

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
NEWBANK,

Plaintiff,

- against -

Index No. **22652/2020E**

Hon. **FIDEL E. GOMEZ**
Justice

**A&N FOOD ENTERPRISES INC. DBA
PIONEER SUPERMARKET, BROOK'S AVE
FOOD ADVANTAGE CORP., N&A PRODUCE
& GROCERY CORP., YOKASTA D. MEDINA,
NAFTALI MEDINA, LOURDES ROJAS,
ASSOCIATED FOOD STORES, L.L.C. AKA
ASSOCIATED FOOD STORES, LLC,
ASSOCIATED SUPERMARKET GROUP LLC,
AFS CAPITAL LLC, DERLE FARMS INC,
SIGNAPAY OF NY LLC, INTERNAL
REVENUE SERVICE – UNITED STATES OF
AMERICA, AND KRASDALE FOODS, INC.,**

Defendants.

-----X

The following papers numbered 1 and 2, read on these motions, noticed on 10/16/2020 & 3/30/2022, and duly submitted as no. 1 and 2 on the Motion Calendar of 3/30/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		

Defendant Krasdale Foods, Inc.'s motions are decided in accordance with the Decision and Order annexed hereto.

Dated: 4/22/22


 Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
2. MOTION IS..... GRANTED (#1 &2) DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
 NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
NEWBANK,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **22652/2020E**

**A&N FOOD ENTERPRISES INC. DBA
PIONEER SUPERMARKET, BROOK’S AVE
FOOD ADVANTAGE CORP., N&A PRODUCE
& GROCERY CORP., YOKASTA D. MEDINA,
NAFTALI MEDINA, LOURDES ROJAS,
ASSOCIATED FOOD STORES, L.L.C. AKA
ASSOCIATED FOOD STORES, LLC,
ASSOCIATED SUPERMARKET GROUP LLC,
AFS CAPITAL LLC, DERLE FARMS INC,
SIGNAPAY OF NY LLC, INTERNAL
REVENUE SERVICE – UNITED STATES OF
AMERICA, AND KRASDALE FOODS, INC.,**

Defendants.

-----X

Defendant Krasdale Foods, Inc. (“Defendant”) moves for an order lifting any stay imposed by the filing of bankruptcy by Defendant N&A Produce & Grocery Corp. (“N&A Produce”), as currently applied to Defendant’s pending motion (mot. seq. #1) (the “Pending Motion”) or the prosecution of the crossclaim sought to be asserted by Defendant and its affiliated entities against Defendants A&N Food Enterprises, Inc. (“A&N Food”) and Neftali Medina (“Medina”).

In the Pending Motion, Defendant moves for leave to file and serve its supplemental summons and amended verified answer with a crossclaim. The motions are unopposed.

For the reasons which follow, Defendant’s motions are granted, on default and without opposition.

BACKGROUND:

On February 21, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint, alleging causes of action for breach of contract, preliminary and permanent injunction, and unjust enrichment. The complaint is verified by Moon Soo Kwon, Plaintiff’s Vice President.

The complaint alleges that on June 20, 2014, Plaintiff extended a SBA loan to A&N Food in the principal amount of \$400,000 (the “SBA Loan”) (Compl. ¶ 17). To secure payment of the SBA Loan, A&N Food signed a security agreement with Plaintiff (the “Security Agreement”) (Compl. ¶ 20). Pursuant to the Security Agreement, A&N Food pledged to Plaintiff all equipment, fixtures, inventory, accounts, instruments, chattel paper, general intangibles, documents, farm products, deposit accounts, and investment property, including amounts payable under any insurance policy located in New York and at 250 Cypress Avenue, Bronx, NY 10451. Plaintiff alleges that N&A Produce, a guarantor of the SBA Loan, also signed a security agreement with Plaintiff pledging the same extent of its collateral to Plaintiff located at 1345 Castle Hill Avenue, Bronx, NY 10462, and wherever else located in the State of New York (Compl. ¶ 21).

The complaint alleges that to further secure payment of the SBA Loan, on June 20, 2014, N&A Produce, along with a number of other named defendants, executed written guarantees to guarantee the payment by A&N Food of all amounts owed to Plaintiff under the SBA Loan (Compl. ¶ 24).

The complaint alleges that Defendant holds a junior security interest in the same collateral against A&N Food, which Plaintiff seeks to peacefully repossess and/or auction (Compl. ¶ 14).

On March 13, 2020, Defendant filed a verified answer with eight affirmative defenses, two counterclaims, and two crossclaims against A&N Food and Medina for breach of contract and an order of seizure.

In its crossclaims, Defendant alleges that on or around February 1, 2018, A&N Food executed a promissory note, pursuant to which it agreed to pay back to Defendant the amounts loaned and advanced by Defendant (Answer, ¶ 14). Defendant alleges that A&N Food also entered into a security agreement with Defendant pursuant to which A&N Food agreed to purchase and obtain grocery supplies from Defendant on credit (Answer, ¶ 15). Defendant alleges that the monetary obligations owed by A&N Food to Defendant were secured by granting Defendant a security interest in the collateral located at the store operated by A&N Food (Compl. ¶ 16). Defendant alleges that the secured collateral is located at 250 Cypress Avenue, Bronx, NY 10454 (Answer, ¶ 23). Defendant alleges that Medina personally guaranteed the aforementioned obligations owed by A&N Food to Defendant (Answer, ¶ 17). Finally, Defendant alleges that A&N Food and Medina are in default of the promissory note, security agreement, and personal guaranty (Answer, ¶ 18). Defendant seeks a money judgment against A&N Food and Medina (Answer, ¶

19), and an order and judgment of seizure directing the secured collateral to be delivered to Defendant (Answer, ¶ 24).

On August 25, 2020, counsel for Plaintiff filed a notice indicating that N&A Produce had filed for bankruptcy under chapter 11 of the United States Bankruptcy Code on November 1, 2018.

On September 24, 2020, Defendant filed a motion for leave to file and serve a supplemental summons and amended verified answer with a crossclaim against A&N Food and Medina, and join Defendant's affiliated entities in this action with respect to the crossclaim. On October 6, 2021, the Court (McShan, J.) issued a decision and order adjourning the motion to December 20, 2021 for a control date and staying this action pursuant to bankruptcy stay until further order of the Court.

On March 9, 2022, Defendant filed the instant motion. The motion was marked fully submitted on March 30, 2022.

DISCUSSION:

Defendant's Motion to Lift the Bankruptcy Stay:

Defendant moves to lift the stay imposed by the filing of bankruptcy by N&A Produce as currently applied to the Pending Motion or the prosecution of its crossclaims against A&N Food and Medina. Defendant argues that neither the Pending Motion nor its proposed amended pleading and crossclaims assert any claims against N&A Produce and are unrelated to N&A Produce.

“It is well settled that the automatic stay provisions of the Federal bankruptcy laws . . . do not extend to nonbankrupt codefendants”, except in limited circumstances (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Oxford Venture Partners, LLC*, 13 AD3d 89, 89 [1st Dept 2004] [internal quotation marks omitted]; *Maynard v Fuller Co.*, 236 AD2d 300, 300 [1st Dept 1997]). “[A] bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against nonbankrupt defendants, which do not involve the bankrupt's property” (*Golden v Moscovitz*, 194 AD2d 385, 385 [1st Dept 1993]; *CenTrust Servs. v Guterman*, 160 AD2d 416, 418 [1st Dept 1990]).

“The unusual circumstances in which the bankruptcy court can stay cases against non-debtors are rare. They typically arise where there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. In other words, the automatic stay will apply to non-debtors only when a claim against the non-debtor will

have an immediate adverse economic consequence for the debtor's estate" (*Bankdirect Capital Finance v Insurance Co. of State of PA*, 120 AD3d 601, [2d Dept 2014]; *Empire Erectors and Elec. Co., Inc. v Unlimited Locations, LLC*, 102 AD3d 419, 419 [1st Dept 2013] ["The automatic stay normally applies to non-debtors only when a claim against a non-debtor will have 'an immediate adverse economic consequence for the debtor's estate'"]). Courts have also held that non-debtors may be protected by the automatic stay if it contributes to the debtor's efforts to achieve rehabilitation (*Teachers Ins. and Annuity Ass'n of America v Butler*, 803 F2d 61, 65 [2d Cir 1986]).

Here, Defendant has demonstrated that the stay imposed by the filing of bankruptcy by N&A Produce should be lifted as to the Pending Motion and the prosecution of its crossclaims against A&N Food and Medina. Defendant has demonstrated that neither the Pending Motion nor the proposed amended pleadings assert any claims against N&A Produce and are unrelated to N&A Produce. Furthermore, a review of the pleadings demonstrates that Defendant's claims against A&N Food and Medina relate to A&N Food's collateral located at 250 Cypress Avenue, Bronx, NY 10454, and do not involve N&A Produce's collateral located at 1345 Castle Hill Avenue, Bronx, NY 10462. The motion is unopposed.

Accordingly, Defendant's motion to lift the stay as to the Pending Motion and prosecution of its crossclaims is granted, on default and without opposition.

Defendant's Motion for Leave to File and Serve Amended Verified Answer with a Crossclaim:

Defendant moves for leave to file and serve its supplemental summons and amended verified answer with a crossclaim. Defendant argues that Plaintiff never served Defendant Neftali Medina with the summons and verified complaint. Defendant also seeks to join in this action Defendant's affiliated entities, Alpha I Marketing Corp., Consolidated Supermarket Supply, LLC, and Kool Temp Foods, LLC, which have liens and claims against A&N Food and Medina, arising out of the same transactions and occurrences.¹

CPLR § 3025(b) provides that:

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be

¹ The Court notes that the UCC Financing Statement and the Security Agreement indicate that Beta II Marketing Corp. also holds a security interest in A&N Food's property. However, Defendant has not moved to join this party to this action.

freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Applications to amend pleadings are within the sound discretion of the court. Courts are given considerable latitude in exercising their discretion, and absent abuse of discretion as a matter of law, such determination will not be disturbed on appeal (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Leave to amend should be granted in the absence of evidence of substantial prejudice or surprise or that the proposed amendments are palpably insufficient or patently devoid of merit (*JP Morgan Chase Bank, N.A. v Low Cost Bearings N.Y. Inc.*, 107 AD3d 643, 644 [1st Dept 2013]). The party seeking the amendment has the burden of showing that the proposed amendment is not palpably insufficient or patently devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]).

“Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side” (*Edenwald Contracting Co. Inc. v City of New York*, 60 NY2d 957, 959 [1983]). Absent prejudice, courts are free to permit amendment, even after trial. “Prejudice is more than the mere exposure of the [party] to greater liability. Rather, there must be some indication that the [party] has been hindered in the preparation of [the party’s] case or has been prevented from taking some measure in support of [its] position. The burden of establishing prejudice is on the party opposing the amendment” (*Kimso* at 411 [internal quotations omitted]).

Here, a review of the proposed amended verified answer and crossclaim demonstrates that Defendant amended its answer only to the extent of joining Defendants/Cross-Claimants Alpha I Marketing Corp., Consolidated Supermarket Supply, LLC, and Kool Temp Foods, LLC; dropping the second crossclaim against A&N Food and Medina for an order of seizure; and dropping the counterclaims against Plaintiff. Defendant has demonstrated that these changes will not prejudice A&N Food, Medina, or Plaintiff, as the amended answer drops all claims against them, except one. Moreover, Defendant has demonstrated that A&N Food and Medina already have notice of the claims against them, as they were previously served with the verified answer and crossclaims, which contain the same claims against them. Defendant has demonstrated the merits of its claims by submitting copies of the UCC Financing Statements, Promissory Note, and Security

Agreements (Plaintiff's Exhibit G – UCC Financing Statements, Exhibit H – Promissory Note, and Exhibit I – Security Agreements).

Defendant has also demonstrated that the joinder of Defendants Alpha I Marketing Corp., Consolidated Supermarket Supply, LLC, and Kool Temp Foods, LLC, is warranted pursuant to CPLR § 1002(b) [“Persons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common question of law or fact would arise”]. Since they are holders of liens against A&N Food and Medina, they are parties “against whom there is asserted any right to relief” as Plaintiff seeks to extinguish their UCC security interest against the collateral (*See* Compl. ¶ 14, ¶ 23) (*See generally, Stewart Tenants Corp. v Square Industries, Inc.*, 269 AD2d 246, 248 [1st Dept 2000] [“A proper party is one against whom plaintiff asserts any right to relief jointly, severally or in the alternative, arising out of the same set of transactions or occurrences”]). The motion is unopposed.

Accordingly, Defendant's motion to file and serve its supplemental summons and amended verified answer with crossclaim is granted, on default and without opposition.

SUMMARY:

Defendant's motion to lift the bankruptcy stay as applied to its motion for leave to file and serve a supplemental summons and amended verified answer with crossclaim or the prosecution of its crossclaim is granted, on default and without opposition.

Defendant's motion for leave to file and serve the supplemental summons and amended verified answer with crossclaim is granted, on default and without opposition.

It is hereby

ORDERED that the bankruptcy stay is lifted solely to allow Defendant to file and serve the supplemental summons and amended verified answer with crossclaim, attached as Exhibit C to its motion (mot. seq. #1), within sixty (60) days of the date of this Decision and Order, to allow any defendants to whom the crossclaim applies to interpose answers thereto; and to allow the parties to litigate the issues raised in Defendant's crossclaim and any answers interposed thereto; and it is further

ORDERED that the caption is amended to read as follows:

-----X
NEWBANK,

Plaintiff,

- against -

**A&N FOOD ENTERPRISES INC. DBA
PIONEER SUPERMARKET, BROOK'S AVE
FOOD ADVANTAGE CORP., N&A PRODUCE
& GROCERY CORP., YOKASTA D. MEDINA,
NAFTALI MEDINA, LOURDES ROJAS,
ASSOCIATED FOOD STORES, L.L.C. AKA
ASSOCIATED FOOD STORES, LLC,
ASSOCIATED SUPERMARKET GROUP LLC,
AFS CAPITAL LLC, DERLE FARMS INC,
SIGNAPAY OF NY LLC, INTERNAL
REVENUE SERVICE – UNITED STATES OF
AMERICA, KRASDALE FOODS, INC.,
ALPHA I MARKETING CORP.,
CONSOLIDATED SUPERMARKET SUPPLY
LLC, AND KOOL TEMP FOODS, LLC**

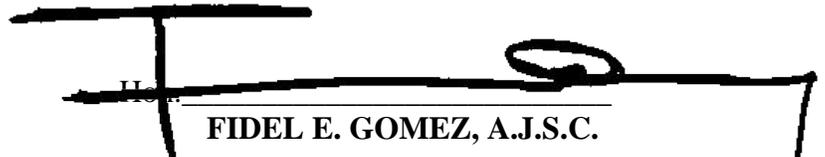
Defendants.

-----X
and it is further²

ORDERED that Defendant serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 4//22/22



FIDEL E. GOMEZ, A.J.S.C.

² The Court notes that there is a related action involving some of the same defendants and plaintiff in the Bronx County Supreme Court, entitled *Alpha I Marketing Corp., et al v Newbank*, Index No. 29715/2020E.