UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HI-LITE STRIPING CO., INC. CASE NO. 93-60014

Debtor Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This contested matter came before the Court by virtue of an Order to Show Cause dated August 23, 1993 obtained by Hi-Lite Striping Co., Inc. ("Debtor") seeking to hold Pavemark Corporation ("Pavemark") and Walter Finley ("Finley") in contempt of court for violating §362(a) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code").

After hearing oral argument, the Court scheduled the matter for an evidentiary hearing, initially on November 17, 1993. The hearing was thereafter adjourned, at the request of the parties, to January 27, 1994 and finally to May 16, 1994, at which time the evidentiary hearing was held.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b) and 157(a)(b)(1) and (b)(2)(0).

FACTS

On January 4, 1993, Debtor filed a voluntary petition pursuant to Chapter 11 of the Code. At the time of its filing, Debtor was obligated to Pavemark in the sum of approximately $28,000 for the purchase of material referred to as "thermoplastic". Subsequent to the filing, representatives of the Debtor contacted Finley who was then the executive vice president of Pavemark and advised him of Debtor's Chapter 11 case.

During the summer months of l993, Finley, acting on behalf of Pavemark, contacted in writing several contractors with whom the Debtor had done business and requested that the contractors make payment of any sums due the Debtor to Pavemark and the Debtor jointly or in the alternative require a release of Pavemark's claim before making payment to Debtor.

Debtor's representative testified that approximately $40,000 in payments were held up as a result of Finley's contacts. One of the contractors, Valerino Construction Inc. was still withholding some $2,000 as of the date of the evidentiary hearing.[1]

John McNeely ("J.McNeely"), Debtor's controller,

[1] At the hearing, Pavemark and Finley's attorney agreed to authorize the release of the $2,000 directly to Debtor.

testified that in spite of written warning from Debtor's attorney in July 1993, that they would be in contempt, Finley and Pavemark proceeded to notify the various contractors to make payment to Pavemark and the Debtor jointly or obtain the necessary release. J.McNeely testified that as a result of the letters sent by Pavemark, he was required to expend approximately forty hours dealing with the various contractors while a staff accountant employed by Debtor was required to expend some ten hours. J.McNeely testified that his rate of pay was $700 per week while the staff accountant was paid $500 per week. J.McNeely also testified that he anticipated a bill from Debtor's attorney, in connection with the actions of Pavemark and Finley, of approximately $2,000, though no such bill had been rendered as of the date of the hearing. On cross-examination, J.McNeely acknowledged that he had no time slips or other documentation to support his claims of some forty hours expended by him and the ten hours expended by the staff accountant. Also on cross-examination, J.McNeely testified that the letters sent by Pavemark to the various contractors made reference to Pavemark's intention to file a "Lien Notice with the County to protect our interests." (See Respondent's Exhibit 3)

Richard C. McNeely, III ("R.McNeely"), Debtor's operations manager, testified that he verbally notified Finley of the Debtor's Chapter 11 case two days after the filing. He asserted that Finley indicated that Pavemark was willing to continue working with the Debtor as long as it received payment on the pre-petition debt. R.McNeely testified that Finley inquired as

to the location of "its product", where was Debtor planning on using it, and where had Debtor actually used it. R.McNeely then provided Finley with the requested information. R.McNeely testified that he personally visited all of the contractors contacted by Pavemark post-petition in an effort to avoid a loss of their business. He estimated he spent approximately two weeks trying to "control damage." R.McNeely also received a gross weekly wage of $700.00. Finally, R.McNeely opined that only one-half of the contractors contacted by Pavemark post-petition still have business dealings with the Debtor.

ARGUMENTS

Debtor contends simply that Pavemark and Finley intentionally violated the stay provisions of Code §362(a) in attempting to collect a pre-petition debt by contacting various contractors with whom the Debtor had done business and requesting that they make payments jointly to the Debtor and Pavemark or require a release from Pavemark before making payment to Debtor.

Debtor argues that Pavemark and Finley's conduct constituted a contempt and that as a result thereof, both respondents should bear the costs and disbursements of Debtor's motion as well as Debtor's attorney's fees.

Pavemark and Finley assert that their actions were not intended to violate the stay imposed by Code §362(a), but rather contend that their correspondence with various companies doing business with the Debtor post-petition was simply intended to

verify with those companies that, in fact, Pavemark's "product" was being utilized on various construction projects, thus enabling Pavemark to pursue public improvement liens and/or bond claims. Pavemark and Finley contend that their correspondence was informational in nature and was not intended to nor did it result in any direct damage to the Debtor.

DISCUSSION

At the outset, the Court notes that in spite of apparent discovery undertaken and the two consensual adjournments of this evidentiary hearing, allegedly due to the need for further discovery, the proof proffered by both parties at the hearing was very limited.

There is little doubt that a corporate debtor who asserts a willful violation of the automatic stay imposed pursuant to Code §362(a) may request a bankruptcy court to invoke its contempt power pursuant to Code §105 and Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 9020 in order to sanction the creditor's conduct. See In re Chateaugay Corp., 920 F.2d 183, 187 (2d Cir. 1990); In re Goodman, 991 F.2d 613, 620 (9th Cir. 1993)[2]

In this Circuit, however, it has been suggested that a violation of the stay, sufficient to invoke the Court's contempt power, must have been something more than willful; rather, a debtor must establish that the creditor acted in bad faith or with a

[2] Both the Second and Ninth Circuits agree that Code §362(h) is unavailable to a corporate debtor.

malicious intent. See In re Crysen/Montenay Energy Co., 902 F.2d 1098, 1104 (2d Cir. 1990) (case dealt with sanctions imposed pursuant to Code §362(h)). This standard of proof has been acknowledged by other bankruptcy courts as well.

Bankruptcy Judge Francis Conrad in In re Stockbridge Funding Corp., 145 B.R. 797 (Bankr. S.D.N.Y. 1992), aff'd in part and vacated in part on other grounds, 158 B.R. 914 (S.D.N.Y. 1993) in discussing the Second Circuit's conclusion that corporate debtors were excluded from the scope of Code §362(h), acknowledged that such debtors were not without remedy, concluding that contempt and the sanctions flowing therefrom were available where "malicious and bad faith violations of the stay" were established. Id. at page 813.

Likewise, in a footnote, Bankruptcy Judge John S. Dalis in In re Georgia Scale Co., 134 B.R. 69, 73 (Bankr. S.D.Ga. 1991), opines that the standard warranting the "imposition of sanctions pursuant to the Court's civil contempt power may differ from the standard used for determining willfullness under §362(h)."

This Court is compelled to conclude that were this discrete issue to reach the Second Circuit Court of Appeals it would acknowledge a differing standard of proof to be applied to corporate debtors as illogical as that distinction might be.[3] Thus, unless the Debtor here has established a malicious or bad faith intent on the part of Pavemark and/or Finley, its request for

[3] The Second Circuit Court of Appeals observed in In re Chateaugay Corp., supra 920 F.2d at page 187, that while "§362(h) would better serve the Code's purposes by being applied to all debtors, we could do no more than invite Congress to change the result."

sanctions must apparently fail.

The only documentation of Finley/Pavemark's conduct, as regards the Debtor received in evidence, was a letter written by Finley as the "Exec. V.P./Treasurer" of Pavemark to a J.G. Turner, Inc. on August l3, 1993, requesting that Turner issue a "joint check" presumably to the Debtor and Pavemark or in the alternative request from the Debtor a notarized release executed by Pavemark showing payment to them in full. (See Respondent's Exhibit 3)

The remainder of the admissible testimony proffered by the McNeelys on Debtor's behalf related to conversations with Finley wherein he demanded payment of Pavemark's pre-petition debt, correspondence and personal contacts to "control damage" resulting from Finley/Pavemark letters, discussions with Debtor's attorney and conjecture as to the number of contractors who ceased doing business with the Debtor allegedly due to Pavemark's post-petition correspondence.[4]

While the conclusion is inescapable that Pavemark and Finley willfully violated the automatic stay, (See In re Brilliant Glass, Inc., 99 B.R. 16 (Bankr. C.D.Cal. 1988)), this Court's inquiry must be carried one step further in analyzing whether their conduct was malicious or done in bad faith in order to find the Respondents in contempt. In re Chateaugay, supra 920 F.2d 187.

The only probative evidence before the Court from which it may draw a conclusion as to Pavemark and Finley's motivation was

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[4] Neither Finley nor Pavemark called any witnesses on their behalf, though their attorney, on cross-examination, sought to elicit testimony that his clients were simply attempting to protect their lien rights.

the testimony of R.McNeely who indicated that he contacted Finley a couple of days after the Debtor's Chapter 11 filing and advised him of that fact. In response, Finley advised R.McNeely that Pavemark required payment as a condition of continuing to do business with Debtor, to which R.McNeely responded that Debtor could not pay him due to its bankruptcy filing. Thereafter, Finley on behalf of Pavemark, sent a number of letters to contractors with whom Debtor did business and on whose projects Pavemark's material was thought to be used advising them to make payment of pre-petition debts to the Debtor and Pavemark by a joint check. (Respondent's Exhibit 3)

The Court concludes that while Finley and Pavemark may not have acted maliciously, they clearly acted in bad faith without any reasonable belief that their actions were not in violation of the Code §362(a) stay. Thus, the Court rejects the contention that Respondents were simply protecting their lien rights and finds that both Finley and Pavemark must be held in contempt of court.

As a sanction for their contempt, the Court may assess actual damages, costs and attorney's fees. Stockbridge Funding, supra, 145 B.R. at 813. J.McNeely testified that he expended approximately forty hours in dealing with the Pavemark/Finley letters to various contractors, while Debtor's staff accountant had expended approximately l0 hours. Additionally, R.McNeely testified that he had expended approximately two weeks personally meeting with various contractors to whom the Pavemark/Finley letters were sent. Both McNeelys testified without contradiction that their rate of pay was $700 per week while the staff accountant earned

$500 per week. Accordingly, the Court will award the Debtor $2,225.00 in actual damages. With regard to costs and reasonable attorney's fees, there is no competent evidence presently before the Court. The Court will, however, permit Debtor's counsel to file and serve on Pavemark/Finley's attorneys, within ten days of the date of this Order, an application for costs and attorney's fees incurred in connection with this contested matter. The Court will then review said application and award the actual damage, costs and appropriate attorney's fees by separate order.

Pursuant to Fed.R.Bankr.P. 9020(c), upon the fixing of costs and attorney's fees, the Clerk of this Court shall then serve a copy of the order awarding actual damages, costs and attorney's fees, upon Pavemark and Walter Finley and said Respondents shall have a period of ten days after service to file and serve objections in accordance with Fed.R.Bankr.P. 9033(b).

Dated at Utica, New York
this day of September, 1994

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge