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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	:	
JOY R. DUNYON a/k/a Jerry Dunyon,	:	Bankruptcy Case No. 87B-04887
Debtor.	:	[Chapter 7]

MEMORANDUM OPINION

Noel S. Hyde, Esq., and Chris L. Schmutz, Esq., of Nielsen & Senior, of Salt Lake City, Utah, for Debtor.

Suzanne West, Esq., Robert A. Goodman, Esq., and Jerome Romero, Esq., of Jones, Waldo, Holbrook & McDonough of Salt Lake City, Utah, for BancBoston Financial Company.

The issues presented in this case arise from Joy R. Dunyon's (Dunyon) Motion for Sanctions as provided in 11 U.S.C. § 362(h) for an alleged violation of the automatic stay by BancBoston Financial Company (BancBoston) because of its continued postpetition pursuit of collection of a judgment in state court. The lawsuit brought by BancBoston involved causes of action against both Dunyon and related entities in which Dunyon was allegedly a principal.

BACKGROUND

According to the argument presented at the hearing for sanctions and the supporting pleadings, BancBoston obtained a prepetition state court judgment in the amount of $347,947.37 against Dunyon, resulting from his personal guarantee of obligations of the Ryan Distributing Company. BancBoston unsuccessfully attempted to collect the judgment against Dunyon and on September 3, 1987, initiated a new action in state court against Joyco, Inc. and Joy Dunyon & Associates (Dunyon companies), entities in which Dunyon owned stock or had general partnership interests. The new complaint alleged that the Dunyon companies were the alter ego of Dunyon and were therefore liable for his personal obligation owing to BancBoston. BancBoston also asserted that Dunyon and the Dunyon companies were involved in various fraudulent conveyances and preferential transfers between the entities, co-mingling of funds, and transfer of assets to defeat BancBoston's judgment. The original case against Dunyon was consolidated with the new action where BancBoston also named Dunyon and Daniel G. Hirst as Third-Party Defendants alleging additional claims involving fraudulent conveyances.

The detailed chronology of the events in this case is relevant to this decision. Dunyon filed a Chapter 7 petition on September 18, 1987, listing BancBoston as a creditor resulting from its prepetition judgment. In state court on December 11, 1987, BancBoston moved to amend its September 3, 1987,

consolidated complaint to add J. F. Dunyon Company as a counterclaim defendant. In its motion to amend, BancBoston republished its original September 3, 1987, complaint and included additional allegations against J. F. Dunyon Company. The allegations against Dunyon in the amended complaint were unmodified from the allegations as they appeared in the September 3, 1987, complaint.

On December 24, 1987, the Chapter 7 trustee filed with the court his Report of Trustee in No-Asset Case stating that there were no assets to administer in the case. On January 28, 1988, the trustee withdrew his report and the court signed an order on February 3, 1988, allowing the trustee to proceed with administration of the estate's assets.

On January 12, 1988, BancBoston filed an additional motion in the consolidated state court action for a Prejudgment Writ of Attachment and Writ of Garnishment against the Dunyon companies. The motion sought to attach money and real property to collect the Dunyon judgment, and alleged that Dunyon and the Dunyon companies had effectuated improper transfers of assets with the intent to defraud BancBoston. Counsel for Dunyon responded in state court, pleading that BancBoston was stayed by this bankruptcy and that any cause of action against the Dunyon companies, alleging transfer of assets from Dunyon, was an asset of this estate. The hearing on the motion for the prejudgment writs was held in state court on January 20, 1988. No dispute

exists that the state court motion to amend the complaint and motion for the prejudgment writs were both filed subsequent to the date of the filing of the Chapter 7 case. No relief from the automatic stay was sought by BancBoston as it related to the continued collection of its judgment in state court.[1]

Dunyon, taking exception to the continued pursual in state court of the action against himself and the Dunyon companies, filed this Motion for Sanctions asserting that both BancBoston and its attorneys violated the automatic stay imposed by 11 U.S.C. § 362(a) and also the injunction provided in the discharge order entered January 5, 1988. In response, BancBoston maintains that it did not intend to continue to pursue its cause of action against Dunyon individually and asserts that its state court action was only an attempt to exercise the alter ego cause of action against the Dunyon companies.[2]

ISSUES

This motion presents three issues to the court for determination:

1. Do the postpetition proceedings in

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[1] BancBoston did obtain relief from the automatic stay in relation to Dunyon's stock in Joyco, Inc.

[2] Argument of counsel indicated that the Dunyon companies have subsequently sought relief under the Bankruptcy Code in this court.

state court by BancBoston against Joy Dunyon constitute a violation of the automatic stay?

2. Are the postpetition proceedings by BancBoston against the Dunyon companies enjoined by the automatic stay because the proceedings constitute an action against property of this estate?

3. If a violation of the automatic stay has occurred, should sanctions be imposed?[3]

ACTIONS AGAINST DUNYON

Subsection 362(a)(2) provides that the filing of a petition stays the enforcement, against the debtor, of a judgment obtained before the commencement of the case. There can be no dispute that the postpetition proceedings of BancBoston were taken to enforce the judgment received prepetition against the debtor. All of the allegations in BancBoston's new complaint against the Dunyon companies stem from the judgment against Dunyon. BancBoston asserts, however, that it had no intention of

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[3] The parties refer to a violation of the general discharge order entered in favor of Dunyon on January 5, 1988. BancBoston filed a timely objection to discharge of its debt pursuant to 11 U.S.C. § 523(a) on December 18, 1987, therefore, the discharge did not apply to BancBoston's debt. Thus, any violation can only be of the automatic stay provided by 11 U.S.C. § 362. To rule otherwise would in effect give Dunyon the benefit of the discharge against BancBoston even though that very issue is pending. Accordingly, the sanctions available would flow from 11 U.S.C. § 362(h), not via any other contempt or sanction authority of the court.

pursuing any state court cause of action against Dunyon subsequent to the date of the filing of his Chapter 7 petition.

BancBoston admits that it did republish, as an exhibit to its December 11, 1987, motion to add a party defendant, its initial cause of action against Dunyon. At the hearing before this court, BancBoston alleged that telephone conversations or correspondence flowed between counsel for BancBoston and Dunyon indicating that, notwithstanding the republication, BancBoston did not intend to pursue the collection of the judgment against Dunyon in state court. Obviously counsel for Dunyon thought otherwise and, therefore, was compelled to appear in state court and to file the Motion for Sanctions in this court.

This court finds from the evidence that the steps taken on the part of Dunyon's counsel were reasonable. Indeed, failure to take such action to protect his client and the estate by Dunyon's counsel may have been improper. BancBoston, upon questioning by the court regarding why it did not delete the cause of action against Dunyon from its republished pleadings, merely indicated that it would have been too complicated and taken too much time to review the pleadings sufficiently to delete the cause of action brought personally against Dunyon. BancBoston further contends that such republication was, if anything, merely a technical violation of the stay.

BancBoston's explanation is unsatisfactory. It would have taken little time to delete the Dunyon related cause of

action from the pleadings, thus avoiding the need for Dunyon's counsel to expend time in drafting pleadings and appearing in court in order to protect the estate and his client. BancBoston's argument also evidences a rather cavalier attitude toward the obligatory care that should be taken by creditors toward a provision of the Code that is the heart and soul of the bankruptcy system. Based thereon, the court finds that the republication and failure to purge the cause of action against Dunyon was willful.

ACTIONS AGAINST DUNYON COMPANIES

Dunyon has also objected to the postpetition state court proceedings of BancBoston against the Dunyon companies. To the extent that this estate possesses a fraudulent conveyance claim against the Dunyon companies, such claim constitutes property of the estate. See 11 U.S.C. § 541(a)(3). Any actions for the enforcement of a judgment against property of the estate that falls within section 541(a)(3) would constitute a violation of the stay under section 362(a)(2). BancBoston argues that by the trustee's filing of the no asset report, all fraudulent conveyance actions were abandoned.[4] The trustee's report was filed on December 24, 1987, almost two weeks after BancBoston

[4] BancBoston failed to plead that the trustee's no asset report was filed in error, even though counsel for BancBoston was present at the hearing in which the trustee so stated. The court was forced to rely upon the minute entry of the hearing and further questioning of BancBoston's counsel to obtain accurate information regarding this element.

filed its motion to amend its complaint on December 11, 1987. The fraudulent conveyance actions were clearly property of the estate on December 11, 1987.

BancBoston has indicated that it did not intend to pursue the fraudulent conveyance actions against the property of the estate. Regardless of BancBoston's now stated intentions, the republication of the fraudulent conveyance allegations in the December 11, 1987, motion constituted a further willful violation of the stay. Again, any argument by BancBoston that it was too difficult to amend the complaint to remove the fraudulent conveyance actions is not justified. The affidavit of BancBoston's counsel indicates that in early December, 1987, research was performed whereby counsel determined that continuing to pursue the fraudulent conveyance actions would be in violation of the automatic stay. See Affidavit of Suzanne West at ¶ 14(a) and (b). Therefore, BancBoston had no excuse for failing to delete the causes of action related to the fraudulent conveyances.

BancBoston further argues that Dunyon's counsel's objection at state court to the pursuit of the fraudulent conveyance actions only benefited the Dunyon companies, not this estate. The fraudulent conveyance causes of action are property of this estate. Thus, actions taken to protect property of the estate by the appearance of and pleadings filed by Dunyon's counsel were actions taken to preserve and protect assets of the

estate. The fact that these actions were not taken at the request of the trustee is irrelevant. Dunyon has a vested interest in the administration of his estate and in seeing that assets of the estate are not dissipated and are available to pay his creditors to the greatest extent possible.

The Affidavit of BancBoston's counsel also indicates that research was performed to determine if the pursuit of alter ego action against the Dunyon companies would be a violation of the automatic stay. Counsel concluded that there would be no violation. See Affidavit of Suzanne West at ¶ 14(a) and (b). BancBoston relies heavily on the ruling of the Eighth Circuit Court of Appeals in In re Ozark Restaurant Equipment Co., Inc., 816 F. 2d 1222 (8th Cir. 1987). The Ozark court determined that a Chapter 7 trustee had no standing to assert an alter ego action against the principals of the corporation on behalf of the debtor corporation's creditors. Id. at 1229. Based on this decision, BancBoston determined that the alter ego cause of action was not property of the bankruptcy estate and therefore it could continue to pursue that action.[5]

Counsel for BancBoston has failed to cite to the court or has overlooked other authority of equal weight to the Ozark decision. The Seventh Circuit Court of Appeals in Koch Refining

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[5] BancBoston also relies on the representations of the trustee that he thought the alter ego action would not be property of the estate. No abandonment was obtained from the trustee. Under the circumstances, the trustee's casual representations are not sufficient to exonerate BancBoston's actions.

v. Farmer's Union Cent. Exchange, Inc., 831 F. 2d 1339 (7th Cir. 1987) came to the opposite conclusion from the Ozark court. Furthermore, the court in Koch Refining relied heavily on a Tenth Circuit decision, Delgado Oil Company, Inc., v. Torres, 785 F. 2d 857 (10th Cir. 1986) which would be controlling precedent in this jurisdiction.[6]

It is not necessary for this court to determine at this time whether or not the alter ego cause of action is property of this bankruptcy estate. The determination of the application of the alter ego theory requires more evidence than presently exists on the record. For the purpose of this motion, it is only necessary for the court to decide whether BancBoston possessed a bona fide legal theory that in good faith, BancBoston thought it was able to pursue in state court.

The legal theory supporting the argument that the alter ego cause of action is not property of the estate is in dispute

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[6] Because of the extensive research performed and detailed memorandum submitted by counsel for BancBoston, the court is surprised that neither the Koch nor Delgado decision was cited. The ethical rules require counsel to disclose to the court authority that is adverse to counsel's opinion. Rule 3.3 of the Utah Rules of Professional Conduct provides:

> (a) A lawyer shall not knowingly:
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> ....
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> (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

because the interpretation of the alter ego theory is unclear. For example, the first step in the Ozark analysis requires a determination under state law that the alter ego lies with third parties and does not run to the corporation. In Utah, alter ego actions have been recognized to exist. See e.g., Norman vs. Murray First Thrift & Loan Company, 596 P. 2d 1028 (Utah 1979). However, there is no clear indication that the cause of action only lies with third parties under Utah law. To make matters more complex, the facts of the present case involve a theory of "reverse alter ego". As a basis for this theory, BancBoston cites to the court Messick vs. PHD Trucking Service, Inc., 678 P. 2d 791 (Utah 1984).[7] Because the trustee may choose to bring

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[7] The court in Messick describes the "reverse pierce" theory as follows:

> The trial court's disregard of the corporate entity was purportedly based upon a little-recognized theory associated with the alter-ego doctrine characterized as 'reverse-pierce-of-the-corporate-veil' or simply the 'reverse pierce' theory. While the practice of piercing the corporate veil generally involves a creditor seeking redress against a corporate insider (i.e., shareholder or officer) who has used the corporate entity as a shield to defraud the creditor, under the 'reverse pierce' theory the 'insider' may also pierce the corporate veil to prevent a party outside the corporation from likewise using the entity as a shield to defraud the insider.

Id at 793.

This court's reading of the Messick opinion and the definition of "reverse pierce" read in conjunction with the Ozark opinion indicates that this particular theory is one in which the insider has the capacity to pierce the corporate veil to prevent a party outside the corporation from using the entity as a shield

(continued...)

the alter ego action on behalf of this estate's creditors and because this court has no evidence regarding the facts as they apply to this theory, this court will not attempt to make any further analysis of this issue. This court finds that BancBoston did possess an arguable legal theory and it is therefore unnecessary to impose punitive damages against BancBoston for its use of the alter ego theory. The court will note, however, in review of BancBoston's complaint that neither the reverse pierce theory nor the fraudulent conveyance actions were plead with particularity to indicate that careful thought was given with respect to the impact of the automatic stay.

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[7](...continued)
to defraud the insider. Two cases cited by the court in Messick, Crum v. Krol, 425 N.E. 2d 1081 (Ill. App. 1981) and Roepke v. Western Nat. Mut. Ins. Co., 302 N.W. 2d 350 (Minn. 1981) both interpret the reverse pierce theory as one in which an insider is allowed to pierce the corporate veil from within the corporation in certain narrow fact circumstances. Roepke follows a line of authority in probate proceedings to allow a decedent's heirs to recover insurance proceeds owed to a corporation where the decedent was a sole shareholder. The Crum court found "equitable considerations" of previous injustice to apply where a third party rather than an insider attempts to use the corporate entity as a shield. The facts of this case are apparently different.

BancBoston is apparently not using the reverse pierce theory as an insider, but as a creditor attempting to collect on its judgment. There are largely no facts that are part of the record that would allow this court to determine if the reverse pierce theory is appropriate. Factors might include the relationship of Dunyon to the Dunyon companies, the underlying basis for BancBoston's receiving its judgment, the nature of the alleged transfers, and the equities involved if BancBoston were allowed to pierce the Dunyon companies' veil.

SANCTIONS

The motion before the court is one brought pursuant to 11 U.S.C. § 362(h) which indicates that:

> An individual injured by any willful violation of the stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.[8]

After reviewing the Memorandum of Points and Authorities, the case law provided by BancBoston and after the oral arguments presented, this court finds that the republication by BancBoston of its amended complaint against Dunyon and its continued use of the fraudulent conveyance terminology in its complaint constituted a violation of the stay. BancBoston could have easily deleted from the complaint these provisions and thus have eliminated the need for Dunyon's counsel to respond to protect Dunyon and assets of the estate. Such action is deemed to be willful and without justification, thus subject to sanctions as set forth in section 362(h).

This court finds that the actual damages suffered by Dunyon should be equal to those attorney fees generated by

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[8] This court is not called upon to determine whether or not it has a contempt power because the action is brought specifically under the sanctions provision as provided in the statute. It is not necessary to make a determination whether contempt is appropriate for violation of the debtor's discharge because of the timely filing of a complaint objecting to dischargeability by this creditor.

Dunyon's counsel in proceeding in state court and bringing this Motion for Sanctions in this court. No evidence of other damages was presented to the court. The court has carefully reviewed the time records provided by Dunyon's counsel, together with the objections filed by BancBoston. The court will disallow, however, the time expended in research specifically relating to the alter ego theory. Dunyon's counsel declined to file any pleadings setting forth case law which would have assisted the court or to present evidence that would have resolved the alter ego issue. Therefore, the court will find that such expenditures were not necessary to the administration of the estate. The total of the value of such time is $315.00. This court finds total damages to be in the amount of $2,340.50, representing the value of the remaining time set forth in the Affidavit of Noel S. Hyde.

The court will not impose sanctions upon BancBoston or its counsel relative to the alter ego theory for the reasons stated above. The case law is sufficiently unclear to find a willful violation of the stay as a matter of law related to the alter ego theory, especially in light of the speculative applicability of the reverse pierce theory. However, the better practice would have been to ask permission from this court to proceed in state court through a declaration that all of the causes of action were not property of this estate. Therefore, it is hereby

ORDERED, that BancBoston or its attorneys, Jones, Waldo, Holbrook & McDonough, shall pay to Noel S. Hyde, Esq., and Nielsen & Senior, the amount of $2,340.50, to be held in trust pending a final determination of Dunyon's attorneys fees upon application and allowance by this court.

DATED this 27th day of May, 1988.

JUDITH A. BOULDEN
United States Bankruptcy Judge