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BY MOLLIE C. JONES-CLERK DEPUTY

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:

CASE NO. 9101358JC

EAST LAKELAND, LTD.

EAST LAKELAND, LTD.

PLAINTIFF

VS.

ADVERSARY NO. 9100278JC

GEORGE HARDIN

DEFENDANT

Charles E. Gibson
P.O. Box 3493
Jackson, MS 39207-3493

Attorney for Plaintiff

Craig B. Flood
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Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

Came on for trial in this adversary proceeding, the Complaint for Turnover, Injunction and Other Relief, and the Motion to Show Cause Why Defendant Should Not be Cited for Contempt filed by the Debtor. After considering the evidence presented at trial, along with arguments of counsel, set forth both at trial and by memorandum briefs, this Court holds that the complaint is well taken and should be granted, and that the motion for citation of contempt should be held in abeyance. In so holding, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Plaintiff, East Lakeland, Ltd. ("East Lakeland"), filed its petition for relief under Chapter 11 of the Bankruptcy

Code on April 3, 1991, and has operated as a debtor-in-possession since that time. The principal asset of East Lakeland is a shopping center known as East Woods Place located in the Jackson, Mississippi area. In April, 1991, shortly after the Debtor filed its Chapter 11 petition, a hail storm damaged certain canvas awnings that were attached to the shopping center. Bids for the replacement of the awnings were sought, and a bid was submitted by the Defendant to the Debtor.

East Lakeland then entered into a contract dated July 9, 1991, with the Defendant, George Hardin, for the replacement of the awnings. The contract recites as consideration for replacement of the awnings the sum of \$10,000, with \$5,000 being paid prior to commencement of the work and \$5,000 due upon completion of the work.

In accordance with the terms of the contract, East Lakeland made the initial payment of \$5,000 to Hardin on August 12, 1991. The awnings were then installed, and a certificate of completion dated September 24, 1991 was executed by Hardin certifying that completion of the contract occurred on September 19, 1991. For reasons that are not entirely clear, but involving transactions between the Debtor, the insurer, and the mortgagee, East Lakeland did not immediately pay Hardin the \$5,000 balance due under the contract. Instead the Debtor required additional documentation regarding the purchase of the materials used on the project.

After further delay in receiving payment, Hardin retained an attorney, Bill Vick, to assist him in collecting the amount due under the contract. Mr. Vick wrote a letter on November 18, 1991, to Craig Geno, the attorney for East Lakeland, demanding immediate payment for Hardin's work.

On December 2, 1991, a check in the amount of \$5,000 was issued to Hardin as final payment under the contract. Hardin testified at trial that he received and negotiated the check. He then traveled on December 4, 1991 from Grenada, Mississippi, where he lives and his business is located, to Jackson and removed the awnings from the East Woods Place shopping center. Hardin was aware that East Lakeland was in bankruptcy at the time that he removed the awnings, and testified at trial that he first became aware of the bankruptcy prior to commencement of his work on East Woods Place.

Hardin then wrote a letter on December 6, 1991, to Southern Electrical Retirement Fund, the holder of the first deed of trust on East Woods Place, stating that he had repossessed the awnings as a result of East Lakeland's default in payment, and that additional amounts were due under the contract as a result of the default. Hardin further stated that East Lakeland is liable to him for \$500 attorney fees, \$314.30 interest on the late payment, a \$500 repossession fee, and that the awnings would not be returned until payment of the full amount. Finally, Hardin stated that an additional \$3,000 payment would be necessary in order for him to re-install the awnings.

On December 17, 1991 East Lakeland commenced this adversary proceeding seeking an order requiring Hardin to turnover and re-install the awnings, and a judgment against Hardin for costs, attorney fees, compensatory and punitive damages. On December 23, 1991 the Plaintiff filed a separate motion for citation of contempt against Hardin for willful violation of the automatic stay, requesting essentially the same relief as set forth in the complaint.

CONCLUSIONS OF LAW

The central issue before this Court for decision is whether the Defendant, George Hardin, violated the automatic stay provisions of the Bankruptcy Code by removing the awnings from the East Woods Place shopping center and taking possession of them. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(2)(E).

The Defendant contends that he did not violate the automatic stay because the awnings are not property of the estate since they were acquired post-petition, and also because the automatic stay does not apply to post-petition contracts. The defendant is incorrect on both assertions.

Property of the estate is defined by § 541 of the Bankruptcy Code¹ and specifically includes "any interest in property that the estate acquires after the commencement of the

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

case". § 541(a)(7). Accordingly, in Carroll v. Tri-Growth Centre City, Ltd. (In Re Carroll), 903 F.2d 1266 (9th Cir. 1990), the court held that a post-petition management agreement between the debtor and the defendant was property of the estate. See also In re MCEG Productions, Inc., 133 B.R. 232 (Bankr. C.D. Cal. 1991). From the language of § 541(a)(7) it is clear that the awnings, although acquired by the Debtor post-petition, are property of the estate.

Section 362(a) contains eight different categories of actions that are stayed by the filing of a petition for relief under 11 U.S.C., providing in pertinent part as follows:

11 USC § 362

§ 362. Automatic stay.

(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;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that

arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

While subsections 362(a)(1), (2), (5), (6), and (7) apply to certain actions involving only pre-petition claims, subsections 362(a)(3) and (4) are not limited to pre-petition claims. In re Zeigler, 136 B.R. 497, 500 (Bankr. N.D. Ill. 1992).

In support of his position that the automatic stay does not apply to post-petition contracts, the Defendant relies on Turner Broadcasting System, Inc. v. Sanyo Electric, Inc., 33 B.R. 996 (N.D. Ga. 1983) aff'd sub nom. Turner Broadcasting v. Rubin, 742 F.2d 1465 (11th Cir. 1984)(unpublished), in which the court held that the commencement of a judicial or administrative action or proceeding based on a post-petition claim does not violate the automatic stay. However, the issue in the Turner case involved only the prosecution of an action before the United States District Court, and the applicability of § 362(a)(1) to post-petition claims.

Hardin's actions did not involve the commencement of a judicial or administrative proceeding, but rather were an effort to obtain possession or to enforce his alleged vendor's lien against property of the estate. Therefore, subsections 362(a)(3) and (4)

apply to the instant case, and as previously stated, are applicable to both pre-petition and post-petition claims against the estate.

Additionally, it is important to note that even though § 362(a)(1) does not stay the commencement of judicial proceedings based on post-petition claims, any action to enforce a judgment obtained on a post-petition claim is still subject to the automatic stay pursuant to subsections 362(a)(3) and (4). In Bellini Imports, Ltd. v. Mason and Dixon Lines, Inc., 944 F.2d 199 (4th Cir. 1991), the Fourth Circuit held that while § 362(a)(1) does not stay the institution of a district court action against a debtor based on breach of a post-petition contract, enforcement of any judgment obtained is subject to the automatic stay, stating:

However, the stay is also applicable to 'any act to obtain possession of property of the estate or of property from the estate' and to 'any act to create, perfect, or enforce any lien against property of the estate.' 11 U.S.C.A. § 362(a)(3)-(4) (West 1979 & Supp.1991). Because attachment or execution of a judgment obtained as a result of a post-petition claim would fall within the stay provision of subsections 362(a)(3) and (4), a creditor must obtain relief from the stay to satisfy a judgment against property of the bankruptcy estate.

Id. at 200 (citations omitted). Likewise, in Turner Broadcasting System, Inc. v. Sanyo Electric, Inc., 33 B.R. 996, 1000 n.2 (N.D. Ga. 1983) aff'd sub nom. Turner Broadcasting v. Rubin, 742 F.2d 1465 (11th Cir. 1984) (unpublished) the court explained that while the defendant did not violate the automatic stay by commencing a judicial action, the enforcement of any judgment entered would be subject to the automatic stay.

The awnings which Mr. Hardin sold to East Lakeland are property of the estate as defined by § 541(a)(7). Therefore, any act to obtain possession or control of the awnings is subject to subsections 362(a)(3) and (4), which prohibit exactly the course of action taken by Mr. Hardin. Accordingly, this Court finds that the Defendant violated the automatic stay by taking possession of the awnings, and that pursuant to § 542(a), East Lakeland is entitled to an order requiring the Defendant to turnover and re-install the awnings in a good and workmanlike manner within 20 days from entry of the order.

The Court will hold in abeyance any findings as to damages resulting from the Defendant's violation of the automatic stay, and will hold in abeyance the Debtor's Motion to Show Cause Why Defendant Should Not be Cited for Contempt, pending compliance by the Defendant with the mandate to turnover and re-install the property of the estate.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

Dated this the 23rd day of April, 1992.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
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U. S. BANKRUPTCY COURT
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BY DEPUTY

IN RE:

CASE NO. 91-0-1358JC

EAST LAKELAND, LTD.

EAST LAKELAND, LTD.

PLAINTIFF

VS.

ADVERSARY NO. 9100278JC

GEORGE HARDIN

DEFENDANT

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, it is hereby ordered and adjudged that:

1. Within 20 days from entry of this judgment the Defendant, George Hardin, shall turnover to the Debtor and re-install the awnings which he removed from the East Woods Place shopping center, and shall perform said re-installation in a workman-like manner.

2. This Court shall hold in abeyance any findings as to damages resulting from the Defendant's violation of the automatic stay, pending compliance by the Defendant with this judgment.

3. The Debtor's Motion To Show Cause Why Defendant Should Not Be Cited for Contempt shall also be held in abeyance pending compliance by the Defendant with this judgment.

ORDERED AND ADJUDGED this the 23rd day of April, 1992.


UNITED STATES BANKRUPTCY JUDGE