

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No. 04-45063

Eric C. Miller
ASF/Sherwood Construction, Inc.

Chapter 7 Case

Debtor.

NOTICE OF HEARING AND MOTION FOR RELIEF FROM STAY

TO: DEBTOR AND OTHER ENTITIES SPECIFIED IN LOCAL RULE 9013-3.

1. Timothy J. DeWuske (“Movant”), hereby gives notice that a hearing on his Motion for Relief from Stay will be held on October 28, 2004, before the Honorable Robert J. Kressel, United States Bankruptcy Court Judge in Courtroom No. 8 West at 2:00pm at the United States Courthouse, 300 South Fourth Street, Minneapolis, MN, or as soon thereafter as counsel can be heard.

2. Any response to this motion must be filed and delivered not later than 2:00p.m. on October 25, 2004, which is three days before the time set for hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than October 19, 2004, which is seven days before the time set for hearing (excluding Saturdays, Sundays and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

MOTION TO LIFT AUTOMATIC STAY

3. Movant brings this motion pursuant to 11 U.S.C. §362.01 and Bankruptcy Rule 4001. This motion is filed under Bankruptcy Rule 9014 and Local Rules 9006-1

and 9013-1.

4. Movant requests relief from the automatic stay to continue to pursue his breach of contract, breach of warranty, negligence, consumer fraud, slander of title and fraud and misrepresentation claims against Debtor in state court.

5. Movant, however, seeks a judgment against Debtor only for the purposes of filing a claim against the Contractor's Recovery Fund through the Minnesota Department of Commerce pursuant to Minn. Stat. §326.975 and/or filing a claim against Debtor's commercial insurance company. Movant does not intend to and will not seek to recover any monetary sums or property from Debtor in satisfaction of said judgment.

6. This court has jurisdiction over this motion pursuant to 28 U.S.C. §157 and 1334, 11 U.S.C. §362(d), and Bankruptcy Rule 5005. The determination of this motion constitutes a core proceeding pursuant to 28 U.S.C. §157(b)(2)(G). The petition commencing this Chapter 7 case was filed on September 13, 2004. This case is now pending in this court.

7. That pursuant to the provisions of 11 U.S.C. §362(d)(1)(a), the Movant alleges "cause" for relief from the stay exists to lift the automatic stay.

WHEREFORE, Movant requests relief from the automatic stay provided by 11 U.S.C. §362(a), for himself and his successors and assignees, to pursue a state court judgment against Movant only for the purposes of using said judgment for filing a claim against the Contractor's Recovery Fund through the Minnesota Department of Commerce pursuant to Minn. Stat. §326.975, and/or pursuing a claim against Debtor's commercial insurance company and for such other and further relief as may be just and equitable.

Dated: 9/24/04

SCHNEIDER, BAUDLER & ABBOTT, P.C.

/e/ Lori J. Abbott

Lori J. Abbott (#287787)

8525 Edinbrook Crossing

Suite 208

Brooklyn Park, MN 55443

(763) 315-1100

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VERIFICATION

STATE OF MINNESOTA)
)SS.
COUNTY OF HENNEPIN)

Lori J. Abbott, being duly sworn, deposes and states on oath that she has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her knowledge to the best of her information.

Lori J. Abbott

Subscribed and sworn to before me
this 24th day of September, 2004.

Notary Public

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MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM STAY

FACTS

Prior to the debtor filing this Chapter 7, debtor entered into a construction contract with the Movant, Timothy J. DeWuske (“DeWuske”). Pursuant to the contract, debtor was to provide construction services on the DeWuske’s home. After construction services began debtor demanded that the DeWuske either pay additional money or it would not finish the work. Under the terms of the contract DeWuske was not required to make additional payments and so he declined to make the demanded payments. Debtor walked off the project. Debtor also failed to pay certain subcontractors which caused Mechanic’s Liens to be filed on the DeWuske property. DeWuske therefore sued debtor for breach of contract, fraud and misrepresentation, breach of warranty, negligence, unjust enrichment, consumer fraud, and slander of title. (Washington County Court File No. C2-03-007384).

At the time debtor filed this Chapter 7, DeWuske was in the process of setting the state court matter on for summary judgment with a hearing date to be scheduled for late October. DeWuske is seeking a judgment against debtor so that he may recover a portion of his damages from the Minnesota Department of Commerce Contractor’s Recovery

Fund pursuant to Minn. Stat. §326.975. In order to make a claim to the fund, DeWuske must obtain a judgment against the debtor in state court. DeWuske is further seeking a judgment so that he may continue to pursue the claim against Debtor's commercial insurance provider. Due to debtor's bankruptcy filing, DeWuske is now precluded from continuing with his lawsuit until he receives relief from the automatic stay.

ARGUMENT

I. GOOD CAUSE EXISTS TO GRANT THE MOVANT RELIEF FROM THE STAY

Section 362(d)(1) of the Bankruptcy Code, 11 U.S.C. §362(d)(1), provides in part that:

on request of a party in interest and after notice and 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; for cause, including the lack of adequate protection of an interest in property of such party in interest; or....

DeWuske's claim for damages will not be adequately protected unless he is able to finalize the lawsuit against the debtor in state court. DeWuske is seeking leave so that he can continue to pursue a judgment in state court. Any judgment obtained will be used to file a claim against the Contractor's Recovery Fund pursuant to Minn. Stat. §326.975 which provides that:

the sole purpose of this fund is to compensate any aggrieved owner or lessee of residential property located within this state who obtains a final judgment in any court of competent jurisdiction against a licensee licensed under section 326.84, on grounds of.....failure of performance arising directly out of any transaction when the judgment debtor was licensed....

In this case, debtor was a licensed contractor at the time he entered into the contract and DeWuske's claim is based on failure of performance arising directly out of the contractual transaction with debtor. As such, application to the Recovery Fund is

appropriate.

In order to make application to the Recovery Fund, a party must first obtain a judgment in any court of competent jurisdiction. See Minn. Stat. §326.97, subd. 2(a). The judgment may be used for application to the Recovery Fund regardless of whether the judgment has been discharged by a bankruptcy court. Id.

To the extent DeWuske is awarded judgment, he will pursue collection against the Recovery Fund and/or debtor's commercial insurance carrier, not against the debtor. Therefore, cause exists for the Court to terminate the automatic stay and allow DeWuske to continue with his claims against debtor in state court for the limited purposes of applying to the Recovery Fund and/or pursuing its claim against Debtor's commercial insurance carrier.

CONCLUSION

For the foregoing reasons, the Movant respectfully requests this Court grant Movant relief from the automatic stay of 11 U.S.C. §362(a).

Dated: 9/24/04

SCHNEIDER, BAUDLER & ABBOTT, P.C.

/e/ Lori J. Abbott
Lori J. Abbott (#287787)
8525 Edinbrook Crossing
Suite 208
Brooklyn Park, MN 55443
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UNSWORN DECLARATION OF SERVICE

I, Lori J. Abbott, declare that on September 24, 2004, I served the attached Notice of Hearing and Motion for Relief From Automatic Stay, Memorandum for Relief from Stay and proposed Order upon each of the persons or entities named below by mailing to each of them a copy thereof by enclosing the same in an envelope with first class mail postage prepaid and depositing the same in the post office at Brooklyn Park, Minnesota addressed to each of them as follows:

Attorney for Debtor:
Joseph W. Dicker, Esq.
1406 W Lake Street, STE 208
Minneapolis, MN 55408

Debtor:
Eric C. Miller
2449 62nd Street NW
Maple Lake, MN 55358

Bankruptcy Trustee:
Doraine A. Larison
1010 W St. Germain RM 600
St. Cloud, MN 56301

U.S. Bankruptcy Court
U.S. Courthouse Rm 301
300 South 4th Street
Minneapolis, MN 55415

Dated: September 24, 2004

By: /s/
Lori J. Abbott (#287787)
8525 Edinbrook Crossing
Suite 208
Brooklyn Park, MN 55443
(763) 315-1100

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ORDER TERMINATING STAY

This matter came on before the Honorable Robert J. Kressel, Judge of the above-entitled Court, upon the motion of Movant, Timothy J. DeWuske, on October 28, 2004 at the United States Courthouse located at 300 South 4th Street, Minneapolis, MN 55415.

Movant was represented by Lori J. Abbott, Esq., Schneider, Baudler & Abbott, P.C., 8525 Edinbrook Crossing, Suite 208, Brooklyn Park, MN 55443.

Other appearances, if any, are noted on the record.

Based upon all the files, records and proceedings herein, and the Court having considered the arguments of counsel,

IT IS HEREBY ORDERED THAT:

1. The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to Movant, Timothy J. DeWuske for the purposes of continuing his state court claim against Debtor for among other things, breach of contract. Any judgment given in favor of Movant may be used only for the purposes of filing a claim against the Contractor's Recovery Fund through the Minnesota Department of Commerce pursuant to Minn. Stat. §326.975 and/or collection against Debtor's commercial

insurance provider.

Dated: _____, 2004

Honorable Robert J. Kressel
Judge of Bankruptcy Court