
UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 99-11087-JMD
Chapter 11

Shepherds Hill Development Co., LLC,
Debtor

Anthony F. Balzotti, Dawn Balzotti,
Michael Balzotti, Thomas Iarrobino,
Ann Burgess, and Edmond J. Ford, Trustee,
Plaintiffs

v.

Adv. No. 00-1087-JMD

RAD Investments, LLC and
Robert A. Dianni,
Defendants

Michael Mortimer, Esq.
William Gannon, Esq.
WADLEIGH STARR & PETERS, PLLC
Attorneys for Plaintiffs Anthony Balzotti, Dawn Balzotti,
Michael Balzotti, Thomas Iarrobino, and Ann Burgess

Mark McDonald, Esq.
FORD AND WEAVER, PA
Attorney for Edmond Ford, Chapter 11 Trustee

Norman Novinsky, Esq.
NOVINSKY & ASSOCIATES
Attorney for Defendants

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On June 30, 2000, Anthony F. Balzotti, Dawn Balzotti, Michael Balzotti, Thomas Iarrobino, Ann Burgess, and Edmond J. Ford, Chapter 11 Trustee, (the “Plaintiffs”) commenced this adversary proceeding against RAD Investments, LLC and Robert A. Dianni (the “Defendants”), seeking damages for breach of a post-petition purchase and sale agreement. After service by publication, the Defendants failed to answer

and an Order Entering Default in the adversary proceeding was entered by the Court on January 24, 2001. See Adv. Doc. No. 14.¹ On February 21, 2001, the Court held a hearing regarding a motion for entry of a default judgment. At the February 21, 2001 hearing, counsel for the Defendants appeared for the first time and raised questions about entering the default judgement. Consequently, the Court continued the hearing to April 12, 2001 and set a deadline for the Defendants to file a motion to strike the entry of default. See Adv. Doc. No. 27.

On March 7, 2001, the Court issued an Order to Show Cause why the Order Entering Default should not be vacated and the adversary complaint should not be dismissed for lack of jurisdiction. See Adv. Doc. No. 31. On April 12, 2001, the Court held a hearing on the Order to Show Cause and the Defendants', RAD Investments, LLC and Robert A. Dianni, Motion to Strike Default Judgment² (the "Motion to Strike") filed by the Defendants (Adv. Doc. No. 35). At the end of the hearing the Court took the Order to Show Cause and the Defendants' Motion to Strike under submission.

II. FACTS

On April 2, 1999, Shepherds Hill Development Co., LLC (the "Debtor") filed a Chapter 11 bankruptcy petition in this Court. The Debtor and several of the Plaintiffs attempted to find new investors or to sell its development project to a third party. By November of 1999 an interested buyer had been identified and a purchase and sale agreement had been signed, subject to approval by the Court. The Debtor sought Court approval for bidding procedures and an order authorizing the sale. Shortly thereafter, on December 3, 1999, the Plaintiffs, along with the other members of the Debtor (collectively the

¹ In this opinion the term "Adv. Doc." refers to the docket in this adversary proceeding, Adv. No. 00-1087-JMD.

² While the Defendants' motion was captioned as one to strike a default judgment, in reality it was a motion to strike the Court's entry of default, as the Court had not yet entered a default judgment.

“Members”), filed a Motion to Dismiss the case. See Bkr. Doc. No. 45.³ The Members sought to have the case dismissed so they could sell their membership interests to the Defendants for \$19,000,000.00.

Attached to the Motion to Dismiss was a copy of the agreement for the sale of the membership interests signed by the Plaintiffs and Robert Dianni as the managing member of RAD Investments, LLC (the “RAD Agreement”). The RAD Agreement was subject to dismissal of the Chapter 11 proceeding and provided for payment in full of the Debtor’s unsecured creditors outside of a plan of reorganization and for payment to the Members for their membership interests. The Debtor was not a party to the RAD Agreement.

At the hearing on the Debtor’s application to sell the project, a new buyer, W. O. Brisben Companies, Inc. submitted a higher offer. On December 23, 1999, the Court granted the Debtor’s application to sell the project to the new buyer, and approved the form of a purchase and sale agreement between the Debtor and W. O. Brisben Companies, Inc. (the “Brisben Agreement”). The rights and obligations of the parties under the Brisben Agreement were subject to certain conditions relating to financing and land use matters as well as resolution of the Motion to Dismiss on or before January 24, 2000. See Bkr. Doc. No. 67. By January 24, 2000, the RAD Agreement had collapsed due to the alleged failure of the Defendants to transfer to the Plaintiffs the money necessary to obtain dismissal of the Chapter 11 proceeding. In the absence of money necessary to pay creditors’ claims, the Motion to Dismiss was denied. See Bkr. Doc. No. 72.

The Court subsequently approved the U. S. Trustee’s motion to appoint a trustee and the Chapter 11 Trustee was appointed on February 22, 2000. See Bkr. Doc. No. 101. On March 29, 2000, the Chapter 11 Trustee filed a liquidating plan and disclosure statement (together with all subsequent amendments hereinafter the “Trustee’s Plan”) as an alternative to the sale contemplated in the Brisben Agreement. In late April, the Brisben Agreement expired when the buyer failed to act in a timely manner to

³ In this opinion the term “Bkr. Doc.” refers to the docket in the main bankruptcy case, Bk. No. 99-11087-JMD.

extend the time permitted to satisfy the conditions in the Brisben Agreement. See In re Shepherds Hill Development Co. LLC, 2000 BNH 012.

On May 2, 2000, Plaintiff Caesar Balzotti and a creditor filed a liquidating plan and disclosure statement as an alternative to the Trustee's Plan (together with all subsequent amendments hereinafter the "Caruso Plan"). The Chapter 11 Trustee and the proponents of the Caruso Plan filed a series of amendments to their respective plans and ultimately agreed that the competing plans would proceed to a confirmation hearing on parallel tracks.

On June 30, 2000, the Plaintiffs commenced this adversary proceeding against the Defendants seeking damages for breach of a purchase and sale agreement, negligent misrepresentation and detrimental reliance, violation of the New Hampshire Unfair Business Practices Act, and violation of the common law covenants of good faith and fair dealing. See Adv. Doc. No. 1. The complaint specifically stated that the Chapter 11 Trustee, Edmond Ford, (the "Trustee") had been granted an assignment of the first \$200,000.00 of any money recovered (the "Assignment").⁴ Further, the Trustee was only joined in the first count of the complaint alleging breach of a purchase and sale agreement. On July 21, 2000 the Caruso Plan was confirmed by this Court. See Bkr. Doc. No. 294.

⁴ It appears on face of the documents that the Trustee was gratuitously granted the first \$200,000.00 recovered in this suit. However, at the April 12, 2001 hearing it was revealed that the Assignment was the result of negotiations between the Plaintiffs and the Trustee relating to his agreeing to continue the confirmation hearing on the Trustee's Plan to permit the Caruso Plan and the Trustee's Plan to proceed on parallel tracks.

III. DISCUSSION

In 1982 the Supreme Court held that the pervasive grant of jurisdiction over all matters pertaining to bankruptcy cases to the bankruptcy courts contained in the 1978 Bankruptcy Reform Act⁵ was unconstitutional. Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). Congress responded to the Marathon decision through enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.⁶ The 1978 Bankruptcy Reform Act had given bankruptcy jurisdiction to the United States district court, but it was required to be exercised by the bankruptcy court. 1 RICHARD F. BROUD ET AL., COLLIER ON BANKRUPTCY ¶1.02[2] (Lawrence P. King et. al. eds., 15th Ed. Revised 2001). Under the 1984 amendments, the district court can, but need not, refer matters to the bankruptcy court and the district court has the authority to control the exercise by the bankruptcy court of the jurisdictional referral. Id.

Under 28 U.S.C. § 157(a) district courts are allowed to automatically refer “all proceedings arising under title 11 or arising in or related to a case under title 11 . . .” to the bankruptcy court for the district. The United States District Court for the District of New Hampshire has chosen to make use of its referral power and automatically refers any cases arising under, arising in, or related to title 11 to the bankruptcy judges of the district. See Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire, dated January 18, 1994 (Diclerico, C.J.). However, the referral of cases to the bankruptcy court does not confer on the bankruptcy court unlimited power to hear and determine cases.

Under 28 U.S.C. § 157(b) bankruptcy courts have jurisdiction to hear and make determinations on any “core” proceedings that arise under title 11 or arise in a case under title 11. “Proceedings *arise under* title 11 if they involve a cause of action created or determined by a statutory provision of the bankruptcy

⁵ Pub. L. No. 95-598 (1978).

⁶ Pub. L. No. 98-353 (1984).

code.” Work/Family Directions, Inc. v. Children’s Discovery Ctr., Inc. (In re Santa Clara County Child Care Consortium), 223 B.R. 40, 43 n.2 (1st Cir. B.A.P. 1998) (emphasis added) (quoting Goldstein v. Marine Midland Bank, N.A. (In re Goldstein), 201 B.R. 1, 4 (Bankr. D. Maine 1996) (citations omitted)). “Proceedings *arising in* a bankruptcy case are those that are not based on any right expressly created by title 11, but nevertheless would have no existence outside of the bankruptcy.” Id. at n.3 (emphasis added).

In Marathon, the Supreme Court ruled that bankruptcy courts did not have jurisdiction to adjudicate cases where a debtor brings a state law contract action against a private party when the underlying claim the debtor was seeking damages for arose pre-petition. In 1987 the Court of Appeals for the First Circuit held that bankruptcy courts did, however, have jurisdiction over contract actions that arose post-petition and that were made as part of the debtor’s attempts to liquidate estate assets. See Arnold Print Works, Inc. v. Apkin, 815 F. 2d 165 (1st Cir. 1987). The court in Arnold reasoned that persons entering contracts with the debtor post-petition would know of the debtor’s condition and would expect to have any controversies ruled upon by the bankruptcy court. See Arnold, 815 F. 2d. at 170.

In the case before this Court, the contract in dispute did arise post-petition. However, unlike Arnold the contract was not between the Debtor and third parties. The contract underlying the dispute in this adversary proceeding was between the Members and the Defendants. Furthermore, the dispute does not involve a cause of action that is created by a provision of the Bankruptcy Code and the dispute could exist outside of a bankruptcy proceeding. Accordingly, the Court finds that this adversary proceeding is a not a core proceeding that “arises under” or “arises in” a case under title 11.

Although this case is not a core proceeding, the Court may still hear the proceeding if it is a proceeding related to title 11.⁷ “Related to” jurisdiction is the most expansive of the three types of jurisdiction referred to in 28 U.S.C. § 157. See Work/Family Directions, Inc., 223 B.R. at 40 n.4.

⁷ Unless the parties expressly or impliedly consent in a non-core related to proceeding, the bankruptcy court may only make proposed findings of facts and conclusions of law that must be submitted to the district court for review and entry of a final judgment. See 28 U.S.C. § 157(c).

Proceedings related to title 11 “are those whose outcome could conceivably have an effect on the bankruptcy estate, and which (1) involve causes of action owned by the debtor that became property of a title 11 estate under § 541, or (2) are suits between third parties which ‘in the absence of bankruptcy, could have been brought in a district court or a state court,’” Id. at 44 (citations omitted).

The case before the Court involves a contract dispute between two non-debtor third parties. In the absence of bankruptcy, such a breach of contract claim could be brought in a state court. Further, through the provisions of the plan of reorganization and the agreement that was made with the Trustee, the outcome of the proceeding will have an effect on the bankruptcy estate. Accordingly, the Plaintiffs argue that the Court has at least “related to” jurisdiction over this adversary proceeding.

While the Plaintiffs’ argument that the Court has “related to” jurisdiction over this adversary proceeding is sufficient to warrant a test drive, on the facts of this case the Court cannot accept the jurisdictional argument. The breach of contract claim that is the underlying dispute in this case arose in late January of 2000 when the Defendants allegedly failed to timely supply the money that was required under the RAD Agreement. At the time the breach of contract claim arose the bankruptcy estate was in no way affected by the claim. The claim did not belong to the Debtor, as the Debtor was not a party to the RAD Agreement, and the claim was not property of the estate. Accordingly, the Court did not have even “related to” jurisdiction over the breach of contract claim at the time the claim arose.

While the Plaintiffs have argued that the outcome of the proceeding affects the estate because of the Assignment and the payments due to creditors under the Caruso Plan, the Court finds that it is not possible to create jurisdiction by using the proceeds of a claim or a pending suit to fund a plan of reorganization or by assignment of a portion of such claim or suit to the Trustee. If plan proponents could use such methods to create jurisdiction in the bankruptcy courts where it would not otherwise exist, jurisdiction over any case or controversy could be created in the bankruptcy courts in contravention of the Supreme Court’s ruling in Marathon. The Supreme Court has ruled that bankruptcy courts are courts of limited jurisdiction. This Court did not have jurisdiction over this adversary proceeding before the

Assignment and before confirmation of the Caruso Plan. Accordingly, the Court finds that it does not have jurisdiction over this case.

IV. ORDER

In accordance with this Memorandum Opinion, the Court finds and rules that:

1. The Court does not have jurisdiction to hear this adversary proceeding.
2. The Court's previous order entering default in this adversary proceeding is **vacated** as the Court had no jurisdiction to enter any such order.
3. This adversary proceeding is hereby **dismissed** for lack of jurisdiction.
4. The Defendants' Motion to Strike is **denied** as moot.
5. Any other matters remaining open in this adversary proceeding are **denied** as moot.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 15th day of May, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge