UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re Chapter 7

SLAVCHO ANCHEV, Bankruptcy Case No. 99 B 45846(PCB)

Debtor.

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SLAVCHO ANCHEV, Adversary Proceeding No. 03-8264A (PCB)

-against-

335 WEST 38th STREET COOPERATIVE
CORPORATION, ROSENBERG & ESTIS, P.C.,
JOSEPH P. KELLY, KRIS ALEX, CLARK JOHNSON,
"JOHN" SCHWINGHAMMER, "DOE" CORPORATION,
said buyers jointly and severally

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APPEARANCES:

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BEATTY, PRUDENCE CARTER, U.S.B.J

MEMORANDUM DECISION GRANTING MOTION TO REMAND ADVERSARY PROCEEDING

On or about June 20, 1999, Slavcho Anchev ("Anchev" or the "Debtor") commenced an action in the Supreme Court of the State of New York, New York County (the "State Court Action") against a number of defendants. Approximately four months later and on October 15, 1999, the Debtor filed a petition under Chapter 7 of the Bankruptcy Code (the "Code").[1] On

[1] This case is governed by the Code as it existed prior to the amendments made effective to cases filed on or after October 17, 2005.

April 21, 2003, the Chapter 7 trustee (the "Trustee") filed a notice of removal with respect to the State Court Action.[2] See AP ECF Doc. No. 5.

This is a decision on a motion made by one of the defendants, Rosenberg and Estis ("R&E"), seeking to remand the action on the grounds that it was untimely removed, along with an award of fees and costs. In the alternative, R&E seeks dismissal of the action. R&E seeks to dismiss the action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), made applicable to adversary proceedings by Bankruptcy Rule ("B.R.) 7012, on grounds that the claim for relief against R&E is moot and that the complaint fails to state a claim against R&E on which relief can be granted.

In the State Court Action, the Debtor sought to prevent defendants West 38th Street Cooperative Corporation (the "Coop") and R&E, the Coop's attorney, from closing on a non-judicial foreclosure sale that would transfer the shares for Unit 1 of the Coop, which had been owned by Anchev, to defendants William Schwinghammer ("William"), Larry Clark Johnson ("Johnson") and Schwinghammer Lighting and to declare the sale void. Defendants William and Larry filed an answer and asserted two counterclaims. On August 24, 1999, the state court denied the Debtor's motion to enjoin the defendants from closing the sale and declare the sale null and void. The court found that the subject sale was consummated on July 28, 1999 and the motion to enjoin was therefore moot. See AP ECF Doc No. 21, Ex. E.

The state court thereafter issued an order stating "In accordance with the Voluntary

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[2] The Trustee made the removal under 28 U.S.C § 1452 which governs removal of claims and causes of action related to bankruptcy cases and not under 28 U.S.C. §1446, the general federal removal section. Removal under 28 U.S.C. § 1446 requires either federal question jurisdiction or diversity, neither of which exist here.

Petition of Bankruptcy filed by plaintiff Slavcho Anchev, it is ORDERED that further prosecution of any proceedings in this action are stayed except for an application to vacate or modify the stay." See AP ECF Doc. No. 10, Appendix.

DISCUSSION

B.R. 9027 governs the procedure for removal of civil actions from a nonbankruptcy court to the bankruptcy court. B.R. 9027(a)(2) provides the time frame within which a removal must occur. The rule states:

> "If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the largest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under §362 of the Code or (C) 30 days after the trustee qualifies in a Chapter 11 reorganization case but not later than 180 days after the order for relief."

A trustee has a "fixed 90 day period after the commencement of a voluntary bankruptcy case within which to apply for the removal***." *In re Jandous Electric Construction Corp.*, 106 B.R. 48, 50 (S.D.N.Y. 1989). See also *In re Potter*, 2007 WL 1672181 (Bankr. D.N.M.) and *In re Exchange Parts of America, Inc.*, 138 B.R. 585 (W.D. Arkansas 1992). It is undisputed that the Trustee's removal, having occurred well beyond the 90 day time limit specified in B.R. 9027(a)(2)(A), was untimely, unless the Trustee can come within B.R. 9027(a)(2)(B), given that B.R. 9027(a)(2)(C) is inapplicable. The Trustee argues that the post-petition state court order staying further prosecution of the State Court Action enabled the matter to fall within B.R. 9027(a)(2)(B).[3]

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[3] It should be noted that the Trustee never sought to amend the state court order. That order was entered before the Trustee filed the removal. B.R. 9027 (c) provides that after removal "The parties shall proceed no further in that [state] court unless and until the claim or cause of action is remanded."

However, B.R. 9027(a)(2)(B) only applies to those matters stayed by the automatic stay under Code § 362. Since the Debtor was the plaintiff in the State Court Action and on the facts of this case, the automatic stay did not apply.

The automatic stay is not implicated when the debtor is the plaintiff in a prepetition action. "The trustee or debtor in possession is not prevented by the automatic stay from prosecuting or appearing in an action which the debtor has initiated and that is pending at the time of the bankruptcy." *In re White,* 186 B.R., 700, 704 (BAP 9th Cir. 1995); *In re Merrick*, 175 B.R. 333, 337 (BAP 9th Cir. 1994). The policy behind the automatic stay under Code § 362 is to protect the estate from being depleted by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal and distribute assets. *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n.*, 892 F.2d 575, 577 (7th Cir. 1989). Thus the purpose of Code § 362 is not applicable to actions initiated by a debtor prepetition and "a debtor may not use the automatic stay as a sword when the debtor is the plaintiff in a pending nonbankruptcy suit." *In re Jandous Electric Construction Corp.*, 106 B.R. at 50.

> "The automatic stay is inapplicable to suits by the bankrupt ("debtor" as he is now called). This appears from the statutory language, which refers to actions "against the debtor," 11 U.S.C. 362(a)(1) and to acts to obtain possession of or to exercise control over "property of the estate," §362(a)(3), and from the policy behind the statute***There is***no policy of preventing persons whom the bankrupt has sued from protecting their legal rights. True, the bankrupt's cause of action is an asset of the estate; but as the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it, subsection (a)(3) is no more applicable than (a)(1) is." *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n.*, 892 F.2d at 577.

Here the Debtor as plaintiff, initiated the State Court Action prepetition and the Trustee did not filed the notice of removal until more three years after the Debtor filed his Chapter 7 petition. The Debtor's State Court Action was not stayed under Code § 362 and the Trustee was

limited by the 90 day fixed period by B.R. 9027(a)(2)(A). Therefore the Trustee's removal was not timely.

In the State Court Action, defendants William and Larry did assert counterclaims. Courts have found that "out of fairness, the defendant should be allowed to defend himself from attack and the automatic stay should not tie the hands of the defendant while the plaintiff is given free rein to litigate." *In re White,* 186 B.R., 706. The counterclaims only served as defenses to the relief sought against the defendants William and Larry and were not stayed under Code § 362. "*** When the debtor is in the position of assailant, it would be inequitable to invoke the stay against the defendant's counterclaim or to permit the debtor to use the stay as a basis for extending the time to remove the state court action to the bankruptcy court." *In re Jandous Electric Construction Corp*., 106 B.R. at 50.

Even if the debtor or the trustee requires time to evaluate the litigation in terms of the bankruptcy case, the time limitation on removal is not tolled by the filing of a bankruptcy petition. *In re White,* 186 B.R. at 704. The Trustee could have, but did not, seek to enlarge the 90 day period to remove the State Court Action under B.R. 9006(b). B.R. 9006(b) provides as follows:

> "***when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

Since no extension of time was granted pursuant to B.R. 9006(b), the Trustee was bound by the 90 day deadline.

The Trustee further argues that R&E's remand motion should be denied because it was untimely under 28 U.S.C § 1447(c). However, this Court holds that the 30-day time limit contained in § 1447(c) is not applicable to removals made pursuant to 28 U.S.C. § 1452, which contains no time limit on when the motion to remand must be made. Neither does Bankruptcy Rule 9027.

The non-bankruptcy court retains jurisdiction unless an action is properly removed. See *In re White,* 186 B.R. at 704. Therefore because the State Court Action was untimely removed under B.R. 9027(a)(2)(A), R&E's motion to remand the action is granted. This Court need not reach the issue of dismissal of the Debtor's claims against R&E. The Court declines R&E's request for fees and costs.

William and Larry finally argue that in the interest of judicial economy, the Court should not remand the action.[4] See AP ECF Doc. No. 27. However, the Court finds that it does not have the discretion to make such a determination when the action was not timely removed. While it may not be desirable, there are occasions where a substantially similar action will also proceed through state court.

R&E is directed to settle an appropriate order.

Dated: New York, New York
April 15, 2009

/s/ Prudence Carter Beatty

United States Bankruptcy

[4] There is a related adversary proceeding in this Court, AP 01-8152, involving many of the same defendants and the same issues. R&E is not a defendant in that adversary proceeding as neither the Trustee nor the defendants sought to implead them.

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