

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

In re)	Chapter 11
)	
THE MAJESTIC STAR CASINO, LLC, <i>et al.</i> ,)	Case No. 09-14136(KG)
)	(Jointly Administered)
Debtors.)	
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THE MAJESTIC STAR CASINO, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Adv. No. 10- 50841(KG)
)	
CITY OF GARY, INDIANA,)	
)	
Defendant.)	
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)	Re Dkt. No. 3

MEMORANDUM ORDER

The Debtors are seeking the extension of the automatic stay or, in the alternative, a preliminary injunction against the City of Gary, Indiana (“the City”) pursuant to 11 U.S.C. §§ 362(a)(1) and (3), and 105(a). The City has brought an action in the Lake Circuit Superior Court of Indiana (the “Indiana Court” and the “Action”) against present and former directors, officers and employees of the Debtors and affiliates (the “Defendants”).

The Debtors assert jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. The Court finds that the matters raised are core matters.

The Verified Complaint (“VC” or “the Complaint”) by which Debtors initiated the adversary proceeding alleges the following salient facts:

a. The Debtors are actively preparing and will be negotiating the terms for a plan of reorganization. VC ¶ 15.

b. The dispute arises from a development agreement, dated March 26, 1996 (the “Development Agreement”) between the City and Debtors for the payment of a percentage of gross receipts from Debtors’ operation of riverboat gaming. The parties amended the Development Agreement in 2005 providing for a revised payment arrangement which Debtors claim is contingent upon the City’s performance of required environmental remediation and development of access roads and a freeway interchange. VC ¶¶ 16-19.

c. The Debtors claim the City has breached its performance obligations and Debtors commenced an arbitration proceeding against the City on or about February 11, 2008. VC ¶ 21. The arbitration proceeding remains pending. The Debtors also brought a lawsuit against the City and the Indiana Gaming Commission in Indiana state court relating to the matters raised in the arbitration. VC ¶¶ 21-22. The Debtors stated in their complaint in the lawsuit that they would begin to deposit “into a segregated , interest-bearing account the amounts that would otherwise be paid to the City”. VC ¶ 22. The segregated funds (the “Funds”) are the subject of the Action.

d. The City thereafter filed a lawsuit against Debtors seeking injunctive relief to compel the Debtors to make payments under the Development Agreement, as amended, and to cease paying the money into a segregated account. The trial court and an appellate court in Indiana denied emergency relief to the City.

e. Debtors commenced these bankruptcy proceedings on November 23, 2009. Thereafter, on March 11, 2010, the City filed the Action against the Defendants pursuant to the Indiana Criminal Victims Act, I.C. § 34-24-3-1 *et seq.* (the “Act”), complaining that the Defendants wrongfully converted the Funds, which the City describes as an “escrow account.” The Act provides that a person may recover monetary loss in a civil action resulting from criminal conversion. The City seeks treble damages for the alleged conversion as the Act permits.

f. Debtors seek to extend the automatic stay, 11 U.S.C. 362(a), to stop the Action from proceeding. In the alternative, the Debtors seek injunctive relief. The Debtors assert as grounds for the extension of the automatic stay that:

1. There is an identity of interest between the Debtors and the Defendants such that if the Action proceeds, it will deplete property and interfere with Debtors’ reorganization efforts, particularly because the Debtors have indemnification obligations to the Defendants. VC ¶¶ 38-39.

2. A ruling adverse to the Defendants could result in collateral estoppel or *res judicata* thereby precluding the relief the Debtors seek in the pending arbitration and lawsuit Debtors commenced against the City. VC ¶ 40.

3. The Defendants in the Action include Debtors’ most senior management and the Action would therefore distract them from Debtors’ reorganization efforts at a very critical time in the bankruptcy. VC ¶ 41.

g. The request for injunctive relief states the prerequisites for such relief in the context of foregoing considerations and, as well, alleges that the City will not be harmed by the Court's entry of an injunction, in contrast to the harm to Debtors if the injunction does not issue. VC ¶¶ 44-48.

RULING

1. The automatic stay is a fundamental debtor protection. *Midlantic Nat'l Bank v. New Jersey Dep't of Envl. Prot.*, 474 U.S. 494 (1986). Under appropriate circumstances, such as exist here, the automatic stay may be extended to non-debtors. *In re Continental Airlines*, 177 B.R. 475, 479 (D.Del. 1993). The Court finds that multiple grounds exist to grant the requested relief to Debtors.

2. The Court is satisfied, based on undisputed facts, that permitting the Action to proceed will directly and significantly interfere with the Debtors' reorganization efforts because senior management will have to defend themselves. *In re Johns-Manville Corp.*, 24 B.R. 420, 426 (D.D.N.Y. 1990). In addition, the Debtors will have to advance defense costs thereby, at the very least, temporarily diverting much needed funds – and funds which they do not have to expend absent their lenders' acquiescence. The indemnification demands are grounds for extending the stay. *Continental Airlines*, 177 B.R. at 481. Finally, any findings or adverse rulings in the Action may have a preclusive effect on the Debtors' case against the City. *See In re Johns-Manville Corp.*, 24 B.R. at 429.

3. While the foregoing concerns are each reason enough to extend the automatic stay and thereby stop the Action from proceeding, the Court's decision turns on the indisputable fact that the Funds are property of the estate. The City's claim for conversion is based on its assertion that the Funds are escrow or "constructive" trust funds. Indiana law says otherwise. An "escrow" according to Indiana law is:

A written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promisor or obligor, or his agent, with a stranger, or third party, to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee or obligee.

Yost v. Miller, 129 N.E. 487, 488 (Ind. App. 1921), citing 10 R.C.L. 621. See also, *Snyder v. International Harvester Credit Corp.*, 261 N.E.2d 71, 73 (Ind. App. 1970) ("A valid escrow agreement requires the giving of a deposit to a stranger or third person to be kept by the depository. . ."). The master fact here is that the Debtors remained in possession of the Funds and did not deposit them with a third party. The Funds thus remain property of the Debtor's estate and the City seeks by the Action to recover or restrict the use of the Funds – which may be subject to the lenders' liens. The City's effort to obtain or restrict the use of property of the Debtors' estate is clearly subject to the automatic stay.

4. Similarly, the City's argument that the Funds are held as a constructive trust is a misapprehension of Indiana law. A "constructive trust" is an equitable remedy, not an independent cause of action. *Leever v. Leever*, 919 N.E. 2d 118, 122 (Ind. App. 2009). A constructive trust is imposed upon a res, and is not the res itself. Therefore, the Funds are

not in trust. Defendants, acting on Debtor's behalf, could not convert the Debtors' own funds.

The City argues that the regulatory and police powers exception of Section 362(b)(4) applies. The Court firmly disagrees. There is an objective test for the applicability of the exception. Under the "pecuniary purpose" test, the issue is whether the governmental action or proceeding relates primarily to the protection of the government's pecuniary or financial interest in the debtor's property, as opposed to a matter of public safety or welfare. *See, e.g., Missouri v. U.S. Bankr. Court*, 647 F.2d 768, 776 (8th Cir. 1981) (denying Section 362(b)(4) defense where plaintiff sought to enforce state grain laws that "primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public safety and health"); *In re Fairchild Corp.*, 2009 Bankr. LEXIS 3815, at *15 (Bankr.D.Del. Dec. 1, 2009) (concluding that agency's action sought solely to promote its pecuniary interest in being reimbursed for expenditures, and thus did not qualify as an exercise of police or regulatory power). An action whose primary purpose is a pecuniary one is not an exception under Section 362(b)(4).

The history and depth of the dispute between Debtors and the City over money at issue provide ample evidence that the City is pursuing a pecuniary interest. This is a case of principal, not principle. The regulatory and police power exception is thus inapplicable.

Accordingly, it is HEREBY ORDERED THAT:

1. The Motion is GRANTED under Section 362(a). The Court is therefore not deciding the request for injunctive relief.
2. The automatic stay extends to the Defendants in the Action and the Action is thus stayed pending a further order of this Court.
3. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.
4. The Debtors are authorized to take all actions necessary or appropriate to effectuate the relief granted pursuant to this order.
5. Notwithstanding the possible applicability of Rules 6004(h), 7062, and 9014 of the Federal Rules of Bankruptcy Procedure or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

Dated: April 28, 2010



KEVIN GROSS, U.S.B.J.