

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:

CLEAR VIEW HURRICANE SHUTTERS, LLC,

Debtor.

Case No. 06-15409-BKC-JKO

CHAPTER 7

SONYA L. SALKIN, TRUSTEE,

Plaintiff,

vs.

Adv. Pro. No. 06-2119

JEFFREY A. ULLMAN, a/k/a
JEFF ULLMAN,

Defendant.

**ORDER DENYING DEBTOR'S AND JEFFREY ULLMAN'S MOTIONS FOR
PROTECTIVE ORDER AND TO STAY ADVERSARY PROCEEDING**

On March 19, 2007, I conducted a hearing on the Debtor's parallel motions for protective order and to stay adversary proceeding [CP 126 in the main case; CP 16 in the Adversary Proceeding]. The Trustee in this case has scheduled a Rule 2004 examination of Jeffrey A. Ullman, the Debtor's principal, and a Rule 2004 examination of the person most knowledgeable about the

Debtor's documents, as defined. In addition, the Trustee has noticed the deposition of Mr. Ullman in Adversary Proceeding 06-2119, styled *Sonya L. Salkin, Trustee v. Jeffrey A. Ullman*, which arises in this case and in which the Trustee seeks to recover allegedly preferential and fraudulent transfers under 11 U.S.C. §§ 547 and 548.

Mr. Ullman was arrested by local law enforcement officers at the conclusion of the meeting of creditors conducted under 11 U.S.C. § 341 in connection with certain charges which had been brought against him by Florida state authorities which apparently related to the Debtor's business operations. Although I am informed by the parties that those charges have been dropped, I am also informed that the State Attorney has an on-going criminal investigation. It is in this context that Mr. Ullman and the Debtor seek entry of protective orders as to the 2004 examinations and the deposition in the adversary proceeding, and seek a stay of the adversary proceeding for at least 90 days.

The parties agree that a federal court has the ability to stay civil discovery pending the outcome of a concurrent criminal proceeding. *See, e.g., United States v. Kordel*, 397 U.S. 1 (1970); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980). Such decisions are addressed to the court's sound discretion, are to be granted in limited circumstances, and with great reluctance. *See, e.g., In re MMH Automotive Group, LLC*, 346 B.R. 229 (Bankr. S.D. Fla. 2006), in which Judge Isicoff denied such a stay where the government was not a party to the civil proceeding before the Bankruptcy Court. Here, of course, there is no pending criminal proceeding.

The applicable standards for the granting of such stays during the pendency of criminal proceedings, as quoted by Judge Isicoff in *MMH Automotive Group*, are as follows:

(1) the extent to which a defendant's Fifth Amendment rights are implicated; (2) the interests of the plaintiff in an expeditious resolution and the prejudice to the plaintiff in not proceeding; (3) the interests of and burdens on the defendants; (4) the convenience to the court in the management of its docket and in the efficient use of judicial resources; (5) the interest of other persons not parties to the civil litigation; and (6) the interest of the public in the pending civil and criminal actions.

The constitutional protections of the Fifth Amendment apply only to individuals and not to artificial entities such as corporations, *Braswell v. United States*, 487 U.S. 99 (1988) or, as here, limited liability companies. *Braswell* makes clear that a corporation cannot designate an individual as its corporate representative a person who might legitimately claim a privilege against self-incrimination and then use that shield to protect the corporation from having to produce subpoenaed documents on the basis of the individual's Fifth Amendment privileges. Accordingly, I will deny the Motions to the extent that they seek protective orders which would stay the Rule 2004 examination of the appropriate representative of the Debtor. The Debtor can designate a representative other than Mr. Ullman. Alternatively, if the Debtor chooses to go forward with Mr. Ullman as its representative, then he may assert any Fifth Amendment right to which he is entitled as to any particular question of particular document.

Unlike the Debtor, Mr. Ullman himself does, of course, have the right to assert Fifth Amendment privileges. I must therefore analyze the relevant factors for determining whether a stay is appropriate here. As noted above, the government is not a party to the Adversary Proceeding and has not even made an appearance in the Debtor's case. There are no pending criminal charges. In these circumstances, Mr. Ullman seeks a prophylactic shield against the vague threat posed by the pending criminal investigation. In these circumstances, I conclude that the balancing factors weigh in favor of the Trustee's investigation into "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the

debtor's estate..." under Rule 2004, in favor of the Trustee's obtaining information through discovery in the Adversary Proceeding, and in favor of the orderly prosecution of the Adversary Proceeding.

Based upon the foregoing, it is ORDERED:

1. The Motions for protective order and to stay adversary proceeding [CP 126 in the main case; CP 16 in the Adversary Proceeding] are hereby DENIED.

2. Jeffrey A. Ullman and the person most knowledgeable of the Debtor's documents shall appear for Rule 2004 examinations no later than April 27, 2007.

3. Jeffrey A. Ullman shall appear for deposition in the Adversary Proceeding no later than April 27, 2007.

4. The Clerk is directed to file this Order in both the main case and in the Adversary Proceeding.

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Copies to:

Julie Elizabeth Hough, via cm/ecf

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