UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

GRACO TRUCKING CORP.	CASE NO. 94-62438
Debtor	Chapter 11

APPEARANCES:

DAFFNER And TANG, ESQS. Attorneys for Debtor 138 Central Avenue Albany, New York 12206	HOWARD DAFFNER, ESQ. Of Counsel
WILLIAM F. LARKIN, ESQ. Assistant U.S. Attorney Attorney for Internal Revenue Service U.S. Department of Justice P.O. Box 7198 100 South Clinton Street Syracuse, New York 13261-7198	
HISCOCK & BARCLAY, LLP Attorneys for Key Bank Financial Plaza Syracuse, New York 13202	J. ERIC CHARLTON, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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

This contested matter is before the Court by way of an Order to Show Cause dated March 26, 1996, granted upon the Application of Graco Trucking Corp. ("Debtor") dated March 25, 1996, and a Motion to Impose A Stay of Collection filed by the Debtor, also on March 26, 1996.

Opposition was interposed by the Internal Revenue Service ("IRS") and the contested matter was orally argued at the Court's April 2, 1996 motion term in Syracuse, New York.

JURISDICTIONAL STATEMENT

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

FACTS

Debtor, which operates a trucking business, filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on September 8, 1994. On or about September 19, 1994, the IRS filed a Proof of Claim in the amount of $315,868.20, which included a claim of $254,268.20 secured by various federal tax liens, an unsecured priority claim of $56,000, and an unsecured general claim of $5,600.

On or about February 21, 1995, the Debtor and the IRS entered into an "Agreement For Use of Cash Collateral" ("Cash Collateral Agreement") which was thereafter approved by an Order of this Court dated April 7, 1995 ("Cash Collateral Order"). In significant part, the Cash Collateral Agreement required the Debtor to 1) provide the IRS with monthly operating reports pursuant to Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 2015 on the same day that each report was filed with the Court; 2) provide the IRS with listings of its aged accounts receivable; 3) file all past due tax returns by August 1, 1995 or 60 days prior to the submission of a plan of reorganization, whichever was earlier; 4) pay each federal tax deposit when due and submit proof to the IRS

within 3 working days of the deposit; 5) propose a plan of reorganization on or before October 1, 1995 and, 6) commencing December 1, 1994, make monthly payments of $1,949.00 to the IRS to be applied to its" pre-petition priority debts."

Paragraph 9 of the Cash Collateral Agreement provided that in the event of a default of any of the aforementioned conditions, the IRS might declare the Debtor in default and that a failure to declare a default did not constitute a waiver of that right at a later date.

Paragraph 10 of the Cash Collateral Agreement stated that upon default, the entire unpaid liability described in the Agreement to the extent secured as of the filing date, as well as any current liabilities, would become due and owing immediately upon demand by the IRS.

Finally, paragraph 11 of the Cash Collateral Agreement provides that if the default was not corrected within 15 days of the demand, the IRS could proceed with collection efforts unencumbered by the stay provisions of Code §362.

On or about February 1, 1996, the IRS mailed the Debtor a Notice of Default advising the Debtor of 5 separate events of default under the Cash Collateral Agreement, declaring the Debtor to be in default, advising Debtor that the IRS was entitled to proceed to collect the sum of $270,105.42 and terminating Debtor's right to further use of cash collateral. The Notice of Default also advised the Debtor that failure to pay $270,105.42 within 17 days of the date of mailing would result in the IRS "proceeding to collect the liability using the administrative collection

provisions available in the Internal Revenue Code." (See Notice of Default dated February 1, 1996.)

Within 15 days of the IRS Notice of Default, Debtor filed its 1994 and 1995 Federal Unemployment Tax Returns (Form 940) and paid the post-petition federal tax deposits and also paid the monthly payments due under the Cash Collateral Agreement for the months of December 1995, January 1996 and February 1996. Debtor did not file its monthly operating reports for January and February 1996 with the IRS, did not file a plan of reorganization by October 1, 1995 and has not paid the sum of $270,105.42 to the IRS.

On March 6, 1996, the IRS served a Notice of Levy on Debtor's bank and upon parties with whom Debtor has current contracts.

DISCUSSION

The IRS argues that Debtor's motion is procedurally incorrect, that what Debtor seeks is a preliminary injunction for which it had to commence an adversary proceeding pursuant to Fed. R.Bankr.P. 7001(7). Additionally, the IRS asserts that since the stay has been lifted due to Debtor's default under the Cash Collateral Agreement, the Anti-Injunction Act (26 U.S.C. §7421) prohibits the issuance of any restraint against the collection of tax by the IRS.

With regard to the former argument, this Court has consistently held that where the parties are afforded due process of law and are not prejudiced thereby, this Court can treat a

contested matter filed pursuant to Fed.R.Bankr.P. 9014 as an adversary proceeding. See In re Command Services Corp., 102 B.R. 905, 908 (Bankr. N.D.N.Y. 1989). As to the IRS' invocation of the Anti-Injunction Statute, that argument has merit only if the Court concludes that the stay imposed by Code §362(a) has been vacated.

The Debtor interprets the Cash Collateral Agreement as providing it with a "15 day grace period during which it could cure any defaults" (see Affidavit of Patricia A. Conhaim in Support of Motion, sworn to March 26, 1995). The Debtor, however, acknowledges that it did not cure its default as regards those portions of the Cash Collateral Agreement that required it to provide the IRS with copies of its monthly operating reports, as well as to file a plan of reorganization by October 1, 1995. In defense of its failure to comply with this latter condition, Debtor points to a Conditional Order of this Court dated February 29, 1996, which requires inter alia the filing of a Disclosure Statement and Plan of Reorganization by April 30, 1996. At oral argument, Debtor asserted that the IRS' action in enforcing its secured claim "denudes" the Court's February 29th Order.[1]

The IRS, on the other hand, correctly reads the Cash Collateral Agreement as providing that in the event of a default, the Debtor was given l5 days following demand to pay the IRS its entire unpaid liability which was alleged in the Notice of Default

[1] The Court's February 29, 1996 Order resulted from a motion, initially filed by the U.S. Trustee in August 1995 and thereafter adjourned numerous times, seeking to dismiss Debtor's Chapter 11 case for failure to file timely operating reports, pay quarterly fees due the U.S. Trustee and failure to file a plan of reorganization. Both the IRS and the State of New York Department of Taxation and Finance joined in the motion.

dated February 1, 1996, as being $270,105.42, together with any unpaid current liabilities" (see Exhibit A attached to the Conhaim Affidavit). There is no dispute that the Debtor did not tender the sum of $270,105.42 to the IRS within 15 days of February 1, 1996. Thus, on or about February 18, 1996, the stay imposed pursuant to Code §362(a) was vacated, and the IRS was free to pursue its collection efforts.

While Debtor makes some suggestion that the IRS has waived its right to enforce the Cash Collateral Agreement by not issuing a Notice of Default in October 1995 when Debtor failed to file a plan of reorganization or on other occasions when it failed to timely file monthly operating reports, make adequate protection payments, file timely tax returns or make timely tax deposits, Debtor's most meritorious argument is that the collection activity of the IRS will force the Debtor to fail just when "it has the best opportunity in years to turn around its business." (See Supplemental Affirmation of Howard Daffner, Esq. in Support of Motion To Impose Stay of Collection, dated April 1, 1996). Thus, it implores the Court to exercise its equitable powers pursuant to Code §105 and effectively modify the Cash Collateral Agreement so as to render it compatible with Debtor's current intentions.

As the IRS points out, the U.S. Court of Appeals for the Fifth Circuit in the case of Matter of Southmark Corp., 49 F.3d llll, lll6 (5th Cir. 1995), appropriately drew a perimeter around the bankruptcy court's equitable power when it observed that Code §105 does not "empower the bankruptcy courts to act as 'roving commission[s] to do equity'" (citations omitted). "Even the broad

powers of the bankruptcy courts to fashion equitable remedies....must be exercised only within the confines of the Bankruptcy Code (citations omitted)." "The Statute does not create substantive rights that are otherwise unavailable under applicable law...." (citation omitted).

The Cash Collateral Agreement negotiated between Debtor and the IRS in February 1995 was not the result of coercion by either party. It was submitted to this Court on notice pursuant to Fed.R.Bankr.P. 4001(b), and was approved by Court Order. Despite Debtor's apparent misinterpretation of certain of the terms of the Cash Collateral Agreement, it is admittedly in default of others and has not cured those defaults. "[A] Stipulation freely entered into by the parties is binding on the parties" Matter of B.O.S.S. Partners I, 37 B.R. 348, 350 (Bankr. M.D.Fla. 1984).

While a cash collateral order may be considered non-final in the sense that it is subject to change if the circumstances upon which it is premised change, (Matter of Lafayette Dial, Inc. 92 B.R. 798, 799 (Bankr. N.D.Ind. 1988)) at no time did the Debtor herein, prior to its default, seek to modify the Cash Collateral Agreement or the Order approving it. As the bankruptcy court observed in Lafayette Dial, supra

> This Court is fully cognizant that it sits as a court of equity and as such wields vast equitable powers. Ultimately the debtor asks the court to use these powers to both relieve it of its agreement with the Bank and to condone its failures to comply. The Court declines to do so.
>
> '[O]nce a Stipulation has been entered into and approved by the court the express agreement of the parties will be strictly enforced. This court will not use its equity

> powers to disregard the express agreement and allow the defaulting party another chance to do what it has failed to accomplish. Id. at 802, quoting In re Borchardt, 47 B.R. 879, 881 (Bankr. D.Minn. 1985).'

Having considered all of the foregoing, the Court will not entertain the relief sought by the Debtor and its motion is, therefore, denied.

IT IS SO ORDERED.

Dated at Utica, New York

this 15th day of April 1996

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge