



ORDERED in the Southern District of Florida on July 18, 2016.

A handwritten signature in black ink, appearing to read "Erik P. Kimball". The signature is written in a cursive style and is positioned above a horizontal line.

Erik P. Kimball, Judge
United States Bankruptcy Court

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

In re:

Case No. 15-21596-EPK

**INTERNATIONAL OIL TRADING
COMPANY, LLC,**

Chapter 7

Debtor.

_____ /

**ORDER DENYING
INTERNATIONAL OIL TRADING COMPANY, LLC'S
MOTION FOR STAY PENDING APPEAL**

International Oil Trading Company, LLC (the "Debtor") seeks entry of a stay pending appeal, pursuant to Fed. R. Bankr. P. 8007, of the order for relief in this case, the order directing the clerk to enter the order for relief, and an order denying the Debtor's prior motion to stay those orders. ECF Nos. 234, 235, and 238. The Debtor's motion for stay pending appeal may be found in the record at ECF No. 254 (the "Motion"). The Court considered a joinder filed by ABN Amro Bank N.V. ("ABN") and a response filed by the petitioning creditor, Mohammad Anwar Farid Al-Saleh. ECF Nos. 269, 268. The Court

held a hearing on the Motion on July 13, 2016, and heard argument from the Debtor, Mr. Al-Saleh, ABN, and the chapter 7 trustee.

When determining whether to issue a stay pending appeal under Rule 8007, the Court must consider (a) whether the movant is likely to succeed on the merits of the appeal, (b) whether the movant will suffer irreparable harm if the stay is not granted, (c) whether other parties will be substantially harmed if the stay is granted, and (d) whether the public interest is harmed by implication of the requested stay. *In re F.G. Metals, Inc.*, 390 B.R. 467, 471-72 (Bankr. M.D. Fla. 2008); *Antonio v. Bello*, No. 04-12794-GG, 2004 U.S. App. LEXIS 18334, at *3 (11th Cir. June 10, 2004).

The argument presented by the Debtor in the Motion is substantially similar to that presented in the Debtor's prior motion for stay of the Court's order directing the clerk to enter the order for relief and the order for relief itself. The Court incorporates here its order denying that motion, which can be found in the record at ECF No. 238. The Court also incorporates its order granting the petitioning creditor's motion for summary judgment on all matters raised under 11 U.S.C. § 303, which may be found in the record at ECF No. 132, and its order directing the clerk to enter the order for relief, which may be found in the record at ECF No. 234.

From the present Motion, and as confirmed by the Debtor at the hearing, the Debtor intends to appeal from the order for relief in this case, and related orders, not by arguing that an order for relief was unwarranted under 11 U.S.C. § 303. Indeed, no one argues that an order for relief was not warranted under the statute. Instead, the Debtor argues only that the order for relief should not have been entered when it was entered. Both the Court's initial delay in entering the order for relief, intended to be brief, and the Court's later determination that further delay was inappropriate, were exercises of this Court's

discretion. The likelihood of that exercise of discretion being overturned on appeal is essentially nil.

Even if the Debtor had challenged the Court's substantive conclusion, on summary judgment, that all requisites under 11 U.S.C. § 303 had been satisfied, the Debtor's chance of success on such an appeal likewise would be slim. The Court incorporates here the analysis in its order at ECF No. 238.

The Debtor argues that if the order for relief and related orders are not stayed it will suffer irreparable injury because it is divested of control over substantial litigation, referred to as the DLA Litigation, which represents the Debtor's primary asset. Prosecution of the DLA Litigation is apparently the Debtor's only business activity. The Debtor argues that the chapter 7 trustee "has neither the resources, nor the knowledge, nor the counsel to preserve and advance" the Debtor's claims in the DLA Litigation.

There is no support for these arguments. To begin with, if the fact that a debtor would be relieved of control over its assets upon entry of an order for relief in an involuntary case by itself constituted irreparable injury to a debtor, then the first prong of the test for entry of a stay pending appeal would be met in every case where the order for relief is subject to appeal. Even so, in spite of the protestations of the Debtor and ABN, it appears very unlikely that the bankruptcy estate's involvement in the DLA Litigation will be detrimental to the prosecution of that case. The Debtor believes that the DLA Litigation will result in a significant recovery. The Debtor obviously had ample incentive to pursue the DLA Litigation prior to this case, and there is no reason to believe that incentive will be reduced during this chapter 7 case. Apparently, the Debtor's affiliates have been funding the DLA Litigation. It is not even suggested that the Debtor's affiliates will no longer have a desire to fund the DLA Litigation. Even if they fail to continue to fund the litigation, the

chapter 7 trustee may seek financing from another source, including the Debtor's secured creditor, ABN, which claims a lien on the DLA Litigation.

As counsel for the Debtor and ABN well know, it is customary for the chapter 7 trustee to seek to retain the same counsel previously retained by a debtor to continue prosecution of pending litigation. It appears very likely that the chapter 7 trustee may do so in connection with the DLA Litigation. In this manner, the chapter 7 trustee will gain all of the historical knowledge of the Debtor's litigation counsel, thereby negating much of the risk in transition as the chapter 7 trustee becomes the plaintiff in that action. In any case, the chapter 7 trustee of a corporate debtor is the absolute owner of the attorney-client privilege, and so the Debtor's existing counsel would be permitted to assist the trustee in the transition. The Court has no doubt that the DLA Litigation will continue under the able stewardship of the chapter 7 trustee, with the cooperation of the Debtor.

In the Motion, the Debtor states that the petitioning creditor "did not seek the entry of an order for relief pending trial of [the Debtor's] motion to abstain and dismiss, and in fact specifically disclaimed a request for such an order at the summary judgment hearing." This statement is simply untrue. Instead, the petitioning creditor expressed concern that the Court might not grant summary judgment if the Court then felt compelled to enter an order for relief prior to the then impending trial on the Debtor's motion for the Court to abstain, and argued that the Court would not be required to enter the order for relief if it granted summary judgment. The petitioning creditor made it clear, however, that it would prefer immediate entry of an order for relief. Specifically, at oral argument on the summary judgment motion, counsel for the petitioning creditor stated, "But that was -- that was the reason I point out, to make sure that we understand the stakes of today. And it may -- it may actually be the entry of an order for relief. *That's what we would request.*" [Tr. 23:17-20, ECF No. 134] (emphasis added).

Creditors and the estate would be harmed by the Court staying the order for relief in this case. The Debtor appears to have substantial accounts receivable from related entities that it is not pursuing, which the chapter 7 trustee may investigate for the benefit of the estate. The estate also holds potential fraudulent transfer and alter-ego claims that the chapter 7 trustee may investigate on behalf of the estate. The Debtor has taken no action on these matters, possibly because they involve the Debtor's affiliates. The entry of a stay of the order for relief would leave these assets un-pursued, to the detriment of creditors and the estate. At a minimum, the entry of a stay of the order for relief in this case would divest the chapter 7 trustee of her powers and duties, and would deny creditors and the Court the value of her input in connection with the Debtor's motion to abstain. All of this weighs against the granting of a stay pending appeal.

The Bankruptcy Code, the Bankruptcy Rules, and the vast majority of case law addressing involuntary bankruptcy petitions, make it clear that public policy supports speedy determination of the requirements of section 303 and, if they are met, immediate entry of an order for relief. The Debtor's motion to abstain, presented under another provision of the Bankruptcy Code, is secondary relief not exclusive to involuntary cases. When circumstances warrant, it is obviously preferable that challenges to an involuntary case under sections 303 and 305 should be heard together. It is also appropriate for the Court to delay entry of an order for relief for a short time when a motion under section 305 is to be heard soon thereafter. But a substantial delay, particularly where the Debtor is a non-operating entity whose sole purpose is prosecution of litigation, flies in the face of applicable law. Public policy supported the swift determination of challenges under section 303, supported entry of the order for relief in this case, and so militates against imposition of a stay pending appeal here.

The Debtor's secured creditor, ABN, filed a joinder in support of the Debtor's Motion for stay pending appeal. ECF No. 269. ABN did not have standing to contest the involuntary petition under 11 U.S.C. § 303(d). ABN did not take part in the petitioning creditor's motion for summary judgment because it had no legal right to do so. ABN may not appeal from the order granting summary judgment or any of the orders at issue in the present Motion. ABN has no standing to seek a stay pending appeal or join in the Debtor's Motion. As a creditor, ABN has standing to be heard in connection with the Debtor's request for the Court to abstain under 11 U.S.C. § 305 and may be heard when that matter is presented to the Court for evidentiary hearing. ABN's joinder will be stricken.¹

¹ Even if ABN had standing, its additional arguments lack weight. ABN did not have an opportunity to address the Debtor's presentation of the DLA Litigation at the summary judgment stage not only because ABN lacked standing but also because the DLA Litigation was not at all relevant to the Court's determination under 11 U.S.C. § 303 that an order for relief was warranted.

The suggestion that affiliates of IOTC may cease funding of the DLA Litigation, not assist in gaining cooperation of necessary foreign witnesses, or otherwise fail to support prosecution of the case, is simply a mirror of the Debtor's own veiled threat. The initial knowledge of the chapter 7 trustee with regard to the litigation is far less important than the knowledge and experience of counsel involved in that action, and it is not even hinted that there is any reason the chapter 7 trustee could not retain the same counsel already litigating the matter. In short, there is absolutely no reason to believe the chapter 7 trustee cannot immediately step into the shoes of the Debtor, and no reason to believe that the Debtor or its affiliates will abandon the litigation. Indeed, the Debtor has a statutory duty to assist the chapter 7 trustee.

ABN's joinder suggests that the Court should not "impose" a trustee at this inopportune moment. Yet the Court did not appoint a trustee; the Court entered an order for relief in an involuntary case, more than a year after the petition was filed, and five months after the Court determined that all requisites of 11 U.S.C. § 303 were satisfied. Other than a short time sometimes presented in the case law, neither the Bankruptcy Code nor the Bankruptcy Rules sanction an extended delay in the entry of an order for relief.

To paint the petitioning creditor's substantial attempts to collect on his claim against the Debtor outside this Court, for a period of years and in multiple jurisdictions, as somehow inconsistent with the present exercise of bankruptcy jurisdiction simply turns the law on its head. A creditor's immediate pursuit of an involuntary bankruptcy against its judgment debtor, without first attempting collection by other means, is subject to question. Here, the petitioning creditor apparently has been repeatedly stymied by the Debtor and, after substantial unsuccessful efforts elsewhere, decided to pursue this involuntary case. The involuntary provisions of the Bankruptcy Code exist to assist creditors in preserving the assets of a debtor for the benefit of creditors including the petitioning creditor. A petitioning creditor need not have a consistent desire, or even a momentary desire when the petition is filed, to benefit any creditor other than itself. Absent actual bad faith, the Bankruptcy Code does not require altruism.

For the foregoing reasons, the Motion [ECF No. 254] is DENIED and the joinder filed by ABN [ECF No. 269] is STRICKEN. If the Debtor files a motion for stay pending appeal with the United States District Court, consistent with the requirements of Fed. R. Bankr. P. 8007(b)(2)(B), the Debtor shall attach to such motion copies of this order and the Court's orders entered at ECF Nos. 132, 234, and 238.

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Copies furnished to:

Charles W. Throckmorton, Esq.

Charles W. Throckmorton, Esq. is directed to serve a conformed copy of this order on all appropriate parties and file a certificate of service with the Court.

Contrary to ABN's suggestion, the petitioning creditor is not a "profits" partner taking control of the Debtor through this case. Mr. Al-Saleh is an unsecured creditor, holding a judgment claim of more than \$38 million, which was successfully defended on appeal.