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EASTERN DISTRICT OF CALIFORNIA

MODESTO DIVISION

In re)	
)	Case No. 99-92684-A-7
)	
E.D. WILKINS GRAIN COMPANY,)	
)	
)	
Debtor.)	
)	
)	

Dennis M. Hauser, Esq., Woodbridge, California, appearing for
Bank of Stockton.

Charles L. Hastings, Esq., Stockton, California, appearing for
E.D. Wilkins Grain Company.

MEMORANDUM DECISION

On June 15, 1999, three unsecured creditors filed an involuntary chapter 7 petition against E.D. Wilkins Grain Company, a corporation (Wilkins). Wilkins is contesting the involuntary petition. It filed a timely answer denying that it is not paying its undisputed debts as they come due and requesting that the petition be dismissed.

On June 25, 1999, secured creditor Bank of Stockton filed a stipulation for "Complete Relief from the Automatic Stay." Wilkins executed the stipulation. The court is requested to enter an order approving this stipulation without notice to any other party in interest and without a hearing. The stipulation is accompanied by no evidence.

The Bank allegedly has a security interest in Wilkins' property, including "all present and future accounts . . . [and] drafts. . . ." The stipulation states that since March 16, 1998,

1 Wilkins has turned over "to the Bank possession of all checks
2 representing a payment on an outstanding invoice, the Bank
3 depositing the check in the Company's checking account maintained
4 at the Bank and then debiting the checking account to effect a
5 reduction to the balance of the Bank Loan." It is clear from the
6 stipulation that Wilkins and the Bank wish to continue this
7 arrangement and that they seek the permission of the court to do
8 so now and, if Wilkins is not paying its debts as they come due,
9 after entry of an order for relief under chapter 7.

10 An involuntary case is commenced against a corporation when
11 three or more entities holding unsecured, noncontingent, and
12 undisputed claims aggregating at least \$10,775.00 file a petition
13 alleging that the corporation is generally not paying its debts
14 as they mature. 11 U.S.C. § 303(b)(1) & (h)(1). While no order
15 for relief is entered upon the filing of an involuntary petition,
16 its filing creates an estate consisting of all of the involuntary
17 debtor's property. 11 U.S.C. §§ 303(h) & 541(a). Wilkins
18 accounts receivable, then, are part of a bankruptcy estate.

19 This estate is automatically protected by a stay against,
20 among other things, the enforcement of claims and liens. 11
21 U.S.C. § 362(a); but see In re Acelor, 169 B.R. 764, 765 (Bankr.
22 S.D. Fla. 1994). If a creditor wishes to enforce a claim or lien
23 against property of the estate, it must first obtain relief from
24 the automatic stay. 11 U.S.C. § 362(a) & (d). Thus, if Bank of
25 Stockton wishes to enforce its security interest against Wilkins'
26 assets, it must first obtain the appropriate relief from this
27 court. This is not in dispute. The issue is whether having
28

1 Wilkins stipulate to that relief will garner the necessary relief
2 from the court. It will not.

3 Consider how Bank of Stockton would be required to obtain
4 relief if Wilkins had filed a voluntary chapter 7 petition. That
5 petition would result in the entry of an order for relief and the
6 appointment of a chapter 7 trustee. 11 U.S.C. §§ 301 & 701. If
7 the chapter 7 trustee were so inclined, he or she could enter
8 into an agreement with Bank of Stockton to terminate or modify
9 the automatic stay. However, Fed.R.Bankr.P. 4001(d)(1) prohibits
10 the trustee from unilaterally binding the bankruptcy estate.
11 Important constituencies, such as any committee elected pursuant
12 to 11 U.S.C. § 705 and the United States Trustee, have the right
13 to appear and be heard on the proposed agreement regarding the
14 automatic stay. See Fed.R.Bankr.P. 2002(k), 5005, & 9034.

15 If, prior to entry of an order for relief, the court were to
16 permit an involuntary debtor to stipulate to relief from the
17 automatic stay, not only would these constituencies not receive
18 notice of the motion and the opportunity to oppose it, the
19 administration of the estate by any future trustee would be
20 effectively thwarted. There is nothing in the Code or the Rules
21 which gives such preemptive authority to an involuntary debtor.

22 Permitting an involuntary debtor the latitude to simply
23 stipulate away the automatic stay for a future trustee would also
24 frustrate the very purpose of arming creditors with the right to
25 file an involuntary petition. When a debtor is not paying its
26 debts as they come due, creditors may file an involuntary
27 petition to preserve the debtor's assets rather than run the risk

1 that the debtor will be financially dismembered by other
2 creditors or its assets dissipated through the debtor's
3 incompetence or dishonesty. Joseph Mullin, Comment, *Bridging the*
4 *Gap: Defining the Debtor's Status During the Involuntary Gap*
5 *Period*, 61 U. Chi. L. Rev. 1091 (1991).

6 During the period prior to entry of an order for relief,
7 commonly referred to as the gap period, the debtor may continue
8 to operate its business. See 11 U.S.C. § 303(f). This grant of
9 authority, however, does not invest the debtor with the powers of
10 a trustee. In re Roxy Roller Rink Joint Venture, 73 B.R. 521,
11 525-527 (Bankr. S.D. N.Y. 1987).

12 In Roxy Roller Rink, an involuntary chapter 11 petition had
13 been filed against the debtor. During the gap period, the debtor
14 borrowed money. The lender then sought an order pursuant to 11
15 U.S.C. § 364(c)(1) requiring that the loan be repaid with
16 priority over all claims of administration. The bankruptcy court
17 concluded that section 364(c) was only available to a trustee and
18 that the debtor was a trustee only if 11 U.S.C. § 1107(a) applied
19 during the gap period. Section 1107(a) provides that " . . . a
20 debtor in possession shall have all of the rights, other than the
21 right to compensation under section 330 of this title, and
22 powers, and shall perform all the functions and duties, except
23 the duties specified in sections 1106(a)(2), (3), and (4) of this
24 title, of a trustee serving in a case under this chapter." The
25 bankruptcy court went on to conclude:

26 The statutory scheme makes it evident that Code S
27 1107(a) does not apply to the debtor during the
28 involuntary gap period. Code § 303(f) allows the
involuntary gap debtor to operate as if no petition had

1 been filed, unless otherwise ordered by the court. The
2 freedom explicitly granted by Code § 303(f) to the
3 debtor is plainly inconsistent with the fiduciary
4 obligations imposed on a debtor by Code § 1107(a). It
5 is unreasonable to assume that the Code intended to
6 impose such fiduciary obligations on the unwilling
7 involuntary debtor before the order for relief. As the
8 involuntary gap Chapter 11 debtor cannot qualify as a
9 "trustee", it cannot take advantage of Code § 364(b) or
10 (c) to obtain superpriority for the claims of a lender.
11 It is a sensible statutory scheme to preclude the
12 debtor from taking advantage of the powers of the
13 Bankruptcy Code, such as the right to incur debt under
14 Code § 364 on a priming lien, superpriority basis or
15 the right to void liens, recover fraudulent conveyances
16 or set aside preferences under Code §§ 547 and 548,
17 while the debtor opposes the entry for an order for
18 relief and when no order for relief may ever be
19 entered. In re Roxy Roller Rink Joint Venture, 73 B.R.
20 at 527.

21 Not only is the involuntary gap debtor not a trustee or
22 vested with a trustee's powers, except to the extent specified in
23 11 U.S.C. §§ 303(f), 502(f), 507(a)(2), and 549(b), the debtor
24 does not have the authority to bind the bankruptcy estate during
25 the gap period. These sections permit the involuntary gap debtor
26 to conduct its business, use, sell, lease, and transfer property
27 of the estate, and incur claims that may be entitled to priority
28 treatment if an order for relief is entered. But they do not
29 permit the debtor to waive the protection afforded to property of
30 the estate by the automatic stay.

31 Some commentators have suggested that the bankruptcy court
32 in Roxy Roller Rink was incorrect when it concluded the
33 involuntary gap debtor was neither a trustee nor vested with the
34 powers of a trustee. See Paul M. Baisier and David G. Epstein,
35 *Postpetition Lending Under Section 364: Issues Regarding the Gap*
36 *Period and Financing for Prepackaged Plans*, 27 Wake Forest L.
37 Rev. 103, 120-121 (1992). These commentators argue: (1) 11

1 U.S.C. § 1107(a) gives a chapter 11 debtor in possession the
2 powers of a trustee, other than the right to compensation; (2) a
3 debtor is, by virtue of 11 U.S.C. § 1101(1), the debtor in
4 possession unless and until a trustee is appointed; (3) 11 U.S.C.
5 § 101(13) defines "debtor" without distinguishing between the gap
6 debtor and the debtor after entry of an order for relief; (4) 11
7 U.S.C. § 303(g) permits the appoint of a trustee prior to an
8 order for relief only in connection with an involuntary chapter 7
9 petition; therefore, (5) the involuntary gap debtor is a debtor
10 in possession and possesses the powers of a trustee.

11 While this court finds the contrary analysis in Roxy Roller
12 Rink more persuasive, there is no need to choose between the
13 reasoning of the commentators or that in Roxy Roller Rink.
14 Unlike Roxy Roller Rink where an involuntary chapter 11 petition
15 was filed, this case involves an involuntary chapter 7 petition.
16 There is no provision in chapter 7 for a debtor in possession nor
17 is there any provision comparable to section 1107(a) giving the
18 debtor the right to exercise the powers of a trustee.¹ 61 U.
19 Chi. L. Rev. at 1118. But see 11 U.S.C. § 522(h) & (i).

20 Therefore, if Bank of Stockton wants relief from the
21 automatic stay prior to entry of an order for relief, it must
22 deal with the fact that Wilkins is not a trustee and does not
23 have the power or authority to act for the bankruptcy estate by
24 agreeing to terminate the automatic stay.

26
27 ¹ The fact that the commentators' argument does not apply in the
chapter 7 context is itself a reason for discounting it in the chapter 11
context. See 61 U. Chi. L. Rev. at 1118.

1 Because there is no one who can agree on behalf of the
2 estate, relief from the automatic stay must be requested by an
3 appropriate motion pursuant to 11 U.S.C. § 362(d), Fed.R.Bankr.P.
4 4001(a), and Local Bankruptcy Rules 4001-1 and 9014-1. That
5 motion must be served on Wilkins and its attorney.² The court
6 will also require that the motion be served on the United States
7 Trustee, the petitioning creditors and their attorney, and any
8 other party in interest requesting special notice. In the
9 absence of a trustee and excluding the debtor, these persons are
10 the most likely to have the inclination and the incentive to
11 oppose the motion if opposition is in the best interests of the
12 estate. Also, if they believe the debtor's failure to oppose the
13 motion is indicative of a failure to preserve the estate, they
14 have the right to request the appointment of an interim trustee.
15 11 U.S.C. § 303(g). Such relief may be requested by counter-
16 motion. Local Bankruptcy Rule 9014-1(g).

17 The court will issue a separate order.

18 Dated:

19 By the Court

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21
22 Michael S. McManus
United States Bankruptcy Judge
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27 ² No committee has been appointed pursuant to 11 U.S.C. § 705.
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