

**IN THE UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF ARKANSAS  
LITTLE ROCK DIVISION**

**IN RE: ATLAS CARRIERS, INC.**

**CASE NO. 4:02-bk-19878  
CHAPTER 11**

**ORDER GRANTING *EX PARTE*  
RELIEF FROM THE AUTOMATIC STAY**

On February 6, 2003, the Court heard a Motion for *Ex Parte* Relief From the Automatic Stay filed by CitiCapital Commercial Corporation (“**CitiCapital**”) and the Debtor’s response. Martha Jett McAllister appeared for CitiCapital, and Geoffrey Treece appeared for the Debtor. Debtor’s representative, Larry Megel, was also present. After the parties rested, the Court took the matter under advisement and requested briefs addressing the legal issue of under what circumstances the Court may not enforce an agreed order.

Upon consideration of the pleadings, testimony and exhibits presented in open court as well as the briefs filed by counsel, the Court makes the following findings of fact and conclusions of law in accordance with Rule 7052 (made applicable to contested matters by Rule 9014(c)). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G), and the Court has jurisdiction to enter a final judgment in this case.

**FACTS**

Debtor filed its petition under Chapter 11 on August 30, 2002. On October 9, 2002, CitiCapital filed a Motion for Relief from the Automatic Stay, or in the Alternative, Adequate Protection, with respect to 57 1999 Peterbuilt Tractors/Trucks, 26 1998 Peterbuilt Tractor/Trucks, 35 1996 Peterbilt Tractor/Trucks, and 15 1999 Great Dane Trailers (the “**Motion for Relief**”). The parties entered into an agreed order which was subsequently approved by the Court on November 5, 2002 (the “**Agreed Order**”). The Agreed Order granted CitiCapital’s Motion for Relief in part, provided for interim adequate

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protection payments and withdrew CitiCapital's Motion for Relief upon conditions with respect to the collateral which the Debtor was retaining. A final hearing was to be scheduled with respect to certain collateral under the Agreed Order. Before a final hearing was held, the parties agreed to an "Amended Interim Order Granting Interim Adequate Protection Payment and Continuing the Motion for Relief from the Automatic Stay Upon Conditions" which the Court entered on December 6, 2002 (the "**Amended Interim Order**"). Pursuant to the Amended Interim Order, the Debtor was to retain 57 1999 Peterbuilt Tractor/Trucks and 26 1998 Peterbuilt Tractor/Trucks upon payment conditions. Specifically, the Debtor was to make a payment to CitiCapital in the amount of \$58,100.00 on or before January 15, 2003, provided that if the Debtor failed to make a full and timely payment by that date, CitiCapital was to transmit written notice to Debtor's counsel by e-mail, facsimile or U.S. mail. The Debtor would then have three business days to cure its default. The Amended Interim Order also provided that if Debtor failed to cure its default, CitiCapital would be allowed to present an *ex parte* order relaxing the automatic stay with respect to the 1998 and 1999 Peterbuilt Tractor/Trucks.

It is undisputed that Debtor failed to timely make the full adequate protection payment due in January 2003 under the Amended Interim Order, but that Debtor made certain partial payments to CitiCapital in January 2003. Specifically, Debtor made the following payments to CitiCapital: \$8,000.00 on January 8, 2003, and \$12,700.00 on January 24, 2003. On January 27, 2003, CitiCapital sent Debtor's counsel a letter via e-mail, facsimile and U.S. mail informing him of Debtor's default and requesting full payment within three business days. The full payment was accordingly due January 30, 2003. Debtor proposed to make the full payment by February 3, 2003, but CitiCapital refused payment and moved for *ex parte* relief from the automatic stay on January 31, 2003.

At hearing, the Debtor's president, Larry Megel, testified regarding the circumstances which led to the Debtor's inability to make the January 2003 adequate protection payment. Megel testified that the company's revenue was down due to holiday closings and catastrophic engine problems with its tractor/trucks. Specifically, Megel testified that he knew December would be a bad month, but while business had been down during December and early January, business had picked up in the ten days prior to the hearing. Megel also testified that many of the Debtor's tractors had serious engine problems resulting from the failure of cast-iron pistons which the Debtor had to repair at its own cost of \$70,000.00. He testified that the Debtor was currently negotiating with Detroit Diesel regarding at least a partial reimbursement for the Debtor's expenses in repairing the pistons. Megel explained that the piston troubles began in August of 2002 which led to the Debtor's bankruptcy filing on August 30, 2002. Megel testified that the Debtor will go out of business if it loses the tractors financed by CitiCapital in that those tractors represent 90% of Debtor's fleet.

On cross-examination, Megel was questioned regarding the compensation received by himself, his wife, his daughter and his son-in-law, who are the four officers of Debtor. The Debtor's operating reports were introduced showing that the Debtor's officers paid themselves salaries totaling approximately \$129,000.00 for the months of October, November and December 2002. Megel testified that the four officers' salaries had been reduced by 25%, but that the Debtor had also recently eliminated 12 higher-paid management positions, and as a consequence, the four officers were forced to work much more than 40 hours per week, and accordingly, they paid themselves more during the months of October, November and December. Megel testified that he did not know what the officers' salaries were in January 2003. He also testified that the officers would be paid much more in an open market.

## DISCUSSION

Although Debtor is able and willing to make the full adequate protection payment for January 2003, CitiCapital contends that it is entitled to *ex parte* relief from stay under the terms of the Amended Interim Order. CitiCapital also argues that even if the payment were made, it would not constitute adequate protection due to the engine troubles with the collateral. CitiCapital also asserts that it is unreasonable to forgive Debtor's failure to abide by the terms of the Amended Interim Order when its operating reports reflect that the Debtor's officers paid themselves salaries totaling approximately \$129,000.00 for the months of October, November and December. The Debtor contends that it could not timely make the full adequate protection payment in January due to certain circumstances, such as the holiday work schedule, decrease in business and catastrophic engine problems.

The legal issue presented is whether the Court can refuse to grant CitiCapital the *ex parte* relief it is entitled to under the Amended Interim Order based on the circumstances presented by Debtor. Generally, courts must enforce agreed orders and cannot allow debtors to change their mind or repudiate an agreement once it has been executed. *See In re Weiseler*, 934 F.2d 965, 967 (8<sup>th</sup> Cir. 1991) (*citing Matter of Lafayette Dial, Inc.*, 92 B.R. 798, 800 (N.D. Ind. 1988)). However, a court may, within its equitable powers, set aside an agreed order or stipulation, but it may do so only where "[a] showing of special circumstances, such as a change of condition, justifies relief from a stipulation to prevent manifest injustice." *In re Olsen*, 861 F.2d 188, 189 (8<sup>th</sup> Cir. 1988). In this case, the Debtor argues that the following special circumstances justify relief from the Amended Interim Order:

- (1) A weak U.S. economy;
- (2) A holiday season that significantly stifled the production of revenue;

(3) Unforeseen problems with Detroit Diesel engines relating to a design defect that caused the Debtor to spend approximately \$70,000.00 of its own funds in special maintenance and repairs since the filing of the case;

(4) Eighty-three tractors out of the Debtor's 92-tractor fleet are CitiCapital financed. Granting relief from the automatic stay effectively ceases the Debtor's ongoing business and results in the loss of 130 jobs and ensures that unsecured creditors will receive no distribution in this case;

(5) Debtor advised CitiCapital in advance that it would not be able to make the January 2003 payment on a timely basis and submitted a proposal to pay in increments, with the final increment due and payable on February 3, 2003. While CitiCapital rejected the Debtor's proposal, it did cash two checks forwarded by the Debtor pursuant to the proposal to pay in increments in the sum of \$20,800.00;

(6) Debtor was ready, willing and able to pay the balance of the January 2003 payment by no later than Monday, February 3, 2003;

(7) Debtor has the ability to pay the February 2003 payment within the grace period provided for under the parties' stipulation; and

(8) Debtor is prepared to file a plan of reorganization and disclosure statement on or before May 1, 2003.

The Court does not find that these circumstances warrant relief from the terms of the Amended Interim Order. Had these circumstances arisen *after* the Debtor executed the Amended Interim Order, relief may be warranted. However, in this case, the Amended Interim Order was executed on December 6, 2002, and with the exception of the facts surrounding negotiations over the January 2003 payment and the Debtor's ability to file a plan of reorganization, all of the listed circumstances were present at that time.

Specifically, the U.S. economy has been weak for some time, and Megel testified that he expected revenue to be down in December due to holiday closings. Additionally, Megel testified that the engine problems began in August 2002 which led to Debtor's bankruptcy filing. Finally, the Debtor was certainly aware of the fact that CitiCapital financed 90% of its fleet when it reached the agreement regarding adequate protection payments and *ex parte* relief from stay in December 2002. Because none of the factors leading up to Debtor's inability to make the January 2003 payment were sudden or otherwise unforeseen, the Debtor, having entered into a settlement agreement with CitiCapital, cannot now be excused from abiding by that agreement. While the Court does consider it unfortunate that the Debtor will most likely be unable to reorganize without the CitiCapital-financed tractor/trucks, the Court must enforce the agreement executed by Debtor granting CitiCapital *ex parte* relief from stay upon breach of the Amended Interim Order's terms.

### CONCLUSION

For the reasons stated herein, CitiCapital's Motion for *Ex Parte* Relief From the Automatic Stay is **GRANTED**.

**IT IS SO ORDERED.**



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HONORABLE AUDREY R. EVANS  
UNITED STATES BANKRUPTCY JUDGE

DATE: March 6, 2003

cc: Mr. Geoffrey Treece, attorney for Debtor  
Ms. Martha Jett McAllister, attorney for CitiCapital  
U.S. Trustee