

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
PHOENIX INSURANCE COMPANY,)
)
Plaintiff,)
)
VS.) NO: 95-CV-0467-PER
)
NEW ERA, INC.,) (BK 91-31347)
Debtor,)
)
and)
)
DONALD M. SAMSON,)
)
Trustee.)

MEMORANDUM AND ORDER

RILEY, District Judge:

Before this Court is an appeal from a May 1995 Order entered by United States Bankruptcy Judge Kenneth J. Meyers. Oral argument on the appeal was held on March 21, 1996 and the matter was taken under advisement. Phoenix Insurance Company maintains that the Bankruptcy Court erred by denying Phoenix's motion to intervene and by approving the settlement agreement and assignment as proposed by the Trustee, Donald Samson. The Hamiltons counter that the Bankruptcy Court properly exercised its discretion in denying Phoenix's motion for intervention, and that the assignment of the cause of action to the Hamiltons by Samson was in the best interest of the bankruptcy estate. Jurisdiction over the appeal is proper, pursuant to FEDERAL RULE OF BANKRUPTCY PROCEDURE 8001, 28 U.S.C. § 158(a) and 28 U.S.C. § 1334.

I. Standard of Review

Reviewing courts must accept a bankruptcy court's findings of fact unless they are clearly erroneous. **FEDERAL RULE OF BANKRUPTCY PROCEDURE 8013**. Conclusions of law, however, are governed by de novo review. Calder v. Camp Grove State Bank, 892 F.2d 629, 631 (7th Cir. 1990), citing In re Longardner & Assocs., Inc., 855 F.2d 455, 459 (7th Cir. 1988), cert. denied, 489 U.S. 1015 (1989).

II. Procedural History

New Era, Inc., filed its petition of bankruptcy under Chapter 11 of the Bankruptcy Code on December 3, 1991.¹ Two years before New Era filed under Chapter 11, Howard Hamilton and Laura Hamilton, individually and as owners of Magna Fab Companies, Inc., f/k/a Hamilton Buehle, Inc., d/b/a Magna Fab, Ltd. ("Hamiltons"), filed suit in state court seeking to recover damages which they claim resulted from a fire on premises owned by them and leased to New Era.

On February 5, 1992, the Hamiltons filed a motion in the bankruptcy case seeking relief from the automatic stay which would permit them to pursue their civil suit in state court against New Era.² The Bankruptcy Court entered a general form order on February 21, 1992 granting the Hamiltons' request to lift the automatic stay after New Era or other parties failed to file a timely response.

¹Debtor's petition was converted to a Chapter 7 action.

²The Hamiltons based their request to lift the stay on: (1) insurance coverage existed for the Hamiltons' claim; (2) Debtor was being defended by counsel provided by Debtor's insurance company (Phoenix); and (3) the bankruptcy by the Debtor did not discharge the insurance company from its obligation to pay for any judgment or damages within the coverage of the policy of insurance.

The petition requested that the stay be lifted in state court to determine the extent of insurance coverage. The order of the Bankruptcy Court was not specific.³ The state court proceedings went forward, and in August 1994 a jury rendered a verdict. Following post-trial motions, judgment was entered against New Era on October 14, 1994 in the sum of \$2,303,974.⁴

On August 5, 1994, a separate complaint seeking a declaratory judgment was filed by Phoenix which is presently before this Court (94-CV-569). Therein, Phoenix seeks a determination of its rights (as New Era's insurer). Phoenix maintains that it has no duty to defend or indemnify New Era in the state court action.⁵

On March 9, 1995, Donald Samson filed an application to approve the settlement agreement and assignment. Samson sought leave of the Bankruptcy Court to assign to the Hamiltons all rights New Era may have against Phoenix under the policy of insurance. New Era's assignment of the claim includes not only the claim for indemnity but also any further claim that may accrue to New Era for the alleged "bad faith" by

³A separate appeal is being pursued currently in the instant bankruptcy case in this Court, 94-CV-893. The issue before the Court is whether the excess amount of \$1.3 million is void because the automatic stay was supposed to have been lifted only to the extent of the available insurance proceeds.

⁴Appellant was permitted to supplement the record by submitting a copy of the Rule 23 Order of the Appellate Court of Illinois, Fifth District, granting the plaintiffs motion to dismiss the appeal for mootness. Appeal to the Illinois Supreme Court remains a possibility.

⁵An Order by this Court on September 27, 1995, stayed the declaratory judgment action pending final resolution of the state court garnishment proceeding.

Phoenix for failing to settle the action prior to entry of the judgment.

On March 29, 1995, Phoenix filed an application to intervene as an interested party in the bankruptcy case. Phoenix also filed an objection to the Trustee's application of approval of the settlement between New Era and the Hamiltons (including assignment of the alleged "bad faith" claim). Judge Meyers held a hearing on April 19, 1995 on these motions.⁶ Judge Meyers' May 4, 1995 order denied Phoenix's motion to intervene and approved the settlement agreement and assignment between New Era and the Hamiltons. It is from that order that Phoenix appeals.

III. Analysis

A. Motion to Intervene

Judge Meyers denied Phoenix's motion to intervene. (Transcript, p. 15.) Phoenix disputes this ruling and relies on **FEDERAL RULE OF BANKRUPTCY PROCEDURE 2018(a)**, which provides a suitable avenue for intervention by an "interested entity" for "cause shown." Phoenix maintains that Judge Meyers erred because Phoenix demonstrated that: (1) it was an interested party in the bankruptcy proceedings; (2) it has an economic interest at stake; and (3) the interest at stake would not be adequately protected by others. This three-prong test has not been clearly met by Phoenix.

Even if these three prongs are met, intervention is not automatic. "Permissive intervention under Rule 2018(a) may be permitted upon a

⁶This Court has carefully reviewed the April 19, 1995 hearing transcript ("Transcript").

showing of cause." In re Public Service Co. of New Hampshire, 88 B.R. 546, 551 (Bankr. D.N.H. 1988) (emphasis added). No other cause has been shown by Phoenix. Phoenix's interest is confined to eliminating exposure to a potential "bad faith" claim which is best pursued at other locations beyond the bankruptcy court.

At best, Phoenix may have an indirect interest in the bankruptcy proceedings. Phoenix has an indirect economic interest to protect which is speculative, since a potential "bad faith" claim has yet to be filed. The Court finds that the Bankruptcy Court's mission is protecting the bankrupt estate, not Phoenix. Phoenix's early reservation of rights and pending declaratory judgment action suggest that there are protections available beyond the bankruptcy action. Furthermore, the Bankruptcy Court's discretionary denial of intervention means that Phoenix "... is not legally bound or prejudiced by any judgment that might be entered in the case." Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 524 (1947). Phoenix will have its day in court should a "bad faith" claim be brought by the Hamiltons to protect its interests.

Furthermore, Judge Meyers considered countervailing factors including, "... undue delay or prejudice to the original parties." In re Public Service Co., 88 B.R. at 551, See Transcript, p. 11. Phoenix's argument about judicial economy does not sway this Court. This Court hereby **AFFIRMS** the ruling by the Bankruptcy Court which denied Phoenix's motion to intervene.

B. Settlement Agreement and Assignment

The second issue Phoenix raises is that the Bankruptcy Court erred

in approving the settlement agreement and assignment as sought by the Trustee. Even though intervention was denied, the appropriateness of the assignment received the Bankruptcy Court's attention. A cause of action seeking recovery of the excess judgment belonged to New Era. With New Era in bankruptcy, the cause of action rests with the Bankruptcy Trustee. Shearson Lehman Hutton, Inc. v. Waggoner, 944 F.2d 114, 118 (2nd Cir. 1991).

The Trustee has three options regarding the potential "bad faith" claim. The Trustee could elect to pursue Phoenix on the claim, assign the claim to someone else to pursue, or abandon the claim under 11 U.S.C. § 554. The last of these options would not extinguish the claim inasmuch as the Hamiltons could obtain an assignment from the Debtor and pursue the claim. See In re Wilson, 94 B.R. 886 (Bankr. E.D. Va. 1989).

Nothing will prevent Phoenix from filing a motion to stay a proceeding should the Hamiltons file an "imminent" "bad faith" claim until the declaratory judgment is resolved. This still leaves unresolved the most provocative issue noted by Phoenix. Phoenix urges this Court to first reach this matter as raised by New Era in 94-CV-893 before ruling here.

This Court has reviewed these related arguments, cases and considered oral argument on the merits thereof before reaching its ruling here. The universe of parties and interests that a Bankruptcy Court must protect are circumscribed. That is, the trial court must look to protect the primary interests of the bankruptcy estate. This is precisely what the Bankruptcy Court has done to date. The Court

AFFIRMS the Bankruptcy Court's decision to approve the settlement agreement and assignment as sought by the Trustee.

IV. Conclusion

The ruling of the United States Bankruptcy Court denying Appellant's motion to intervene and approving the settlement agreement and assignment proposed by the Trustee is hereby **AFFIRMED**.

IT IS SO ORDERED.

DATED this 27th day of March, 1996.

/s/ PAUL E. RILEY
United States District Judge