IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
(Martinsburg)

In re

PANTHERA ENTERPRISES, LLC,

Debtor.

BK No. 2:19-bk-00787
Chapter 11

MOTION OF DARRICK AND EMILY GUST FOR RELIEF FROM AUTOMATIC STAY TO PURSUE INSURANCE WITH COMBINED REQUEST FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM

Darrick and Emily Gust ("Movants") hereby request that this Honorable Court grant the within *Motion Of Darrick And Emily Gust For Relief From Automatic Stay To Pursue Insurance With Combined Request For Allowance Of Administrative Expense Claim* (the "Motion"), pursuant to 11 U.S.C. (the "Bankruptcy Code") §§ 362 and 503(b)(1) and applicable authority. In support of this Motion, Movants state as follows:

Introduction

Darrick Gust was severely injured when he lost his hand during a post-petition explosion that occurred on real estate that the Debtor, Panthera Enterprises, LLC ("Debtor" or "Enterprises") leases to non-debtor Panthera Training, LLC as part of the Debtor's post-petition operations. Movants are informed and believe that there are one or more insurance policies, owned both by the Debtor and also owned by Mr. Gust's employer, Panthera Training, LLC, covering Movants' claims against Debtor.[1] Movants seek relief as follows: First, Movants seek allowance of a contingent, unliquidated administrative expense claim against the Debtor for a post-petition injury; Second, Movants seek relief from the automatic stay under 11 U.S.C. §362 for cause file a civil

[1] Movants understand Panthera Training, LLC has obligations to indemnify the Debtor and to obtain third-party insurance covering the Debtor.

action in state court to fix their claims against the Debtor and to further seek recovery from applicable insurance coverage. Third, and only in the event insurance covering Movants' claims against the Debtor (along with other non-debtor sources of recovery) is insufficient to satisfy any judgment granted in Movants' favor, Movants would seek to return to this Court to fix their administrative expense claim and seek payment of the same from the Debtor's estate.

Jurisdiction, Venue, and Statutory Predicates for Relief

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334.

2. Venue is proper in this District pursuant to §§ 1408 and 1409(a) of the Bankruptcy Code.

3. This underlying Motion is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B).[2]

4. The statutory predicates for relief herein include §§ 362, 503(b)(1) and 105(a) of the Bankruptcy Code.

Factual Background

5. The Debtor filed its voluntary petition for protection under Chapter 11 of the United States Bankruptcy Code on September 13, 2019 ("Petition Date"), initiating this bankruptcy case.

6. The Debtor is operating its business and managing its properties as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

7. On September 29, 2019, Darrick Gust was severely injured when a flash bang grenade exploded during a training exercise. At the time, Darrick Gust was employed by non-

[2] The substantive tort claims are not a core proceeding and may not be heard by the Bankruptcy Court. Movants do not submit to this Court's equitable jurisdiction with respect to the underlying claims and do not waive the right to a jury trial.

debtor, Panthera Training, LLC, and the training exercises were conducted on real estate leased by the Debtor to Panthera Training, LLC on a post-petition basis.

8. Darrick Gust has claims for personal injury arising from the post-petition explosion on the Debtor's premises. Emily Gust has related claims, including but not limited to, loss of consortium arising from Darrick Gust's injuries.

9. Movants are informed and believe that there are one or more insurance policies, owned by the Debtors, and also owned by non-debtor Panthera Training, LLC, covering Movants' claims against the Debtor.

Relief Requested

Relief from the Automatic Stay

10. Cause for relief from the automatic stay exists because the Debtor has no interest in any property at risk that is necessary for an effective reorganization.[3] 11 U.S.C. §362(d)(2). *See also State Bank v. Miller* (In re Miller), 513 Fed. Appx. 566, 575, 2013 U.S. App. LEXIS 2582, *24, 2013 FED App. 0134N (6th Cir.) ("The bankruptcy court may grant relief from the automatic stay "for cause," which includes inadequate protection of the Bank's interest in collateral, or when the debtor has no equity in the property and the property is unnecessary to reorganization").

11. Stay relief is mandatory where the Debtor has no equity in the property sought (i.e. insurance proceeds). *Elliott v. Hardison*, 25 B.R. 305, 308 (E.D. Va. 1982). In *Elliott*, the movant, a personal injury claimant, sought stay relief to seek recovery from an insurance policy insuring the Debtor. The Court discussed the legislative history behind the provisions of 11 U.S.C. §362:

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[3] Because Movants presently seek only a contingent, unliquidated administrative expense claim and seek recovery from available insurance and non-debtor sources, there is no present risk to property of the estate.

> The legislative history to § 362 is abundantly clear on the point that Congress intended the bankruptcy courts to be required to lift the stay in appropriate circumstances. The Senate report states: Subsection (d) requires the court, upon motion of a party in interest, to grant relief from the stay for cause, such as by terminating, annulling, modifying, or conditioning the stay. The lack of adequate protection of an interest in property is one cause for relief, but is not the only cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. Generally, proceedings in which the debtor is a fiduciary or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is protection of the debtor and his estate from his creditors.
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> Upon the court's finding that the debtor has no equity in the property subject to the stay and that the property is not necessary to an effective reorganization of the debtor, the subsection requires the court grant relief from the stay . . . .S.Rep. No. 989, 95th Cong., 2d Sess. 50 (1978), reprinted in [1978] U.S.Code Cong. & Ad.News 5787, 5838 (emphasis added). *Matter of Holtkamp, supra*, at 508.

Elliott v. Hardison, 25 B.R. 305, 308 (E.D. Va. 1982). This Court continued: "Not to allow Mr. Elliott to proceed with his personal injury claim effectively would preclude him from any possibility of recovering for his alleged injuries, and might allow the insurance company to escape a risk which it has accepted . . . ." *Id*. at 310.

12. Movants have been provided with insurance certificates for multiple insurance policies that may cover all of Movants' claims. The Debtor has no equity in any of the insurance proceeds as they are not property of the estate and they cannot be necessary for an effective reorganization. Accordingly, cause exists to grant relief from the automatic stay to allow Movants to initiate a civil action in state court to fix and liquidate their claims against the Debtor (and any applicable non-Debtor).

Administrative Expense Claim

13. Movants are entitled to the allowance of an administrative expense claim pursuant to §503(b)(1)(A) of the Bankruptcy Code, as well as pursuant to the doctrine set forth in *Reading*

Co. v. Brown, 391 U.S. 471 (1968) holding that tort liabilities are ordinarily incident to the operation of the business of the estate and, therefore, are allowable as actual and necessary costs. *See Reading Co. v. Brown*, 391 U.S. 471, 485, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968)).

14. Section 503(b) of the Bankruptcy Code provides, in relevant part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
> (1)(A) the actual, necessary costs and expenses of preserving the estate…

15. Courts have recognized a narrowly tailored exception to the traditional test for allowing an administrative expense by acknowledging that, under certain circumstances, a claim may qualify as an administrative expense if it: (1) arises out of a post-petition transaction with the debtor-in-possession or trustee; *and* (2) results in distinct, actual, post-petition harm to the claimant. This line of cases stems from the Supreme Court's opinion in Reading, *supra*. In *Reading*, a receiver's negligence in operating the debtor's business resulted in a fire which not only consumed the debtor's property, but destroyed real and personal property of neighboring third parties. The Supreme Court held:

> At the moment when an arrangement is sought, the debtor is insolvent. Its existing creditors hope that by partial or complete postponement of their claims they will, through successful rehabilitation, eventually recover from the debtor either in full or in larger proportion than they would in immediate bankruptcy. Hence the present petitioner did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law.

Reading, 391 U.S. at 478. The *Reading* Court, based on considerations of "fundamental fairness," ruled "that damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter XI arrangement." *Id*. at 485. *See also In re Resource Technology Corp*., 662 F.3d 472, 476 (7th Cir. 2011)(citations omitted).

> A tort victim . . . is a creditor, but not a creditor whose actions benefit his debtor, the tortfeasor. Yet in *Reading v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968), the Supreme Court held that at least in a Chapter 11 bankruptcy, tort claims arising from the continued operation of the bankrupt business should be treated as administrative claims, like other post-petition expenses. . . . Tort liability is an expense of doing business, like labor or material costs, and should be treated the same way. Businesses operating in bankruptcy that were excused from tort liability would have an inefficient competitive advantage over their solvent competitors—and deficient incentives to use due care in the operation of the business.

Id. Movants assert that their claims fall within the *Reading* doctrine because the Movants' claims arose as a result of a debtor-in-possession operating its business post-petition as a lessor of the premises where the injury occurred.

16. By this Motion, Movants request the allowance of a contingent/unliquidated administrative expense claim.[4] Movants further seek the ability to liquidate their post-petition administrative expense claim in state court in West Virginia as part of the effort to seek recovery of insurance proceeds.[5] Movants agree to first seek recovery from the following combined sources available for payment of Movants' claims: (i) insurance covering claims against the Debtor, (ii) insurance covering claims against any non-debtor, and (iii) any direct recovery against any non-debtor. Only in the event all sources listed above are insufficient to satisfy any judgment in Movants' favor, will Movants seek to fix and obtain payment of an administrative expense claim.

WHEREFORE, Movants respectfully requests that the Court enter an Order, in the form attached hereto: (i) granting relief from the automatic stay under 11 U.S.C. §362 for cause to permit Movants to proceed against the Debtor up to the limits of any insurance policies insuring the

[4] Allowance of the claim would protect Movants against an administrative expense bar date that could run during the pendency of the Debtor's bankruptcy. Alternative, the Court could estimate or fix the claim based upon the amount of any deductible or self-insured retention that may be applicable under one of the applicable insurance policies.

[5] Movants anticipate that defense costs will be borne by the applicable insurer(s), posing no cost or risk to the Debtor's estate in the fixing of Movants' administrative expense claim.

Debtor and covering Movants' claims; (ii) allowing Movants a contingent, unliquidated administrative expense claim pursuant to 11 U.S.C. § 503(b) (with the ability to later seek payment of the same if there is a deficiency in other sources of recovery); and (iii) granting such other and further relief as the Court deems just and proper.

Dated: May 28, 2020

Respectfully submitted,

DARRICK AND EMILY GUST

By Counsel:

/s/ Spencer D. Elliott
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CERTIFICATE OF SERVICE

I, Spencer D. Elliott, counsel for Movants, hereby certify that a true and correct copy of the **MOTION OF DARRICK AND EMILY GUST FOR RELIEF FROM AUTOMATIC STAY TO PURSUE INSURANCE WITH COMBINED REQUEST FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM** has been served upon all parties designated to receive service via the CM/ECF Electronic Notification System on May 28, 2020.

/s/ Spencer D. Elliott (WVSB 8064)