

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:)
)
MARK W. BUSH,) Case No. 16-03122
)
Debtor.)

ORDER DENYING MOTION FOR RELIEF FROM STAY

This case is before the court on a motion for relief from stay (doc. 52) filed by Pruet Production Co. (“Pruet”). The court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 and the order of reference of the district court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G), and the court has authority to enter a final order.

In December 2015, debtor Mark Bush and two others, Ernest Hays and Oliver Leggett, were indicted for conspiring to steal crude oil from Pruet. U.S. v. Leggett, et al, Case No. 1:15-CR-00290-002, U.S. District Court for the Southern District of Alabama. In May 2016, Bush pled guilty to one count of conspiracy and the other counts were dismissed on the United States’ motion. Bush was sentenced to six months in jail and ordered to pay restitution to Pruet in the amount of \$198,220. The restitution obligation is joint and several with Hays and Leggett. Bush recently completed his prison term, according to his counsel.

Bush filed a Chapter 13 bankruptcy in September 2016. The debtor’s schedules show a disposable income, after allowable expenses, of \$130 a month. At the time of filing, the debtor owned a mobile home and lot plus another parcel; relief from stay has been granted as to the mobile home and lot (doc. 36), and the other parcel has been sold to pay the mortgage (doc. 39). Other than the real property, debtor’s assets at filing consisted of \$6,976 of personal property, all of which is exempt pursuant to Alabama Code § 6-10-6. Bush’s plan was confirmed on

February 1, 2017 with a plan payment of \$130 per month, which is all of his disposable income, pursuant to Bankruptcy Code § 1325(b)(1)(B). Pruet has not filed a proof of claim.

Bush did not list Pruet as a creditor in his original schedules and did not add Pruet until March 2017. The proof of claim deadline for non-governmental creditors was January 25, 2017. The deadline to challenge the dischargeability of debts under 11 U.S.C. § 523(a)(2) or (4) was December 27, 2016.

In January 2017, Pruet filed a civil action in the Circuit Court of Wayne County, Mississippi against Bush, Hays, Leggett, and their respective employers -- Wood Group PSN, Inc., Hays Petroleum, Inc. of Mississippi and T. K. Stanley, Inc. -- as well as the alleged purchaser of the stolen oil, Vertex Energy, L.P. Pruet now seeks relief from stay to pursue the state court action against Bush. Pruet stipulates that it will not attempt to enforce a money judgment against Bush or property of the bankruptcy estate without further leave of this court.

The parties and this court agree that the criminal restitution of \$198,220 is not dischargeable pursuant to Bankruptcy Code § 1328(a)(3),¹ which exempts criminal restitution from discharge. The question is thus whether Pruet should be allowed to proceed in state court against Bush to have additional amounts declared nondischargeable pursuant to Bankruptcy Code § 523(a)(2) or (4), as incorporated by § 1328(a)(2). Complicating the situation is the fact that the debtor did not originally list Pruet as a creditor and did not add it to the schedules in time to file an action for determination of dischargeability pursuant to § 523(c).

The court held two hearings on the motion for relief from stay and questioned Pruet regarding its intentions and why it wants to pursue Bush in state court. Counsel for Pruet

¹ The parties discussed Code § 523(a)(13) at the hearing, but since this case is a Chapter 13 § 1328(a)(3) applies to the same effect.

acknowledged that the main goal of the state court action is to recover from the three criminal defendants' employers on a respondeat superior or independent tort theory. According to Pruet's counsel, since the three individuals have already pleaded guilty, primary issues in the state court action will be (1) whether Pruet's damages exceed the \$198,220 criminal restitution and (2) whether the three criminal defendants was acting within the line and scope of their employment such that the corporate defendants are civilly responsible. Counsel for Pruet candidly acknowledged that Pruet is not likely to recover from Bush more than the criminal restitution which has already been ordered and that the real targets in the civil action are the corporate defendants. When asked why Pruet needs Bush as a defendant in the Mississippi state court action, Pruet argued that it would be strategically advantageous but did not offer any legal reason why Bush as employee or alleged agent must be a party to an action against his former employer, Wood Group. When asked how Bush can reasonably be expected to defend himself in the action in Mississippi, Pruet offered only the possibility that his former employer would offer him a complimentary defense, which has not occurred to date.

In usual situation where a creditor seeks relief from stay to pursue a state court action, there is insurance coverage available to the debtor and the debtor is being provided a defense by the insurance company; relief from stay is routinely granted to allow the state court action to proceed and the creditor to recover only against the insurance proceeds, not the debtor or the bankruptcy estate. The situation here is much different. This court adopts the holding of and the factors set out in In re Cummings, 221 B.R. 814, 818 (Bankr. N.D. Ala. 1998). The court agrees with Judge Cohen that particular emphasis should be given to the cost of defense or other potential burden to the debtor or the bankruptcy estate and the extent to which the trial of the state court case will interfere with the progress of the bankruptcy case. Here, the debtor is

completely unable to effectively defend himself in an out-of-state, relatively complex, large dollar civil action in out-of-state forum. With little assets and a net income of \$130 a month which is already devoted to his bankruptcy case, Bush cannot afford counsel, leaving him effectively defenseless in an action brought by a deep-pocketed corporate plaintiff.

Pruet wants to take discovery from Bush, which it certainly can do even if the action against him remains stayed, and the court will so provide. Pruet may not be able to compel Bush's presence at trial in Mississippi, but of course that could be the situation even if he were a party; Pruet can take Bush's video or stenographic deposition and use that at trial.

Considering all the factors set out in Cummings, supra at 818-19, the court finds that Pruet's strategic desire to have Bush as a defendant in the Mississippi state court action is far outweighed by the debtor's practical inability to defend himself in that forum against a nondischargeable judgment and that Pruet has thus not shown sufficient "cause" for lifting the stay under Bankruptcy Code § 362(d)(1). If Pruet truly wants to pursue Bush for nondischargeable debt in excess of the \$198,220 in criminal restitution, it can do so in this bankruptcy court on an expedited and more economical basis for both parties. It appears to the court that the primary issue would be simply the amount of damages, since Bush has pleaded guilty to liability for some amount, and the more complicated issues of respondeat superior or the employers' independent liability would not be an issue in a § 523(c) action.

For the reasons stated above, the Court thus orders as follows:

1. Pruet's motion for relief from stay is denied. The Mississippi state court action remains stayed against debtor Mark Bush.² Bush is to be treated as a non-party in terms of

² The Court is not ordering that Bush be dismissed from the state court case out of concern of Bush's bankruptcy case could be dismissed in the future and the statute of limitations would have run in the meantime.

discovery in the state court action. However, he is subject to discovery as a non-party in the state court action.

2. If Pruet desires to liquidate its claim against Bush for an amount greater than the \$198,220 in criminal restitution, which is nondischargeable pursuant to Bankruptcy Code § 1328(a)(2), then within sixty (60) days of this order it must file a motion seeking to do so. The Court at that time will then give debtor the option of dismissing this Chapter 13 without an injunction in order to refile and retrigger the deadline for filing an action to determine dischargeability of the debt pursuant to Bankruptcy Code § 523(c).

Dated: June 1, 2017


HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE