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ATTORNEYS FOR CREDITOR,
JAMES R. MACKLIN

5952.02/rh

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:)	IN PROCEEDINGS UNDER
)	
MIRANT CORPORATION, et al)	
)	CHAPTER 11
Tax I.D. No. 58-2056305)	
)	
DEBTOR)	CASE NO. 03-46590-DML-11
)	JOINTLY ADMINISTERED
)	
<hr/>		
JAMES R. MACKLIN, JR.)	
Movant)	
)	
v.)	(A CONTESTED MATTER)
)	Preliminary Hearing Set for
MIRANT CORPORATION, et al)	July 15, 2004 at 9:30 o'clock a.m.
Respondent)	
)	

AMENDED MOTION FOR RELIEF FROM STAY
TO PURSUE DISCRIMINATION SUIT

TO THE HONORABLE D. MICHAEL LYNN, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, JAMES R. MACKLIN, the Movant herein, and files his Amended Motion For Relief From Stay to Pursue Discrimination Suit, based upon the following:

1. Mirant Corporation, Mirant Services, L.L.C., and Mirant L.L.C. Midatlantic hereinafter“Mirant”, commenced a case under Chapter 11 on July 14, 2003. Mirant has scheduled assets totaling approximately \$20 billion and liabilities totaling approximately \$16 billion. Upon information and belief, the claims asserted by Movant are covered by insurance maintained by the Debtor.

2. James Macklin, hereinafter "Macklin", was an employee of Mirant Corporation, Mirant Services L.L.C., or Mirant LLC Midatlantic Services L.L.C., which was originally headquartered in Washington, D.C., but has now moved to Upper Marlboro, Maryland.

3. Macklin was employed from March 2, 1987, to April 18, 2003, at which time Macklin was terminated. At the time of his termination Macklin was making approximately \$60,000.00 per year. Since his termination by Mirant, Macklin has been unable to obtain employment due to the fact that Macklin was terminated from Mirant and has to disclose this fact on any application he has filled out to date.

4. Prior to his termination in December, 2002, Macklin filed a complaint against Mirant alleging discrimination based on race. For some reason, the complaint was not forwarded to Mirant until March, 2003. Approximately thirty (30) days after the receipt of the complaint, Macklin was terminated.

5. A copy of Macklin’s Complaint as filed with the Alexandria Human Rights

Commission is attached as Exhibit "1".

6. Following his termination, and pending the outcome of his complaint with the EEOC, Macklin sought unemployment benefits by filing a claim with the Virginia Un-Employment Commission in Alexandria, Virginia.

7. Mirant contested the right to employment benefits. Following a two (2) day hearing on September 24, 2003 and October 20, 2003, Macklin's rights to employment benefits were upheld, as evidenced by the Decision of Appeals Examiner, issued on November 7, 2003, a copy of which is attached hereto as Exhibit "2". Additionally, on February 13, 2004, the EEOC in Alexandria, Virginia found that there is reasonable cause to believe that Mirant retaliated against Macklin when Macklin was terminated in April, 2003. A copy of the February 13, 2004 Investigative Report issued by the Office of Human Rights is attached as Exhibit "3".

8. On June 9, 2004, the EEOC issued its right to sue letter, which is attached as Exhibit "4".

9. The issuance of the "right to sue letter" means that Macklin may sue for his personal injuries as a result of his wrongful termination. Suit has to be filed within ninety (90) days of receipt of the "right to sue" letter.

10. Cause to lift the stay exists within the meaning of 11 U.S.C. §362(d)(1) to allow Macklin to bring suit in the United States District Court for the District of Columbia and against Mirant.

11. The United States District Court in the District of Columbia is the proper place to file this action. Moreover, Macklin intends to bring several torts claims against Mirant. As such,

allowing this action to go forward in that forum is consistent with congressional policy under both the Bankruptcy laws and civil rights laws.

12. Mirant is a huge corporation, which Debtor believes has insurance to cover claims such as those held by Macklin.

13. Because witnesses who live in close proximity to Washington, D.C. will be called to testify in Macklin's claim, requiring Macklin to prosecute his cause of action in Bankruptcy Court in Fort Worth would greatly prejudice Macklin.

14. Further, this Court is not the appropriate forum to try a jury trial involving civil rights violations which occurred in Washington D.C. and Alexandria, VA.

15. This Court should lift the stay for cause to allow Macklin to pursue his causes of action in other appropriate forums.

ARGUMENT AND AUTHORITIES

_____The automatic stay pursuant to 11 U.S.C. §362(a)(1) prevents Macklin from filing, and serving a complaint against Mirant and from proceeding to trial in this matter. The several courts that have dealt with the issues herein presented have generally resolved the issue in favor of lifting the stay to allow the civil rights claims for personal injuries to be prosecuted in the forum that would be proper had the bankruptcy proceeding not have been filed. The following decisions on this issue provide persuasive guidance to this Court in resolving the issues before this Court.

One of the earliest decisions to deal with this problem was *In re Larkham*, 31 B.R. 273 (Bnkr. D. Vt. 1983). In *Larkham* the Plaintiff had, prior to the commencement of a bankruptcy case

commenced a proceeding alleging discrimination under Title VII of the Civil Reports Act of 1964 (herein after “Title VII”). The Plaintiff filed a motion for relief from the stay to continue the Title VII action, but the Debtor sought the protection of the automatic stay.

After a hearing, the Court lifted the stay holding that Congress intended that civil rights cases to be heard expeditiously and that lifting the stay to allow the civil rights case to go forward would in no way interfere with the purpose of the automatic stay, especially where there would be no prejudice to the bankruptcy estate to allow the civil rights case to go forward.

Following *Larkham*, the Court in *In re Johnson*, 115 B.R. 634, 636 (Bankr. D. Minn. 1989) set forth the following factors to be considered by the Court in determining whether or not to lift the stay:

- a. Whether insurance is available to defend debtor or whether the defense of the suit will impose a financial burden;
- b. Whether judicial economy favors the action to proceed in the court in which it commenced;
- c. Whether a likelihood exists that resources used to prepare the matter for trial would be wasted due to the stay enjoining the action from proceeding;
- d. Whether the issues are solely state law actions or whether a special tribunal should use its expertise to hear the issues;
- e. Whether the litigation involves other parties in which the Bankruptcy Court lacks jurisdiction and whether full relief may be accorded to all non-debtor parties without debtor’s presence;

- f. Whether the creditor has a probability of success on the merits;
- g. Whether the Bankruptcy court should first address the threshold bankruptcy-law issues.

Citing *Larkham* and *Johnson*, the court in *In re. America West Airlines*, 148 B.R. 920, 923 (Bnkr. D. Ariz. 1993), provided additional considerations for the court to consider in making the determination whether or not to lift the stay to permit litigation to continue in another forum, as follows:

- a. Whether the litigation causes debtor great prejudice. *In re Johnson*, 115 B.R. 634, 636 (Bankr. D. Minn. 1989).
- b. Whether a balancing of the respective hardships tips in favor of the debtor or creditor, resulting from denial or granting of the relief. *Id.*;
- c. Whether public policy supports the type or kind of action the Movant is bringing against the Debtor. *Carter v. Larkham (In re Larkham)*, 31 B.R. 2734 (Bankr. D. Vt. 1983). *See also In re: Tricare Rehabilitation Systems, Inc.*, 181 B.R. 569, 573 (Bnkr. D. AL 1994).

Regarding the first determination, Macklin has reason to believe that Mirant has insurance which would cover Macklin's claims. As such, the cost of defending Macklin's Title VIII and state torts claims, would be paid by Mirant's insurance company rather than the Debtor. Assuming arguendo that Mirant lacks insurance to defend Macklin's claim, there is no reason to believe that Mirant, who continues to operate with efficiency throughout these Chapter 11 proceedings and who has incurred substantial attorney's fees and administrative fees to administer the estate, does not have

the financial resources to defend the instant case. Indeed, compared to the cost of reorganization, the expenditure to defend the instant claim would be minimal.

Next, the court should consider the consequences should Macklin be prohibited from pursuing his claim in the United States District Court for the District of Columbia. Macklin has already suffered great hardship as a result of Mirant's unlawful actions and will continue to suffer until the rights and liabilities of the parties can be determined by a court of law. Because Macklin was terminated by Mirant, Macklin has become virtually unemployable in that he has to disclose this fact on every employment application he submits.

Moreover, it would be virtually impossible for Macklin to pursue his claim in this court as Macklin as well as his and Mirant's witnesses reside in the Mid-Atlantic region and, at least, Macklin and his witnesses do not have the means to appear before this court. Additionally, as time passes, witnesses may no longer be available or may have fading memories regarding the facts of this case. Mirant, on the other had, has only to file a claim with their insurance carrier or, lacking coverage, must hire local counsel and make its employees available to participate in discovery and to testify.

This Court should also consider the public policy when making the determination as to whether or not cause exists to lift the stay. In *In re American West Airline, supra* the Court observed that "the enactment of Title VII indicates the strong public policy against [discrimination and retaliation]." *Id.* at 924. As such it is important that Title VII claims are resolved without undue delay. More important, it is certainly not in the public interest to allow debtors in Chapter 11 proceedings to escape liability by seeking refuge under 11 U.S.C. 362 (a)(1). Indeed, in *In re*

Johnson, supra the Court noted that, “The Bankruptcy Code does not provide unlimited protection for a Debtor [and] the mere filing of a petition in bankruptcy cannot, in and of itself, erase a plaintiff’s claim, their opportunity to litigate, or the fact that a debtor may be liable to the plaintiff in some amount.” 115 B.R. at 636.

Another factor to be considered is whether or not Macklin is likely to succeed on the merits. Here, the balance clearly tips in Macklin’s favor. To date, the issue has been presented to two separate quasi judicial bodies. In each case, the presiding official found for Macklin and rejected Mirant’s claims that Macklin’s termination was justified. (See attached Exhibits “2” and “3”)

Finally, it should also be pointed out that the fact that the claim is one for personal injuries. As such, it is unsuitable to be heard in the normal Bankruptcy Claim process by virtue of the prohibitions of 28 U.S.C. §157(b)(5). See *In re Thomas*, 211 B.R. 838, 840-41 (D.S.C. 1997).

Additionally, as Migrant is likely to have insurance which covers this claim, the litigation at issue will not cause the Debtor great prejudice. Assuming, *arguendo*, Migrant is not covered under an insurance policy, it has continued to operate during its Chapter 11 and, to date, has incurred substantial attorney’s fees and administrative costs administering the estate. The cost necessary to defend Macklin’s Title VII claim are minimal in comparison to the other legal expenses incurred in this case.

More important, it would be virtually impossible and financially prohibitive for Macklin to pursue his claim in this Court as the Plaintiff and all his witnesses reside in the State of Maryland, the District of Columbia and the State of Virginia. Macklin has suffered as a result of Mirant’s unlawful actions in that he has become virtually unemployable due to the fact that he has to disclose

that he has been terminated by Migrant on any application for employment. He will continue to suffer until the rights and obligations of the parties can be determined by a Court of law.

Migrant discriminated against and terminated Macklin in clear violation of Title VII. As such, Migrant should not be allowed to hide behind the Bankruptcy Code. In *In re Johnson, supra* the Court noted that "the Bankruptcy Code does not provide unlimited protection for a Debtor [and] the mere filing of a petition in bankruptcy cannot, in and of itself, erase a plaintiff's claim, their opportunity to litigate, or the fact that a debtor may be liable to the plaintiff in some amount." 115 B.R. at 636. On balance, a consideration of the various factors that have been considered by other courts under similar circumstances, the facts of this case justify the Court here lifting the stay to permit Movant, James R. Macklin, to continue the prosecution of his claim for violations of Title VII of the Civil Rights Act in the court of appropriate jurisdiction in the District of Columbia..

WHEREFORE, PREMISES CONSIDERED, Macklin prays that the Court lift the stay for cause to allow Macklin to pursue his claims in another appropriate forum.

Macklin prays for general relief.

Respectfully submitted:

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A Professional Corporation

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ATTORNEYS FOR CREDITOR,
JAMES R. MACKLIN

CERTIFICATE OF SERVICE

_____I hereby certify that I have this date served a true and correct copy of the foregoing via first class mail, proper postage affixed, upon the following:

Office of the U. S. Trustee
Attn: Ms. Erin Schmidt
United States Courthouse
1100 Commerce, Room 9-C-60
Dallas, TX 75242

Judith Elkin
Haynes and Boone
901 Main Street, Suite 3100
Dallas, TX 75202

Dated: July 2, 2004.

/s/

ST. CLAIR NEWBERN III