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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1144-HPaD
FABTECH INDUSTRIES, INC.,	Bk. No. 10-18411-BB
Debtor.	Adv. No. 10-01294-BB
BANK OF THE WEST,	
Appellant,	**AMENDED**
v.	**M E M O R A N D U M**[1]
FABTECH INDUSTRIES, INC.,	
Appellee.	

Argued and Submitted on June 16, 2010
at Reno, Nevada

Filed - July 19, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Before: HOLLOWELL, PAPPAS and DUNN, Bankruptcy Judges.

Fabtech Industries, Inc. (the Debtor) was granted a temporary restraining order and preliminary injunction enjoining its primary secured creditor, Bank of the West (the Bank), from continuing an action in state court to enforce a guaranty against

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

the Debtor's CEO. The injunction was extended twice by the bankruptcy court over the Bank's objection.

When the bankruptcy court granted the Debtor's third motion to continue the extension until the date scheduled for the Debtor's chapter 11 plan confirmation hearing, the Bank appealed. The Bank contends that because the Debtor's chapter 11 plan contains a post-confirmation provision limiting the Bank's ability to pursue its guaranty against the Debtor's CEO, the Debtor's plan cannot be confirmed, and therefore, the Debtor necessarily failed to establish that it had a reasonable likelihood of successful reorganization, one of the requirements necessary for a preliminary injunction. We **AFFIRM.**

I. FACTS

The Debtor is in the business of designing, developing and manufacturing suspension systems and accessories for off-road car and truck enthusiasts and race teams. The company was established in 1989, and employs between 45 and 50 workers. The Debtor had a profitable history until 2006-2007, when it lost money after it incurred significant expenses associated with a large advertising and sales campaign for one of its customers that ultimately failed. Additionally, in conjunction with the recession, its primary customers cut back on purchases and payments for the Debtor's specialty products.

The Debtor is owned and run by Brent Riley (Riley) and David Winner (Winner). Riley is a 10% shareholder and the president of the Debtor. He oversees the Debtor's administrative business operations. Winner is a 90% shareholder through The David James Winner Trust. Winner is the Debtor's CEO and oversees its

manufacturing and warehouse operations. Together, Riley and Winner run the Debtor's day-to-day business; however, Winner is in charge of the design, manufacture and marketing of the Debtor's products and according to the Debtor is considered to be "the face of Fabtech."

On March 7, 2005, the Debtor and the Bank entered into a credit agreement (the Agreement). The extension of credit was secured by almost all of the Debtor's personal property and assets. Winner personally guaranteed the Debtor's obligations under the Agreement. Over time, the Debtor's borrowing limit reached $8 million. In March 2008, the Bank requested the credit line be paid down. Winner paid down over $2.5 million, from $7.6 million to $5 million.[2] On August 31, 2008, the Agreement matured and the Bank declined to renew the credit line and demanded payment. The Debtor filed a chapter 11[3] bankruptcy petition on March 9, 2009, and continued to operate as the debtor-in-possession.

On April 28, 2009, the Bank filed a complaint in state court against Winner individually and as trustee for The David James Winner Trust alleging Winner breached his guaranty obligations to

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[2] Winner used $652,000 of his personal assets to pay down the credit line in June 2008; and caused Eucalyptus Properties, LP, an entity in which Winner is a member, and White Star Properties, another entity in which Winner has an interest, to pay $1,090,000 and $636,764, respectively, to the Bank.

The Bank filed a proof of claim on April 16, 2009, asserting a secured claim in the amount of $5,117,198.14.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

the Bank under the Agreement (the State Court Action). Bank of the West v. David J. Winner, et. al., Superior Court of California, County of Orange, Case No. 0012219.

On May 19, 2009, the Debtor filed a complaint for a temporary restraining order and a motion for preliminary injunction seeking to restrain the Bank from proceeding with the State Court Action. The Debtor alleged that the diversion of Winner's time to the State Court Action would adversely affect the Debtor's ability to effectively reorganize. The Bank argued, in opposition, that the Debtor had no financial ability to make any payments to creditors, and therefore any plan of reorganization contemplated by the Debtor would not be feasible. Additionally, the bank argued it would be harmed by an injunction of indefinite duration if other creditors sued Winner and obtained judgments that would dissipate Winner's assets.

On July 6, 2009, the bankruptcy court approved the Debtor's motion for a preliminary injunction to restrain the Bank from prosecuting its State Court Action through September 30, 2009 (the Injunction Order). The Injunction Order allowed the Debtor to seek further extensions of the injunction. It also required Winner to notify the Bank if he was served with any other complaint and enjoined Winner from transferring or disposing of any of his assets outside the ordinary course unless he obtained the consent of the Bank or the bankruptcy court.

On September 8, 2009, the Debtor filed a motion to continue the preliminary injunction. The Bank again opposed the motion arguing that no confirmable plan could be proposed by the Debtor. The bankruptcy court granted the extension of the preliminary

injunction on the same terms and conditions as the Injunction Order until December 11, 2009.

On November 3, 2009, the Debtor filed its initial plan of reorganization. On November 12, 2009, the Debtor again sought to continue the injunction. In opposition, the Bank argued that the Debtor's plan was not feasible because it proposed to pay $600,000 compensation to Winner and Riley, and lacked any infusion of new money into the Debtor's business. Overruling the Bank's objection, the bankruptcy court extended the preliminary injunction to March 31, 2010.

On March 1, 2010, the Debtor filed a third motion to extend the preliminary injunction (the Third Extension Motion). By that time, it had filed a Second Amended Disclosure Statement and Second Amended Plan (the Plan). The Second Amended Plan proposed to pay the Bank in full over seven years. It also contained a provision that restricted the Bank's right to pursue Winner on his guaranty by prohibiting the Bank from taking any action until the Debtor had been in default on its Plan obligations for over 90 days and the Bank had provided notice of the default to the Debtor.[4] The Bank argued that the Plan was not confirmable

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[4] The Plan provides, in relevant part:

> The order confirming the plan (or the plan as amended) shall act as a temporary injunction restraining any creditor, party-in-interest or any third party from pursuing any of the equity holders for so long as the Debtor is making payments pursuant to the Plan. . . .
>
> This temporary injunction is to remain in effect only for so long as the Debtor complies with the terms of the Plan concerning payment of claims. Should the Debtor be in violation of payment terms in the Plan and that violation remains uncured for a period of 90 days after receipt by the

(continued...)

because it included an impermissible post-confirmation injunction. At the hearing on the Third Extension Motion,[5] the bankruptcy court set out findings supporting each requirement necessary to obtain a preliminary injunction. It extended the injunction until July 8, 2010, which was the date set for plan confirmation. On April 22, 2010, the bankruptcy court entered its Order on Motion to Continue Preliminary Injunction Restraining Bank of the West from Prosecuting State Court Action and Continuing Status Conference in Adversary Proceeding to July 8, 2010 (the Fourth Injunction Order). The Bank timely appealed.

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[4](...continued)

> Debtor of written notice from any party affected by such violation, the affected party may apply to the Bankruptcy Court for an order to dissolve the temporary injunction as to the affected party.
>
> To the extent they may have any liability, neither the officers, guarantors, and directors of the Debtor . . . shall be discharged and released from any liability for such claims and debts under the Plan, however, absent further order of the court, upon notice and hearing, the exclusive remedy for payment of any claim or debt so long as the plan is not in default as described above shall be payment through the Plan. . . . This temporary injunction is not intended to discharge a debt of a non-debtor. § 524(e).

[5] A Third Amended Disclosure Statement and Third Amended Plan were filed on March 26, 2010 (a deadline set by the bankruptcy court). However, at the time of the hearing on the Debtor's Third Extension Motion, only the Debtor's Second Amended Disclosure Statement and Second Amended Plan were before the bankruptcy court. See Hr'g Tr. at 1:22 - 2:9. Both the Second and the Third Amended Plans proposed full payment to the Bank and contained the limited post-confirmation injunction provision.

The Debtor's Third Amended Disclosure Statement was approved by the bankruptcy court on April 22, 2010. The Third Amended Plan was sent out for votes and is scheduled for plan confirmation on July 8, 2010.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(1). Because an injunction granted by the bankruptcy court is a final decision, we have jurisdiction under 28 U.S.C. § 158. Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.), 502 F.3d 1086, 1092 (9th Cir. 2007), cert. denied, 553 U.S. 1017 (2008) (equating the granting or denying of a preliminary injunction to relief from a § 362(a) automatic stay), citing Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.), 139 B.R. 772, 778 (S.D.N.Y. 1992) ("[W]here the bankruptcy court issues a 'preliminary' injunction, but contemplates no further hearings on the merits of the injunction, apart from the outcome of the reorganization, the injunction is a final, appealable order.").

III. ISSUE

Did the bankruptcy court abuse its discretion in granting the Debtor's Third Extension Motion to continue the preliminary injunction?

IV. STANDARDS OF REVIEW

An order granting a preliminary injunction is reviewed for an abuse of discretion. Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). The "review is limited and deferential." Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003); Canter v. Canter (In re Canter), 299 F.3d 1150, 1155 (9th Cir. 2002).

In determining whether the bankruptcy court abused its discretion, we first review de novo whether the bankruptcy court "identified the correct legal rule to apply to the requested

relief" and, if it did, we determine whether the bankruptcy court's application of the legal standard to the facts was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." United States v. Hinkson, 585 F.3d 1247, 1261-63 (9th Cir. 2009).

V. DISCUSSION

Bankruptcy courts have the authority to grant injunctive relief under § 105(a), which allows the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). Under § 105(a) the bankruptcy court may enjoin an action against a non-debtor, effectively extending the automatic stay to actions (beyond those subject to § 362(a)) that "threaten the integrity of a bankrupt's estate." In re Canter, 299 F.3d at 1155 (citation omitted); Lazarus Burman Assocs. v. Nat'l Westminster Bank USA (In re Lazarus Burman Assocs.), 161 B.R. 891, 898 (Bankr. E.D.N.Y. 1993) (injunction justified when an action would "interfere with, deplete or adversely affect property of the [bankruptcy estate]" or "diminish [the debtor's] ability to formulate a plan of reorganization."); Otero Mills, Inc. v. Sec. Bank & Trust (In re Otero Mills, Inc.), 21 B.R. 777, 778 (Bankr. D.N.M. 1982) (collecting cases).

In order to obtain a preliminary injunction, the moving party must establish: (1) a strong likelihood of success on the merits, (2) the likelihood of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of the hardships favoring the plaintiff, and (4) that an injunction advances the

public interest. Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d at 1052; Winter v. Nat. Res. Def. Council, Inc., –U.S.–, 129 S.Ct. 365, 374 (2008).

Here, there is no question that the bankruptcy court applied the correct legal standard because it identified each criterion to be satisfied in its oral ruling. However, the Bank argues that the bankruptcy court's factual findings supporting the grant of the injunction were erroneous. A factual finding is clearly erroneous only if, based on the entire evidence, we are left with the definite and firm conviction that a mistake has been committed. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

A. Likelihood Of Success On The Merits

In this context, "a strong likelihood of success on the merits" requires a showing that "the debtor has a reasonable likelihood of a successful reorganization." In re Excel Innovations, Inc., 502 F.3d at 1096; In re Otero Mills, Inc., 21 B.R. at 779; Homestead Holdings, Inc. v. Broome & Wellington (In re PTI Holding Corp.), 346 B.R. 820, 826 (Bankr. D. Nev. 2006). Although it is "not a high burden" to show a reasonable likelihood of successful reorganization, the debtor must demonstrate a "meaningful contribut[ion] toward reorganization." In re Excel Innovations, Inc., 502 F.3d at 1097.

The Bank contends that the Debtor did not satisfy this requirement. The Bank asserts that the Debtor's Plan violates

§ 524(e)[6] by improperly affecting the liability of a non-debtor third party, and therefore, cannot be confirmed. The Bank argues that the Plan impermissibly proposes to enjoin the Bank from pursuing its State Court Action against Winner for the term of the Plan.

However, the applicable standard for enjoining an action against a non-debtor is the ability to demonstrate a reasonable likelihood of reorganization, not, as the Bank contends, "a reasonable likelihood of being able to confirm its Plan." Appellant's Opening Brief at 2, 13-23.

Whether the Plan, including its provision for a limited post-confirmation injunction, meets the requirements for confirmation under § 1129 was not before the bankruptcy court and is not before us now. Chapter 11 plans can be amended and certain provisions and terms may be altered or deleted during the confirmation process. As the bankruptcy court noted: "I'd put a bullet through the brain of a plan that I think is not likely to be confirmed. So I haven't ruled on the confirmation yet, but I'm cautiously optimistic that that's going to occur." Hr'g Tr. at 6:1-4.

The bankruptcy court based its finding that the Debtor had a reasonable likelihood of successful reorganization on the history of the case and the Debtor's Second Amended Disclosure Statement. The disclosure statement, along with the declarations submitted

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[6] Section 524(e):

> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

by Riley and Winner, stated that the Debtor had obtained the authority to use cash collateral and was current on all postpetition obligations, including its obligations to the Bank; had settled litigation and obtained turnover of personal property; and had, postpetition, increased its sales and revenues, along with its receivables and inventory. Furthermore, according to the Second Amended Disclosure Statement, Winner and Riley had expanded the Debtor's business by forming contracts with the U.S. military and private label sales, and Winner was working to expand the business through new marketing strategies and through the design and introduction of new products.

As to whether the post-confirmation injunction provision contained in the Plan rendered the Debtor's ability to reorganize futile, the bankruptcy court stated,

> It's not before me and I haven't seen the briefing on it, but I certainly am familiar with contexts in which such a post-confirmation injunction under the plan was permitted. . . . I don't know whether the Ninth Circuit has a different view on that or not. I haven't looked at those cases yet. . . . I'm not - - that to me didn't strike me as [meaning the Plan] was necessarily unconfirmable.

Hr'g Tr. at 7:13 - 8:7.

Based upon the information provided by the Second Amended Disclosure Statement, the Debtor had become more profitable postpetition and was making a meaningful contribution toward reorganization. Therefore, notwithstanding the provision in the Plan limiting the Bank from pursuing Winner, we are not convinced the bankruptcy court made a mistake in finding that the Debtor established a reasonable likelihood of successful reorganization.

B. Likelihood Of Irreparable Injury To Plaintiff

The bankruptcy court found that it would be detrimental to the reorganization effort if the attention of the Debtor's principals was not devoted to reorganization and running the company. The Bank argues that Winner's distraction is not enough to establish that the Debtor would be irreparably harmed. However, "courts have easily found that the loss of such key participants at a crucial period in the operational life and reorganization of the debtor may constitute irreparable harm to the estate and to the reorganization effort." In re PTI Holding Corp., 346 B.R. at 827 (collecting cases). Irreparable harm may be found if an action would "so consume the time, energy and resources of the debtor that it would substantially hinder the debtor's reorganization effort." Gilman v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 177 B.R. 475, 481 n.6 (D. Del. 1993) (citation omitted).

The declarations of Riley and Winner indicate that Winner is focused on and committed to running the company and formulating new strategies to expand and refine the business. The bankruptcy court found that Winner, as one of the Debtor's principals, should be able to "continu[e] minding the store" and "respond to what I'm sure will be [the Bank's] very well written and well argued attempts to try to not confirm the plan" without being distracted by other litigation. Hr'g Tr. at 6:11-20.

We conclude that the bankruptcy court did not err in its finding. See In re Lazarus Burman Assocs., 161 B.R. at 899-900 (principals are in best position to effectively formulate, negotiate, and carry out the Debtor's plan of reorganization);

Northlake Bldg. Partners v. Nw. Nat'l Life Ins. Co. (In re Northlake Bldg. Partners), 41 B.R. 231, 233-34 (Bankr. N.D. Ill. 1984) (guarantor's critical management function integral to debtor's ability to reorganize).

C. Balance Of Hardships

The Bank's enforcement of its bargained-for rights is an interest that would be adversely affected by an injunction. The bankruptcy court was required to balance this harm against the harm to the Debtor if the injunction was not granted. The bankruptcy court found that the

> hardship of continuing to wait to proceed on vis-a-vis the guarantors while we try to see if the plan is confirmable and will be confirmed, doesn't impose an unreasonable hardship and the risks of having the plan derailed instead is more significant and would outweigh whatever hardship is on the other equation.

Hr'g Tr. at 6:22-7:3.

As noted above, the declarations, together with the Debtor's Second Amended Disclosure Statement, demonstrated that Winner was integral to running the day-to-day business of the Debtor and in reorganizing the business in order to be profitable. The bankruptcy court found that the focus of the parties on reorganization and the confirmation of a plan was paramount.

The Bank has not identified any particularized harm it suffers by the delay from enforcing its remedies against the Debtor. Additionally, the terms of the Fourth Injunction Order (as all of its predecessors) protect the Bank from risk of loss or dissipation of Winner's assets. Therefore, we do not determine that the bankruptcy court's findings were clearly erroneous.

D. Advancement Of The Public Interest

The Bank argues that the public interest in ensuring the enforceability of contracts is a stronger public interest than "grant[ing] Winner the benefit of the automatic stay without requiring him to accept any of the burdens of bankruptcy." Appellant's Opening Brief at 28. While upholding contract rights is an important public interest, the grant of a preliminary injunction that is limited in time (as it is here) does not destroy the Bank's enforcement rights; it merely postpones them. In re PTI Holding Corp., 346 B.R. at 832.

On the other hand, "[t]he public interest in successful reorganization is significant." In re PTI Holding Corp., 346 B.R. at 832 (internal citations omitted); In re Lazarus Burman Assocs., 161 BR at 901. Indeed, the bankruptcy court found that the Debtor's successful reorganization was the paramount goal, which required that Winner focus his attention on managing the business and confirming a plan rather than being distracted by dealing with litigation against him.

Winner's declaration stated that he is in charge of moving the design and manufacturing business along. He is actively involved in new strategies for innovation and attends trade shows and engages in other marketing efforts. He stated that he would be distracted and unable to perform his job at the same level if he were diverted to defend litigation. He stated that any defenses he may raise in the State Court Action could impact the Debtor's arguments regarding the Bank's claims.

As a result, the bankruptcy court found the primary interest advanced was the goal of a successful reorganization of the

Debtor, which it was optimistic would occur if Winner could continue to "mind the store" without distraction, and which it found outweighed any hardship the Bank would suffer by waiting to enforce its rights under the Agreement. Given this record, we are not left with the definite and firm conviction that the bankruptcy court committed a mistake in granting the Third Extension Motion.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM the bankruptcy court's Fourth Injunction Order.