

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

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In re)	
AFCO DEVELOPMENT CORPORATION,)	Bankruptcy Case No. 82-00578
Debtor.)	
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REED S. ANDRUS,)	
Plaintiff.)	Civil Proceeding No. 82P-0575
vs.)	
AFCO DEVELOPMENT CORPORATION, a Utah corporation; UTAH FIRSTBANK, a Utah corporation; and GRANT C. AFFLECK,)	
Defendants.)	
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UTAH FIRSTBANK, a Utah corporation,)	
Plaintiff.)	Civil Proceeding No. 82P-0628
vs.)	
REED S. ANDRUS,)	
Defendant.)	MEMORANDUM ON MOTION TO CONSOLIDATE

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FACTUAL AND PROCEDURAL BACKGROUND

On May 14, 1981, Reed S. Andrus filed a complaint in this Court against AFCO Development Corporation (AFCO), Utah Firstbank, and Grant C. Affleck. This civil proceeding was assigned the number 82P-0575. AFCO had previously filed a petition for relief under Chapter 11. The complaint alleged fraud on the part of the defendants and requested rescission of contracts with AFCO and Utah Firstbank and, in addition, an award of compensatory and punitive damages against the defendants.

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On May 21 Mr. Andrus filed a petition for removal to this Court of a lawsuit then pending in state court in which Utah Firstbank had sued Reed S. Andrus to collect payment on a promissory note. The removed action was assigned the number 82P-0628. On May 24 and May 25 Mr. Andrus filed motions to consolidate the removed action with the action which had been commenced on May 14.

On May 26 and June 8, respectively, counsel for Mr. Affleck and counsel for AFCO each filed in 82P-0575 a pleading entitled "Acceptance of Service," in which they entered an appearance as counsel and accepted service. On June 16 counsel for AFCO filed in 82P-0575 a notice that because of AFCO's bankruptcy, the automatic stay was in effect.

On June 18 Mr. Affleck filed a motion to dismiss the complaint in 82P-0575 and, alternatively, for an order staying all proceedings in the lawsuit. A hearing was noticed for August 13. The motion argued that prosecution of the lawsuit violated the automatic stay which was imposed when AFCO filed its petition and that, therefore, Mr. Affleck was not required to file a responsive pleading.

On June 24 Mr. Affleck filed a petition for relief under Chapter 7. Four days later, his counsel filed in 82P-0575 a notice of the automatic stay.

DISCUSSION

The motion to consolidate 82P-0575 and 82P-0628 is unopposed. Indeed, consolidation of the two civil proceedings appears to be the most efficient means of handling them. But in view of the automatic stay which was imposed when AFCO filed its petition in bankruptcy, a determination of whether the motion was properly filed at all is a necessary predicate to a determination of its merits.

The automatic stay of actions against AFCO was already in effect when 82P-0575 was filed in the Bankruptcy Court. This Court has previously had occasion to address the question of whether a post-petition lawsuit against a debtor based on a pre-petition claim violates the automatic stay when that lawsuit is filed in the Bankruptcy Court. In Alcorn v. Affleck (In re AFCO Enterprises, Inc., Bankr. No. 82-00577; In re AFCO Development Corp., Bankr. No. 82-00578; In re AFCO Investment Corp., Bankr. No. 82-00579) Civ. Pro. No. 82P-0333, Judge Harold L. Mai held that creditors seeking to liquidate pre-petition claims against debtors violated the automatic stay by commencing a lawsuit in the Bankruptcy Court without first securing relief from the stay. See Alcorn v. Affleck, transcript of hearing June 23, 1982.

In this case, however, AFCO waived, at least with respect to filing and service of the complaint and with respect to the motion to consolidate, the protection of the automatic stay by filing an acceptance of service of the summons and complaint and by filing an entry of appearance of counsel. AFCO did not give any indication that it intended to oppose continuance of the lawsuit until June 16 when it filed its notice of the automatic stay. But by then, the fifteen (15) day period set by Local Rule 5(e) for filing objections to the motion to consolidate had already expired and the motion was ripe for decision. Therefore, the Court may properly rule on the motion to consolidate.

That Mr. Affleck later filed a petition in bankruptcy does not affect this conclusion. First, there was no stay as to actions against Mr. Affleck until he filed his petition on June 24. The stay of actions against AFCO has no applicability to actions against Mr. Affleck. Second, the stay in Mr. Affleck's case began on June 24, well after the motion to consolidate was ripe for decision.

The automatic stay does not prevent the Court from ruling on a motion which is ready for decision when the stay goes into effect. See In re Willard 15 Bankr. 898 (Bankr. App. Pan. 9th Cir. 1981).

The Court therefore rules that in the interest of efficiency and judicial economy, the two civil proceedings, 82P-0575 and 82P-0628, should be consolidated. The Court, however, makes no ruling with respect to the effect of the automatic stay on any further actions by the parties in these two proceedings. Mr. Andrus shall submit an order of consolidation.

DATED this 27 day of July, 1982.


Glen E. Clark
United States Bankruptcy Judge