuant to 28 U.S.C. § 1334(a) and (b)/28 U.S.C. § 157(a)/N.D.Ind.L.R. 200.1. The contested matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

This order constitutes the findings of fact and conclusions of law required by Fed.R.Bankr.P. 9014(c)/Fed.R.Bankr.P. 7052/Fed.R.Civ.P. 52(a)(1).

On July 24, 2009, the court entered separate judgments on motions for relief from the automatic stay filed severally by Dexia and by the United States of America. The United States of America chose to appeal the court's judgment; Dexia chose to file the Second Motion. The Second Motion differs from the motion denied by the July 24, 2009 judgment essentially in limitation of the scope of the assets constituting property of Rogan's estate with respect to which it seeks authority to pursue separate litigation, presently pending in the United States District Court for the Northern District of Illinois. The court applauds Dexia for recognizing at least in part the court's concerns with the broad scope of its initial motion for stay relief, and for its efforts to resolve a matter necessary to be resolved before this Chapter 13 case can proceed any further.

The principal case in the Seventh Circuit with respect to motions seeking relief from the automatic stay to pursue litigation is *In re Fernstrom Storage and Van Co.*, 938 F.2d 731 (7th Cir. 1991). The *Fernstrom* test is deceptively simple, stated as follows in that case:

Though § 362(a) provides for a nearly comprehensive stay of proceedings against the debtor, § 362(d) requires the bankruptcy judge "to grant relief from the stay ... for cause." " 'Cause' " as used in § 362(d) "has no clear definition and is determined on a case-by-case basis." *In re Tucson Estates*, 912 F.2d 1162, 1166 (9th Cir.1990). See also *In re Makarewicz*, 121 B.R. 262, 264 (Bankr.S.D.Fla.1990); *In re Revco D.S.*, 99 B.R. 768, 777 (Bankr.N.D.Ohio 1989). Nevertheless, a number of themes

emerge from the cases interpreting § 362(d)'s expansive language. As we wrote in *Matthews*, 739 F.2d at 251, “[s]uspension of [the automatic stay] may be consonant with the purposes of the Bankruptcy Act when equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems.” An influential district court opinion adopts a three factor test for determining whether “cause” exists, asking whether

- a) Any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit,
- b) the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and
- c) the creditor has a probability of prevailing on the merits.

In re Pro Football Weekly, 60 B.R. 824, 826 (N.D.Ill.1986) (bracketed text in original, internal quotations omitted). *See also In re Bock Laundry Machine*, 37 B.R. 564, 566 (Bankr.N.D.Ohio 1984).

938 F.2d 731, 735 (7th Cir. 1991). As the court noted in its memorandum of decision with respect to the September 24, 2009 judgment which denied Dexia’s first motion for relief from the stay, *Fernstrom* deals with a very narrow circumstance – not present here – and it is of relatively little use in a complicated factual situation such as that presented in Rogan’s case. However, it is what it is, and it remains a necessary starting point for a motion for stay relief pursuant to 11 U.S.C. § 362(d)(1) with respect to resumption or continuation of litigation pending at the time a bankruptcy case was filed.

Dexia’s first motion for relief from the stay was a broad, undifferentiated effort to pursue litigation which had been previously commenced concerning nearly every asset of Rogan’s Chapter 13 case. As the court sought to make clear in denying that motion, uncontrolled lifting of the stay would result in a judicial determination or determinations by another court which will not take into account creditors in this case, and which will not acknowledge the clear, exclusive jurisdiction of this court over property of the estate of Rogan. A principal concern of the court was that the interests of creditors in this case, and of Rogan’s bankruptcy estate in this case,

would not be protected or championed in any manner in the litigation with respect to which Dexia sought stay relief to pursue. While the court – under the *prima facie* case standard applicable to the third prong of *Fernstrom* – found that Dexia and the United States had a “probability of prevailing on the merits” sufficient to sustain their motions, the court deemed the first and second prongs of the *Fernstrom* test to not have been satisfied under the circumstances of Dexia’s first motion. With respect to the second prong’s requirement that hardship to Dexia by maintenance of the stay outweigh the hardship to the debtor, the court found that Dexia did not establish that its hardship “considerably” outweighed that of the debtor. Focusing on the first prong of the *Fernstrom* test, the court essentially found that the first prong of the *Fernstrom* test was not satisfied due to the lack of protection for interests of Rogan’s bankruptcy estate and creditors in her bankruptcy case which would arise from lifting the stay in the manner proposed by Dexia.

Time continues to pass in this case. It is abundantly clear, and the record before the court with respect to the Second Motion overwhelmingly establishes, that any plan in this case requires resolution of property interests of the bankruptcy estate in the Unstayed Assets. The record also establishes that significant determinations regarding the interests of other potentially similarly situated parties with respect to one of those assets have been made in litigation in the United States District Court for the Northern District of Illinois. Until the “cloud” over Rogan’s bankruptcy estate’s interests in the Unstayed Assets is removed, or is determined tsumani-like to wash Rogan’s interests in those assets away, Rogan’s Chapter 13 case can never reach the point of confirmation of a plan, and the nature and extent of the claim filed by Dexia in this case cannot be determined.

11 U.S.C. § 362(d) is not an all or nothing proposition. The statute by its express terms allows the court to not only terminate or annul the automatic stay, but also to modify or condition the stay. In the litigation regarding Dexia’s first motion for stay relief, the debtor Rogan

tangentially referred to the potential for modifying the stay; Dexia did not do so in any substantive way. Rogan’s responses to the Second Motion also mention this alternative. Be that as it may, the court’s ability to condition the lifting of the automatic stay, and to modify the stay, provides a mechanism for getting this case moving.

As previously stated, the court’s principal concern with allowing litigation to proceed in the United State District Court for the Northern District of Illinois with respect to the Unstayed Assets is the lack of protection for interests of the bankruptcy estate, and the inability of a party charged with overseeing those interests to be a meaningful part of that litigation.² It is beyond question that there are issues relating to the interests of other entities in the Unstayed Assets which raise the potential for the Chapter 13 Trustee’s utilization of bankruptcy avoidance powers, and also raise the issue of whether or not Dexia’s interests – in light of the pendency of this bankruptcy case – amount to no more than a claim against Rogan in this case. Those interests can only be protected if a mechanism is provided for active participation in all pending litigation involving the Unstayed Assets by the Chapter 13 Trustee, or by Rogan empowered by the U.S. Trustee to represent the estate’s interests in that litigation.

The analysis provided by Dexia with respect to the potential pool of assets available for satisfaction of claims filed in this bankruptcy estate from the so-called “Stayed Assets”³ misses

² Dexia’s focus in case number 02-C-8288 is not avoidance of transfers to Rogan and to others similarly situated – rather it is the concept that the assets remain the property of Peter Rogan, and that mechanisms were used in an attempt to disguise Peter Rogan’s actual control over those assets. Be that as it may, the fact is that Judith Rogan has present legal interests in those assets that cause her interests to constitute property of her Chapter 13 bankruptcy estate. Dexia may contest the sometimes convoluted manner in which her interests arose, but until otherwise determined, Judith Rogan has present legally cognizable interests in all of the “Unstayed Assets”.

³ The Stayed Assets are designated in pages 5 and 6 of the Second Motion as follows:

Line	Type	Description	Current Value
1.	Cash	Cash	\$ 20.00
2.	Financial Accounts	First Source Bank	\$ 31,000.00

the point: it is a valid position to deem Dexia to be nothing more than a potential creditor in this case, and to determine that its interests in property of the estate are not those which it has asserted in the presently pending litigation in the Northern District of Illinois. The court has determined, however, that it is possible to structure a stay relief order which advances both the interests of Dexia and of the bankruptcy estate and its creditors.

The interests of the Chapter 13 bankruptcy estate are represented by the Chapter 13 Trustee, and it is the Chapter 13 Trustee who has avoidance powers provided to trustees under the Bankruptcy Code. The Trustee may authorize the debtor to pursue actions on behalf of the estate in his stead; *In re Stubbs*, 330 B.R. 717, 723 (Bankr. N.D.Ind. 2005), *aff'd* 2006 WL 2361814 (N.D.Ind. 2006); *U.S. v. Dewes*, 315 B.R. 834 (Bankr. N.D.Ind. 2004). The second *Fernstrom* factor – comparing hardship to a non-bankrupt party with hardship to the debtor – must of necessity include not only the debtor in the analysis, but in the circumstances of a case such as this, the bankruptcy estate of the debtor as contraposed to the debtor. If issues relating to Rogan’s interests in the Unstayed Assets are not determined, then creditors in this case are

4.	Household goods	Furniture	\$ 5,000.00
7.	Furs and Jewelry	Jewelry	\$ 20,000.00
12.	IRAs and Pensions	Ameritrade	\$ 58,115.00
		Brandywine	\$ 109,240.42
		DWS-Scudder	\$ 31,775.65
13.	Stock	Bank of America	\$ 1,876.43
		Clipper Fund	\$ 47,905.46
		DWS - Scudder	\$ 26,220.47
18.	Liquidated Debts	2007 Tax Refund	\$ 50,000.00
		2008 Tax Refund	\$ 500.00
25.	Vehicles	1009 Lexus LX 470	\$ 11,000.00
		1992 Lexus SC 400	\$ 4,500.00
		2006 Hyundai Elantra	\$ 6,500.00
26.	Boats	1995 Boat and motor	\$ 5,000.00

Footnote 7 omitted

severely prejudiced because the case cannot proceed with a confirmable plan until those interests have been resolved. As was found with respect to Dexia's first stay relief motion, the third prong of the *Fernstrom* test has been satisfied by Dexia – it has a “probability of prevailing on the merits” under the applicable *Fernstrom* standard for that criterion. The court now finds that Dexia's Second Motion satisfies the second prong of *Fernstrom* as well: non-resolution of the issues raised in the Northern Illinois District Court litigation works a hardship on both the bankruptcy estate and on Dexia which considerably outweighs the hardship to Rogan by continuing the litigation.

The court's concerns as to Dexia's satisfaction of the first prong of the *Fernstrom* test can be satisfied by the court's conditioning and modifying the stay with respect to the pending litigation, primarily by allowing interposition of the bankruptcy estate's interests in case number 02-C-8288 as a condition of modifying the stay.

The court thus determines that the Second Motion should be granted, provided, however, that the stay relief requested by Dexia is conditioned as follows:

1. Rogan's Chapter 13 bankruptcy estate, by and through the Chapter 13 Trustee, shall be allowed an opportunity to intervene, as a necessary party pursuant to Fed.R.Civ.P. 24(a)(2), in the litigation which Dexia seeks to pursue through its Second Motion. In this context, the court does not deem Rogan – independently – to adequately represent the interests of the Chapter 13 bankruptcy estate in that litigation, and a finding to the contrary by the United States District Court in Illinois will cause the stay to remain in effect. The “opportunity” to intervene will allow the Chapter 13 Trustee at least 30 days to determine whether or not he desires to join as a party in the litigation.

2. By motion to and order of this court, the Chapter 13 Trustee may authorize and empower Rogan to pursue the interests of the Chapter 13 estate in the pending litigation on behalf of the estate, and to exercise the Trustee's avoidance powers in the pending litigation.

3. As an intervenor, the Trustee will be allowed to assert any claim or action which could be asserted against Dexia as a creditor or party-in-interest in Rogan's Chapter 13 bankruptcy case, including the assertion of any avoidance power authorized by the Bankruptcy Code against the interests asserted by Dexia in the pending litigation.

4. Neither Dexia nor the United States nor any other party will oppose the intervention designated above on behalf of the Chapter 13 bankruptcy estate/Chapter 13 Trustee, or the filing of any claim or action referred to in the immediately preceding section.

5. To the extent that Rogan or the Chapter 13 bankruptcy estate is determined in the pending litigation to have any interest in any Unstayed Asset, no further action will be taken by Dexia or by any other party with respect to any interest of Rogan or the bankruptcy estate so determined without first seeking relief from the automatic stay from this court to do so.

6. Dexia and Edgewater Medical Center will withdraw their claims filed in Rogan's Chapter 13 case with prejudice.⁴

7. While Rogan's Chapter 13 case number 08-23221 remains pending, the United States Bankruptcy Court for the Northern District of Indiana will have exclusive jurisdiction over the "Stayed Assets", and Dexia will take whatever actions are necessary to release those assets from any jurisdiction sought to be exercised over those assets by the United States District Court for the Northern District of Illinois, including the Preliminary Injunction Order With Asset Freeze and Other Equitable Relief Directed to Judith K. Rogan.

8. Dexia and Edgewater Medical Center will withdraw the Joint Motion(s) to Intervene filed in adversary proceeding numbers 08-2140 and 08-2141, with prejudice.

IT IS ORDERED, ADJUDGED AND DECREED as follows:

A. Relief from the automatic stay of 11 U.S.C. § 362(a) is granted to Dexia Credit

⁴ The court construes Dexia's Second Motion to confine its interests, and EMC's interests, in property of Rogan's Chapter 13 estate to the "Unstayed Assets", and its interests in those assets will be determined in case number 02-C-8288.

Local to undertake action necessary in case number 02-C-8288 in the United States District Court for the Northern District of Illinois to determine the interests of Judith K. Rogan in the following property:

1. The Peter G. Rogan Irrevocable Trust;
2. Bank accounts at HSBC in Vancouver, British Columbia, Canada;
3. The proceeds from the sale of 476 Wexford in Valparaiso, Indiana;
4. 55 East Erie in Chicago, Illinois; and
5. The John Rogan Note.

subject to the following conditions:

1. Rogan's Chapter 13 bankruptcy estate, by and through the Chapter 13 Trustee, shall be allowed an opportunity to intervene in the litigation which Dexia seeks to pursue through its Second Motion as a necessary party pursuant to Fed.R.Civ.P. 24(a)(2). In this context, the court does not deem Rogan – independently – to adequately represent the interests of the Chapter 13 bankruptcy estate in that litigation, and a finding to the contrary by the United States District Court in Illinois will cause the stay to remain in effect. The “opportunity” to intervene will allow the Chapter 13 Trustee at least 30 days to determine whether or not he desires to join as a party in the litigation.

2. By motion to and order of this court, the Chapter 13 Trustee may authorize and empower Rogan to pursue the interests of the Chapter 13 estate in the pending litigation on behalf of the estate, and to exercise the Trustee's avoidance powers in the pending litigation.

3. As an intervenor, the Trustee will be allowed to assert any claim or action which could be asserted against Dexia as a creditor or party-in-interest in Rogan's Chapter 13 bankruptcy case, including the assertion of any avoidance power authorized by the Bankruptcy Code against the interests asserted by Dexia in the pending litigation.

4. Neither Dexia nor the United States nor any other party will oppose the intervention designated above on behalf of the Chapter 13 bankruptcy estate/Chapter 13 Trustee, or the filing of any claim or action referred to in the immediately preceding section.

5. To the extent that Rogan or the Chapter 13 bankruptcy estate is determined in the pending litigation to have any interest in any Unstayed Asset, no further action will be taken by Dexia or by any other party with respect to any interest of Rogan or the bankruptcy estate so determined without first seeking relief from the automatic stay from this court to do so.

6. Dexia and Edgewater Medical Center will withdraw their claims filed in Rogan's Chapter 13 case with prejudice.

7. While Rogan's Chapter 13 case number 08-23221 remains pending, the United States Bankruptcy Court for the Northern District of Indiana will have exclusive jurisdiction over the "Stayed Assets", and Dexia will take whatever actions are necessary to release those assets from any jurisdiction sought to be exercised over those assets by the United States District Court for the Northern District of Illinois, including the Preliminary Injunction Order With Asset Freeze and Other Equitable Relief Directed to Judith K. Rogan.

8. Dexia and Edgewater Medical Center will withdraw the Joint Motion(s) to Intervene filed in adversary proceeding numbers 08-2140 and 08-2141, with prejudice.

B. A hearing will be held on **March 24, 2010, at 10:30 A.M.** to address the manner in which the foregoing conditions will be effected.

Dated at Hammond, Indiana on March 11, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:

Debtor, Attorney for Debtor, Trustee, US Trustee, Attorney for Creditor