

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI**

In Re:) Chapter 11
PATRIOT COAL CORPORATION, et al.,) Case No. 12-51502-659
Debtors in Possession) Jointly Administered
) Honorable Kathy Surratt-States
)
) Hearing Date: April 23, 2013
) Hearing Time: 10:00 a.m.

**MOTION FOR RELIEF FROM STAY TO ALLOW
CIVIL LITIGATION TO PROCEED**

Under 11 U.S.C. §362(d) and Local Rule 4001-1, Ernie Burns (“Movant”), by counsel, moves this Court for relief from the automatic stay imposed by §362(d) of the Bankruptcy Code. In support of this motion, the Movant states as follows:

MEMORANDUM IN SUPPORT

1. That the Movant, Ernie Burns, is the Plaintiff in a civil action filed against the Debtor, Patriot Coal Corporation, in a case styled, *Ernie Burns v. Patriot Coal Corporation, Pine Ridge Coal Company, LLC and Mark Neal, Civil Action No. 12-C-197*, which Complaint is currently pending in the Circuit Court of Boone County, West Virginia and is attached hereto as Exhibit #1 and is incorporated herein by reference. Plaintiff alleges in his Complaint that the Defendant/Debtor engaged in workers’ compensation discrimination, age discrimination, disability discrimination and violated the West Virginia Wage Payment and Collection Act;
2. That on or around July 9, 2012, the Debtor Patriot Coal Corporation and each of its affiliated companies (including Pine Ridge Coal Company, LLC) filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code, which case was assigned

Bankruptcy Case No. 12-20434 after it was transferred to this Court from the United States Bankruptcy Court for the Southern District of New York;

3. That upon information and belief, the Debtor has available insurance coverage against liability for the claims in the civil court actions referenced above. The Movant herein seeks to proceed with the civil litigation in Boone County Circuit Court for discovery purposes and/or to recover any insurance coverage;

4. That based on the foregoing, the Movant seeks relief from the automatic stay “for cause” under §362(d)(1) to proceed to recover from Debtor’s insurance coverage;

5. That upon information and belief, there is available insurance coverage by which to cover the claims of the Movant against the Debtor, and allowing the civil action litigation to proceed will cause no harm to the Debtor or the bankruptcy estate;

6. As the legislative history of §362 shows “it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their *chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere.*” In re Lamberjack, 149 B.R. 467, 470 (Bankr. N.D. Ohio 1992) (citing Senate Report No., 989, 95th Cong., 2d Sess., 50)(emphasis added).

7. That determining as to whether “cause” exists, most Courts “balance the hardship to the creditor, if they are not allowed to proceed with their lawsuit, against potential prejudice to the Debtor, Debtor’s estate and other creditors.” In re R. J. Groover Constr., LLC, 411 B.R. 460, 463-64 (Bankr. N.D. Ga. 2008). In carrying out this balancing test, Courts have considered numerous factors, including:

(a) Whether relief would result in partial or complete resolution of the issues;

- (b) The lack of any connection with or interference with the bankruptcy case;
- (c) Whether other proceeding involves the Debtor as a fiduciary;
- (d) Whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (e) Whether the Debtor has applicable insurance coverage and said insurer has assumed full responsibility for defending it;
- (f) Whether the action primarily involves third parties;
- (g) Whether litigation in another forum would prejudice the interests of other creditors;
- (h) Whether the judgment claim arising from the other action is subject to equitable subordination;
- (i) Whether the Movant's success in the other proceeding would result in a judicial lien available by the Debtor;
- (j) The interests of judicial economy and the expeditious and economical resolution of the litigation;
- (k) Whether the parties are ready for trial in the other proceeding;
- (l) The impact of the stay on the parties and the balance of harm.

In re New York Medical Group, P.C., 265 B.R. 408, 413 (Bankr. S.D.N.Y. 2001); *see also* Sonnax Industries, Inc. v. Tri Component Production Corp. (*In re Sonnax Industries, Inc.*), 907 F.2d 1280, 1286 (2d Cir. 1990); Goya Foods, Inc. v. Unanue-Casual, (*In re Unanue-Casal*) 159 B.R. 90, 96 (D.P.R. 1993) *aff'd* 23 F.3d 395 (1st Cir. 1994); In re Busch, 294 B.R. 137, 141 n.4 (10th Cir. B.A.P. 2003); In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984). In weighing these factors, Courts only consider those factors that are relevant to the particular case

at issue and do not assign equal weight to each factor. In re Mezzeo, 167 F.3d 139, 143 (2d Cir. 1999). In this case, several of the factors are relevant and all weigh heavily in favor of lifting the stay so that the Movant can proceed with his employment claims in the Boone County, West Virginia Circuit Court.

8. That determining whether “cause” exists to permit the Movant to proceed with his circuit court litigation is whether “the interests of the estate” are outweighed “by the hardships incurred by the creditor-plaintiff.” In re Indian River, 293 B.R. at 433. Because no harm will befall the Debtor and Movant may effectively be prejudiced by delaying his employment claims, a lifting of the stay is appropriate.

A. LIFTING THE STAY TO ALLOW THE CIRCUIT COURT LITIGATIONS
TO PROCEED WILL COMPLETELY RESOLVE THE ISSUES
BETWEEN THE DEBTOR AND THE MOVANT

This Court can completely resolve the issues between the parties by lifting the automatic stay. The only issue that exists between the Movant and the Debtor is the underlying employment action. If the Court lifts the stay and allows the Movant to proceed and litigate his employment claim to conclusion, the relationship between the Movant and the Debtor will be over.

B. LIFTING THE STAY WILL NOT INTERFERE WITH
THE BANKRUPTCY ESTATE

Whether the circuit court proceedings are connected with or will interfere with the bankruptcy estate also supports lifting the stay. Movant seeks to liquidate his claims in the West Virginia Circuit Court in order to recover under the applicable insurance policies and from other non-debtor sources. “Numerous Courts have permitted the stay to be lifted when the Movant is simply seeking to establish the fact and amount of the Debtor’s liability and, as in these cases the Movant has stipulated that any recovery will be sought from the Debtor’s insurer or a co-

defendant.” In re Peterson, 116 B.R. 247, 250-51 (D. Colo. 1990). In such cases, “there can be no legitimate complaint that the estates will be dissipated by allowing the litigation to move forward.” In re 15375 Memorial Corp., 382 B.R. 652, 689 (Bankr. D. Del. 2008); “Where, as here, the Plaintiffs have agreed that they will not seek any recovery from estate assets, there is no basis for continuing the automatic stay”; In re Grace Indus., Inc., 341 B.R. 399, 405 (Bankr. E.D.N.Y. 2006); also see, In re Todd Shipyards Corp., 92 B.R. 600, (Bankr. D.N.J. 1988) (“Since the Movants only seek to litigate their claims and obtain proceeds through the Debtor’s available insurance coverage and do not seek relief from the stay in order to attach the property of the Debtor, such relief does not interfere with the bankruptcy proceedings.”)

C. THE DEBTOR HAS AVAILABLE INSURANCE COVERAGE
THROUGH ITS INSURANCE CARRIER

The next relevant factor is whether the Debtor has applicable insurance coverage and if an insurance carrier has assumed responsibility for defending the circuit court litigation. If so, then lifting the stay to allow the circuit court litigation to proceed will not prejudice the Debtor.

That upon information and belief, the Debtor has liability insurance coverage for the periods in which the claims filed by Ernie Burns took place.

D. LIFTING THE STAY WILL NOT PREJUDICE
OTHER CREDITORS

Another factor that supports granting the motion to lift the stay is that the West Virginia state court litigation will not prejudice the interests of other creditors. Movant will collect any judgment against the Debtors solely from the applicable insurance proceeds and/or other non-debtor sources. Thus, the other creditors in the bankruptcy will not be harmed by granting the motion because the Movant will not be able to enforce any judgment directly against the Debtor or its estate. See R.J. Groover Construction, 411 B.R. at 465; In re Loudon, 284 B.R. 106, 108

(8th Cir. B.A.P. 2002); In re; G.S. Distribution, Inc., 331 B.R. 552, 567-68 (Bankr. S.D.N.Y. 2005) (finding no prejudice to creditors from lifting the stay because Movant will not be able to enforce judgment without permission of Bankruptcy Court); In re 15375 Memorial Corp., 382 B.R. at 690 (lifting the stay because Movants “recovery against available insurance proceeds will in no way negatively impact the rights of the handful of other creditors in these cases”).

E. CONTINUING THE AUTOMATIC STAY WILL IMPOSE SUBSTANTIAL
HARDSHIPS ON MOVANTS THAT FAR OUTWEIGHT ANY HARDSHIPS
ON THE DEBTORS

Movant may effectively be harmed by delaying the civil court action. The mere existence of a bankruptcy action does not deny the Movant the opportunity to prosecute his case. In re Brock Laundry Machine Co., 37 B.R. 564, 566-67 (Bankr. N.D. Ohio 1984). In fact, courts have found that making a plaintiff wait to prosecute a claim puts them at a considerable disadvantage due to the preservation of evidence and loss of witnesses, as well as the length of time to receive a final award. *Id.* Therefore, courts lift the stay under §362(d) and allow Movant/Plaintiff to recover under any applicable insurance policy coverage. *Id.*

CONCLUSION

“The automatic stay was never intended to preclude a determination of tort liability and the attendant damages. It was merely intended to prevent a prejudicial dissipation of a Debtor’s assets. A lifting of the stay to allow a Plaintiff-Creditor to determine liability will not affect the estate. It will only allow the Movants to establish the amount of (their) claim. . . . In this respect, a relief from the stay will not violate the purpose for which it was imposed.” In re Brock Laundry Machine Co., 37 B.R. at 567. On the other hand, Movant believes the interest of judicial economy will be served by lifting the stay to permit the civil court employment case to continue, and, if successful, proceed against the Debtor’s insurance liability carrier for an award

of damages, if any. For the reasons stated above, the Movant herein requests that this Court grant his Motion.

WHEREFORE, Movant hereby requests that this Court enter an Order granting relief from the automatic stay imposed by 11 U.S.C. §362 and permit the Movant to proceed in the circuit court action and to proceed against any insurance coverage of the Debtors, Patriot Coal Corporation and Pine Ridge Coal Company, LLC.

THE LAW OFFICE OF TRACY A. BROWN, PC.

Date: March 13, 2013

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IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

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ERNIE BURNS,

Plaintiff,

v.

CIVIL ACTION NO.:

12-C-197

PATRIOT COAL CORPORATION,
a Delaware corporation; PINE RIDGE
COAL COMPANY, LLC, a Delaware
corporation; and MARK NEAL, Individually,

Defendants.

COMPLAINT

1. The plaintiff, Ernie Burns, brings this action against the defendants for their discriminatory and/or retaliatory actions against the plaintiff.

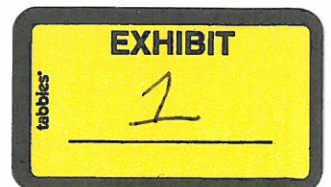
PARTIES

2. The plaintiff, Ernie Burns, was at all times relevant herein, a resident of Boone County, West Virginia.

3. The defendant, Patriot Coal Corporation, is a Delaware corporation and at all times relevant herein was doing business in Boone County, West Virginia.

4. The defendant, Pine Ridge Coal Company, LLC, is a Delaware corporation and at all times relevant herein was doing business in Boone County, West Virginia.

5. The defendant, Mark Neal, is, upon information and belief, a resident of Lincoln County, West Virginia and at all times relevant herein, was a supervisor of the plaintiff.



FACTS

6. The plaintiff, Ernie Burns, was employed by the defendants or their predecessor companies for 36 years.

7. During his employment, Ernie Burns consistently performed his duties in a satisfactory manner and met the reasonable expectations of the defendants.

8. On or about August 15, 2012, the defendants willfully, maliciously and unlawfully terminated the plaintiff's employment.

FIRST CAUSE OF ACTION

9. The defendants' actions constitute an unlawful retaliatory discharge motivated, in whole or in part, by the plaintiff's attempt to receive benefits from the Workers' Compensation Division of the West Virginia Bureau of Employment Programs, in violation of §23-5A-1 of the West Virginia Code, as amended.

10. As a direct and proximate result of the defendants' actions, plaintiff has suffered, and will continue to suffer, lost wages and benefits in an amount to be determined by a jury.

11. As a direct and proximate result of the defendants' actions, plaintiff is entitled to damages for indignity, embarrassment and humiliation in an amount to be determined by a jury.

12. Defendants' actions were willful, wanton and/or undertaken with reckless disregard and/or reckless indifference to the rights of the plaintiff entitling the plaintiff to punitive damages in an amount to be determined by the jury.

13. Defendants' actions were willful and malicious and violated the statutory and common law of West Virginia, entitling the plaintiff to attorney fees and costs.

SECOND CAUSE OF ACTION

14. The defendants refused to reinstate the plaintiff to his employment, as required by West Virginia Code §23-5A-3(b).

15. As a direct and proximate result of the defendants' actions, plaintiff has suffered, and will continue to suffer, lost wages and benefits in an amount to be determined by a jury.

16. As a direct and proximate result of the defendants' actions, plaintiff is entitled to damages for indignity, embarrassment, humiliation and emotional distress in an amount to be determined by a jury.

17. Defendants' actions were willful, wanton and/or undertaken with reckless disregard and/or reckless indifference to the rights of the plaintiff entitling the plaintiff to punitive damages in an amount to be determined by the jury.

18. Defendants' actions were willful and malicious and violated the statutory and common law of West Virginia, entitling the plaintiff to attorney fees and costs.

THIRD CAUSE OF ACTION

19. The defendants terminated the plaintiff's employment in violation of West Virginia Code §23-5A-3(a).

20. As a direct and proximate result of the defendants' actions, plaintiff has suffered, and will continue to suffer, lost wages and benefits in an amount to be determined by a jury.

21. As a direct and proximate result of the defendants' actions, plaintiff is entitled to damages for indignity, embarrassment, humiliation and emotional distress in an amount to be determined by a jury.

22. Defendants' actions were willful, wanton and/or undertaken with reckless disregard and/or reckless indifference to the rights of the plaintiff entitling the plaintiff to punitive damages in an amount to be determined by the jury.

23. Defendants' actions were willful and malicious and violated the statutory and common law of West Virginia, entitling the plaintiff to attorney fees and costs.

FOURTH CAUSE OF ACTION

24. Plaintiff Ernie Burns discharge from his employment was based upon, in whole or in part, plaintiff's age, in violation of the West Virginia Human Rights Act, West Virginia Code §5-11-9(1).

25. As a direct and proximate result of the defendants' actions, plaintiff has suffered and will continue to suffer lost wages and benefits in an amount to be determined by the jury.

26. As a direct and proximate result of the defendants' actions, plaintiff is entitled to damages for indignity, embarrassment and humiliation in an amount to be determined by the jury.

27. Defendants' actions were willful, wanton and/or undertaken with reckless disregard and/or reckless indifference to the rights of the plaintiff entitling the plaintiff to punitive damages in an amount to be determined by the jury.

28. Defendants' actions were willful and malicious and violated the West Virginia Human Rights Act entitling the plaintiff to attorney fees and costs pursuant to West Virginia Code §5-11-13 and/or the decisions of the West Virginia Supreme Court of Appeals.

FIFTH CAUSE OF ACTION

29. Plaintiff Ernie Burns' discharge from his employment was based upon, in whole or in part, plaintiff's disability and/or perceived disability, and/or the defendants' failure to accommodate the plaintiff's disability, in violation of the West Virginia Human Rights Act, West Virginia Code §5-11-9.

30. As a direct and proximate result of the defendants' actions, plaintiff has suffered and will continue to suffer lost wages and benefits in an amount to be determined by the jury.

31. As a direct and proximate result of the defendants' actions, plaintiff is entitled to damages for indignity, embarrassment and humiliation in an amount to be determined by the jury.

32. Defendants' actions were willful, wanton and/or undertaken with reckless disregard and/or reckless indifference to the rights of the plaintiff entitling the plaintiff to punitive damages in an amount to be determined by the jury.

33. Defendants' actions were willful and malicious and violated the West Virginia Human Rights Act entitling the plaintiff to attorney fees and costs pursuant to West Virginia Code §5-11-13 and/or the decisions of the West Virginia Supreme Court of Appeals.

SIXTH CAUSE OF ACTION

34. Defendants failed to pay plaintiff's wages in full within seventy-two hours of the plaintiff's discharge in violation of the West Virginia Wage Payment and Collection Act, W. Va. Code § 21-5-1, et seq.

35. The actions of defendants entitle the plaintiff to liquidated damages, pursuant to W. Va. Code § 21-5-4(e).

36. As a direct and proximate result of the defendants' aforesaid actions, plaintiff is entitled to any and all remaining wages, damages for loss of use of funds, annoyance and inconvenience in an amount to be determined by the jury.

37. The actions of Defendants entitle the Plaintiff to an award of attorney fees and costs, pursuant to W. Va. Code § 21-5-12(b).

WHEREFORE, plaintiff prays for the following relief:

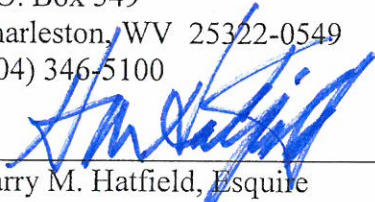
1. Damages set forth in this Complaint, including lost wages and benefits, back pay, front pay, damages for indignity, embarrassment and humiliation, and punitive damages in an amount to be determined by the jury;
2. Prejudgment interest as provided by law;
3. Attorney fees and costs; and
4. Such further relief as this court may deem just and equitable.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES TRIABLE TO A JURY.

ERNIE BURNS
By Counsel



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