

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
BUILDING MATERIALS HOLDING)	Case No. 09-12074 (KJC)
CORPORATION, <i>et al.</i>)	
)	
Reorganized Debtors.)	Hearing Date: March 24, 2010 at 10:00 a.m.
)	Obj. Deadline: March 17, 2010 at 4:00 p.m.

**MOTION OF ANTHONY E. SCURRIA
FOR RELIEF FROM THE PLAN INJUNCTION**

Anthony E. Scurria, by and through the undersigned counsel, respectfully submits the following Motion For Relief from the Plan Injunction (hereinafter "Motion"), seeking an order from the Court modifying the plan injunction to allow Mr. Scurria to prosecute a personal injury action in the Superior Court of the State of Washington in and for Pierce County, against BMC West Corporation a/k/a Building Materials Holding Corporation, the above-captioned Debtor, John Doe 1 and Jane Doe 1. In support of the Motion, Mr. Scurria respectfully states as follows:

Jurisdiction

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

2. On June 16, 2009 (the "Petition Date"), the above-captioned debtors (collectively as the "Debtors") filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware.

3. On or about July 10, 2007, Mr. Scurria was working on a job site known as the Rosemont Place Project located at 8624 19th Street, University Place, Pierce County, Washington,

working on interior walls of a home in said project. On that same date, John Doe 1 was operating a boom truck owned by debtor BMC West Corporation a/k/a Building Materials Holding Corporation, to situate trusses at the Rosemont Place Project. While operating said boom truck, and in the scope of his employment for debtor BMC West Corporation a/k/a Building Materials Holding Corporation, Mr. Scurria alleges that John Doe 1 negligently swung and hit Mr. Scurria with the trusses.

4. As a result of the alleged negligence of John Doe 1, Mr. Scurria states he sustained bodily injury, pain and suffering, both mental and physical, and loss of enjoyment of life. Certain injuries suffered by Mr. Scurria are permanent. He will continue to experience pain, suffering, and mental anguish, will continue to incur medical expenses, and has been and will continue to be affected in his ability to work and enjoy life.

5. On July 23, 2009, Mr. Scurria filed a lawsuit (the "State Court Action") in the Superior Court of the State of Washington in and for Pierce County, against BMC West Corporation a/k/a Building Materials Holding Corporation, John Doe 1 and Jane Doe 1, seeking general damages, special damages, and costs and disbursements, relating to the injuries Mr. Scurria sustained in the above-described incident.

6. A copy of the complaint filed in the State Court Action is attached hereto as Exhibit A. The complaint was served on BMC West Corporation a/k/a Building Materials Holding Corporation on or about July 23, 2009. Upon information and belief, to date, no attorney has entered an appearance on behalf of BMC West Corporation a/k/a Building Materials Holding Corporation. Subsequently, Mr. Scurria learned that BMC West Corporation a/k/a Building Materials Holding Corporation had filed for bankruptcy in this Court. Since learning of the Debtors bankruptcy filing, Mr. Scurria has taken no further action in the State Court Action. Mr.

Scurria seeks a jury trial to assess the liability of and damages against BMC West Corporation a/k/a Building Materials Holding Corporation, its insurance carriers, John Doe 1 and Jane Doe 1.

7. No discovery has yet been conducted in the State Court Action. At the time that the State Court Action was stayed, jury trial had not yet been scheduled.

Relief Requested

8. Mr. Scurria respectfully requests that this Court enter an Order lifting/modifying the plan injunction(s), to the extent necessary, set forth in Article IX of the Plan and Paragraph 19 of the Order Confirming Joint Plan of Reorganization for the Debtors under Chapter 11 of the Bankruptcy Code (“Confirmation Order”) to allow Mr. Scurria to liquidate his claim in the pending Action (or in any such other forum as is proper and to proceed to final judgment, including any alternative dispute resolution) and to collect any proceeds from and against the Debtors’ insurance carrier(s).

9. The same principles in determining “cause” that apply in determining a request for relief from the automatic stay, apply to a request for modification of the plan injunction. See In re Worldcom, Inc., 2007 WL 841948, at *5 (Bankr. S.D.N.Y. March 12, 2007). Accordingly, section 362(d) analysis applies to the present case.

10. Section 362(d) of the Bankruptcy Code provides that:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as be terminating, annulling, modifying, or conditioning such stay- -

(1) For cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

11. “Cause” is not defined in the Bankruptcy Code, it must be determined on a case-by-case basis. Int’l Bus. Machines v. Fernstrom Storage and Van Co., 938 F.2d 731, 735 (7th Cir. 1991). Such cause has been found to exist to permit litigation in another forum to liquidate a personal injury claim. See, In re Rexene Products Co., 141 B.R. 574, 576 (Bankr. D. Del. 1992) (noting that the legislative history of § 362(d) indicates that cause may be established by a single factor such as “a desire to permit an action to proceed ... in another tribunal.”); In re Drexel Burnham Lambert Group, Inc., 113 B.R. 830, 838 n.8 (Bankr. S.D.N.Y. 1990) (citing liquidation of a personal injury claim as “cause” for relief); In re Holtkamp, 669 F.2d 505 (7th Cir. 1982) (affirming lift of stay by Bankruptcy Court to allow personal injury suit against debtor to proceed to judgment).

12. Most courts employ an equitable balancing test to determine cause. In re Rexene Products, Co. 141 B.R. at 576. In In re Rexene Products Co., the balancing test formula is as follows: Whether

- a. any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit,
- b. the hardship to the movant by maintenance of the stay considerably outweighs the hardship to the debtor, and
- c. the movant has a probability of prevailing on the merits. Id. at 576.

13. In the cases where a movant seeks to liquidate the claim, courts have used a two-prong balancing test. See, In re Peterson, 116 B.R. 247, 249 (D. Colo. 1990).¹ Employing a two-

¹ In In re Peterson, 116 B.R. 247, 249 (D.Colo. 1990), the Court refused to consider the probability of success on the merits of the underlying claim. Id. The Peterson Court reasoned that

pronged balancing test, relief from the plan injunction(s) is warranted here. The Debtors will not be prejudiced by the prosecution of Mr. Scurria's claims, claims which the BMC West Corporation a/k/a Building Materials Holding Corporation must defend, and which must be liquidated in a court other than the Bankruptcy Court. See 28 U.S.C. § 157(b)(2)(B). Bankruptcy Courts have consistently found that litigation expenses do not constitute prejudice to justify a continuation of the stay. See In re Peterson, *supra*, 116 B.R. at 250; In re Nkongho, 59 B.R. 85, 86 (Bankr.D.N.J. 1986) (rejecting debtor's claim that litigation expenses precluded modification of stay); In re Nicholas, Inc., 55 B.R. 212, 217-18 (Bankr.D.N.J. 1985) (same).

14. Mr. Scurria seeks relief from the plan injunction so that he can proceed with the Action and liquidate his claim against the Debtors' applicable insurance policies. Further, because the Debtor has insurance coverage for Mr. Scurria's claims, any burden for defending this suit may be borne by the Debtors' insurance carrier².

15. Mr. Scurria is entitled to a jury trial for his injuries and damages which is not available in this Court. A jury trial in the Superior Court for the State of Washington in and for Pierce County is best suited to try all issues raised by the incident, John Doe 1's negligence, and Mr. Scurria's injuries and damages.

16. Mr. Scurria stipulates and agrees that he is not seeking, and will not seek immediate

a merits analysis was more appropriate in a case seeking some extraordinary relief, but not in a claims liquidation case, where the question is simply the forum in which the action should be brought against the debtor. Id. at 250. Should the Court conclude that the three-prong test applies here, however, all that is required is a vague initial showing that a *prima facie* case can be established. See In re Reice, 88 B.R. 676, 681 (Bankr.E.D.Pa 1988); In re Morysville Body Works, 86 B.R. 51, 55 (Bankr.E.D.Pa 1988).

² See First Fidelity Bank v. McAteer, 985 F.2d 114 (3d Cir. 1993) (discharge in bankruptcy does not alter the right of a creditor to collect from third parties; Courts have allowed claimants to proceed with tort claims against the debtor for the purpose of collecting from the debtor's liability insurer); Houston v. Edgeworth, M.D. (In re Edgeworth, M.D.), 993 F.2d 51 (5th Cir. 1993) (Section 524(e) specifies that the debt still exists and can be collected from any other entity that might be liable).

recovery against the Debtor or the Debtor's estate for any amount owing Mr. Scurria over and above its primary, excess or umbrella insurance as a result of any settlement or judgment of the personal injury claim in the Superior Court of the State of Washington in and for Pierce County, so relief would permit the enforcement of any judgment against the Debtor's applicable insurance.

17. If this Motion is not granted, Mr. Scurria would be prejudiced and harmed by a delay in liquidating his claim against the BMC West Corporation a/k/a Building Materials Holding Corporation, as he has unpaid bills and expenses as a result of the negligence of John Doe 1, an employee of BMC West Corporation a/k/a Building Materials Holding Corporation, which continue to accrue. The State Court Action, before a jury of his peers, is the best forum to assess both special and general damages incurred by Mr. Scurria, as well as future medical care, future lost wages, future pain and suffering, and future loss of physical capacity sought by Mr. Scurria in the State Court Action.

18. The hardship to Mr. Scurria if the relief sought is not granted considerably outweighs any possible harm the Debtors might suffer as a result of the modification of the Plan. Mr. Scurria seeks to liquidate his claims against the Debtors. If Mr. Scurria were forced to litigate his unliquidated claims in Delaware, he would incur significant financial burden. Mr. Scurria's attorney, the witnesses, and the relevant evidence, including any documentation that would support his claims are all located in Washington; none are located in Delaware. Moreover, Mr. Scurria will be prejudiced by the continued delay resulting from the Plan Injunction(s) due to witnesses who may pass away, the memory of events becoming less clear, and witnesses moving to unknown locations. Accordingly, as the court in Rexene suggests, "[i]t will be often be more appropriate to permit proceedings to continue in their place of origin" In re Rexene, 141 B.R. at 576.

19. Mr. Scurria's injuries are real, and he has a substantial likelihood of success on the merits. Mr. Scurria was injured when he was hit with trusses being moved by a boom truck that was operated by an employee of BMC West Corporation a/k/a Building Materials Holding Corporation. Mr. Scurria sustained serious physical injuries. He has incurred real and substantial medical bills and missed significant time at work. Mr. Scurria believes he will prevail in his claims against BMC West Corporation, a/k/a Building Materials Holding Corporation, John Doe 1 and Jane Doe 1. Further, this Court has held that the required showing of the creditor's likelihood of prevailing need only be "very slight." In re Rexene, 141 B.R. at 578.

20. Importantly, as set forth above, this Court lacks jurisdiction to liquidate Mr. Scurria's claims. See 28 U.S.C. § 157(b)(2)(B); In re Drexel Burnham Lambert Group, supra, 113 B.R. at 838 n.8.

21. For the above stated reasons, Mr. Scurria asserts that cause exists to lift or modify the plan injunction.

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WHEREFORE, Anthony E. Scurria respectfully requests that this Court enter an Order modifying the plan injunction to allow him to proceed with the State Court Action to judgment, and to enforce any judgment against the Debtors' applicable insurance carriers.

Dated: February 25, 2010
Wilmington, Delaware

CROSS & SIMON, LLC

By: 

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Attorneys for Anthony E. Scurria

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In re:)	Chapter 11
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Debtors.)	Hearing Date: March 24, 2010 at 10:00 a.m.
_____)	Obj. Deadline: March 17, 2010 at 4:00 p.m.

NOTICE OF MOTION

PLEASE TAKE NOTICE that Anthony E. Scurria ("Movant") has filed his Motion for Relief from the Plan Injunction (the "Motion").

A HEARING ON THE MOTION WILL BE HELD ON MARCH 24, 2010 AT 10:00 A.M. AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 5TH FLOOR, COURTROOM 5 BEFORE THE HONORABLE KEVIN J. CAREY.

ANY RESPONSE MUST BE FILED AND SERVED TOGETHER WITH A CERTIFICATE OF SERVICE ON OR BEFORE MARCH 17, 2010 AT 4.00 P.M. FAILURE TO TIMELY FILE AND SERVE A RESPONSE WILL RESULT IN AN ORDER GRANTING THE RELIEF REQUESTED IN THE MOTION.

At the same time you must also serve a copy of the response upon Movant's attorneys:

Christopher P. Simon, Esq.
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The hearing date specified above may be a preliminary hearing or may be consolidated with the final hearing, as determined by the Court.

The attorneys for the parties shall confer with respect to the issues raised by the Motion in advance for the purpose of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts such as value of the property, and the extent and validity of any security instrument.

Dated: February 25, 2010
Wilmington, Delaware

CROSS & SIMON, LLC

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)	
Debtors.)	
_____)	Re: D.I. No. _____

**ORDER GRANTING MOTION OF ANTHONY E. SCURRIA
FOR RELIEF FROM THE PLAN INJUNCTION**

Upon consideration of the Motion of Anthony E. Scurria ("Movant") for Relief from the Plan Injunction (the "Motion"), it is hereby ORDERED that:

1. The Motion is Granted.
2. The Movant is granted relief from the plan injunction for cause shown and is permitted to proceed with and prosecute the State Court Action¹ against the Debtors, including any subsequent appeals, and may enforce any judgment obtained in the State Court Action against the Debtors' applicable insurance policies.

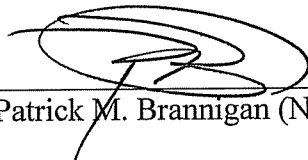
DATED: _____

The Honorable Kevin J. Carey
Chief United States Bankruptcy Court Judge

¹ Capitalized terms herein shall have the meaning ascribed to them in the Motion.

CERTIFICATE OF SERVICE

I, Patrick M. Brannigan, Esquire, hereby certify that on this 25th day of February, 2010, I caused a copy of the foregoing *Motion of Anthony E. Scurria for Relief from the Plan Injunction* to be served on the parties on the attached service list as indicated and electronically via Fed. R. Bankr. P. 2001 and Local Rule 2001 available on ECF/PACER.



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