

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
INSUL COMPANY, INC., *
* CASE NUMBER 02-43909
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Debtor. *
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ANDREW W. SUHAR, TRUSTEE, *
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Plaintiff, *
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vs. * ADVERSARY NUMBER 04-4100
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TRAVELER'S CASUALTY AND SURETY *
COMPANY, et al., *
*
*
Defendants. *
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O R D E R

This matter came on upon the motion to dismiss ("Motion to Dismiss") of Goldberg, Persky & White, P.C. ("GPW"). On May 25, 2004, Andrew W. Suhar ("Suhar"), Trustee for Insul Company, Inc. ("Insul"), Debtor herein, filed Adversary Number 04-4100 (the "Adversary Proceeding") to determine the validity, priority or extent of a lien or other interest in property; to obtain a declaratory judgment relating to the foregoing, for injunctive relief and other relief. Suhar filed this Adversary Proceeding against "approximately 36,297 asbestos claimants and claims represented by the following lawyers and/or law firms" and also specifically named 47 Defendants. Eight of the named Defendants are insurance companies. The remaining named Defendants are law

firms that allegedly represent asbestos claimants who have filed lawsuits or asserted asbestos related injury claims against Insul. GPW is alleged to be a lawyer or law firm that represents one or more of the 36,297 asbestos claimants (collectively, the "Asbestos Claimants"). All such Asbestos Claimants assert pre-petition claims. There has been no bar date for pre-petition claims against Insul.

Insul filed a Chapter 7 bankruptcy petition on or about September 4, 2002. Insul sold all of its operating assets to Cast Powder LLC on June 30, 2002 for Six Hundred Sixty-Four Thousand Dollars (\$664,000.00) in cash plus the assumption of Insul's remaining liability to National City Bank, Insul's secured creditor. All of the cash proceeds of sale were paid to National City Bank, but National City Bank was still owed over One Million Dollars (\$1,000,000.00). Pursuant to the complaint in the Adversary Pro-ceeding, Insul states that it has no assets to pay claims asserted by the Asbestos Claimants except for certain policies of insurance, as set forth in the Adversary Proceeding.

On July 22, 2004, this Court held a hearing on Suhar's motion for preliminary injunction, which sought to enjoin the law firm of Kelly & Ferraro, one of the Defendants in the Adversary Proceeding, from continuing certain pre-petition lawsuits asserting claims by certain Asbestos Claimants by reimposing a stay on such pre-petition lawsuits. It was

necessary to reimpose a stay because, on or about October 21, 2003, Insul had agreed with Kelly & Ferraro, pursuant to a stipulation that was so ordered by the bankruptcy court, to modify the automatic stay imposed by § 362 of the Bankruptcy Code so that the pre-petition asbestos lawsuits could proceed to judgment or settlement. The stipulation further provided that no payment could be made to the Asbestos Claimants from any applicable insurance proceeds without further order of the bankruptcy court. This Court denied the motion for preliminary injunction on due process grounds, citing the fact that the Asbestos Claimants represented by the Kelly & Ferraro law firm were not before the Court and also that there appeared to be no change in circumstances that would warrant the reimposition of a stay that Insul had voluntarily modified nine months earlier.

On October 1, 2004, GPW filed the Motion to Dismiss. The basis for the Motion to Dismiss is that (i) the Adversary Proceeding failed to state a claim upon which relief may be granted and had to be dismissed pursuant to FED. R. BANKR. P. 7012(b)(6) and (ii) there was inadequate and insufficient service of process pursuant to FED. R. BANKR. P. 7012(b)(4) and (5).

A motion for withdrawal of the reference was filed by Cincinnati Insurance Company, Crum & Forster Indemnity Co., Firemen's Fund Insurance Company, United States Fire Insurance Company and Zurich American Insurance Company of Illinois on September 17, 2004. On that same date, these same parties also

filed a memorandum in support of the motion for withdrawal of the reference.

The gravamen of the Motion to Dismiss is that although GPW represents persons whose rights are purportedly to be affected by the Adversary Proceeding, GPW is not itself a proper party to this Adversary Proceeding. The Motion to Dismiss argues that, since GPW is not a proper party to the Adversary Proceeding and GPW is not a creditor of Insul's estate, GPW must be dismissed pursuant to Rule 7012(b)(6). The Motion to Dismiss notes that Suhar did not even purport to attempt service upon GPW's clients by service upon the named clients. The Motion to Dismiss argues that such service is improper and, therefore, GPW must be dismissed for inadequate and insufficient service of process.

On October 6, 2004, Suhar filed a motion for extension of time to respond to several motions to dismiss, including the instant Motion to Dismiss, requesting a thirty (30) day extension to respond. To date, Suhar has filed no response to the Motion to Dismiss. This Court finds that the Motion to Dismiss is well taken because GPW is not a proper Defendant to the Adversary Proceeding and Suhar cannot obtain relief from GPW itself. The complaint fails to state a claim upon which relief can be granted against GPW. Therefore, GPW must be dismissed pursuant to FED. R. BANKR. P. 7012(b)(6). To the extent that the Adversary Proceeding has purported to obtain service of process upon the

personal injury clients represented by GPW that are or may be Asbestos Claimants asserting asbestos claims against Insul, such service of process is inadequate and insufficient and, therefore, ineffective under FED. R. BANKR. P. 7012(b)(4) and (5). Accordingly, the Motion to Dismiss is granted and the complaint in the Adversary Proceeding is dismissed as to Defendant Goldberg, Persky & White, P.C.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**