

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

CASE NO.: 04-12723-3F1

SOUTH STREET TAVERN
& GRILL, INC.,

Debtor.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This case came before the Court upon Motion for Relief from Stay filed by Beverage Law Institute, Inc., ("BLI"). The Court conducted a hearing on the matter on September 12, 2005. In lieu of oral argument, the Court directed the parties to file memoranda in support of their respective positions. Upon review of the evidence and the argument, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

South Street Tavern & Grill, Inc. ("South Street") was formerly the operating company for a bar/restaurant in Jacksonville, Florida. The bar/restaurant is now being operated by Triple J Enterprises ("Triple J"), which owns its own liquor license. The real property upon which the bar/restaurant is located is owned by Sotav, Ltd. ("Sotav"), another Chapter 11 debtor.

South Street's only asset is a 4COP liquor license (the "license"). The distinction between a 4COP liquor license and a "run of the mill" liquor license is that the owner of a 4COP license is not required to earn 51% of its revenues from food sales, while the owner of a "run of the mill" liquor license is. A 4COP license is typically purchased from a private source and its value is based upon the demand in a specific area.

BLI is in the business of getting together buyers and sellers of 4COP liquor licenses throughout Florida. On November 19, 2004 the Duval County Circuit Court entered a summary final judgment (the "final judgment") in favor of the then lien-holder and against South Street in the amount of \$103,168.84 plus interest at 7% annually and set a

sale date for December 20, 2004. Prior to the sale date, the final judgment was assigned to BLI.

South Street filed its bankruptcy petition on December 12, 2004. South Street valued the license on its bankruptcy schedules at \$225,000.00. South Street indicated on its Schedule D, Creditors Holding Secured Claims, that it owed \$141,000.00 to the State of Florida, Department of Revenue (the "Department of Revenue"), \$121,832.00 of which is secured by the license.

The Department of Revenue filed a claim, which the Clerk's office designated as Claim 3, in the amount of \$147,612.82. Claim 3 is broken down as follows: \$ 22,457.86 secured, \$30,995.90 unsecured, and \$94,119.06 priority. South Street has filed an objection to Claim 3. In its objection South Street asserts that the Department of Revenue has a lien against the license in the amount of \$26,001.12. The Court has scheduled a hearing on the matter for March 9, 2006.

Richard George ("George"), the president of South Street, testified at the hearing. George testified that the replacement value of the license is \$225,000.00. Horace Moody ("Moody"), the president of BLI, also testified at the hearing. Moody testified that three 4COP licenses have been sold in Duval County during 2005. Two of the licenses were sold for \$190,000.00, and the third was sold for \$185,000.00.

South Street last operated using the license on September 30, 2004. Although South Street currently has no ongoing business and no employees, South Street intends to use the license to operate a liquor store with a small tavern called Sparky's Tavern ("Sparky's"). Relying on his twenty years experience in running liquor establishments, George prepared a pro-forma income statement for Sparky's. George testified that South Street will be able to fund a plan of reorganization based on Sparky's revenues. George testified that he would make adequate protection payments to BLI until Sparky's opens. Sparky's is expected to open in early 2006.

CONCLUSIONS OF LAW

BLI seeks relief from the stay pursuant to 11 U.S.C. § 362(d)(1) and (2). Section 362(d) provides in pertinent part:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section,

such as by terminating, annulling, modifying, or conditioning such stay--

- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
- (2) with respect to a stay of an act against property under subsection (a) of this section, if—
 - (A) the debtor does not have an equity in such property; and
 - (B) such property is not necessary to an effective reorganization;

11 U.S.C. § 362(d) (West 2004).

Initially BLI contends that the petition was filed in bad faith and therefore constitutes cause for relief from the stay. Good faith is an implicit prerequisite to filing a Chapter 11 bankruptcy petition. In re Albany Partners, Ltd., 749 F.2d 670, 674 (11th Cir. 1984). A debtor's lack of good faith in filing a bankruptcy petition constitutes "cause" for lifting the automatic stay. In re Jacksonville Riverfront Dev., 215 B.R. 239, 242 (Bankr. M.D. Fla. 1997) (citations omitted). Although there is no particular test for determining whether a debtor has filed a petition in bad faith, courts may consider factors which evidence "an intent to abuse the judicial process and the purposes of the reorganization provisions" or, in particular, factors which evidence that the petition was filed "to delay or frustrate the legitimate efforts of secured creditors to enforce their rights." In re Phoenix Picadilly, Ltd., 849 F.2d 1393, 1394 (11th Cir. 1988) (quoting Albany Partners, 749 F.2d at 674). In Phoenix Picadilly the Eleventh Circuit affirmed the district court's decision affirming the bankruptcy court's dismissal of a case for cause pursuant to § 1112(b). In doing so, the Eleventh Circuit noted the presence of the following circumstantial factors previously identified by courts as evidence of a bad faith filing:

- (i) The Debtor has only one asset, the Property, in which it does not hold legal title;
- (ii) The Debtor has few unsecured creditors whose claims are small in relation to the claims of the Secured Creditors;
- (iii) The Debtor has few employees;
- (iv) The Property is the subject of a foreclosure action as a result of arrearages on the debt;

- (v) The Debtor's financial problems involve essentially a dispute between the Debtor and the Secured Creditors which can be resolved in the pending State Court Action; and
- (vi) The timing of the Debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the Debtor's secured creditors to enforce their rights.

Id. at 1394 (citations omitted).

The factors set forth in Phoenix Picadilly are not to be rigidly applied. In re State Street Houses, Inc., 356 F.3d 1345, 1347 (11th Cir. 2004). See also In re Harco Company of Jacksonville, LLC, 331 B.R. 453, 455 (Bankr. M.D. Fla. 2005) (noting that "[w]hile the factors enunciated in Phoenix Picadilly are helpful in identifying bad faith, the Eleventh Circuit does not appear to suggest that the factors, if applicable, mandate dismissal."); In re Venice-Oxford Assocs., Limited P'ship, 236 B.R. 805, 810 (Bankr. M.D. Fla. 1998) (noting that "[t]he Eleventh Circuit [in Phoenix Picadilly] does not appear to suggest, however, that the list is intended as a mandatory and exclusive itemization of factors to be mechanically applied in every determination of good or bad faith.")

Like Harco and Venice-Oxford, the instant case has many of the factors set forth in Phoenix Picadilly. However, as in those cases, the Court does not find that South Street filed its bankruptcy petition with the intent to abuse the judicial process and the purposes of the reorganization provisions or to delay or frustrate BLI's efforts to enforce its rights. The Court finds that South Street filed the case in an attempt to salvage whatever equity it has in the license and to repay all creditors from the revenue generated by the license. Accordingly, the Court will not lift the automatic stay pursuant to § 362(d)(1).

Alternatively, BLI contends that it is entitled to relief from the stay pursuant to § 362(d)(2). BLI contends that there is no equity in the license because the fair market value of the license is \$185,000.00 and that the sum of the debt owed to BLI and the Department of Revenue exceeds \$200,000.00. In light of the fact that the amount of the Department of Revenue's secured claim is at this point undetermined, the Court declines to make a finding as to whether there is any equity in the license. However, to the extent there is no equity in the license, the Court finds that the license is necessary to an effective reorganization because South Street intends to use the license to operate Sparky's and to use the revenues therefrom to make its plan

payments. Accordingly, the Court will not lift the automatic stay pursuant to § 362(d)(2).

Although the Court will not lift the automatic stay at this time, the Court finds it appropriate to order adequate protection payments pending the confirmation hearing. Additionally, in the event the plan is not confirmed by March 9, 2006, thirty days after the date set for the confirmation hearing, the Court will lift the automatic stay upon an affidavit of BLI. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

DATED this 9 day of December, 2005 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies furnished to:

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Harold Purnell, Attorney for Beverage Law Institute,
Inc.
United States Trustee