



The relief described hereinbelow is SO ORDERED.

SIGNED this 5th day of February, 2019.


Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

MISSION RECREATION, INC.,

Debtor.

Case No. 17-22143

Chapter 11

ORDER GRANTING NCRI'S MOTION FOR STAY RELIEF

This matter comes before the Court on the motion of creditor National Catastrophe Restoration, Inc. ("**NCRI**") for relief from the automatic stay under 11 U.S.C. § 362(d)(1) to pursue pending litigation against debtor Mission Recreation, Inc. ("**Debtor**") and creditor Mission Mart Shopping Center, LLC ("**Mission Mart**") in the district court of Johnson County, Kansas. For the reasons stated below, NCRI's motion for stay relief will be granted.

I. FACTUAL BACKGROUND¹

Debtor owns a building (the Mission Bowl bowling alley, which Debtor also operates) on land it leases from Mission Mart. On April 3, 2015, a fire damaged portions of the building, including the roof. Debtor's president and co-owner, Beverly McDonnell, subsequently entered into an "Emergency Work Authorization and Assignment of Insurance Proceeds" (the "**Agreement**") with NCRI. NCRI performed work at Mission Bowl from April 3, 2015, until Debtor terminated the Agreement on either June 3, 2015, or June 9, 2015. NCRI sent invoices totaling \$903,506.27 to Debtor. Debtor, who was dissatisfied with NCRI's work, refused to pay.

On July 14, 2015, NCRI filed a \$903,506.27 mechanic's lien encumbering both Debtor's building and Mission Mart's land. Debtor and NCRI then filed suit against each other in the district court of Johnson County, Kansas, which consolidated the two cases. In its complaint, Debtor alleged that NCRI's work was only worth \$194,559.16 and that NCRI's failure to secure the fire-damaged roof against water leaks had damaged Debtor's property (its wooden lanes and pin-setting equipment in particular) beyond the value of NCRI's work. Debtor asked (under a variety of legal theories)² that the amount of NCRI's lien be lowered to

¹ The Court takes judicial notice of the pleadings (but not the truth thereof) in *Mission Recreation, Inc. v. National Catastrophe Restoration, Inc.*, No. 15CV06282 (Kan. 10th Judicial Dist. Ct.). *Cf.* Fed. R. Evid. 201; 21B Charles Alan Wright et al., *Fed. Prac. & Proc. Evid.* § 5106.4 (2d ed. 2018).

² Debtor's first amended complaint, filed July 21, 2016, asserts claims against NCRI for breach of contract, breach of implied warranty, negligence, invalidation of

\$194,559.16, that NCRI be ordered to return Debtor's personal property, and for an award of damages and costs against NCRI. In its counterclaim, NCRI alleged that Debtor owed it \$899,575.44. NCRI, which added Mission Mart as a defendant to the consolidated cases,³ asked for a judgment of \$899,575.44 plus interest, attorney's fees, and costs against Debtor for breach of the Agreement; additionally, NCRI sought to foreclose on both Debtor's building and Mission Mart's land under its mechanic's lien. In its answer to NCRI's counterclaim, Mission Mart argued that the lien was entirely invalid as against Mission Mart, but otherwise adopted Debtor's arguments and defenses.

Mission Mart filed a motion in the Kansas court on June 14, 2016, for judicial review and discharge of NCRI's lien under K.S.A. § 58-4301. In its motion, Mission Mart argued that the lien was invalid as against Mission Mart because the Agreement was only between NCRI and Debtor, such that NCRI did not have "a contract with the owner or with the trustee, agent or spouse of the owner" of the land as required by K.S.A. § 60-1101.⁴ NCRI responded that Debtor was acting as

NCRI's lien under K.S.A. §§ 60-1108 and 58-4301, slander of title, fraudulent or negligent misrepresentation, replevin, and declaratory judgment.

³ NCRI also added Central Bank of Kansas City, Paragon Bank, and IJB Schroder Bank & Trust Company (also known as Mizuho Bank) as defendants; however, those banks were dismissed as parties by subsequent orders of the Kansas state court.

⁴ Although Mission Mart's motion cited K.S.A. § 60-1101, a lien is presumed fraudulent under K.S.A. § 58-4301(e)(2)—the statute upon which Mission Mart's motion was based—if it was not:

created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property, if

Mission Mart's agent when Debtor entered into the Agreement. The Kansas court agreed with NCRI; it held that the lease agreement between Mission Mart and Debtor created both an express and an implied principal-agent relationship between the two. Accordingly, the Kansas court held that NCRI's lien against Mission Mart was not fraudulent under K.S.A. § 58-4301.

The Kansas court scheduled a jury trial on the claims remaining in the case for the week of August 14, 2017. However, following a joint motion for continuance, which the parties filed in anticipation of this bankruptcy case, the court canceled the trial. The issues pending before the Kansas court at that time were (1) the value of the work performed by NCRI; (2) the amount of damages caused by NCRI; (3) the validity of NCRI's lien under K.S.A. § 60-1101 as to Mission Mart's land; and (4) the amount of NCRI's lien under K.S.A. § 60-1101 as to Debtor's building and Mission Mart's land.

Debtor filed its Chapter 11 petition on November 3, 2017. NCRI filed a claim for \$1,418,396.14. Mission Mart filed a claim for \$1,311,407.94, comprising unpaid rent (both pre- and post-petition), the quoted cost of demolishing Debtor's fire-damaged property, and indemnification for any amount recoverable by NCRI against Mission Mart under the lien. There are only two other creditors remaining in this bankruptcy case: The Claims Group, with a \$113,665.57 unsecured claim for post-fire insurance consulting services, and TK Architects, with a \$26,314.53

required under the laws of [Kansas], or by *implied or express consent or agreement of an agent*, fiduciary or other representative of that person [emphasis added].

unsecured claim for post-fire renovation. The only claim to which Debtor has objected is that of NCRI.

On January 8, 2018, Mission Mart filed an adversary complaint against Debtor and NCRI in the bankruptcy case. Count I of the complaint seeks to invalidate NCRI's lien as to Mission Mart; Count II asks, assuming NCRI's lien is valid, that Debtor indemnify Mission Mart for any amount needed to remove the lien. NCRI then filed the two motions now before this Court: (1) in the main case, a motion for relief from the automatic stay under 11 U.S.C. § 362(d) to allow the Kansas case to proceed (which is addressed in this order); and (2) in the adversary proceeding, a motion for abstention under 28 U.S.C. § 1334(c)(1) or, in the alternative, to dismiss Count I of NCRI's complaint (which will be addressed by separate order).

II Analysis

Section 362(d)(1) of the Bankruptcy Code provides that the automatic stay can be modified "for cause." "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." *Pursifull v. Eakin*, 814 F.2d 1501, 1506 (10th Cir. 1987). "The moving party has the burden to show that 'cause' exists to modify the stay, after which the burden shifts to a debtor to demonstrate why the stay should remain in place." *In re Busch*, 294 B.R. 137, 140-41 (B.A.P. 10th Cir. 2003).

The Tenth Circuit has not provided a specific framework for establishing whether cause exists to lift the automatic stay so that litigation involving the debtor

can continue in another forum. While the Tenth Circuit did state in *Chizzali v. Gindi (In re Gindi)*, 642 F.3d 865, 872 (10th Cir. 2011), *overruled on other grounds*, *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011), that “the likelihood that the movant would prevail in the litigation” if the stay were lifted “can be” a dispositive factor, the parties have not addressed that factor here. Thus, and in the absence of a specific framework, this Court will apply the factors enumerated by *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984), which “have been widely adopted by bankruptcy courts.” *See Jim’s Maint. & Sons Inc. v. Target Corp. (In re Jim’s Maint. & Sons Inc.)*, 418 F. App’x 726, 728 n.1 (10th Cir. 2011) (unpublished) (quoting *In re Busch*, 294 B.R. 137, 141 (B.A.P. 10th Cir. 2003)).

The *Curtis* factors are:

- (1) Whether the relief will result in a partial or complete resolution of the issues.
- (2) The lack of any connection with or interference with the bankruptcy case.
- (3) Whether the foreign proceeding involves the debtor as a fiduciary.
- (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.
- (5) Whether the debtor’s insurance carrier has assumed full financial responsibility for defending the litigation.
- (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.

- (7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.
- (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under § 510(c).
- (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under § 522(f).
- (10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties.
- (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.
- (12) The impact of the stay on the parties and the "balance of hurt."⁵

Here, NCRI has demonstrated that several *Curtis* factors favor stay relief. Allowing the Kansas action to proceed will completely resolve the issues of the value of NCRI's work, the damages caused by NCRI, the validity of NCRI's lien as to Mission Mart, and the amount of NCRI's lien (factor 1). Because there are only two other creditors (whose unsecured claims are comparatively small and whose attorneys have not yet appeared) in Debtor's bankruptcy case, no interested parties will be prejudiced if the Kansas case proceeds (factor 7).⁶ Stay relief will serve

⁵ *Curtis*, 40 B.R. at 799-800 (citations omitted).

⁶ Debtor will incur litigation expenses regardless of whether stay relief is granted. As another bankruptcy court observed:

It is clear that movants' claim will have to be liquidated either in state court or the bankruptcy court. In either instance, the debtor will have to defend that action. It is unreasonable to presume that the continuance in the

judicial economy because the Kansas court is already familiar with the facts of the case and the Kansas law under which it will be decided (factor 10). The Kansas case had been pending for over two years, and was less than two months from trial, when the parties jointly moved to continue the trial in anticipation of Debtor's bankruptcy (factor 11). Under these circumstances, NCRI has met its initial burden of showing that cause exists to modify the stay.⁷

Debtor, however, has not met its now-shifted burden of demonstrating that the stay should remain in place. Regarding factor 1, Debtor argues that its allegations of fraud against NCRI in the Kansas case would have to be relitigated in bankruptcy because common-law fraud is not equivalent to fraud under § 523(a), and because the dischargeability of debts under §§ 523(a)(2) and (4) is within the exclusive jurisdiction of the bankruptcy courts. This argument is (a) perplexing because no one has alleged (in either case) that *Debtor* committed fraud, and (b) even more perplexing because Debtor is a corporation, and § 523(a) only applies to

state court would subject the debtor's estate to a greater expense. The cost of defending the state court action in the state court has not been considered so prejudicial as to require continuance of the stay.

In re Rabin, 53 B.R. 529, 532-33 (Bankr. D.N.J. 1985) (citations omitted).

⁷ See *Pursifull*, 814 F.2d at 1506 (affirming stay relief where "there was a . . . state court proceeding pending which dealt with the same issues, and . . . the issues involved were matters of state law best decided by the state courts"); cf. *In re VidAngel, Inc.*, 593 B.R. 340, 346 (Bankr. D. Utah 2018) ("When the causes of action are based on non-bankruptcy law, and the litigation was beyond its initial stages, bankruptcy courts generally grant relief from stay to allow the court with original jurisdiction to liquidate the claim for purposes of administration in the bankruptcy case.").

individual debtors. *See* 11 U.S.C. § 523(a) (“A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an *individual* debtor”) (emphasis added). The remaining arguments from Debtor and Mission Mart (such as their contention that the Kansas case is now “closed”) are likewise without merit. Because NCRI has met its burden and Debtor has not, stay relief is appropriate here.

III. Conclusion

For the reasons above, NCRI’s motion for stay relief is hereby granted pursuant to 11 U.S.C. § 362(d)(1). The parties may proceed to judgment, but not execution, on the Kansas case.

IT IS SO ORDERED.

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