

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Lead Case No. 09-50026-reg, Adv. Case No. 10-05008-reg

- - - - -x

In the Matter of:

GENERAL MOTORS CORPORATION

Debtors.

- - - - -x

MOTORS LIQUIDATION COMPANY

Plaintiffs,

v.

MCM MANAGEMENT CORP.

Defendants.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

July 14, 2010

10:13 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HEARING re Pretrial Conference

HEARING re Motion for Relief from Stay or in the Alternative,
Application for FRBP 2004 Examination Re: The Schaefer Group,
Inc.

HEARING re Debtors' Twelfth Omnibus Motion Pursuant to 11 USC,
Section 365 to Reject Certain Executory Contracts

HEARING re Debtors' Twenty-Fourth Omnibus Objection to Claims
(Workers' Compensation Claims)

Transcribed by: Dena Page

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

PEPPER HAMILTON, LLP

Attorneys for Motors Liquidation Company
100 Renaissance Center, Suite 3600
Detroit, MI 43243

BY: DEBORAH KOVSKY-APAP, ESQ.

WEIL, GOTSHAL & MANGES LLP

Attorneys for Debtor
767 Fifth Avenue
New York, NY 10153

BY: JOSEPH H. SMOLINSKY, ESQ.

JAFFE RAITT HEUER & WEISS P.C.

Attorneys for MCM Management Corp.
27777 Franklin Road, Suite 2500
Southfield, MI 48034

BY: CHRISTOPHER CATALDO, ESQ.

(TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: All right. This is Judge Gerber. GM, want to come on up on that.

UNIDENTIFIED SPEAKER: Yes, hello?

THE COURT: Just a minute, please. At the counsel lectern.

MS. KOVSKY-APAP: Good morning, Your Honor, this is Deborah Kovsky-Apap from Pepper Hamilton, on behalf of Motors Liquidation Company.

THE COURT: May I get your name again, please?

MS. KOVSKY-APAP: Sure. It's Deborah Kovsky-Apap.

THE COURT: I didn't get your last name.

MS. KOVSKY-APAP: Kovsky-Apap.

THE COURT: Can you speak -- pull the microphone closer to your mouth and -- okay, try again.

MS. KOVSKY-APAP: It's Kovsky-Apap.

THE COURT: Wait just a second. Now, I've got breathing on the microphone, on the telephone, and I still can't hear you. I don't think I'm that hard of hearing, but I need some help from both of you. One to be quiet on the phone, and for you -- Ms. Kovsky, is it?

MS. KOVSKY-APAP: Kovsky-Apap, but just Kovsky's fine, if that would be more convenient.

THE COURT: K-o-v-s-k-y?

MS. KOVSKY-APAP: Yes, Your Honor.

1 THE COURT: Okay. You're hyphenated, I'll give you
2 the other half of your name, too, if you'd just tell me what it
3 is.

4 MS. KOVSKY-APAP: Sure. It's Apap, A-p-a-p.

5 THE COURT: A-p-a-p, all right. Ms. Kovsky-Apap and
6 you're from Pepper Hamilton?

7 MS. KOVSKY-APAP: Yes, Your Honor.

8 THE COURT: Okay. Go ahead, please.

9 MR. CATALDO: This is Christopher Cataldo of Jaffe
10 Raitt Heuer & Weiss, appearing for MCM Management Corporation.

11 THE COURT: Okay. And, Ms. Kovsky-Apap, you're
12 special counsel for GM or Motors Liquidation Company in the MCM
13 adversary?

14 MS. KOVSKY-APAP: Yes, Your Honor.

15 THE COURT: Okay. Go ahead then, please.

16 MS. KOVSKY-APAP: Your Honor, this is a status
17 conference in the adversary proceeding that was filed by Motors
18 Liquidation against MCM Management Corp.

19 MCM is a demolition contractor and had asserted
20 approximately a \$22 million secured claim in the bankruptcy.
21 We filed a claim objection and a complaint, turning it into an
22 adversary proceeding. We subsequently amended the complaint,
23 which meant that our original status conference was put off.
24 MCM filed an answer in a counterclaim, and then Motors
25 Liquidation filed a partial motion to dismiss certain of the

1 counts, pursuant to 12(b)(6).

2 After some discussion with MCM's litigation counsel
3 and Mr. Cataldo can please feel free to correct me if I'm
4 misstating anything. I believe that MCM has recognized that
5 there may be some merit to some of the issues that we raised in
6 our motion, with respect to certain of the counts. And MCM
7 intends to file an amended counterclaim, and they've asked that
8 we not push forward with the currently pending motion to
9 dismiss while they do that.

10 We're agreeable to their proposal, and if they file an
11 amended counterclaim and it resolves the issues that we had
12 raised in our motion to dismiss, then we would just answer the
13 counterclaim and go from there. If the amended counterclaim
14 doesn't resolve those issues, then our plan would be to refile
15 an amended motion to dismiss to address whatever, or to raise
16 whatever issues we still see remaining. And we would ask that
17 the Court set a briefing schedule on that.

18 We didn't feel that given the procedural posture, we
19 didn't feel that it made sense to try to set a discovery
20 schedule at this point.

21 THE COURT: Why doesn't it make sense to set a
22 discovery schedule? Don't -- aren't there enough issues that
23 both sides know about, so that you should start rolling up your
24 sleeves and get into your discovery?

25 MS. KOVSKY-APAP: Well, Your Honor, if we're able to

1 dispose of some of the counts in the complaint, then there
2 would be issues that we don't need to take discovery on, and
3 I'd hate to have to go back to the same witnesses and redepose
4 them, if it's not necessary. Because issues that were raised
5 in the complaint end up being dismissed.

6 THE COURT: All right. Well, the question I'm going
7 to ask you, Ms. Kovsky-Apap and then I'm going to ask Mr.
8 Cataldo the same one, is if as I imagine your dialog could well
9 be productive, and you moot out the existing 12(b)(6) issue,
10 were there any remaining issues on failure to state a claim,
11 can simply be raised by answer, so that I don't have to waste
12 my time and yours, and the money of GM creditors on a 12(b)(6),
13 which is a labor intensive exercise, and rarely accomplishes
14 anything, if it doesn't make the entire case go away.

15 Can I get your view on that?

16 MS. KOVSKY-APAP: I believe that we could work
17 something out through discussions where the issues that we
18 raised in our original 12(b)(6) are resolved in their amended
19 counterclaim, and we can answer and go forward.

20 THE COURT: Okay. Anything else that you want to
21 convey to me before I give Mr. Cataldo's perspective?

22 MS. KOVSKY-APAP: No, Your Honor.

23 THE COURT: Okay. Mr. Cataldo, can I get your view?

24 MR. CATALDO: My view is that we would be available to
25 try and resolve all of the 12(b)(6) issues and so we don't have

1 to deal with the motion before the Court. We would agree that
2 that really isn't -- if that can resolve the entire
3 counterclaim, then it's time well spent by the Court.

4 THE COURT: Okay. So here's what I want you to do,
5 folks. I want you to proceed on the road that you've started,
6 which is to get the pleadings cleaned up, so that we're in a
7 position where each of you knows what the other guy is trying
8 to get out of you, and the issues and the claims in each
9 direction have been clarified.

10 I want you to start putting your noodles together to
11 get discovery underway, and I want you to start rolling on
12 that, at least in preliminary terms, even if you haven't fully
13 buttoned up the closing of the pleadings, because I think each
14 of you has probably talked to the other guy enough that you
15 know generally what is going to be on the table in the way of
16 controversy and you can refine it thereafter.

17 I won't make you submit a discovery plan stip to me
18 until you have your arms around it, but I want you to get
19 rolling on it.

20 Ms. Kovsky-Apap, how much time do you think you're
21 going to need for discovery, assuming as I do, that you and Mr.
22 Cataldo can reach a deal in terms of what the issues on the
23 table are?

24 MS. KOVSKY-APAP: I'd like nine months, Your Honor.

25 THE COURT: Nine months?

1 MS. KOVSKY-APAP: Yes, Your Honor.

2 THE COURT: Sounds kind of long. Is there -- is this
3 case that complicated?

4 MS. KOVSKY-APAP: No, Your Honor, but a lot of the
5 witnesses that have factual information about what actually
6 went on and what may have gone wrong, have sort of gone to the
7 four corners of the earth, and it'll take some time to track
8 down former employees of GM, be able to take their depositions,
9 find out what actually happened. There's also reams of
10 documents.

11 THE COURT: Before I get Mr. Cataldo's perspective,
12 tell me in a paragraph or two what this controversy's about.
13 If we had a discussion on it before, I just don't remember it.

14 Ms. Kovsky-Apap?

15 MS. KOVSKY-APAP: Oh, I'm sorry, Your Honor. I
16 thought you said Mr. Cataldo.

17 The gist of the controversy is that MCM was engaged to
18 demolish certain of GM's former manufacturing sites. The way
19 that it was supposed to work was that MCM would actually pay GM
20 money up front, demolish the site, receive its remuneration
21 through taking out scrap and other valuable items from the
22 sites, selling them, recycling them, et cetera, and then once
23 they had actually taken out enough steel, copper, whatever the
24 scrap was that they were getting, above a certain threshold,
25 they were then supposed to share revenue with GM.

1 There were a number of issues that came up at a
2 variety of sites. There are allegations that GM caused delay,
3 there are allegations that MCM caused delay, that there were
4 problems with permits, there was problems with flooding, there
5 was problems with all sorts of things that happened, that
6 caused the projects not to proceed the way that they should
7 have done.

8 At this point, MCM claims that it's entitled to \$22
9 million based on delay claims, damages, breach of contract and
10 so forth, and MLC's position rather, is that MCM owes it still
11 some of the upfront money it was supposed to pay, the revenue
12 sharing, and that MCM breached the contract by not timely
13 completing the demolition.

14 And, Mr. Cataldo, please feel free to correct me if
15 I've said anything incorrectly.

16 THE COURT: And is there some reason why this isn't a
17 garden variety breach of contract case in each direction?

18 MS. KOVSKY-APAP: I'm not sure I understand Your
19 Honor's question.

20 THE COURT: I feel like there's a hurricane on the
21 other side of the phone. If -- I don't know why there is the
22 breathing, but until you're ready to be heard, why don't you
23 just put your phone on mute.

24 And you're saying that these issues require nine
25 months to do discovery on?

1 MS. KOVSKY-APAP: Well, there's, I think, six
2 different demolition sites, a lot of employees involved, and
3 many of them are no longer employees of GM or Motors
4 Liquidation. So just trying to find the information and the
5 right people to ask the questions of, may in and of itself take
6 some time.

7 THE COURT: I'll tell you what's bugging me, Ms.
8 Kovsky-Apap. It isn't the nine months of time in the
9 chronological sense, because I've got enough to -- on my plate,
10 in terms of other cases to give trials to that I -- I ain't
11 going to be sitting on my hands for the next nine months
12 waiting for your trial. But I'm concerned about the cost to
13 the creditor community, and for that matter your opponent of
14 going through nine months of litigation on a matter of this
15 character unless I'm missing something.

16 But I won't ask you to respond to that. Mr. Cataldo,
17 I want to find out from you what you think we need in the way
18 of discovery, because I assume that although Ms. Kovsky-Apap
19 told me the witnesses have gone to the ends of the earth, they
20 haven't gone beyond the territorial limits of the United
21 States.

22 And tell me, if you would, why we have a secured claim
23 here instead of a garden variety contract dispute, which unless
24 I missed something, is an unsecured claim.

25 MR. CATALDO: Your Honor, there certainly is an

1 element of the case what you would characterize as the garden
2 variety contract claim, which is why we filed a proof of claim.
3 There's also -- it's raised in our counterclaim, Your Honor,
4 there was significant post-petition work that was done for
5 which we've asserted an administrative claim.

6 There is also -- we have raised issues that promises
7 for new work, and new contract remain post-petition, and we
8 have brought claims to enforce those promises and those
9 agreements, that would take this outside of just your regular
10 garden variety pre-petition type of contract.

11 THE COURT: Uh-huh. All right. What do you think you
12 need in the way of -- what do you think is a realistic time for
13 discovery?

14 MR. CATALDO: Your Honor, I think probably the reality
15 is it's going to take nine months to get the discovery done on
16 this case. There are some logistic issues involved. Yes, all
17 of the folks that have to be deposed are still within the
18 territorial boundaries of the United States, but just the
19 reality of getting everything scheduled it's going to take
20 time.

21 THE COURT: All right. Folks, I'm going to give you a
22 six-month discovery cut off on fact discovery, extendable for
23 cause, but only for cause. My discretion on this being
24 informed by the fact that except in the most complicated cases
25 that I've had like Adelpia and Lyondell, I have yet to come

1 over a case that requires more than six months to get fact
2 discovery and -- but if there's some reason why you can't get
3 it done in six months, I'll give you -- and you can make a
4 showing of cause other than your desire to do other things,
5 I'll let you do what you need to do.

6 I want you to prepare a stip or consent order,
7 papering it. Have you already had your exchange of documents?
8 I sense not. Am I correct, Ms. Kovsky-Apap?

9 MS. KOVSKY-APAP: That's correct, Your Honor.

10 THE COURT: All right. I want a resolution of the
11 controversy on the pleadings, and to have a stip in hand,
12 vis-a-vis the discovery no later than 30 days from now, and I
13 want you to get a mutually satisfactory status conference date
14 for Ms. Blum (ph) in about the 45-day range.

15 Mr. Cataldo, where are you physically?

16 MR. CATALDO: We are located in Southfield, Michigan.

17 THE COURT: Southfield, Michigan, okay. And Ms.
18 Kovsky, are you based here in New York?

19 MS. KOVSKY-APAP: No, Your Honor, I'm also based in
20 Detroit.

21 THE COURT: All right. Again, I want this case
22 litigated in a way that benefits the creditors. If, as I
23 sense, we can deal with the status conference issues by phone,
24 Ms. Kovsky-Apap and Mr. Cataldo, why don't you just plan on
25 appearing telephonically, so we don't make GM creditors have to

1 pick up the plane fares and the cost of New York hotels and all
2 of that stuff.

3 MS. KOVSKY-APAP: Certainly, Your Honor. I just
4 wanted to point out I happened to be in town anyway --

5 THE COURT: Okay.

6 MS. KOVSKY-APAP: -- so I thought I would come down in
7 person.

8 THE COURT: Okay. Anything else, either side?

9 MS. KOVSKY-APAP: No, Your Honor.

10 THE COURT: Mr. --

11 MR. KATAUBO: No, Your Honor.

12 THE COURT: All right. Thank you, folks. Have a good
13 day.

14 MS. KOVSKY-APAP: Thank you.

15 THE COURT: All right. Main GM calendar. Mr.
16 Smovlinsky, good morning.

17 MR. SMOVLINSKY: Good morning, Your Honor, Joe
18 Smovlinsky of Weil Gotshal and Manges for the debtors. We're
19 left with a very short calendar today.

20 We have one carry-over motion, it's the debtor's
21 twelfth omnibus motion to reject contracts. There was one
22 contract with Electro Motive Diesel that were -- that we had
23 discussions on. They now are okay with the relief requested in
24 the motion, so we're going to submit an order, and that will
25 resolve omnibus motion number twelve.

1 Your Honor, we have two claims objections motions on
2 for the first time today. The debtor's twenty-third omnibus
3 objection to claims. We've received five formal and informal
4 responses, and as usual, we're going to push those off, so we
5 can continue discussions and seek relief with respect to those
6 that did not respond.

7 THE COURT: Very well.

8 MR. SMOVLINSKY: Your Honor, the twenty-fourth omnibus
9 objection to claims that worker's compensation claims. We
10 received no responses, and we would request an order expunging
11 those claims.

12 THE COURT: Okay.

13 MR. SMOVLINSKY: The last matter on the calendar is a
14 motion by Schaefer Group, Inc. for a relief of the stay and for
15 2004. Here, the debtors are a third-party defendant. The
16 plaintiff and the defendant are looking for discovery. They
17 realize now that most of the discovery or all of the discovery
18 is in the hands of GM, New GM.

19 THE COURT: New GM.

20 MR. SMOVLINSKY: With respect to insurance policies,
21 we offered what Your Honor has described in the past, for a
22 variety of reasons, that wasn't acceptable to them, and rather
23 than drag this Court through a discovery dispute with New GM,
24 we've agreed to lift the automatic stay, solely for the purpose
25 of letting them do their discovery in the state court action

1 against New GM. To the extent the stay relief is necessary,
2 I'm not sure it is.

3 THE COURT: Yeah, I never understood that stay,
4 automatic stays protect estates from discovery, although
5 sometimes the discovery is more expensive than some kinds of
6 underlying lawsuits can be.

7 MR. SMOVLINSKY: It doesn't, Your Honor, but
8 theoretically we could argue that without severing the debtor's
9 from that claim, they can't proceed with the litigation. We're
10 not doing that. So we've entered into a stipulation that we
11 won't object to that discovery, and they could operate under
12 their own civil procedure rules.

13 THE COURT: Okay. That's fine.

14 MR. SMOVLINSKY: So we can submit that order to
15 chambers.

16 THE COURT: Very good.

17 MR. SMOVLINSKY: And I think that's the count,
18 everything else was withdrawn or adjourned.

19 THE COURT: Okay. And the other folks in the room are
20 just people who are interested in GM generally? I assume that
21 I covered everything on my calendar? All right. Then we're
22 adjourned. Thank you.

23 (Whereupon, the proceedings were concluded at 10:31 a.m., July
24 15, 2010.)

25 * * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dena Page

Digitally signed by Dena Page
DN: cn=Dena Page, c=US
Reason: I am the author of this document
Date: 2010.07.15 16:01:37 -04'00'

Dena Page

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: July 15, 2010