

ENTERED ON

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DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:) CHAPTER 7
)
RONALD R. JOHNSON and)
THERESA D. JOHNSON,) CASE NO. 04-74452-MHM
)
Debtors.)

IN RE:) CHAPTER 7
)
INNOCENTIA, INC.,) CASE NO. 04-74454-MHM
)
Debtor.)

WOW! FACTOR DESSERTS, INC.,)
WOW! FACTOR DESSERTS, LTD.,)
)
Movants)
v.) **CONTESTED MATTER**
)
PAUL H. ANDRESON, TRUSTEE)
for RONALD R. JOHNSON and)
THERESA D. JOHNSON,)
and INNOCENTIA, INC.,)
)
Respondents.)

ORDER REGARDING RELIEF FROM THE STAY

Before the court is the second motion of WOW! Factor Desserts, Inc. and WOW! Factor Desserts, Ltd. (collectively "WOW") for relief from the automatic stay to prosecute counterclaims against Debtors in the pending litigation commenced by Debtors in U. S.

District Court (the "District Court Litigation"). The District Court Litigation was filed postpetition by the Chapter 7 Trustee in Cobb County, Georgia, and removed to U.S. District Court for the Northern District of Georgia. The facts surrounding that litigation were set forth in the order on WOW's first motion for relief from stay, entered July 13, 2006, and those facts are incorporated herein by reference.

In the District Court Litigation, WOW seeks to prosecute counterclaims¹ against Debtor Innocentia, Inc. ("Innocentia"), under the Agreement between the parties, in the amount of \$72,661.51; and against Debtor Ronald Johnson ("Johnson") under his personal guarantee of Innocentia's debt. WOW expressly sets forth in the motion for relief from stay that they do not seek setoff or to collect on any judgment that they might receive in the District Court Litigation and the only distribution will be in Debtors' bankruptcy cases. WOW filed a proof of claim in Innocentia's bankruptcy case. The Johnsons' Chapter 7 bankruptcy case was filed as a no-asset case and creditors have been instructed not to file proofs of claim in that case.

WOW contends it is entitled to relief from stay under 11 U.S.C. §362(d), for cause, to assert its counterclaims against Debtors in the District Court Litigation. Trustee opposes relief from the stay because defending the counterclaims would require additional energy and resources from the estate.

¹ WOW filed their answer and counterclaims in the District Court Litigation August 7, 2006. WOW provides specifically in their Answer that the counterclaims are asserted subject to an order from the bankruptcy court on WOW's motion for relief from the automatic stay to pursue those claims and that WOW recognizes that Debtors are not required to file answers to the counterclaims unless and until the bankruptcy court grants WOW's requested relief from the automatic stay.

In the case of *In re Video Cassette Games, Inc.*, 108 B.R. 347 (Bankr. N.D. Ga. 1989) (J. Drake), the court adopted the three-part test set forth in *In re Pro Football Weekly*, 60 B.R. 824 (N.D.Ill. 1986):

The test to determine whether an automatic stay should be lifted to allow continuation of a pending lawsuit is whether

- a) Any "great prejudice" to either the bankrupt estate or the debtor will result from continuation of a civil suit,
- b) the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and
- c) the creditor has a probability of prevailing on the merits of his case.

Id. at 826, citing *In re Bock Laundry Machine Co.*, 37 B.R. 564, 566

(Bkrcty.N.D.Oh.1984); *Matter of McGraw*, 18 B.R. 140 (Bkrcty.W.D.Wis.1982). Other courts have used the following twelve-part test set forth in *Sonnax Industries, Inc. v. Tri Component Products Corp.*, 907 F.2d 1280, 1286 (2d Cir.1990):

- (1) whether relief would result in a partial or complete resolution of the issues;
- (2) lack of any connection or interference with the bankruptcy case;
- (3) whether the other proceeding involves the debtor as a fiduciary;
- (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (5) whether debtor's insurer has assumed full responsibility for defending it;
- (6) whether the action primarily involves third parties;
- (7) whether litigation in another forum would prejudice the interests of other creditors;

(8) whether the judgment claim arising from the other action is subject to equitable subordination;

(9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;

(10) the interests of judicial economy and the expeditious and economical resolution of litigation;

(11) whether the parties are ready for trial; and

(12) impact of the stay on the parties and the balance of harms.

Neither of these tests is intended to be applied mechanically and is intended to assist in determining whether the totality of the circumstances provide cause for modification of the automatic stay.

The choice presented by WOW's motion is whether to allow WOW to present and litigate its claim in the District Court Litigation or in this bankruptcy case. In either forum, the Chapter 7 Trustee will be engaged, although the claims administration process in the bankruptcy court is probably more a streamlined process than litigation of the claim in the District Court Litigation would be. Additionally, any issues regarding setoff and subordination, which WOW has stated would not be asserted in the District Court Litigation, if allowed, could be raised and resolved in the bankruptcy claims administration process. Also of significance is this fact: unless the Chapter 7 Trustee were to prevail in the District Court Litigation, any litigation involving WOW's claim may be abbreviated or unnecessary because few or no assets would be available for

distribution to creditors, including WOW. The Chapter 7 Trustee's claims and WOW's counterclaims arise from the same transaction but the nature of those claims is very different – a tort claim, fraud, versus a contract claim – and the means of proof of those claims would be very different. Even if WOW is not allowed to assert its counterclaim, its defense against the Trustee's claims would not be curtailed. Therefore, the totality of the circumstances supports a determination that the automatic stay should not be modified to allow WOW to assert the counterclaims in the District Court Litigation. Accordingly, it is hereby

ORDERED that the second motion of WOW! Factor Desserts, Inc. and WOW! Factor Desserts, Ltd. for relief from the automatic stay is *denied*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtors, counsel for Debtors, counsel for Movants, the Chapter 7 Trustee, and counsel for the Chapter 7 Trustee.

IT IS SO ORDERED, this the 11th day of October, 2006.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE