COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

Superior Court Department
Civil Action No.

TOWN OF ACTON , and
JANET K. ADACHI, MIKE GOWING,
KATIE GREEN, DAVID CLOUGH AND
JOHN SONNER AS THEY ARE THE
MEMBERS OF THE
BOARD OF SELECTMEN OF THE
TOWN OF ACTON,,

Plaintiff,

v.

W.R. GRACE & CO. — CONN.,

Defendant.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR DETERMINATION THAT THIS ACTION IS AN EXERCISE OF THE TOWN'S POLICE AND REGULATORY POWERS AND IS THEREFORE EXCEPTED FROM THE BANKRUPTCY CODE'S AUTOMATIC STAY PURSUANT TO SECTION 362(b)(4) THEREOF

The Town of Acton's (the "Town") and its Board of Selectmen's ("Board") *Emergency Motion for Determination that this Action is An Exercise of the Town of Acton's Police and Regulatory Powers and Therefore Excepted from the Bankruptcy Code's Automatic Stay Pursuant to Section 362(b)(4) Thereof* (the "Emergency Motion") should be granted because this action seeks enforcement of a Town Bylaw designed to protect the safety of the drinking water in the Town. It is therefore an exercise of the Town's police and regulatory powers and therefore excepted from the Bankruptcy Code's automatic stay.

I. Introduction

In this action, the Town and the Board (together, the "Plaintiffs") seeks to enjoin defendant, W.R. Grace & Co. – Conn ("Grace"), a debtor reorganizing in bankruptcy under Chapter 11, from shutting down, decommissioning and/or removing, in violation of a Town Bylaw, an environmental cleanup effort designed to protect and restore a significant public water supply aquifer to a fully usable condition. The Bylaw, a copy of which is attached as Exhibit A to the Verified Complaint, provides that the Town, acting by and through the Board, may seek injunctive relief if an entity responsible for an environmental cleanup effort either abandons or discontinues a cleanup effort for more than thirty days without meeting the Groundwater Cleanup Standards established under the Bylaw. Bylaw § 7. Despite Grace's own consultant's report confirming that the applicable Groundwater Cleanup Standards have not been satisfied, Grace has proposed to "shut down the Northeast Area Remedial Action ... and begin decommissioning the system." *See* Tetra Tech, Inc. ("Tetra Tech") Report, Exhibit C to the Verified Complaint, at pages 3 and 6.

The Plaintiffs' sole purpose in initiating the instant lawsuit is to enforce the Bylaw "to protect, preserve, improve and maintain the Town of Acton's existing and potential public drinking water sources and to assure public health and safety through the application of stringent environmental ground water quality clean up standards which assure restoration of any contaminated water resources area covered by this Bylaw to a fully useable condition." Bylaw § 2. Adjudication of the Verified Complaint in this action is therefore excepted from the Bankruptcy Code's automatic stay under 11 U.S.C. § 362(b)(4) because the Town is a governmental unit seeking to enforce its police and regulatory powers. As the Complaint is pending before this Court, this Court has concurrent jurisdiction with the Bankruptcy Court

overseeing Grace's bankruptcy case to determine whether adjudication of the Complaint is excepted from the automatic stay.

II. Factual Background

Grace owns an approximately 260 acre Superfund site (the "Site") located, in substantial part, in the Town. Verified Complaint ("VC") ¶ 46. Grace's manufacturing operations at the Site released volatile organic chemicals, including without limitation 1,1-dichloroethene (also known as "1,1-dichloroethylene" and "vinylidine chloride" ("VDC")), vinyl chloride, benzene, and dioxane into the groundwater beneath the Site. VC ¶ 52. While Grace's manufacturing operations at the Site have ceased, plumes of volatile organic chemicals released at or from the Site continue to contaminate groundwater beneath and migrating from the Site. VC ¶ 53. The Town relies ***exclusively*** on groundwater as the source of public drinking water for the citizens, residents, businesses and other institutions in the Town. VC ¶ 54.

In October 1980, EPA and Grace entered into a Consent Decree under Section 7003 of the Resource, Conservation and Recovery Act ("RCRA") regarding cleanup of the Site (the "1980 Consent Decree"). VC ¶ 94. The 1980 Consent Decree required, among other things, restoration to a fully usable condition of groundwater and drinking water aquifers contaminated by operations at the Site. VC ¶ 95. On July 14, 1980, the Massachusetts Department of Environmental Quality Engineering (now the Department of Environmental Protection ("DEP")) and Grace entered into an Administrative Consent Order (the "ACO"), which was amended on April 15, 1981, to conform to the federal decree between Grace and EPA. VC ¶ 96. Pursuant to the ACO, Grace constructed a groundwater recovery and treatment system that pumped and treated contaminated groundwater from under the former waste disposal units on the Site. VC ¶ 98. Also pursuant to the ACO, the EPA issued its First Record of Decision designating all work

intended to address contaminated groundwater in the area of the Site as "Operable Unit Three." VC ¶¶ 101, 105.

On April 10, 1997, the Town adopted the Bylaw by unanimous vote of the Town Meeting pursuant to Article 89 of the Massachusetts Constitution (the Home Rule Amendment); the Town's police powers to protect the public health, safety, and welfare; its authority pursuant to G.L. c. 40, § 21; and its authority to plan for the prevention, control and abatement of water pollution pursuant to G.L. c. 21, § 27(1). VC ¶¶ 16, 17. Over objection by Grace, the Massachusetts Attorney General approved the Bylaw pursuant to G.L. c. 40, § 32. VC ¶ 31.

The Bylaw's stated purpose is to protect, preserve, improve and maintain the Town's existing and potential public drinking water sources and to assure public health and safety through the application of environmental groundwater quality cleanup standards which assure restoration of any contaminated water resources areas covered by the Bylaw to a fully useable condition. Bylaw § 2. After taking effect pursuant to G.L. c. 40, § 32, the Bylaw has continuously been in effect in the Town. VC ¶ 33.

The Bylaw (§ 5) states in pertinent part that:

> Any Cleanup performed in the Town of Acton by a person potentially liable under Section 5(a) of General Laws Chapter 21E on, in, at, of or affecting any Resource Area(s) shall on a permanent basis meet or surpass in cleanness the Groundwater [Cleanup] Standards established by this Bylaw throughout the Resource Area for each and every contaminant for which the Cleanup is or has been undertaken.

Pursuant to Section 4.10 of the Bylaw, the Groundwater Cleanup Standards under the Bylaw are equivalent to the Maximum Contaminant Level Goals ("MCLG") established under the Safe Drinking Water Act for each contaminant for which an MCLG has been established, or, if the MCLG is zero or no MCLG has been established, 1 ppb for any VOC and 5 ppb total for all VOCs. Section 7 of the Bylaw provides that "it shall constitute a breach of this bylaw to discontinue for more than thirty (30) days or to abandon a Cleanup of a Resource Area without

meeting the Groundwater Cleanup Standards of this Bylaw." Section 7 of the Bylaw also provides that "[a]ny breach of this Bylaw shall be deemed to cause irreparable harm to the Town of Acton and its citizens, residents, and persons employed in the Town, entitling the Town of Acton to all appropriate injunctive relief in addition to all other available remedies provided by law."

In 1998, EPA, Grace, and DEP negotiated a Statement of Work for a Remedial Investigation/Feasibility Study for work under Operable Unit Three ("OU3"). VC ¶ 108. On September 30, 2005, EPA issued a Record of Decision (the "OU3 ROD") selecting and documenting the remediation plan for Operable Unit Three. VC ¶ 109. The OU3 ROD's selected remedy for Operable Unit Three "includes active treatment of contaminated groundwater . . ., monitored natural attenuation of groundwater beyond the active treatment zones and institutional controls to restrict groundwater use until the cleanup objectives have been met to address unacceptable risks." VC ¶ 115, citing OU3 ROD at 66. The OU3 ROD required, among other things, the installation of additional extraction wells in the northeast area of the Site to work in combination with existing wells to pump and treat contaminated groundwater (the "Treatment System") for the purpose of protecting the municipal water supply. VC ¶ 127. The Treatment System began operation in April 2010; it involves pumping groundwater from bedrock extraction well NE-1, treating the pumped water at a treatment facility located on a property adjoining the Site, and injecting the treated water into shallow unconsolidated deposits. VC ¶¶ 139, 140. The OU3 ROD allowed, at the end of three years of operation of the groundwater extraction system, for "an evaluation to determine if pumping can be discontinued." VC ¶ 152, citing OU3 ROD at 69.

Prior to beginning the Northeast Area Remedial Action, on April 2, 2001, Grace filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, Case No. 01-01139-JKF. VC ¶ 6. On January 31, 2011, Grace's plan of reorganization was confirmed by the Bankruptcy Court. VC ¶ 7. That plan has not, however, become effective, as portions of the Plan are under appeal to the Third Circuit. VC ¶¶ 8-9.

On February 25, 2013, pursuant to the three-year timeframe for review outlined in the OU3 ROD, TetraTech, Inc., a Grace consultant, issued a letter (the "TetraTech Letter") recommending the shut down, decommissioning and removal of the Treatment System, including certain active pumping systems; extraction, reinjection and observation wells; and treatment systems. VC ¶¶ 150-152. The TetraTech Letter and attached documentation establish that concentrations of VDC and vinyl chloride in groundwater present at the Site and in the surrounding areas exceed the allowable maximum contaminant levels under the Groundwater Cleanup Standards established by the Bylaw. VC ¶¶ 63-90.

By letter dated April 29, 2013, the Town responded to the TetraTech Letter, objecting to the proposed shutdown, decommissioning and removal of the Treatment System. VC ¶ 153, Exhibit D. On September 20, 2013, EPA and DEP issued a conditional shutdown approval letter giving Grace permission to shut down the Treatment System, subject to conditions. VC ¶¶ 156-159. Concurrent with the filing of this Emergency Motion, the Town and the Board filed the Verified Complaint seeking injunctive relief to prevent Grace from commencing that shut down .

III. This Court Has Jurisdiction to Determine that this Action is Excepted from the Automatic Stay.

The Massachusetts Appeals Court has, consistent with the decisions of numerous federal courts,[1] repeatedly held that state courts in Massachusetts enjoy concurrent jurisdiction with the Bankruptcy Court to determine the applicability of the Bankruptcy Code's automatic stay. *See, e.g.*, *Garg* v. *Eresian*, 80 Mass. App. Ct. 1103, 1103 n.6, 951 N.E.2d 368 (2011) ("We have concurrent jurisdiction with the Bankruptcy Court to determine the applicability of the automatic stay provision of the United States Bankruptcy Code . . . .") (citations omitted) (Rule 1:28 decision); *Lombardo* v. *Gerard*, 32 Mass. App. Ct. 589, 593-94, 592 N.E.2d 1333 (1992) (concluding that the automatic stay did not prohibit the post-petition commencement of a domestic support proceeding in probate court); *Amonte* v. *Amonte*, 17 Mass. App. Ct. 621, 625-26, 461 N.E.2d 826, 830 (1984) (analyzing the scope of the automatic stay exception under 11 U.S.C. § 362(b)(2)).

This Court should exercise that concurrent jurisdiction because (a) the Plaintiffs commenced this action seeking a temporary restraining order and preliminary and permanent injunctions enjoining Grace from shutting down the Treatment System, matters over which this Court has original jurisdiction pursuant to G.L. c. 214, § 1, to protect citizens resident in Middlesex County; (b) the Town adopted the Bylaw by unanimous vote pursuant to Article 89 of the Massachusetts Constitution, a bylaw that was approved by the Massachusetts Attorney General pursuant to G.L. c. 40, § 32; and (c) Section 7 of the Bylaw entitles the Town to "all appropriate injunctive relief" in the event the Bylaw provisions are breached.

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[1] *See, e.g.*, *In re Mystic Tank Lines Corp.*, 544 F.3d 524, 529 (3d Cir. 2008) (quoting *Sanders v. City of Brady (In re Brady Mun. Gas Corp.)*, 936 F.2d 212, 218 (5th Cir.1991)); *In re Angelo*, 480 B.R. 70, 83 (Bankr. D. Mass. 2012); *In re Martinez*, 227 B.R. 442, 444 (Bankr. D.N.H. 1998); *In re Conference of African Union First Colored Methodist Protestant Church*, 184 B.R. 207, 215 (Bankr. D. Del. 1995).

IV. This Action is Excepted from the Automatic Stay Under 11 U.S.C. § 362(b)(4).

While, as a general matter, section 362(a)(1) of the Bankruptcy Code stays the commencement of any judicial proceeding against debtors in bankruptcy to recover a claim, section 362(b)(4) specifically excepts from the stay "the commencement . . . of an action . . . by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment . . . ." 11 U.S.C. § 362(b)(4). "[S]ection 362(b)(4) embodies a fundamental judgment of Congress: that protecting the public welfare and safety trumps the concerns that underlie the automatic stay. . . ." *In re Spookyworld, Inc.*, 346 F.3d 1, 10 (1st Cir. 2003) (citing *Mann* v. *Chase Manhattan Mortgage Corp.*, 316 F.3d 1, 3 (1st Cir. 2003)). Accordingly, the courts in the First Circuit have repeatedly held that when a governmental unit is pursuing litigation as a matter of public safety and welfare rather than to advance a pecuniary interest, the litigation is excepted from the stay. *See, e.g., In re McMullen*, 386 F.3d 320, 325 (1st Cir. 2004) (applying "public policy" and "pecuniary purpose" tests to find that a complaint against a real estate agent before the Massachusetts Division of Registration for Real Estate Agents was excepted from the automatic stay under § 362(b)(4)); *In re Envtl. Source Corp.*, 431 B.R. 315, 323-24 (Bankr. D. Mass. 2010) (applying the "public policy" and "pecuniary purpose" tests to except enforcement of the Massachusetts Worker's Compensation Act from the automatic stay); *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1, 9 (Bankr. D. Mass. 1999) (applying the "public policy and "pecuniary purpose" tests to hold that the Massachusetts Commission Against Discrimination's authority to sanction and enforce monetary penalties falls under 11 U.S.C. § 362(b)(4)). Here, there is no doubt the "police and regulatory power" exception applies to the Town's action to enforce the Bylaw.

A. The Town of Acton is a "governmental unit" for purposes of 11 U.S.C. § 362(b)(4).

The Bankruptcy Code defines a "governmental unit" to mean, among other things, a "municipality" such as the Town. 11 U.S.C. § 101(27). As a result, the First Circuit has consistently held that towns are "governmental unit(s)" for purposes of the automatic stay exception in section 362(b)(4) of the Bankruptcy Code. *See, Spookyworld*, 346 F.3d at 9 ("The town is a 'governmental unit' within the meaning of 362(b)(4).") (citing *Cournoyer v. Town of Lincoln*, 790 F.2d 971, 975 (1st Cir. 1986)).

Massachusetts law empowers the Town to appoint agents for the purpose of filing suit. *See* G.L. c. 40 § 2. The Bylaw (§ 7) authorizes and empowers the Board of Selectmen to "enforce the provisions of this Bylaw." Accordingly, the filing of the Verified Complaint by the Town, acting by and through the Board, is an act of the Town as a "governmental unit" for purposes of the automatic stay exception contained in § 362(b)(4).

B. The Town and the Board Filed this Action to Enforce the Town's Police and Regulatory Powers and Not to Advance any Pecuniary Interest.

Based on the plain language of the Bylaw and the relief sought in this action, there can be no doubt that the Plaintiffs filed the Verified Complaint to enforce the Town's police and regulatory powers. The Bylaw was adopted by the Town "under its Home Rule Authority pursuant to Article 89, Section 6 of the Amendments to the Massachusetts Constitution (the Home Rule Amendment), its police powers to protect the public health, safety, welfare, and its authorization under Massachusetts General Laws Chapter 40, Section 21, and its authority to plan for the prevention, control and abatement of water pollution under M.G.L. c. 21, § 27 (1)." Bylaw § 1. Indeed, the sole and stated purpose of the Bylaw is to "protect, preserve, improve and maintain the Town of Acton's existing and potential public drinking water sources and to

assure public health and safety through the application of stringent environmental ground water quality clean up standards which assure restoration of any contaminated water resources area covered by this Bylaw to a fully useable condition." Bylaw § 2.

In the Complaint, the Plaintiffs do not seek to impose monetary penalties the Bylaw affords them the right to impose. Instead, it seeks, consistent with the public interest in clean water, to enforce the Bylaw only by enjoining Grace from shutting down, decommissioning and/or removing the Treatment System. Thus, the only action taken by the Plaintiffs is to enforce the Bylaw's police and regulatory powers to protect public health and safety by preventing Grace from breaching the Bylaw, and not to advance the Plaintiffs' pecuniary interests. Accordingly, this action plainly falls within the confines of section 362(b)(4).

Aside from filing the instant lawsuit, the Town has not engaged in any act or expended any funds in a manner that would give rise to a private cause of action for remuneration or reimbursement from Grace.[2] In addition, while section 7 of the Bylaw provides that the Town may assess a monetary penalty and pursue "all other available remedies provided by law" in the event that an entity is found to be in breach of the Bylaw provisions, the Plaintiffs are seeking only an injunction to prevent Grace from breaching. Indeed, if the injunction is granted and Grace continues with the Treatment System and complies with the Bylaw, Grace would no longer be in "breach" the Bylaw. Thus, there can be no doubt that the Town is seeking only to advance a public interest in clean water, as it is authorized and encouraged to do under Massachusetts law. See *Arthur D. Little, Inc.* v. *Commissioner of Health & Hospitals*, 395 Mass.

[2] If and to the extent the Court were to award the Town fees and costs of this action associated with the Town's exercise of its police and regulatory power, exercised for the purpose of protecting the health safety and welfare of its citizenry, such an award would be excepted from the automatic stay as well. *See In re Patton*, 323 B.R. 311, 315 (Bankr. D. N.H. 2005) (finding that an award of legal fees and expenses incurred in the enforcements of a town's junkyard statute is excepted from the automatic stay as part of the town's exercise of its police and regulatory power).

535, 546 (1985) (citations omitted) (protection of public health is "a subject of 'particular, immediate, and perpetual concern' to any municipality" and is at the core of its police powers); *Lawrence* v. *Commissioner of Public Works*, 318 Mass. 520, 522-23 (1945) (recognizing a municipality's "interest in the purity of [its] water supply" as part of its "responsibility for the health and safety of its inhabitants," and in light of "the unfortunate consequences that might result if that supply should become polluted").

C. The Facts and Circumstances Compel Determination that this Action is Excepted from the Automatic Stay.

The case of *Com., Dep't of Envtl. Res.* v. *Ingram*, 658 A.2d 435 (Pa. Commw. Ct. 1995), provides persuasive authority with respect to this Court's exercise of its concurrent jurisdiction to determine the automatic stay does not apply.[3] In *Ingram*, the Commonwealth Court of Pennsylvania was asked to determine whether a lawsuit filed by the Pennsylvania Department of Environmental Resources (DER) to enforce an order requiring a debtor mining operation to abate violations of several state environmental laws was excepted from the automatic stay under section 362(b)(4) of the Bankruptcy Code. After holding that it had concurrent jurisdiction with the bankruptcy court to determine the applicability of the automatic stay, the Commonwealth Court held that the stay did not apply to the DER's lawsuit seeking to compel the debtor's compliance with an order requiring the debtor to cease discharging untreated pollutants from its mining site into public waters. *Id.* at 440.

In its analysis, the Commonwealth Court distinguished the facts before it from the facts underlying the United States Supreme Court decision in *Ohio* v. *Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). In *Kovacs*, the Supreme Court found that a debtor's obligation to complete site cleanup was subject to the automatic stay because the cleanup obligation had been

[3] A copy of this decision is attached hereto as Exhibit A hereto for the convenience of the Court.

reduced to a monetary judgment once the responsible debtor had been dispossessed of the site and a receiver had been appointed who was seeking to recover assets from the debtor to pay for cleanup of the site. The Commonwealth Court distinguished the facts before it from *Kovacs* by observing that the DER was seeking only to enforce a cleanup order that compelled a debtor, who was capable of performing the cleanup, to treat mine waste in accordance with its lawful duties.

Ingram is analogous to the present case. Despite active remediation efforts at the Site beginning in April 2010, the report issued by Grace's consultant confirms that concentrations of VDC and vinyl chloride in groundwater present at the Site and in the surrounding Resource Area exceeds the Groundwater Cleanup Standards established by the Bylaw. *See* Bylaw § 4.10; TetraTech Report, Figure 4 (VC Exhibit C). Similar to the injunction sought in *Ingram*, the sole purpose of the instant lawsuit is to enjoin Grace from discontinuing the Treatment System and, thus, prevent or stop a violation of the Bylaw designed to protect public health and safety.[4] It is beyond dispute that not only is Grace "capable" of continuing the Treatment System; it has been conducting related remediation efforts on and around the Site for years. Moreover, "[n]o more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined . . ." than a governmental unit attempting to enforce an injunction that seeks to rectify environmental hazards. *Penn Terra Limited* v. *Department of Environmental Resources*, 733 F.2d 267, 274 (3d Cir. 1984). As a result, the instant action is excepted from the automatic

[4] Grace may argue that because it will incur costs to continue the Treatment System, the instant matter may be seeking to enforce a "money judgment," which action would be barred by the automatic stay. Courts have consistently rejected similar arguments, holding that the mere fact that the injunctive relief sought may require expenditures by the debtor does not make the attempt to enforce an injunction or seek some form or equitable relief, a request for a "money judgment." *See, e.g., Mohawk Greenfield*, 239 B.R. at 9 (holding that the preservation of a governmental unit's authority to sanction and enforce monetary penalties punishing discriminatory behavior falls within its police and regulatory powers); *In re Madison Indus., Inc.*, 161 B.R. 363, 366 (D.N.J. 1993) (a state agency's request for injunctive relief and statutory penalties for a debtor's failure to remedy a violation of New Jersey's version of RCRA was not subject to the automatic stay following *Penn Terra*).

stay as an exercise of Town's "police and regulatory power" to protect the health, safety and welfare of its citizens.

V. Conclusion

For the foregoing reasons, the Court should grant the Motion, and conclude that this action is not subject to the automatic stay. Pursuant to Mass. R. Super. Ct. Rule 9A(c)(2) the Plaintiffs hereby requests a hearing on the Motion with respect to the relief requested therein.

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Dated: September 23 2013

EXHIBIT A

658 A.2d 435
(Cite as: 658 A.2d 435)

C

Commonwealth Court of Pennsylvania.
COMMONWEALTH of Pennsylvania, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Petitioner,
v.
Clark R. INGRAM, George M. Ingram, Gary C. Ingram, and Gregory B. Ingram, and Henry L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel, Respondents.

Argued Jan. 25, 1995.
Filed March 2, 1995.
Publication Ordered May 15, 1995.

Department of Environmental Resources (DER) brought action against individuals and corporation to enforce orders of Commonwealth Court and DER requiring abatement of environmental violations involving discharges from mine site. Individuals filed "Suggestion of Bankruptcy," which was treated as motion for stay. The Commonwealth Court, No. 254 M.D.1991,John W. Keller, Senior Judge, held that: (1) Commonwealth Court had concurrent jurisdiction with bankruptcy court to determine applicability of automatic stay, and (2) exceptions to automatic stay for commencement or continuation of action or proceeding by governmental unit to enforce police or regulatory power, and for enforcement of judgment, other than money judgment, obtained in action or proceeding by governmental unit to enforce police or regulatory powers, were applicable.

Motion denied.

West Headnotes

[1] Bankruptcy 51 ⇐2062

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2060 Exclusive, Conflicting, or Concurrent Jurisdiction
51k2062 k. Bankruptcy Courts and State Courts. Most Cited Cases

Commonwealth Court had concurrent jurisdiction with bankruptcy court to consider applicability of Bankruptcy Code's automatic stay. Bankr.Code, 11 U.S.C.A. § 362.

[2] Bankruptcy 51 ⇐2402(3)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(B) Automatic Stay
51k2394 Proceedings, Acts, or Persons Affected
51k2402 Administrative Proceedings and Governmental Action
51k2402(3) k. Environmental Matters. Most Cited Cases

Exceptions to automatic stay for commencement or continuation of action or proceeding by governmental unit to enforce police or regulatory power, and for enforcement of judgment, other than money judgment, obtained in action or proceeding by governmental unit to enforce police or regulatory powers, were applicable in proceeding brought by Department of Environmental Resources (DER) to enforce environmental cleanup orders issued by DER and Commonwealth Court, where DER's order did not seek money damages, but sought to have debtors perform their lawful duty in treating mine waste discharges, debtors had not been dispossessed of their property by receiver, cleanup order had not been reduced to money judgment, and debtors or bankruptcy trustee were capable of taking acts to comply with order. Bankr.Code, 11 U.S.C.A. § 362(b)(4, 5).

***436** Dennis A. Whitaker, for petitioner.

Roger H. Taft, for respondent.

KELLER, Senior Judge.

Before the Court is a petition entitled "Suggestion of Bankruptcy" filed by respondents Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram (collectively, the Ingrams) and the Department of Environmental Resources' (DER) answer thereto. By order dated January 4, 1994, this Court notified the parties that the "Suggestion of Bankruptcy" would be treated as a motion for a stay and ordered briefs addressing the issue of the effect of Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362. During argument via telephone conference call on January 25, 1995, the issue of this Court's jurisdiction to review the applicability of the suggestion of bankruptcy was raised. Further briefs addressing this issue were ordered on or before February 13, 1995. After reviewing those briefs and the applicable statutory and caselaw, we conclude that this Court possesses concurrent jurisdiction to address the issues relating to a stay and that the Ingrams must comply with the Administrative Order of August 30, 1988, as affirmed by this Court in *Ingram v. Department of Environmental Resources,* 141 Pa.Commonwealth Ct. 324, 595 A.2d 733 (1991), *petition for allowance of appeal denied,* 530 Pa. 648, 607 A.2d 257 (1992), *cert. denied,* 506 U.S. 918, 113 S.Ct. 329, 121 L.Ed.2d 248 (1992).

BACKGROUND

The history of this litigation dates back to DER's issuance of an amended Compliance Order on August 30, 1988, directing the individual respondents in this case as well as a corporate respondent, Rockwood Energy and Mineral Corporation (REMCorp) to abate violations of §§ 5, 316, 402 and 610 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.5, 691.316, 691.401 and 691.610; §§ 4.2 and 4.3 of the Surface Mining Act, Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. §§ 1396.4b and 1396.4c; and § 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. § 510-17. All of the violations involved discharges from a mine site in Clearfield County referred to as the "Frenchville site."

The Ingrams and Israel filed timely appeals to the Environmental Hearing Board (EHB) from DER's order. On April 17, 1990, the EHB issued an opinion and order granting DER's Motion for Partial Summary Judgement and dismissing the appeal of the Ingrams and Israel [FN1] On May 18, 1990, DER ***437** filed a Petition to Enforce Administrative Order with this Court, which was docketed at No. 196 M.D.1990. The Ingrams and the Israel Estate filed Petitions for Review of the April 17, 1990 EHB opinion and order, which were docketed at Nos. 1075 and 1091 C.D.1990, respectively. Ultimately, the Opinion and Order of the EHB was affirmed by an unanimous panel of this Court on July 19, 1991 and the Petition to Enforce was dismissed as moot. *Ingram v. DER.*

FN1. Herman J. Israel died on September 30, 1989 and the personal representatives of his estate were substituted as parties in the EHB order of April 17, 1990.

The present action was commenced by DER on August 28, 1991 as a Petition to Enforce the August 30, 1988 order of DER and this Court's July 19, 1991 order. On December 30, 1994, the Ingrams filed the "Suggestion of Bankruptcy" which is currently at issue.

JURISDICTION

The Ingrams argue that this Court has no jurisdiction to determine whether a Section 362 automatic stay applies. DER counters that this Court has such jurisdiction and has exercised it in the past, citing *Department of Environmental Resources v. Peggs Run Coal Co.,* 55 Pa.Commonwealth Ct. 312, 423 A.2d 765 (1980), which DER argues is on "all fours" with the present case. In *Peggs Run,* this Court indeed concluded that Section 362 of the Bankruptcy Code did not automatically stay action in this Court because the action was brought to enforce the Department's regulatory powers. It would appear, however, the precise jurisdictional issue presently before the Court was not raised in *Peggs Run.*

This jurisdictional question has, however, been raised and decided in the federal context. In *Brock v. Morysville Body Works,* 829 F.2d 383 (3d Cir.1987), the Secretary of Labor petitioned the United States Court of Appeals for the Third Circuit for summary enforcement of a final order of the Occupational Safety and Health Review Commission pursuant to 29 U.S.C. § 660. That section grants the courts of appeals exclusive jurisdiction over such matters. Morysville, however, had filed for reorganization under Chapter 11 of the Bankruptcy Code prior to the institution of the petition to enforce. The Third Circuit concluded that both the appellate court and the bankruptcy court had concurrent original jurisdiction over the petition to enforce, and that no purpose would be served by the Third Circuit deferring to the bankruptcy court. *Id.* at 385-387.

The Third Circuit also considered whether it had jurisdiction to determine the applicability of the automatic stay and determined that it had, citing for support a number of cases from the Second, Third, Fifth and Sixth Circuit Courts of Appeals. *Id.* at 387, citing *In re Baldwin-United Corporation Litigation,* 765 F.2d 343 (2d Cir.1985); *NLRB v. Edward Cooper Painting, Inc.,* 804 F.2d 934 (6th Cir.1986); *Hunt v. Bankers Trust Co.,* 799 F.2d 1060 (5th Cir.1986); *EEOC v. Hall's Motor Transport Co.,* 789 F.2d 1011 (3d Cir.1986).

While these cases all involve other *federal* courts, the same conclusion can be applied to cases pending in state courts. As the Third Circuit stated in Morysville, "The court in which the litigation claimed to be stayed is pending thus 'has jurisdiction to determine not only its own jurisdiction but also the more precise question of whether the proceeding pending before it is subject to the automatic stay.' " *Id.* at 387 (quoting *Baldwin-United,* 765 F.2d at 347). One bankruptcy court has specifically recognized that a state court has at least concurrent jurisdiction with the bankruptcy court to consider the applicability of the automatic stay. *In re Mann,* 88 BR 427 (Bankr.S.D.Fla.1988). In *Mann,* an individual who had filed for Chapter 11 bankruptcy protection requested the bankruptcy court to

> Enter an order enforcing automatic stay specifically with regard to contempt proceedings against the Petitioner case No. 85-13816(21) of the Family Division of the 11th Judicial Circuit in and for Dade County, Florida....

In re Mann at 429.

Chief Judge Thomas Britton noted that the circumstances of the case involved a state court order to pay $1,500 of delinquent alimony or child support or go to jail. *Id.* In ***438** discussing jurisdiction to determine the applicability of the automatic stay, Judge Britton stated that "[m]ovant has already placed that issue before [the state trial court judge], *who has at least concurrent jurisdiction with this court to consider the applicability of the stay.* " *Id.* at 430.

[1] Accordingly, we conclude that this court has concurrent jurisdiction with the bankruptcy court to consider the applicability of the § 362 automatic stay.

APPLICABILITY OF THE AUTOMATIC STAY

[2] Having determined that this Court has jurisdiction to consider the applicability of the automatic stay, We must now decide whether the stay applies to the instant proceedings. § 362(a)(1-8) of the Bankruptcy Code, 11 U.S.C. § 362(a)(1-8), provides for an automatic stay of eight enumerated types of actions against a debtor. These enumerated types of actions include the commencement or continuation of a judicial, administrative or other action or proceeding against the debtor to recover a claim against the debtor that arose before the commencement of the bankruptcy, § 362(a)(1) and the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under the Bankruptcy Code, § 362(a)(2).

Section 362(b), however, sets forth specific ex-

ceptions to the automatic stay. As to actions stayed under § 362(a)(1), § 362(b)(4) provides that the filing of a petition in bankruptcy does not operate as a stay as to the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. As to actions stayed under § 362(a)(2), § 362(b)(5) provides that the filing does not operate to stay the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such government unit's police or regulatory powers.

The Ingrams rely heavily on *Ohio v. Kovacs,* 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985) for the proposition that what DER seeks in this case is essentially a money judgment against them, and is therefore not exempted from the automatic stay under the above-cited provisions. In *Kovacs,* the bankrupt was subject to an order by the State of Ohio to clean up a hazardous waste disposal site. The Supreme Court concluded that such an order was a "claim" against the bankrupt and therefore dischargeable in bankruptcy. A close reading of *Kovacs,* however, reveals that the case is factually distinguishable from the matter now before this Court.

Key to an understanding of *Kovacs* is the fact that the state had utilized its authority to place the property into receivership prior to the institution of the bankruptcy proceedings. Because the property was no longer in the possession of the bankrupt, Justice White noted that "there is no suggestion by [Ohio] that defendant can render performance under the affirmative obligation other than by payment of money." *Id.* at 708, 105 S.Ct. at 708-09 (quoting *In re Kovacs,* 29 B.R. 816, 818 (Bankr.S.D.Ohio 1982)). The Supreme Court opinion further highlights this aspect of the case by stating that

> Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused.... In reality, the only type performance in which Ohio is now interested is a money payment to effectuate the ... cleanup.... Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations imposed upon him by the State court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance.
>
> *Id.* (quoting *In re Kovacs,* 717 F.2d 984 (6th Cir.1983)).

The Supreme Court found that, in the circumstances of the case before it, the cleanup duty had been reduced to a monetary obligation, and therefore not included under the § 362(b) exceptions to the automatic stay. According to Justice White,

> ***439** We do not disturb this judgment. The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property. Furthermore, when the bankruptcy trustee sought to recover Kovacs' assets from the receiver, the latter sought an injunction against such action.
>
> *Id.* at 283, 105 S.Ct. at 709, 710.

In concluding that the cleanup order in *Kovacs* had been converted into an obligation to pay money, and hence dischargeable in bankruptcy, the Supreme Court discussed *Penn Terra, Ltd. v. Department of Environmental Resources,* 733 F.2d 267 (3d Cir.1984), a case on which DER now relies. In distinguishing the two cases, Justice White noted that in *Penn Terra,* "there had been no ap-

pointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt." *Id.* at 283, n. 11, 105 S.Ct. at 710, n. 11. Finally, Justice White emphasized what was *not* being decided in *Kovacs*, stating that

> [W]e do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or from criminal prosecution for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligations would be discharged in bankruptcy. *Third, we do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee....*

Id. at 284, 105 S.Ct. at 710 (emphasis added).

It is Justice White's third point which is before this Court in the present case. The order which DER seeks to enforce is a cleanup order that does not seek money damages. Rather, it seeks to have the Ingrams perform their lawful duty in treating mine waste discharges into the waters of the Commonwealth. Unlike *Kovacs*, the Ingrams have *not* been dispossessed of their property by a receiver, the cleanup order has *not* been reduced to a money judgment, and the Ingrams, or the trustee in bankruptcy *are* capable of taking actions to comply with the DER order. Justice White, in fact, appears to anticipate such a situation in a case such as this where a trustee in bankruptcy has been appointed.

> Had no receiver been appointed prior to Kovacs' bankruptcy, the trustee would have been charged with the duty of collecting Kovacs' nonexempt property and administering it. If the site at issue were Kovacs' property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would then have to comply with the state environmental law to the extent of his ability.

Id. at 284, n. 12, 105 S.Ct. at 710-11, n. 12.

In sum, what is sought by DER in the present matter is compliance, not the payment of monetary damages, thus distinguishing this case from *Kovacs*. That distinction, we believe, is persuasively set forth by the Third Circuit in *Re: Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental Protection*, 8 F.3d 146 (3d Cir.1993), which held that "the state can exercise its regulatory powers and force compliance with its law, even if the debtor must expend money to comply. Under *Kovacs*, ***440** what the state cannot do is force the debtor to pay money to the state; at that point, it is acting as a creditor." *Id.* at 150.

Because DER does not seek payment of money to the state in this case, we conclude that § 362(b)(4) and (5) of the Bankruptcy Code apply here and that the automatic stay is inapplicable to this case.

ORDER

AND NOW, this 2nd day of March, 1995, Respondents' Suggestion of Bankruptcy in the nature of a Motion for Stay is hereby DENIED.

Pa.Cmwlth.,1995.
Com., Dept. of Environmental Resources v. Ingram
658 A.2d 435

END OF DOCUMENT