UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

MARK ANTHONY STORY, Case No. 89-12196-K

Debtor. Chapter 7

ANDREA ARNOLD,

Movant,

VS.

MARK ANTHONY STORY,

Respondent.

MEMORANDUM RE "MOTION FOR RELIEF FROM AUTOMATIC STAY"

In this core proceeding[1] the movant, Andrea Arnold, seeks relief pursuant to 11 U.S.C. §362(d)(1) in order that she might continue to prosecute to conclusion a State court personal injury action against the respondent, Mark Anthony Story, the above-named debtor ("Debtor").

The relevant background facts are not in substantial dispute and may be briefly summarized as follows: Movant has sued the debtor in the Circuit Court for Benton County, Tennessee, being civil action #2947, arising out of asserted injuries sustained as a result of the debtor's alleged negligent operation of an automobile.

The mere filing of the debtor's chapter 7 no asset bankruptcy case on December 15, 1989, resulted in an automatic stay of certain actions against him. 11 U.S.C. §362(a). The automatic stay arises by

[1]28 U.S.C. §157(b)(1) and (2)(G).

operation of law and requires no judicial action.

As noted, movant seeks relief from the automatic stay under §362(d)(1) to allow her to prosecute the pending State court lawsuit to judgment. The instant motion states in relevant part here as follows:

> "6. That any verdict rendered in the civil action will be paid by the debtor's liability insurance carrier or by Plaintiff's uninsured motorists carrier and not by the debtor.
>
> "7. Plaintiff has and had in effect at the time of the accident a policy of insurance with limits of $20,000 each person or $40,000 each occurrence uninsured motorist coverage with Auto Owners Insurance Company and that they have been given proper notice of an uninsured motorist pursuant to T.C.A. §56-7-1206.
>
> "8. That under debtor's liability policy or Plaintiff's uninsured motorist's coverage, the insuror has a duty to defend debtor, as well as to pay any judgment, and therefore, such continuation of the State Court Action would cause no undue burden to debtor."

11 U.S.C. §727(b) specifies that the discharge granted under §727(a) discharges the debtor from all dischargeable[2] debts[3] that arose before the date of the order for relief.[4] By virtue of Bankr. Rule 4004(c) in a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge, the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, or (3) the debtor has filed a waiver under §727(a)(10) of the Bankruptcy Code.

With limited exception not applicable here, the chapter 7 debtor's discharge does not affect

---

[2]See 11 U.S.C. §523(c).

[3]By virtue of 11 U.S.C. §101(11) the word "debt" means liability on a "claim". The word "claim" is broadly defined in 11 U.S.C. §101(4) to mean any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

[4]Pursuant to 11 U.S.C. §301, the commencement of a voluntary case under chapter 7 constitutes an order for relief.

the liability of any other entity. Specifically, 11 U.S.C. §524(e) provides as follows:

> "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

In In re Lembke, 18 B.C.D. 911 (Bankr. Ct. N.D. 1988), Bankruptcy Judge William A. Hill stated at pp. 912-913 as follows:

> "What is important to keep in mind is that a discharge in bankruptcy does not extinguish the debt itself but merely releases the debtor from personal liability which, by virtue of section 524(a)(2) bars its enforcement against him. The debt still exists, however, and can be collected from any other entity that might be liable. It has been said, as regards the effect of section 524(e) on an insurance company's liability for the acts of its insured who obtains a discharge in bankruptcy, that the injunction does not affect a personal injury claimant's efforts to recover from the debtor's insurer so long as the insurer covers all defense costs and all potential liability. In re Holtkamp, 669 F.2d 505, 508-09 (7th Cir. 1982). The Kansas case of Johnson v. Bondurant, 359 P.2d 861 (Kansas 1961), involved facts similar to the case at bar. In that case the injured plaintiff brought a state action to recover injuries sustained as the result of the negligent operation of the debtor's truck being used on a construction project. While suit was pending, the debtor, who was covered by liability policy, filed for bankruptcy and obtained a discharge. The court interpreting former section 16 [sic] of the Bankruptcy Act, said:
>
> > `It seems only logical to conclude that section 16 [sic] of the Bankruptcy Act, above, which provides that liability of a person who is co-debtor with, or guarantor or in any manner a surety for a bankruptcy, shall not be altered by the bankupt's discharge, evidences a legislative intent to confine operation of the Act to a bankrupt's assets at the time of adjudication, and does not operate to release claims against parties liable with the bankupt, whether liquidated, as in the case of debts, or unliquidated, as in the case of claims based on torts. 359 P.2d at 865.'

> "Section 524(e) is broader than former section 16 [sic] of the Act in that the potential liability of other entities is not dependent upon a particular relationship. In the case of In re Mann, 58 B.R. 953 (Bankr. W.D. Va. 1986), cited by both parties, the court said that section 524(e) suggests that the section 524(a) injunction is not meant to affect the liability of third parties nor prevent establishing their liability by whatever means necessary. The logic of this position is echoed in In re White, 73 B.R. 983 (Bankr. D.D.C. 1987), where the court said:
>
> > `Any other outcome would result in a windfall to insurers, which receive premiums as the *quid pro quo* for providing insurance. Any other outcome would also disadvantage both innocent, third-party, personal-injury claimants...73 B.R. at 985.'"

Accordingly, if, e.g., an insurance company is liable as a matter of law to a plaintiff in a personal injury action, a subsequent discharge of the assured in bankruptcy will not alter the obligation of the insurance company. See, e.g., In re Bracy, 449 F.Supp. 70 (D.C. Mont. 1978); Miller v. Collins, 40 S.W.2d 1062 (Mo. 1931); Fidelity Union Casualty Co. v. Hanson, 44 S.W.2d 985 (Tex. Com. App. 1932), cert. den. 53 S.Ct. 12, 287 U.S. 599; In re Traylor, 94 B.R. 292 (Bankr. Ct. E.D. N.Y. 1989); 11 U.S.C. §524(e); cf. 11 U.s.C. §34, §16 of the former Bankruptcy Act.[5] That is, an insurer under an accident liability policy cannot successfully plead the insured's discharge in bankruptcy as the right to plead a bankruptcy discharge is personal to the debtor. See, e.g., Union Casualty Co. v. Hanson, supra; Miller v. Collins, supra.

In In re White, 851 F.2d 170 (6th Cir. 1989), the Sixth Circuit Court of Appeals held that the

[5]11 U.S.C.A. §34, §16 of the former Bankruptcy Act provides: "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

bankruptcy court had discretion to lift the automatic stay for cause under §362(d)(1) to allow a state divorce court to make a division of the marital properties. Unsecured creditors may seek relief under §362(d). See, e.g. In re Holtkemp Farms, Inc., 669 F.2d 957 (7th Cir. 1982). There is nothing in the Bankruptcy Code which provides that only secured creditors may seek relief from the automatic stay. In re Westwood Broadcasting, Inc., 35 B.R. 47 (Bankr. Ct. HI 1983).

Moreover, 2 Collier On Bankruptcy, ¶362.07[3] (15th ed. 1980) (footnotes omitted) provides as follows:

> "Lack of adequate protection and lack of equity are not the sole grounds for relief from the stay since section 362(d)(1) requires that the stay be vacated `*for cause*, including lack of adequate protection...' (emphasis added). Actions which are only remotely related to the case under title 11 or which involve the rights of third parties often will be permitted to proceed in another forum. Generally, proceedings in which the debtor is a fiduciary or which involve the post petition activities of the debtor need not be stayed since they bear no real relationship to the purpose of the stay which is to protect the debtor and the estate from creditors. Where the claim is one covered by insurance or indemnity, continuation of the action should be permitted since hardship to the debtor is likely to be outweighed by hardship to the plaintiff. Finally, the liquidation of a claim may be more conveniently and speedily determined in another forum."

When a debtor is discharged, §524(a)(2) creates a permanent injunction against lawsuits to recover prepetition dischargeable debts of the debtor. However, the injunction does not necessarily prevent lawsuits against the debtor to establish the liability of a third party from which recovery might be had, such as, e.g., the debtor's insurer. See, e.g., Foust v. Munson Steamship Lines, 299 U.S. 77, 84 (1936).

Consequently, in the instant proceeding the court shall modify the automatic stay for cause under §362(d)(1) to allow the movant to continue to prosecute the pending State court lawsuit against the debtor to its logical conclusion for the special and limited purpose of liquidating her claim against the debtor.[6] If the movant is ultimately successful in the State court lawsuit against the debtor, she will still nonetheless

[6]It is noted that the debtor's time is not property of the debtor protected by §524's permanent discharge injunction. In re Papas, 19 B.C.D. 1501 (D.C. Wyo. 1989).

be stayed from proceeding on that judgment against this debtor or his property.[7] See In re Philadelphia Athletic Club, Inc., 9 B.R. 280 (Bankr. Ct. E.D. Pa. 1981). If a debt exists, it can be collected from any other entity that might also be liable. §524(e).

The foregoing shall constitute findings of fact and conclusions of law in accordance with Bankr. Rule 7052.

DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE

DATE: May 5, 1990

cc: Robert T. Keeton, III, Esq.
Attorney for Movant
346 East Main Street
Huntingdon, TN 38344

Clyde Watson, Esq.
Attorney for Debtor
119 Lake West
Camden, TN 38320

Jackson Office

PUBLISHED

[7]Cf, however, §524(e), supra.