

Automatic Stay  
Property of Estate

In re Peter R. Richardson

Bankr. # 695-62120-fra13

8/16/95

FRA

Unpublished

CBIC, as surety, issued to debtor, as principal, a bond in favor of the Oregon Construction Contractors Board. CBIC filed a motion for relief from stay so that it could exercise its right under the terms of the bond to cancel the bond upon giving 30 days' written notice.

The court determined that, pursuant to Ninth Circuit case law, the surety bond was never property of the estate. The motion for relief was denied because, as non-estate property, CBIC did not require relief from stay to cancel the surety bond. The fact that the premium for the bond was paid and had several more months to run or that the bond may be necessary for the debtor's reorganization had no bearing on CBIC's right to cancel.

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9 UNITED STATES BANKRUPTCY COURT  
10 FOR THE DISTRICT OF OREGON

11 IN RE )  
12 )  
13 PETER R. RICHARDSON, ) Case No. 695-62120-fra13  
14 )  
15 \_\_\_\_\_ Debtor. ) MEMORANDUM OPINION

16 Contractors Bonding and Insurance Company (CBIC), as surety,  
17 issued to Debtor, as principal, a bond in favor of the Oregon  
18 Construction Contractors Board. The bond was purchased from CBIC  
19 by Debtor in compliance with O.R.S. Chapter 701.

20 The bond contains the following provision:

21 This bond may be canceled by the surety and the surety be  
22 relieved of further liability hereunder by giving 30  
23 days' written notice to the principal and the  
24 Construction Contractors Board of the State of Oregon.

25 This language is consistent with O.R.S. 742.366, governing surety  
26 insurance. CBIC now seeks relief under 11 U.S.C. § 362(d), in  
order to exercise its rights under the foregoing clause.

I conclude that, since § 362 is not implicated here, the  
relief sought is unnecessary.

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2           11 U.S.C. § 362 operates to stay certain acts, including any  
3 attempt to "exercise control over property of the estate." 11  
4 U.S.C. § 362(a)(3).

5           The Ninth Circuit has held that an executory contract that is  
6 property of the estate can only be terminated after a grant of  
7 relief from the stay. In re Computer Communications, Inc., 824  
8 F.2d 725 (9th Cir. 1987). However, the Circuit has also held that  
9 a surety bond, such as the contract at issue here, is not "property  
10 of the estate" within the meaning of 11 U.S.C. § 541. Matter of  
11 John E. Lockard, 884 F.2d 1171, 1178 (9th Cir. 1989). In Lockard  
12 the court determined that, since the bond was not property of the  
13 estate, a creditor's state court action against the surety was not  
14 subject to the automatic stay of 11 U.S.C. § 362(a)(3). The same  
15 reasoning applies with the surety's election to exercise its right  
16 to terminate the contract.

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18           Debtor responds to the motion by arguing that, since he has  
19 paid the full premium on the policy, which is not due to expire for  
20 several months, he has a "paid up intangible property interest" in  
21 the bond. That may be: however, § 362(a)(3) protects only  
22 property of the estate as noted; the bond is not property of the  
23 estate.<sup>1</sup>

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26           <sup>1</sup> Debtor also complains that CBIC seeks to cancel the bond  
without compensating him for the premium paid. Whether or not the  
Debtor has a claim rising out of the cancellation is not at issue  
here.

1 Debtor states that the bond is necessary for his effective  
2 reorganization. While such a need may be a defense to relief from  
3 the stay under 11 U.S.C. § 362(d)(2), it does not follow that the  
4 stay is applicable wherever the need exists.

5 CBIC has withdrawn on the record its claim for attorney's fees  
6 and other relief.

7 Strictly speaking, the motion should be denied in its  
8 entirety, since the stay which the moving party seeks to modify is  
9 not applicable in the first instance. An order to that effect will  
10 be issued.  
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14 FRANK R. ALLEY, III  
15 Bankruptcy Judge  
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