

In the United States Bankruptcy Court

for the Northern District of Iowa

LARKEN HOTEL LIMITED PARTNERSHIP
Debtor(s).

Bankruptcy No. 94-10388KC
Chapter 11

LARKEN HOTEL LIMITED PARTNERSHIP
Plaintiff(s)

Adversary No. 94-1027KC

vs.

STATE OF NORTH DAKOTA
Defendant(s)

RULING ON MOTION FOR TEMPORARY INJUNCTION

On March 28, 1994, the above-captioned matter came on for expedited hearing on Plaintiff's Motion for Injunctive Relief. The specific matter before the Court is Plaintiff's Motion for a preliminary injunction enjoining Defendant State of North Dakota from pursuing a criminal prosecution. The Plaintiff was represented by Attorney Dan Childers. The State of North Dakota was represented by Burleigh County Attorney Kristine J. Paronica. Hearing was held on an expedited basis by telephone conference call. Upon completion of the conference, the Court took the matter under advisement.

STATEMENT OF THE CASE

The following factual conclusions were not presented in an evidentiary context. However, it appears that most, if not all, of the recited facts are not in controversy and, for the purposes of this record, are sufficiently established that legal conclusions can be drawn from these recitations.

Mr. Jack Fider is the Hotel Manager for the Ramada Hotel located in Bismarck, North Dakota. Bismarck is located in Burleigh County, North Dakota. This Ramada Hotel is one of the properties owned by Plaintiff. In his capacity as Hotel Manager, Mr. Fider wrote checks on the Ramada Hotel account on January 26, 1994. One of those checks was No. 3342 in the amount of \$118.72. The payee was Dakota Office Supplies which had provided goods to the Ramada Inn. Firstar Bank in Cedar Rapids, Iowa is the drawee bank named on the check. It appears that the check was handed over to a delivery man for Dakota Office Supplies on January 26, 1994.

The check was presented to Firstar Bank for payment. The stamped dates on the check do not clearly reflect the dates when the check was presented. It does appear, however, that the check was presented twice and was returned both times unpaid with the designation that the account was closed. The check was presented for the second time no later than February 24, 1994.

On January 28, 1994, Plaintiff filed its Chapter 11 Petition in the U.S. Bankruptcy Court for the District of Nebraska. All existing bank accounts, including the bank account in question here, were

closed pursuant to U.S. Trustee guidelines. On either January 28 or January 29, 1994, the Plaintiff closed its Ramada Hotel/Bismarck checking account at Firststar Bank and the Bank was directed to stop payment on all outstanding checks. It is for this reason that the Dakota Office Supply check was returned with the "Account Closed" designation.

When the check was returned for the second time, Dakota Office Supply contacted the Burleigh County Attorney's Office which filed a criminal complaint captioned State of North Dakota, Plaintiff v. Jack Fider, d/b/a Ramada Hotel-Bismarck, Defendant. The criminal complaint was filed March 9, 1994. The complaint, the attached affidavit, and other charging documents allege facts consistent with the factual determination made in this ruling.

Plaintiff Larken Hotels Limited Partnership filed this adversary proceeding on March 24, 1994 seeking injunctive relief. Plaintiff alleges many of the operative facts contained in this ruling and seeks injunctive relief to prevent the State of North Dakota from prosecuting Mr. Fider for this insufficient funds check. Plaintiff asserts that Mr. Fider may be subject to a fine, jail sentence, or both as well as suffer loss of reputation and a detriment to his financial history. Plaintiff claims irreparable injury will occur if Defendant's prosecution is not enjoined because employee morale is important and Plaintiff cannot afford to have its employees prosecuted for actions which may be attributable to Plaintiff.

The State of North Dakota, through Assistant State's Attorney Paronica, filed an Answer on March 28, 1994. Defendant asserts that the criminal complaint was filed in good faith and that Federal Courts should honor a State's rights in criminal proceedings to protect its citizens through the exercise of legitimate police powers. Defendant, State of North Dakota, therefore, asks this Court to deny the Plaintiff's request for a temporary or permanent injunction.

Hearing was held on an expedited basis on March 28, 1994 on the Plaintiff's request for a temporary injunction. The parties submitted documents and briefs as well as oral arguments which were held by telephone conference call. The Court has considered all of those matters in this ruling.

CONCLUSIONS

The Debtor's Chapter 11 Bankruptcy Petition was filed on January 28, 1994. The Bankruptcy Code, 11 U.S.C. § 362, provides for an automatic stay upon commencement of the case. This automatic stay prevents the commencement or continuation of proceedings against the Debtor to recover a claim against the Debtor that arose before the commencement of the case.

Even though the automatic stay is extremely broad in scope, § 362(b)(1) provides the following exception to the stay: "The filing of a petition . . . does not operate as a stay . . . under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor."

This exception is consistent with the general philosophy of the Federal Courts that principles of equity and comity must restrain Federal Court conduct when it is asked to enjoin a State Court proceeding. Mitchum v. Foster, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972). This exception is also consistent with the Anti-Injunction Act, 28 U.S.C. § 2283, which contains a general prohibition against Federal Courts enjoining both civil and criminal proceedings in State Court: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by act of Congress, or where necessary, in aid of jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1988).

The Anti-Injunction Act provides, however, that Federal Courts may enjoin State proceedings when there is Federal statutory authorization for the issuance of an injunction. Section 105(a) of the Bankruptcy Code is generally interpreted as giving bankruptcy courts the authority to stay State criminal proceedings in appropriate circumstances. In re Matter of Davis, 691 F.2d 176, 178 (3d Cir. 1982).

Therefore, the exemption of criminal proceedings from the automatic stay under § 362(b)(1) and the prohibitions contained in the Anti-Injunction Act, 28 U.S.C. § 2283, are not absolute if a party requesting injunctive relief can meet the stringent requirements of 11 U.S.C. § 105.

A party seeking an injunction under 11 U.S.C. § 105 must comply with the procedural rules relating to this extraordinary remedy set out in Bankruptcy Rule of Procedure 7065. Generally, four criteria are evaluated to determine if injunctive relief should be granted. The Court must find that the moving party stands a substantial likelihood of success in the underlying dispute, that there is irreparable harm to the movant, that the harm to the moving party outweighs the potential harm to the non-moving party, and that there is no violation of public interest by the granting of the relief sought. In re Terry Gearhart, No. 93-10494LC, slip op. at 2 (Bankr. N.D. Iowa Aug. 18, 1993).

In applying these criteria, the Court must keep in clear focus the extreme reluctance of Federal Courts to enjoin criminal prosecutions even though such authority exists under 11 U.S.C. § 105. In this case, based upon the limited record, it is impossible to predict with any degree of certainty whether the movant stands a substantial likelihood of success in the underlying dispute. It does appear, however, that the Plaintiff has raised substantial issues in this litigation including the interplay between the Bankruptcy Code and the North Dakota Criminal Code as well as potential application of the Supremacy Clause. Clearly, serious issues exist which can be addressed at a final hearing.

The matter before the Court, at this time, is the more limited issue of a temporary injunction. In order to warrant the issuance of a temporary injunction, the Court must be satisfied that there will be irreparable harm to the movant which outweighs potential harm to the State of North Dakota. At the time of hearing on the temporary injunction, the Court was advised that the Defendant had an initial appearance on March 31, 1994. This procedure involved the entry of a not guilty plea and the setting of a trial date. The Court was advised that a trial date would probably not be set until September of 1994. There does not appear to be a substantial risk of loss of the Defendant's liberty pending trial. There is little possibility of financial loss to Mr. Fider pending completion of these proceedings. No restitution is ordered pre-trial and, in fact, under the applicable North Dakota statute, it appears that restitution may be prohibited as a part of this prosecution procedure. While Mr. Fider will be required to defend himself at these initial stages in this proceeding, the Courts have unanimously held that the "cost, anxiety, and inconvenience" of defending oneself in a good faith criminal prosecution does not constitute irreparable injury. In re Matter of Davis, 690 F.2d 176, 178 (3d Cir. 1982); Younger v. Harris, 401 U.S. 37, 46, 91 S. Ct. 746, 751 (1971).

Potential harm to the movant must be weighed against possible harm to the non-moving party. Public policy considerations must be considered in this analysis. This Court has already addressed the reluctance of Federal Courts, pursuant to statute and case law, to enjoin criminal prosecutions in State court except for the most compelling reasons. Because of those public policy considerations, and because the Court can find no present irreparable injury to the movant, the Court concludes that the issuance of a temporary injunction, at this point, would be improvident.

WHEREFORE, for the reasons set forth herein, the Plaintiff's Application for a Temporary Injunction under 11 U.S.C. § 105 is DENIED.

FURTHER, a scheduling conference to establish discovery and briefing deadlines, as well as a hearing date, is set for the **29th day of April, 1994 at 9:45 a.m.** by **telephone conference call to be initiated by Mr. Childers**. Parties should be ready and available to accept said call. The telephone number for Judge Kilburg's chambers is **(319) 365-9507**. **NOTE: THIS HEARING WILL BE TAPED ON ELECTRONIC RECORDING EQUIPMENT.**

SO ORDERED this 6th day of April, 1993.

Paul J. Kilburg
U.S. Bankruptcy Judge