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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ALLEN LIPP,

Plaintiff,

-against-

ROBERT ZIGMAN a/k/a ROBERT ARONSON a/k/a ROBERT ARENSON, AUTO BODY CORP., EPA AUTO SALES, INC. and COLLISION DEPOT, INC.,

Defendants.

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TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 011435-05

Motion Seq. No: 4
Submission Date: 4/25/11

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition and Exhibit.....x
Reply Affirmation in Further Support and Exhibit.....x

This matter is before the Court for decision on the motion filed by Plaintiff Allen Lipp on January 5, 2011 and submitted on April 25, 2011. For the reasons set forth below, the Court grants Plaintiff's motion, directs that the instant action shall proceed against the Corporate Defendants and further directs Special Referee Thomas V. Dana to schedule the continued Inquest before him on a date that is mutually convenient for the Special Referee and counsel for the parties, but not later than July 15, 2011.

BACKGROUND

A. Relief Sought

Petitioner/Plaintiff Allen Lipp ("Lipp") seeks an Order 1) pursuant to CPLR § 603,

severing the claims asserted as against Defendant Robert Zigman a/k/a/ Robert Aronson a/k/a Robert Arenson from the balance of the action until the bankruptcy stay is lifted; and 2) allowing the inquest ("Inquest") ordered by the Court pursuant to its decision dated June 8, 2010 ("2010 Decision") (Ex. C to Levin Aff. in Supp.) to be completed.

Defendants/Respondents Robert Zigman a/k/a Robert Aronson a/k/a Robert Arenson ("Zigman"), Auto Body Corp. ("Auto Body"), EPA Auto Sales Inc. ("EPA") and Collision Depot, Inc. ("Collision") oppose Lipp's motion. EPA and Collision are referred to collectively as the "Corporate Defendants."

B. The Parties' History

1. Prior Decision

The parties' history, which is outlined in detail in a prior decision of the Court dated November 6, 2009 ("2009 Decision") and incorporated by reference in the 2010 Decision, is as follows:

Lipp and Zigman are equal owners of the outstanding shares of Collision, an auto body business located at the Premises. Lipp alleges that Zigman has improperly diverted Collision's assets, in part through Zigman's operation of Auto Body and EPA, whose offices are also located at the Premises. In his Verified Answer to Petition, Zigman denied or disputed many of Lipp's allegations. Zigman asserted a counterclaim in which he alleged, *inter alia*, that 1) Lipp failed to pay his share of Collision's debts and expenses; 2) Lipp failed to contribute capital, work, labor or services to Collision, in violation of the parties' agreement; 3) Zigman never deprived Lipp of his personal property at the Premises; rather, Zigman asked Lipp to remove that property, which Lipp failed to do; and 4) Zigman made a loan to Collision, for which Lipp has failed to contribute his share.

In the 2010 Decision, the Court granted Plaintiff's motion, pursuant to CPLR § 3126, to the extent that the Court directed that 1) Defendants' answer was stricken; 2) all affirmative defenses and counterclaims were dismissed; 3) Plaintiff was granted a judgment as to liability only as to the causes of action in its complaint; and 4) the issue of damages was referred to Special Referee Thomas V. Dana to hear and determine at an Inquest.

Counsel for Plaintiff ("Plaintiff's Counsel") affirms that, pursuant to the 2010 Decision, he and counsel for Defendants ("Defendants' Counsel") scheduled the Inquest for

November 10, 2010 and further scheduled an attorney-only conference on October 20, 2010, at which the parties would determine which documents and other evidence would be entered into evidence at the Inquest by stipulation. Defendants' Counsel acknowledged the Special Referee's request that each party submit to him, at least one week before the Inquest, its own brief description of the issues that would be addressed at the Inquest on damages.

On October 19, 2010, Plaintiff's Counsel contacted Defendants' Counsel to confirm the attorney-only conference on October 20, 2010 and subsequently received a letter from Defendants' Counsel cancelling that conference. By facsimile and regular mail dated November 5, 2010, Plaintiff's Counsel provided Defendants' Counsel with a stipulated document list ("Correspondence") delineating the documents and testimony to be submitted at the Inquest (Ex. E to Levin Aff. in Supp.). Defendants' Counsel never responded to the Correspondence and did not appear at the Inquest on November 10, 2010.

At the Inquest on November 10, 2010, certain evidence and testimony were submitted. Due to Defendants' failure to appear and/or properly stipulate, however, the Inquest was continued to December 21, 2010 to allow Plaintiff to obtain certain certified documents and testimony.

By letter dated November 22, 2010 (Ex. F to Levin Aff. in Supp.), Defendants' Counsel advised the Special Referee and Plaintiff's counsel that 1) Zigman filed a petition ("Bankruptcy Petition") on November 22, 2010 in the United States District Court, Eastern District of Court seeking bankruptcy protection pursuant to Chapter 7 of the Bankruptcy Code; and 2) Plaintiff was listed as a creditor on the Bankruptcy Petition. Defendants' Counsel also stated in the letter that, "As you are aware, this stays all further proceedings in this matter. I will notify [the Court] of the filing, before the December 21, 2010 court date." Plaintiff disputes Defendants' assertion that this action should be stayed as to the Corporate Defendants.

In opposition, Defendants' Counsel submits that the Court should deny Plaintiff's motion to sever because the claims against the non-bankrupt Corporate Defendants may include property of Zigman, the Defendant seeking bankruptcy protection. In the lease agreement executed by the parties in 1998, Plaintiff and Zigman were given the opportunity to purchase the building ("Building") of Collision's headquarters (*see* Rider to Lease Agreement, Ex. A to Casolaro Aff. in Opp.). Plaintiff waived that right of refusal, but Lipp exercised his right. The

Trustee in the Bankruptcy matter ("Trustee") has requested all personal and corporate documents regarding Zigman's financial dealings. Defendants argue that this request supports their assertion that "the claims may overlap and be inextricably linked" (Casolaro Aff. in Opp. at ¶ 9). Defendants also suggest that the Trustee requested these documents to determine the extent to which Zigman's debts should be discharged, and argue that the Trustee may include the Defendant Corporations, or their assets, as property that may be used to satisfy Zigman's creditors.

Defendants' Counsel also affirms that Zigman's current debt far exceeds his income, and the liens and mortgages on his assets exceed the value of those assets. He avers, further, that the Corporate Defendants have few if any assets. Defendants argue that it is the Trustee, not the Court, who should determine the viability of the Corporate Defendants.

In reply, Plaintiff's Counsel affirms that, contrary to the suggestion of Defendants, the Trustee has taken no position with respect to this motion. Moreover, the fact that Zigman's debt exceeds his income does not support the requested severance. Plaintiff has a 50% ownership interest in the Defendant Corporations, which he is entitled to protect. The fact that any judgment that Plaintiff obtains may remain unsatisfied does not compel the severance that Defendants request. Plaintiff's Counsel notes, further, that Plaintiff has suffered prejudice as a result of Defendants' delays in this matter, and argues that further delays will cause additional prejudice to Plaintiff.

C. The Parties' Positions

Plaintiff concedes that this action is stayed as against Defendant Zigman in light of the Bankruptcy Petition, but submits that the claims against Zigman should be severed and that this action can and should proceed against the corporate Defendants. Plaintiff submits that it will be prejudiced if this action is stayed in its entirety, as Plaintiff will be unable to secure at least a portion of the relief granted to Plaintiff in the 2010 Decision.

Defendants oppose Plaintiff's motion, submitting that severance is inappropriate in light of the overlap between the issues in the Instant Action and the Bankruptcy. Defendants contend, further, that severance will unduly prejudice Zigman, who has sought bankruptcy protection, and that the Bankruptcy matter is the appropriate forum in which Plaintiff should pursue its claim against Defendants.

In reply, Plaintiff argues that Defendants have failed to cite a statute, or case law, supporting their position that severance is inappropriate. Plaintiff also contends that it will be prejudiced by further delay.

RULING OF THE COURT

It is well settled that the automatic stay under Section 362(a) of the United States Bankruptcy Code ordinarily applies only to the debtor and not to co-defendants. *Matthews v. Castro*, 35 A.D.3d 403 (2d Dept. 2006), quoting *Trustees of the Sickness & Acc. Fund of Local One-L v. Klein*, 2005 U.S. Dist. LEXIS 1527 (S.D.N.Y. 2005). Indeed, that principle was recognized in *CenTrust Services, Inc. v. Guterman et al.*, 160 A.D.2d 416 (1st Dept. 1990), which is the first case cited by Defendants in its counsel's affirmation. (Casolaro Aff. in Opp. at ¶ 7). In *CenTrust*, the defendant partnership moved for bankruptcy protection, and the trial court granted plaintiff's motion to sever and stay the causes of action concerning the partnership's property. *Id.* at 418. The plaintiff then moved for, *inter alia*, a default judgment against the defendant corporation, based on its failure to answer the complaint, on the causes of action in the complaint that did not involve the partnership property. The trial court denied plaintiff's motion on the basis that there was an automatic stay, pursuant to 11 U.S.C. § 362, of the entire action. *Id.* The First Department reversed, and vacated the stay so as to permit the plaintiff to proceed against the nonbankrupt defendants with the causes of action not involving the partnership property. *Id.* In so holding, the First Department noted that "[a]ppellate courts in this State have repeatedly held that 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 [citations omitted]." *Id.* Based on their conclusion that the causes of action on which plaintiff moved for judgment did not involve the bankrupt's property, the First Department determined that the trial court had erred in staying the entire action. *Id.*

In light of this general principle that a bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against nonbankrupt defendants, and Defendants' failure to establish, beyond any conclusory statements, that the severed action would involve the bankrupt's property, the Court grants Plaintiff's motion and directs that the instant action shall proceed against the Corporate Defendants. The Court further directs Special Referee Thomas V. Dana to schedule the continued Inquest before him on a date that is mutually convenient for the Special Referee and counsel for the parties, but not later than July 15, 2011.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 6, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.