


ORDERED.

Dated: October 08, 2019



Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re)	
)	
MELBOURNE BEACH, LLC,)	Case No. 6:17-bk-07975-KSJ
)	Chapter 11
Debtor.)	
_____)	

**ORDER DENYING MOTION BY
BRIAN WEST FOR TEMPORARY INJUNCTIVE RELIEF**

This case came before the Court on September 9, 2019, to consider the Motion by Brian West (“West”) for Temporary Injunctive Relief from Insider/Non-Debtor Defendants’ Existing and Recently-Filed State Court Litigation (the “Motion”) and the Objection to the Motion filed by Pirogee Investments, LLC and Yellow Funding Corp. (the “Disputed Owners”).¹ After the hearing, the Court provided West with an opportunity to file a reply, which he did.² Having reviewed the pleadings and considering the positions of all interested parties, the Court will deny the Motion.

For years, West and the Disputed Owners have engaged in aggressive and expensive litigation relating to their ownership interests and management for the Debtor. West filed this

¹ The Motion is Doc. No. 376, and the Objection to the Motion is Doc. No. 436.

² Doc. No. 457.

Chapter 11 case trying to stop this litigation.³ Over a year ago, the Debtor, West and the Disputed Owners agreed to the appointment of a chief restructuring officer (“CRO”) for the Debtor.⁴ After appointment, the CRO managed the Debtor, a large shopping center in Melbourne Beach, supervised the Debtor’s finances, and reviewed existing leases. And recently, for the reasons stated in the Order Denying Disputed Owners’ Motion to Dismiss and Directing Appointment of a Chapter 11 Trustee,⁵ the United States Trustee has appointed a Chapter 11 Trustee for the Debtor, Jules S. Cohen (the “Chapter 11 Trustee”), which this Court has approved.⁶

West now requests the Court enjoin the Disputed Owners from proceeding with two state court actions pending in the Circuit Court for Martin County, Florida styled *Melbourne Beach, LLC v. Ilya Palinsky et.al.*,⁷ and *Pirogee Investments, LLC et.al v. West* (the “2019 Action”).⁸ West argues the Disputed Owners’ recent state court litigation hinders his ability to manage the Debtor’s shopping center. He also argues the litigation requires the Florida Circuit Court to determine the equity interests of West and the Disputed Owners in the Debtor, and, if the Disputed Owners obtain a judgment against West, the Debtor may have indemnification liability under the Debtor’s Amended Operating Agreement.⁹ Based on these reasons, West argues “unusual circumstances” exist allowing the Court to extend the automatic stay under § 362 of the Bankruptcy Code to protect West, a non-debtor, from the state court litigation filed by the Disputed Owners.¹⁰

³ This case was filed on December 26, 2017.

⁴ A detailed history of this case is found in the Order Denying Disputed Owners’ Motion to Dismiss and Directing Appointment of a Chapter 11 Trustee (Doc. No. 383). To the extent necessary, the Court’s factual findings made in the Order Denying Disputed Owners’ Motion to Dismiss (Doc. No. 383) are incorporated into this order.

⁵ Doc. No. 383.

⁶ Doc. No. 406.

⁷ Case No. 14-CA-00146. Debtor, West and the Disputed Members are the parties to this action, which involves claims relating to their ownership interests and management for the Debtor.

⁸ Case No. 2019-CA-000674. *See* Doc. No. 376, Ex. A. Only West and the Disputed Owners are parties to the 2019 Action, which involve claims against West for injurious falsehood and tortious interference.

⁹ Paragraph 11.1 of the Amended Operating Agreement requires the Debtor to “...indemnify and hold each of the Members who has acted or is acting by or in the right of the Company harmless from and against all claims, demands and expenses whatsoever...”

¹⁰ All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq.*

Generally, § 362 of the Bankruptcy Code provides the filing of a bankruptcy petition “operates as a stay of a broad range of actions against the debtor, property of the debtor or property of the estate.”¹¹ The automatic stay under § 362 specifically prohibits the commencement or continuation of an action that could have been commenced before the bankruptcy filing to recover a claim against the debtor that arose before the commencement of the case.¹² Although § 362 refers to the debtor, a court may in “unusual circumstances” extend the automatic stay to enjoin litigation against non-debtor parties.¹³ The “unusual circumstances” needed to enjoin non-debtor litigation have included “where stay protection was deemed essential to the debtor’s efforts of reorganization”¹⁴ or “when there is such identity between the debtor and third-party defendant... that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor”¹⁵

Here, the Court concludes unusual circumstances do not exist. West is no longer essential to the Debtor’s efforts of reorganization. A CRO has been managing the Debtor for over a year, and the Chapter 11 Trustee recently was appointed. If West can no longer manage the shopping center, the Chapter 11 Trustee can (and perhaps should) hire an independent professional. Nor does the Debtor’s Amended Operating Agreement indemnification language likely create any liability for the Debtor.

In the 2019 Action, the Disputed Owners assert claims against West for injurious falsehood and tortious interference. If the Disputed Owners prevail, these fraud and tort claims are unlikely

¹¹ *In re Barr*, 318 B.R. 592, 597 (Bankr. M.D. Fla. 2004).

¹² See 11 U.S.C. §362(a)(1).

¹³ See *Lanard Toys Ltd. v. Toys “R” US-Delaware, Inc.*, Case No. 3:15-cv-849-J-34PDB, 2017 WL 5256870, *4 (M.D. Fla. Nov. 13, 2017); *Brent v. Source Interlink Distribution, LLC*, Case No. 2:14-cv-52-FtM-38DNF, 2014 WL 4162770 (M.D. Fla. Aug. 21, 2014).

¹⁴ *Lanard Toys*, 2017 WL 5256870 at *4.

¹⁵ *Id.*

to have involved a member “acting by or in the right” of the Debtor.¹⁶ So, the Debtor likely will have a viable defense to West’s claims for indemnification. West has not persuasively explained how the claims raised in the 2019 Action will require indemnification by the Debtor. Because “unusual circumstances” do not exist in this case, the Court declines to extend the automatic stay to enjoin the state court actions against West, a non-debtor party.

The issuance of a preliminary injunction is “an extraordinary and drastic remedy which may be granted only upon a clear and convincing showing that the movant has carried its heavy burden on each element...”¹⁷ To obtain an injunction prohibiting third-parties from proceeding against non-debtor entities, the movant must demonstrate that the debtor will suffer irreparable injury unless the injunction issues, among other factors.¹⁸ As discussed, West is no longer essential to the Debtor’s operations and has not explained how the claims raised in the 2019 Action will require indemnification by the Debtor. West failed to demonstrate the Debtor will be irreparably harmed if the Disputed Owners proceed with their claims against him.

Finally, the Court finds persuasive that the Chapter 11 Trustee did not take a position on the Motion. The Chapter 11 Trustee did not raise any concerns with the Disputed Owners proceeding with their claims against West. The Court, however, reminds the Disputed Owners and West to proceed cautiously in the state court actions. Unless modified or terminated, the automatic stay remains in full force and effect as to the Debtor. To the extent any claim requires

¹⁶ See *Brent*, 2014 WL 4162770 at *1 (“where a non-debtor co-defendant is allegedly liable upon its own breach of duty, then the automatic stay protection afforded to the debtor is not extended to the co-defendant”).

¹⁷ *In re Steven P. Nelson, D.C., P.A.*, 140 B.R. 814, 816 (Bankr. M.D. Fla. 1992); See also *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983).

¹⁸ See *In re Regency Realty Associates*, 179 B.R. 717, 720 (Bankr. M.D. 1995); *Steven P. Nelson, D.C., P.A.*, 140 B.R. at 816.

a ruling by the State Circuit Court of the Debtor's equity members or interests, such action remains stayed under §362. Any order would be void *ab initio*.¹⁹

Accordingly, it is

ORDERED:

1. The Motion (Doc. No. 376) is **DENIED**.
2. West is not entitled to the protection of the automatic stay.
3. The automatic stay under § 362, however, remains in effect to the extent any state court claim requires a ruling by the State Circuit Court concerning the Debtor's equity members or interests.

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The Clerk is directed to serve a copy of this order on all interested parties.

¹⁹ *United States v. White*, 466 F.3d 1241, 1244 (11th Cir. 2006) (citing *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982)).