

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

In Re:

CHAPTER 11

Eagan Tower Office Building Partnership,

Bky. 92-35867

Debtor.

ORDER

The motion of Prudential Insurance Company of America (Prudential) for relief from stay came on for hearing on January 29, 1993. Appearances are as noted in the record. The Court, having reviewed the motion and memoranda filed by the parties, having heard oral argument, and now being fully advised in the matter, makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

Prudential holds a mortgage and an assignment of rents on commercial real estate of the Debtor securing a mortgage note in the original amount of \$11,700,000.00. Prior to filing of the petition, Prudential commenced an action in state district court for judgment on the note, appointment of a receiver to collect the rents, and for foreclosure of its mortgage. Principals of the Debtor were named in the suit based on joint and several liability for the note.(1) The petition under Chapter 11 was filed on November 4, 1992, before resolution of any issues in the state court litigation. Prudential has not filed a claim in the estate. In their separate answer to the state court complaint, the principals of the Debtor allege that the 11 U.S.C. Section 362 stay prevents the litigation from going forward as to them.

Footnote 1

Prudential is not seeking relief to obtain appointment of a receiver, to otherwise pursue its mortgage foreclosure, or to realize on its assignment of rents.

End Footnote

Prudential seeks relief from the stay against the Debtor for the limited purpose of obtaining judgment in state court against it on the note. Prudential seeks relief against the principals of the Debtor by way of an order reciting that the 11 U.S.C. Section 362 stay does not apply to them, thereby resolving against them the contrary allegation in their answer filed in the state court action. The Debtor objects to the relief sought against it, and takes no position regarding the relief sought against the principals.

II.

Prudential argues that relief against the Debtor is appropriate, if not mandatory, because of 28 U.S.C. Section 1334(c). That subsection provides:

(1) Nothing in this section prevents a...court in the interest of justice, or in the interest of comity with the State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or a State law cause of action, related to a case under title 11 but not arising under title 11 or in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such a proceeding if an action is commenced, and can be timely adjudicated in a State forum of appropriate jurisdiction...

Prudential argues that its action against the Debtor on the note is solely a state law cause of action, and, but for its being related to a case under title 11, no action could be had on it in a court of the United States. Accordingly, it argues, abstention is mandatory under 28 U.S.C. Section 1334(c)(2). But if not, Prudential argues, then the Court should exercise discretionary abstention under 28 U.S.C. Section 1334(c)(1). Abstention is not appropriate under either subsection, and the motion for relief from stay should be denied.

The state court action against the Debtor for judgment on the note is not a proceeding related to case under title 11. It is a pending prepetition action for a money judgment directly against the Debtor, which presents no viable postpetition remedy for Prudential. Prudential is not entitled to judgment against the Debtor on the note except, perhaps, in the limited sense that it might be necessary to the foreclosure of its mortgage. Prudential does not seek relief from stay to continue foreclosure. In light of the bankruptcy filing and status of the Debtor in Chapter 11, Prudential is entitled to seek the allowance and treatment of a claim in the estate, or, alternatively, to seek foreclosure of its mortgage, but it is not entitled to a state court money judgment against the Debtor based on a prepetition state law cause of action on the note. Accordingly, it would be inappropriate to grant Prudential relief from stay to pursue relief to which it is not entitled in a state court. Certainly, 28 U.S.C. Section 1334(c)(2) has no application.

28 U.S.C. Section 1334(c)(1) has no application either. Prudential has chosen not to file a claim in the estate. The Debtor lists the claim in its schedules as fixed and liquidated at \$15,211,011.05, secured by collateral having a value of \$8,300,000.00. There presently exists no proceeding, actual or prospective, arising in or under title 11 that provides a basis for the evaluation of abstention considerations under 28 U.S.C. Section 1334(c)(1).

Based on the foregoing reasoning, relief from stay should be denied as against the Debtor. Relief should be denied as against the principals too.

While it seems clear that the Section 362 stay does not protect the partners of the Debtor from further litigation in the state court action, it is inappropriate to determine in this Court an issue that has arisen and exists as an affirmative defense of

