

FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

AUG 01 1986
CLERK
U.S. BANKRUPTCY COURT

In re:

Case Number:

AMCON CONSTRUCTION COMPANY, INC.

EF11-86-00097

Debtor.

ORDER

The court having this day entered its memorandum opinion, findings of fact, and conclusions of law;

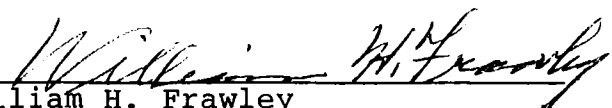
NOW, THEREFORE, IT IS ORDERED that the motion of Children's World, Inc., requesting relief from the 11 U.S.C. § 362 automatic stay with respect to the action commenced by the debtor in Ohio is denied.

IT IS FURTHER ORDERED that the motion of Children's World, Inc., requesting relief from the 11 U.S.C. § 362 automatic stay in order that it might assert claims against the debtor in the actions commenced by the subcontractors in Ohio is denied.

IT IS FURTHER ORDERED that the motion of Children's World, Inc., requesting relief from the 11 U.S.C. § 362 automatic stay with respect to the actions it intends to commence in Illinois to clear property of liens is hereby granted to the extent that the debtor may be joined as a nominal party to such action.

Dated: August 1, 1986.

BY THE COURT:


William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney George Serdar
Attorney Thomas Schumacher

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MEMORANDUM OPINION,
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Children's World, Inc. (Children's World), by George Serdar, has brought this motion seeking relief from the 11 U.S.C. § 362 automatic stay. The debtor appears by Thomas Schumacher and objects to the motion. A telephonic conference was held on this matter on May 22, 1986. At said conference the parties were requested to submit briefs to the court arguing their respective positions. Such briefs have been submitted and the matter is now ready for determination.

Children's World is engaged in the business of building and operating day-care centers. In December of 1984, Children's World entered into a series of contracts with the debtor. Under these contracts the debtor was to act as general contractor for the construction of several day-care centers in Illinois and Ohio. The debtor commenced performance pursuant to the contracts in early 1985. Children's World was not satisfied with the debtor and provided written notice dated October 24, 1985, of contract termination. Such termination caused the debtor to file

for relief under Chapter 11 of the Bankruptcy Code. The major asset of the debtor's bankruptcy estate is its cause of action against Children's World for breach of contract.

Several of the debtor's subcontractors have filed mechanic's lien statements on the properties on which Children's World is constructing day-care centers in Illinois. The debtor has not filed liens on any Illinois properties. Children's World seeks to commence litigation in Illinois to clear the property of the liens filed by the subcontractors. The Illinois Revised Statute Chapter 82, Section 28, provides that the general contractor must be joined as a party in an action respecting the mechanic's lien of a subcontractor. Hence, Children's World seeks relief from the § 362 stay in order that it can commence litigation in Illinois to clear title to its property. The debtor has no objection to being joined as a nominal party to such proceedings.

Several of the subcontractors of the debtor have filed mechanic's lien statements on properties that Children's World is constructing day-care centers on in Ohio. The subcontractors have commenced foreclosure actions against these properties. Children's World seeks relief from the § 362 automatic stay in order that it may assert claims against the debtor in these actions.

The debtor has commenced a lien foreclosure action in Ohio in which Children's World is a defendant. (Ohio, Hamilton County Court of Common Pleas; File No. A86-02701). This action involves the same properties that are the subject of the above mentioned

subcontractor's foreclosure actions. The debtor has also filed an adversary proceeding in its bankruptcy in which Children's World is a defendant. Amcon Construction Co. v. Children's World, Inc., (Adv. No. 86-0145-11). The facts and circumstances surrounding the debtor's claims in the adversary proceeding are inextricably bound with the claims made by the debtor in the action the debtor commenced in Ohio. Children's World has filed a motion with the District Court for the Western District of Wisconsin to withdraw reference of the adversary proceeding. The debtor has agreed to adjourn the action it commenced in Ohio until the resolution of the adversary proceeding.

Children's World seeks relief from the 11 U.S.C. § 362 automatic stay so that it can:

- 1.) Join the debtor as a party defendant to the actions that it would like to commence in Illinois.
- 2.) Join the debtor as a party and assert claims against the debtor in the actions commenced by the subcontractors in Ohio.
- 3.) Assert cross-claims and defenses against the debtor with respect to the action commenced by the debtor in Ohio.

The issue presented for determination is whether the protection afforded the debtor by the § 362 automatic stay should be modified to permit Children's World to proceed with litigation against the debtor. The court may grant relief by modifying the § 362 stay for "cause." 11 U.S.C. § 362(d)(1). The legal standard of "cause" by which the issue involved in this case should be

determined is well established. Matter of McGraw, 18 B.R. 140 (Bankr. W.D. Wis. 1982).

Both the U.S. Congress and federal bankruptcy courts have recognized that relief from the 11 U.S.C. § 362 stay is permissible in some limited circumstances. Courts have allowed tailoring of the 11 U.S.C. § 362 stay to permit the continuance of a civil suit with a debtor where two conditions were met. These conditions are that:

- (a) No "great prejudice" to either the bankruptcy estate or the debtor must result from the continuance of the civil action, and
- (b) the hardship to the plaintiff caused by the continuance of the stay considerably outweighs the hardship caused to the debtor by modification of the stay.

(Citations omitted) Id. at 141.

The debtor has no objection to being joined as a nominal defendant in the litigation that Children's World intends to commence in Illinois to clear property of the liens of the subcontractors. The debtor makes this concession with the understanding that it is a necessary party to such proceedings and that it will only be a nominal party to the actions. There is no apparent hardship that would be caused to either the debtor or the bankruptcy estate by allowing the debtor to be a nominal party to these actions. Children's World would be precluded from commencing the Illinois litigation and be prejudiced thereby if it is not provided with relief from the § 362 automatic stay. Wherefore, Children's World should be allowed relief from the § 362 automatic stay so that it may join the debtor as a nominal party in the actions it intends to commence in Illinois to clear its property of the liens of the subcontractors.

The debtor intends to adjourn the lien foreclosure action that it initiated in Ohio until after the issues involved in the adversary proceeding have been resolved. Since the debtor intends to adjourn said lien foreclosure action, Children's World is not able to show "cause" for relief from the § 362 automatic stay with respect to that action. When the adversary proceeding has been resolved, Children's World may apply to the court for relief if such relief is still desired.

Children's World also seeks relief from the § 362 automatic stay so that it may join the debtor as a party defendant and assert claims against the debtor in the actions commenced in Ohio by the subcontractors to foreclose on liens on property owned by Children's World. The claims that Children's World seeks to assert against the debtor in these actions would have a direct financial impact on the bankruptcy estate. Further, the cost of defending these various lawsuits in a different state would be a major expense and a significant burden on the debtor's financially distressed bankruptcy estate. Finally, the adjudication of the claims that Children's World intends to assert against the debtor should properly be made as a part of the debtor's bankruptcy proceedings.

The purpose of the automatic stay is to preserve what remains of the debtor's insolvent estate and to provide a systematic equitable liquidation procedure for all creditors, secured as well as unsecured, H.R.Rep.No.595; 95th Cong., 1st Sess. 340 (1977), reprinted in [1978] U.S.Code Cong. & Ad.News 6296-97, thereby preventing a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts."

Matter of Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982). It would be contrary to the basic principle of bankruptcy of providing for

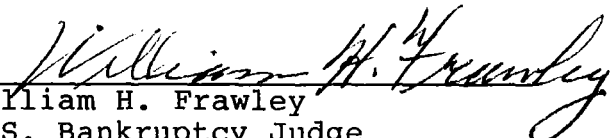
equality of distribution among creditors, if Children's World were allowed to assert claims against the debtor in these various Ohio proceedings. "Cause" does not exist for granting Children's World relief from the § 362 automatic stay with respect to the actions commenced in Ohio by the subcontractors.

It is the conclusion of the court that Children's World should not be granted relief from the § 362 automatic stay with respect to the litigation commenced in Ohio by the subcontractors. Children's World should not be granted relief from the § 362 automatic stay in the action commenced in Ohio by the debtor since the debtor intends to adjourn such action until the resolution of the adversary proceeding. Children's World should be granted relief from the § 362 automatic stay for the action it intends to commence in Illinois to clear its property of the liens of the subcontractors. However, Children's World is entitled to relief in the Illinois litigation only to the extent that it may join the debtor as a nominal party to the litigation for the purpose of statutory compliance.

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

Dated: August 1, 1986.

BY THE COURT:


William H. Frawley
U.S. Bankruptcy Judge