

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

_____)	
In re:)	
)	
MONTREAL, MAINE &)	CHAPTER 11
ATLANTIC RAILWAY LTD.,)	Case No. 13-10670
)	
Debtor.)	
_____)	

REPLY TO TRUSTEE’S OBJECTION TO
MOTION OF TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)(1)

Introduction

In his capacity as trustee of the Debtor’s bankruptcy estate, Robert J. Keach (“Trustee”) objected to the Motion of Travelers Property Casualty Company of America for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1) (the “Motion”)(Dkt. No. 105). The Trustee argues in his objection (Dkt No. 199) that the proposed Declaratory Judgment Action¹ “should be filed in this Court because: (1) this Court is required to determine whether the Declaratory Judgment Action constitutes a core or non-core proceeding; and (2) any proceeding which determines [the Debtor’s] or [Montreal, Maine & Atlantic Canada Company’s (“MMA Canada”)] rights under the Policy should be coordinated with, and conducted in cooperation with, the Canadian Case.” (Dkt No. 199, p.2). The Trustee concedes that a declaratory judgment action must eventually proceed in order for the estate to be administered, but the Trustee’s posited reasons that such an action must proceed before this Court are unpersuasive.

¹ Unless otherwise indicated the capitalized terms used herein shall have the meanings ascribed to them in the Motion.

Argument

I. The Declaratory Judgment Action is a Non-Core Proceeding.

The Declaratory Judgment Action is a non-core proceeding which could be most efficiently adjudicated before a court authorized to enter a final judgment with respect thereto. See 28 U.S.C. § 157(c)(1); Silverman v. Tudor Ins. Co. (In re Lenders Abstract and Settlement Service, Inc.), 493 B.R. 385, 394 (E.D.N.Y. 2013)(deciding that a chapter 7 trustee’s breach of contract and declaratory judgment action concerning the scope of coverage under an insurance policy is non-core); Kirschenbaum v. Fed. Ins. Co. (In re EMS Fin. Servs., LLC), 491 B.R. 196, 204 (E.D.N.Y. 2013)(same); DeWitt Rehab. And Nursing Center, Inc. v. Columbia Cas. Co., 464 B.R. 587, 592-93 (S.D.N.Y. 2012)(holding that a declaratory judgment action concerning the debtor’s insurance coverage was non-core and distinguishing United States Lines v. Am. Steamship Owners Mut. Protection and Indem. Assocs., Inc. (In Re United States Lines, Inc.), 197 F.3d 631 (2nd Cir. 1999) on the basis that the policies at issue did not contain “pay first” provisions); Bowles v. Massey Energy Co., 12-cv-05997, 2012 U.S. Dist. LEXIS 179187, at *19-24 (S.D.W.V. 2012)(deciding that a declaratory judgment action concerning pre-petition insurance policies is non-core and distinguishing In re United States Lines and Matter of Celotex Corp., 152 B.R. 667 (Bankr M.D. Fla. 1993) because of, among other things, the absence of “pay first” provisions in the debtor’s policy); Amatex Corp. v. Aetna Cas. & Surety Co. (In re Amatex Corp.), 107 B.R. 856, 863 (E.D. Pa. 1989); Nat’l Century Fin. Enters. v. Gulf Ins. Co. (In re Nat’l Century Fin. Enters.), 312 B.R. 344, 355 (Bankr. S.D. Ohio 2004)(deciding that an action concerning coverage under an insurance policy was non-core and distinguishing those cases determining that such an action is core on the basis that they involved insurance policies which were the “linchpin” of the reorganizations at issue); G-I Holdings, Inc. v. Hartford

Accident & Indem.Co. (In re G-I Holdings, Inc.), 278 B.R. 376, 383-84 (Bankr. D. N.J. 2002)(distinguishing In re Prudential Lines, Inc., 170 B.R. 22, 229 (S.D.N.Y. 1994) and Matter of Celotex Corp, 152 B.R. 667 (Bankr M.D. Fla. 1993) based upon the unique circumstances present when asbestos injury claimants were direct beneficiaries of insurance policies or where the policies at issue contained “pay first” provisions).

The Trustee cites inapposite and distinguishable cases in support of his contention that the Declaratory Judgment Action is a core matter. Of the six cases cited by the Trustee, three involved mass tort liabilities on account of asbestos related injury claims. See In re United States Lines, Inc., 197 F.3d at 635; In re Prudential Lines, Inc., 170 B.R. at 229; Matter of Celotex, 152 B.R. at 676. The reasons which led these courts to determine that the adjudication of rights under insurance policies is a core issue are not present here. In particular, the Policy is not a “pay first” policy which would require the payment of claims asserted against the estate before the estate would be entitled to reimbursement from the Policy’s proceeds. Compare In re United States Lines, Inc., 197 F.3d at 638; In re Prudential Lines, Inc., 170 B.R. at 229 with DeWitt Rehab. And Nursing Center, Inc., 464 B.R. at 592-93; In re G-I Holdings, Inc., 278 B.R. at 383-84. Additionally, the asbestos cases relied upon by the Trustee involved reorganizations in which the treatment of an entire class of asbestos injury claims, and therefore the administration of the debtors’ estates, depended almost entirely upon the outcome of the coverage disputes at issue. In re United States Lines, Inc., 197 F.3d at 638; In re Prudential Lines, Inc., 170 B.R. at 229; Matter of Celotex, 152 B.R. at 676 (stating, “This entire adjudicatory process is bound up in Debtor’s seminal tenet that funding of the Chapter 11 plan through utilization of the insurance proceeds will compensate the significant parties of interest having claims stemming from asbestos-related injury.”). In fact, the United States Lines court specifically noted that, “In

[Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F3d 1095 (2nd Cir. 1993)] we concluded where the insurance proceeds would only augment the estate, the effect on the administration of the estate was insufficient to render the proceedings core.” 197 F.3d at 638. The Policy’s proceeds here may augment the estate if paid to the Debtor. However, the *property* insurance at issue bears no resemblance to the *liability* policies which were integral to the reorganization of the debtors in the asbestos cases relied upon by the Trustee because the Policy’s proceeds will be available to the estate generally rather than a particular class of indemnified claims.

The remaining cases relied upon by the Trustee lend little more support for his position that the Declaratory Judgment Action would be a core proceeding. As in the asbestos cases, the court in Cohen v. Nat’l Union Fire Ins. Co. of Pittsburgh (In re County Seat Stores, Inc.), 01 Civ 2966 (JGK), 2002 U.S. Dist. LEXIS (S.D.N.Y. Jan. 31, 2002)² determined that the coverage dispute before it was core because the estate could not be effectively administered without first determining whether the D&O policy’s proceeds would be available to satisfy substantial indemnification claims asserted by the debtor’s directors and officers. 2002 U.S. Dist. LEXIS 1555, at *16. In contrast, the effective administration of the Debtor’s estate will not depend upon the outcome of the Declaratory Judgment Action. While the Policy’s proceeds may ultimately augment the estate, these proceeds would not be earmarked for a particular subset of creditors such that an equitable distribution of estate assets would depend upon the result of the Declaratory Judgment Action.

The court in In re Northwestern Inst. of Psychiatry explicitly rested its holding that the coverage dispute before it was core upon the fact that the policy in controversy was issued to the debtor post-petition. 268 B.R. at 92 (stating, “I conclude on these facts that the Coverage Issue is

² The Trustee mistakenly identified this case as Furman v. Nat’s Union Fire Ins. Co. of Pittsburgh.

a core proceeding under § 157(b)(2)(A) since the policy was issued to the debtor-in-possession post-petition.”). In contrast, the Policy at issue here was issued to the Debtor pre-petition. This distinction alone makes In re Northwester Inst. of Psychiatry inapplicable. See e.g. Arnold Printworks, Inc. v. Apkin (In re Arnold Printworks, Inc.), 815 F.3d 165, 168 (1st Cir. 1987)(holding that a determination of rights under post-petition contracts falls squarely within the terms of 28 U.S.C. § 157(b)(2)(A)).

Finally, Kraken Inv. Ltd. v. Jacobs (In re Salander-O’Reilly Galleries, LLC), 475 B.R. 9 (S.D.N.Y. 2012) involves an issue which is not remotely related to the issue before the Court. In In re Salander-O’Reilly Galleries, LLC, the court considered whether the determination of the estate’s rights in a Botticelli painting was a core issue. In particular, the issue presented was whether the Botticelli was included within 11 U.S.C. § 541’s demarcation of property of the estate. The Declaratory Judgment Action does not assert that the Policy is not property of the estate, rather it seeks a declaration as to the scope of coverage of the Policy. The Declaratory Judgment Action is not rendered core simply because it concerns property of the estate. See In re United States Lines, 197 F.3d at 637 (stating, “A general rule that such proceedings are core because they involve property of the estate would ‘create[] an exception to Marathon that would swallow the rule.’”).

In light of the inapplicability of all authorities relied upon by the Trustee, the Court should determine, to the extent it believes it is necessary to do so to resolve the Motion, that the Declaratory Judgment Action is non-core. The Declaratory Judgment Action can be most efficiently adjudicated by the District Court, thereby avoiding the unnecessary duplication of litigation in seeking de novo review of any report and recommendation rendered by this Court in a non-core matter. However, the core/non-core determination is unnecessary at this juncture

because that determination can be made after the commencement of the Declaratory Judgment Action, if necessary, in the context of a motion to withdraw any reference to this Court.

II. The District Court can Determine whether the Declaratory Judgment Action is a Core Matter.

The Trustee asserts in his objection that Travelers seeks to delay a determination of the parties' rights under the Policy by requesting permission to file the Declaratory Judgment Action in the District Court.³ The Trustee's assertion is based upon the flawed premise that if the Declaratory Judgment Action were filed in the District Court, 28 U.S.C. § 157 and D. Me. Local Rule 83.6(a) would require referral to this Court for a determination of whether the issues presented are core or non-core. While section 157(b)(3) does require the Court to determine whether a matter is core upon the motion of any party, or its own motion, nothing contained within that section prohibits the District Court from making such a determination in the event Travelers' moved to withdraw any reference of the Declaratory Judgment Action to this Court. See Executive Risk Indem., Inc. v. Brooks (In re Jackson Brook Inst., Inc.), 280 B.R. 779, 783 n.3 (D. Me. 2002)(stating, "Although the determination of the 'core' versus 'noncore' nature of [an action] is properly left to the bankruptcy court in the first instance...this Court must at least make a preliminary determination in order to decide this motion to withdraw the reference."); see also DeWitt Rehabilitation and Nursing Center, Inc., 464 B.R. at 590. In the event that the Declaratory Judgment Action were filed in the District Court and referred to this Court, Travelers would anticipate filing a motion to withdraw the reference which would, if granted, have the practical effect of allowing the Declaratory Judgment Action to proceed virtually uninterrupted in the District Court.

³ The Trustee's assertion is ironic given that he objected to Travelers' request for expedited consideration of the Motion in order to preserve its rights under 11 U.S.C. § 362(e). (Dkt. No. 137).

III. The Adjudication of the Declaratory Judgment Action in the District Court Will Ensure the Coordinated and Efficient Administration of the Estates of the Debtor and MMA Canada.

The Trustee's final argument in opposition to the Motion rests upon the fact that the District Court is not subject Cross-Border Insolvency Protocol. From this fact, the Trustee draws the unjustified conclusion that adjudication of the Declaratory Judgment Action will jeopardize the efficient and consistent administration of the estates of the Debtor and MMA Canada.

The Trustee's conclusion is unfounded. As contemplated at this time, both the Debtor and MMA Canada will be named as defendants in the Declaratory Judgment Action. A consolidated proceeding involving both debtors will allow for consistent outcomes and coordinated scheduling in the Declaratory Judgment Action. Furthermore, there is no reason that the District Court is unable to keep the Superior Court for the Province of Quebec, District of St-François informed of the status of the Declaratory Judgment Action.⁴ Finally, a much greater risk of inconsistency would result from an adjudication of rights under the Policy before this Court given the Travelers' claims against the non-Debtor codefendants (including MMA Canada) are, at best "related to" the Debtor's bankruptcy and therefore unquestionably non-core. See Lindsay v. O'Brien, Tanski, Tanzer and Young Healthcare Providers of Connecticut (In re Dow Corning Corp.), 86 F.3d 482, 497 (6th Cir. 1996)(breast implant injury claims asserted against non-debtors held to be "related to" the debtor's bankruptcy).

Conclusion

For the foregoing reasons, the reasons set forth in the Motion and for any other reasons which may be set forth on the record of a hearing on the Motion, Travelers requests that the

⁴ Indeed, the District Court's role in these proceedings is assured given its duty to liquidate the personal injury and wrongful death claims which will undoubtedly be asserted. See 28 U.S.C. § 157(b)(5).

Court grant it relief from the automatic stay to commence the Declaratory Judgment Action against the Debtor in the District Court.

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