

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 04-12595
)
THE CAPITAL CREATION CO., INC.,) Chapter 11
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Few, if any, issues involving the claims of creditor The Coventry Group, Inc. have been resolved amicably in this chapter 11 case, and the issue before the court is no exception. The current debate arises out of an agreed order entered by the court on March 2, 2006 which authorized the appointment of an examiner for specific purposes and contained various waivers.¹ J.L. Gottlieb Agency, Inc. (the Agency) and J.G. Acquisitions, LLC (Acquisitions) (collectively, “movants”) now contend that Coventry violated the agreed order by filing a state court lawsuit against the Agency and move for an order requiring Coventry to dismiss that lawsuit. Coventry claims the agreed order does not address the issues raised in the state court action and opposes the motion.²

There is no dispute over the fact that Coventry failed to disclose to adverse parties during the negotiations leading up to the agreed order that it was planning, or reserving the right, to file the state court lawsuit. It is also clear, however, as discussed below, that the agreed order did not address the state court claims. The motion is, therefore, denied.

¹ This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

² Docket 484, 504, 506.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This proceeding is a core proceeding under 28 U.S.C. § 157 (b)(2)(A) and (O).³

FACTS

The Capital Creation Co., Inc. filed its chapter 11 case on March 4, 2004. The debtor and Acquisitions filed a joint plan which was denied confirmation and they have filed a second plan which has not yet been set for hearing due in part to this dispute.

From the beginning, Coventry has argued that the bankruptcy estate has claims against the debtor's insiders that should be prosecuted. In an attempt to resolve that issue and proceed to confirmation, the debtor filed a motion to appoint an examiner to review transfers between the debtor and insiders to determine whether they should be prosecuted.⁴ The United States trustee and Coventry objected to the debtor's motion for different reasons. In the same time period, Coventry filed a motion for leave to file a lawsuit in the bankruptcy court against the debtor's insiders on behalf of the debtor's estate and all creditors. Coventry attached to the motion a proposed complaint naming the Agency, and others, as defendants.⁵ One reason Coventry cited for its request was that the two year statute of limitations for filing bankruptcy causes of action

³ Coventry raises two issues regarding jurisdiction which are easily resolved. First, the argument that movants' lack of standing deprives this court of jurisdiction is mooted by the determination that movants do have standing. Second, Coventry's suggestion that jurisdiction is absent because the agreed order may be relevant to a pending appeal is not persuasive because the agreed order is not the subject of that appeal.

⁴ The debtor's motion also requested that the examiner be appointed for the purpose of pursuing any claims judged to be beneficial to the debtor's estate.

⁵ The other named defendants were Joshua Gottlieb, J Gottlieb Companies LLC, CCC Financial Organization, Inc., Joshua Holdings Agency Corp., Charles Hall, and a number of John Does.

was due to elapse on March 4, 2006. The debtor filed a response to Coventry's motion.

The court heard both motions on February 16, 2006, at which time counsel for Coventry, the debtor, the United States trustee, and the plan proponent Acquisitions appeared.⁶ After discussion both on and off the record, the parties reported that the motions would be resolved through an agreed order which would include tolling agreements signed by the Agency and others.

The court entered the agreed order as submitted on March 2, 2006 (the agreed order).⁷

The agreed order provides:

1. Subject to the terms and conditions set forth below, the Examiner Motion be and hereby is granted and the UST is hereby directed . . . to appoint an examiner (the "Examiner") in the Debtor's chapter 11 case.
2. The Examiner shall review and evaluate (i) alleged pre-petition breaches of fiduciary duty claims against Joshua L. Gottlieb ("Gottlieb") and Charles Hall ("Hall"), and (ii) alleged pre-petition fraudulent conveyance, preferential transfer, alter ego and transferee liability claims (collectively, the "Claims") against Gottlieb, J.L. Gottlieb Agency, Inc. ("JLGA"), J Gottlieb Companies LLC ("JGC"); HP, Inc., FraudFind, LLC, DME Ventures, LLC, HealthOne, Inc., B2FS, LLC and Managed Insurance Strategies, LLC (collectively, the "Insiders").
3. No later than 90 days after the date of his or her appointment, the Examiner shall file a report with the Court (a) detailing (i) the scope of the investigation; (ii) the investigatory methods used; and (iii) the specific transactions and claims reviewed and evaluated and (b) recommending whether an action should be commenced on behalf of the Debtor's bankruptcy estate with respect to any of the Claims.

⁶ Counsel for Acquisition is also counsel for the Agency.

⁷ Docket 382.

4. The Examiner shall have the authority to waive the attorney-client privilege on behalf of the Debtor with regards and pertaining to the Claims.
5. To facilitate the review and evaluation of the matters specified above, the Insiders and Hall have agreed to execute agreements (a) tolling the statute of limitations in favor of the Examiner or a chapter 11 trustee if one is appointed by the Court and (b) waive their right to challenge the standing of the Examiner to commence and prosecute adversary proceedings on behalf of the Debtor with respect to such matters (the “Tolling Agreements”). These Tolling Agreements, copies of which are attached hereto as Exhibit A, are hereby approved by the Court. The Tolling Agreements shall become effective upon execution by the respective party.
6. In the event that the Examiner determines that no action should be brought with respect to any one or more of the Claims against Insiders and/or Hall, all parties hereto shall be bound by such determination.
7. In the event that the Examiner recommends the commencement and prosecution of actions with respect to any one or more of the alleged Claims, the Court shall, at its earliest convenience after the filing of the Examiner’s report, make a determination as to whether to appoint a Chapter 11 trustee in the Debtor’s case, to expand the scope of the Examiner’s powers and duties to prosecute such causes of action on the Debtor’s behalf, or to establish any other means to settle such actions without formal prosecution by the Examiner or a Chapter 11 trustee, if the Court determines that such settlement is in the best interest of the Debtor.⁸
8. The Derivative Standing Motion, being moot, is hereby denied.

Counsel for the debtor, Coventry, and the United States trustee signed the agreed order.

⁸ For clarity, the court notes that it has advised all parties in open court that it will act under this paragraph only if a party files an appropriate motion seeking relief.

A tolling agreement executed by the Agency is included in Exhibit A to the agreed order.⁹

The United States trustee appointed Michael Tucker to serve as the examiner.¹⁰ Mr. Tucker filed his report on September 18, 2006.¹¹ In the report, Mr. Tucker concluded that:

- 1) breach of fiduciary duty claims should not be pursued against Joshua Gottlieb or Charles Hall;
- 2) alter ego liability claims should not be pursued against Gottlieb or the insiders; and
- 3) claims for fraudulent transfer, preferential transfer and transfer liability should not be pursued against named insiders including the Agency.

The examiner also concluded that an action on behalf of the estate should be brought against Joshua Gottlieb for transfer claims and for amounts owed to the debtor on the petition date.

On October 4, 2006, Coventry filed a lawsuit against the Agency in the court of common pleas for Cuyahoga County, Ohio; *The Coventry Group, Inc. v. J.L. Gottlieb Agency, Inc.*, case no. CV 06 603412 (the lawsuit). In this action, Coventry seeks to recover from the Agency based on claims that it is a successor and mere continuation of the debtor and also based on breach of contract.

DISCUSSION

Movants assert that Coventry's lawsuit violates the terms of the agreed order and they request an order requiring Coventry to dismiss it.¹² Coventry opposes this request on two

⁹ Tolling agreements executed by the other named Insiders are also included as part of exhibit A to the agreement.

¹⁰ Docket 391, 398.

¹¹ Docket 458.

¹² The request for an order requiring Coventry to dismiss the state court lawsuit is a request for injunctive relief which must be raised through an adversary proceeding, rather than by motion. *See* FED. R. BANKR. P. 7001(7). However, as Coventry did not object to this procedural

grounds. First, Coventry argues that the movants do not have standing to request enforcement of the agreed order. Second, it argues that its lawsuit “does not impinge in any way on the Debtor, its estate, or its assets[]” and does not conflict with the terms of the agreed order.

A. Standing

The Sixth Circuit has noted that “[s]tanding is a rather vague concept that defies precise formulation, but it seems to require, at the least, that a plaintiff have a personal stake in the outcome of the litigation.” *O’Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears v. Perlin (In re Perlin)*, 30 F.3d 39, 41 (6th Cir. 1994). A prudential rule of standing provides “[a]s a general rule, [that] one party may not assert the rights of another.” *Id.* Coventry argues that the movants lack standing to bring the motion under this rule.¹³

Coventry argues that the movants do not have standing to raise any issues relating to the agreed order because their counsel did not sign the order and thus the movants are not parties to it. As a result, the argument continues, the movants are trying to assert rights that are not theirs. This argument is simply wrong. The Agency’s counsel undeniably participated in the settlement discussions and the tolling agreement which the Agency signed is an integral component of the agreed order. Under the agreed order, the Agency agreed to toll the statute of limitations in favor of the Examiner or a chapter 11 trustee and to waive its right to challenge the standing of the Examiner to commence and prosecute an adversary proceedings on the debtor’s behalf. Having

irregularity, it is appropriately deemed waived. *See In re Dunning*, 269 B.R. 357, 368 (Bankr. N.D. Ohio 2001).

¹³ Constitutional standing under the “case and controversy” requirement of Article III of the United States Constitution is not at issue. Under that requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct, the injury must be traceable to the challenged conduct, and there must be a substantial likelihood that the requested relief will redress the injury. *Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838, 852 (6th Cir. 2002). Movants clearly meet this requirement.

made this agreement, the Agency is a party to the agreed order and has standing to request relief with respect to it. Whether Acquisitions has independent standing need not be decided, because as a plan proponent it is a party in interest and may be heard on the issue raised in the motion.¹⁴ See 11 U.S.C. § 1109(b).

B. The Agreed Order

The parties next dispute the scope of the agreed order. The movants contend that the order encompasses the claims which Coventry has asserted on its own behalf in the lawsuit and that Coventry should be bound by the examiner's recommendation that claims against the Agency should not be pursued. Coventry argues that the claims it asserts against the Agency are outside the scope of the agreement.¹⁵

Agreed orders are contractual in nature and are governed by the principles of contract interpretation. *City of Covington v. Covington Landing Ltd.*, 71 F.3d 1221, 1227 (6th Cir. 1995). Therefore, “[c]ase law makes clear that ‘the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.’” *Rosen v. Tennessee Comm’r of Fin. & Admin.*, 288 F.3d 918, 925 (6th Cir. 2002) (quoting *Firefighters Local Union N. 1784 v. Stotts*, 467 U.S. 561, 574 (1984)). Absent ambiguity, there is no need to look beyond the language of the agreement to determine whether it has been violated. “However, a consent decree should be construed to preserve the position for which the

¹⁴ Acquisitions is not defined as an insider in the agreed order and did not sign a tolling agreement under the agreed order, although the movants have asserted otherwise. See movants’ reply at 1, docket 506.

¹⁵ Coventry argues that the agreed order should be construed against the movants because “to the best of Coventry’s recollection, the Agreed Order was drafted entirely by counsel for the Debtor.” Objection of The Coventry Group, docket 504, ¶ 21. This is factually inaccurate. The movants, in their reply, attach an email from Breaden Douthett, one of Coventry’s three lawyers, that states “Attached is a redrafted Proposed Order.” Docket 506, exhibit A.

parties bargained.” *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994).

A review of the agreed order leads to the inescapable conclusion that its terms and scope are unambiguous. The intended scope of the order is to resolve the two pending motions—the debtor’s motion to appoint an examiner and Coventry’s motion to file a complaint on behalf of the estate—both of which centered on any claims the estate might have against insiders. As a result, the agreed order requires the examiner to investigate and recommend “whether . . . action[s] should be commenced on behalf of the Debtor’s bankruptcy estate[.]” The potential insider defendants and the claims which are to be reviewed are specifically identified in the agreed order. The potential claims are estate claims for breach of fiduciary duties and for fraudulent conveyance, preference, alter ego and transfer liability. The movants argue that the claims Coventry asserts against the Agency are barred by the agreed order. However, Coventry’s claims (or potential claims) against the Agency are not mentioned in the agreed order, and there is nothing in the order to even suggest that they were to be resolved by the examiner’s investigation and recommendations. Consequently, the movants’ contention that “[t]he agreed order covers all of the claims that Coventry could have against the insiders” is without merit.¹⁶

The movants also argue that the lawsuit fails to state an independent cause of action against the Agency, instead asserting claims that are property of the bankruptcy estate. This argument has several components for which little legal analysis has been provided. The complaint filed by Coventry on its face asserts a claim on behalf of Coventry against the Agency as the debtor’s successor and based on contract. The complaint does not assert claims against the debtor or claims belonging to the debtor. Whether there is a legal and factual basis for the claims

¹⁶ Motion at 4, docket 484.

is an issue for the state court. And while the effect of the agreed order may be relevant to that determination, this court does not have jurisdiction to render an advisory opinion on the issue. *See Thickstun Bros. Equip. Co. v. Encompass Servs. Corp. (In re Thickstun Bros. Equip. Co.)*, 344 B.R. 515, 519–20 (B.A.P. 6th Cir. 2006).

The movants also argue that Coventry violated the automatic stay when it filed the breach of contract claim against the Agency. This argument fails because it is based on the faulty premise that the claims asserted by Coventry are the debtor's property, which they are not. Further, the automatic stay does not apply to prevent Coventry from filing a lawsuit for alleged successor liability and breach of contract against the Agency. *See* 11 U.S.C. § 362(a).

CONCLUSION

For the reasons stated, the motion of J.L. Gottlieb Agency, Inc. and J.G. Acquisitions, LLC for an order requiring The Coventry Group, Inc. to comply with the March 2, 2006 agreed order is denied. A separate order reflecting this decision will be entered.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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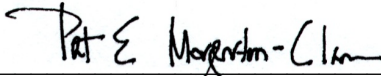
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THE CAPITAL CREATION CO., INC.,) Chapter 11
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Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the motion of J.L. Gottlieb Agency, Inc. and J.G. Acquisitions, LLC for order to require The Coventry Group, Inc. to comply with this court's prior agreed order and for other relief (docket 484) is denied.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge