

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION**

In Re:

CHAPTER: 11

DEB-LYN, Inc.,

CASE NO. 03-00655-GVL1

Debtor.

ORDER DENYING MOTION OF RELIEF FROM STAY

THIS MATTER came before the Court for hearing on the motion of GMAC Mortgage Acceptance Corporation as servicer for Wells Fargo Bank Minnesota, N.A. (“the Movant”), for relief from stay under 11 U.S.C. § 362(d)(1) “for cause” against Chapter 11 debtor, Deb-Lyn, Inc. (“Deb-Lyn”). This Court has jurisdiction over this matter and this is a core proceeding under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(G). For the reasons set forth herein, the motion for relief from stay will be DENIED.

FACTS

Deb-Lyn operates twelve Burger King restaurants located in North Central Florida on properties it owns or leases. The Movant holds mortgages on four of the twelve properties of the debtor. Pre-petition, Deb-Lyn defaulted on each of the mortgages, owing as of February 28, 2003, the following amounts (not including attorney’s fees): the Palatka property (\$1,136,645), East Palatka property (\$1,119,872), Starke property (\$508,480), and Gainesville property (\$272,744). Prior to the petition date, the Movant instituted foreclosure actions with respect to these four

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properties (no final judgment had been obtained) ¹. On June 20, 2003, the Movant and Deb-Lyn entered into Interim Agreements which included a provision providing that in consideration of the Movant's agreement to abate foreclosure actions, the Debtor would not oppose or object to the Movant's motion for relief from the automatic stay should it file for Bankruptcy relief in the future. On October 1, 2003, the Debtor filed its voluntary Chapter 11 petition. Subsequently, the Movant filed for relief from stay and, contrary to the agreement, the Debtor opposed. A preliminary hearing was held on January 5, 2004, in which the Court ordered a Final Hearing and directed the parties to submit memoranda supporting their positions. Final hearing was held February 5, 2004.

DISCUSSION

The issue before me is whether the pre-petition waivers of automatic stay constitute "cause" under 11 U.S.C. § 362(d)(1) to lift the automatic stay. The enforceability of pre-petition waivers has produced much litigation. Some courts have held that such pre-petition waivers are per se unenforceable. *See Matter of Pease, 195 B.R. 431, 433 (Bankr. Neb. 1996)*. There is a fear that banks and lenders will undercut the debtor's relief provided for under the Code by requiring borrowers to waive their right to the automatic stay in standardized loan and forbearance documents. *Id. at 435*.

This Court has previously recognized the enforceability and validity of a pre-petition waiver of the automatic stay. *See In re McBride Estates, 154 B.R. 339, 341 (Bankr. N.D. Fla. 1993)*. In *McBride*, the debtor, McBride Estates Ltd. ("McBride Estates"), filed its Chapter 11 petition two hours prior to the scheduled foreclosure sale of the debtor's principal asset. Prior to petition, this

¹ The Movant is only proceeding against the following three properties: Palatka, Starke, and Gainesville.

Court confirmed a Chapter 11 plan of reorganization for Equity Resources, Inc., the sole general partner of McBride Estates. Incorporated into Equity Resources, Inc.'s *plan of reorganization* was a settlement agreement in which McBride Estates, Equity Resources, Inc., and secured creditor, Barnett Bank ("Barnett") agreed that McBride Estates would make certain payments to Barnett on various dates and if such payments were not kept current, Barnett reserved the option to obtain a final judgment of foreclosure. (emphasis added) Additionally, the settlement agreement provided that should McBride Estates file a petition for bankruptcy, it would consent immediately to the lifting of the automatic stay. Contrary to the agreement, the debtor opposed the bank's motion for relief from stay. Finding the agreement enforceable, I lifted the automatic stay and permitted Barnett to conclude its foreclosure. In finding that the debtor's objection to Barnett's relief from stay was sanctionable I relied in part on *In re B.O.S.S. Partners I*, 37 B.R. 348, 350 (Bankr. M.D. Fla. 1984), in which Judge Paskay held that a "stipulation freely entered into by the parties is binding on the parties." However, enforcement of the waiver may be declined in special circumstances, "[f]or instance, if there is a radical and new development which drastically changes the economic picture and the value of the collateral." *Id.* at 351.

Here, the Movant seeks relief from automatic stay, asserting that absent a "radical and new development that drastically changes the [debtor's] economic picture," together with an assurance of prompt and full satisfaction of a secured creditor's claim, a debtor's pre-petition agreement to stay relief is enforceable in bankruptcy court, and constitutes sufficient cause for lifting the automatic stay. *McBride*, 154 B.R. at 342. The Movant relies on several cases from the Middle District of Florida in which pre-petition waivers have been held enforceable. *see B.O.S.S.; In re Gulf Bank Beach Dev. Corp.*, 48 B.R. 40 (Bankr. M.D. Fla. 1985) (Debtor cannot file a bankruptcy petition to

prevent enforcement of the waiver and then reap the advantages of his action by asserting that he is released from his obligations); *In re Int'l Supply Corp. of Tampa, Inc.*, 72 B.R. 510 (Bankr. M.D. Fla. 1987) (Sufficient cause exists to lift the automatic stay pursuant to 362(d)(1) where debtor's Petition was filed to frustrate the creditor's rights under the agreement); *In re Citadel Prop., Inc.*, 86 B.R. 275 (Bankr. M.D. Fla.1988) (“[T]erms of the pre-petition stipulation are binding upon the parties and sufficient cause exists to lift the automatic stay pursuant to section 362(d)(1)”).

The Debtor contends that the cases cited by the Movant are distinguishable because they either involve a situation in which (1) a debtor was a single asset real estate holding company or owned a single parcel of real estate and the debtor had no realistic possibility of reorganization (classic bad faith) or (2) the relief waiver was part of an agreement previously approved by a bankruptcy court. On the facts in this case, I agree with the Debtor. Shortly after the *McBride* decision, *Farm Credit of Cent. Florida, ACA v. Polk*, 160 B.R. 870 (M.D. Fla. 1993) , limited *B.O.S.S.* and the enforcement of pre-petition waivers by distinguishing court decisions that involved single asset debtors or bad faith case with no realistic possibility of reorganization (*B.O.S.S, Int'l Supply, Gulf Bank, Citadel Prop., and McBride*) from multi-asset operational businesses (which is before the Court). The *Farm Credit* court stated that “a pre-petition agreement [... is] in and of itself, [] not sufficient to lift the stay unless there is a showing of other criteria such as bad faith.” *Farm Credit*, 160 B.R. at 872. It was noted that in each of the cited cases (*B.O.S.S, Int'l Supply, Gulf Bank, Citadel Prop., and McBride*)“the Bankruptcy Court, expressly or impliedly, determined that the debtor could not effectively reorganize.” *Id.* This Court concurs in the holding of *Farm Credit* that “pre-petition agreements providing for the lifting of the automatic stay are not per se

binding on the debtor, as a public policy position.” *Id.* at 873. This notion is “consistent with the purposes of the automatic stay to protect the debtor’s assets, provide temporary relief from creditors and promote equality of distribution among the creditors by forestalling a race to the courthouse.”

Id.

The instant case is distinguished from *McBride* which involved a bad faith, single-asset case with no possibility of reorganization coupled with a waiver of the stay previously approved by the court. Like the debtor in *Farm Credit*, Deb-Lyn has a significant business enterprise that operates twelve Burger King fast food chains. The Debtor employs nearly 200² employees in servicing customers at these locations and generates substantial income (on a monthly basis have \$ 1.07 million gross receipts and pay out \$ 991,000 in disbursements). This involves the types of activity for which Chapter 11 was designed. Additionally, there is no indication of bad faith unlike in *McBride* where filing a second Chapter 11 petition on the eve of foreclosure was done for an improper purpose.

The Movant contends that the debtor should not be allowed to vitiate this pre-petition agreement by filing Chapter 11, regardless of whether or not this is a single asset or bad faith case without the possibility of effective reorganization. Its position relies on the notion that *Farm Credit’s* holding is inaccurate in that “although the some of the cases did involve these factors, the courts did not rely on their existence to grant stay relief [...] [s]tay relief was granted based *solely* on the pre-petition waiver.” (GMAC’s Mem. Supp. Mot. Stay Relief at 6) (emphasis added). In each of the aforementioned cases, the *Farm Credit* court specifically stated that the it was fully aware of the previous Florida decisions and rejected the applicability of the reasoning of those cases as applied

² At hearing, this number was estimated to be between 200 – 400 employees.

to a case with an operational business that had a realistic possibility of reorganization. *Farm Credit*, 160 B.R. at 872.

Moreover, *Farm Credit* states that the Debtor may not unilaterally waive the automatic stay against the interest of his creditors. *Id.* at 873; *See also In re Powers*, 170 B.R. 480, 483 (Bankr. Ma. 1994) (*Pre-petition waivers are not binding on third parties*); *In re South Estate Fin. Assoc.*, 212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997) (*If a waiver adversely affects other creditors, it is unlikely that the waiver will be enforced*). An underlying policy of the § 362 automatic stay is to prevent creditors from obtaining preferential payment of their claims to the detriment of other creditors. *See*, William Burnett, *Pre-petition Waiver of the Automatic Stay: Automatic Enforcement Equals Automatic Trouble*, 5 J.Bankr.Law & Prac. 257, 263 (1996). Jeffrey W. Warren and Wendy V.E. England, *Pre-Petition Waiver of the Automatic Stay is Not Per Se Enforceable*, Am.Bankr.Inst.J. 22, 29 (March 1994). The purpose of the stay is to protect the creditors (as well as the debtors) and to treat them equally. *Farm Credit*, 160 B.R. at 873. Deb-Lyn has a significant number of creditors; at least four separate secured creditors with over \$ 9.0 million of secured debt and at least 103 general unsecured creditors with \$ 1.6 million unsecured debt. The Movant's secured claims are but a fraction of the total secured and unsecured claims asserted by all creditors (approximately \$ 2.9 million / \$ 10.6 million total secured and unsecured claims). Here, if the stay was lifted some creditors would not be protected nor treated equally.

Another distinction is that in *McBride*, the pre-petition waiver was part of a Chapter 11 plan of reorganization already approved by the court. Thus, other third party creditors would have agreed on the confirmed plan. Case law shows that pre-petition waivers as a result of a plan of reorganization in a prior bankruptcy case are distinguished from agreements that waive the automatic

stay outside the purview of the court. *See In re Atrium High Point Ltd. P'ship.* 189 B.R. 599, 607 (Bankr. M.D.N.C. 1995) ("Enforcing the Debtor's agreement under these conditions [a pre-petition waiver in a negotiated plan of reorganization in a prior bankruptcy case] does not violate public policy concerns. This is not a situation where a prohibition to opposing a motion to relief was inserted in the original loan documents ..."); *In re Excelsior Henderson Motorcycle Mfg. Co., Inc.* 273 B.R. 920 (Bankr. S.D. Fla, 2002); *In re Rohit N. Desai* 282 B.R. 527 (Bankr. M.D. Ga. 2002). In a negotiated confirmed plan of reorganization in a previous bankruptcy case, the debtor has already received the full benefit of the automatic stay and third party creditors have been given the opportunity to review the waiver agreement. In the instant case, the pre-petition waiver was not part of a plan of reorganization - the Debtor unilaterally waived the automatic stay against the interest of other creditors. Additionally, a majority of the creditors did not have an opportunity to object to or evaluate the legitimacy of the claimed waiver asserted by Movant³.

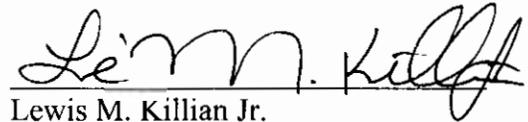
Based on the foregoing, I hold the pre-petition waivers of the automatic stay provisions, as set forth in the Interim Agreements, are unenforceable⁴. This is not a situation in which the Debtor was a single asset real estate holding company or owned a single parcel of real estate, or had no realistic possibility of reorganization, nor did it involve a two party dispute between a single secured lender and the Debtor. This case involves a debtor with active ongoing business operations throughout the state of Florida, employs over 200 employees, generates substantial income, and has four separate secured creditors and at least 103 general unsecured creditors. Additionally, the pre-petition waiver was not part of a plan of reorganization or one that was approved by a prior adjudication.

³ Only top 20 creditors were given notice of this hearing.

⁴ To the extent that the ruling in McBride may be read to support the per se enforceability of stay waivers, I hereby recede from that position in light of the *Farm Credit* case.

Therefore, it is hereby ORDERED AND ADJUDGED that the Movant's motion for relief from stay is hereby DENIED.

DONE AND ORDERED in Tallahassee, Florida, this 20th day of February, 2004.



Lewis M. Killian Jr.
United States Bankruptcy Judge

cc: Cynthia Jackson
Amy Denton
Stephen Leslie
U.S. Trustee