UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

In Re:	)	
	)	Case No. 12-01573
CHURCH STREET HEALTH	)	Judge Lundin
MANAGEMENT, LLC, *et al*[1]	)	
	)	Jointly Administered
Debtors	)	

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM THE AUTOMATIC STAY

I. BACKGROUND

Movants are thirty-one children who were patients at one of the New York Small Smiles dental clinics owned and managed by Debtors Church Street Health Management, LLC ("Church Street") and FORBA NY, LLC ("FORBA NY"). Beginning in April 2011, Movants sued Church Street, FORBA NY, and numerous non-bankrupt clinics, dentists and others in one of four lawsuits that are coordinated for pre-trial purposes in an action styled *In re Small Smiles Litigation*, Index No. 11-2128, pending in the New York Supreme Court in Syracuse, New York. In those cases, Movants allege that they received inappropriate, abusive and unnecessary dental care at the Small Smiles dental centers.

Movants urge this Court to exercise its discretion and, pursuant to 11 U.S.C. § 362(d), lift the automatic stay to permit the litigation between the Movants, Debtors Church Street and FORBA NY, and numerous other parties pending in the New York state courts to continue to conclusion. Movants are not seeking to recover anything directly from the Debtors or their

[1] The Debtors are Church Street Health Management, LLC (Case No. 12-01573), Small Smiles Holding Company, LLC (Case No. 12-01574), FORBA NY, LLC (Case No. 12-10575), EEHC, Inc. (Case No. 12-01576) and FORBA Services, Inc. (Case No. 12-01577).

bankruptcy estates, but instead will rely entirely on the proceeds from the Debtors' applicable insurance policies to satisfy any judgment obtained against them. Thus, there is no legitimate reason to continue the automatic stay over the New York state court personal injury litigation.

II. ARGUMENT

Under section 362(d) of the Bankruptcy Code, a court may grant relief from the automatic stay for cause upon request of a party in interest. *See* 11 U.S.C. § 362(d)(1). "Although cause is not defined . . . Congress did intend that the automatic stay be lifted to allow litigation involving the debtor to continue in nonbankruptcy forums . . ." *In re United Imports, Inc*., 203 B.R. 162, 166 (Bankr. D. Neb. 1996)(citing legislative history); s*ee also Robbins v. Robbins*, 964 F.2d 342, 345 (4th Cir. 1992)(citing legislative history: "it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere").

The determination of whether cause exists to permit the movants to proceed with their state court litigation is left to the court's discretion and is to be made based on the facts of the case. *Laguna Assocs. Ltd v. Aetna Cas. & Sur. Co.*, 30 F.3d 734, 737 (6th Cir. 1994). The party opposing relief from the stay bears the burden of proof on all issues except for the debtor's equity in real property. 11 U.S.C. § 362(g)(2); *In re Ramsey,* 2011 Bankr. Lexis 2657 at *4 (Bankr. N.D. Ohio July 7, 2011)(memorandum opinion).

In determining whether cause exists, most courts "balance the hardship to the creditor, if he is not allowed to proceed with his lawsuit, against potential prejudice to the debtor, debtor's

estate and other creditors." *In re R.J. Groover Constr., LLC,* 411 B.R. 460, 463-64 (Bankr. N.D. Ga. 2008). In carrying out this balancing test, courts have considered numerous factors, including:

(1) Whether relief would result in a partial or complete resolution of the issues;

(2) The lack of any connection with 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 the 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 available by the debtor;

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

(11) Whether the parties are ready for trial in the other proceeding;

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

In re New York Medical Group, P.C., 265 B.R. 408, 413 (Bankr. S.D.N.Y. 2001); *see also Sonnax Industries Inc. v. Tri Component Production Corp*. (*In re Sonnax Industries, Inc*.), 907 F.2d 1280, 1286 (2d Cir. 1990); *Goya Foods, Inc. v. Unanue-Casal, (In re Unanue-Casal)* 159 B.R. 90, 96 (D.P.R. 1993) *aff'd* 23 F.3d 395 (1st Cir. 1994); *In re Busch*, 294 B.R. 137, 141 n.4 (10th Cir. B.A.P. 2003); *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984). In weighing these factors, courts only consider those factors that are relevant to the particular case at hand

and do not assign equal weight to each factor. *In re Mazzeo*, 167 F.3d 139, 143 (2d Cir. 1999). In this case, eight of the factors are relevant and all weigh heavily in favor of lifting the stay so that the Movants can continue to prosecute their personal injury claims in the New York state courts.

A. LIFTING THE STAY TO ALLOW THE STATE COURT LITIGATION TO PROCEED WILL COMPLETELY RESOLVE THE ISSUES BETWEEN THE DEBTORS AND THE MOVANTS (FACTOR ONE)

This Court can completely resolve the issues between the parties by lifting the automatic stay. The only issues that exist between the Movants and the Debtors are the underlying personal injury lawsuits. If the Court lifts the stay and allows the Movants to litigate their personal injury claims to conclusion, the relationship between the Movants and the Debtors will be over. Thus, the first factor favors lifting the stay.

B. LIFTING THE STAY WILL NOT INTERFERE WITH THE BANKRUPTCY CASE (FACTOR TWO)

The second factor—whether the state court proceedings are connected with or will interfere with the bankruptcy case—also supports lifting the stay. Movants seek to liquidate their claims in the New York state court litigation as a predicate to recovering under applicable insurance policies and from other non-debtor sources. "Numerous courts have permitted the stay to be lifted when the movant is simply seeking to establish the fact and amount of the debtor's liability and, as in this case, the movant has stipulated that any recovery will be sought from the debtor's insurer or a codefendant." *In re Peterson,* 116 B.R. 247, 250-51 (D. Colo. 1990). In such cases, "there can be no legitimate complaint that the estates will be dissipated by

allowing the litigation to go forward." *In re 15375 Memorial Corp*, 382 B.R. 652, 689 (Bankr. D. Del. 2008); "Where, as here, the plaintiffs have agreed that they will not seek any recovery from estate assets, there is no basis for continuing the automatic stay"; *In re Grace Indus., Inc*., 341 B.R. 399, 405 (Bankr. E.D.N.Y. 2006); s*ee also In re Todd Shipyards Corp*., 92 B.R. 600, (Bankr. D. N.J. 1988)("Since the movants only seek to litigate their claims to the point of judgment and do not seek relief from the stay in order to attach the property of the debtor, such relief does not interfere with the bankruptcy proceedings").

C. THE NEW YORK STATE COURT LITIGATION HAS BEEN COORDINATED BEFORE A SPECIALIZED TRIBUNAL WITH NECESSARY EXPERTISE (FACTOR FOUR)

The motion to lift stay should be granted for another reason: the cases are pending before a specialized New York tribunal with the necessary expertise. Movants' cases were originally filed in the Supreme Court in Schenectady County, Onondaga County, Monroe County and Rensselaer County. Because the cases contain numerous common issues of law and fact, on August 25, 2011, the New York Litigation Coordination Panel ordered the cases and any other similarly filed cases in New York against Church Street, its clinics and dentists be coordinated for pre-trial purposes before a single New York Supreme Court Justice. On September 27, 2011, the Honorable John C. Cherundolo was appointed as the coordinating justice. Medical negligence cases receive specialized treatment in New York, including unique pleading and discovery rules. Judge Cherundolo received his appointment as coordinating justice because he is familiar with, and has the expertise to deal with complex multi-party medical negligence cases under New York law. Conversely, the bankruptcy court does not have experience managing

New York medical personal injury cases. Thus, the fourth factor supports lifting the stay so the cases may continue before a New York state court judge. *See In re White*, 851 F.2d 170, 173-74 (6th Cir. 1988)(lifting of stay affirmed because state law issues are best left to state courts to resolve).

D. THE DEBTOR'S INSURANCE CARRIER HAS ASSUMED RESPONSIBILITY FOR DEFENDING THE NEW YORK STATE COURT LITIGATION (FACTOR FIVE)

The next relevant factor is whether a debtor's insurance carrier has assumed responsibility for defending the state court litigation. If so, then lifting the stay to allow the state court litigation to proceed will not prejudice the debtors.

The Debtors have insurance coverage for the claims that are the subject of this case. They purchased liability policies from National Union Fire Insurance Company covering the period of September 2008 through September 2010. The policies insured the Debtors for claims made during each policy year for conduct going back as far as 2001. When National Union cancelled the policy in September 2010, the Debtors purchased an extended reporting endorsement ("tail coverage") that provides insurance coverage for acts between 2001 and September 2010, regardless of when the claim is made. Movants made claims during the period covered by National Union policy so there is no doubt that National Union owes the Debtors a duty to defend the litigation.

Debtors Church Street and FORBA NY are represented in the New York state court litigation by the law firm of Smith Sovik Kendrick & Sugnet, P.C. of Syracuse, New York. Smith Sovik also represents the three non-bankrupt clinics in the case. Movants believe that the

Debtors' insurance carrier, National Union, hired Smith Sovik to defend the New York state court litigation and is paying the attorneys' fees and expenses related to that defense. Since National Union is paying for the cost of defending Debtors Church Street and FORBA NY in the New York state court litigation, they will not suffer any financial burden from continuing to defend those cases. Thus, factor five also strongly favors lifting the stay. *Holtkamp v. Littlefield* (*In re Holtkamp*), 669 F.2d 505, 508 (7th Cir. 1982)(stay lifted to allow civil action to go forward since insurer assumed full responsibility for defending litigation); *Elliott v. Hardison*, 25 B.R. 305, 308 (E.D. Va. 1982)("Where the claim is one covered by insurance or indemnity, continuation of the action should be permitted since hardship to the debtor is likely to be outweighed by hardship to the plaintiff." (quoting 2 Collier on Bankruptcy ¶ 362.07[3] (15th ed. 1980).

E. THE NEW YORK STATE COURT LITIGATION PRIMARILY INVOLVES THIRD PARTIES (FACTOR SIX)

The sixth factor—whether the litigation outside of bankruptcy primarily involves third parties—also favors lifting the stay. The New York state court litigation is comprised of four cases with a total of 31 plaintiffs and 45 defendants. Of those 76 parties, only 2—Church Street and FORBA NY—are in bankruptcy. The stay should be lifted so that the rights of dozens of non-bankrupt parties can be adjudicated promptly in the New York state courts.

F. LIFTING THE STAY WILL NOT PREJUDICE OTHER CREDITORS (FACTOR SEVEN)

Another factor that supports granting the motion to lift the stay is that the New York state court litigation will not prejudice the interests of other creditors. Movants have disavowed any claim to the Debtors' estate and will collect any judgment against the Debtors solely from the applicable insurance proceeds. Thus, the other creditors in the bankruptcy will not be harmed by granting the motion because Movants will not be able to enforce any judgment directly against the Debtors or their estates. *See R.J. Groover Construction*, 411 B.R. at 465; *In re Loudon*, 284 B.R. 106, 108 (8th Cir. B.A.P. 2002); *In re G.S. Distribution. Inc.*, 331 B.R. 552, 567-68 (Bankr. S.D.N.Y. 2005)(finding no prejudice to creditors from lifting stay because movant would not be able to enforce judgment without permission of bankruptcy court); *In re 15375 Memorial Corp*., 382 B.R. at 690 (lifting stay because movant's "recovery against available insurance proceeds will in no way negatively impact the rights of the handful of other creditors in these cases").

G. LIFTING THE STAY WILL PROMOTE JUDICIAL ECONOMY (FACTOR TEN)

The Court should grant relief from the automatic stay because doing so will serve the interests of judicial economy and expeditious resolution of the issues in the cases. *See In re Laventhol & Horwath*, 139 B.R. 109, 116 (S.D.NY. 1992) (important factors for a court to consider in deciding whether to lift an automatic stay for cause are "the interests of judicial economy and the expeditious and economical resolution of litigation").

The New York state court litigation began a year ago. The parties have exchanged discovery requests. Responses to those requests are due soon. In addition, the parties are awaiting rulings by Judge Cherundolo on partial motions to dismiss that were filed by most of the defendants, including the Debtors. Those motions were argued on February 9, 2012 and are based entirely on New York law. It would be extraordinarily inefficient to halt the personal injury litigation that is well underway in New York and start over in bankruptcy court.

Moreover, New York is the only court that has jurisdiction over all the parties. Besides the two Debtors, there are more than forty defendants in the coordinated proceedings. Most are dentists who treated one or more of the thirty-one plaintiffs. The majority of the dentist defendants live in New York and none live in Tennessee. Nearly all of the plaintiffs reside in New York. Most of the events that are the subject of the litigation took place in New York. Most of the witnesses to those events live in New York. "Because this Court does not have jurisdiction over [any of the nonbankrupt defendants], two trials, one in the state court and one in the bankruptcy court, with attendant duplication and waste of judicial resources, will be required to resolve the same cause of action, if the stay is not lifted." *In re Marvin Johnson's Auto Service, Inc*., 192 B.R. 1008, 1015-16 (Bankr. N.D. Ala. 1996). Faced with the prospect of ordering the parties to try the same facts once in bankruptcy court and once in state court, the bankruptcy judge in *In re Marvin Johnson Auto Service, Inc*., lifted the automatic stay for the benefit of all concerned, including the bankruptcy court:

> Principles of judicial economy require that, without good reason, judicial resources should not be spent by duplicitous litigation, and that a lawsuit should only be tried once, that is if one forum with jurisdiction over all parties is available to dispose of all issues relating to the lawsuit. The state court is in the best posture to provide a relatively quick and complete consideration of all the issues, among all the parties, and to do so while guaranteeing to each, the constitutional rights of due process and a trial by jury. *Id.*

H. CONTINUING THE AUTOMATIC STAY WILL IMPOSE SUBSTANTIAL HARDSHIPS ON MOVANTS THAT FAR OUTWEIGH ANY HARDSHIPS ON THE DEBTORS (FACTOR TWELVE)

The final factor looks to whether maintaining the automatic stay will cause Movants a greater hardship than the Debtors would suffer if the Court lifted the stay. *In re Pro Football Weekly, Inc*., 60 B.R. 824, 826 (N.D. Ill. 1986); *In re Peterson*, 116 B.R. at 250. Here, the automatic stay is causing significant hardship to the Movants with no corresponding benefit to the Debtors. The Movants' lawsuits against not only the two Debtors, but the other 43 defendants as well, are in limbo because of the automatic stay. If the automatic stay is not lifted, Movants will have to wait an inordinately long time to get their personal injury claims decided. The indefinite delay creates enormous hardships for the Movants. "A number of Courts have attributed a considerable weight to the fact that a plaintiff, by having to wait, may effectively be denied an opportunity to litigate. The aging of evidence, loss of witnesses, and crowded court dockets are factors which contribute to these hardships." *In re Bock Laundry Machine Co*., 37 B.R. 564, 566 (Bankr. N.D. Ohio 1984); *In re 15375 Memorial Corp*, 382 B.R. at 690 (Lifting stay because, among other reasons, Movant was "prejudiced by the lapse of time in terms of its ability to effectively prosecute its claims"); *see also In re Robertson,* 244 B.R. 880, 883 (Bankr. N.D. Ga. 2000)("Movant['s] claim for damages will evaporate if the stay is not lifted . . ."). Moreover, if the automatic stay is not lifted, Movants will be required to litigate their claims against the Debtors in Tennessee. Practically, that will be the end of their litigation against the Debtors. Movants—low-income young children and their parents—will not be able to travel to Tennessee to attend a trial in bankruptcy court against two of several defendants. *See In re Bock Laundry Machine, Co*., 37 B.R. at 567 ("Personal injury litigation can consume a considerable

length of time before the final award is made. Requiring the Movants to forego prosecution of their claims until such time as the stay is no longer in effect will effectively deny them an opportunity to be heard.").

Conversely, if the stay is lifted, Debtors will not suffer at all. Their insurance carrier has already assumed the defense of these personal injury cases and any judgment Movants obtain against the Debtors will be paid out of insurance proceeds and not by the Debtors or the bankruptcy estates. Indeed, "the only party that stands to benefit financially if the stay is not lifted is [the Debtors' insurance company]." *In re Robertson*, 244 B.R. at 883. As one bankruptcy judge said in lifting the stay under similar circumstances: "[I]t would be grossly unfair for [the insurance company] to benefit at Movant's expense." *Id*; *see also Awashi v. Jet Florida System, Inc*., 883 F.2d 970 (11th Cir. 1989)("The 'fresh start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured.").

III. CONCLUSION

"The automatic stay was never intended to preclude a determination of tort liability and the attendant damages. It was merely intended to prevent a prejudicial dissipation of a debtor's assets. A lifting of the stay to allow a plaintiff-creditor to determine liability will not affect the estate. It will only allow the Movants to establish the amount of [their] claim . . . In this respect, a relief from the stay will not violate the purpose for which it was imposed." *In re Bock Laundry Machine, Co.*, 37 B.R. at 567. On the other hand, Movants believe the interests of judicial economy will be served by lifting the stay to permit these New York personal injury cases to

continue in the New York state courts before a judge who is familiar with the cases, the applicable New York law, and has special expertise to hear them. For all the reasons stated above, Movants respectfully request that this Court grant their Motion.

Dated this 2nd day of April, 2012

Respectfully submitted,

/s/ Glenn B. Rose

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2012 a true and correct copy of the foregoing Document was filed electronically. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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