UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Case Nos. 8:13-bk-06864-CED, et al.
Chapter 7

Able Body Temporary Services, Inc., et al.

Debtors.
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ORDER DENYING TRUSTEE'S MOTION FOR REHEARING OF ORDER DENYING TRUSTEE'S MOTION TO APPROVE COMPROMISE

THIS CASE came before the Court without a hearing to consider *Trustee's Motion for Rehearing of Order Denying Trustee's Motion to Approve Compromise with American Casualty Insurance Company of Reading, Pennsylvania and CNA Claims Plus, Inc*. (the "Motion for Rehearing"),[1] the response (the "Response") filed by Regions Bank ("Regions"),[2] and the Trustee's reply to Regions' Response.[3] The Court has carefully considered the papers and record, and denies the Motion for Rehearing.

1. The Bankruptcy Cases

On February 2, 2011, Frank Mongelluzzi filed a petition for relief under Chapter 11 of the Bankruptcy Code.[4] Shortly thereafter, he converted the case to a Chapter 7 liquidation case and a Chapter 7 trustee, Angela Welch, was appointed. In May 2013, Angela Welch, in her capacity as Chapter 7 trustee and thus in control of Mr. Mongelluzzi's assets, filed Chapter 7 cases for sixteen entities owned by Mr. Mongelluzzi—the above-captioned Debtors. Christine Herendeen (the "Trustee") was appointed as the Chapter 7 trustee in Debtors' bankruptcy cases. Most of the sixteen Debtors had been in the business of providing temporary staffing services, primarily in the construction industry.[5]

In January 2015, the Trustee filed adversary proceedings against Regions to avoid alleged fraudulent transfers from Debtors to Regions totaling over $26.5 million (the "Regions Litigation").[6]

2. CNA's Proofs of Claim and the Trustee's Objections

In September 2013, CNA Insurance Companies ("CNA") timely filed claims in each of the sixteen Debtors' bankruptcy cases, each in the amount of $2,797,508.00 (the "Claims"). The supporting documentation to the Claims reflects that between December 2001 and December 2004, CNA had entered into a number of agreements to provide workers' compensation insurance and claims handling services to one of the Debtors, Professional Staffing – A.B.T.S., Inc. ("Professional Staffing") and a related entity, Safe Harbor Employee Services, Inc. (together, "ABTS"). In 2008, after ABTS defaulted in the payment obligations under the CNA Agreement, CNA filed an arbitration claim against ABTS with the American Arbitration Association; ABTS filed a response and a counterclaim against CNA.

Thereafter, CNA entered into a settlement agreement with ABTS and Debtors' principals, Frank and Anne Mongelluzzi (the "2008 Settlement Agreement"). Under the 2008 Settlement Agreement, both ABTS entities executed a promissory note in the amount of

[1] Doc. No. 242. In this Order, all references to the docket will be to documents filed in Able Body Temporary Services, Inc., Case No. 8:13-bk-06864-CED.
[2] Doc. No. 247.
[3] Doc. No. 248.
[4] Case No. 8:11-bk-01927-CED.
[5] One of the Debtors, Cecil B. DeBoone, LLC, owned and operated a completely unrelated business—a movie theatre in North Carolina.
[6] Adv. Pro. Nos. 8:15-ap-111-CED, 8:15-ap-112-CED, 8:15-ap-113-CED, 8:15-ap-114-CED, 8:15-ap-115-CED, 8:15-ap-116-CED, 8:15-ap-117-CED, 8:15-ap-118-CED, 8:15-ap-119-CED, 8:15-ap-120-CED, 8:15-ap-121-CED, 8:15-ap-122-CED, 8:15-ap-123-CED, 8:15-ap-124-CED, 8:15-ap-125-CED, and 8:15-ap-126-CED.

$5,635,675.62 (the "2008 Note"). The 2008 Note provided for ABTS to pay CNA $5,635,675.62 in a series of monthly installments between August 2008 and February 2012.[7] In addition, Frank Mongelluzzi and his wife, Anne, signed a personal guaranty of ABTS's obligations under the 2008 Note.[8]

In January 2017, over three years after CNA filed the Claims and while the Regions Litigation was pending, the Trustee filed objections to the Claims (the "Objections") in each of the Debtors' cases, except for the Professional Staffing case.[9] The basis for each of the Objections was that

> . . . the claims are duplicative of other claims filed by these claimants in the chapter 7 case of [Professional Staffing]. The documentation attached to the claims evidences that the claims should not have been filed in the Debtor's case. Accordingly, the Trustee recommends disallowing [the claim in its] entirety on the basis that the [claim is] duplicative of claims filed in the Professional Staffing Chapter 7 Case.

The Trustee served the Objections on CNA using the negative notice procedure of Local Rule 2002-4. Under Local Rule 2002-4, an objection to claim may be served upon the claimant with a "negative notice legend" that advises the claimant that if no response to the objection is filed within 30 days from service of the objection, the Court will consider that the claimant does not oppose the relief sought in the objection, may proceed to consider the paper without further notice or hearing, and may grant the relief requested. If the claimant does not file a response to an objection to its claim, the objecting party may then submit an order sustaining the objection for the Court's consideration.

CNA did not file written responses to the Objections, and for nearly three years—the Trustee not having presented the Court with orders sustaining the Objections—the Court took no action on the Objections.

3. The Motions to Compromise

On October 31, 2019—over two years after the Trustee filed the Objections and without any record activity in connection with them—the Trustee filed virtually identical *Motions to Approve Stipulation for Compromise and Settlement Between Trustee, Christine L. Herendeen, as Chapter 7 Trustee for the Debtors' Estates, and American Casualty Insurance Company of Reading, Pennsylvania and CNA Claims Plus, Inc.*, in each of the Debtors' cases (the "Compromise Motions").[10] The Compromise Motions describe a proposed settlement between the Trustee and CNA under which CNA's Claims would be allowed in *each* of the Debtors' cases in the amount of $3,347,964.07, an *increase* of more than $550,000.00 from the amount stated in the Claims as originally filed, without providing any calculation whatsoever for the increased amount.

In the Compromise Motions, the Trustee asserted that the Claims should be allowed in each of the Debtors' cases. This was despite the following undisputed facts: that only Professional Staffing was a party to the 2008 Settlement Agreement and the 2008 Note; that only two of the Debtors even existed when ATBS entered into the CNA Agreement;[11] that four of the Debtors were formed more than half-way through the coverage period of the CNA Agreement;[12] that ten of the Debtors were formed after the CNA insurance coverage period had ended;[13] and that three of the Debtors were not formed until after the execution

[7] Exhibit C to Claim 23-1.
[8] Doc. No. 241, pp. 3-4.
[9] Doc. No. 206.
[10] Doc. No. 230.
[11] Professional Staffing and Able Body Temporary Services, Inc.
[12] YJNK II, Inc., YJNK III, Inc., YJNK VIII, Inc., and Able Body Gulf Coast, Inc.
[13] Westward Ho II, LLC, Westward Ho, LLC, YJNK XI CA, LLC, ABTS Holdings, LLC, Cecil B. DeBoone, LLC, Preferable HQ, LLC, Rotrpick, LLC, Training U, LLC, USL&H Staffing, LLC, and Organized Confusion, LLP.

of the 2008 Settlement Agreement and 2008 Note.[14]

In support of the Compromise Motions, the Trustee represented that she "direct[ed] her counsel to discuss the settlement with Anne Mongelluzzi to ascertain from her perspective, as a former principal of the Debtors, the intent of the Parties to the CNA Settlement Agreement"[15] and that, "through counsel," the Trustee "spoke with Anne Mongelluzzi regarding the intent of the CNA Settlement Agreement and the business relationship between the Debtors and CNA."[16] However, the Compromise Motions were not supported by an affidavit of Mrs. Mongelluzzi or of the Trustee's counsel.

Regions filed objections to the Compromise Motions.[17] Among its other objections, Regions asserted that the Trustee's representation of her attorney's conversations with Mrs. Mongelluzzi was contradicted by Mrs. Mongelluzzi's deposition testimony: Mrs. Mongelluzzi had previously testified that one of the Debtors, Training U, LLC ("Training U"), "shouldn't have been" involved in the litigation with CNA because Training U did not have employees and was not in existence when CNA provided coverage. Mrs. Mongelluzzi testified that Training U came into existence in "2006 or 2007, and we had AIG insurance then."[18]

At the hearing on the Compromise Motions, the Trustee raised, for the first time, the issue of the possible reformation of the 2008 Settlement Agreement and the 2008 Note as a basis on which each of the Debtors was liable to CNA.[19] Regions' counsel addressed the issue, contending that "[t]he statute of frauds can't be trumped by reformation."[20]

After the hearing, the Court entered an order denying the Compromise Motions (the "Order").[21] In the Order, the Court applied the *Justice Oaks* factors[22] as follows:

First, the Court held that because fifteen of the Debtors were not parties to the 2008 Settlement Agreement or 2008 Note, the Trustee had a reasonable chance of success on the Objections.

Second, the Court held that the issues presented by the Claims and the Objections could likely be determined as a matter of law without the need for complex ligation. The Court held that it could likely rule as a matter of law on the issues of "(1) whether the liability of any Debtor other than [Professional Staffing] is prohibited by Florida's statute of frauds, and (2) whether any Debtors other than [Professional Staffing] may be liable for the obligations under the 2008 Settlement Agreement if they were not formed until after the underlying insurance coverage had ended and, in some cases, after the 2008 Settlement Agreement was signed."[23]

Third, in weighing the paramount interest of creditors, the Court held that the Trustee might be motivated to agree to the allowance of the Claims because CNA would then qualify as a "triggering creditor" to satisfy a necessary element of the Trustee's claims in the Regions Litigation. In addition, the Court found that the Trustee had provided no support for her agreement to allow the Claims in an amount that is $550,000.00 more than

[14] Preferable HQ, LLC, Rotrpick, LLC, and USL&H Staffing, LLC. Doc. Nos. 234, 239 (Regions' Request and Supplemental Request to Take Mandatory Judicial Notice of state corporate records evidencing Debtors' formation dates).
[15] Doc. No. 230, ¶ 5.
[16] Doc. No. 230, ¶ 15.
[17] Doc. No. 233.
[18] Doc. No. 233, p. 5.
[19] Doc. No. 243, Transcript of January 7, 2020 hearing, pp. 12 -21.
[20] Doc. No. 243, Transcript of January 7, 2020 hearing, p. 24.
[21] Doc. No. 241.
[22] *In re Justice Oaks II, Ltd*., 898 F.2d 1544, 1549 (11th Cir. 1990)(quoting *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986)). The *Justice Oaks* factors are "(a) [t]he probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises."
[23] Doc. No. 241, p. 11.

originally stated by CNA, which could prejudice other creditors in some of the Debtors' cases.

Ultimately, the Court concluded in the Order that "Debtors' estates and their other creditors would have been better served if the Trustee had merely withdrawn her objections to the Claims, rather than settling the Claims for more than CNA sought when it filed them."[24]

4. The Trustee's Motion for Rehearing

The Trustee seeks rehearing of the Order under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e). In the Eleventh Circuit, the only grounds for granting a motion for rehearing under Rule 59(e) are newly discovered evidence or manifest errors of law or fact.[25] A Rule 59(e) motion cannot be used to raise arguments that were or could have been made before entry of the judgment, and a factually supported and legally justified decision does not constitute clear error under the Rule.[26] For the following reasons, the Court will deny the Motion for Rehearing.

a. The Trustee did not meet her burden of proof on the Compromise Motions.

As the proponent of the Compromise Motions, the Trustee bore the burden of demonstrating that the proposed settlement is both reasonable and in the best interest of the bankruptcy estate.[27] Although the Court's Order did not make specific findings regarding the Trustee's failure to meet her burden of proof, the Order explained (1) that the Trustee represented in the Compromise Motions only that she had instructed her attorneys to confer with Mrs. Mongelluzzi regarding the intent to bind Debtors other than Professional Staffing to the 2008 Settlement Agreement and 2008 Note, that this representation appeared to conflict with Mrs. Mongelluzzi's deposition testimony, and that the Trustee's representation was not supported by a competent declaration; (2) that the Trustee provided no calculation or analysis of the increased amount of the Claims under the proposed compromise; and (3) that "Debtors' estates and their other creditors would have been better served if the Trustee had merely withdrawn her objections to the Claims, rather than settling the Claims for more than CNA sought when it filed them," which expressed the Court's view that the proposed settlement was not in Debtors' estates' best interest.

Independent of the grounds stated in the Motion for Rehearing, the Court finds that the Trustee did not meet her burden of proof on the Compromise Motions. Accordingly, the Court's denial of the Compromise Motions was not "clear legal error."

b. The Court implicitly considered the reformation issue in its denial of the Compromise Motions.

The Trustee contends that the Order should be reconsidered "to correct clear legal error" because it failed to take into consideration that CNA may be entitled to reformation of the 2008 Settlement Agreement and 2008 Note such that it holds a claim in each of the Debtors' cases. However, the issue of reformation was argued by the parties at the hearing on the Compromise Motions. And in filing her Motion for Rehearing, the Trustee seeks to reargue, albeit with more case law citations, an issue that has already been argued to the Court.

In the Motion for Rehearing, the Trustee cites to *First Jackson Capital & Management, LLC v.*

[24] Doc. No. 241, p. 12.
[25] *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)) (and cited in *In re Ardis*, 2017 WL 3491797, at *2 (Bankr. N.D. Fla. Jan. 6, 2017)).
[26] *Arthur v. King*, 500 F.3d at 1343; *In re Ardis*, 2017 WL 3491797, at *2.
[27] *In re Vazquez*, 325 B.R. 30, 35 (Bankr. S.D. Fla. 2005) (quoted in *In re Gibson*, 2017 WL 7795950, at *6 (Bankr. M.D. Fla. June 22, 2017)).

Falcone Group, LLC[28] and the cases cited therein, as holding that under Florida law, reformation is an available remedy to bind a party to a contract even if that party has not signed the contract.[29] But in *First Jackson*, the court did not address whether enforcement of a reformed guaranty agreement would be barred by the statute of frauds because the plaintiff did not "seek enforcement of any resulting reformed contact."[30] And the *First Jackson* court specifically held that if the plaintiff had sought enforcement of the reformed guaranty, the court could consider whether the statute of frauds would bar the claim. In other words, the *First Jackson* court held that although a plaintiff may establish all of the elements of a claim for reformation, the court may ultimately determine that the reformed contract is unenforceable under the statute of frauds because it was not signed by the party to be charged.[31]

The Trustee recognizes that "reformation is separate and distinct from enforcement,"[32] and accordingly, she contends that the issue of the enforceability of a "reformed contract" is a matter for trial. The Trustee then contends that the Court erred in finding that the Objections could likely be resolved on summary judgment.[33] But the need for a trial may be obviated if the Court were to determine, on summary judgment, that even if CNA were able to establish the elements of reformation, the 2008 Settlement Agreement and 2008 Note are unenforceable as barred by the statute of frauds. This analysis is implicit in the Court's finding that the issues that may be determined by summary judgment include "whether the liability of any Debtor other than [Professional Staffing] is prohibited by Florida's statute of frauds."[34] In any event, if a trial is required on the reformation issue, the issue is not so complex as to outweigh the impact of the allowance of a $3,347,964.07 claim in each of the Debtors' cases.

Accordingly, the Court finds no "clear legal error" in the Order and it is

ORDERED that the *Trustee's Motion for Rehearing of Order Denying Trustee's Motion to Approve Compromise with American Casualty Insurance Company of Reading, Pennsylvania and CNA Claims Plus, Inc*. is **DENIED**.

DATED: December 10, 2020.

/s/ Caryl E. Delano

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Caryl E. Delano
Chief United States Bankruptcy Judge

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[28] 2010 WL 11647370, at *15 (S.D. Fla. Apr. 15, 2010). The reported decision is a Report and Recommendation by Magistrate Judge Robin Rosenbaum dated April 15, 2010. Twelve days later, on April 27, 2010, the parties filed a Joint Stipulation for Dismissal Without Prejudice, and a Final Order dismissing the case was entered the same day, with the result that the Report and Recommendation was never considered or adopted by the District Court (Case No. 9:09-cv-80797-Zloch, Doc. Nos. 59, 60, 61).

[29] Doc. No. 242, p. 4; Doc. No. 248, p. 2. According to the Trustee, the statute of frauds is not a bar to reformation of a contract, courts of equity can reform a contract to reflect the parties' intent, and Mrs. Mongelluzzi confirmed that the 2008 Settlement Agreement was intended to bind all the Debtors (Doc. No. 242, pp. 4-6). In her reply to Regions' Response, the Trustee restates the proposition that the statute of frauds does not preclude the reformation of a contract (Doc. No. 248).

[30] *First Jackson Capital & Management, LLC v. Falcone Group, LLC*, 2010 WL 11647370, at *15.

[31] *Id*. One of the cases that the *First Jackson* court relied upon, *Smith v. Royal Automotive Group, Inc*., 675 So. 2d 144 (Fla. 5th DCA 1996), specifically holds that the written contracts for which reformation was sought were outside the statute of frauds.

[32] Doc. No. 242, ¶ 9.

[33] Doc. No. 241, p. 11; Doc. No. 242, ¶ 9.

[34] Doc. No. 241, p. 11.