

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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|---------------------------|---|-------------------------|
| In re: |) | Chapter 11 |
| |) | |
| NORTHWESTERN CORPORATION, |) | Case No. 03-12872 (CGC) |
| |) | |
| Debtor. |) | |
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MEMORANDUM DECISION

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June 16, 2004

CASE, J.

Before the Court is Comache Park LLC's Motion for Relief from Automatic Stay Pursuant to 11 U.S.C. § 362(d) (the "Motion") (Docket No. 1174) seeking an order authorizing the commencement of an adversary proceeding against NorthWestern Corporation (the "Debtor" or "NorthWestern") to avoid a fraudulent transfer. Separate objections were filed by the Debtor and the Official Committee of Unsecured Creditors. Upon considering all relevant pleadings, the parties' oral argument heard on May 17, 2003, and for the reasons set forth below, the Motion will be denied.

FACTS

On September 14, 2003 (the "Petition Date"), the Debtor filed a voluntary petition for relief under title 11 of the Bankruptcy Code. Pursuant to §§ 1107 and 1108 of the Bankruptcy Code, the Debtor continues to operate its business and manage its properties as debtor-in-possession.

The Debtor filed its initial disclosure statement and plan of reorganization on March 11, 2004. Numerous objections were filed by various parties in interest. The Debtor filed an amended disclosure statement and a first amended plan of reorganization on May 14, 2004 and May 17, 2004, respectively. After the hearing held on May, 17, 2004, the Court entered an Order on May 26, 2004 approving the Debtor's first amended disclosure statement. The confirmation hearing is currently scheduled for August 25, 2004.

Comanche Park, LLC (“Comanche”) is the plaintiff in a pre-petition lawsuit against the Debtor, among others, pending in Montana State Court.¹ The lawsuit asserts unliquidated damages for lost profits between \$7.3 million and \$12.2 million, which Comanche alleges are subject to trebling under applicable Montana law. The lawsuit arises out of an allegedly deceptive bidding solicitation scheme for “default power supply.” Comanche was an unsuccessful bidder; it asserts that the bidding process was a “sham” resulting from a conspiracy among the Debtor and its co-defendants.

By order dated October 10, 2003, the Court established January 15, 2004 (the “Bar Date”) as the deadline for creditors, such as Comanche, to file proofs of claims with respect to claims that arose prior to the commencement of the bankruptcy case. On December 29, 2003, Comanche filed its proof of claim for \$30 million in damages (Claim No. 427), attaching its Montana State Court complaint. Comanche did not assert a fraudulent conveyance claim against NorthWestern or any of its affiliates or subsidiaries.

The current Motion arises out of the so called “going flat” transaction pursuant to which the assets of Montana Power Company were transferred to the Debtor. This was accomplished through a series of transactions, including the transfer by Montana Power Company of its power generation assets to Montana Power, LLC, the acquisition by the Debtor of Montana Power, LLC (subsequently renamed NorthWestern Energy, LLC), and finally the transfer of the assets from NorthWestern Energy, LLC to the Debtor, NorthWestern Corporation. NorthWestern Energy was then renamed Clark Fork and Blackfoot, LLC (“Clark Fork”).

¹ Comanche Park LLC, v. NorthWestern Corp., et al., DV 02-1109, Montana Thirteenth Judicial District.

Comanche now seeks relief from stay in order to commence an adversary proceeding seeking to unwind this series of transactions as a fraudulent conveyance. The Court has previously granted such relief to Magten Asset Management Corporation ("Magten"). The Debtor and the Official Committee of Unsecured Creditors object.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b). This is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A) and (G).

DISCUSSION

The fraudulent transfer claims asserted in this Motion present an unusual fact pattern in a chapter 11 reorganization. In the ordinary case, the debtor-in-possession, exercising its rights as the trustee, seeks to recover, from a third party, assets transferred by the debtor pre-petition for less than fair consideration. This power lies directly with the trustee/debtor-in-possession under 11 U.S.C. § 548 or indirectly under 11 U.S.C. § 544(b). Under § 544(b), the debtor-in-possession steps into the shoes of an actual creditor who, under applicable state law, could have asserted the fraudulent conveyance claim.

Here, Comanche seeks to recover a fraudulent conveyance from the Debtor itself. The gist of its proposed claim is that it, as a creditor of Clark Fork (the successor to Montana Power Company), was injured by the transfer of assets from Montana Power Company to NorthWestern. In effect, Comanche wants to return those assets to Clark Fork for the sole benefit of the creditors of Clark Fork and to the exclusion of other general creditors whose claims lie only against Northwestern itself.

The difficulty is that Comanche did not assert such a claim prior to the expiration of the Bar Date. Comanche's filed claim relies exclusively upon its pending Montana State Court lawsuit; that complaint contains no allegation of a fraudulent conveyance. Nevertheless, Comanche asserts that, because under applicable Montana law it would have standing to pursue the matter in Montana Court, it has standing to pursue the claim here. While that fact would be relevant if it were the debtor-in-possession proceeding under § 544(b), it is not relevant here where the claim is brought directly by a creditor against the estate itself. Bluntly put, the question is whether or not a creditor who does not assert a fraudulent conveyance claim prior to the expiration of the Bar Date subsequently has standing to do so.

The answer is no. To conclude otherwise would be to render the bar date process meaningless. Comanche may be correct that under applicable Montana law it had standing to assert such a claim; the difficulty is that it did not do so. It could have included a fraudulent conveyance claim as part of its proof of claim, but it did not. As such, it lacks standing to pursue the claim now and lifting the stay would therefore be a fruitless act.

Comanche argues that the fact that this issue must be addressed and resolved in itself justifies lifting the stay. However, just as jurisdiction is not a matter of convenience, neither is standing. Clearly, Comanche was on notice of the Bar Date and filed its timely proof of claim. Having elected not to assert the fraudulent conveyance claim at that time, it lacks standing to do so now.

CONCLUSION

Therefore, Comanche's motion for relief from stay will be denied. Counsel for NorthWestern is to submit a form of order.



Charles G. Case II
United States Bankruptcy Judge