

EXHIBIT K-8

HSmith v. Dominion Bridge Corp.
 E.D.Pa., 1999.

United States District Court, E.D. Pennsylvania.
 James B. SMITH, On Behalf of Himself and Others
 Similarly Situated, Plaintiff,

v.

DOMINION BRIDGE CORPORATION (f/k/a Cedar
 Group, Inc.), Michel L. Marengère and Nicolas
 Matossian, Defendants.
 No. CIV. A. 96-7580.

March 2, 1999.

MEMORANDUM

REED.

*1 Before the Court is the motion of defendants Dominion Bridge Corporation ("DBC"), Michel L. Marengère, and Nicolas Matossian (collectively the "individual defendants") for stay of proceedings (Document No. 32). Based on the following analysis, the motion to stay will be granted.

I. BACKGROUND AND POSITIONS OF THE PARTIES

The following background on this class action is taken from the complaint and the Memorandum and Order of the Court dated March 5, 1998 granting the plaintiff's motion for class certification (Document No. 28). Cedar Group, Inc. was an international engineering, infrastructure, project management, aerospace and industrial metal transformation company. In August of 1996, Cedar changed its name to Dominion Bridge Corporation. Defendant Michel L. Marengère was DBC's Chairman of the Board and Chief Executive Officer, and defendant Nicolas Matossian was DBC's President, Chief Financial Officer, and Chief Operating Officer during the period of time relevant to this lawsuit. The common stock of DBC was traded publicly in the United States on the NASDAQ Stock Exchange and in Canada on the Vancouver Stock Exchange.

The plaintiffs allege that between April 20, 1995 and May 18, 1996, defendants failed to disclose to the

investment community that DBC's construction contracts were at risk of either not being formed or being canceled, that DBC lost \$40 million in contracts for fiscal 1996, that DBC suffered from a lack of adequate accounting controls, that DBC's financial status lacked credibility because of inaccurate and misleading accounting practices, and that the defendants had been accused of violations of federal securities law in a letter from a former executive. The *Montreal Gazette* published this information on May 18, 1996. In addition to DBC's failure to disclose, Smith alleges that DBC issued several misleading statements to the press touting the purported success and growth of DBC during this period.

Smith brought this class action in this Court on November 12, 1996 alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t, and Rule 10b-5, 17 C.F.R. 240.10b-5, which was promulgated thereunder. Marengère and Matossian resigned from DBC on April 28, 1998. (Marengère Declaration ¶ 3; Matossian Declaration ¶ 3).

The defendants filed the pending motion to stay the proceedings after DBC filed a notice of intention to file a proposal ^{FN1} pursuant to Canada's Bankruptcy and Insolvency Act ("BIA") § 50.4 in the Quebec Superior Court, Bankruptcy Division, District of Montréal, Canada on August 11, 1998. (Leduc Declaration ¶ 1). The defendants contend that under BIA § 69, the filing of the notice of intention automatically stayed the commencement or continuation of all suits, actions and proceedings against DBC, except by leave of the Canadian court. (Leduc Declaration ¶ 6; Pls.' Ex. A, Notice of Stay Order). The defendants argue that this Court should extend comity to the stay of the Canadian court and exercise its inherent power to stay the proceedings as to DBC in this lawsuit.

^{FN1}. A notice of intention to file a proposal is an indication to creditors that the debtor is going to reorganize. (Pls.' Ex. C, Leduc Dep. at 11).

*2 Although the defendants acknowledge that the stay issued by the Canadian court does not apply to the

individual defendants in this lawsuit, the defendants seek to stay the proceedings against the individual, non-debtor defendants as well, in order to protect the interests of DBC. The defendants contend that any judgment against the individual defendants could have a collateral estoppel effect on the liability of DBC. In addition, under to the Certificate of Incorporation of DBC and agreements entered into between the individual defendants and DBC (Defs.' Exs. A, B, and C), the individual defendants contend that they are entitled to indemnity from DBC for any liability that they may incur as a result of this litigation. (Marengère Declaration ¶ 6; Matossian Declaration ¶ 6).

The plaintiffs argue that comity should not be extended to the Canadian stay and that this lawsuit should proceed against DBC. Alternatively, the plaintiffs argue that if the Court grants the stay as to the claims against DBC, it should be conditioned upon DBC's production of certain documents. The plaintiffs argue that a stay should not be granted as to their claims against the individual defendants as they are former officers and directors of DBC who are not involved in the reorganization efforts of DBC. In addition, the plaintiffs argue that no harm would incur to DBC if the case proceeds against the individual defendants as collateral estoppel would not apply to the claims against DBC and DBC has no duty to indemnify the individual defendants.

II. ANALYSIS

A. Extension of Comity to the Canadian Stay

A federal court has discretion to exercise its inherent power to stay the proceedings before it. See *I.J.A., Inc. v. Marine Holdings, Ltd.*, 524 F.Supp. 197, 198 (E.D.Pa.1981) (citing *Landis v. North American Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936)). In general, a federal court should give effect to executive, legislative, and judicial acts of a foreign nation under the principle of international comity. See *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191 (3d Cir.1994). Comity is the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113,

163, 16 S.Ct. 139, 40 L.Ed. 95 (1895). Courts in the United States have long extended comity to foreign bankruptcy actions. See *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 714 (2d Cir.1987). According comity to a foreign bankruptcy proceeding enables "the assets of debtor to be disbursed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion." *Cunard S.S. Co. v. Salen Reefer Services A.B.*, 773 F.2d 452, 457-58 (2d Cir.1985). "Under general principles of comity ..., federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat the claims of local creditors." *Victrix S.S. Co.*, 825 F.2d at 714. In *Philadelphia Gear Corp.*, the Court of Appeals for the Third Circuit concluded that a party seeking a stay of a judicial proceeding based on a foreign bankruptcy proceeding must demonstrate that "(1) the foreign bankruptcy court shares our policy of equal distribution of assets; and (2) the foreign law mandates the issuance or at least authorizes the request for the stay." 44 F.3d at 193.

*3 As a sister common law jurisdiction, courts have consistently extended comity to Canadian bankruptcy proceedings. See *In re Davis*, 191 B.R. 577, 587 (Bankr.S.D.N.Y.1996) (finding that the BIA "contains a comprehensive procedure for the orderly marshaling and equitable distribution of a Canadian debtor's assets which closely resembles that under the [Bankruptcy] Code"); *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F.Supp. 1255, 1259 (S.D.N.Y.1979). The defendants submitted the declaration of René C. Leduc, the administrator acting on behalf of Arthur Andersen Inc. who was appointed trustee under DBC's proposal, which describes Canadian bankruptcy law. (Leduc Declaration ¶¶ 6, 9-20). Canadian law provides for equal distribution of assets and authorizes the stay of proceedings against an entity that has filed for bankruptcy protection. (Leduc Declaration ¶¶ 9, 6). The provision for an automatic stay of proceedings against the debtor issued under Canadian law is analogous to 11 U.S.C. § 362, which provides for an automatic stay of the continuation or commencement of any action against a bankrupt. Moreover, there is no indication in the record that the proceedings instituted by DBC in Canada do not comport with American notions of due process or that extending comity here would be prejudicial to the interests of the plaintiffs or the United States. See *Philadelphia Gear Corporation*, 44 F.3d at 193 (noting that a court should consider (1)

whether the court in which the proceedings were pending is a duly authorized tribunal, (2) whether the foreign bankruptcy code provides for equal treatment of creditors, (2) whether a stay would be in some manner “inimical to this country’s policy of equality;” and (4) whether the creditor would be prejudiced by the stay).

The plaintiffs argue that the United States has an overriding public policy interest in enforcing its securities laws; however, deference may be given to foreign bankruptcy proceedings notwithstanding that the plaintiffs in this Court are Americans and the claims are based on the securities laws of this country. See Lindner Fund, Inc. v. Polly Peck International PLC, 143 B.R. 807, 810 (S.D.N.Y.1992) (extending comity to English bankruptcy proceedings by dismissing action claiming violations of the Security and Exchange Act of 1934 filed in the United States federal court against debtor on the grounds that dismissal “would further the public policies underlying the automatic stay provisions of the English Insolvency Act and the analogous provision of the United States Bankruptcy Code.”).

These notions of international comity and the case law on the issue suggest that comity should be extended to the Canadian bankruptcy proceedings and the automatic stay issued by the Canadian court; accordingly, the motion to stay will be granted as to the proceedings against DBC.

B. Extension of Stay to Proceedings against Non-Debtor Defendants

*4 Neither the stay entered by the Canadian court nor the automatic stay provision of § 362(a) apply to non-bankrupt co-defendants of the debtor, such as the individual defendants in this case. See United National Insurance Company v. Equipment Managers, Inc., No. 95-0116, 1997 WL 241152, *3 (E.D.Pa. May 6, 1997). However, under certain “unusual circumstances,”^{FN2} courts have stayed proceedings against non-debtor co-defendants in cases in which the claims against the debtor were automatically stayed. See McCartney v. Integra Nat’l Bank North, 106 F.3d 506, 510 (3d Cir.1997). “Unusual circumstances” exist when “there is such identity between the debtor and third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third party defendant will in effect be a judgment or finding

against the debtor” or where the protection of a stay is essential to the debtor’s reorganization efforts. *Id.* (quoting A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 999 (4th Cir.), cert. denied, 479 U.S. 876 (1986)). Similarly, many bankruptcy courts have issued preliminary injunctions pursuant to 11 U.S.C. § 105(a),^{FN3} staying the prosecution of actions against non-debtor defendants who were officers or directors of the debtor. See e.g., In re American Film Technologies, Inc., 175 B.R. 847, 850 (Bankr.D.Del.1994) (citing cases).

FN2. There is some disagreement as to whether under “unusual circumstances,” the stay provisions of § 362 apply automatically to non-debtor co-defendants or if the stay provisions must be extended by court order. See In re Bidermann Industries U.S.A., Inc., 200 B.R. 779, 782 (Bankr.S.D.N.Y.1996). There is no need to address this issue here as the Court is only considering the automatic stay by analogy in determining whether to exercise its inherent power to stay proceedings before it.

FN3. The plaintiffs argue that the Court should apply the standard for a preliminary injunction to determine whether to stay the proceedings against the individual defendants. However, the cases which the plaintiffs cite concern a court’s power to issue an injunction staying proceedings in other courts pursuant to § 105. As the motion requests that this Court stay proceedings before it pursuant to its inherent power to stay, the defendants do not need to satisfy the requirements for a preliminary injunction to obtain a stay in this Court.

In United National Insurance, the court, in the context of considering a motion to sever the claims against individual, non-debtor defendants, considered four factors that have been used to determine whether a court should proceed without a party whose absence from the litigation is compelled by other reasons: “(1) the plaintiff’s interest in having a forum and whether or not plaintiff has a satisfactory alternative forum; (2) whether the defendant may wish to avoid multiple litigation or inconsistent relief or sole responsibility for liability he shares with another; (3) the interest of the outsider whom it would have been desirable to join

and the extent to which the judgment may, as a practical matter, impair or impede the absent party's ability to protect his interest; and (4) the interest of the courts and the public in the complete, consistent and efficient settlement of controversies."1997 WL 241152 at *3 (citing *Cushman and Wakefield, Inc. v. Backos*, 129 B.R. 35, 36 (E.D.Pa.1991)). Consideration of these factors is helpful in determining whether unusual circumstances exist such that the proceedings against the individual defendants should be stayed.

As to the first factor, because this is a motion to stay the proceedings not a motion to dismiss, the plaintiffs retain this Court as the forum in which to bring their claims, even if they are unable to bring their claims before the bankruptcy court in Canada. Extending the stay to all defendants does not shield any of the defendants from liability, but rather merely delays the proceedings until DBC can submit and implement a reorganization plan to its creditors. The interests in avoiding multiple proceedings and potentially inconsistent relief and in the efficient resolution of claims, represented in the second and fourth factors, weigh in favor of extending the stay to the claims against the individual defendants.

*5 As to the third factor, given the fact that the individual defendants were officers of DBC at the time of the allegations of plaintiffs and that the claims against the individual defendants arise out of the same factual basis as the claims against DBC, I conclude that DBC will not be able to adequately protect its interests if it is not present while the case proceeds against the individual defendants. Two issues contribute to this potential hindrance to DBC: the possible operation of collateral estoppel and DBC's potential duty to indemnify the individual defendants. If this case is allowed to proceed against the individual defendants, collateral estoppel may prevent DBC from litigating factual and legal issues critical to the claims of the plaintiffs against it. See *In re Johns-Manville Corporation*, 26 B.R. 420, 429 (Bankr.S.D.N.Y.1983) (extending the automatic stay to enjoin a security holders' class action suit against various employees and agents of a debtor, noting the risk that the corporate debtor "would be found to be a controlling nonparty ... [and] thus could be collaterally estopped in subsequent suits from relitigating issues determined against its officers and directors"), *vacated in part on other grounds*, 41 B.R. 926 (S.D.N.Y.1984).

The parties disagree as to whether the individual defendants have a right to indemnification by DBC for any liability they may incur in this lawsuit. Because it is possible that DBC may be required to indemnify the individual defendants for any liability they incur as a result of this lawsuit and in the least, it would be in DBC's interest to protect itself in the proceedings against the individual defendants in case its duty to indemnify is later established, continuing with the claims against the individual defendants in the absence of DBC would undermine the purpose of granting the stay as to the claims against DBC. Indeed, it is likely that DBC would have to focus some of its efforts on the defense of these individual defendants to protect its interests, which would detract from its ability to successfully reorganize.

All four of the factors discussed in *United National Insurance* weigh in favor of staying the proceedings against the individual defendants. In addition, the case law addressing this issue under similar facts supports the same conclusion. See e.g., *Allstate Life Insurance Co. v. Linter Group Ltd.*, 994 F.2d 996, 1000 (2d Cir.1993) (affirming the lower court's dismissal of suit against individual, non-debtor defendants and noted that "since these individuals were sued solely because of their affiliation with the [debtor], to allow these claims to go forward in the United States despite the dismissal as to the [debtor] would defeat the purpose of granting comity in the first place"); *United National Insurance*, 1997 WL 241152 at *4 (denying motion to sever case against individual defendants and proceed to trial and noting that "where wrongful conduct by officers and agents of a corporation and the corporation itself are alleged, there is great potential for the interest of [the debtor] to be impaired or impeded if the case were to proceed against the individual defendants"). Because I find that unusual circumstances exist such that there is identify between DBC and the individual defendants such that DBC may be said to be the real party defendant and a stay is necessary to DBC's reorganization efforts, the motion to stay as to the claims against the individual defendants will be granted.

C. Request for Discovery

*6 The plaintiffs request that this Court require DBC to produce certain documents that the plaintiffs argue DBC agreed to produce in July of 1998 before it filed

for bankruptcy protection in Canada. Because I conclude that the plaintiffs will not suffer prejudice if discovery is delayed and that requiring DBC to proceed with document production in this lawsuit during its efforts to reorganize would defeat the purpose in extending comity to the Canadian stay in the first place, the request will be denied.

IV. CONCLUSION

Based on the foregoing analysis, the motion to stay will be granted. The request of plaintiffs that this Court condition the stay on the production of certain documents by DBC will be denied.

An appropriate Order follows.

ORDER

AND NOW, this 2nd day of March, 1999, upon consideration of the motion of defendants for stay of proceedings (Document No. 32), the response of the plaintiffs thereto (Document No. 35), and the reply of the defendants (Document No. 36), and for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that the motion is GRANTED and the proceedings in this Court are STAYED until further order of the Court. The parties shall notify the Court when the automatic stay imposed by the Canadian bankruptcy court is lifted.

IT IS FURTHER ORDERED THAT the request of the plaintiffs that the stay be conditioned on the production of certain documents by Dominion Bridge Corporation is DENIED.

IT IS FURTHER ORDERED that the Clerk shall place this case on the civil suspension docket of this Court.

E.D.Pa.,1999.
Smith v. Dominion Bridge Corp.
Not Reported in F.Supp.2d, 1999 WL 111465
(E.D.Pa.), 33 Bankr.Ct.Dec. 1263

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