

Telcar Group, Ltd. v Telcar Certified Ltd.

2007 NY Slip Op 32798(U)

August 30, 2007

Supreme Court, Suffolk County

Docket Number: 0027352/2004

Judge: Emily Pines

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Short Form Order

Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

*Present:***HON. EMILY PINES**

Justice Supreme Court

Original Motion Date: 06-20-2007

Motion Submit Date: 07-11-2007

Motion Sequence No.: 002 MD

_____ X
 TELCAR GROUP, LTD, n/k/a MIGNONE
 HOLDINGS, LLC,

Plaintiff,

-against-

TELCAR CERTIFIED LTD and
 ANTHONY LEVEY,

Defendants .

_____ X
 TELCAR CERTIFIED LTD and
 ANTHONY LEVEY,

Third Party Plaintiffs,

-against-

ANGELO MIGNONE,

Third Party Defendant.

_____ X

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ORDERED, that the motion (motion sequence number 002) by Plaintiff/third party Defendant Telecar Group, Ltd., n/k/a Mignone Holdings, LLC and Angelo Mignone, for an Order staying the matter pending the outcome of a bankruptcy petition, is denied; and it is further

ORDERED, that a compliance conference is scheduled for September 19, 2007 at 9:30 a.m. before the undersigned.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff commenced the instant action for conversion of receivables and declaratory judgment arising out of an Asset Purchase Agreement, by filing of a Summons and Complaint on or about January 18, 2005. Defendants thereafter answered, counterclaimed and commenced a third party action against ANGELO MIGNONE, principal of Plaintiff. By Order (PINES, J.) dated February 6th, 2007, Defendants/third-party Plaintiffs were granted permission

to serve an amended Third Party Complaint alleging additional causes of action against MIGNONE for breach of contract which occurred after the commencement of the within action. The Amended Third Party Complaint was served on or about February 9, 2007 and an Amended Verified Answer to the Amended Third Party Complaint was served on or about February 21, 2007.

The submissions reflect that in October of 2003, plaintiff Telcar Group Ltd. ("Telcar Group") sold its assets to non-party Telcar Group LLC¹ for an amount in excess of \$5,000,000. Third-Party Defendant Angelo Mignone was a principal in both corporations. To finance the asset purchase, Telcar Group LLC established a credit line with Commerce Bank and withdrew approximately \$1,500,000. In or about May, 2004, Telcar Group LLC defaulted on its payments to Commerce Bank, and Commerce commenced an action against Telcar Group LLC to foreclose the assets in which it held a security interest. Among those assets, were purportedly the disputed receivables. Telcar Group LLC ultimately surrendered its assets to Commerce Bank in the context of the foreclosure action and Commerce in turn sold the assets to Defendant/Third-Party Plaintiff Telcar Certified, Ltd. ("Telcar Certified"). Telecar Certified purchased the assets of Telcar Group LLC for \$700,000 pursuant to an Asset Purchase Agreement dated June 30, 2004. The Asset Purchase Agreement listed the "borrower" as "Telcar Group, LLC, formerly known as Telcar Holdings, LLC." The Asset Purchase Agreement was signed by Defendant/Third-Party Plaintiff Anthony Levey, as president of Telecar Certified and Third-Party Defendant Angelo Mignone, as Chief Executive Officer of Telcar Group, LLC., formerly known as Telcar Holdings, LLC. In conjunction with the Asset Purchase Agreement, Commerce executed a general release in favor of Telcar Group LLC, formerly known as Telcar Holdings, Angelo Mignone and Ken Bogart, releasing them from all actions, suits, debts, etc., arising from the October 20, 2003 credit line.

By letter agreement dated July 1, 2004, Levey and Mignone agreed to each perform certain tasks in conjunction with the Asset Purchase Agreement, and specifically, Mignone agreed to cooperate with Levey regarding the deposit of receivables and providing information as to existing contracts, receivables and business of Telcar Group LLC, f/k/a Telcar Holdings. In or about July 2004, Telecar Group LLC filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Eastern District of New York. Plaintiff Telcar Group, LTD., n/k/a Mignone Holdings LTD., thereafter commenced the instant action seeking a judgment declaring that certain receivables were never transferred to Telecar Group LLC, were not subject to Commerce Bank's security interest, were not sold to Telecar Certified but belong to Plaintiff. Defendant Telcar Certified counterclaimed, alleged that Mignone fraudulently induced Telcar Certified to enter into the Asset Purchase Agreement and thereby purchase assets from Commerce that were worth less than represented and that Mignone breached the letter agreement requiring him to cooperate. The Court notes that, in the Complaint, Plaintiff, Telcar Group LTD., specifically alleges that the disputed receivables were *excluded* from the transfer to Telcar Group LLC in October of 2003, and thus not acquired by Defendant Telcar Certified in the asset purchase from Commerce Bank.

As set forth above, Telcar Group LLC filed a Chapter 7 petition seeking a voluntary bankruptcy discharge. In the context of that proceeding, the bankruptcy trustee has asserted potential causes of action against Mignone for breach of fiduciary duty, common law fraud, breach of contract and capital contribution. It appears from the limited submissions from the bankruptcy proceeding, that the trustee attempted to negotiate a settlement of his claims with Mignone and submitted a proposed settlement agreement for approval by the Bankruptcy Court. Levey, and others, submitted opposition to the proposed agreement, and by Decision and Order dated February 13, 2007 (CYGANOWSKI, J.), the trustee's motion for approval was denied.

¹The Court notes that both sides herein refer to this entity as "Telcar Holdings", although the submission reflect that the bankrupt and the borrower in the Commerce transaction is listed as "Telcar Group LLC".

MOTION FOR A STAY

Plaintiff and Third Party Defendant (Telcar Group LTD and Mignone) now seek a stay of this action pursuant to **Bankruptcy Law §362**. Specifically, they argue that the allegations of the counterclaims asserted against Mignone refer to conduct that he undertook in his capacity as a principal of the debtor, Telcar Group LLC. Again, as set forth above, the Defendants/Third Party Plaintiffs, in their counterclaims and Third Party complaint, allege that Mignone, on behalf of the debtor, Telcar Group LLC, made certain misrepresentations to induce Levey and Telcar Certified to enter into the asset purchase agreement with Commerce. Therefore, Plaintiff and Third Party Defendant argue that since the allegations revolve around actions of Mignone in his capacity as representative of the debtor, that this matter should be stayed pending the outcome of the bankruptcy proceeding.

Plaintiff and Third Party Defendant also argue that since the fifth cause of action and counterclaim against Mignone seeks recovery based on Mignone's alleged conduct with the bankruptcy trustee, that the Bankruptcy Court would be the proper forum to hear such claims. Specifically, they allege that since that cause of action/counterclaim alleges that Mignone breached the cooperation clause contained within the July 1, 2004 letter agreement by providing false information to the trustee and entering into illegal settlements with the trustee, that such claims are violative of the Bankruptcy stay.

Finally, Plaintiff and Third Party Defendant allege that the claims alleged in the Defendant/Third Party Plaintiff's counterclaims and amended verified complaint are duplicative of those of the bankruptcy trustee for breach of fiduciary duty, fraud, breach of contract and capital contribution. Therefore, they argue that the prosecution of these claims by the trustee would be based upon the same set of facts and should be determined in the Bankruptcy Court.

Defendant/Third Party Plaintiffs oppose the motion for a stay. They argue, that since Plaintiff's complaint alleges that the disputed receivables were not transferred to Telcar Group LLC in the October 2003 asset transfer, then such receivables are not property of Telcar Group LLC, the bankrupt and thus the stay is inapplicable. Defendant/Third Party Plaintiffs point to the plain language of **Bankruptcy Code §362**, which provides for a stay of proceedings "against a debtor", and argue that since the counterclaims and third party complaint were not interposed against Telcar Group LLC, the debtor, that the stay is inapplicable. Specifically, they argue, that the Levey counterclaims arose from his purchase from Commerce of the foreclosed assets of Telcar Group LLC; that the foreclosed assets were thus the property of Commerce, not the debtor, and thus are not part of the bankrupt estate. Thus, they assert, that since both Plaintiff's claims and the counterclaims arise from assets which are not alleged to be property of the debtor, Telcar Group LLC, the stay does not apply and the motion must be denied.

Regarding the Plaintiff and Third Party Defendant's claim that a stay must be imposed because the allegations against Mignone center on his representation of the debtor Corporation, Defendant/Third Party Plaintiff argues that Mignone is not the debtor and again, therefore, the stay does not apply. Additionally, even assuming that Mignone was acting in a representative capacity, they argue that he could be personally liable for fraud to Levey. On the issue of duplicative relief by the bankruptcy trustee, Defendants/Third Party Plaintiffs argue that the potential claims by the trustee against Mignone arise out of separate transactions than Levey's claims against Mignone. Specifically, they argue that the trustee's potential claims for breach of fiduciary duty, common law fraud, breach of contract and capital contribution stem from Mignone's conduct in connection with certain transactions of the debtor corporation, including the October 2003 asset transfer from Telcar Group LTD to the debtor and dissipation of the debtor's assets for his personal benefit. These claims are contrasted with the counterclaims by Levey against Mignone, based upon the alleged fraud by Mignone with respect to the Commerce foreclosed assets, which are not the property of the bankrupt estate. Thus, they argue, there is no duplication of claims, and the motion for a stay must be denied.

BANKRUPTCY CODE §362

11 U.S.C. §362(a) provides that the filing of a voluntary petition for bankruptcy operates as an automatic stay applicable to “the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor* ... that arose before the commencement of the case under this title.” *Lukas, Nace, Gutierrez & Sach, Chartered v. Havens*, 245 B.R. 180 (Dist. Ct. D.C. 2000)(emphasis in original). Moreover, “it is universally acknowledged that an automatic stay of proceedings accorded by §362 may not be invoked by entities such as sureties, guarantors, co-obligors or others with a similar legal or factual nexus to the debtor defendant.” *Id.*, quoting, *Collier on Bankruptcy*, ¶362.03[3][d]. “The stay of litigation does not protect non-debtor parties who may be subjected to litigation for transactions or events involving the debtor.” *Collier on Bankruptcy*, ¶362.03[3][d]. Moreover, 11 U.S.C. §362(a)(3), stays all actions that seek to obtain possession of property of the bankrupt estate.

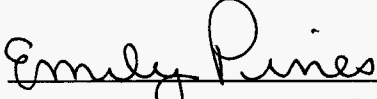
In the case *sub judice*, the debtor, Telcar Group LLC is not a party to this action. Moreover, Plaintiff’s complaint specifically alleges that the disputed receivables were not transferred to the debtor Telcar Group LLC, as part of the asset transfer in October of 2003. Thus, by their very complaint, they admit that the disputed receivables are not part of the bankrupt estate. Although some of the transactions referred to may have involved the debtor corporation, the gravamen of their allegations are that Plaintiff never transferred the disputed receivables to the debtor, thus they were never subject to the Commerce foreclosure and hence not included in the Asset Purchase Agreement with Telcar Certified. Based upon the foregoing, the Court finds that the automatic stay provision of 11 U.S.C. §362(a) does not apply.

The Court also rejects Plaintiff and Third Party Defendant’s argument that the causes of action of the Third Party Complaint and counterclaims against Mignone must be stayed as potentially duplicative of the claims by the bankruptcy trustee. It is clear from the submissions that the Levey counterclaims and third party complaint assert causes of action against Mignone for fraud arising out of the Asset Purchase Agreement with Commerce Bank. Specifically, that Mignone acted in his individual capacity to perpetuate a fraud against Levey to induce him to enter into the Asset Purchase Agreement. Moreover, even if Mignone acted in a representative capacity, he may be personally liable for the fraud allegedly perpetrated against Levey. *See, First Bank v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 690 N.Y.S.2d 17 (1st Dept. 1999); *People v. Concert Connection, Ltd.*, 211 A.D.2d 310, 629 N.Y.S.2d 254 (2d Dept. 1995). *See also, Rothstein v. Equity Ventures, LLC.*, 299 A.D.2d 472, 750 N.Y.S.2d 625 (2d Dept. 2002)(members of limited liability companies, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business).

CONCLUSION

Based upon the foregoing, the motion by the Plaintiff and Third Party Defendant to stay the within proceeding pursuant to 11 U.S.C. §362(a) is denied in its entirety. Counsel are reminded that a compliance conference is scheduled for September 19, 2007 at 9:30 a.m. before the undersigned.

Dated: August 30, 2007
Riverhead, New York



EMILY PINES
J. S. C.