United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Howard A. Koop

Bankruptcy No. 00 B 24471

Date of Issuance: May 23, 2002

Judge: John H. Squires

Appearance of Counsel:

Attorney for Movant: Harold L. Moskowitz, Esq., 100 North LaSalle Street, 24th Floor, Chicago, IL 60602

Attorney for Respondent: Anthony J. Sassan, Esq., Aldo E. Botti, Esq., Botti, Marinaccio & DeLongis, Ltd., 720 Enterprise Drive, Oak Brook, IL 60523

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 7
HOWARD KOOP,	)	Bankruptcy No. 00 B 24471
	)	Judge John H. Squires
Debtor.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Howard Koop (the "Debtor") for sanctions under 11 U.S.C. § 362(h) against William Gahlberg ("Gahlberg") and his attorneys, the law firm of Botti, Marinaccio & Delongis, Ltd. (the "Law Firm") for alleged violations of the automatic stay provisions of 11 U.S.C. § 362(a). For the reasons set forth herein, the Court denies the Debtor's motion and concludes that Gahlberg and the Law Firm did not violate the automatic stay by pursuing post-judgment enforcement proceedings against a third-party non-debtor entity of which the Debtor was the registered agent.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. FACTS AND BACKGROUND

In June 1999, Gahlberg filed a complaint in the Circuit Court for the Eighteenth Judicial Circuit in DuPage County, Illinois (the "State Court Lawsuit") against Koop, individually, and as a member of Wheaton Townhome Venture, L.L.C. ("Wheaton Townhome"), as well as against Wheaton Townhome as an Illinois limited liability company, concerning a purchase agreement regarding a single-family home. Pursuant to the purchase agreement, Gahlberg provided a deposit on the home. Thereafter, the parties allegedly modified the purchase agreement whereby Gahlberg was no longer obligated to purchase the home, and the Debtor and Wheaton Townhome had the right to sell the residence to another purchaser in exchange for the return of Gahlberg's deposit. Allegedly, the Debtor and Wheaton Townhome resold Gahlberg's home to another purchaser for a substantially greater price than that initially agreed upon with Gahlberg, but failed to return Gahlberg's deposit. The Law Firm represented Gahlberg in the State Court Lawsuit.

Gahlberg learned that certain business entities named Koopwisch, BJLM Construction, Inc. ("BJLM") and Elmhurst Townhomes, L.L.C. ("Elmhurst Townhomes") either participated in or were invoiced by subcontractors for the construction of the home Gahlberg had originally contracted to purchase. Gahlberg filed two amended complaints adding, among others, these entities as defendants. The Illinois Secretary of State's records listed the Debtor as the

registered agent for BJLM. See Gahlberg's Exhibit No. 23. Elmhurst Townhomes and BJLM were dissolved by the Illinois Secretary of State during the pendency of the State Court Lawsuit on June 29, 2000 and November 1, 2000, respectively. See Debtor's Exhibit Nos. 5 and 6.

On August 21, 2000, the Debtor filed a Chapter 7 bankruptcy petition. The Law Firm learned of the Debtor's bankruptcy petition in September, 2000. On September 20, 2000, all matters relating to the Debtor individually in the State Court Lawsuit were placed on inactive status as a result of his bankruptcy. See Gahlberg's Exhibit No. 15. On November 21, 2000, Gahlberg filed an adversary proceeding against the Debtor objecting to the Debtor's discharge under 11 U.S.C. § 727. That adversary proceeding was ultimately dismissed on October 12, 2001.

On March 15, 2001, Gahlberg obtained a default judgment against Wheaton Townhome in the amount of $30,000.00 and an order of default against BJLM in the State Court Lawsuit. See Gahlberg's Exhibit No. 19. Thereafter, on June 27, 2001, a judgment was entered in favor of Gahlberg and against BJLM in the sum of $30,000.00. See Debtor's Exhibit No. 10 and Gahlberg's Exhibit No. 20.

On July 23, 2001, a citation to discover assets was issued against BJLM and served on its registered agent, the Debtor, setting a hearing for September 7, 2001. See Debtor's Exhibit No. 1 and Gahlberg's Exhibit No. 24. The instant motion focuses on this and subsequent enforcement actions taken against BJLM through the Debtor as its registered agent. The Debtor failed to appear on September 7, 2001. Therefore, a rule to show cause was entered

against him. See Gahlberg's Exhibit No. 26. The rule to show cause was returnable on November 7, 2001. See id. On November 7, 2001, the rule to show cause was continued to December 6, 2001 because Gahlberg did not have proof of service of the rule to show cause on the Debtor. See Debtor's Exhibit Nos. 11 and 12; Gahlberg's Exhibit No. 27. On December 6, 2001, the rule to show cause was again continued to January 10, 2002 because Gahlberg did not have proof of service of the rule on the Debtor. See Gahlberg's Exhibit Nos. 28 and 29.

On December 27, 2001, the Debtor's attorney sent a letter to the Law Firm demanding that they cease on behalf of Gahlberg any action against the Debtor in the State Court Lawsuit. See Debtor's Exhibit No. 2 and Gahlberg's Group Exhibit No. 31. On January 3, 2002, the Law Firm responded that any action taken in the State Court Lawsuit post-petition was against the non-debtor business entities and that any documents that the Debtor had been served with were served on him in his capacity as the registered agent for BJLM. See Debtor's Exhibit No. 3 and Gahlberg's Group Exhibit No. 31. The letter further stated that the Law Firm would continue to honor the automatic stay issued in the Debtor's Chapter 7 case, but that it would continue its efforts against the business entity co-defendants of the Debtor because such efforts did not violate the automatic stay. See id. Thereafter, on January 7, 2002, the Debtor's attorney responded by letter and raised issues concerning the status of the co-defendants and accused Gahlberg of having a personal vendetta against the Debtor. See Debtor's Exhibit No. 4 and Gahlberg's Group Exhibit No. 31.

On January 9, 2002, the Debtor filed the instant motion against Gahlberg and the Law

Firm for sanctions under 11 U.S.C. § 362(h) for alleged violations of the automatic stay. Specifically, the Debtor contends that the citation to discover assets filed in the State Court Lawsuit that was served on the Debtor, as registered agent for BJLM, and the subsequent enforcement actions, which sought information regarding documents of BJLM, was an attempt to proceed against the assets of the Debtor in violation of the automatic stay.

The Court held a trial on this contested matter on April 26, 2002. At that time, the Debtor's attorney submitted the time he expended relevant to this motion. He initially sought fees and costs in the amount of $4,452.70. See Debtor's Exhibit No. 16. Thereafter, the parties submitted written closing arguments. The Debtor's attorney filed a supplement to his fee request in which he seeks additional payment of fees in the sum of $4,082.50, plus reimbursement of costs in the amount of $34.25. The Court took the matter under advisement and makes the following findings and conclusions.

III. APPLICABLE STANDARDS

"The automatic stay is indeed a powerful tool of the bankruptcy courts." Fox Valley Const. Workers Fringe Benefit Funds v. Pride of Fox Masonry and Expert Restorations, 140 F.3d 661, 666 (7th Cir. 1998) (footnote omitted). Section 362 of the Bankruptcy Code provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of–
>
> (1) the commencement or continuation, including the issuance or employment of

> process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.
>
> . . .
>
> (h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(a)(1) and (h). Moreover, § 362 also operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). "'The purpose of this section . . . is to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors. . . .'" Fox Valley Const. Workers, 140 F.3d at 666 (quoting A.H. Robins Co. v. Piccinin, 788 F.2d 994, 998 (4th Cir.), cert. denied, 479 U.S. 876 (1986)).

The Seventh Circuit Court of Appeals has held that, as a general rule, the automatic stay applies only to actions against the debtor; it does not apply to actions against other parties. See Pitts v. Unarco Indus., Inc., 698 F.2d 313, 314 (7th Cir. 1983). By way of contrast, in Chapters 12 and 13 of the Bankruptcy Code, Congress has explicitly provided for a stay of actions against individuals liable with the debtor on consumer debts. See 11 U.S.C. §§ 1201 and 1301. Accordingly, actions may generally proceed with respect to the debtor's co-

defendants. See Pitts, 698 F.2d at 314. The language of § 362 refers only to actions against the debtor and does not relate to any other inter-party claims. See 555 M Mfg., Inc. v. Calvin Klein, Inc., 13 F. Supp.2d 719, 722 (N.D. Ill. 1998); Royal Truck & Trailer, Inc. v. Armadora Maritima Salvadorena, S.A., 10 B.R. 488, 490 (N.D. Ill. 1981). A literal interpretation of the language comports with the rationale behind § 362's formulation. The automatic stay is designed to provide the debtor with a respite and preserve the assets of the estate for the benefit of the creditors; it is not designed to afford collateral benefits to non-debtor parties involved in litigation with the debtor as party defendants or as co-defendants. The debtor is not stayed from pursuing claims in its favor and plaintiffs are free to pursue the debtor's co-defendants. They are not included under the penumbra of § 362's protection. See In re Johns-Manville Corp., 26 B.R. 405, 409-10 (Bankr. S.D. N.Y. 1983), aff'd, 40 B.R. 219 (S.D. N.Y. 1984). Furthermore, the automatic stay does not generally apply to post-petition liabilities of Chapter 7 and 11 debtors. See Bellini Imports v. Mason & Dixon Lines, Inc., 944 F.2d 199, 201 (4th Cir. 1991). The Debtor's failure to appear as registered agent for BJLM at the citation hearing and the subsequent civil contempt proceedings against him constitute a new post-petition claim, which is not subject to the automatic stay. The stay bars only the personal pre-petition claims Gahlberg asserted against the Debtor.

There are certain limited situations in which the automatic stay is held applicable to non-debtor parties. The Seventh Circuit announced in In re Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991) that the automatic stay may be applicable in unusual circumstances where "'there is such identity between the debtor and the third-party defendant that the debtor

may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.'" See id. at 736 (quoting A.H. Robins, 788 F.2d at 999). Another exception operates where the pending litigation, though not brought against the debtor, would cause the debtor, the bankruptcy estate, or the reorganization plan "irreparable harm." Fernstrom, 938 F.2d at 736 (citations omitted).

Accordingly, the stay protects only the debtor (as well as the debtor's exempt property and property comprising the bankruptcy estate), unless the debtor and a third party have such a similarity of interests that failure to protect the third party will mean that the assets of the debtor itself will fall into jeopardy. Fox Valley Const. Workers, 140 F.3d at 666 (citation omitted).

IV. DISCUSSION

First, the Court notes that the Debtor's motion for sanctions incorrectly alleges, and the evidence at trial failed to prove, that Gahlberg and the Law Firm continued to file proceedings in the State Court Lawsuit making claims against the Debtor personally. To the contrary, both the documentary and credible testimonial evidence showed that Gahlberg and the Law Firm neither initiated nor pursued any action against the Debtor personally in the State Court Lawsuit after the Law Firm received notice of the Debtor's bankruptcy filing in September, 2000. Anthony J. Sassan, an attorney with the Law Firm, testified that he took no action against the Debtor personally once he learned of the bankruptcy filing. Rather, he stated that all actions were directed toward the non-debtor co-defendant entities. Furthermore, Gahlberg testified that he directed the Law Firm to secure a judgment against any responsible entity whose assets

were sufficient to pay the judgment. Gahlberg testified that he had limited input into the actions taken by the Law Firm in carrying out his directions. His principal goal was to obtain a refund of his deposit.

The Court finds that the Debtor has failed to demonstrate that the automatic stay should serve as a bar to Gahlberg and the Law Firm and preclude them from proceeding against BJLM in the State Court Lawsuit. As the Seventh Circuit has noted, the automatic stay generally does not apply to non-debtor co-defendants of debtors. Pitts, 698 F.2d at 314. The Debtor failed to argue, let alone show that he and BJLM have such a similarity of interest of identity between them that the Debtor may be said to be the real party defendant and that a judgment against BJLM will, in effect, constitute a judgment or finding against the Debtor. The citation to discover assets required the Debtor, as registered agent for BJLM, to appear. He did not appear, which led to the rule to show cause. The automatic stay does not apply to protect the Debtor's co-defendant BJLM.

Moreover, the automatic stay does not apply to the Debtor in his corporate capacity as registered agent for BJLM to allow him to avoid the legitimate attempt to discover BJLM's assets from which Gahlberg's judgment might be paid. The citation to discover assets did not seek any type of prohibited action under § 362(a) against the Debtor personally. Rather, the citation to discover assets pertains to BJLM and was served on the Debtor as the registered agent of the Illinois corporation. The issue of whether the Debtor wholly owned BJLM does not, ipso facto, mean that Gahlberg and the Law Firm were seeking to obtain his assets personally. Additionally, the Debtor failed to allege, let alone demonstrate, that the citation to

discover assets summons served upon him in his capacity as registered agent for BJLM would cause him or the bankruptcy estate "irreparable harm." The automatic stay did not absolve the Debtor, as registered agent for BJLM, from appropriately responding to the state court process on its behalf.

The Debtor argues that the real purpose of the BJLM citation to discover assets was an attempt to ascertain information about the Debtor and his assets–if not to obtain money from the Debtor–because Gahlberg and the Law Firm used the state court authority to attempt to ascertain information, among many other things, about corporate advances to the shareholders, and the Debtor was the only shareholder of BJLM. The Court finds that the evidence adduced at trial failed to show any proscribed action against the Debtor personally. In support of this argument, the Debtor cites In re Fridge, 239 B.R. 182 (Bankr. N.D. Ill. 1999). Unfortunately for the Debtor, the Fridge case fails to lend support to his argument. In Fridge, the creditor and its counsel served a citation to discover assets on the debtor. Shortly thereafter, the debtor filed a Chapter 13 bankruptcy petition. The citation summons was set for hearing in the state court several days later. The creditor and his attorneys were aware that the debtor had filed a bankruptcy petition. The debtor appeared at the hearing in the state court (unlike the Debtor in this matter), as ordered by the citation summons, without counsel. The creditor's attorney proceeded to question the debtor about whether he had filed a bankruptcy petition and whether he had paid any money in violation of the citation proceeding. The court in Fridge held that the creditor's attorney's question as to whether the debtor had filed for bankruptcy was not a violation of the automatic stay because it did not constitute an effort to collect the judgment

owed by the debtor to the creditor. See id. at 190. However, the inquiry as to whether the debtor had paid any money in violation of the citation, after the debtor had already stated that he had filed bankruptcy, constituted an action to enforce the authority of the citations summons in violation of the automatic stay. See id.

The facts in the Fridge case are significantly different than those in the case at bar. The creditor's actions in Fridge were taken by citing in the individual who had filed a bankruptcy petition, unlike here where the citation was directed against BJLM, a non-debtor entity, via its registered agent--the Debtor. Gahlberg and the Law Firm took post-judgment collection action against the Debtor solely as a registered agent of a non-debtor, co-defendant. These facts differ significantly from those in the Fridge case. Accordingly, the Debtor's reliance on Fridge is misplaced.

The Court adheres to the legal fiction that artificial entities like limited liability companies, corporations and partnerships are separate legal entities from those individuals who are their agents. The automatic stay does not provide a shield under § 362(a) to any entities in which the Debtor was an officer, director, partner or agent. The actions taken by Gahlberg and the Law Firm were not against the Debtor personally. While the automatic stay of § 362(a) clearly provides a shield to the Debtor, the Debtor's property and the property of the bankruptcy estate, the sanctions provision of § 362(h) is generally not properly employed as an offensive weapon in favor of non-debtor third-party entities not protected by § 362(a).

Further, the Debtor argues that pursuant to the doctrine of election of remedies, once Gahlberg obtained a judgment against Wheaton Townhome, he had elected his remedy and

could not seek a judgment against the other entities. He cites to several Illinois cases in support of this proposition. The Court finds this argument both inapposite and disingenuous. Whether Gahlberg and the Law Firm violated the automatic stay by serving a citation to discover assets on the Debtor, as registered agent of a non-debtor co-defendant, is the only issue before the Court. The issue of whether Gahlberg was correctly proceeding against entities other than the Debtor and Wheaton Townhome, or is barred by his election of remedies in further pursuit of BJLM, must be raised in the State Court Lawsuit. This Court does not review the actions of the state court. See generally Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); see also Levin v. Attorney Registration and Disciplinary Comm'n of the Supreme Court of Illinois, 74 F.3d 763, 766 (7th Cir.), cert. denied, 518 U.S. 1020 (1996) ("The Rooker-Feldman doctrine dictates that federal courts lack jurisdiction to review decisions of state courts.").

Moreover, that certain of the co-defendant business entities were dissolved during the time that the State Court Lawsuit was pending, does not, ipso facto, convert the post-judgment citation proceeding directed against BJLM into a proceeding against the Debtor personally. It is undisputed that Elmhurst Townhomes and BJLM were dissolved under Illinois law. See Debtor's Exhibit Nos. 5 and 6. However, the dissolution of those non-debtor co-defendant entities during the pendency of the State Court Lawsuit did not convert the post-judgment actions taken by Gahlberg and the Law Firm into prohibited actions against the Debtor personally. It is well-established in Illinois that a corporate entity many be sued for a certain period even after it has been dissolved. See 805 ILCS 5/12.80; Pehr v. Metz, Train &

Youngren, Inc., 274 Ill. App.3d 218, 224, 653 N.E.2d 766, 770 (1st Dist.), appeal denied, 164 Ill.2d 567 (1995). The Debtor's individual bankruptcy case does not insulate him from post-petition liability for failure to appear as registered agent for BJLM.

Similarly, the Court rejects the Debtor's bootless argument that the failure of Gahlberg and the Law Firm to pursue other parties, and other avenues of potential recovery, somehow proves that they were therefore improperly pursuing the Debtor. That argument misdirects the proper focus of this matter from what Gahlberg and the Law Firm actually did to the Debtor personally, to what Gahlberg and the Law Firm failed to do with respect to other avenues of recovery. The latter is irrelevant to the issue at bar.

Furthermore, the Court rejects the Debtor's argument that under the doctrine of judicial estoppel, Gahlberg and the Law Firm should not be allowed to assert that they served the citations summons on the Debtor solely in his capacity as registered agent for BJLM because in the State Court Lawsuit, the judgment obtained against BJLM was based on the alleged fact that the Debtor and BJLM were deemed as one entity. The doctrine of judicial estoppel provides that a party who prevails on one ground in a lawsuit cannot repudiate the ground in order to have a second victory based upon a contradictory ground. See Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 526 (7th Cir. 1999). The Court rejects the Debtor's contention that the judgment against BJLM in the State Court Lawsuit was allegedly obtained because BJLM and the Debtor were deemed to be one entity. This is irrelevant to the issue at bar–whether the automatic stay was violated when the Debtor was served with the citation summons in his capacity as registered agent for BJLM. The doctrine of judicial

estoppel is inapposite to the issue of whether Gahlberg and the Law Firm violated the automatic stay.

The Court concludes that the evidence failed to demonstrate that the Law Firm and Gahlberg violated the automatic stay. The service of the citation to discover assets upon the Debtor, as registered agent for BJLM, and the subsequent actions in the State Court Lawsuit to attempt to enforce the judgment against BJLM, did not constitute acts in violation of the automatic stay. Thus, the Court need not address the issue of the attorney's fees sought.

Finally, the Court denies, as both procedurally and substantively deficient, the Debtor's request to enjoin Gahlberg and the Law Firm from taking any further action in the State Court Lawsuit. Procedurally, pursuant to Federal Rule of Bankruptcy Procedure 7001(7), a request to obtain an injunction must be filed by way of an adversary proceeding. That was not done here. Moreover, even if the request had been procedurally proper, the Debtor failed to allege, let alone prove, the requisite elements for the imposition of injunctive relief under Federal Rule of Bankruptcy Procedure 7065, which incorporates by reference Federal Rule of Civil Procedure 65.

V. CONCLUSION

For the foregoing reasons, the Court denies the Debtor's motion for sanctions under § 362(h) against Gahlberg and the Law Firm.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

_____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 7
HOWARD KOOP,	)	Bankruptcy No. 00 B 24471
	)	Judge John H. Squires
Debtor.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 23rd day of May, 2002, the Court denies the motion of Howard Koop for sanctions under 11 U.S.C. § 362(h) against William Gahlberg and his attorneys, the law firm of Botti, Marinaccio & Delongis, Ltd. for alleged violations of the automatic stay provisions of 11 U.S.C. § 362(a).

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List