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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 10-10684 (PJW)

Adversary Case No. 10-51083 (PJW)

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In the Matter of:

ORLEANS HOMEBUILDERS, INC., et al.,

Debtors.

- - - - -x

NVR, INC.,

Plaintiff,

-against-

ORLEANS HOMEBUILDERS, INC., et al.,

Defendants.

- - - - -x

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United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

August 6, 2010
10:29 AM

B E F O R E:
HON. PETER J. WALSH
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: GINGER MACE

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HEARING re Debtors' Motion Pursuant to Bankruptcy Code Sections 105(a), 363(b) and 507(a) for Authority to Pay Pre-Petition Employee Compensation, Benefits, Reimbursable Business Expenses, and Other Obligations and Related Administrative Costs.

HEARING re Motion of Wm. M. Young Company, Inc. for Relief from Automatic Stay.

HEARING re Joseph & Irene Bordowski's Motion for Relief from Automatic Stay.

HEARING re Debtors' Motion for Order (a) Enforcing the Automatic Stay, (b) Awarding Actual Damages, Costs, Attorneys' Fees, Punitive Damages, and (c) Holding Dinaso & Sons Building Supply Company in Civil Contempt.

HEARING re Motion of G&I Greenwood FE LLC for Allowance and Payment of Administrative Expense Claim.

HEARING re Motion of Deborah Paolucci for Relief from Automatic Stay Under Rule 4001(a).

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HEARING re Debtors' Application for Authority to Employ and Retain Ferguson Partners Ltd., as Recruitment Advisor Nunc Pro Tunc to July 14, 2010.

HEARING re Debtors' Application for Authority to Employ and Retain PricewaterhouseCoopers LLP as Auditor and Tax Consultant Nunc Pro Tunc to the Petition Date.

HEARING re Motion of Laura J. Rosquist for Relief from Stay Under Section 362 of the Bankruptcy Code.

HEARING re Debtors' Motion for Order (a) Enforcing the Automatic Stay, (b) Awarding Actual Damages, Costs, Attorneys' Fees, and Punitive Damages, and (C) Holding Eric's Nursery and Landscaping LLC in Civil Contempt.

HEARING re Motion of Karen Lynne Cousin for Relief from the Automatic Stay Pursuant to Section 362 of the Bankruptcy Code.

HEARING re Motion of Byers Station Community Association for Relief from the Automatic Stay Pursuant to Section 362 of the Bankruptcy Code.

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HEARING re Motion of Jeffrey Beard and Nancy Beard for Relief from the Automatic Stay Pursuant to Section 362 of the Bankruptcy Code.

HEARING re Motion of All Steel Supply, Inc. for Relief from Automatic Stay Pursuant to 11 U.S.C. Section 362(d)(1) for Lack of Adequate Protection.

HEARING re Debtors' Application for Authority to Employ and Retain Scanden LLC Nunc Pro Tunc to March 1, 2010.

HEARING re Debtors' Motion for Order Clarifying Home Sale Procedures Established by Home Sales Order in Light of Claims Bar Date.

HEARING re Complaint filed by NVR, Inc. (Adversary Proceeding No. 10-51083).

Transcribed by: Pnina Eilberg

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P R O C E E D I N G S

THE CLERK: Please rise.

THE COURT: Please be seated. Yes?

MR. BURKE: Good morning, Your Honor. Kevin Burke from Cahill Gordon & Reindel for the debtors.

We have the agenda before you, there's been a request from one of the counsel, the counsel for NVR which is here for the status conference, that's one of the last items on the agenda, to go first in light of the fact that that should be very brief, if that suits Your Honor.

THE COURT: Okay.

MR. BURKE: The NVR case is an adversary commenced by NVR seeking fees and disbursements in connection with the failed purchase by NVR of the debtors and the complaint was filed in May. Our motion to dismiss was filed in early July and the plaintiff's time to respond to the motion to dismiss is August 28th, reply September 24th, I believe.

We don't believe there's anything that needs to happen immediately and it's our view that discovery shouldn't proceed until a decision on the motion to dismiss. I believe counsel for NVR wants to commence discovery so we would ask that discovery not proceed at this time, until we know exactly what the parameters of the complaint are. The debtors have scarce resources and would rather not expend them if not needed.

THE COURT: Okay.

1 MR. YODER: Good morning, Your Honor. Steve Yoder
2 from Potter Anderson Carroon on behalf of NVR.

3 Your Honor I have with me, from the Hogan Lovells
4 firm, Frank Spano and Brian Grieco, both of whom Your Honor has
5 been so kind to admit pro hac vice in the case. I'll cede the
6 podium to Mr. Spano for discussion on the status.

7 THE COURT: Okay.

8 MR. SPANO: Good morning, Your Honor. NVR's lawsuit
9 against the OHB defendants, which includes two non-debtors, is
10 principally based on explicit promises in an APA to use
11 "reasonable best efforts to obtain Court approval". These
12 claims are based on explicit provisions in the contract, as
13 well as the implied covenant of good faith and fair dealing.

14 OHB denies factual allegations in the complaint
15 regarding whether promises were made to NVR, whether there was
16 reasonable reliance, whether there are any damages by our
17 client and whether, in connection with our equitable claim for
18 unjust enrichment, NVR's negotiation and participation in the
19 APA bestowed any benefit on the OHB. For that reason we've
20 discussed with Mr. Burke having a very limited, focused
21 discovery program where we focus on the key players who were
22 involved in the discussions and negotiations of the contract,
23 gather their documents and complete necessary deposition
24 discovery by the end of the year. And for that reason, I
25 believe that having this very focused discovery program would

1 actually expedite resolution of the matter, which I believe
2 cannot be resolved on a motion to dismiss because we've
3 satisfied Rule 8, we have well-pleaded factual obligations that
4 state a plausible claim under Twombly & Iqbal.

5 We had a Rule 26(f) conference and I believe counsel
6 for OHB generally agrees that if discovery were pursued, that
7 the parameters of the discovery program we've proposed and the
8 time period would be reasonable. So what we would request is
9 that the Court enter a scheduling order along those lines at
10 this time.

11 THE COURT: Are there defendants other than the
12 debtor?

13 MR. SPANO: Yes, there are two.

14 THE COURT: Who are they?

15 MR. SPANO: They are LLCs which were affiliates of
16 Orleans Homebuilders that as part of the APA had certain assets
17 that they contracted to sell.

18 THE COURT: All right. Mr. Burke, do you wish to be
19 heard further?

20 MR. BURKE: Thank you. Your Honor, the two affiliates
21 are -- they are two affiliates of the debtors, they are not in
22 bankruptcy because they had no assets. They were formed for
23 purposes of this acquisition and they're not a separate party
24 that they can proceed against in this case. This case is
25 against the debtors.

1 We believe this case is very simple. The APA was
2 subject to the approval of this Court, in all of its respects,
3 and the fee provisions of the APA, all of the entitlement that
4 the plaintiff would have to any recovery was subject to the
5 approval of this Court. That approval did not occur, the case
6 should be dismissed.

7 At the minimum, we think that issue should be decided
8 before we embark on an expensive course of discovery. If there
9 are fact issues that Your Honor sees in reviewing the papers,
10 we can narrowly tailor the discovery to those facts and get
11 this promptly heard. But until we know exactly what the
12 complaint is, it's just -- we'll be off spending money,
13 perhaps, for naught.

14 THE COURT: Let me ask you a question. When the
15 debtor decided not to do a 363 transaction but to seek a
16 reorganization, can you tell me what prompted that change of
17 position?

18 MR. BURKE: Yes, Your Honor. The secured lenders of
19 the debtors sold substantial portions of their positions to
20 other parties who, when they arrived on the scene, determined
21 that their interests, and in their view the interests of the
22 entire estate, were better served by a reorganization than by
23 the original thought of the sale of assets, which would have
24 essentially been for the benefit of the secured lenders. It
25 was a very small pot available to the unsecured under the

1 original APA.

2 THE COURT: Is that fact anywhere in the record?

3 MR. BURKE: I don't believe it's in the -- it is
4 alleged in the complaint that that occurred. It is also, of
5 course, part of this Court's records in the context of various
6 applications that were made in the course of when that
7 occurred. There are filings that reference the change in
8 ownership and the change in plan.

9 THE COURT: Because it strikes me that that fact may
10 have bearing upon the merits of the complaint.

11 MR. BURKE: I don't think that fact is in dispute,
12 Your Honor, but certainly if the discovery were limited to did
13 another group take ownership of the secured debt and press for
14 a different approach, that's a fairly confined area that would
15 not cost a huge amount to resolve, if Your Honor believes
16 that's worthy of pursuing.

17 THE COURT: I think it may be relevant. I'm sure
18 you're aware of the Penn Traffic decision that I made here.

19 MR. BURKE: We are.

20 THE COURT: And in that case what I pointed out, I
21 don't remember whether that's a reported opinion or not.

22 MR. BURKE: Actually, we did attach a slip opinion and
23 some transcripts to the motion.

24 THE COURT: I pointed out that, let's see, the two
25 days before the motion to approve the sale and the auction

1 procedure, two days before the debtor backed out because the
2 new buyer came in with a lot more money. And I pointed out in
3 that opinion that had the -- notwithstanding the new bidder
4 with more money, if the debtor attempted to go forward with the
5 sale process that was to be heard two days later, it was very
6 obvious that the committee would oppose that motion. And given
7 the reasons why the committee stated they would oppose it if it
8 went forward, I concluded that the contract would not have been
9 approved. And therefore, it never got to first base, if you
10 will.

11 MR. BURKE: In this context the committee had already
12 opposed the sale motion, even before the change in plan and of
13 course with the change in plan both the committee and the
14 secureds would have been against, and in fact the debtors,
15 would have been against the motion.

16 THE COURT: Did the committee file an objection?

17 MR. BURKE: Yes.

18 THE COURT: Well, I was not aware of that. Okay.
19 Well let me put it this way, I think if anybody is not
20 satisfied with the factual record regarding who prompted a
21 decision to not go forward, I think we ought to have discovery
22 on that very limited issue, nothing else.

23 MR. BURKE: We will be prepared to do that, Your
24 Honor.

25 THE COURT: Okay.

1 MR. SPANO: May I respond very briefly?

2 THE COURT: Yes.

3 MR. SPANO: I just -- as our complaint, I believe,
4 makes clear, this is not an application for a breakup fee.
5 This is a lawsuit for damages based on a whole series of
6 representations and assurances.

7 THE COURT: I understand.

8 MR. SPANO: And that's why we believe the discovery,
9 in fairness, ought not to be limited to that one highly
10 relevant point, because the issue of what was told to us and
11 when and whether we reasonably relied is hotly contested issues
12 in their papers and we would like an opportunity to prove our
13 case.

14 THE COURT: But don't you have those allegations in
15 your complaint?

16 MR. SPANO: Yes, we do.

17 THE COURT: That somebody said we're on track, we're
18 going forward?

19 MR. SPANO: Yes.

20 THE COURT: Or language to that effect.

21 MR. SPANO: Like there's no turning back now, for
22 example.

23 THE COURT: Okay. And I assume the debtor does not
24 deny that?

25 MR. BURKE: Not for purposes of the motion to dismiss,

1 Your Honor.

2 THE COURT: Okay.

3 MR. SPANO: Thank you.

4 THE COURT: Okay. Well, let's proceed with the
5 limited discovery and keep on track for the schedule for the
6 briefing.

7 MR. BURKE: Returning to the agenda, Your Honor, the
8 next thing that's up is the motion of Laura J. Rosquist for
9 relief from stay. I guess since that is Ms. Rosquist's motion,
10 I will cede the podium to the movant.

11 THE COURT: Okay. What item is that?

12 MR. BURKE: Item 9.

13 THE COURT: Okay.

14 MR. YODER: Your Honor, may we be excused?

15 THE COURT: Yes.

16 MR. YODER: Thank you.

17 MR. BUSENKELL: Good afternoon, Your Honor. Mike
18 Busenkell, Womble Carlyle on behalf of Ms. Rosquist.

19 I don't know if Your Honor's had an opportunity to
20 read the papers, if not I can give you --

21 THE COURT: I have.

22 MR. BUSENKELL: -- a little bit of background and I'll
23 skip the background and go right to the basis for the relief
24 that we're requesting.

25 Ms. Rosquist is requesting relief from the stay to

1 allow the Illinois State Court proceeding to move forward and
2 in our view, if you look at the Rexene factors, it warrants
3 lifting the stay to allow that to move forward.

4 As far as prejudice to the debtors, these cases have
5 been proceeding for over five months, close to six months. The
6 debtors have counsel, separate counsel, handling the Illinois
7 action. I can't imagine, given the nature of the action, it's
8 a warranty claim, that the debtors' CFO or chief restructuring
9 officer or anyone who's really involved in the restructuring of
10 the company is going to be involved in the Illinois litigation.
11 It really is a warranty case that I'm sure the debtors have
12 plenty of experience handling.

13 In that light, we don't believe that it would cause
14 much distraction at all, from the reorganization and very
15 little, if any, prejudice to the debtors in allowing the
16 proceeding to go forward. As far as prejudice to the movant,
17 we would submit that this is a little bit different than the
18 normal case that Your Honor might see requesting relief from
19 the stay.

20 The movant's house is at the point where she can't
21 sell it because of the defects and it's close to being
22 uninhabitable. The case has been proceeding for over two
23 years, the Illinois action, and it's critical that she be able
24 to move forward and she should be permitted to move forward
25 because -- there are also some codefendants in this case and

1 the debtors have suggested that, I guess, the matters be
2 bifurcated and we be permitted to proceed against the
3 codefendants in Illinois and her claim could be subject to the
4 claims reconciliation process before Your Honor.

5 That would be prejudicial to Ms. Rosquist to have to
6 litigate the claims in separate forums, especially given that
7 she's in Illinois, the property's in Illinois, all the
8 codefendants are in Illinois and to have to proceed with the
9 matters separately would be prejudicial to the movant.

10 And with respect to the last Rexene factor, likelihood
11 of success on the merits, this is almost, *res ipsa loquitur*
12 type of case. She bought the home from them; the home has
13 serious deficiencies in terms of its structure and the
14 foundation. I don't think there can be a serious question as
15 to liability.

16 So looking at the Rexene factors, we believe that they
17 weigh in favor of allowing Ms. Rosquist to proceed with the
18 Illinois action in granting her relief from the stay.

19 MR. BURKE: Kevin Burke for the debtors, Your Honor.
20 What was missing from that argument was something that was
21 brought forward for the first time in reply in this case and
22 that is that the debtors reached a settlement with Ms. Rosquist
23 in Illinois that was subject to a court order that approved
24 that settlement and actually made it a mandatory injunction
25 that the debtor pay for the repair of the house.

1 There's nothing to try. There's nothing to go back to
2 do, vis-a-vis the debtors in Illinois. They've agreed that
3 they should repair the house. They've agreed to pay for it.
4 The problem is, that's a prepetition agreement. That
5 prepetition agreement is subject to the claims process here.
6 She'll be entitled to whatever unsecured creditors get in this
7 case, not to go back and waste the debtors' money trying a case
8 that they've already settled.

9 THE COURT: I had difficulty reading those handwritten
10 orders. Did the -- you say there was a settlement?

11 MR. BURKE: Yes, and that's reflected in the
12 attachment to the second handwritten order that the judge
13 orders --

14 THE COURT: And does it identify an amount for which
15 your client is liable?

16 MR. BURKE: No, because the amount was subject to
17 whatever the contractor ultimately charged for it. But it does
18 identify the contractor. It identifies the work that is to be
19 performed, in detail, pursuant to prior estimates and says that
20 work should get done, debtors should pay for it.

21 THE COURT: With no price tag?

22 MR. BURKE: No exact number.

23 THE COURT: No limit?

24 MR. BURKE: No limit, but there were bids submitted by
25 this company so there was parameters that the people were --

1 that everyone was talking about.

2 THE COURT: And what were the bids?

3 MR. BURKE: I don't know the exact numbers, Your
4 Honor, but they were several tens of thousands of dollars.

5 So Your Honor, there's nothing to go back and try, as
6 against the debtor. The debtor already agreed to pay for the
7 repair. The problem here is that the debtor went bankrupt in
8 the interim and that puts a stay on enforcement of that
9 settlement and it forces it back to this Court, ultimately, for
10 resolution as part of the claims resolution process.

11 The stay, the automatic stay, has no impact on Ms.
12 Rosquist's ability to go after the other people, who actually
13 did the work that the debtors are being charged with solely
14 because they were the general contractor. But the people who
15 did the work that led to the subsistence of their house,
16 they're also defendants in the case. They're -- the debtors
17 would just turn around and claim against them anyway.

18 THE COURT: Where do they stand with respect to the
19 settlement?

20 MR. BURKE: They're not in the settlement. That's
21 part of why the injunction was entered was because under
22 Illinois law, in order to retain your contribution rights,
23 which the debtors wanted to retain because they didn't think
24 this was their fault, they had to have what is called a good
25 faith finding that the settlement was done in good faith,

1 otherwise they would give up their contribution rights and
2 indemnity rights. So that's why all of those proceedings
3 happened.

4 If you look at the typewritten attachment to the
5 second handwritten order you see all the detailed findings that
6 are in there about the ability -- the good faith nature of the
7 settlement so that the debtors, or then just Orleans, could
8 proceed against the third party defendants to get recoupment
9 for anything they had to pay for the repair.

10 This case should go on as against the other people.
11 They can get the judgment, perhaps collect it all.
12 Unfortunately, it does not appear that this case is going to be
13 a hundred cent case for unsecured creditors and far from it.
14 So unfortunately there may not be a lot for Ms. Rosquist to
15 obtain from debtors, notwithstanding the settlement. The fact
16 is, there's nothing to try. There's nothing to go back and do.

17 If the case did go back there, he was speaking briefly
18 about the inconvenience of having to be in this court, well if
19 the case does go back to Illinois, the debtors will remove it
20 to federal court there and ask that it be transferred here
21 anyway, at least as to the debtors. It's not going to stay in
22 the State Court in Illinois no matter what.

23 We think that the motion is unnecessary because the
24 liability has already been determined by the settlement. The
25 amount was subject to some fluctuation, based on the bids of

1 the contractors, but it was set forth exactly what we would pay
2 for and there's nothing to go back and try and so the motion
3 should be denied.

4 THE COURT: Any response?

5 MR. BUSENKELL: Your Honor, I don't necessarily agree
6 with that. There was a settlement reached at mediation and the
7 settlement, I think Your Honor, may have been able to read
8 that, maybe not, given the handwritten notes, where the debtors
9 agreed to go and remediate the problem. I'm not sure if there
10 was because of some kind of delay in doing so or because of
11 this good faith finding that counsel mentions, but ultimately
12 the Court entered the injunction ordering them to make the
13 repairs shortly before they filed their Chapter 11 proceedings.

14 My point is that there's been no dollar amount fixed.
15 It was simply an order go make these repairs. So there is
16 something to go litigate in Illinois. I just wanted to clarify
17 that.

18 THE COURT: Well, but at the end of the day the debtor
19 has to pay whatever subcontractor is going to perform the
20 remediation, right? And we don't know whether that's 10,000
21 dollars or 100,000 dollars, but it is a significant number and
22 if I require the debtor to pay that, then that creditor is a
23 leg up on all other creditors. How can I sanction that?

24 MR. BUSENKELL: We're not asking for that, Your Honor.
25 We're asking that the Illinois proceeding be allowed to go

1 forward so the claim can be liquidated.

2 THE COURT: But my understanding is it is liquidated.

3 MR. BUSENKELL: I don't --

4 THE COURT: We don't know the exact amount.

5 MR. BUSENKELL: Right.

6 THE COURT: It's a significant number.

7 MR. BUSENKELL: We don't know the exact amount so I
8 don't think it is liquidated. We don't know what the dollar
9 amount is.

10 THE COURT: Well, whatever -- who's entitled to pick
11 the contractor to do the repair?

12 MR. BUSENKELL: If I recall correctly --

13 THE COURT: Is it the debtor?

14 MR. BUSENKELL: I think -- well, the parties confer
15 but I'm not entirely sure on that.

16 THE COURT: Mr. Burke, do you know the answer to that?

17 MR. BURKE: Your Honor, I believe the contractor was
18 already selected, perhaps as far as the mediation, but there is
19 a set contractor referred to.

20 MR. BUSENKELL: Was that Ram Jack (ph.)?

21 MR. BURKE: Ram Jack, correct. And their expenses are
22 the ones that the debtors are supposed to pay under the
23 settlement.

24 THE COURT: But you don't know what that number is?

25 MR. BURKE: No, not the exact number because it was

1 subject to actually doing the work and when they -- the work
2 always, you know from if you've done any home construction,
3 every time you do start something the number changes somewhat
4 in the course of the process. But there were estimates that
5 were presented to the mediator and agreed to by the parties and
6 there were certain fees in this order that were expressly
7 agreed to, like a 1,500 dollar engineering fee, 10,000 dollars
8 for fixing piers under the garage. There are specific numbers
9 in the settlement and the rest of it would be done by the Ram
10 Jack contractor, to be paid for by the debtor.

11 THE COURT: Well, I'm inclined to agree with Mr.
12 Burke. This case is over and there's, effectively, a judgment.

13 MR. BUSENKELL: Effectively a judgment that doesn't
14 completely set forth the dollar amount that the movant's
15 entitled to.

16 THE COURT: I understand that.

17 MR. BUSENKELL: And we don't know what that dollar
18 amount is.

19 THE COURT: But the contractor that they have
20 selected, I assume, is not going to commence performance on
21 behalf of a debtor.

22 MR. BUSENKELL: That's probably a fair assumption.

23 THE COURT: And the debtor can't, obviously, say to
24 that contractor tell us what the number is and we'll write out
25 a check.

1 MR. BUSENKELL: Then, I think, if you're in a
2 situation where you have this court ordered injunction, based
3 on the mediation settlement, that hasn't been performed, I
4 think we should be able to go forward as if the settlement
5 doesn't exist so we can liquidate our claim. This was a
6 settlement that hasn't been performed by the debtor. Why
7 shouldn't we be able to go forward and say these are our
8 damages -- get a judgment from the Illinois court that says
9 these are your damages because the house is falling apart?
10 Because right now the movant's left in the situation where she
11 has this injunction that's worthless because it's ordering the
12 debtors to do something, and I don't disagree with Your Honor
13 that they can't do it at this juncture. We don't have a
14 liquidated claim. We don't have a dollar amount to support our
15 claim. We need to get that from the Illinois court.

16 THE COURT: I'm confused. Does the -- when the
17 parties agree upon the contractor to do the remediation and he
18 gives them a number, are you telling me the parties have to get
19 back to the Court and get court approval of that number?

20 MR. BUSENKELL: No, that's not what I'm saying. I
21 guess I don't follow Your Honor's question.

22 THE COURT: I thought you were suggesting that the
23 parties had to go back to the Court to finalize this matter.

24 MR. BUSENKELL: No. No, I'm not. That's not what I'm
25 suggesting. What I'm saying is, the parties went to mediation

1 and the debtors agreed to remediate the property. I think
2 ultimately that was memorialized in this injunction that was
3 entered by the Illinois court. My point is, if the debtors
4 aren't going to do that we should be permitted to go forward
5 and liquidate our claim, get a dollar amount, this is the
6 damage that the movant has incurred because this house has
7 defective foundation.

8 Right now we're in a situation where we have this
9 injunction that's ordering the debtors to do something that
10 they can't do; they're not going to do, so that doesn't resolve
11 the issue. That doesn't finalize our claim. That doesn't put
12 a number on our claim, that's my point.

13 THE COURT: Can the debtor get a number from the
14 contractor who's going to do the repairs?

15 MR. BURKE: Your Honor, the -- certainly if this Court
16 were resolving this claim, if this claim were filed -- by the
17 way Monday is the bar date so the claimant ought to be well
18 aware of that. If this Court were asked to resolve that claim,
19 Your Honor would get evidence of what the claim was and through
20 that this Ram Jack quote would be put before you and you would
21 determine -- I'm certain we would agree on what number it was,
22 that's not going to be the issue. The amount is not the issue
23 here. The amount is just a ministerial pass to actually
24 getting the work done or actually getting a quote of the work
25 done.

1 The problem is, to go back and waste time and money in
2 Illinois litigating a case where we've already agreed we're
3 obligated to make the repair because of the settlement, it
4 makes no sense.

5 Also, just something I didn't mention earlier, counsel
6 mentioned that the debtors had counsel in that case. Well, the
7 debtors don't have counsel in that case as debtors. We've
8 never applied to Your Honor to approve that counsel in this
9 court. We would have to hire that counsel, that counsel has
10 prepetition claims. I'm not sure that counsel would be willing
11 to be hired. So that there are other factors here to going
12 back to Illinois.

13 THE COURT: Okay. Well, notwithstanding that you keep
14 referring to it as an injunction, to me it's the equivalent of
15 a settlement or a consented to judgment in X amount and that X
16 is whatever the subcontractor says it is.

17 MR. BUSENKELL: I'm calling it an injunction because
18 that's what it's entitled and I'm not randomly applying some
19 label to the document.

20 THE COURT: Okay. Well, under the circumstances I
21 don't think I can require the debtor to hire that contractor to
22 do the repairs and I doubt that that contractor is going to
23 enter into a contract with the debtor absent payment up front.
24 I mean, he'd be foolish to enter into a contract with this
25 debtor.

1 MR. BUSENKELL: Well then, again Your Honor, I think
2 what we're asking for is to be able to proceed in Illinois. I
3 understand Your Honor's position that the injunction is a
4 judgment. I don't quite see it as the same because, again,
5 there's no -- the damages aren't liquidated on that judgment.
6 We don't know what our judgment is for the damages and for the
7 deficiencies in the construction. As we stand here right now
8 we have no idea and our position is that the movant should be
9 permitted to go forward in Illinois and liquidate that claim.
10 And we don't want to have to do it in two separate forums. We
11 don't want to have to proceed against the codefendants in
12 Illinois and separately --

13 THE COURT: How are you going to liquidate the claim?

14 MR. BUSENKELL: Go forward in Illinois with the
15 debtors and the codefendants and get a judgment on a dollar
16 amount on damages.

17 THE COURT: And how would you do that?

18 MR. BUSENKELL: I guess Illinois counsel would try the
19 case.

20 THE COURT: There's already a settlement with respect
21 to this defendant?

22 MR. BUSENKELL: I guess you could have a trial on the
23 damages aspect because you don't know what that is. No one
24 knows what that number is.

25 THE COURT: But what good would that do you, your

1 client? Suppose you got a number of 50,000 dollars, what would
2 you do with that number relative to the debtor?

3 MR. BUSENKELL: I suppose we'll file our claim. What
4 other option would we have?

5 THE COURT: I don't think you have any other options.

6 MR. BUSENKELL: Right.

7 THE COURT: And I assume you'll file a claim before
8 the bar date and if the -- if the debtor is in possession of
9 proposals, pick the highest one as a starting point.

10 MR. BUSENKELL: All right. Very well, Your Honor.

11 THE COURT: I feel sorry for the family with this
12 defective home but it just doesn't make any sense to require
13 the debtor to perform a prepetition obligation for the full
14 amount of the claim. And it seems to me a certainty in this
15 case that the unsecured creditors are going to fair badly in
16 this case.

17 MR. BUSENKELL: Uh-huh.

18 THE COURT: I think that's my reading from day one
19 was.

20 MR. BUSENKELL: All right. Thank you, Your Honor.

21 THE COURT: Okay. Next?

22 MR. BURKE: Next up, Your Honor, is item 10 which is
23 the debtor's motion to assess damages against Eric's nursery
24 for breach of the automatic stay. If you recall we were here
25 last month where Your Honor, after having reviewed the

1 claimants -- the debtors' motion and the response from Eric's
2 Nursery, determined that this was a clear case for contempt and
3 set today for the assessment of damages.

4 You've instructed us to file and we did file a further
5 pleading that identified each of the damages, including each
6 attorneys' fee time entry and we submitted that to the Court,
7 served that on Eric's Nursery and we're here today for Your
8 Honor's ruling or any questions Your Honor has about those
9 materials.

10 Well, let me look at the -- I had forgotten what the
11 materials are. You submitted invoices?

12 MR. BURKE: We submitted invoices for the repairs and
13 we submitted detailed time records for the attorneys' fees. I
14 have a spare set of them for Your Honor.

15 THE COURT: Yes, could you --

16 (Pause)

17 THE COURT: Okay. Is counsel for Eric Nursery here?

18 MR. BATES: Good morning, Your Honor. Gilbert W.
19 Bates of Penberthy & Penberthy. I also have John Penberthy
20 here who's the New Jersey counsel for Eric's Nursery and Eric
21 Solomon, the owner, is here as well. And we apologize last
22 time, in court, we understood it was an afternoon hearing and
23 when we had appeared it had already occurred.

24 In any event, in this case the first thing that we'd
25 like to look at is the fact that the underlying matter here,

1 when assessing the damages, our client's position is that it
2 was fraudulent misrepresentation here that caused Eric's to --

3 THE COURT: Are you prepared to prove that?

4 MR. BATES: Yes we are, Your Honor. Mr. Solomon is
5 here. He contacted Bill Briegel who's the vice president of --
6 let me try that again, Bill Briegel contacted him twice early
7 in 2010 because under a long-term contract that had started
8 back in November 2005 under which Eric's was putting the
9 driveways in in this development, they had stopped performing
10 the work because they had not been paid, or at least the account
11 was seriously in arrears.

12 He received a telephone call, the first one, in
13 January from Mr. Briegel pleading, begging with Eric's to come
14 and do the work. Mr. Solomon said you guys are 45,000 dollars
15 behind; I can't really go forward with work until I get some
16 payment on that.

17 Mr. Briegel told him that, one, he'd be paid 25,000
18 dollars in the arrears, and we're not here about that because
19 that was prepetition, and also you'll be paid promptly on the
20 work going forward.

21 In February, again, Mr. Briegel called and Mr. Solomon
22 said well we can go and start doing the work. The driveway was
23 prepared, the underlayment was laid down, the bedding or the
24 seeding for the driveway was there. Eric's Nursery took pavers
25 there; they laid some of them out. They were still cuts that

1 needed to be done but the pavement was never affixed to this
2 driveway. It was still -- it was the medium under which they
3 had to perform their contract. The contract provides that
4 Eric's going to provide all the materials and the labor to do
5 these jobs. So the material -- pavements were not attached to
6 the driveway. In mid-February we had snowstorms, they had to
7 wait. So they had never been finished. They had never been
8 sanded and affixed to the driveway.

9 When Eric received notice that the bankruptcy had been
10 filed, Mr. Penberthy called New York counsel for Orleans and
11 offered to perform the work if they pay for the executory
12 portion of this contract. And the labor to affix the pavements
13 and actually affixing the pavements themselves was what
14 remained to be done and we offered to do that for 6,500
15 dollars, what was owed going forward and this is postpetition
16 work.

17 The counsel for -- the New York counsel for Orleans, I
18 should say, for the debtor, told Mr. Penberthy well we're not
19 going to do that and not only that we may file criminal charges
20 against you for stealing our pavers which, of course, Eric's
21 position is these pavers are still Eric's. We needed to buy
22 everything under each of these driveways under the contract.
23 We had to buy all the materials, affix them and perform the
24 labor and then we can apply and we'll be paid under the
25 contract.

1 THE COURT: The bottom line is fraudulent inducement,
2 right?

3 MR. BATES: That's correct, Your Honor. And it was
4 vice president of the company.

5 THE COURT: And you have witnesses who are going to
6 testify?

7 MR. BATES: Yes we do. We do have that.

8 THE COURT: Do you have any witness?

9 MR. BURKE: No, Your Honor. We're here today on the
10 assessment of damages; we weren't here for an evidentiary
11 hearing. But it's our position that inducement to perform the
12 work does not alter the fact that these pavers were removed in
13 violation of the automatic stay. They were sitting in the
14 driveway, laid out already, whether or not they still needed
15 some sand, I don't know, but there's no affixing that gets done
16 with these pavers. These driveways were done; maybe some sand
17 had to go on top of them. They were on debtors' property.
18 They were debtors' property, from the beginning. As soon as
19 they were put in place they became debtors' property and
20 perhaps the day they were delivered to debtors' property they
21 became the debtors' property.

22 Here Eric's nursery went, ripped those all out, every
23 one of them, and took them away.

24 THE COURT: Well, no, I understand that. But they're
25 alleging fraudulent inducement and that claim would not be

1 discharged.

2 MR. BURKE: Your Honor, this is --

3 THE COURT: If they're successful in that regard.

4 MR. BURKE: That would be true if this were an
5 individual debtor, Your Honor. This is a corporate debtor and
6 the discharge -- the non-discharge provisions don't apply to a
7 corporate debtor. We'll have a plan, ultimately, and Eric's
8 may object to that plan and the discharge that it would provide
9 but the ordinary discharge rules don't apply and in fact Eric's
10 Nursery has commenced an adversary proceeding in this Court for
11 exactly that, to deny a discharge.

12 We've sent a Rule 11 letter saying you better withdraw
13 that because that's not valid and my understanding is it's been
14 agreed that that will be withdrawn.

15 MR. BATES: Your Honor, the adversary proceeding will
16 be withdrawn. However, there was fraudulent inducement in this
17 matter.

18 As the vice president of the company, Mr. Solomon
19 justifiably relied on his representations that going forward
20 this would be done. Plus these pavers had not been affixed,
21 and it's more than just sprinkling sand on them. They have to
22 -- sand has to put on, they be tapped down, cuts had to be made
23 to fit them to the driveways. We have townhouses here with
24 adjoining driveways that's why you'll see there's two invoices
25 in such for each of these items. And on top of that, Eric's --

1 even if it was a technical violation of the stay, Eric's was
2 willing to come in and do that work if they were paid for the
3 postpetition work and the postpetition work included these
4 materials that had to be affixed and the labor. And that would
5 have been a total of 6,500 dollars. So if there's even damages
6 due, Orleans should have to mitigate the damages. They could
7 have had this done by Eric's on schedule, probably even quicker
8 than they had it done by another vendor who charged more
9 because the driveway was not ripped up.

10 What happened was, Eric's went to the location and
11 they lifted the pavers off. They didn't want to break the
12 pavers, they don't want to damage it, they make no profit off
13 trying to damage this driveway. This costs Eric's more each
14 time. They had to pay to go have them recovered. Under the
15 UCC they're entitled to recover them, they were done within
16 twenty days of putting them on the driveway, laying them in
17 preparation for affixing them, the petition was filed.

18 If there is a breach found by the Court because these
19 were laying on the driveway then the breach would be a very
20 technical one and the property -- the damages are in no way
21 justified and just the attorneys' fees. We offered to complete
22 the work under -- as an executory contract that they never
23 rejected. The contract continues from 2005 till today. So
24 Eric's was entitled to find out one way or another when they're
25 going to do this. As a matter of fact, probably Eric's was

1 entitled to complete that job.

2 THE COURT: Well, effectively weren't you asking for
3 payment of a prepetition claim?

4 MR. BATES: No, Your Honor. We were asking for a
5 payment because this -- again, there's about 40 to 45,000
6 dollars, I'm not sure, of prepetition claims that are out there
7 that haven't been paid and we explained to Mr. Solomon that
8 hey, those go to the bankruptcy. Unfortunately you have to
9 deal with the bankruptcy rules and the court for prepetition
10 claims. But the executory portion of this contract, if they're
11 affirming the contract which is what would entitle them to
12 these pavers and entitle them to the labor, they have to affirm
13 the contract, that's postpetition date for these specific two
14 driveways.

15 THE COURT: This work was performed prepetition,
16 correct?

17 MR. BURKE: Yes.

18 MR. BATES: The underlayment of the driveways were.
19 The actual pavers sat there but they were not affixed. The
20 final cuts -- the cuts that had to be made to outline the curve
21 of the driveway --

22 THE COURT: The work was done prepetition?

23 MR. BATES: The underlayment of the driveway was.

24 THE COURT: And postpetition you took your property
25 back or you took property back?

1 MR. BATES: Right, Your Honor. And postpetition,
2 also, to complete the job, the only work that needed to be done
3 was laying of new pavers and then the putting the sand on them,
4 the labor to finish the driveway and this work is the
5 postpetition work that needed to be done.

6 Now we believe it was more than just sprinkling sand
7 on there however counsel to the debtor took that position. The
8 thing is that what needed to be done was the sanding, the
9 affixing and the final cuts before you did that and then that
10 would have finished this contract and we offered to do this,
11 the balance of that work, and that was postpetition work.

12 So, you know, as we look at it, also, we offered to
13 complete that. So even if there are damages they failed to
14 mitigate --

15 THE COURT: You offered to complete it if they would
16 pay you for the prepetition --

17 MR. BATES: For the postpetition work.

18 THE COURT: -- for the prepetition --

19 MR. BATES: No, Your Honor. We did not ask them to
20 pay for prepetition work.

21 I guess if Your Honor, sees the underlayment of the
22 driveway we might be able to break that down if there was some
23 of that. But there was still work that needed to be completed.
24 This contract was still executory because our client only got
25 paid once they were completed, once the work was done is when

1 they got paid.

2 THE COURT: But you said you were willing,
3 postpetition, to complete the work --

4 MR. BATES: Right. For postpetition --

5 THE COURT: -- if they paid you for postpetition work?

6 MR. BATES: Yes. Yes, Your Honor.

7 THE COURT: Do you have a response to that?

8 MR. BURKE: Yes, Your Honor. After the blocks had
9 been removed we sent a letter saying hey, the violation was
10 stayed but them back. They said, we will if you pay us to
11 which we said no and filed this motion.

12 THE COURT: Pay you what?

13 MR. BURKE: Their demand was pay us to put the
14 driveways in. It didn't say just for putting the sand on the
15 top because, of course, now there's no driveway there. They
16 had to put the whole thing back and they demanded payment for
17 the whole thing. There's nothing in the demand that says, or
18 in the conversations that suggested that the payment would just
19 be for putting the sand on top or doing those last couple of
20 cuts. The demand was if we get paid we'll put it back but not
21 until we get paid.

22 THE COURT: His story is different from yours.

23 MR. BATES: I understand that, Your Honor. And Your
24 Honor, the driveways -- it's more than just -- the driveway was
25 not gone. Anything that had been done was already there. The

1 only thing that had been removed were the pavers. My client
2 couldn't recoup the sand or the concrete, the underlayment.
3 All they could recoup was the pavers because those they could
4 possibly resell. They were trying to mitigate their damages
5 because anything that was affixed was left. Anything that
6 wasn't was what was removed and that's where the violation to
7 stay is argued, is the removal of the non-affixed pavers.

8 MR. BURKE: Your Honor, I'd like, if I can, just to
9 point to their objection which makes clear what, in fact, they
10 demanded.

11 THE COURT: I'm sorry; come to the podium, please.

12 MR. BATES: Thank you, Your Honor.

13 THE COURT: Hold on. I'm going to hear from Mr.
14 Burke.

15 MR. BURKE: The cost of the --

16 THE COURT: At the podium, sir.

17 MR. BURKE: I'm sorry. The cost of the pavers and
18 labor to complete the job would have been about 7,500 dollars,
19 that's paragraph 14 to the objection filed by Mr. Penberthy's
20 firm. They wanted us to pay for the pavers and the work to
21 reinstall them. That's why that offer was rejected. The
22 pavers were already debtor's property. The pavers had already
23 been mostly installed.

24 THE COURT: Do you dispute that fact?

25 MR. BATES: We do because the installation --

1 THE COURT: But he's reading from your papers?

2 MR. BATES: I don't dispute the fact that this is our
3 document. What we do dispute is whether or not the pavers were
4 actually installed at the time. And that's -- Your Honor, to
5 use an analogy, if we hired a house painter and he came to the
6 building, he brought his paints, which is the medium he's going
7 to use to complete the contract because he has to put the
8 materials on the walls. And he puts a bucket of paint in front
9 of each wall and then at the end of the day he goes home.

10 Overnight he finds out that a bankruptcy has been
11 filed. He comes back, he says, gee here's my materials,
12 they're on the site but they haven't been affixed to the
13 property yet and the final step in affixing the pavers to the
14 driveway is you take the pavers, you lay them out on the
15 driveway, you have to make cuts for where the specific turns
16 and curves and things are in the driveway, and then you have
17 tent (ph.) them and you have to provide the sand that locks
18 them together and that's what affixes them. They were never
19 locked together.

20 So when it's described that they were ripped up, no.
21 They were sitting there, generally where they would belong, and
22 then they were lifted up gently and taken so they could be
23 resold. This is not where this driveway was destroyed. If
24 anything, according to Mr. Solomon, the sand that underlies the
25 pavers would have to be restreaked, dragging a board across to

1 flatten it and the new pavers laid.

2 Now even if we get to the point where we say well gee
3 we should let the pavers -- the damages that are claimed in
4 this request for damages and fees are excessive compared to
5 what needed to be done. If all they needed to do was put new
6 pavers down and the other -- and we were offering to do that
7 for the price of the pavers -- the pavers and then the labor to
8 do finish the job.

9 THE COURT: The pavers that were delivered
10 prepetition?

11 MR. BATES: They were on the site prepetition but
12 whether they were delivered because of the nature of the
13 contract that requires Eric to provide all materials, I don't
14 know they were delivered.

15 MR. BURKE: Your Honor, there's no dispute that they
16 were laid on the driveway.

17 MR. BATES: Yeah, and we don't dispute that at all,
18 Your Honor.

19 MR. PENBERTHY: Your Honor, can I shed some light on
20 it? John Penberthy --

21 MR. BATES: This is Mr. Penberthy, he's New Jersey
22 counsel. He was the one who actually --

23 MR. PENBERTHY: I actually had the conversation.

24 THE COURT: What conversation?

25 MR. PENBERTHY: Well, the conversation that's

1 attributed to this.

2 THE COURT: For the record, identify yourself.

3 MR. PENBERTHY: Yeah, I'm sorry. John Penberthy, I'm
4 counsel for Eric's Nursery in New Jersey.

5 Your Honor, the conversation was a very short
6 conversation from New York counsel, from Cahill's office.

7 MR. PENBERTHY: Your conversation with Ms. Peleg
8 (ph.), I think, I believe her name is. Basically she got on
9 the phone screaming about how they were going to prosecute for
10 whatever they were going to prosecute Eric's on this particular
11 driveway -- these driveways.

12 There are two driveways. What I offered to do is say,
13 look, any postpetition work that needs to be done, that's all
14 that we're looking for, period. All the prepetition work that
15 was done already, to the tune of almost 45,000 -- about 45,000
16 dollars, we realize that's unsecured claim. But the
17 postpetition work, including the pavers which under Whiting
18 Pool (ph.) aren't even property of the estate. They didn't own
19 them. They didn't buy them. It's like bringing a pallet of
20 bricks to a site. They were brought to the site within twenty
21 days of the filing of the petition so I don't even think
22 they're property of the estate.

23 The only thing that the estate had an interest in was
24 the real estate, obviously, and Eric's was not going to go and,
25 as they said in their papers, rip up all the work they've done.

1 It would be absurd. It would take them more labor to tear
2 apart the work that they had done than the bricks were worth.
3 We're talking about 3,500 dollars worth of bricks here.

4 So what the offer was, and it was, in effect, look
5 we'll go in, we'll finish the job postpetition, you'll pay us
6 because it's a postpetition obligation. We'll work some --

7 THE COURT: You'll pay us what?

8 MR. PENBERTHY: You'll pay us the cost to install the
9 pavers and the pavers, which you don't own at this point.
10 They're our pavers; they were delivered within twenty days of
11 the bankruptcy. Under UCC they're still -- we still have an
12 ownership right in those pavers.

13 Now there may be, again as Mr. Bates said, there may
14 be some type of technical violation for Eric's coming in and
15 basically -- first of all, not all the pavers were in place in
16 terms of the driveway . There were still remaining cuts that
17 had to be made to install them, but they just picked them up.
18 That's what they did. So again, the offer was purely
19 postpetition work which what they did was, according to their -
20 - whoever they hired to install it, they apparently tore the
21 whole thing apart because Mr. Solomon will get up and testify
22 that they did not do that. They lifted the bricks off. We got
23 a call, we got two calls actually, the second call -- I mean, I
24 -- quite frankly, I've never in twenty -- almost twenty-one
25 years of practicing law, have been threatened by another

1 attorney of prosecution for something that the attorney's
2 client doesn't own and that's a problem.

3 I mean, look, if it had been, look, we'll take care of
4 it. We'll make sure you get paid postpetition for that work,
5 that would have been fine. We would have resolved this three
6 or four months ago. But, again --

7 THE COURT: Mr. Burke, show me the document that you
8 were reading from.

9 MR. BURKE: Yes, Your Honor. It's called Eric's
10 Nursery's response to debtors' motion.

11 (Pause)

12 THE COURT: I'm sorry; fourteen? What paragraph?

13 MR. BURKE: Yes, Your Honor. Paragraph 14 is on the
14 bottom of the second page and paragraph 15.

15 (Pause)

16 THE COURT: Yes. Well, 15 says complete the job for
17 payment of materials and labor.

18 MR. PENBERTHY: But 14 says, Your Honor, the cost for
19 the pavers and labor to complete the job and 15 just reiterates
20 that.

21 THE COURT: Yes.

22 MR. BURKE: Your Honor --

23 MR. PENBERTHY: Just one other thing. The prepetition
24 materials and labor total -- everything totals about 45,000
25 dollars, Your Honor. They knew that we were just asking for

1 postpetition payment which, if they want the job completed,
2 anybody working postpetition is entitled to be paid. And we
3 would have worked it out in the normal course. I understand
4 how the bankruptcy process works from that standpoint. I
5 clerked for a bankruptcy judge twenty-one years ago. I worked
6 for Judge Carey for a couple years in Mesirov Gelman in
7 Philadelphia. I understand how the mechanics work. The
8 problem is and with all due respect to counsel, the problem is
9 we just got hung up on and if -- we did. I mean, if the offer
10 had come back to us well what are you looking for, how you
11 going to work this out? But that never even -- it never even
12 came back our way and they end up paying twice as much to get
13 the job done as we were going to charge them, more than twice
14 as much.

15 I just think on top of that, as Mr. Bates has pointed
16 out, these --

17 THE COURT: Let me back up. Am I correct that you
18 removed the stones or the bricks from the debtors' property
19 before you had any communication with counsel for the debtor?

20 MR. PENBERTHY: That's not correct. We had forwarded
21 a letter to them about a week ahead of time and attempted to
22 call them on two occasions prior to that. So that's not true.
23 We did have communication with them, it was ignored.

24 MR. BURKE: Your Honor, I can give you the
25 communication, it's dated March 12, 2010, it does not suggest

1 that Eric's is going to remove property from the debtors. It
2 asserts a reclamation right which debtors would have dissolved
3 in the ordinary course under the reclamation order that's in
4 place in this case.

5 THE COURT: This letter's dated March 12, what date
6 were the --

7 MR. PENBERTHY: They were -- I believe it was the 17th
8 or 18th, Your Honor. And subsequent to that letter I did get a
9 phone call back, eventually.

10 THE COURT: Before or after the property was removed?

11 MR. PENBERTHY: It was after, Your Honor. It was
12 after.

13 MR. BATES: Your Honor, with regard to the ownership
14 of the property, the pavers, this is the subcontractor
15 agreement and in the subcontractor agreement, which I'll be
16 glad to bring to you if you'd like, and general scope of the
17 work it raises it, "Orleans hereby retains subcontractor as an
18 independent contractor to provide all work, labor and
19 materials." So it's the subcontractors obligation to provide
20 the materials under the contract. So when they took them
21 there, until they're actually affixed to the driveway, our
22 argument, and I think it's the correct argument, is that they
23 belong to the subcontractor, it's his responsibility.

24 THE COURT: What do you mean by affixed to the
25 property?

1 MR. BATES: When the sand is put in -- you have to lay
2 pavers on the driveway, when everything's in place --

3 THE COURT: So they weren't on pallets?

4 MR. BATES: No.

5 THE COURT: They were not on pallets?

6 MR. BATES: They were laid in place.

7 MR. PENBERTHY: They were in the driveway, some of
8 them.

9 THE COURT: But the job wasn't finished?

10 MR. BATES: Not finished. And then they have to be
11 tamped to be locked in with sand underneath and there's sand
12 between them. That's what affixes them to the driveway and
13 there's an adhesive, I was not aware, that's also used.

14 MR. PENBERTHY: Numerous steps.

15 MR. BATES: There were numerous steps that actually
16 had to happen for them to be affixed. And any time up to that
17 point, if our guys broke one or something like that, we'd have
18 to replace it because it's our responsibility to have those
19 pavers -- to provide those materials. So I don't believe that
20 they were actually property of the estate at that point.

21 Now, a week or two later they might have been. And to
22 be honest, one of the reasons our client was concerned about
23 removing these is someone else could have been pulled in to put
24 that sand in and now they would have been affixed. So we could
25 have lost the right to reclaim our property.

1 And that's, kind of, where the nub is here as to what
2 actually -- whether or not it was the estate's property. And
3 then if we get to the point if we ever get to the -- if we do
4 get to the point of where damages are assessed, how much is
5 reasonable and what's reasonable attorneys' fees over 3,500
6 dollars of pavers. They're asking for over 31,000 dollars in
7 cost and attorney fees in this matter --

8 THE COURT: I think we need to answer the legal
9 question of whether it was the debtors' property or Eric's
10 property.

11 MR. BURKE: Your Honor, the question under the code is
12 whether the debtors had an interest in those pavers. Once they
13 were placed, even on pallets on the debtors' property, the
14 debtors had an interest in those pallets so the injury by
15 Eric's to remove them would have been a violation of the
16 automatic stay. Once they were placed in the driveway, and on
17 a house that was going to close two days later, but for the
18 removal of the driveway --

19 THE COURT: That sounds right to me but I wonder if we
20 can't do some research on this and if I conclude that it was
21 the debtors' property or the debtor had an interest in that
22 property, then I'm going to easily conclude that there was a
23 violation of the stay.

24 MR. BURKE: Okay, Your Honor. What timing would you
25 like us to submit?

1 THE COURT: When is our next omnibus on this?

2 MR. BURKE: September 8th, I believe.

3 THE COURT: All right. Okay. Why don't you just, on
4 that one issue, give me a brief statement of a couple pages or
5 a couple citations, whatever, and then you can respond to it.

6 MR. BATES: Appreciate it, Your Honor.

7 THE COURT: And have that in well before the next
8 omnibus hearing and hopefully we can resolve this at the time.
9 But my view is, at this point, that it was a clear violation of
10 the stay if in fact that property was property of the estate or
11 the estate had an interest in it.

12 MR. PENBERTHY: Your Honor, there's one other issue.

13 THE COURT: Even if they were on pallets I think the
14 answer would still be the same.

15 MR. BATES: Agreed, Your Honor.

16 MR. PENBERTHY: If I might, Your Honor, there's on
17 other issue and that, Mr. Bates brought this up early on. For
18 purposes -- if Your Honor finds that it was property of the
19 estate and then we move to the next phase of what if any
20 damages actually occurred, in my research on that issue fraud
21 still does, if there was in fact -- if there was fraudulent
22 inducement, adversary proceeding notwithstanding, it still does
23 have a bearing on whether the Court would, under its 105
24 contempt power, actually find for damages. That's my
25 understanding and if we could, I'd like to be able to brief on

1 that issue as well. We can bring Mr. Solomon down here to
2 testify as to what actually happened and what occurred. But
3 I'm concerned about that issue because I think that it's across
4 the board, whether it's in a 105 proceeding or any other
5 proceeding that a bankruptcy judge has to decide. The Court
6 obviously is a court of equity and if a debtor comes in with
7 unclean hands, it becomes an issue as to damages.

8 MR. BURKE: The debtor, Your Honor, did not make any
9 representations -- the prepetition entity may have. The
10 problem here is that if it has any bearing at all, it has
11 bearing on punitive damages, not on actual damages, which we've
12 submitted more than sufficient proof of. And the fact that we
13 had to pay more to get this work done as a debtor then it would
14 have cost us had Eric's continued its work is irrelevant.
15 Those are third-party negotiated agreements, the best deal we
16 could get, given the short notice; we had to close that house,
17 that was the deal we could get.

18 THE COURT: Who was the individual -- who at Eric's
19 Nursery talked to the individual --

20 MR. BATES: To the vice president?

21 MR. PENBERTHY: Eric Solomon.

22 THE COURT: And that individual said we'll pay you?

23 MR. PENBERTHY: Absolutely, Your Honor. Not once but
24 twice within twenty days of the filing.

25 THE COURT: And that individual's name is what?

1 MR. BATES: It's Bill Briegel.

2 THE COURT: And it seems to me this raises a question
3 as to what knowledge he had of a possible bankruptcy filing?

4 MR. PENBERTHY: Your Honor, I would submit, and I'm
5 not going to get into detail, but I would submit that this was
6 not an isolated incident and in fact the president of Orleans
7 contacted another individual and did the exact same thing.

8 I know you're laughing but I spoke with this person
9 two days ago and he will be here on the 8th so he can also
10 testify as to the pattern that was going on here. Because
11 this, again, is not an isolated incident. There were hundreds
12 of thousands of dollars worth of materials that were brought to
13 sites around the country within thirty days of the bankruptcy
14 based on these allegations -- on these discussions. And I
15 think it does bear --

16 THE COURT: You need to identify that person and if
17 Mr. Burke --

18 MR. PENBERTHY: I will.

19 THE COURT: -- wants to depose that person, he can.

20 MR. PENBERTHY: I will do that.

21 MR. BURKE: Your Honor, I will note that all of this
22 is incurring further and further attorneys' fees which we've
23 already objected to. So it is a very expensive process, I hope
24 Eric's is prepared for that.

25 THE COURT: Okay. And I think you need to talk to the

1 person that they say made the promise. Because if their
2 argument of fraudulent inducement has any validity, they have
3 to show his knowledge or absence of knowledge about what the
4 company was going to do. And typically only the top management
5 knows what's going to happen in terms of leading up to a
6 filing. Most employees, including a lot of vice presidents,
7 have no knowledge whatsoever in a typical case.

8 So that's an issue, I think, that has to be addressed,
9 also, at our next session.

10 MR. PENBERTHY: Thank you, Your Honor.

11 MR. BATES: Thank you, Your Honor.

12 THE COURT: Let me hand these documents back to you,
13 Mr. Burke. Okay. Where are we?

14 MR. BURKE: The next item is item 11, the motion of
15 Karen Lynne Cousin for relief from the automatic stay. Again,
16 since that's Ms. Cousin's motion, I'll cede the podium to the
17 movant.

18 THE COURT: Okay.

19 MR. NEIDERMAN: Good morning, Your Honor. Seth
20 Niederman from Fox Rothschild on behalf of Ms. Cousins.

21 As reflected in the agenda, Ms. Cousins seeks to have
22 today for a status conference in order to establish a brief
23 discovery schedule pursuant to 9014. We did file a motion for
24 stay relief, that motion was objected to and as Your Honor will
25 see in the objection, the objection speaks to a very

1 untraditional insurance policy which would cover the claim at
2 issue by Ms. Cousin.

3 We look at statements in the objection, such as the
4 debtors believe that this is the only insurance available to
5 cover this claim or based upon a preliminary assessment this is
6 the only coverage available to cover this claim. And that
7 leads us to ask questions in terms of what else might be out
8 there. So what we want to do is take some very limited
9 discovery and get verified responses from the debtors that in
10 fact there are no other insurance policies which may cover this
11 claim in which we could pursue relief against those policies,
12 whether they be policies of some of the other debtors who are
13 named in the lawsuit or excess or umbrella policies that the
14 debtors have.

15 So we have served discovery requests, interrogatories,
16 we anticipate that we'll also file some document requests just
17 seeking documents identified in the responses to the
18 interrogatories and once we are able to obtain that information
19 we will make a decision whether we go ahead and renotice the
20 motion for stay relief.

21 THE COURT: Okay. Mr. Burke?

22 MR. BURKE: Counsel just referred to renoticing the
23 motion. If in fact this motion is being withdrawn, that's one
24 thing. If it's still pending, then we need counsel's
25 representation on the record that the deadlines for ruling on

1 relief from stay motions won't apply while he pursues this
2 discovery.

3 As to the discovery itself, we have seen a set of ten
4 or twelve interrogatories which, for the most part, we are
5 prepared to answer. When he talks about other discovery, I
6 worry that we're going to end up on a frolic and a detour. If
7 in fact all he wants are documents referred to in our
8 interrogatory responses, that won't be an issue. If he's
9 talking about some massive search and some massive deposition
10 schedule, I have problems with that. But otherwise, if it's
11 just these interrogatories and the documents we've referred to,
12 we'll promptly respond to those interrogatories.

13 THE COURT: Okay.

14 MR. NEIDERMAN: We've made no indication that we're
15 going on some massive discovery quest here. We served six
16 numbered interrogatories that did have subparts and we will
17 serve a request for documents, which basically asked for those
18 documents identified in response to the interrogatories.

19 We are not withdrawing the motion. We are not -- we
20 are asking that the matter be adjourned until such a time that
21 we get responses to our interrogatory request.

22 THE COURT: Can we push it back to the next omnibus
23 date?

24 MR. NEIDERMAN: I'm not sure if debtors are able to
25 provide responses.

1 THE COURT: Is that enough time? What date did you
2 say that was?

3 MR. BURKE: September 8th, yes. We can provide
4 responses by then.

5 THE COURT: Okay. All right. We'll continue it to
6 September 8.

7 MR. NEIDERMAN: Thank you, Your Honor.

8 MR. BURKE: I don't know if counsel on the next matter
9 is here. The next matter is related to this as well in that it
10 arises out of the same alleged injury. I had communication
11 with counsel for buyers and he had indicated that he agreed or
12 his client agrees with continuing the matter until such time as
13 discovery has been obtained.

14 MR. NEIDERMAN: We don't object to that, Your Honor.
15 They are linked.

16 THE COURT: Okay. Continued.

17 MR. BURKE: Next is the motion of Jeffrey Beard and
18 Nancy Beard for relief from automatic stay, number 13 on the
19 agenda and I'll cede the podium to movant's counsel.

20 MR. NEIDERMAN: Your Honor, for the record, again,
21 Seth Niederman from Fox Rothschild on behalf of the movant.

22 Your Honor, we filed a motion for stay relief arising
23 out of a property damage claim in a lawsuit pending down in
24 North Carolina, that was back in June. We did receive an
25 objection to that motion at the end of June stating that the

1 debtors were unsure if there was coverage. We were seeking to
2 get stay relief to only liquidate a claim against insurance
3 proceeds. The debtors stated that they didn't know if there
4 was coverage.

5 A look back at the statement of financial affairs
6 identified this matter as being defended by insurance. So it
7 appears that the debtors have identified the insurance that is
8 covering this and we are in receipt of a suggested form of
9 order resolving this matter. We are considering that form of
10 order and I'm hopeful that we'll be able to present it to the
11 Court under certification of counsel.

12 MR. BURKE: Your Honor, the insurance policy has been
13 produced to counsel. The only issue is that the claimant is
14 still seeking to assert a proof of claim against the debtors;
15 otherwise we're in complete agreement. I think it's pretty
16 clear, if they're going to pursue the insurance coverage,
17 pursuant to an automatic stay -- to automatic stay relief, they
18 can't come back and assert any kind of claim against the
19 debtor, arising out of whatever judgment occurs in that court.

20 If they are going to have that right, then we would
21 have to defend the case, notwithstanding that there is
22 insurance and that would be an expense to the debtor that would
23 be inappropriate.

24 If counsel is saying that this should be continued
25 while he considers the consent order, I suppose that's okay.

1 But if he's saying the motion is on today, then it should be
2 denied.

3 THE COURT: I think he's asking for a continuance.

4 MR. NEIDERMAN: That's correct, Your Honor. And as
5 I've communicated to counsel for the debtors, none of the
6 counsel are here in the courtroom, I don't believe, we're
7 hopeful that we'll get back to them within a day or two and say
8 we agree to the terms. We're just reviewing the two or 300
9 page insurance policy that was given to us so that we know
10 that -- we have a little more background in terms of the
11 details of the insurance program. So I'm hopeful that we'll
12 present a consensual order, agreed order, to the Court for
13 consideration in the next few days.

14 THE COURT: Okay. Next.

15 MR. NEIDERMAN: May I be excused, Your Honor?

16 THE COURT: Yes.

17 MR. NEIDERMAN: Thank you.

18 THE COURT: Fourteen has been continued, has it?

19 MR. BURKE: Yes, Your Honor.

20 THE COURT: Okay. Fifteen.

21 MR. STIEGLITZ: Yes. Good morning, Your Honor. For
22 the record, Richard Stieglitz from Cahill Gordon & Reindel
23 also.

24 I'm going to assume the Court is aware of at least
25 some of the facts related to this dispute, as we were before

1 you at the last hearing regarding a settlement motion that the
2 debtors tried to propose to resolve all these issues in one
3 package. The Court approved part of that settlement motion,
4 I'll say, and denied the rest of it. And more importantly,
5 suggested that the debtors file the application that's on for
6 today, along with a request for nunc pro tunc approval.

7 What's set forth in the application is the debtor is
8 seeking nunc pro tunc approval of the retention of Scanden LLC,
9 which is an LLC owned and singlely employed by Patrick Worall
10 who's actually in the courtroom today.

11 I do want to note that Mr. Worall has actually
12 returned any excess money over the retainer, in a good faith
13 showing to the debtors, it was about 18,000 dollars. The only
14 amount he holds in the retainer is the twenty-three, or so,
15 thousand dollars that would be approved, presumably, with
16 respect to a fee application later on if the Court were to
17 grant the requested relief today.

18 Simply put, the standard for nunc pro tunc retention
19 is whether the entity could be retained in the first place,
20 which the debtors submit is the case here, fairly easily, and I
21 don't say that too presumptively but he's certainly
22 disinterested. He submitted an affidavit. He has no
23 connections with the debtors or the long list of other parties
24 involved in this case and the services that he provided were
25 needed and were not duplicative of the debtors' other

1 professionals. In fact, he was brought in to assist the
2 debtors other professionals and the debtors' former CFO in a
3 support and directive role.

4 As I mentioned at the hearing last time, he wasn't
5 providing typical investment banking and financial advisory
6 services that you'd expect from firms such as Lazard or FTI or
7 the like.

8 The second question becomes whether extraordinary
9 circumstances existed justifying the nunc pro tunc retention
10 and specifically looking at the delay and the reasons for it
11 and why the Court should consider what is potentially a late
12 application.

13 In this situation Mr. Worall relied on the debtors and
14 the debtors' decision to change his employment terms to make
15 him an employee. The debtors relied on that too. They thought
16 they had remedied any situations with respect to retention.
17 They also thought by tying everything into a settlement motion
18 that they could resolve all the issues together. The U.S.
19 Trustee and this Court obviously disagreed and that's why we're
20 here today.

21 I will mention one other point and that is, looking at
22 the delay, the settlement motion was filed four months from the
23 petition date, not a particularly long period of time when you
24 look at the other cases where nunc pro tunc retention may have
25 been denied or may have been granted. Most of which were set

1 forth in the replies and the objection papers filed by the U.S.
2 Trustee. Also, I don't even think the petition date in this
3 case is the relevant date to look back. I personally think you
4 can look back at, you know, the latest possibly when this Court
5 denied the settlement motion. And as everyone here is aware,
6 the debtors filed the application immediately.

7 The only other date I think you could go back is what
8 is the date the debtors discovered there was an issue and
9 decided to handle it, and that was about a month between when
10 they terminated Mr. Worall's employment and then sought the
11 settlement motion and then later this retention application.

12 As one last point, I question what the benefit would
13 be for these estates if the application was denied. He
14 provided services, they were of value. The debtors submit he
15 deserves to get paid. It's about 23,000 dollars, in the scope
16 of this case it's not a large sum. He also -- if it's a policy
17 issue for the United States Trustee, I don't really understand
18 that as the actual lapse in time, as I submitted, was fairly
19 short and shouldn't influence other situations where larger
20 professionals failed to file their retention applications in a
21 timely fashion. Those professionals that presumably have been
22 involved in other bankruptcy matters and have bankruptcy
23 specific related counsel.

24 Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. BUCHBINDER: Good morning, Your Honor. Dave
2 Buchbinder on behalf of the United States Trustee.

3 Your Honor, this is not a difficult matter. It's the
4 law of the case that the Court has already found that Scanden
5 LLC was a professional that was subject to the professional
6 retention rules in this case. That was the finding of the
7 prior hearing. There's no question that the underlying
8 contract stated provisions that were equivalent to an
9 investment banker.

10 We did not object, in the earlier motion, to the
11 payment of fees to Mr. Worall for the period of time he was
12 employed as an employee. We are objecting to the fees
13 allegedly payable to Scanden under the retention of Scanden.
14 This case is not any different from any of the other cases that
15 the Third Circuit of this district have ruled upon in these
16 particular matters. There's no separate set of nunc pro tunc
17 rules for big firms versus little firms. There's no set of
18 separate rules for sophisticated versus unsophisticated
19 professionals, but let's take a look at that real quickly.
20 This particular professional knew, as early as August of 2009,
21 many months before this case was filed, that if a bankruptcy
22 were to be filed its fees would have to be approved by the
23 bankruptcy court. There is a term in the August 9th amendment
24 to the contract that says, "In the event client were to file
25 for protection under Chapter 11 of the United States Bankruptcy

1 Code client," and that's Orleans, "shall take commercially
2 reasonable efforts to file a motion with the bankruptcy court
3 with jurisdiction over client's bankruptcy cases seeking to
4 assume this agreement and/or to confirm any amounts due under
5 this agreement would be afforded administrative expense
6 priority under Bankruptcy Code Section 503(b).

7 They may have gotten the section wrong. They may have
8 missed Section 327, but they were certainly cognizant of the
9 fact that their contract would require some form of Court
10 approval if there were -- a bankruptcy were to be filed.

11 The facts here are identical to those in which Judge
12 Walrath denied compensation in Funding Companies, Inc. In that
13 particular case a financial advisor performing postpetition
14 services terminated their services. They didn't bring a
15 retention application. Several months later, like in this
16 case, they brought an application seeking nunc pro tunc
17 retention, simply to approve it so they could be paid. That's
18 precisely and exactly what is happening here, Your Honor. It
19 may be unfortunate, we may be sympathetic to it, there may be
20 all kinds of factors like that to consider but the law of the
21 Third Circuit is clear that professionals can only be retained
22 nunc pro tunc under extraordinary circumstances and within the
23 confines of the case law these are not extraordinary
24 circumstances. In fact, they're on all fours with the cases
25 that have rejected retention in identical circumstances.

1 Thank you, Your Honor.

2 MR. STIEGLITZ: Your Honor, again for the record,
3 Richard Stieglitz from Cahill Gordon. I just want to make a
4 couple of points.

5 I agree with Mr. Buchbinder, this is not a difficult
6 issue. The U.S. Trustee has no problem with Patrick Worall's
7 employment from April on and I submit that there's nothing
8 different than what he did in March, except for a technicality
9 that he was operating through his LLC.

10 There is some boilerplate language in the retention
11 agreement, I drafted it. We knew at that point that there was
12 a possibility that the debtors were going to file for
13 bankruptcy. We put that in there as much for the debtors'
14 protection as not. After the debtors filed for bankruptcy they
15 thought they hadn't changed his employment terms to make him an
16 employee, which the United States Trustee would have had no
17 issue with the payments for March.

18 Shame on my client, shame on me. This Court
19 shouldn't, in essence, punish Mr. Worall for those oversights,
20 especially when the services he was providing in March were the
21 same exact thing as the services he was providing in April.
22 The cases Mr. Buchbinder cites are well described but the delay
23 in those cases is much longer and the parties in those cases,
24 Bane & Company, Ernst & Young. Mr. Worall is in the Court
25 today. I don't want to insult him any more than I insulted him

1 at the last hearing, he's not those institutions. Whether the
2 cases do say that you impute excessive knowledge on to smaller
3 financial advisory firms, that's fine. That's a point that I
4 can understand. Imputing that knowledge on to someone like Mr.
5 Worall in this situation would be patently unfair, Your Honor.

6 Thank you.

7 THE COURT: Okay. I think this case is different from
8 the two Third Circuit cases. The length of time in the delay
9 is short. The amount involved in this case is very small and
10 under those circumstances I'll grant the motion.

11 MR. STIEGLITZ: Thank you, Your Honor. I realize I
12 sat down prematurely.

13 There is one other matter on the agenda. It was the
14 debtors' -- it's number 16 -- the debtors' motion to clarify
15 the home sale procedures in light of entry of this Court's bar
16 date order. The one formal objection to that matter has been
17 resolved. We did receive informal comments from Mr. Buchbinder
18 and from the debtor's title insurance provider.

19 We submitted a certificate of service, I'm guessing --
20 excuse me, certification of counsel, but I'm guessing it
21 probably didn't get to your desk because of the timing of the
22 objection deadlines. But, I believe, and parties can disagree
23 --

24 THE COURT: I signed it.

25 MR. STIEGLITZ: You have signed it?

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THE COURT: Yes.

MR. STIEGLITZ: Okay. Your Honor, I think that concludes what's on the docket. We thank you for your time.

THE COURT: Okay. We'll stand in recess.

(Proceedings concluded at 11:50 AM)

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I N D E X

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

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

Pnina Eilberg (CET**D-488)
AAERT Certified Electronic Transcriber

Veritext
200 Old Country Road
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Date: August 8, 2010

**UNITED STATES BANKRUPTCY COURT
District of Delaware**

In Re:

Chapter: 0

Case No.: 10-51083-PJW

***NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND
REDACTION***


A transcript of the proceeding held on 8/6/2010 was filed on 8/11/2010 . The following deadlines apply:

The parties have seven days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 9/1/2010 .

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