IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

IN RE:	**)**	**CHAPTER 11**
	)	
BARBER & ROSS COMPANY,	**)**	**Case No. 07-50546**
	)	
Debtor.	**)**	

MEMORANDUM DECISION

Before the Court is the Debtor's Motion to Enforce Automatic Stay Pursuant to 11 U.S.C. § 362 (the "Motion") against JPMorgan Chase Bank, N.A. ("Chase"), in which Debtor seeks to compel Chase to return funds transferred to it by its borrowing customer, SCP Building Products, LLC ("SCP"). The latter had acquired those funds post-petition from an escrow account in connection with a pre-petition indemnification claim which SCP had against the Debtor. Prior to the filing of the Motion this Court had held that SCP violated the automatic stay by obtaining and retaining such funds after the stay came into effect. For the reasons which follow, the Court will deny Debtor's Motion.

FINDINGS OF FACT

The present dispute has its origins in the sale of the assets and business of one of Debtor's subsidiaries, Barber & Ross Company of Indiana, Inc., to SCP in 2006. As part of that transaction, the parties agreed to place a percentage of the sales price in escrow to assure SCP that certain post-closing indemnification obligations would be paid by Debtor. The arrangement was governed by a detailed Escrow Agreement entered into by Debtor and SCP.

On July 10, 2007, SCP sent a letter to the escrow agent making a claim against

the funds remaining in escrow.[1] However, the letter appears to have failed to comply with the requirements under the Escrow Agreement for a valid demand on the funds. Under the Escrow Agreement, Debtor had thirty days to file a response if it objected to a demand and, if it failed to do so, the escrow agent was authorized to disburse the funds. The Debtor did not respond to the letter, and the escrow agent transferred the $422,717.18 remaining in the escrow account to the deposit account SCP maintained with Chase on August 13, 2007. The next day, SCP paid precisely the same amount to Chase for credit upon a revolving line of credit it maintained with that bank.

On August 10, 2007, three days before the transfer of the funds to SCP's account, an involuntary petition was filed against the Debtor. On October 2, 2007, Debtor filed a motion seeking to convert the case to chapter 11, which was granted by the Order entered October 24, 2007. Debtor filed a complaint initiating an adversary proceeding against SCP, Strength Capital Partners, LLC, and Strength Capital Partners II, L.P., on August 9, 2009, in which it sought to recover the funds formerly in escrow pursuant to 11 U.S.C. §§ 549 and 550. All defendants except SCP were later dismissed from the case. SCP and Debtor filed cross-motions for summary judgment. This Court denied both motions in *Barber & Ross Co. v. SCP Building Products, LLC (In re Barber & Ross Co.)*, Ch. 11 Case No. 07-50546, Adv. No. 09-05081 (Bankr. W.D. Va. June 24, 2010). In so ruling, the Court held that, while the escrow account and the funds in it were not property of the estate, Debtor's contingent interest in the account was

[1] This demand was made within days of the complete shutdown of the Debtor's operations as a result of actions taken by its principal bank. Whether that timing was simply coincidental or represented an effort on SCP's part to take advantage of that development is not evident, but in any case it is not a factor affecting the ruling upon the Motion.

property of the estate, SCP's claim against the escrow fund was in reality a claim against the Debtor for indemnity, and SCP's receipt of the escrow funds was an act to collect on a pre-petition claim against the Debtor in violation of the automatic stay and therefore void. *Barber & Ross Co.*, slip op. at 8–10.

After the decision was handed down, counsel of record for SCP in the adversary proceeding filed their Motion to Withdraw as Counsel for Defendant on July 19, 2010, which was granted by an order entered by this Court on July 21, 2010. Under the terms of that order, SCP was required to retain new counsel within twenty-one days. However, SCP failed to do so and has not appeared at subsequent pre-trial conferences conducted telephonically.

Debtor filed the instant Motion to Enforce Automatic Stay Pursuant to § 362 against Chase on October 12, 2010. After Chase filed its Objection, the Court heard oral arguments on November 22, 2010. Counsel for Chase requested at that hearing leave to file a supplemental brief, which the Court granted with an opportunity provided to Debtor's counsel to reply. The briefs so authorized were filed with the Court on December 3rd and 10th, respectively. Accordingly, the matter in dispute is now ready for decision.

CONTENTIONS OF THE PARTIES

Debtor contends that, because SCP's acceptance of the transfer of the escrow funds was a violation of the stay and was void, its subsequent transfer of the funds to Chase was also void. It further contends that, by accepting the transfer, Chase has obtained possession of property of the estate in violation of the automatic stay.

Chase, on the other hand, argues that it has taken no action that would violate the automatic stay and that the only relief potentially available to Debtor in these circumstances is

through an action to avoid a post-petition transfer pursuant to 11 U.S.C. § 549. However, because the Court has held that the funds in escrow are not property of the estate, it argues that § 549, which only applies to transfers of estate property, is also of no help to Debtor. Even if it did apply, Chase argues, defenses applicable to actions under that section, namely the two-year statute of limitations found in § 549(d) and the good-faith transferee defense found in § 550(b), would preclude its liability. It further argues that, since the transfer is not avoidable under § 549, § 362(b)(24) makes it impossible for its action in accepting the transfer to violate the automatic stay. Next, Chase argues that Fed. R. Bankr. P. 7001(1) requires an action to recover property, such as this one, to be filed as an adversary proceeding. Finally, Chase argues that Debtor should not be able to "enforce" the automatic stay any longer because it expired on the effective date of Debtor's Plan of Liquidation, which was more than a year and a half ago.

In response, Debtor argues that Chase did violate the automatic stay by taking possession of property of the estate. Specifically, Debtor argues that, while the funds themselves are not property of the estate, the Court has expressly held that Debtor's interest in the escrow account is property of the estate. Because Chase took possession of property in which Debtor has an interest, it violated the automatic stay. Debtor also argues that § 549 is not applicable to this action because that section only applies to transfers initiated by the debtor. It further argues that § 362(b)(24) does not except Chase's actions from coverage under the automatic stay because it only applies to transfers to which § 549 is applicable. Because § 549 does not apply to this transfer, Debtor argues, neither does § 362(b)(24). In addition, Debtor argues that, because the action is not one to recover property but instead to enforce the stay, it may, consistent with the Bankruptcy Rules, be brought by motion. Finally, it argues that its Motion is

proper despite the expiration of the stay because the stay was in effect at the time the challenged transfer occurred.

CONCLUSIONS OF LAW

This Court has jurisdiction over this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. The Court concludes that a motion demanding turnover of money claimed to be property of the estate is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(E) and (O).

Upon the commencement of a bankruptcy case, whether it be a voluntary or involuntary case, a bankruptcy estate is created, 11 U.S.C. § 541(a), and an automatic stay takes effect, 11 U.S.C. § 362(a). The automatic stay prohibits, among other things not relevant here, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" and "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(3), (6).

Examining Chase's actions, it becomes clear that it has not done anything to violate the stay. First, Chase never had a claim against the Debtor, so obviously none of its acts were designed to collect or recover on such a claim in violation of § 362(a)(6). Furthermore, it never obtained property of the estate or attempted to do so. As this Court recognized in its previous decision in the related adversary proceeding, when a debtor transfers funds into an escrow account to serve as an assurance of performance or a guarantee fund pre-petition, the funds are not property of the debtor's bankruptcy estate once the petition is filed. *Barber & Ross*

Co., slip. op. at 8 (quoting *Holmes Envtl., Inc. v. Suntrust Banks, Inc. (In re Holmes Envtl., Inc.)*, 287 B.R. 363, 376 (Bankr. E.D. Va. 2002)). In the instant case, while Debtor's rights under the escrow agreement are property of the estate, the actual money that was in the escrow account is not. *Id.* Therefore, Chase's receipt of those funds was not an "act to obtain possession of property of the estate" and did not violate § 362(a)(3).

Nevertheless, Debtor argues that, because SCP's exercise of dominion over the funds received from the escrow agent violated the stay and was void, the subsequent transfer to Chase was also void, and Chase obtained possession and exercised control over property of the Debtor's estate in violation of § 362(a)(3) in accepting the transfer. In support of its contention that when the initial transfer violates the stay and is void, all subsequent transfers also violate the stay, Debtor cites *Jubber v. Search Market Direct, Inc. (In re Paige),* 413 B.R. 882 (Bankr. D. Utah 2009). In *Paige*, the court examined the proper interplay between § 362 and § 549 with regard to post-petition transfers. It held that § 362 applies to the activities of creditors and third parties, whereas § 549 applies to transfers in which the debtor willingly participates. 413 B.R. at 914 (quoting *Garcia v. Phoenix Bond & Indem. Co. (In re Garcia)*, 109 B.R. 335, 339 (D. Ill. 1989)). The court then determined that § 362 would apply to the transfers it was considering because the debtor had not participated in the transactions. *Id.* at 915. Having determined the property transferred was property of the estate, the court found that the initial transfer and all subsequent transfers were acts to obtain possession of property of the estate in violation of § 362(a)(3) and declared them void. *Id.*

Even if the line of demarcation drawn between § 362 and § 549 by the *Paige*

court is correct,[2] the case does not support the proposition that all subsequent transfers of property obtained in violation of the automatic stay are void. As noted above, the court in *Paige* found that the property transferred was estate property and that the first transfer and all subsequent transfers were acts to obtain possession of estate property in violation of § 362(a)(3). 413 B.R. at 915. Here, by contrast, the initial violation of the automatic stay is based not on SCP's obtaining possession of estate property, as the funds it received were not property of the estate, but instead on the conclusion that its receipt and retention of the funds which had been in the escrow account constituted an act to collect or recover post-petition on a pre-petition claim against the Debtor without obtaining a modification or an annulment of the automatic stay. The fact that SCP subsequently transferred the funds to a third party did not transform them into property of the estate, which is the basic contention made by Debtor's counsel to provide a legal foundation for the Motion.[3] Accordingly, Chase, which is guilty only of accepting the transfer of the funds rather than taking some action against the Debtor or property of the estate, has not violated the stay, and the Debtor's attempt to recover the funds from the bank pursuant to § 362 is inappropriate.

Finally, in support of its contention that it can proceed by motion rather than by adversary proceeding, Debtor cites a number of cases that it asserts support its argument. *See*

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[2] *Compare In re Striblin*, 349 B.R. 301, 303 (Bankr. M.D. Fla. 2006) ("Section 549 applies only to debtor initiated transfers."), *with Morton v. Kievit (In re Vallecito Gas, LLC)*, Ch. 11 Case No. 07-35674, Adv. No. 10-3039, 2010 Bankr. LEXIS 4063, at *66–67 (Bankr. N.D. Tex. Nov. 17, 2010) ("[T]here is nothing in the text of § 549 that limits its application to transfers by the debtor, or to voluntary transfers."). Under this Court's view of the matter, it need neither adopt nor reject the holding in *Paige* in order to determine the issue in dispute here.

[3] The Court recognizes the inescapable fact that even though the transfer of funds by the escrow agent into SCP's account is deemed to be void and of no legal effect, that does not change the reality that the funds were transferred and placed under SCP's dominion and control.

Amedisys, Inc. v. Nat'l Century Fin. Enters., Inc. (In re Nat'l Century Fin. Enters., Inc.), 423 F.3d 567, 579 (6th Cir. 2005) (holding that a debtor is not required to initiate an adversary proceeding in order to enforce the automatic stay); *Williams v. Levi (In re Williams),* 323 B.R. 691, 702 (B.A.P. 9th Cir. 2005); *Fortune & Faal v. Zumbrun (In re Zumbrun),* 88 B.R. 250, 252–53 (B.A.P. 9th Cir. 1988); *In re Hildreth,* 362 B.R. 523, 526 (Bankr. M.D. Ala. 2007); *In re LTV Steel Co.*, 264 B.R. 455, 463 (Bankr. N.D. Ohio 2001); *In re Dunning,* 269 B.R. 357, 367 (Bankr. N.D. Ohio 2001)*; In re Timbs,* 178 B.R. 989, 994 (Bankr. E.D. Tenn. 1994); *In re Phar-Mor, Inc.*, 152 B.R. 924, 926 (Bankr. N.D. Ohio 1993); *In re Hooker Invs., Inc.*, 116 B.R. 375, 378 (Bankr. S.D.N.Y. 1990); *In re Forty-Five Fifty-Five, Inc.*, 111 B.R. 920, 923 (Bankr. D. Mont. 1990); *see also Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 291, 293 (4th Cir. 1986) (affirming the imposition of fines for violation of the automatic stay in an action brought by motion, although the propriety of proceeding by motion was not an issue in the case); *Phillips v. Lehman Bros. Holdings, Inc. (In re Fas Mart Convenience Stores, Inc.),* 318 B.R. 370, 374 (Bankr. E.D. Va. 2004) (noting that a claim for damages under § 362(h) is not listed in Rule 7001 as requiring an adversary proceeding but requiring the motion to be re-filed as a complaint in an adversary proceeding as a precaution). However, in all of these cases, the relief sought was enforcement of the stay to stop certain actions or the recovery of damages for stay violations. None of the cited cases authorized the use of § 362 to recover property obtained in violation of the stay from subsequent transferees, such as Chase here, who had done nothing to violate the stay. Accordingly, while this Court accepts the general proposition that a motion pursuant to § 362 is an appropriate remedy to address a violation of the automatic stay by some creditor or other party determined to have committed such an act, it is not persuaded that such a motion is

authorized to address a subsequent transfer by the offending party to some independent third party, which is the situation presented here.

Because the Court concludes that Chase has not violated the automatic stay and that use of § 362, which concerns violations of the automatic stay, against an entity which has not violated such stay[4] is neither authorized by the words of the statute nor implied by its provisions or its evident purposes, it will deny the Debtor's Motion. An order dismissing the Motion will be entered contemporaneously herewith.

This 22nd day of December, 2010.

William F. Stone, Jr.
UNITED STATES BANKRUPTCY JUDGE

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[4] The Court notes that the Debtor has not contended that Chase had notice, much less actual knowledge, that the funds which were transferred to it and then used to pay down the line of credit it provided to SCP were so applied by the latter in violation of the automatic stay in this bankruptcy case.