

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

Case No. 8:01-bk-22614-PMG

UNITED CONTAINER, LLC,

Debtor.

Chapter 7

**ORDER ON MOTION FOR ORDER DIRECTING PAYMENT
ON ACCOUNT OF CLAIM NO. 48**

THIS CASE came before the Court for hearing to consider the Motion for Order Directing Payment on Account of Claim No. 48 filed by Peninsula Bank.

Claim No. 48 was initially filed by SunShore Leasing Corp. (SunShore) as a general unsecured claim in the amount of \$1,402,205.98. According to Peninsula Bank (the Bank), SunShore and the Bank subsequently entered into a Forbearance Agreement pursuant to which SunShore assigned to the Bank its right to receive "all distributions to be made by the Chapter 7 Trustee on the Allowed Claim." (Doc. 1552, ¶ 4).

SunShore does not dispute the existence of an assignment. SunShore contends, however, that the amount of its obligation to the Bank is less than the amount of the distribution on the Claim, with the result that the Bank is not entitled to receive the entire amount of the payment from the Trustee. SunShore's obligation to the Bank is the subject of an action pending in the State Court in Sarasota County, Florida.

I. Background

At the hearing on the Bank's Motion, the parties agreed that the issue is whether the proceeds of Claim No. 48 should be distributed to the Bank, or deposited into the Registry of the State Court pending determination of entitlement to the funds.

A. The Bankruptcy case

On December 6, 2001, the Debtor, United Container, LLC, filed a petition under Chapter 11 of the Bankruptcy Code.

On January 22, 2002, the Chapter 11 case was converted to a case under Chapter 7. (Doc. 60). Steven S. Oscher is the Trustee of the Chapter 7 estate.

During his administration of the case, the Trustee recovered the sum of \$42,937,809.57 for the estate. General unsecured claims were filed and allowed in the case in the total amount of \$32,465,258.80. (Doc. 1538).

On December 17, 2004, and August 10, 2006, the Court authorized the Trustee to make interim distributions to the holders of allowed, unsecured claims. (Docs. 887, 1436).

On March 4, 2010, the Trustee filed his Final Report of the estate. (Doc. 1538). In the Final Report, the Trustee proposed a final distribution to the holders of unsecured claims. According to the Report, the total dividend to unsecured creditors in this case, after payment of administrative and priority claims, is approximately 70% of the allowed claims.

It appears that the Trustee has written all of the distribution checks proposed in the Final Report. It further appears that the Trustee has disbursed all of the checks other than the check written on account of Claim No. 48, and that the estate may be closed once the dividend check for Claim No. 48 is disbursed.

B. Claim No. 48

On April 25, 2002, SunShore filed Claim No. 48 as a general unsecured claim in the amount of \$1,402,205.98. The Claim was allowed in the amount of \$1,390,907.87. (Doc. 893).

On December 17, 2004, the Court entered an Order authorizing an interim distribution in this case, which included an interim distribution to SunShore in the amount of \$278,181.57 on account of Claim No. 48.

On December 30, 2004, the Bank filed a Notice of Transfer of Claim No. 48 pursuant to Rule 3001(e) of the Federal Rules of Bankruptcy Procedure. (Doc. 967). In the Notice, the Bank stated:

The Transferee holds a valid and perfected security interest in the account and proceeds thereof represented by the proof of claim filed by Sunshore Leasing Corporation ("Transferor"), Claim No. 48, in the allowed amount of \$1,390,907.87 ("Allowed Claim"). The Transferee is entitled under applicable state law (section 679.607(1), Florida Statutes) to all distributions to be made by the Chapter 7 Trustee on the Allowed Claim. The Transferee's security interest arises under a Loan and Security Agreement ("Security Agreement") dated June 15, 2001, and a UCC-1 Financing Statement, No. 200100135569, filed June 21, 2001. The security interest secures payment of a Promissory Note ("Note") dated June 15, 2001. The Transferor is in default under the Note and Security Agreement, and the Transferee, therefore, accelerated the Note on December 29, 2004.

(Doc. 967).

On January 10, 2005, SunShore filed a Notice of Partial Transfer of Claim No. 48. (Doc. 1017).

Pursuant to the Notice, SunShore stipulated that:

[A]n order may be entered recognizing (i) the assignment of the Allowed Claim as an unconditional assignment after the first \$70,000.00 of distributions to be made thereon and (ii) the Assignee as the valid owner of the Allowed Claim as to all distributions to be made thereon in excess of \$70,000.00.

(Doc. 1017). On the following day, January 11, 2005, the Bank withdrew its Notice of Transfer on the grounds that its Notice had been superseded by SunShore's Notice of Partial Transfer and the parties' agreed division of proceeds. (Doc. 1018).

On August 10, 2006, the Court entered an Order authorizing the Chapter 7 Trustee to make a second interim distribution in this case. (Doc. 1436). The schedule attached to the Order included a distribution in the amount of \$417,272.36 to the Bank as transferee of SunShore's Claim.

Two years later, on August 13, 2008, the Bank filed an Amended Notice of Transfer of Claim No. 48. (Doc. 1512). In the Amended Notice, the Bank asserted that it had entered into a Forbearance Agreement with SunShore on July 2, 2008, and that the Forbearance Agreement provided:

11. Sunshore Leasing is entitled to an additional distribution in the matter In re: United Container, LLC, Sunshore Leasing Corp hereby unconditionally and irrevocably assigns to Plaintiff all distributions to be made by the Chapter 7 Trustee on the Allowed Claim to secure any and all obligations of the Obligor to Plaintiff, as set forth herein.

(Doc. 1512, quoting Forbearance Agreement). The Amended Notice stated that it was filed pursuant to Rule 3001(e) of the Federal Rules of Bankruptcy Procedure, and that any future notices regarding Claim No. 48 should be given to the Bank.

On March 4, 2010, the Trustee filed his Final Report of the Estate. (Doc. 1538). The Final Report proposes a distribution to SunShore in the amount of \$278,648.81 on account of Claim No. 48. The Trustee is holding the final distribution check pending determination of the Bank's Motion for Order Directing Payment on Account of Claim No. 48.

II. Discussion

In the Motion for Order Directing Payment, the Bank asserts that (1) SunShore had assigned the final distribution on Claim No. 48 to the Bank pursuant to a Forbearance Agreement; (2) that the

amount of the final distribution from the estate is \$278,648.81; and (3) that SunShore owes the Bank the sum of \$237,118.90 as of April 27, 2010. (Doc. 1552). Consequently, the Bank seeks the entry of an Order "directing the Trustee to pay Peninsula Bank its appropriate share" of the final distribution, and "to remit the remaining proceeds to be distributed on account of Claim No. 48 directly to Sunshore Leasing." (Doc. 1552, ¶9).

In response, SunShore contends that the amount owed to the Bank is \$119,534.92 as of January 5, 2010, instead of the larger amount stated by the Bank. (Doc. 1565). SunShore further asserts that the Forbearance Agreement is no longer enforceable, or alternatively, that the Agreement is enforceable to the extent that it contains a formula for determining the amount owed, "which amount requires an evidentiary hearing." (Doc. 1565, ¶9).

Finally, SunShore asserts that an action styled Peninsula Bank v. SunShore Leasing Corp., Case No. 2007-CA-11872-NC is pending in the Circuit Court for Sarasota County, Florida, and that the Court should direct the Trustee to deposit the final distribution check into the Registry of the State Court for determination of the appropriate allocation of the funds. (Doc. 1565, ¶12).

The Bank opposed SunShore's request for deposit of the check into the Court Registry, and asserted that the Trustee should distribute the check to the Bank as the owner of Claim No. 48.

A. Rule 3001(e)

At the hearing on its Motion for Order Directing Payment, the Bank asserted that the Forbearance Agreement contained an unconditional and irrevocable assignment of Claim No. 48, that the Bank had filed a Notice of Transfer of the Claim with the Court, and that the Bank was therefore the owner of Claim No. 48 pursuant to Rule 3001(e)(2) of the Federal Rules of Bankruptcy Procedure.

Rule 3001(e)(2) provides:

Rule 3001. Proof of Claim

...

(e) TRANSFERRED CLAIM.

...

(2) Transfer of Claim Other Than for Security After Proof Filed. If a claim . . . has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. . . . If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

F.R.Bankr.P. 3001(e)(2). The Advisory Committee Notes to Rule 3001(e) indicate that the purpose of the subsection was to address the abuse that might arise from the postpetition trafficking in claims against a bankruptcy estate. The Notes further indicate that the Rule was not intended to affect any remedies otherwise available under nonbankruptcy law to a transferor or transferee.

In the event that evidence of a transfer is filed in a case and not opposed, the last sentence of Rule 3001(e)(2) provides that the transferee "shall" be substituted for the transferor as the holder of the claim. At the hearing on its Motion for Order Directing Payment, the Bank relied on the case of In re Northwest Airlines Corporation, 2007 WL 498285 (Bankr. S.D.N.Y.) to support its contention that this provision is essentially self-executing, and that the Court has no role in the substitution of the transferee as the holder of the claim. According to the Court in Northwest Airlines, the language of Rule 3001(e)(2) is mandatory, and intended to prevent the litigation of transfer disputes in the Bankruptcy Court unless a timely objection is filed under the Rule. See In re Northwest Airlines Corporation, 2007 WL 498285, at 2(citing In re Olson, 120 F.3d 98, 100-02 (8th Cir. 1997)).

In this case, SunShore did not file an objection to the Bank's Amended Notice of Transfer. Consequently, the Bank contends that it was substituted for SunShore as the owner of Claim No. 48 in accordance with the mandatory provision of Rule 3001(e)(2).

B. State Court determination

The request before the Court in Northwest Airlines was whether an alleged transferor of a claim should be permitted to assert a late objection to a Notice of Transfer filed by the transferee. The Court denied the alleged transferor's request, based on its conclusion that Rule 3001(e)(2) was designed to "sever bankruptcy courts from claim transfer disputes unless a timely objection is filed." In re Northwest Airlines, 2007 WL 498285, at 2.

Although the Court in Northwest Airlines denied the alleged transferor's request, it ultimately found that the dispute involving the transfer of the claim should be determined in state court. Specifically, the Court found that the dispute was "entirely tangential to the bankruptcy case," and that no reason had been offered as to why other parties to the bankruptcy case "should even have to monitor this private dispute." In re Northwest Airlines, 2007 WL 498285, at 4.

In fact, even though the transfer dispute may be a "core" proceeding under 28 U.S.C. §157(b)(2), the Court found that the delegation of the dispute to state court was appropriate pursuant to the discretionary abstention provisions of §1334(c)(1). Id. at 4. That section provides:

§1334. Bankruptcy cases and proceedings

...

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for state law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. §1334(c)(1). Abstention under §1334(c)(1) is discretionary, and may even be raised by a Court sua sponte. In re Northwest Airlines, 2007 WL 498285, at n.3(citing In re Petrie Retail, Inc., 304 F.3d 223, 232 (2d Cir. 2002)). See also Bricker v. Martin, 348 B.R. 28, 33-34 (W.D. Pa. 2006).

In Northwest Airlines, the claimants' private contract dispute did not affect the bankruptcy estate. Based on §1334(c)(1), therefore, the Court concluded that the dispute should be resolved by the state court. In re Northwest Airlines, 2007 WL 498285, at 4.

The same result was achieved in In re Casual Male Corp., 317 B.R. 472 (Bankr. S.D.N.Y. 2004), even though that case did not arise from a dispute regarding a Notice of Transfer under Rule 3001(e) of the Federal Rules of Bankruptcy Procedure. Casual Male involved a contract dispute between the alleged buyer and seller of a claim against a bankruptcy estate. The Bankruptcy Court concluded that it possessed subject matter jurisdiction over the proceeding, but remanded the dispute to state court on equitable grounds. In re Casual Male, 317 B.R. at 474.

In Casual Male, the Court first noted that the chapter 11 plan had been confirmed, and that there was "no particular administrative advantage to the estate, or vis-à-vis the needs and concerns of other creditors, to adjudicate" the controversy in the bankruptcy court. Id. at 478. Additionally, the Court found that the dispute involved "classic state law causes of action for breach of contract," and that such causes of action were suitable for determination by the state court. Id. at 478-79.

III. Application

The Court has considered the record and authorities discussed above, and finds that the check written by the Trustee on account of Claim No. 48 should be deposited into the Registry of the Circuit Court in Sarasota County, Florida, pending resolution of the parties' dispute in the case styled Peninsula

Bank v. SunShore Leasing Corp., Case No. 2007-CA-11872-NC. This conclusion is based primarily on three factors.

A. Rule 3001(e)

First, Rule 3001(e)(2) of the Federal Rules of Bankruptcy Procedure does not require the substitution of the Bank as the holder of Claim No. 48.

On August 13, 2008, the Bank filed an Amended Notice of Transfer of Claim No. 48 pursuant to Rule 3001(e). (Doc. 1512). Significantly, the Notice does not specifically refer to subsection (2) of Rule 3001(e).

The Amended Notice quotes a Forbearance Agreement between the parties as the basis for the transfer. The portion of the Forbearance Agreement quoted in the Amended Notice provides:

Sunshore Leasing Corp hereby unconditionally and irrevocably assigns to Plaintiff all distributions to be made by the Chapter 7 Trustee on the Allowed Claim to secure any and all obligations of the Obligor to Plaintiff, as set forth herein.

(Doc. 1512, quoting Forbearance Agreement)(Emphasis supplied). Consequently, SunShore's assignment of the Claim to the Bank was not necessarily an absolute transfer of the entire amount of the distribution from the estate. Instead, it appears that SunShore may have transferred the dividend to the Bank only to secure SunShore's indebtedness to the Bank. By its terms, therefore, the Amended Notice of Transfer does not support the Bank's contention that it should be substituted as the sole and absolute owner of the distribution rights to Claim No. 48.

If the assignment was a transfer for security, Rule 3001(e)(4) may be the subsection of Rule 3001(e) that applies in this case, rather than Rule 3001(e)(2) as asserted by the Bank. Rule 3001(e)(4) is encaptioned "Transfer of Claim for Security After Proof Filed." Rule 3001(e)(4) does not contain a provision for the mandatory substitution of transferee for transferor if no objection to a Notice of

Transfer is filed. If no agreement is filed regarding the parties' relative rights to a claim, Rule 3001(e)(4) provides only that the Court "shall enter such orders respecting these matters as may be appropriate." Fed.R.Bankr.P. 3001(e)(4).

B. State law issues

Second, it appears that the true dispute between the parties involves the amount of the obligation owed by SunShore to the Bank under the Forbearance Agreement. In its Response to the Bank's Motion, for example, SunShore asserts that the amount claimed by the Bank bears no relation to the judgment amount stipulated by the parties in the Forbearance Agreement. (Docs. 1552, 1565). The dispute arises solely as a matter of state law.

Specifically, the parties' relationship originated with a Promissory Note and Security Agreement. (Doc. 967). The parties subsequently entered into a Forbearance Agreement, which was submitted in a State Court action initiated by the Bank. The Forbearance Agreement provides for the entry of a stipulated judgment in the event that certain conditions were not satisfied, and contains the basis for calculating the amount of the stipulated judgment. (Doc. 1552, Exhibit D, ¶14).

The Bank received the assignment regarding Claim No. 48 to secure the obligations set forth in the Forbearance Agreement, and appears to acknowledge that its right to collect the proceeds of the Claim is based on state law. The Bank relies on §679.607 and §679.608 of the Florida Statutes, for example, as authority for its right to receive the dividend check from the Trustee, and thereafter to apply the proceeds of the check in accordance with the schedule of priorities set forth in the statute. (See Doc. 967, and statutory authority presented at hearing).

The dispute between the parties involves the amount owed by SunShore to the Bank, and the application of the dividend check to be disbursed by the Trustee. The resolution of these issues will not

implicate any bankruptcy statutes or rules, but will only involve matters of contract interpretation and state law. See In re Northwest Airlines, 2007 WL 498285, at 2.

C. No effect on estate

Third, this is a Chapter 7 case that has been fully administered. The amount of the dividend to unsecured creditors has been fixed, and the Trustee has written and distributed dividend checks to all of the holders of unsecured claims except Claim No. 48. The Trustee is holding the funds for distribution on Claim No. 48 pending the disposition of the Bank's Motion for Order Directing Payment, and it appears that the case may be closed upon the disbursement of those funds. The Trustee's Final Report has been filed and approved.

The resolution of the parties' dispute will have no impact on the chapter 7 estate or on other creditors of the estate. Neither party is asserting any additional claims against the estate, or seeking any additional funds from the estate. In re Casual Male, 317 B.R. at 481. The only effect of the proceeding will be the allocation of the dividend check as between the Bank and SunShore.

IV. Conclusion

In conclusion, Rule 3001(e)(2) of the Federal Rules of Bankruptcy Procedure does not mandate the substitution of the Bank as the holder of Claim No. 48, because it appears that the assignment of the Claim was made to secure SunShore's obligation to the Bank. Further, the true dispute between the Bank and SunShore involves the amount of the obligation arising under the parties' contract. The dispute is a state law matter that has no impact on the Chapter 7 case, and the funds should therefore be deposited with the State Court in Sarasota County pending resolution of the dispute by that Court.

Accordingly:

IT IS ORDERED that:

1. The Motion for Order Directing Payment on Account of Claim No. 48 filed by Peninsula Bank is granted in part and denied in part as set forth in this Order.

2. The funds distributed by Steven S. Oscher, as Chapter 7 Trustee, on account of Claim No. 48 shall be deposited into the Registry of the Circuit Court for Sarasota County, Florida, pending a final determination of entitlement to the funds in the action styled Peninsula Bank v. SunShore Leasing Corp., Case No. 2007-CA-11872-NC.

DATED this 10 day of August, 2010.

BY THE COURT

/s/ Paul M. Glenn

PAUL M. GLENN
Chief Bankruptcy Judge