UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:	)	Bankr. No. 01-10280
	)	
GREGORY A. ANDERSON	)	Chapter 7
Soc. Sec. No. 504-76-2059	)	
	)	
and	)	DECISION RE: TRUSTEE'S
	)	WITHDRAWAL OF MOTION TO
DEANNE M. ANDERSON	)	APPROVE STIPULATION AND
Soc. Sec. No. 503-74-7613	)	RAMKOTA'S MOTION FOR
	)	RELIEF FROM AUTOMATIC STAY
Debtors.	)	
	)	

The matters before the Court are Trustee William J. Pfeiffer's withdrawal of a motion to approve a stipulation and Ramkota Companies, Inc.'s, motion for relief from the automatic stay. These are core proceedings under 28 U.S.C. § 157(b)(2). This Decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, Trustee Pfeiffer is permitted to withdraw his motion to approve the stipulation pursuant to Fed.Rs.Bankr.P. 7041 and 9014. Further, Ramkota Companies, Inc., will not be granted relief from the automatic stay to pursue costs and disbursements in state court.

I.

Gregory A. and Deanne M. Anderson filed a Chapter 7 petition in bankruptcy on October 5, 2001. William J. Pfeiffer was appointed to serve as the Chapter 7 trustee. Debtors included in their schedule of assets a civil cause of action that Debtor Deanne Anderson held against Ramkota Companies, Inc. ("Ramkota"). Debtors described the claim as one arising from a violation of the Fair

Labor Standards Act. Debtors valued the cause of action as "unknown." They did not declare any of it exempt in their original schedules, but they later amended their schedules on December 5, 2001, to declare $6,045 of the lawsuit exempt.

On November 5, 2001, Debtors, Trustee Pfeiffer, and Robert L. Spears, the attorney who had been handling the civil suit for Debtors pre-petition, entered into a stipulation. The stipulation acknowledged that a trial date of November 19, 2001, on the civil action was looming, that Attorney Spears had agreed to represent Debtors on a one-third contingency basis, and that the bankruptcy estate had no assets to hire its own attorney or advance the costs of litigation. Based on these circumstances, the parties agreed that Attorney Spears would continue to represent the bankruptcy estate in the action on the same one-third contingency basis on all amounts recovered by verdict, decision, or settlement, plus sales tax on the fees, and "costs and expenses advanced in the pursuit of the claims...." The parties also agreed that, after payment of Attorney Spears, Debtors would receive the first $6,000 of any recovery, which would represent their available personal property exemptions under S.D.C.L. § 43-45-4, and that Debtors and the bankruptcy estate would split the remaining sum equally.

On November 8, 2001, Trustee Pfeiffer filed the stipulation and on November 9, 2001, sought approval of it by motion and notice to all creditors and other parties in interest. The last date to object to the motion to approve the stipulation, as stated in the

notice, was December 3, 2001.

On November 13, 2001, Trustee Pfeiffer also sought the employment of Attorney Spears for the bankruptcy estate. That application was approved in light of the United States Trustee's recommendation.

On December 5, 2001, which was after the last date to object to his motion to approve the stipulation, Trustee Pfeiffer filed a motion seeking the Court's approval to withdraw his motion to approve the stipulation. He stated the withdrawal was based on a jury verdict for Ramkota, the defendant in the subject civil action, which rendered the stipulation moot. The withdrawal was approved by order entered December 7, 2001.

On December 12, 2001, Ramkota filed a motion for relief from the automatic stay. It sought permission to continue the state court action with Debtor Deanne Anderson in order to seek costs and disbursements based on Debtor Deanne Anderson's and Trustee Pfeiffer's refusal of a pre-trial offer of judgment by Ramkota. In so doing, Ramkota argued that these costs and disbursements would be a post-petition obligation of the bankruptcy estate.

In tandem with its relief from stay motion, Ramkota also objected to Trustee Pfeiffer's withdrawal of his motion to approve the stipulation with Debtors and Attorney Spears. It argued that, through the withdrawal, Trustee Pfeiffer should not be permitted to disavow the bankruptcy estate's relationship with Debtors and Attorney Spears and avoid the consequences of the unsuccessful

litigation against Ramkota.

Debtors timely objected to Ramkota's relief from stay motion. They appeared to argue that any costs imposed by the state court in the civil action would be a dischargeable pre-petition debt. In late December, the Court directed the parties in interest to file briefs on whether any costs awarded to Ramkota by the state court would be a dischargeable debt in this bankruptcy case.

Trustee Pfeiffer responded to Ramkota's objection to his withdrawal of the motion to approve the stipulation with Debtors and Attorney Spears. Therein, he stated that the only offer of judgment that Ramkota made post-petition was for $3,500. Trustee Pfeiffer said he had essentially advised counsel for Ramkota

> that the offer of $3,500.00 deals only with the bankruptcy debtors' exempt property over which the trustee has no control, and that the trustee was therefore not in a position to either accept or reject the offer of settlement in the amount of $3,500.00.

In their brief, Debtors acknowledged that Ramkota had made identical offers of judgment of $3,500 several months before trial and again on November 9, 2001, just ten days before trial. Debtors also acknowledged that both offers were rejected by Debtor Deanne Anderson personally "because the offer...of $3,500 was Debtor's exempt property and not part of the bankruptcy estate." Debtors also acknowledged that Ramkota was seeking costs of $903 under S.D.C.L. §§ 15-6-68 and 15-17-37. Debtors stated they were not able to find any cases on point. They argued, however, since most, if not all, of the subject costs were incurred by Ramkota pre-

petition, any costs imposed by the state court should be treated as a dischargeable pre-petition debt. In the alternative, Debtors argued that only those costs incurred by Ramkota after the October 5, 2001, petition date would be nondischargeable.

In its brief, Ramkota, basing its argument on the Bankruptcy Code definition of a claim, argued that any costs imposed by the state court would be a post-petition debt. In the alternative, Ramkota argued that the debt should be treated as an administrative expense.

II.

TRUSTEE PFEIFFER'S WITHDRAWAL OF MOTION TO APPROVE STIPULATION.

Under Fed.Rs.Bankr.P. 7041 and 9014 and Fed.R.Civ.P. 41(a)(1), Trustee Pfeiffer could withdraw his motion to approve the stipulation by filing a notice. A formal motion and an opportunity for other parties to object to the withdrawal was not required since no adverse party had responded to his motion to approve the stipulation. Thus, when Trustee Pfeiffer filed a motion for the Court to the approval of his motion to approve the stipulation, the Court properly treated the withdrawal motion like a notice, and an order granting the withdrawal motion without further notice or hearing was entered. The December 7, 2001, Order approving the withdrawal will, therefore, remain as entered.

III.

Whether Ramkota's motion for relief from stay should be granted so that it may seek an imposition of costs and

disbursements by the state court is a more difficult question. That Ramkota may be entitled to some costs and disbursements under S.D.C.L. §§ 15-6-68 and 15-17-37 does not appear to be at issue. The issue that has been brought before this Court is whether Ramkota should be permitted relief from the automatic stay to bring a determination of these costs and disbursement before the state court.

When faced with the question of whether to permit relief from the automatic stay to allow a proceeding before another tribunal to continue, the Court must find "cause" to do so. 11 U.S.C. § 362(d)(1). Although "cause" has not been defined within the Bankruptcy Code, Congress

> intended that the automatic stay could be lifted to allow litigation involving the debtor to continue in a nonbankruptcy forum under certain circumstances. H.R.Rep. No. 95-595, at 341 (1977); S.Rep. No. 95-989, at 50 (1978) ("It will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from duties that may be handled elsewhere."); *see In re United Imports, Inc.*, 203 B.R. 162, 166 (Bankr. D. Neb.1996). In making the determination of whether to grant relief from the stay, the court must balance the potential prejudice to the Debtor[,] to the bankruptcy estate, and to the other creditors against the hardship to the moving party if it is not allowed to proceed in state court. *Internal Revenue Service v. Robinson (In re Robinson)*, 169 B.R. 356, 359 (E.D.Va.1994); *United Imports*, 203 B.R. at 166; *In re Marvin Johnson's Auto Service, Inc.*, 192 B.R. 1008, 1014 (Bankr. N.D. Ala.1996); *Smith v. Tricare Rehabilitation Systems, Inc. (In re Tricare Rehabilitation Systems, Inc.)*, 181 B.R. 569, 572-73 (Bankr. N.D. Ala.1994).

Blan v. Nachogdoches County Hospital (In re Blan), 237 B.R. 737,

739 (B.A.P. 8th Cir. 1999). The factors used to balance the hardships include: (1) judicial economy; (2) trial readiness; (3) the resolution of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors. *Id.* (cites therein).

If this bankruptcy estate had assets from which to pay claims, the Court would first have to decide some bankruptcy law questions: whether any costs or disbursements awarded by the state court to Ramkota would be a general, unsecured pre-petition claim against the bankruptcy estate or a post-petition administrative cost for the estate. *See, e.g., Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 387-92 (5th Cir. 2001); *Kadjevich v. Kadjevich (In re Kadjevich)*, 220 F.3d 1016, 1019-22 (9th Cir. 2000); *In re MTC Telemanagement Corp.*, 269 B.R. 44, 46-47 (Bankr. N.D. Cal. 2001); *Barnett v. Jamesway Corp. (In re Jamesway Corp.)*, 235 B.R. 329, 347-48 (Bankr. S.D.N.Y. 1999)(to qualify as a § 503(b) expense, a claim must either benefit the estate or arise in connection with the business or activities carried on by the estate). Since there are no assets in this bankruptcy estate to pay either type of claim, however, the only pertinent question left is whether any costs and disbursements that the state court might award Ramkota would be a post-petition claim against Debtor Deanne Anderson. The Court concludes that any award under S.D.C.L. §§ 15-6-68 and 15-17 37 in this case would not be a

post-petition claim against Debtor Deanne Anderson.

It is clear from the pleadings that Trustee Pfeiffer, Debtors, and their attorney, and perhaps even Ramkota, thought that Debtors personally controlled the first $6,000 in any settlement offer. That assumption, however, was premature and perhaps too broad.

Debtors amended their schedule of exemptions on November 5, 2001. Under Fed.R.Bankr.P. 4003(b), parties in interest had through December 5, 2001, to file an objection to these amended claim of exemptions. Until that objection deadline passed or until the proposed settlement regarding the distribution of any lawsuit proceeds was approved by the Court, the entire lawsuit remained property of the estate. *Gamble v. Brown (In re Gamble)*, 168 F.3d 442, 444-45 (11th Cir. 1999); *In re Salzer*, 52 F.3d 708, 711 (7th Cir. 1995); *Ball v. Nationscredit Financial Services Corp.*, 207 B.R. 869, 872-73 (N.D. Ill. 1997). Accordingly, at the time Ramkota made its offer of settlement on November 9, 2001, and at the time of trial in mid-November 2001, the entire lawsuit was still property of the estate that Trustee Pfeiffer controlled subject, of course, to the settlement notice requirements of Fed.R.Bankr.P. 9019.

Furthermore, there is also authority that even after Debtors' claim of exemption became final, Trustee Pfeiffer still controlled the lawsuit as an estate asset. *See Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 71-73 (B.A.P. 8th Cir. 2001)(where the value of an estate asset exceeds the amount of the claimed exemption, the

asset as a whole does not become exempt); *In re Fetner*, 218 B.R. 262, (Bankr. D.D.C. 1998); *see also In re Key*, 255 B.R. 217, 219-20 (Bankr. D. Neb. 2000). Under this theory, Debtors' exempt interest would not be removed from the estate until a recovery on the lawsuit was actually made by the case trustee.

Under either theory, Debtors did not own or control the lawsuit when the post-petition offer of judgment was made by Ramkota on November 9, 2001. The bankruptcy estate did. Therefore, Debtors would not be personally liable for any costs or disbursement under S.D.C.L. §§ 15-6-68 and 15-17-37 that the state court may award based on the rejection of that offer of judgment. Since there is nothing for Ramkota or any other party to gain by continuing the state court litigation for the purpose of seeking costs and disbursement under §§ 15-6-68 and 15-17-37 against the bankruptcy estate, Ramkota's relief from stay motion will be denied.

The Court will enter an appropriate order.

Dated this 7 day of February, 2002.

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

FEB 07 2002

Charles L. Nail Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

FEB 07 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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