

<b>Deutsch v Liquid Holdings Group, Inc.</b>
2016 NY Slip Op 30966(U)
May 25, 2016
Supreme Court, New York County
Docket Number: 452951/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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JAY DEUTSCH, AS MANAGING GENERAL  
PARTNER OF THE DEUTSCH FAMILY  
INVESTMENT PARTNERSHIP AND TODD  
DEUTSCH

Plaintiffs,

Index No. : 452951/2015

-against-

DECISION AND ORDER

Mot. Seq. 004-005

LIQUID HOLDINGS GROUP, INC. F/K/A  
LIQUID HOLDINGS GROUP, LLC, BRIAN  
FERDINAND, RICHARD SCHAEFFER,  
FERDINAND HOLDINGS, LLC, SCHAEFFER  
HOLDINGS, LLC, BRIAN STORMS,  
AND JOHN DOES I-X,

Defendants.

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**HON. ANIL SINGH:**

In this action for stock fraud, defendant Liquid Holdings Group (“Debtor”) filed for a chapter 11 bankruptcy. This Court then automatically stayed any action against defendant-debtor Liquid Holdings<sup>1</sup>. Subsequently on February 8, 2016, defendant-debtor Liquid Holdings filed a motion in the Delaware Bankruptcy Court to convert its Chapter 11 filing to a Chapter 7 filing. See In re: Liquid Holdings, Group, Inc. et al., Debtors, 16-10202-KG (Bankr. D. Del., filed Feb. 8, 2016). The

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<sup>1</sup> In motion sequence 003, defendant liquid holdings moved to dismiss. This Court issued a stay in an interim order as to that motion and any action against defendant Liquid Holding.

Bankruptcy Court converted the case from a Chapter 11 reorganization to a Chapter 7 liquidation on February 25, 2016.

Plaintiff's allegations arise out of statements allegedly made at a meeting on February 12, 2013 between defendant Storms, Ferdinand Defendants, and plaintiff Deutsch, in which plaintiff Deutsch was to evaluate an investment opportunity in defendant-debtor Liquid Holdings. Complaint ¶ 17. Plaintiff further alleges that he entered into a subscription agreement with defendant-debtor Liquid Holdings to acquire certain securities in defendant-debtor and that during this meeting defendant-debtor made misrepresentations in its registration filings, press releases and other public filings, and that defendant Storm and Ferdinand Defendants were motivated by a desire to benefit from defendant-debtor's initial public offering. Complaint ¶¶ 21, 26-29, 41-43, 48-53, 55-57. It is alleged that these misrepresentations made by defendant Storms, defendant Brian Ferdinand and other co-defendants caused the damages that Plaintiff suffered.

In the instant motions before this Court, defendant Storms (Mot. Seq. 004) and defendants Brian Ferdinand and Ferdinand Holdings, LLC (together "Ferdinand Defendants") (Mot. Seq. 005) have moved to extend the stay as to them. Plaintiff Deutsch opposes both motions.

## Analysis

Bankruptcy law automatically stays all “action[s] or proceeding[s] against the debtor” and all actions “to obtain possession ... or to exercise control over property of the estate.” 11 U.S.C. §§ 362(a)(1) and 362(a)(3). “In the case of both Chapter 7 and Chapter 11 petitions, [t]he purposes of the bankruptcy stay under 11 U.S.C. § 362 ‘are to protect the debtor’s assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse.’” Catholic Order of Foresters v U.S. Bancorp Piper Jaffray, Inc., 337 F. Supp. 2d 1148, 1161 (N.D. Iowa 2004).

Contrary to plaintiff’s contention, this court does have authority to extend a stay to a non-bankrupt party<sup>2</sup>. The law is clear that the non-bankruptcy court has the jurisdiction to determine the applicability of the automatic stay to litigation before it. The court in which the litigation claimed to be stayed is pending has jurisdiction to determine whether the proceeding before it is subject to the automatic stay. See Wilds v Heckstall, 23 Misc. 3d 1126(A) (Sup. Ct. Kings Cnty. Apr. 3, 2009). “An extension of the automatic stay protection to non-debtors is reserved for cases where the court finds special or unusual circumstances. Special or unusual circumstances always involve an immediate adverse consequence for the debtor's estate.” Florists’

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<sup>2</sup> Neither party cited a case where a state court extended a stay in a chapter 7 filing opposed to a chapter 11 filing. However, in the cases in which the court denied a stay under chapter 7, they did not cite chapter 7 as support for the denial.

Transworld, Inc. v. New York Floral Group, Inc., 25 Misc. 3d 1225(A) (Sup. Ct. New York Cnty. Nov. 12, 2009) (internal citations omitted).

Courts have extended the automatic stay to actions against non-debtors where there is such an identity of interests that the action against the non-debtor would have an adverse impact on the debtor's estate. Empire Erectors and Elec. Co., Inc. v. Unlimited Locations LLC, 102 A.D.3d 419 (1st Dept 2013). On the other hand, a bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against non-bankrupt defendants, which do not involve the bankrupt's property. Golden v. Moscowitz, 194 A.D.2d 385, 385 (1st Dept 1993) (severing action against the bankrupt party).

#### Motion Sequence 004

Defendant Storms is a former executive of defendant-debtor Liquid Holdings<sup>3</sup>. He contends that the automatic stay as to defendant-debtor Liquid Holdings should extend and apply to him because the claims against him are derivative of and identical to, the claims against defendant-debtor Liquid Holdings.

Plaintiffs' claims against defendant Storms arise out of a private investor meeting that was attended by plaintiff, defendant Storms and other co-defendants. The purpose of the meeting was for defendant-debtor Liquid Holdings to provide

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<sup>3</sup> At the time of the alleged actionable conduct, defendant Storms was Liquid Holding's CEO.

information so that plaintiff could evaluate an investment in defendant-debtor Liquid Holdings. Ultimately, plaintiffs entered into a subscription agreement whereby defendant-debtor Liquid Holdings sold its securities to plaintiff. The claims specifically against defendant Storms include: (i) that he and others retained expensive professionals for defendant-debtor and persuaded highly credentialed businessmen to serve on the defendant-debtor's Board; (ii) he and others assisted in implementing defendant-debtor's IPO; (iii) he and others benefited from their affiliation with defendant-debtor; and (iv) he served as defendant-debtor's CEO and then Vice Chairman of its Board. Thus the claims against defendant Storms are under aiding and abetting and alter ego theories.

Under defendant-debtor Liquid Holdings' bylaws, defendant Storms claims to have a right of indemnification for actions taken as a result of his service as a director or officer of the corporation. Thus any judgment against defendant Storms would in effect constitute a judgment against defendant-debtor Liquid Holdings. Pursuant to the bylaws, defendant Storms must and has advanced to defendant-debtor Liquid Holdings an undertaking before receiving the indemnification. In opposition, plaintiff argues that promptly ascertaining defendant-debtor Liquid Holdings' indemnity obligations would not undermine its liquidation proceedings but, rather, delay its resolution. Plaintiff further contends that defendant Storms was engaged in

action that would personally benefit him thus his liability is separate from defendant-debtor Liquid Holdings.

The case law as to whether indemnity obligations constitute special circumstances to warrant an extension of an automatic stay is mixed. New York Federal Courts have held,

[b]ecause the claims against Muller are not derivative of his status as Chairman and Chief Executive Officer of Global, but rather are premised upon Muller's own conduct, including an alleged breach of his fiduciary duty and misrepresentations made by Muller himself, a stay is not warranted on these grounds. Neither does the existence of Muller's potential claim for indemnification from Global rise to the level of unusual circumstances necessary for an extension of the stay.

Thomson Kernaghan & Co. v Glob. Intellicom, Inc., 99 CIV. 3005 (DLC), 2000 WL 640653, at \*15 (S.D.N.Y. May 17, 2000).

Conversely, the New York State Courts have held, "[w]hile the bankruptcy filing by one defendant does not prevent a plaintiff from proceeding on causes of action against the non-bankrupt defendants, an exception is recognized where, as here, the bankrupt is obligated to indemnify a non-bankrupt defendant." Branham v Loews Orpheum Theatre, Inc., 291 A.D.2d 356 (1st Dept 2002). The most recent binding precedent states that, if a non-debtor is united in interest with its co-defendant who is a discharged debtor then the bankruptcy court's discharge

injunction should be extended to non-debtor. Dorador v Trump Palace Condominium, 126 A.D.3d 603, 604 (1st Dept 2015).

The claims against defendant Storms are sufficiently intertwined with those claims made against defendant-debtor, at this juncture, to extend the stay to defendant Storms. In Growbright Enterprise, Inc. v. Barski, the court held that even though debtor “has no plans to reorganize and apparently will emerge from the bankruptcy proceedings without any assets’ as plaintiff asserts, is insufficient, at this juncture, to support severance.” Growbright Enterprises, Inc. v. Barski, 2015 WL 1973232 at \*1 (Sup. Ct. New York Cnty. May 1, 2015). Additionally, the court held that when “the record supports the claim by [defendant] that the joint and several judgment plaintiff seeks against [defendant] will have ‘an immediate adverse economic consequence for the debtor's estate’ [then a] continued stay of [the] action from further proceedings against [defendant] is warranted.” Id. at \*1.

The allegations against defendant Storms are sufficiently intertwined with the allegations against defendant-debtor, to warrant an extension of the stay to defendant Storms. The only allegations made by plaintiff are that statements made by defendant Storms, and other co-defendants during a February 12, 2013 meeting were fraudulent in nature and induced plaintiff to purchase \$1,250,000 in defendant-debtor’s stock. Complaint ¶ 17, 18, 21, 22. However, both parties agree that all of the alleged statements at this meeting involved defendant-debtor’s business and a

proposed investment by plaintiff's in defendant-debtor. The only benefits to defendant Storms that plaintiff alleges is from defendant Storms' assistance in raising money for defendant-debtor to facilitate its IPO. Complaint ¶¶ 41-43.

As a result, any decision made by this Court against defendant Storms would necessarily have an "an immediate adverse economic consequence for the debtor's estate." Growbright Enterprises, Inc. v. Barski, 2015 WL 1973232 at \*1 (Sup. Ct. New York Cnty. May 1, 2015). Since the allegations against both defendant Storms and defendant-debtor arise out of statements made during the meeting on September 12, 2013, any decision against defendant Storms would necessarily amount to a determination against defendant-debtor.

Since the interests of defendant Storms and defendant-debtor are aligned then the stay should be extended to defendant Storm.

#### Motion Sequence 005

Defendant Brian Ferdinand is a former executive of defendant-debtor Liquid Holdings<sup>4</sup> and Ferdinand Holdings, LLC is an entity in which Defendant Ferdinand wholly owned. The Ferdinand defendants have joined defendant Storms in his arguments contending the claims against defendant Ferdinand are derivative of and identical to, the claims against defendant-debtor Liquid Holdings. The Ferdinand

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<sup>4</sup> At the time of the alleged actionable conduct, defendant Brian Ferdinand was a director of Liquid Holdings.

defendants argue that the stay should be extended to them out of equity<sup>5</sup>. Plaintiff opposes the motion.

Similar to the claim made by defendant Storms, the record supports the claims made by the Ferdinand defendants that any adverse judgment against the defendants, at this juncture, will have "an immediate adverse economic consequence for the debtor's estate." See Growbright Enterprises, Inc. v. Barski, 2015 WL 1973232 at \*1 (Sup. Ct. New York Cnty. May 1, 2015). Plaintiff alleges that the Ferdinand defendants were involved in an additional transaction and Ferdinand and Ferdinand Holdings acted as principals for \$125,000 worth of stock sold to Plaintiffs and this transaction makes Ferdinand defendant's independent of any claim against defendant-debtor Liquid Holdings. However, the crux of plaintiff's allegation surrounds statements made by Brian Ferdinand, and other co-defendants, in his role as Director of Liquid Holdings during the meeting on February 12, 2013. For the same reasons discussed *supra*, this court finds that any decision made, at this juncture, will have an immediate negative impact for the debtor's estate.

Since the interests of the Ferdinand defendants and defendant-debtor are aligned, the stay should be extended to the Ferdinand defendants.

Accordingly it is,

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<sup>5</sup> The parties have stipulated that any decision regarding Brian Ferdinand and Ferdinand Holdings, LLC will also apply to defendant Richard Schaeffer and defendant Schaeffer Holdings, LLC. See Oral Argument pp. 34-35.

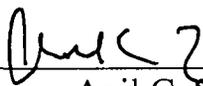
ORDERED that defendant Storms' motion to extend the court's interim stay order is granted until August 30, 2015<sup>6</sup>; and it is further

ORDERED that defendant Brian Ferdinand's motion to extend the court's interim stay order is granted until August 30, 2015; and it is further

ORDERED that defendant Ferdinand Holdings, LLC's motion to extend the court's interim stay order is granted until August 30, 2015; and it is further

ORDERED that the parties are to appear in court for a status conference on September 1, 2016 at 10:00 am<sup>7</sup>.

Date: May 25, 2016  
New York, New York

  
Anil C. Singh

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<sup>6</sup> Based upon representations at oral argument on March 22, 2016, the deadline for filing a proof of claim in the applicable Bankruptcy court is in June and this court extends the interim stay for Defendant Storms, Defendant Ferdinand and Defendant Ferdinand Holding, LLC, until August 30, 2016.

<sup>7</sup> Defendant Liquid Holding's Motion to Dismiss (Mot. Seq. 003) is also adjourned to September 1, 2016 at 10:00 am.