

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:)	Bankr. No. 03-10194
)	Chapter 11
TRI-STATE ETHANOL COMPANY LLC)	
Tax I.D. No. 46-0449270)	
Debtor.)	
)	
NORTH CENTRAL CONSTRUCTION, INC.)	Adv. No. 03-1032
Plaintiff,)	
-vs-)	
)	
TRI-STATE ETHANOL COMPANY LLC;)	
FIRST DAKOTA NATIONAL BANK;)	
SOUTH DAKOTA CORN UTILIZATION)	DECISION RE: DEFENDANT-
COUNCIL; SOUTH DAKOTA BOARD)	DEBTOR'S MOTION FOR VOLUNTARY
OF ECONOMIC DEVELOPMENT;)	ABSTENTION IN ADVERSARY
WILLIAM F. MURPHY)	PROCEEDING AND DEBTOR'S
SELF-DECLARATION OF TRUST AND)	MOTION FOR PARTIAL RELIEF FROM
MIKE D. MURPHY; DETERMAN)	AUTOMATIC STAY IN MAIN CASE
BROWNIE, INC.; INTERSTATES)	
ELECTRIC & ENGINEERING CO. INC.;)	
D & W INDUSTRIES, INC.;)	
J & D CONSTRUCTION, INC.;)	
GAYLOR ENGINEERING; WEBSTER)	
ENGINEERING & MFG. CO.;)	
RENTAL SERVICE CORPORATION;)	
MARTINEK LUMBER;)	
RONNING ENGINEERING CO., INC.;)	
ROBERTS COUNTY;)	
KLEIN NATIONAL BANK;)	
and PEOPLES STATE BANK,)	
Defendants.)	

The matters before the Court are Defendant-Debtor's Motion for Voluntary Abstention Under 28 U.S.C. § 1334(c)(1) in Adversary Proceeding No. 03-1032 and Debtor's Motion for Partial Relief from Automatic Stay. These are core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying orders shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court

concludes that relief from the automatic stay may be modified to allow Plaintiff North Central Construction, Inc., and Defendant-Debtor to complete the appeal to the South Dakota Supreme Court on the arbitration issue that was addressed by the state trial court on April 9, 2002. Otherwise, all other issues presented in Adversary Proceeding No. 03-1032 will be resolved by this Court.

I.

According to pleadings filed to date, North Central Construction, Inc., (North Central) commenced a lien foreclosure action in state court¹ on December 31, 2002, against Tri-state Ethanol Company, L.L.C., and several other defendants. Through the state court action, North Central hoped to force necessary parties into arbitration and then have the state court enforce the arbitration award. The action was intended to determine what liens existed on Tri-state Ethanol Company's assets and what the priorities of those liens were.² On April 9, 2002, the Hon. Jon S. Flemmer, Circuit Court Judge for the Fifth Judicial Circuit for the State of South Dakota, ruled that North Central could not force Tri-state Ethanol Company into arbitration and that Tri-state

¹ Civ. No. 02-127 in the Fifth Judicial Circuit for the State of South Dakota, Roberts County, South Dakota.

² A similar complaint filed by Interstates Electric & Engineering Company in state court, Civ. 03-04, in the Fifth Judicial Circuit for the State of South Dakota, Roberts County, South Dakota, was consolidated with Civ. 02-127 on April 8, 2003. The consolidated action carries Civ. No. 02-127. First Dakota National Bank filed a third action with the same state court, Civ. 03-80. That action has also been stayed by Debtor's bankruptcy.

Ethanol Company's contractual duty to arbitrate had been discharged. An appeal regarding that decision is pending. No trial on the remaining issues has been held.

On May 23, 2003, Tri-State Ethanol Company ("Debtor") filed a Chapter 11 petition in bankruptcy. The petition stayed all state court actions, including the pending appeal on the arbitration issue.

On July 14, 2003, North Central commenced an adversary proceeding before this Court again seeking a determination of the validity, priority, and extent of liens and other encumbrances on Debtor's assets pursuant to 11 U.S.C. §§ 506 and 507. The defendants in this adversary proceeding included Debtor and all those in the state court proceeding commenced by North Central plus Klein National Bank and Peoples State Bank³.

In addition to the lien issues raised by Plaintiff North Central, Defendant-Debtor filed a counterclaim against North Central challenging the "timeliness, validity, and accuracy" of North Central's lien statement and claimed lien, alleging North Central was negligent in its duties as the general contractor for the construction of Debtor's ethanol plant, and claiming North Central had breached its construction contract with Debtor. Defendant-Debtor also argued that North Central should indemnify

³ The Court was also unable to find where adversary proceeding defendant Ronning Engineering Company was a party to Civ. 02-127 or Civ. 03-04 in state court. Ronning Engineering Company was a named defendant in Civ. 03-80. See *supra* n.2.

Debtor from the several claims and liens alleged by the other defendants to the adversary proceeding. Defendant First Dakota National Bank filed a cross-claim against all the other defendants, except Defendant-Debtor. The Bank claimed that its lien position on Debtor's realty was superior to the position of all the other defendants claiming mechanics' liens. The Bank also claimed that its secured interest in all bankruptcy estate property was superior to the consensual liens claimed by the South Dakota Corn Utilization Council and the South Dakota Board of Economic Development. Further, the Bank, in its Answer, alleged Plaintiff North Central's claimed mechanic's lien should be equitably subordinated to the Bank's interests pursuant to 11 U.S.C. § 510(c).

The initial pleadings in the adversary proceeding have been completed. The Clerk has made an entry of default regarding some defendants.

On August 14, 2003, Defendant-Debtor filed a motion in the adversary proceeding asking the Bankruptcy Court to abstain from hearing the matter so that the several issues raised therein could be resolved in state court. Defendant-Debtor argued returning the parties to state court was the most efficient way to resolve the issues because only state law issues were presented, some discovery had been completed, and the arbitration issue on appeal had been fully briefed.

Plaintiff and several defendants all timely objected to

Defendant-Debtor's abstention motion. Defendants South Dakota Board of Economic Development, South Dakota Corn Utilization Council, Peoples State Bank, Klein National Bank, Ronning Engineering Company, and Determan Brownie, Inc., argued the Bankruptcy Court could more quickly resolve all the issues and that it had extensive experience with such issues. It also argued that Debtor's Chapter 11 case could not be timely administered if the lien issues were returned to state court.

Defendant First Dakota National Bank also argued against abstention. It stated that in addition to state law issues, in the bankruptcy adversary proceeding it had also asked this Court to subordinate Plaintiff North Central's claim under 11 U.S.C. § 510(c)(1) on equitable grounds. First Dakota National Bank also argued that returning to state court was not the "most efficient and appropriate forum" to resolve the issues raised in the adversary proceeding, especially in light of Debtor's pending Chapter 11 reorganization.

Plaintiff North Central argued against abstention on the grounds that all issues raised were core bankruptcy matters and that this Court had exclusive jurisdiction over Debtor's assets. North Central also argued that the adversary proceeding issues were not identical to the stayed state court proceedings. It described the state court action as a mechanics' lien foreclosure and an attempt by North Central to compel Debtor to arbitrate. In contrast, North Central said the bankruptcy adversary proceeding

was designed to determine the validity, priority, and extent of several claimed encumbrances. North Central also noted that the bankruptcy adversary proceeding included two additional defendants who are not a part of the state court action, Klein National Bank and Peoples State Bank.⁴ It argued that additional pleadings would be necessary to bring them into the state court action. North Central also essentially joined in the arguments made initially by Defendant South Dakota Board of Economic Development.

Defendant-Debtor filed a brief in support of its motion to abstain. Therein, Debtor more fully articulated some of its arguments. In particular, it urged the Bankruptcy Court to return the matter to state court so that the abstention issue could be finally resolved by the South Dakota Supreme Court. It also argued that administration of its Chapter 11 case would not be compromised if the parties were sent back to resolve the state court litigation.

In the main bankruptcy case, no. 03-10194, Debtor filed, as a companion to its abstention motion in the adversary proceeding, a Motion for Partial Relief From Automatic Stay. It asked that the automatic stay be lifted to allow the parties to the state court action to "fully participate" therein but not to enforce any judgments that may be obtained. The South Dakota Board of Economic Development, Peoples State Bank, Klein National Bank, South Dakota Corn Utilization Council, Ronning Engineering Company, and Determan

⁴ See *supra* notes 2 and 3.

Brownie, Inc., objected to this motion on the same grounds that they had objected to Defendant-Debtor's motion to abstain in the adversary proceeding.

Creditor First Dakota National Bank objected to Debtor's relief from stay motion on the grounds that Debtor had failed to explain why it was in the best interests of Debtor, the bankruptcy estate, and creditors to return to state court. The Bank also argued that Debtor had failed to articulate cause for relief. Finally, the Bank alleged that the state court issues and the bankruptcy adversary proceeding issues were not identical in light of the subordination it has sought under Bankruptcy Code § 510(c)(1).

Creditor North Central also objected to Debtor's relief from stay motion. It argued that Debtor had not alleged cause for relief or plead sufficient facts to support relief under either 11 U.S.C. § 362(d)(1) or § 362(d)(2). North Central again noted that the parties to the two separate proceedings were not identical.

Debtor filed a brief in support of its motion. It argued that cause for relief from stay existed in the form of allowing the state court action to continue.

II.

Abstention under 28 U.S.C. § 1334(c)(1). Under 28 U.S.C. § 1334(c)(1), a bankruptcy court may abstain from hearing a proceeding, including both core or non-core matters. *Williams v.*

Citifinancial Mortgage Co. (In re Williams), 256 B.R. 885, 893 (B.A.P. 8th Cir. 2001). Section 1334(c)(2) provides:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1). With the premise that "federal courts should exercise their jurisdiction if it is properly conferred and that abstention is the exception rather than the rule," courts have developed several factors to consider when deciding whether abstention under § 1334(c)(1) is appropriate. *Williams*, 256 B.R. at 893-94. These factors include:

- (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
- (2) the extent to which state law issues predominate over bankruptcy issues,
- (3) the difficult or unsettled nature of the applicable law,
- (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- (7) the substance rather than the form of an asserted 'core' proceeding,
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
- (9) the burden [on] the bankruptcy court's docket,

(10) the likelihood that the commencement of the proceeding involves forum shopping by one of the parties,

(11) the existence of a right to a jury trial, and

(12) the presence in the proceeding of nondebtor parties.

Williams, 256 B.R. at 894 (citing *In re Phelps Technologies*, 238 B.R. 819, 821 (Bankr. W.D. Mo.1999) (citing, *inter alia*, *Tarkio College v. Bower (In re Tarkio)*, 137 B.R. 34, 36 (W.D. Mo. 1992))); see *AUSA Insurance Co. v. Citigroup, Inc.*, 293 B.R. 471, 478 (N.D. Iowa 2003) (citing factors set forth in *James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE* § 107.15[8][e] (3d ed. 2001)).

Relief from the automatic stay. A creditor may obtain relief from the automatic stay for "cause" under 11 U.S.C. § 362(d)(1).⁵ Although "cause" has not been defined within the Bankruptcy Code, it has been interpreted to include "any reason whereby a creditor is receiving less than his bargain from a debtor and is without remedy because of the bankruptcy proceeding." *In re Food Barn Stores, Inc.*, 159 B.R. 264, 267 (Bankr. W.D. Mo. 1993). The burden of proof is on the movant. *Id.*

Cause for relief from the stay may include a showing that litigation should commence or continue before another court.

[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);

⁵ Relief from the stay may also be granted if the debtor does not have equity in the subject property and the property is not necessary for an effective reorganization, as provided by 11 U.S.C. § 362(d)(2). According to Debtor's brief, it is relying only on § 362(d)(1), relief from stay for cause.

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) (emphasis added). 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); *Loudon v. Amogio Foods, Inc. (In re Loudon)*, 284 B.R. 106, 108 (B.A.P. 8th Cir. 2002).

III.

Of the dozen factors to consider under § 1334(c)(1) that are listed in *Williams*, many divide evenly between letting the state court action continue versus letting the adversary proceeding continue. In the end, however, several factors weigh more heavily for going forward with the adversary proceeding in bankruptcy.

First, this Court's docket is relatively clear in early 2004. Sufficient time can be made available in January to try the adversary proceeding and insure that the administration of Debtor's Chapter 11 bankruptcy case moves forward. Second, the state law issues presented are not novel; there are ample statutes and state case law to guide the Bankruptcy Court on those issues. Third, the adversary proceeding encompasses necessary parties that are not yet a part of the state court litigation. Finally, this Court is the appropriate forum to resolve First Dakota National Bank's request for relief under 11 U.S.C. § 510(c). Accordingly, an order denying Defendant-Debtor's August 14, 2003, Motion for Voluntary Abstention Under 28 U.S.C. § 1334(c)(1) will be entered in the adversary proceeding.

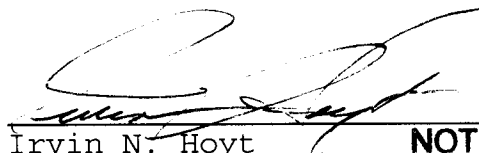
Likewise, in the main bankruptcy case, Debtor has not established cause for relief from the automatic stay. For the same reasons stated above, relief from the stay will not be granted to allow the parties to return to state court.

There is one exception. Though Plaintiff North Central has not specifically asked this Court to rule whether it and Defendant-Debtor should arbitrate their differences, there is some reference to arbitration in North Central's Complaint. None of the factors listed above weigh in favor of this Court addressing that matter. If North Central and Debtor want to complete the appeal to the South Dakota Supreme Court of Judge Flemmer's April 9, 2003, decision on the arbitration issue, relief from stay to that extent

will be granted. This Court need not retry it. The parties can advise the Court within ten days if they want to go forward with the appeal. If so, a limited relief from stay order will be entered in the main case.

Dated this 14th day of November, 2003.

BY THE COURT:

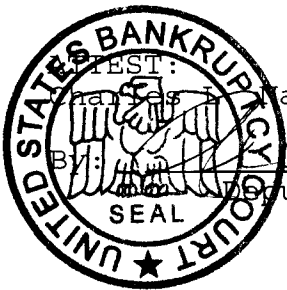


Irvin N. Hoyt
Bankruptcy Judge

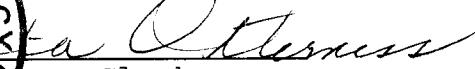
NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

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

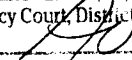


Charles L. Nail, Jr., Clerk


Deputy Clerk
(SEAL)

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

NOV 14 2003

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