

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

PROMEDICUS HEALTH GROUP, LLP

Case No. 03-10102 K

Debtor

EXCELLUS HEALTH PLAN, INC. d/b/a
UNIVERA HEALTHCARE

Plaintiff

-vs-

AP No. 03-1053 K

ALLENTOWN PEDIATRIC AND ADOLESCENT
MEDICINE, LLP, et al.

Defendants

MARK S. WALLACH, TRUSTEE

Defendant-Third Party Plaintiff

-vs-

STANLEY BUKOWSKI, M.D., et al.

Third Party Defendants

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The procedural posture of the present matter is somewhat unusual and requires explanation, in the event that a reviewing court is asked to examine the record.

As this Court has stated on the record in open court, Excellus' Complaint in this Adversary Proceeding asserts various causes of action that (with one minor exception) are non-core. They are complaints by one non-debtor party (Excellus) against numerous other non-debtor parties, based on certain contracts. No bankruptcy issues are presented (with the exception of a single demand to subordinate certain rights of the Bankruptcy Trustee). The Trustee, on the other hand, has filed a Third Party Complaint against his co-defendants and perhaps others, alleging fraudulent transfers and other causes of action that are definitely "core."

(Although the Plaintiff alleged that its Complaint presented "core" matters, and although the Defendants "admitted" this allegation, subject matter jurisdiction may not be conferred by consent, and this Court is unequivocally of the view that the matters raised in the Plaintiff's Complaint are non-core. See 28 U.S.C. § 157(b)(3).)

When the Plaintiff moved for preliminary injunction, this Court deemed that motion to be a motion to lift the automatic stay of 11 U.S.C. § 362(a) seeking to permit the Plaintiff to assert, in a non-bankruptcy court, its various claims against the non-debtor Defendants. Lift of stay is necessary because of the possibility that rights asserted by the Plaintiff

could diminish the value of assets of the estate, as explained below.

The Debtor, Promedicus, was a Limited Liability Partnership consisting of medical professionals and certain employees and agents. Many of them are the non-debtor Defendants here. The Plaintiff's causes of action against the non-debtor Defendants are premised, for the most part, in two types of contracts. One is a single contract between the Plaintiff and the Debtor-Defendant Promedicus; that contract is called the Medical Services Agreement ("MSA"). The other is a collection of individual contracts between the Debtor Promedicus, and various of Promedicus' principals, employees and agents; these are called the Partner Working Agreements ("PWAs"). Specifically, the PWAs between Promedicus and its various principals, employees and agents contained non-competition covenants in favor of Promedicus, and the MSA (to which the individual members of Promedicus, and the individual employees and agents of Promedicus, were not signatory) purported to give to the Plaintiff the right to enforce such non-competition agreements if the Debtor Promedicus failed to do so.

The Trustee argues that if injunctions issue against the former members and others, then the Estate might be impaired in collecting money damages for the insider frauds that he has alleged against those persons.

Once this Court "deemed" the Motion for Preliminary Injunction to be a Motion to Lift Stay, the Court instructed the various parties to brief this question: Does the Plaintiff have any right to enforce covenants not to compete embedded in the PWAs through the MSA in light of the Debtor's Chapter 7 bankruptcy filing?

The extensive briefs received in response persuaded the Court to announce on the

record on May 14, 2003 that the question before this Court should be more limited. Simply put: Does “cause” exist under 11 U.S.C. § 362(d) to lift the stay to permit the Plaintiff to assert its claims for injunctive relief against the non-debtor entities in an appropriate non-bankruptcy forum?

In open court on that date, this Court set forth its reasoning as to why the stay should lift to that extent even though success by the Plaintiff might inhibit the Chapter 7 Trustee’s ability to collect any money judgments that he might recover against the same Defendants. Specifically, the Court reiterated its long-held view that bankruptcy does not constitute a “provisional remedy” by which non-debtor entities which may or may not be creditors or debtors of the Debtor, are “held at bay,” kept from pursuing claims against persons who are also targets of recovery actions by the bankruptcy Trustee.

In its briefs and in its oral arguments the Plaintiff has explained why it believes that a grant only of the ability to pursue injunctive relief against the Defendants does not provide it all the relief to which it is entitled. It recognizes that if it is a creditor of the Debtor Promedicus¹ it may not seek money damages that the Trustee should be able to obtain for the benefit of all creditors under the doctrine of *Moore v. Bay*, 284 U.S. 4 (1931). But it believes that by virtue of the MSA (and perhaps other theories) it is a unique party in these proceedings, having its own rights to money damages to the exclusion of the Trustee and “mere” creditors of

¹This is not entirely clear. The litigation between the Plaintiff and Promedicus began when Promedicus sued the Plaintiff in State Court for what members of Promedicus believed were violations by the Plaintiff of the MSA. The Chapter 7 Trustee has succeeded to that action. When all is said and done, it may turn out that the Plaintiff is a debtor of the Debtor, rather than a creditor of the Debtor.

Promedicus.

This Court has repeatedly stated on the record that although the Plaintiff's claims are "related to" the Chapter 7 case, the Court's ability to adjudicate these claims is inhibited by the fact that these claims are "non-core," and the written consents of numerous defendants to jurisdiction in this Court are not in the offing. Consequently, this Court, in ruling that an adjudication is necessary, must direct that that occur in a court with unquestioned jurisdiction, that being an appropriate non-bankruptcy court (or, in the alternative, the U.S. District Court, should that Court be asked to sit under 28 U.S.C. § 1334 and should it not abstain).

It is now ORDERED by this Court pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157 and the General Order of Reference that the Plaintiff's arguments to the effect that the automatic stay has no application to its efforts to enforce its rights against the non-debtor parties in an appropriate non-bankruptcy venue, are rejected. The rights of the Chapter 7 Debtor Promedicus against the non-Debtor Defendants under the PWAs are assets of the Chapter 7 estate unless and until a court of competent jurisdiction determines otherwise. Any effort by the Plaintiff to enforce its preferred view of the answer to that question would be a violation of 11 U.S.C. § 362(a)(3), in the absence of an Order lifting stay.

By the same token, the Trustee's argument that only this Court may decide that question - whether the Plaintiff succeeds to the relevant rights under the PWAs, to the exclusion of the Chapter 7 Debtor and its Trustee - is rejected. 28 U.S.C. § 1334(e), in stating that "the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of

such case, and of the property of the estate,” is not inconsistent with 28 U.S.C. § 1334(b) which states, in pertinent part, that “the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under Title 11.”

[Emphasis added.] Rather, this statutory structure makes it clear that this Court may relinquish jurisdiction over property of the estate to another court that would enjoy jurisdiction over a non-bankruptcy question but for the bankruptcy filing. Indeed, 28 U.S.C. § 1334(c)(1) specifically provides power to abstain from hearing any “particular proceeding arising under title 11 or arising in or related to a case under Title 11.” (Of course, these powers of the District Court have been referred under 28 U.S.C. § 157 and the General Order of Reference.)

It is of utmost importance that this is a Chapter 7 case not a Chapter 11 case. If this were a Chapter 11 case in which Promedicus was endeavoring to remain in business for the benefit of its creditors, and if there were to be conflict over whether it would be Promedicus or the Plaintiff who would get to choose whether or not the non-competition clauses in the PWAs would be enforced, this Court would have no doubt whatsoever that that would be a “core” matter, and this Court could decide the issue regardless of whether or not the non-Debtor parties to the PWAs consented to the jurisdiction of this Court. Here, however, the liquidating Debtor can have no interest whatsoever in the ongoing maintenance of the PWAs. Indeed, all the trigger events by which the Plaintiff might enjoy rights under the PWAs, pursuant to the MSA, were pre-petition events. Other than the ongoing financial solvency of the Defendants, as explained above, this estate could have no interest in the Plaintiff’s asserted rights to injunctive relief against the Defendants.

The Trustee raises one caveat with regard to this last statement. The Trustee is concerned that if the Plaintiff succeeds in obtaining injunctive relief in another forum, that might, as a matter of law, permit the Defendants (which he has sued in the Third Party Complaint) to raise new defenses as against his claim for money damages. This may or may not be a concern. Of course, as the Court explained on the record, if the Plaintiff is not successful in obtaining any relief against the Defendants in state court, the question becomes moot. But the Court, for the present, will not ignore this concern.

In light of the above, the following is also ORDERED:

The 11 U.S.C. § 362(a) stay is lifted, for cause, (the mere fact that the filing is a Chapter 7 filing is more than adequate “cause”) under 11 U.S.C. § 362(d) in favor of Plaintiff Univera/Excellus as follows: -

1. Excellus may assert, in any appropriate court, its purported contract right to obtain an injunction against anyone other than the Debtor and the Trustee.
2. The Debtor may be named as a nominal Defendant, but no money judgment may be obtained against the Debtor or the Trustee. The Trustee is not to defend in such other court.
3. Excellus’ rights under the MSA are as they existed at the instant before the Debtor Promedicus filed its Chapter 7 case. Consequently, remedies that might be available to the Chapter 7 estate under the Bankruptcy Code are not available to Excellus (such as, the setting aside of preferences or fraudulent conveyances, the assumption or rejection of contracts, or rights reserved to Promedicus under the MSA or PWAs).

4. Excellus may request monetary relief only as an alternative, to be considered only if and in the event that injunctive relief is denied on the merits of the contractual question presented. Excellus may not proceed to obtain money judgment without further leave of this Court.

5. Above paragraph 4 is qualified as follows: Any request for money relief shall specifically and expressly exclude relief or damages that only the Debtor Promedicus could seek, or that any creditor of Promedicus could seek, and shall, therefore, be limited to relief for damages available exclusively to Excellus by virtue of the MSA or by virtue of the equities created by the MSA and PWAs; any relief sought in another court shall expressly state that money relief or damages available to Promedicus, and more particularly to the Trustee or non-insider creditors of Promedicus, have been specifically reserved to the Trustee and to the jurisdiction of this Court.

6. No decision by another forum will bind this Court as to any issue affecting amounts recoverable for the benefit of non-insider creditors of the Debtor, though this Court will adopt material rulings of such other court to the maximum extent that does not violate Federal Law or this Judge's oath of office. (Thus, it is this Court's explicit intention to reduce the risk of inconsistent results where possible.)²

7. Nothing in this Order constitutes a finding that Excellus possesses any rights against any entity other than the Debtor under the MSA. Excellus is liable for any abuse of

²This (though on a "reciprocal" basis) is common practice in an unrelated context - - cross-border insolvencies. This Court and Courts of Canada are observing "protocols" in several cases in this Court at this time.

process or otherwise sanctionable or actionable conduct for any action it might take against others. Excellus is admonished to observe standards such as those contained in Rule 11 Fed.R.Civ.P. as well as State Law, in deciding who it may sue pursuant to this Order.

8. This Order decides only that cause exists to lift stay to a limited extent. This Order is without prejudice to any rights the Trustee might assert against Excellus, whether for actions prior to the Debtor's filing or after. Such rights include, but are not limited to (1) rights of Promedicus under State Court Action #1, by which Promedicus complained of actionable defalcations by Excellus, (2) rights arising out of any confederation by Excellus with parties against whom the Trustee has asserted or may assert claims in favor of the non-insider creditors of Promedicus (such as, but not limited to, Trustee claims against Univera arising out of contractual or other relationships with professionals and others whom Excellus has not or chooses not to sue); and (3) claims against Excellus under 11 U.S.C. § 506 or under other authority for costs and expenses of administering this Chapter 7 estate. This Order, consequently, does not empower any party to settle any matter in another forum in such a way or with such an effect as to diminish the value of claims available to the Trustee for the benefit of non-insider creditors of the Debtor.

SO ORDERED.

Dated: Buffalo, New York
May 20, 2003

/s/ Michael J. Kaplan

U.S.B.J.