UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	
DAVID C. ROSENBERGER,	:	Case No. 90-224-C
	:	Chapter 11
Debtor.	:	
	:	

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ORDER--MOTION FOR RELIEF FROM STAY

On October 3, 1990, a hearing was held on the Farm Credit Bank of Omaha ("FCB") Motion for relief from the Automatic Stay and Joinder by the Exchange National Bank of Chicago ("Exchange"). David L. Davitt appeared for FCB, Donald F. Neiman appeared for Exchange, and Ronald L. Hansel appeared for Debtor. At the conclusion of the hearing the Court took the matter under advisement and now considers it fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(G). The Court, upon review of the pleadings, evidence, briefs submitted and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On January 26, 1990, various creditors of Debtor filed an involuntary Chapter 7 petition against Debtor.

2. On February 14, 1990, FCB filed its motion for relief from stay.

3. Debtor filed an objection to the FCB motion for relief from stay on February 26, 1990.

4. The Court set the involuntary petition and motion for relief from stay for hearing on March 19, 1990.

5. On March 14, 1990, Debtor filed a motion for continuance of the March 19, 1990 hearings, asserting that Debtor was having difficulty obtaining adequate counsel to represent Debtor in the involuntary Chapter 7 proceeding due to the fact tat the majority of local bankruptcy attorneys represented creditors in the Chapter 11 proceedings involving Rose Way, Inc., Case No. 89-1273-C, Double-D Leasing, Inc., Case No. 89-1274-C, and Double-D, Inc., Case No. 89-1275-C, which were solely owned by Debtor and Debtor's spouse.

6. On March 19, 1990, the Court sustained Debtor's motion to continue the hearings on involuntary petition and motion for relief from stay. AT the time of the continuance, neither FCB nor Exchange raised the 11 U.S.C. §362(e) and Fed.R.Bankr.P. 4001(a) time limitations respecting hearing and ruling on a motion for relief from stay.

7. Exchange joined the FCB motion for relief from stay after this continuance.

8. On May 1, 1990, the Court continued the hearing on the FCB motion for relief from stay and ordered the stay to remain in effect. At the time of the continuance, the 11 U.S.C. §362(e) and Fed.R.Bankr.P. 4001(a) time limitations

were not raised by either FCB or Exchange.

9. On August 16, 1990, FCB filed a motion for immediate hearing on its motion for relief from stay asserting that more than 30 days had passed since FCB filed its motion.

10. The Court granted the relief sought in the involuntary petition on August 17, 1990. On that same date, the Court entered an order for relief under Chapter 7 of the Bankruptcy Code.

11. The Court entered an order converting the case to Chapter 11 of the Bankruptcy Code on August 28, 1990, and Exchange filed a joinder in the FCB motion for immediate hearing, asserting that the automatic stay had expired pursuant to the provisions of 11 U.S.C. §362(e).

12. On September 5, 1990, the Court held a preliminary hearing on the motions for relief from stay and continued the matter for an evidentiary hearing to be held on October 3, 1990. Further, the Court ordered that the stay remain in force and effect.

13. An evidentiary hearing on the motions for relief from stay was held on October 3, 1990, and the Court took the matter under advisement at that time.

DISCUSSION

11 U.S.C. §362(e) provides:

> Thirty days after a request under

> subsection (d) of this section for relief from the stay of an act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of the section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than 30 days after the conclusion of such preliminary hearing.

Fed.R.Bankr.P. 4001(a)(2) provides:

> The stay of any act against property of the estate under §362(a) of the Code expires 30 days after a final hearing is commenced pursuant to §362(e) unless before that time expires the court denies the motion for relief from the stay or, after notice and a hearing, orders the stay continued pending conclusion of the final hearing.

In In re Wedgewood Realty Group, Ltd., 878 F.2d 693 (3rd Cir. 1989), the Third Circuit Court of Appeals discussed 11 U.S.C. §362(e) and Fed.R.Bankr.P. 4001(a)(2). The Third Circuit Court stated:

> Section 362(e) and Bankruptcy Rule 4001(a)(2) create a special schedule, comprised of three 30-day periods, which governs the timing of hearing and rulings respecting the continuation of the automatic stay. First, in accordance with

> the provisions of §362(e), the Court must hold a hearing concerning the status of the stay within 30 days after the request for relief from the stay is filed. Second, if that hearing is merely a preliminary hearing, then the court must issue a preliminary ruling at the conclusion of the hearing continuing the stay if there is a reasonable likelihood that the non-movant will ultimately prevail, and must schedule a final hearing to be held within 30 days of the conclusion of the preliminary hearing... Bankruptcy Rule 4001(a)(2) provides the final 30-day time period. Under that rule, the court must issue either an order continuing the stay pending its final decision or a final decision within 30 days after commencement of the final hearing.

Wedgewood, 878 F.2d at 697-98.

In this case, the Court continued the preliminary hearing on the motions for relief from stay pending a ruling on the involuntary petition filed against Debtor. At the time of the continuance, FCB and Exchange did not raise the 11 U.S.C. §362(e) and Fed.R.Bankr.P. 4001(a)(2) time limitations. FCB and Exchange did not raise the 11 U.S.C. §362(e) and Fed.R.Bankr.P. 4001(a)(2) time limitations until FCB filed its motion for immediate hearing on August 16, 1990, and Exchange joined this motion on August 28, 1990. The Court therefore finds that Exchange and FCB waived their right to object to the timeliness of the preliminary hearing under 11 U.S.C. §362(e). See In re Wilmette Partners, 34 B.R. 958, 961 (Bankr. N.D. Ill. 1983).

After the motions for immediate hearing were filed, the

Court held a preliminary hearing on the motions for relief from stay on September 5, 1990. The Court thereafter continued the hearing on the motions for relief from stay for an evidentiary hearing on October 3, 1990. The Court therefore met the timeliness requirements of 11 U.S.C. §362(e) regarding the scheduling of the preliminary and final hearing on the motions for relief from stay.

Concerning Fed.R.Bankr.P. 4001(a)(2), the final hearing on the motions for relief from stay was held on October 3, 1990. The Court has not denied the FCB motion for relief from stay and Exchange joinder thereto, and has not ordered the stay continued pending conclusion of a final hearing. Therefore, the 11 U.S.C. §362(a) stay has expired pursuant to Fed.R.Bankr.P. 4001(a)(2). See Wedgewood, 878 F.2d at 698.

Concerning an 11 U.S.C. §105(a) injunction, the majority of courts have held that the broad injunctive powers of 11 U.S.C. §105(a) authorize bankruptcy courts to reimpose the stay which has lapsed under 11 U.S.C. §362(e) and Fed.R.Bankr.P. 4001(a)(2). See, e.g., In re Looney, 823 F.2d 788, 792-93 (4th Cir.), cert. denied, 484 U.S. 977, 100 S.Ct. 488, 98 L.Ed. 2d 486 (1987); Wedgewood, 878 F.2d at 701; In re Martin Exploration Co., 731 F.2d 1210, 1214 (5th Cir. 1984). However, the relief under 11 U.S.C. §105(a) is neither automatic nor may it be imposed sua sponte by the court. Wedgewood, 878 F.2d at 701, citing Looney, 823 F.2d at 92-93.

In order to obtain 11 U.S.C. §105(a) injunctive relief, the debtor, in accordance with Fed.R.Bankr.P. 7065, must apply for an injunction and the court must consider: 1) the threat of irreparable harm to the movant; 2) the state of balance between such harm and the injury that granting the injunction will inflict on other parties litigant; 3) the probability that plaintiff will succeed on the merits; and 4) the public interest. Wedgewood, 878 F.2d at 701, citing M. L. Barge Pool, 71 B.R. 161, 164 (Bankr. E.D. Mo. 1987) and Sunbelt Savings Association v. Truman, 95 B.R. 55, 57 (N.D. Tex. 1988); Dataphase Systems, Inc. v. C. L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

In the instant case, Debtor has not applied for said injunction pursuant to 11 U.S.C. §105(a) and Fed.R.Bankr.P. 7065. Therefore, the Court finds that the automatic stay is terminated by virtue of Fed.R.Bankr.P. 4001(a)(2).

IT IS ACCORDINGLY ORDERED that the FCB and Exchange motions for relief from stay are granted and the stay is terminated.

Dated this ___26th_____ day of November, 1990.

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RUSSELL J. HILL
United States Bankruptcy Judge