

73
73

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ROBERT J. BRADLEY, SR.

Case No. 91-13893 K

Debtor

The Debtor, Robert J. Bradley, Sr. ("Bradley") is an individual in Chapter 11. His scheduled assets are \$ 27,121,420. They consist principally of interests in corporations or partnerships which manage real estate, operate or manage businesses (such as a hotel), or which manage or operate nursing homes. He also owns some rental properties in his own name. His scheduled liabilities are \$48,183,018. He has operated as a Debtor-in-Possession in Chapter 11 since November 12, 1991. (Also in Chapter 11 as a different case is "BBC Real Estate Partnership" in which Bradley is a 75% partner.) The Creditors' Committee in this case seeks an order fixing the amount that Bradley may spend for personal living expenses at an annualized amount that would be approximately 50% of his post-petition personal spending history. The Committee is joined by creditor, NCNB National Bank. (There is no Creditors' Committee in the BBC Limited Partnership case because NCNB National Bank is the only substantial creditor therein; NCNB is a major creditor in Bradley's individual case because of personal guarantees on the obligations of the Limited Partnership.)

According to his counsel, Bradley's post-petition personal spending is somewhat less than his pre-petition level. In

the first 10 months after the filing of the case, Bradley is said to have spent \$ 130,681.00 for what the Committee and NCNB consider to be "personal expenses." Bradley disputes that characterization as to some of that expense¹ and further argues that a significant portion of what he spends is "salary from business entities that are not in bankruptcy."² The movants want Bradley limited by the Court to approximately \$77,000 in personal expenditures, \$12,000 of which would be his Social Security benefits. (Bradley is a divorced septuagenarian with a large family and extended family, and with extensive family and business holdings in Florida as well as Western New York. For some time prior to his Chapter 11 filing he had been able to maintain what can fairly be described as an affluent lifestyle.) He, as an individual D-I-P receives anywhere from \$7,000 to \$20,000 per month and spends it all. (BBC Real Estate Partnership, on the other hand, has a very much higher cash flow. In August of 1992, for example, receipts were over \$615,000, disbursements were over \$498,000, and the ending cash balance was

¹For example, Bradley argues that part of his travel expenses are business travel expenses, and not exclusively for personal pleasure.

²This characterization points up the paradox, discussed herein, of a chapter 11 debtor who is not a business entity, but instead is a natural person. As is correctly pointed out by NCNB, whatever Bradley takes from separate entities which he owned at the time of bankruptcy, could detract from what is available to his personal creditors, whether or not those separate entities are in bankruptcy.

over \$168,000.)

What makes the matter presently before the Court unusual is the fact that "businesses" so extensive, operating in Chapter 11, are rarely found to be "people" -- individuals, with meals to buy, family to buy gifts for, etc. It is routine for this Court to examine the salaries that a debtor corporation is paying to its principal officers, directors, and stockholders. (See 11 U.S.C. §§ 1108 and 1129(a)(4).) Almost invariably such salary is based on the value of personal services provided to the corporation, and if the principal is unhappy with the salary fixed by the Court, he or she may leave the corporation and the corporation would nonetheless continue in Chapter 11 under the supervision of someone hired or appointed for the purpose. A corporation or partnership operating in Chapter 11 would rarely be permitted to pay the personal living expenses of one of its principals. But in the case of an individual operating in Chapter 11, his or her living expenses are as much a legitimate obligation and liability of the estate as are, for example, the costs of operating one of the office buildings, shopping plazas, or nursing homes Bradley owns.

The movants object to his taking (on an annualized basis) \$156,000 for the maintenance of club memberships, rent for his personal residences in Buffalo and Florida, charge card purchases, etc., because, they argue, he suffered a net cash loss from January, 1992 to July, 1992 of \$270,000 and is making "Capital

Withdrawals" from his investments to meet expenses.

In light of the unusual posture of the matter presented to the Court, the Court asked the parties to brief the question of the Court's authority, duty, or discretion with regard to such a motion, particularly in light of the fact that although personal service income of such a debtor is mentioned in 11 U.S.C. § 541(a)(6), there is no provision in the Bankruptcy Code addressing the personal budget of a Chapter 11 debtor who is an individual (unlike Chapter 13 which contains 11 U.S.C. § 1306(a)(2) and 1325(b)(1)(B) and (b)(2)).

The Court has considered the briefs and arguments and is persuaded by the decision of the Bankruptcy Court of the Northern District of Indiana in the case of *Matter of All Seasons Industries, Inc.*, 121 B.R. 822 (Bankr. N.D. Ind. 1990), that although this Court has authority to grant the present motion, the motion must be denied.

The reasoning of the above case is compelling and needs no elucidation. I would only add the following: cases defining "property of the estate" in Chapter 11 cases for other purposes should not be presumed to be thereby setting limits of the debtor's personal allowance. As suggested by the learned Court in the above case, one does not have to determine property to fall outside property of the estate in order for it to be available to the debtor's personal needs; "the ordinary course" of Bradley's

business includes meeting his personal expenses. Put another way, definitions of the limits of estate property, exempt property, and personal service income (11 U.S.C. § 541(a)(6)) are totally irrelevant to the question at Bar, for there is no prohibition against use of estate property or non-exempt property for personal needs when the debtor is an individual.

Furthermore, the Court declines to be drawn into passing upon each expense Bradley wishes to incur. The Committee and NCNB argue that all the Court need do is set a "cap." This is not correct, for the Court would still be asked whether "this expense" or "that expense" is to be charged as a "personal" expense that is subject to the cap or a "business expense" that benefitted the estate and is not to be charged against the personal allowance.

Lastly, the Committee and NCNB are here ignoring clear remedies provided by the Bankruptcy Code. They are free under Chapter 11 of the Bankruptcy Code to seek the appointment of a Trustee if they are prepared to demonstrate that that is in the interests of the estate or that Bradley is mismanaging his assets (11 U.S.C. § 1104(a)), or to seek the appointment of an examiner if they believe an investigation is needed into his management activities (11 U.S.C. § 1104(b)). If they believe that he is throwing good money after bad, and that liquidation values are the best that creditors can hope for, they are free to move for

conversion of the case (11 U.S.C. § 1112(b)) to Chapter 7.³ At some point, they will presumably be free to file their own plan of reorganization if they grow tired of waiting for Bradley to propose one that is acceptable to them.⁴

In sum, the movants have failed to assert any of the

³The movants seem to totally ignore the distinction between an "individual's" Chapter 11 and a corporate Chapter 11, as discussed above. The very exposure to personal liability that Bradley suffers as a sole proprietor also bestows him with certain rights under the Bankruptcy Code that would not exist in a case involving a corporation or partnership under his ownership and control. No one can make him stay in Chapter 11 against his will; see 11 U.S.C. § 1112(a). Had creditors sought to liquidate him in Chapter 7 ab initio, he would have had an absolute right to attempt to reorganize his affairs under Chapter 11; see 11 U.S.C. § 706(a). If at any point he were to determine that efforts to maintain or to improve the going concern value of his assets are not "worth it" he may insist on liquidation under Chapter 7 (§ 1112(9(a))) and grant of discharge of his dischargeable debts, so that he may engage in other pursuits, free of the scrutiny of the movants. Although it may seem odd that a sole proprietor could enjoy greater rights in insolvency than one who has insulated himself personally from liability, the privilege of an individual to receive a fresh start and to be free of involuntary servitude does seem to have such effect. More prosaically, however, the movants fail to convince the Court that their current complaints are qualitatively any different from complaining of the way Bradley runs his business. The judgment he exercises in determining what the market will bear in the prices he asks for rental of various rental properties might not be qualitatively different from the judgment he exercises in deciding what he may take out of the bank for personal needs and desires.

⁴Bradley has three times sought extensions of the period during which only he may file a plan of reorganization under 11 U.S.C. § 1121. On each occasion there has been no significant opposition and extension was granted. At no time have the movants or any other creditor of Robert Bradley indicated to the Court in any way that they were prepared to propose a Plan of Reorganization for his assets.

well-recognized rights they possess in the context of Chapter 11 cases, and instead seek an unrecognized form of relief. The Court concludes that it has authority, nonetheless, to grant that relief, but declines to do so at the present time. The motion is denied as being currently without sufficient basis.

SO ORDERED.

Dated: Buffalo, New York
November 24, 1992



U.S.B.J.