UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

D.A. ELIA CONSTRUCTION CORP. Case No. 94-10866 K

Debtor

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION TO THE DISTRICT COURT

In the following Report and Recommendation, this Court will explain why this matter is treated as a non-core matter requiring Report and Recommendation under 28 U.S.C. § 157(c).

After hearing on September 14, 2006 and upon the submissions and arguments of the Debtor, D.A. Elia Construction Co. (Feuerstein & Smith, David Smith, of Counsel), L. Andrew Bernheim (Philippe L. Guarino, Esq. And Mattar, D'Agostino & Gottlieb, LLP, Krista Gottlieb, Esq., of counsel) and the law firm of Damon and Morey, pro se (Daniel Brown, Esq., of counsel), the Court offers the following to Chief District Judge Richard J. Arcara.

FINDINGS OF FACT

A. Procedural findings

On October 19, 2004, this Court rejected all objections to the fees and expenses sought by Damon and Morey for its work in representing the Debtor from the date of the Petition, March 30, 1994, to the date of that decision. There was no stay pending appeal.

On June 19, 2006, Your Honor affirmed that ruling and closed the appeal. CIV 04-975. That Affirmance was itself appealed, and the Second Circuit will likely hear argument this coming winter. There was no stay pending appeal.

On February 23, 2005, L. Andrew Bernheim commenced CIV 05-118 which was assigned to Hon. John T. Elfvin. CIV 05-118 had meaningful relationship to CIV 04-975 in that Bernheim was asserting ownership of any "surplus" in this Debtor's estate. CIV 05-118 was dismissed without prejudice, pending resolution of the fee dispute by the Second Circuit and pending a subsequent determination by the present Court as to the amount of remaining "surplus funds" that would be subject to Bernheim's claims in CIV 05-118. That dismissal was also appealed, and is still pending in the Second Circuit.

On August 11, 2006, the present Court, having been informed of the status of matters in the District Court and the Second Circuit, *sua sponte* entered an Order abstaining from all matters then pending in the Higher Courts, and directing the Debtor to proceed to close this case in this Court.

On August 21, 2006, Damon and Morey moved to modify the August 11, 2006 Order so as to permit this Court to enter a Judgment enforcing the fee award of $ 342,518.49, which, as noted above, was affirmed by Your Honor on June 19, 2006, further appeal of which is pending, but with no stays in effect.

On August 21, 2006 , the Debtor appealed this Court's *sua sponte* Order of August 1, 2006. It has since been assigned as # CIV 06-617E.

At hearing on September 14, 2006, the Debtor joined in Damon and Morey's Motion to Modify the August 11, 2006 Order, so that the present court would have jurisdiction under Bankruptcy Rule 8002(b) to modify the Order that the Debtor has appealed.

B. Findings as to Interest of Economy

All parties agree that the procedural complexity requires judicial intervention toward the goal of "getting all the related matters under one roof," and this Court concurs.

Damon and Morey, however, insists that it is entitled to enforcement of the present Court's Order of October 19, 2004, and Your Honor's Order of June 12, 2006. In other words, the Firm insists that it is entitled to the use of the money that this District has ruled it is owed, pending the outcome of the Appeal of the fee dispute. This judicial officer of the District Court agrees, over the Objections of the Debtor and Bernheim.

Damon and Morey insists that this writer should direct entry of a money judgment now. But, over the objection of Damon and Morey, this Court finds that because it is Your Honor's Decision that is on appeal to the Second Circuit, a ruling on Damon and Morey's Motion to Enforce the earlier Orders should come from Your Honor, particularly because Your Honor, as Chief District Judge, may decide the extent, if any, to which the matters dismissed by Judge Elfvin in CIV 05-118, should be combined with the Damon and Morey fee dispute. That is why this matter is reported to Your Honor now as a "non-core" proceeding, suitable only for Report and Recommendation under 28 U.S.C. § 157(c).

Were it not for Damon and Morey's current demand, it is possible that the Second

Circuit's eventual decisions would decisively resolve certain issues. For example, if Your Honor's June 19, 2006 Order is affirmed and becomes final, there will be no doubt as to Damon and Morey's entitlement to payment from the assets of this Chapter 11 case (subject, of course, to any independent actions by the Debtor or Bernheim, under non-bankruptcy law.) For another example, if your Honor's June 19, 2006 Order is reversed (and therefore this writer's Order of October 19, 2004) is reversed, it is likely that all remaining matters will be addressed in a new civil action by Bernheim, such as has been dismissed by Judge Elfvin "without prejudice."

CONCLUSIONS OF LAW

(1) Damon and Morey is entitled to entry of a money judgment against the Debtor in the amount of all of the remaining balance of its applications to this court - - $342,518.49. This is so because this Court and Your Honor have approved these fees and expenses in decisions that are before the Circuit Court, but never stayed.

(2) Bernheim is entitled to a Declaration that there is "surplus money" in this Chapter 11 Estate of at least $357,481.51, as of June 30, 2004 based on my understanding that the Estate contains approximately $700,000, and the maximum amount payable to Damon and Morey is $ 342,518.49.

RECOMMENDATION

It is Recommended that:

1. "Core Matter" CIV 04-975 be consolidated with "Non-Core Matter" CIV 05-118.

2. Damon and Morey be awarded money judgment in CIV 04-975.

3. The District Court withdraw the 28 U.S.C. § 157 reference as to all disputes remaining before me in this Chapter 11 case, as regards the claims raised in CIV 05-118.

Dated: Buffalo, New York
September 29, 2006

/s/ Michael J. Kaplan
_____
U.S.B.J.