

ORDERED in the Southern District of Florida on 03/04/10



*Raymond B. Ray*

Raymond B. Ray, Judge  
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FT. LAUDERDALE DIVISION

In re:

GULFSTREAM CRANE, LLC,

Debtor,

Case No.: 09-37091-BKC-RBR

Chapter 11

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**ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

THIS MATTER came before the Court for hearing on February 16, 2010, upon the Motion for Relief from Automatic Stay to Allow Continuation of Pre-Petition Litigation (the "Motion") [D.E. 97], filed by Creditor Linden-Comansa America, LLC ("Linden"), and the Debtor's objection thereto [D.E. 117]. The Court has heard from counsel, reviewed the contents of the case file, including Exhibit J to the Statement of Financial Affairs [D.E. 54], and taken judicial notice that the Debtor has sought to retain the law firm of Baker Botts LLP of Houston, Texas, to assist in the removal and transfer of certain pre-petition litigation to this Court [D.E. 128]. The Court will grant the Motion for the reasons outlined below.

Background

The Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code

on or about December 8, 2009. The Debtor is engaged in the business of supplying and renting crane, hoist and rigging equipment. The Debtor owns in excess of 300 pieces of equipment that it leases to general contractors in connection with construction projects in Florida, Georgia, Nevada and Texas.

On or about June 23, 2006, the Debtor entered into a contract pursuant to which it agreed to purchase sixty (60) tower cranes from Linden. Following the shipment of fifty-nine (59) of these cranes, Linden became aware of financial problems with the Debtor and the parties agreed to stop shipment of the sixtieth crane. The Debtor secured financing to purchase outright forty-three (43) of the fifty-nine (59) tower cranes for which it contracted with Linden. Of the last sixteen (16) cranes that Linden shipped, the Debtor purchased only three (3). The remaining thirteen (13) cranes (the "Cranes") were stored on the Debtor's property in Houston, Texas. Linden and the Debtor entered into a leasing agreement for the Cranes, which provided in part that the Cranes remained property of Linden.

Subsequently, Linden became concerned that the Debtor was cannibalizing parts from the Cranes to use on other equipment. Two inventories were performed, which demonstrated numerous parts were indeed missing from the Cranes. Representatives of the Debtor signed off on these inventories, and Linden contends that these representatives admitted removing parts from the Cranes without Linden's consent, permission, or authorization. Linden attempted to conduct a third joint inventory but, by this time, the Debtor refused to cooperate. Litigation ensued shortly thereafter.

Linden filed suit in Harris County, Texas seeking, *inter alia*, damages for breach of contract and sequestration of the missing Crane parts. A prejudgment writ of sequestration was issued, and Linden posted a bond of one thousand dollars (\$1,000.00) with the court's registry. Upon further proceedings, the bond amount was increased to one hundred thousand dollars (\$100,000.00), and Linden again timely posted the increased bond. It is undisputed that certain

property was seized by the Sheriff of Harris County, Texas, and is currently being stored at Linden's cost at a site not associated with the Debtor.

The Motion requests that the Court lift the automatic stay to allow the Texas state court to continue with the proceeding that Linden filed against the Debtor. The Debtor denies the allegations that the property was stolen, and asserts that the property seized was in fact property of the estate.

#### Analysis

Pursuant to 11 U.S.C. § 362(d)(1), the Court may grant relief from the automatic stay upon a showing of "cause." In determining whether "cause" is present, a court must balance the potential hardship that will be incurred by a moving party if the automatic stay is not lifted, against the potential prejudice to the debtor and the debtor's estate. *In re Mack*, 347 B.R. 911, 916 (Bankr. M.D. Fla. 2006) (citing *In re Alosi*, 261 B.R. 504, 508 (Bankr. M.D. Fla. 2001)).

It is undisputed that hundreds, perhaps thousands of sequestered parts are located in Texas and are not part of the Debtor's ongoing business operations. If this property was, as Linden contends, stolen from the Cranes, then it is not property of the estate. The Texas court is in a better position to make this determination, which is a question of Texas law. Likewise, the Debtor has not made a *prima facie* showing that the items in the attached inventory are property of the estate in that they were not included in the Schedules filed by Debtor.

Moreover, the convenience of the parties, witnesses, and the courts dictate the Texas court should make the determination of ownership. The parties agree the parts are non-serialized, and as a result, testimony must be taken, and the parts inspected, to determine their ownership. The parts are in located in Texas. The witnesses who oversaw the two audits live and work in Texas. The sheriff's deputies who oversaw the sequestration, presumably key witnesses in this dispute, live and work in Texas. The one hundred thousand dollar (\$100,000.00) bond is situated in a Texas court registry. The Debtor has not proffered any

arguments or evidence that denying it the use of these parts will cause the deterioration or collapse of this chapter 11 case. It in fact it appears the parts would be a *de minimus* part of the estate as they apparently comprise six hundred thousand dollars (\$600,000.00) of a sixty million dollar (\$60,000,000.00) estate, or 1/100th of the value of the estate.

If the Texas court decides the property belongs to Linden, the decision of the District Court in Harris County, Texas shall be conclusive and binding upon the parties in these proceedings as to the disposition of the parts in controversy; the inventory and parts shall in no way be considered property of the Debtor's estate. If the Texas court decides the parts and inventory were owned by the Debtor at the time of their sequestration, then they shall be considered property of the estate and all further proceedings with regard to their disposition, and the rights of all parties with regard to the inventory shall be determined by this Court.

In light of the foregoing, it is

**ORDERED** that the Motion [D.E. 97] is **GRANTED**. Linden may continue and conclude to a final judgment determining of the ownership of the parts in the litigation commenced in the 152nd Judicial District Court of Harris County, Texas, in the case styled LINDEN-COMANSA AMERICA, LLC V. GULFSTREAM CRANE, LLC D/B/A GENERAL CRANE, JASON RETTERATH AND JAMES A. ROBERTSON, Cause No: 2009-72689.

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The Clerk shall provide copies to:

Mark Romance, Esq.  
Michael Seese, Esq.