

**United States Bankruptcy Court  
Western District of Wisconsin**

Cite as: [Unpublished]

**In re Staber W. Reese, Jr., Audrey M. Reese, Debtors**  
Bankruptcy Case No. 85-01498-7

United States Bankruptcy Court  
W.D. Wisconsin, Eau Claire Division

May 15, 1987

Barbara A. Hermanson, for debtors.  
John H. Ames, for trustee.  
Michael F. Roe, for DeByle, Inc.

Thomas S. Utschig, United States Bankruptcy Judge.

**MEMORANDUM OPINION, FINDINGS OF FACT,  
AND CONCLUSIONS OF LAW**

DeByle, Inc. (DeByle), by Michael F. Roe, has filed a motion requesting the court to vacate the order entered on December 31, 1986. The debtors appear by Barbara A. Hermanson. The trustee, Arthur L. Eberlein, appears by John H. Ames and objects to the motion. DeByle also requests that the court enjoin the trustee from disbursing funds that he has collected.

The facts in this case are not complicated. In July of 1985 a judgment was entered in Wisconsin state court proceedings in which DeByle became obligated to pay the debtors. On August 1, 1985, the debtors filed their bankruptcy petition. DeByle received notice of the debtors' bankruptcy filing. DeByle failed to timely file an appeal from the Wisconsin state court judgment. DeByle argues that it did not timely file the notice of appeal because it believed it was stayed from filing such notice by the 11 U.S.C. § 362 automatic stay.

DeByle filed a motion for relief from stay on December 18, 1985. That motion was granted on January 16, 1986. DeByle filed a notice of appeal in Wisconsin state court proceedings on February 15, 1986. The Court of Appeals requested briefs on the issue of whether the notice of appeal had been timely filed. The Wisconsin Court of Appeals on March 20, 1986, issued an order dismissing the appeal because it had not been timely filed under Wisconsin law. DeByle then petitioned the Wisconsin Supreme Court for a review of the Court of Appeals decision. The petition for review was denied on July 25, 1986.

DeByle now intends to commence an action in the United States District Court seeking relief from the state court decisions.

DeByle filed a motion in this bankruptcy case to prohibit the trustee from initiating

further collection activity on October 22, 1986. On November 5, 1986, the trustee filed a motion for a turnover order pursuant to the state court judgment. A hearing was held on these motions on December 17, 1986, at which DeByle failed to appear. The court granted the trustee's motion and denied DeByle's motion at the scheduled hearing. This order was reduced to writing and entered on December 31, 1986.

DeByle filed a motion on January 16, 1987, for rehearing and/or reconsideration of the order entered at the hearing of December 17, 1986. In support for its motion DeByle argues that it did not receive notice of the hearing. DeByle further requests that the court enjoin the trustee from disbursing any of the funds that were collected on account of the state court judgment. A telephone conference was held in this matter on March 10, 1987, at which DeByle was ordered to file a memorandum in support of its motion by March 31, 1987. This order was reduced to writing and entered on March 18, 1987. DeByle did not timely file its memorandum as ordered. The court received a memorandum from DeByle on April 13, 1987, that was apparently mailed on April 10, 1987.

Initially, the court notes that generally when a party requests injunctive relief in a bankruptcy case an adversary proceeding is necessary. Bankruptcy Rule 7001. DeByle has not started an adversary proceeding. The court also notes that a substantial period of time expired after the hearing on December 17, 1986, before DeByle requested a rehearing. It further appears that DeByle did not timely file its brief as ordered by the Bankruptcy Court. It is the opinion of the Court, based on the facts and circumstances of this bankruptcy case, after a full review of the file, and upon reading the legal memoranda provided with appropriate consideration and weight given thereto that the motion of DeByle, Inc., should be denied.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.