



SO ORDERED.

SIGNED this 28 day of January, 2008.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

OPINION DESIGNATED FOR ON - LINE PUBLICATION
BUT NOT PRINT PUBLICATION

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

IN RE:

VOSLITE, INC.,

Debtor.

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Case No. 07-10217
Chapter 7

ORDER DENYING VOSLITE'S MOTION FOR STAY VIOLATION

Debtor Voslite, Inc. filed this Motion to Show Cause alleging that Fleming Building Company, Incorporated (FBC) violated the automatic stay (1) by allowing a civil action in Oklahoma state court to remain pending against Voslite post petition; and (2) by pursuing discovery sanctions against Voslite's counsel (but not Voslite) after the date of the petition. The Court conducted an evidentiary hearing on Voslite's motion on November 14, 2007. Kathleen

Harrell-Latham appeared for the debtor. W. Rick Griffin and Shannon K. Davis¹ appeared for FBC. The factual and procedural background follows.

Voslite filed a chapter 7 petition here on February 12, 2007. Voslite was a distributor of plastic shingles. Previously, on June 3, 2005, FBC and several individuals filed an action in the District Court of Tulsa County, Oklahoma, suing several defendants, including Voslite, on a variety of commercial causes of action arising out of defects in shingles manufactured, distributed and sold by the various defendants. During the course of this action and before Voslite's bankruptcy, FBC propounded written discovery and received responses from Voslite. Voslite's Kansas counsel, Mark G. Ayesh, signed the initial discovery responses. Ayesh had been admitted to practice in the Tulsa County court *pro hac vice* and appeared with the assistance of Oklahoma local counsel. FBC considered the responses incomplete and sent a "golden rule" letter to Voslite and Ayesh requesting that the responses be supplemented. Voslite supplied supplementation, this time verified by James Vosburgh, its president, and again signed by Ayesh. After review of this supplementation, FBC filed a motion to compel discovery and for sanctions against Voslite and Ayesh. FBC alleged that the revised responses were materially false and that Ayesh, by virtue of his having represented Voslite in several previous lawsuits, knew or should have known of their falsehood.

After Voslite filed its bankruptcy petition, a clerk in the Tulsa County court made a docket entry indicating that the Tulsa action as it related to Voslite had been dismissed, stayed, or transferred to another jurisdiction. Thereafter, on July 23, 2007, the Tulsa state court judge

¹ Mr. Davis is a member of the Oklahoma bar. He was admitted *pro hac vice* for the purposes of this contested matter and is a member of James, Potts & Wulfers, Inc., Tulsa, Oklahoma. This firm also represented FBC in the Oklahoma litigation.

made an additional docket entry that stated, in part:

THE DISPOSITION TYPE (DISPBRP) ENTRY OF 2-23-07 AND ACCOMPANYING DISPLAY ON THE ISSUES PORTION OF THIS CASE CONCERNING DEFENDANT VOSSLITE INC WAS AN ADMINISTRATIVE TYPE CODING ENTERED BY THE COURT CLERK FROM A NARROW LIST OF DISPOSITIONS AVAILABLE IN THE OCIS COMPUTER SYSTEM TO INDICATE BANKRUPTCY AND OTHER EVENTS. SAID ADMINISTRATIVE TYPE CODING IS NOT A JUDICIAL DISMISSAL AND DEFENDANT VOSSLITE INC WAS NOT DISMISSED FROM THIS CASE AS A PARTY BY VIRTUE OF THE ADMINISTRATIVE DISPOSITION ENTRY OF THAT DATE. THIS CASE AS TO PARTY VOSSLITE WAS STAYED PURSUANT TO FEDERAL BANKRUPTCY LAW.²

From this entry, the Court concludes that the February 23, 2007 docket entry indicating the case had been dismissed or transferred came without the entry by a judge of an order dismissing the case. In July, the state court judge clarified that the February docket entry effected an administrative stay of the FBC litigation as to Voslite, not a dismissal. Nowhere in the evidence before this Court is a certified copy of an actual dismissal pleading filed in the FBC litigation. Given that the electronic docket is, according to its header, “NOT an official document,” this Court cannot find that the February 23 entry (which this Court did not admit into evidence) amounted to a judicial dismissal of Voslite from the case.³ It necessarily follows that the July docket entry did not “reinstate” the case as to Voslite.⁴

² The only evidence in the record pertaining to this procedural activity is a copy of an “electronic docket sheet” printed from the website of the Oklahoma State Courts Network. This docket sheet was admitted into evidence over the objection of FBC solely as to the July 23, 2007 docket entry. The Court notes that, by its express terms, the electronic docket sheet is not to be relied upon as accurate.

³ See Exhibit 13.

⁴ In its brief, debtor obliquely hints that the timing of this minute entry is somehow suspect. The objection deadline set for the present Motion was July 24, 2007. While struck by the coincidence of the Motion and minute order, this Court is unable to draw a conclusion about the relationship between the two events in the absence of any evidence regarding the timing.

Voslite further claims that FBC continues to violate the stay by pursuing its discovery sanctions motion against attorney Ayesh. In the motion, FBC claimed that the responses violate Okla. Stat. tit. 12 § 3226(G) which is identical to Fed. R. Civ. P. 26(g). That rule provides that an attorney will sign each discovery response in a civil matter and that the attorney's signature represents her certificate that the discovery responses are consistent with the rules and the law, are not interposed for an improper purpose such as delay or harassment, and are not unreasonable or unduly burdensome or expensive in the context of the case. As in federal practice, if such a certification turns out to have been made "without substantial justification," either the party or its attorney may be subjected to sanctions.

FBC filed the sanctions motion prior to the petition date and, after Voslite filed its bankruptcy, FBC requested the state court to conduct a hearing on its demand for sanctions against Ayesh, but not against Voslite. After that request was filed in state court, Voslite filed this motion, asserting that FBC's effort to sanction Ayesh is stayed by operation of the § 362 stay.

Although there was no testimonial evidence on the point, it appears that Voslite was no longer in business at the petition date. The only activity in this case has been the sale of Voslite's shingle inventory and the Court's approval of several uncontested motions for the allowance of administrative expenses, including attorneys fees payable to Ayesh and the Oklahoma counsel.

Analysis

A. The July Docket Entry

Debtor first argues that FBC violated the stay by failing to take action to strike the state

court judge's July docket entry. This lacks merit. Under Oklahoma law, only the plaintiff or the court can dismiss a petition. Okla. Stat. tit. 12, § 683, 684. Presumably this requires more than a docket entry. Voslite did not present in evidence a court order memorializing the February 23 "dismissal." It only relies on the February docket entry. As noted above, the e-docket placed in evidence is specifically not to be relied on as an authoritative court record. Therefore, without proving that the case was judicially dismissed as to Voslite, debtor cannot show that the July docket entry "reinstated" the case or is anything other than an administrative notation that clarifies that the case is stayed (as it should be) as to Voslite and not dismissed. There is absolutely no suggestion in the record that the July docket entry was made at the instance of FBC.

There is no Tenth Circuit authority that requires a plaintiff to dismiss a pending action against a debtor after that debtor files a bankruptcy petition. Several Bankruptcy Appellate Panel cases have addressed stay violations arising out of continued collection actions against debtors, but none of them is on point. In *In re Scroggin*,⁵ the creditor had requested a continuing garnishment order be issued against the debtor's wages prepetition and failed to take adequate measures to release the continuing garnishment after the bankruptcy. The BAP concluded that a garnishing creditor has an affirmative duty to release a garnishment immediately upon learning of the debtor's filing.⁶ The BAP reached a similar result concerning prepetition repossessed collateral in *In re Yates*.⁷ There, the Panel stated that retention of repossessed collateral

⁵ 364 B.R. 772 (10th Cir. B.A.P. 2007).

⁶ *Id.* at 779. *See also In re Pulliam*, 262 B.R. 539, 542 (Bankr. D. Kan. 2001).

⁷ 332 B.R. 1 (10th Cir. B.A.P. 2005).

constitutes a continuation of the action and violates the stay; creditors in that situation were said to have a greater burden than simply maintaining the status quo.⁸ Both of these cases presented much more egregious action than FBC's simply leaving its civil case on file, but not pursuing it further. Even the cases relied on by the debtor suggest that dismissal of a prepetition case against a debtor is not the only way to "discontinue" the action. In *Eskanos & Adler P.C. v. Leetien*, upon which debtor relies heavily, the Ninth Circuit stated that maintaining an *active* collection action violates the stay.⁹ While there is no question that filing a bankruptcy effects a broad stay of litigation, staying that litigation is sufficient.¹⁰

In short, based on the evidence at hand, FBC's inaction concerning the July docket entry did not violate the stay. The state court's administrative stay of the Oklahoma case was entirely proper and consistent with the goals and aims of § 362.

B. The Sanction Motion

Voslite argues that if FBC is permitted to proceed against Ayesh in state court on its sanctions motion, that amounts to the commencement or continuation of a claim against Voslite itself because Ayesh is Voslite's agent and an action against a debtor's agent is an action against the debtor. Debtor in effect seeks to extend the protection of the stay to its attorney. Debtor supplies no authority whatsoever for the unique proposition that a court's efforts to sanction a lawyer who is not himself a debtor should be stayed by the lawyer's client's bankruptcy case. This argument is insupportable for several reasons.

⁸ *Id.* at 4-5.

⁹ 309 F.3d 1210, 1214-1215 (9th Cir. 2002).

¹⁰ *Id.* at 1214. *See also In re Johnston*, 321 B.R. 262, 286 (D. Ariz. 2005).

In general, courts are reluctant to extend the scope of the § 362(a) stay to non-debtors. The Tenth Circuit has held that the debtor's stay does not apply to solvent codefendants of a debtor or where a debtor's codefendant is independently liable. It has stated:

A narrow exception allows a stay to be imposed under section 362(a)(1) against a nonbankrupt party in "unusual situations" as "when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor."¹¹

First, there is no showing that FBC's sanctions motion against Ayesh is an "action against the debtor." Ayesh is debtor's counsel in the Oklahoma case. His relationship with the debtor is simply that of attorney and client – not an "unusual situation." No evidence suggests that Ayesh owns any part of Voslite, nor is it suggested that he is an officer, director, or otherwise an insider or affiliate of the company. He is not pivotal to maintaining debtor's business because the debtor no longer has a business. There is no "identity" between him and Voslite. Thus, the traditional justifications for extending the stay to a non-debtor are not present in this matter.

Second, and more importantly, Ayesh was admitted to the Oklahoma Bar *pro hac vice* to pursue Voslite's interest in the FBC litigation. That makes him an officer of the Tulsa County court, entirely and independently subject to its rules and orders pertaining to his conduct, including the discovery rules. Voslite suggests that Ayesh may look to it for reimbursement or indemnity should he be sanctioned for signing an improper pleading and that the availability of an indemnity implicates Voslite vicariously, if not directly. Debtor provided no case remotely

¹¹ *Oklahoma Federated Gold and Numismatics, Inc. v. Blodgett*, 24 F.3d 136, 141 -142 (10th Cir. 1994), citing *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986).

on point on these issues and this Court is unable to locate one.

Without expressing any opinion on the validity of FBC's sanctions claims, this Court concludes that the sanctions action against Ayesh lies outside the parameters of the stay in this case. He is accountable to the Oklahoma court for his conduct in the course of the FBC litigation. As long as FBC does not seek to exact sanctions from Voslite, there is no reason FBC cannot pursue sanctions against Ayesh separately; indeed, Rule 26(g) contemplates exactly that. Voslite's "indemnity" argument fails, too. Setting aside FBC's allegation that Ayesh knew or had reason to know that the answers submitted over his signature were false, it might be possible that Ayesh would have some form of civil recourse against Voslite if it fed him false responses to discovery that resulted in his being sanctioned. If that happened, Voslite and Ayesh would become adverse parties destroying any "identity" of interest that would be necessary to justify an extension of the automatic stay. Moreover, it appears that in this case Voslite provided Ayesh with the discovery responses before the bankruptcy filing. Therefore, whatever liability Voslite might have to Ayesh would be a prepetition debt that Ayesh would be stayed from collecting.

In short, consideration of the sanctions motion as it relates to Voslite's attorney is not stayed by § 362(a) or any extension thereof.

Ruling

For the forgoing reasons, Voslite's motion is DENIED.