Not for Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

IN RE:

ROBERT G. BUSHNELL, JR.,

Debtor.

Case No.: 94-10706
Chapter 11

#3654

APPEARANCES:

Gerard A. Riso, Esq., Stein Riso Mantel Haspel & Jacobs, 405 Lexington Avenue, New York, NY 10174, Co-counsel for Debtor.

Bernard Lewis, Esq., Obuchowski Law Office, P.O. Box 60, Route 107, Bethel, VT 05032, Co-counsel for Debtor.

Mary G. Kirkpatrick, Esq., Lisman & Lisman, P.O. Box 728, Burlington, VT 05402, Counsel for RICO Claimants.

MEMORANDUM OF DECISION ON MOTIONS
FOR PRECLUSION, RELIEF FROM STAY AND SUMMARY JUDGMENT

Marro, U.S.B.J.[1]

I.

Introduction

Before the court are three pleadings seeking affirmative relief. The first affirmative pleading, filed by Robert G. Bushnell, Jr. (the "Debtor"), is the Debtor's "Motion for Preclusion and Summary Judgment on Objection to RICO Claims" (doc. no. 288) (the "Preclusion Motion"); the second affirmative pleading, filed by the so-called "RICO Claimants", is the RICO Claimants' "Cross-Motion for Relief of Automatic Stay" (doc. no. 292) (the "Stay Relief Motion"); and, the third affirmative pleading is the Debtor's "Motion for Summary

[1] Charles J. Marro, sitting by recall.

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DISTRICT OF VT
JAN 25 2000
FILED BY
KATHLEEN A. MURRAY

Judgment on Debtor's Objections to the Claims of the RICO Claimants" (doc. no. 342) (the "Summary Judgment Motion"). Various supportive and responsive pleadings were filed in connection with the three affirmative pleadings. The court heard oral argument on the pleadings and reserved decision.

The Preclusion Motion seeks two-part relief. The first part moves the court to preclude the submission, under Fed. R. Civ. P. 37(c), of any evidence supporting the claims of the RICO Claimants based upon the alleged failure by the RICO Claimants to comply with discovery requirements. If the court enters such preclusion order, the second part of the motion argues that summary judgment must be granted in favor of the Debtor, as the RICO Claimants would be unable to support their claims.

The Stay Relief Motion moves the court to modify the automatic stay to permit a class-action RICO lawsuit pending in the United States District Court for the Southern District of New York to proceed as against the Debtor.

The Summary Judgment Motion moves the court, assuming the court does not grant the Preclusion Motion, to grant summary judgment based upon alleged undisputed facts which would permit judgment as a matter of law.

For the reasons set forth below, the court denies the Preclusion Motion and grants the Stay Relief Motion, mooting the Summary Judgment Motion.

II.

Background Facts and Proceedings

The Debtor was one of three managing general partners of certain limited partnerships known as arbitrage management partnerships (the "Partnerships"). The RICO

Claimants were investors in the Partnerships. The two other managing partners in the Partnerships, Bernhard F. Manko ("Manko") and Jon J. Edelman ("Edelman"), were convicted in 1991 of various tax-related offenses in connection with Partnership-related activities.[2]

Thereafter, in February 1993, the RICO Claimants, among others, commenced a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"), against Manko, Edelman, the Debtor, the Partnerships and many others (the "RICO Action") in the United States District Court for the Southern District of New York (the "NY District Court").

The Debtor filed his petition in bankruptcy on November 10, 1994, which stayed the RICO Action as to the Debtor. The RICO Claimants filed their proofs of claim (the "RICO Claims") in the Debtor's bankruptcy case on April 4, 1995. The RICO Claims stated that they were based upon the allegations set forth in the RICO Action, and copies of the RICO Action complaint were included with the RICO Claims. The RICO Claimants did not move for relief from the automatic stay.

On October 14, 1995, the Debtor filed his omnibus objection to the claims of the RICO Claimants, based on the RICO statute of limitations and evidentiary preclusion under Fed. R. Civ. P. 37(c). The parties filed cross-motions for summary judgment and on August 30, 1996, this court (Conrad, J.) granted the Debtor's summary judgment motion, holding that the claims were barred by the RICO statute of limitations, without addressing the issue of evidentiary preclusion. The RICO Claimants appealed and the United States District Court for the District of

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[2] See U.S. v. Manko, 979 F.2d 900 (2nd Cir. 1992), cert. denied, 509 U.S. 903 (1993).

Vermont reversed by opinion and order dated October 27, 1998. The Debtor sought permission to appeal to the Second Circuit Court of Appeals, which denied the request on May 14, 1999.

While the Debtor's chapter 11 case and the summary judgment litigation were proceeding, the RICO Action continued in the NY District Court without the Debtor's participation. Given the number of parties in that action, more than 150, swarms of pretrial motions, pleading amendments, dismissals, and decisions and appeals related thereto have been taking place in the RICO Action over the years. Consequently, the parties before this court have represented, discovery only commenced in the RICO Action in the past year.

III.

Discussion

A. The Preclusion Motion

Fed. R. Civ. P. 26(a)(1), made applicable by Fed. R. Bankr. P. 7026, provides in relevant part: "Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties" discoverable information "at or within 10 days after the meeting of the parties under subdivision (f)." Fed R. Civ. P. 26(a)(1). Subdivision (f) provides, in turn, that shortly after issue is joined the parties are to meet and confer about the claims and defenses, settlement possibilities, and discovery. Fed R. Civ. P. 26(f).

Effective as of December 1993, however, this court (Conrad, J.) modified the applicability of Fed. R. Civ. P. 26 in contested matters by providing that the automatic disclosure requirements of Rule 26 are not applicable to contested matters absent order of the court. See

General Order No. 93-6, dated December 17, 1993.[3]

Rule 37, made applicable by Fed. R. Bankr. P. 7037, provides in relevant part that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1).

The Preclusion Motion seeks to impose the Rule 37(c)(1) sanction against the RICO Claimants for their alleged failure to comply with voluntary disclosure requirements of Rule 26(a)(1) during the four year existence of this contested matter. The court, however, is unaware of any order entered by Judge Conrad under General Order 93-6 that would require compliance with Rule 26's automatic disclosure requirements in this contested matter. Without such an order, Rule 37(c)(1) cannot be implicated.

In point of fact, even were such an order entered, failure to comply does not necessarily mandate the sanction of Rule 37(c)(1). Indeed, Rule 37(c)(1) contains a "substantial justification" exception to its sanction. The court finds that substantial justification has existed in

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[3] That General Order provides:

> The time limits and automatic disclosure requirements, set forth under F.R.Civ.P. 26, effective December 1, 1993, are not appropriate for contested matters.
>
> Accordingly, IT IS ORDERED that unless specifically ordered by the Court, F.R.Civ.P. 26 contested matters under F.R.Bkrtcy.P. 9014 are exempt from the time limits and automatic disclosure requirements contained therein.

General Order 93-6.

this matter. In particular, not long after the contested matter began, summary judgment motions were filed by the Debtor and then the RICO Claimants. A motion for summary judgment by its very nature asserts that there are no material facts in dispute. See Fed. R. Civ. P. 56(c). Consequently, discovery was not exigent given that the adversaries were consonant in their views, by virtue of their cross-motions for summary judgment, that no material facts were in dispute.

Moreover, after Judge Conrad granted summary judgment and during the recently concluded appeal process, there was no compelling reason to incur discovery expense. Understandably, the docket does not reflect that the Debtor sought discovery during this phase.

For the foregoing reasons, the relief requested in the Preclusion Motion is denied.

B. The Stay Relief Motion

The RICO Claimants urge this court to modify the automatic stay to permit the them to liquidate their claims against the Debtor in the RICO Action in the NY District Court. In short, the RICO Claimants argue that adjudication of the RICO Claims in a single action/forum – the RICO Action in the NY District Court – will be the most efficient, economical and appropriate course, given the current, parallel posture of the two litigations.

The automatic stay that takes effect upon the filing of a petition with the bankruptcy court by virtue of 11 U.S.C. § 362(a) may be modified under the guidelines set forth in subsection (d)(1) thereof, which provide:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–
>
> (1) for cause, including the lack of adequate protection of an

interest in property of such party in interest . . . .

11 U.S.C. § 362(d)(1).

"The House and Senate committee reports each observed, regarding 'cause' for lifting the stay, that 'a desire to permit an action to proceed to completion in another tribunal may provide . . . such cause.'" In re Bellucci, 119 B.R. 763, 773 (Bankr. E.D.Cal. 1990) (citing H.Rep. No. 95- 595, 95th Cong., 1st Sess. 343 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 52 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5838, 6300). With respect to "cause", "[t]he burden is on the moving party to make an initial showing of 'cause' for relief from the stay. Only if the movant makes such a showing does any burden shift to the debtor; absent a showing of cause, the court should simply deny relief from the stay." Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 142 (2d Cir. 1999).

The Second Circuit, in Sonnax Indus., Inc. v. Tri Component Prod. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d Cir. 1990), listed a number of factors ("the Sonnax factors") "to be weighed in deciding whether litigation should be permitted to continue in another forum. These are: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a

judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms." "Not all of these factors will be relevant in every case." Mazzeo, 167 F.3d at 142.

The Sonnax factors most relevant to the instant matter are: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (7) whether litigation in another forum would prejudice the interests of other creditors; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

The liquidation of the RICO Claims in the RICO Action will result in a full resolution of the issues raised before this court in the claims and the objections thereto, subject to the caveat that the enforcement and collection of any judgment on the RICO Claims may only be through this court. (Sonnax factor (1)).

The Debtor has a confirmed plan of reorganization and there is no activity in the chapter 11 case, save the instant claims litigation. Therefore, modifying the stay to permit continuation of the RICO Action against the Debtor will not interfere with the Debtor's bankruptcy case, nor prejudice other creditors. (Sonnax factors (2) and (7)).

Notions of judicial economy and the expeditious and economical resolution of litigation mandate that one court, rather than two, address a common set of legal and factual issues that concerns a defined group of plaintiffs and defendants. (Sonnax factor (10)). As the RICO Action in the NY District Court will continue with or without the Debtor as a defendant, it

only makes sense from the perspective of the efficient use of judicial resources that the matter be heard by that court. From the standpoint of economy for the parties, whether or not the stay is modified, the Debtor will litigate the issues only once; however, if the stay is not modified, the RICO Claimants will have to litigate the issues twice, with the specter of potentially inconsistent rulings. Furthermore, the "economy" inquiry does not end at the trial level, for matters appealed from this court and the NY District Court may ultimately lead to the Second Circuit Court of Appeals --- presenting further potential waste of judicial and party resources if the issues are not determined by a single court. Finally, as the NY District Court may already have ruled upon issues that would otherwise have to be ruled upon by this court, modification of the stay will eliminate duplication of efforts and inconsistent rulings.

While the RICO Action may not yet be ready for trial (Sonnax factor (11)), the RICO Action has progressed through myriad pretrial motions, and the NY District Court has already issued rulings in the area of certain issues pending before this court, such as vicarious liability. Accordingly, the NY District is closer to trial than this court.

Continued imposition of the stay will require the more than 50 RICO Claimants to try their cases, by and large, twice. By way of contrast, the Debtor will only be required to try his case once, whether or not the stay is lifted. Furthermore, the Debtor's main counsel is based in New York City as is the vast majority of discoverable material. Accordingly, the balance of the harms tips in favor of the RICO Claimants. (Sonnax factor (12)).

Thus, having considered the Sonnax factors, the court concludes that the automatic stay of 11 U.S.C. § 362(a) should be modified for "cause" to the extent that the RICO Action pending in the NY District Court may proceed as against the Debtor for purposes of

liquidating to judgment the RICO Claimants' claims against the Debtor. Enforcement of any judgment obtained by the RICO Claimants against the Debtor shall only be through this court, however.

C. The Summary Judgment Motion

The court's ruling to modify the automatic stay moots the Summary Judgment Motion.

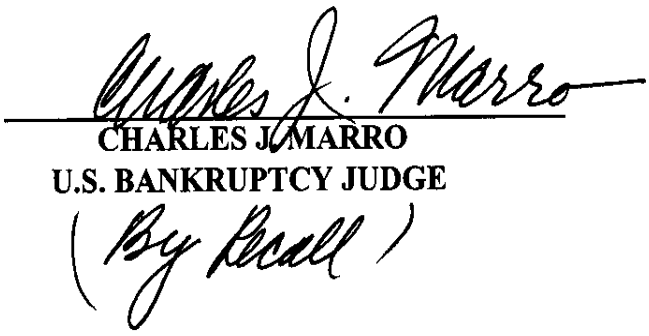
IV.

Conclusion

For the reasons set forth above, the court denies the Preclusion Motion and grants the Stay Relief Motion, mooting the Summary Judgment Motion.

SO ORDERED.

Dated at Rutland, Vermont this 24th day of January, 2000.



CHARLES J. MARRO
U.S. BANKRUPTCY JUDGE

(By Recall)

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