

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:)	CASE No.	15-51485 (JAM)
)		
151 MILBANK, LLC,)	CHAPTER	11
)		
DEBTOR.)	RE: ECF Nos.	514, 515, 516, 517, 518
)		

RULING AND ORDER STAYING DEBTOR’S CHAPTER 11 CASE

I. History of Proceedings

On October 21, 2015, 151 Milbank, LLC (the "Debtor"), filed a voluntary Chapter 11 petition in this Court. Two years before the Debtor's case was filed, Mr. Sean Dunne ("Mr. Dunne"), a real estate developer in Ireland who owns real estate in Greenwich, Connecticut, filed a voluntary Chapter 7 petition in this Court.

During Mr. Dunne's Chapter 7 case, but prior to the filing of the Debtor's case, Richard Coan, the Chapter 7 Trustee of Mr. Dunne's case (the "Trustee"), commenced an adversary proceeding against several parties (the "Dunne adversary proceeding", Adv. Proc. No. 15-05019), seeking to avoid and recover alleged preferential and fraudulent transfers made by Mr. Dunne. The Debtor, John Dunne and Gayle Killilea Dunne (both of whom are the principals of the Debtor and are Mr. Dunne's son and wife/former wife), and other entities allegedly controlled by Dunne, are among the named defendants in the Dunne adversary proceeding.

On September 26, 2017, the Court granted the Debtor’s motion to sell substantially all of its assets—a condominium development comprised of four (4) units in Greenwich, Connecticut (the "Property")—pursuant to 11 U.S.C. § 363¹ and Fed. R. Bankr. P. 6004 (the

¹ Unless otherwise specified, all future statutory references are to Title 11 of the United States Code.

“Order Granting the Debtor’s § 363 Motion”, ECF No. 438). On October 4, 2017, the Court entered an amended Order Granting the Debtor’s § 363 Motion to clarify certain commission related expenses (the “Amended Order Granting the Debtor’s § 363 Motion”, ECF No. 450). In accordance with the Amended Order Granting the Debtor’s § 363 Motion, the Debtor sold the Property free and clear of all liens, claims, interests and encumbrances, but subject to the interests of the Trustee, who had filed a lis pendens against the Property. *See* Amended Order Granting the Debtor’s § 363 Motion, ECF No. 450, at p. 5.²

On or about September 19, 2017, the Property was sold at an auction to Caterina Violi. After payment of the claim of the mortgagee, expenses of the sale, and certain administrative expenses of the Debtor's estate, the remaining proceeds from the sale total approximately \$950,000.00. In accordance with the Amended Order Granting the § 363 Motion, the remaining sale proceeds are being held in escrow by the Debtor’s counsel until further order of the Court (the “Sale Proceeds”). Because the Property was the Debtor's main asset and has now been sold, the Debtor no longer has a business to reorganize and no additional assets to administer or liquidate.

On September 29, 2017, the Trustee filed a Motion to Convert the Debtor’s Case from Chapter 11 to Chapter 7 (the “Motion to Convert”, ECF No. 443). Between October 2017 and January 2018, a series of status conferences were held in connection with the Motion to Convert. On January 16, 2018, counsel for the Debtor, counsel for the Trustee, the Office of the United States Trustee (the “UST”), counsel for the creditor Becker, Glynn, Muffly, Chassin & Hosinski LLP (“Becker Glynn”), and counsel for certain defendants in the Dunne adversary proceeding appeared for a status conference. During the January 16th status conference, the parties informed

² In the Amended Order Granting the § 363 Motion, the term “interest” is defined to include the Trustee’s claims. *See id.*

the Court that they were unable to reach an agreement that would result in a structured dismissal of the Debtor's case, and recited on the record their respective positions regarding the following matters: (i) the Motion to Convert, (ii) the Debtor's Fifth Amended Chapter 11 plan that has been pending for some time, and (iii) the Trustee's competing First Amended Chapter 11 plan that has been pending for some time. Because the Debtor and certain creditors opposed the Motion to Convert, and because the Debtor's Chapter 11 Plan and the Trustee's competing Chapter 11 would require extensive discovery and several days of trial, the Court instructed the parties to submit position papers to address the issue of why the Debtor's case should not be stayed pending the outcome of the Dunne adversary proceeding.

On January 18, 2018, the UST filed its position paper (ECF No. 515), asserting that it had no objection to the stay of the Debtor's case as long as the Debtor continues to pay Chapter 11 quarterly fees (the "Chapter 11 Fees") and file monthly operating reports (the "MORs"). On January 24, 2018, the Trustee filed his position paper (ECF No. 516), stating that he has no objection to the stay of the Debtor's case so long as certain statutes of limitations set forth in the tolling agreement³ (the "Tolling Agreement", ECF No. 454), are extended until after the entry of a final non-appealable order following a trial in the Dunne adversary proceeding. On January 24, 2018, the Debtor filed its position paper (ECF No. 518), stating that it has no objection to the stay of its Chapter 11 case so long as (i) the parties are allowed to negotiate and present the Court with a possible resolution of the Debtor's case; and (ii) the Court allows payment of administrative claims from the escrow account while the stay is in effect. On January 24, 2018,

³ On October 5, 2017, the Debtor, the Debtor's estate, Mountbrook USA, LLC ("Mountbrook"), and TJD 21 LLC ("TJD", collectively with Mountbrook, the "Transferees") executed a tolling agreement that extends the statutes of limitations, including those set forth in § 546, applicable to any causes of action that the Debtor or the Debtor's estate has or may have against the Transferees to February 28, 2018 (ECF No. 454). The tolling agreement was signed by John Dunne on behalf of the Debtor and Gayle Killiea Dunne on behalf of Mountbrook and TJD.

Becker Glynn filed its position paper (ECF No. 517), asserting its belief that the best way to proceed is to encourage negotiations among the parties and to consider confirmation of the Debtor's Fifth Amended Chapter 11 plan. Becker Glynn further argues that the Trustee's lis pendens is not a property interest by operation of law and should therefore not be considered by the Court in determining whether to stay the Debtor's case.

This matter is now fully briefed and ripe for adjudication.

II. Analysis

Federal courts have the inherent power to stay an action based on the pendency of a related proceeding. *See, e.g., Rhines v. Weber*, 544 U.S. 269, 276 (2005); *Clinton v. Johns*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *Katz v. Cellco Partnership*, 794 F.3d 341, 346 (2d Cir. 2015) ("While district courts no doubt enjoy an inherent authority to manage their dockets, that authority cannot trump a statutory mandate that clearly removes such discretion.") (citations omitted); *Bechtel Corp. v. Local 215, Laborers' Intern. Union of North America, AFL-CIO*, 544 F.2d 1207, 1213 (3rd Cir. 1976) (affirming stay of proceedings where resolution of separate action "may obviate the need to pursue" the action); *In re Latimer*, 489 B.R. 844, 874 (Bankr. N.D. Ala. 2013) (bankruptcy court stayed the adversary proceeding pending related arbitration proceeding).

There is no dispute that the Debtor's case and the Dunne adversary proceeding are related proceedings. At almost every hearing held in the Debtor's case, the Trustee has argued that the Debtor and its assets are truly the assets of Mr. Dunne, and the Debtor and related entities have routinely opposed such arguments. No plausible argument can be made that the outcome of the Dunne adversary proceeding will not impact the Debtor's estate. Therefore, in exercising the

discretion to control its own docket, the Court finds that it is in the best interests of the Debtor's estate and its creditors to stay the Debtor's case. Staying the Debtor's case will maintain the status quo and preserve the Sale Proceeds until the entry of a final order in the Dunne adversary proceeding. If the Trustee prevails against the Debtor in the Dunne adversary proceeding, the Trustee will be entitled to all of the Sale Proceeds. If the Trustee does not prevail, then the Sale Proceeds would be available for the Debtor's creditors.

Although no party has objected to the Debtor's case being stayed, several parties have requested that certain conditions be imposed if the case is stayed. For example, the UST does not oppose the stay as long as the Debtor continues to pay the Chapter 11 Fees and file the MORs. In support of its position, the UST argues that several courts have held that a Chapter 11 debtor remains obligated to pay the Chapter 11 Fees and file the MORs while the debtor's case is suspended under § 305. *See In re Gabriel Technologies Corp.*, 2013 WL 5550391, *6 (Bankr. N.D. Cal. Oct. 7, 2013) (court ordered debtor to continue to file MORs and pay Chapter 11 Fees during suspension of case under § 305). However, the Debtor's case is not being suspended pursuant to § 305. Instead, the Court is exercising its inherent power to stay the Debtor's case.

Although 28 U.S.C. § 1930(f)(3) provides that: “[t]his subsection [allowing a waiver of Chapter 7 filing fees] does not restrict the district court or the bankruptcy court from waiving, in accordance with Judicial Conference policy, fees prescribed under this section for *other* debtors and creditors.” 28 U.S.C. § 1930(f)(3) (emphasis added), the Court will not stay the Debtor's obligation to pay the Chapter 11 fees at this time. That being said, there is no indication in the Judicial Conference policy⁴ or in the legislative history of 28 U.S.C. § 1930⁵ that the Chapter 11

⁴ Guide to Judiciary Policy, Vol. 4, Ch. 8, § 820.20 Judicial Determination of Filing Fee Waiver Application, available at http://www.uscourts.gov/sites/default/files/vol04_ch08.pdf.

⁵ According to Congress,

Fees cannot be waived by a bankruptcy court. If any party wishes to be heard on this issue, then on or before March 23, 2018, the party shall file a brief limited to five pages addressing whether the Debtor's obligation to pay the Chapter 11 Fees should be suspended while the stay is in effect.

With respect to the need to continue to file the MORs, the intended purpose of the MORs is to allow the UST and creditors to monitor ongoing business operations of a Chapter 11 debtor. Here, the Debtor is no longer an operating entity; it has no functioning business. There is no reason to require the Debtor to file the MORs while the stay is in effect. Instead, counsel to the Debtor will be required to file a sworn affidavit or declaration pursuant to 28 U.S.C. § 1746 every six months, from the date of entry of this Order and until further Order of the Court, to evidence that the Sale Proceeds remain in escrow in accordance with the provisions of the Amended Order Granting the Debtor's § 363 Motion.

The Debtor requests that the stay be conditioned on its right to seek to pay administrative expenses of its estate and that the parties should not be stayed from negotiating and presenting to the Court a possible resolution of the Debtor' case. The payment of any administrative claims from the Sale Proceeds may be allowed only if the Debtor files an application for payment and such application is approved. While the stay is in effect, the parties may negotiate and present to the Court a possible resolution of the Debtor's case.

Section 418 of [the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") amended 28 U.S.C. § 1930] to permit a district court or a bankruptcy court, pursuant to procedures prescribed by the Judicial Conference of the United States, to waive the chapter 7 filing fee for an individual and certain other fees under subsections (b) and (c) of § 1930 Section 418 [of the Act] also clarifies that § 1930, as amended, does not prevent a district or bankruptcy court from waiving other fees for creditors and debtors, if in accordance with Judicial Conference policy.

H.R. REP. NO. 109-31, pt. 1, at 89 (2005).

Additionally, the Trustee has no objection to the Debtor's case being stayed as long as certain statutes of limitations set forth in the Tolling Agreement are extended until after the entry of a final non-appealable order following a trial in the Dunne adversary proceeding. Staying the Debtor's case will also stop the running of the statutes of limitations set forth in the Tolling Agreement.

The creditor Becker Glynn argues that the decision to impose a stay should not be based on the existence of a lis pendens, because the lis pendens does not create a property interest in the Sale Proceeds. The issue of whether a lis pendens is an interest in property is irrelevant in the Debtor's case. After extensive negotiations and numerous contested hearings as to whether the Debtor could sell the Property under § 363, as opposed to through a Plan of Reorganization, the Debtor and the Trustee presented to the Court the Amended Order Granting the Debtor's § 363 Motion, which provides that the Trustee's lis pendens is a "property interest" which attaches to the Sale Proceeds.

III. Conclusion

After careful consideration of the issues presented, the balancing of the relevant factors, a review of the case law cited herein, and pursuant to §§ 1112(b)(3) and 105(d), it is hereby

ORDERED: The Debtor's case is stayed until further order of the Court; and it is further

ORDERED: The obligation of Debtor to file monthly operating reports is suspended while the stay is in effect; and it is further

ORDERED: Counsel to the Debtor shall file a sworn affidavit or declaration pursuant to 28 U.S.C. § 1746 every six months from the date of entry of this Order to evidence that the Sale Proceeds remain in escrow in accordance with the provisions of the Amended Order Granting the Debtor's § 363 Motion; and it is further

ORDERED: The terms and conditions of the Tolling Agreement are extended until further order of the Court.

IT IS SO ORDERED at Bridgeport, Connecticut this 16th day of February, 2018.

Julie A. Manning
Chief United States Bankruptcy Judge
District of Connecticut

