

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
OLYMPUS HEALTHCARE GROUP, INC., et al.,)	Case No. 01-1849 (MFW) through 01-1858
)	
Debtors.)	Jointly Administered

MEMORANDUM OPINION¹

Before the Court is the Liquidating Trustee's Second Substantive Objection which seeks, inter alia, to disallow the claim asserted by GMAC Commercial Mortgage Servicer ("GMAC") against the Debtors. After a hearing and consideration of the affidavits and exhibits proffered, we sustain the objection for the reasons set forth below.

I. FACTUAL BACKGROUND

On May 25, 2001 ("the Petition Date"), Olympus Healthcare Group, Inc., and several of its affiliates (collectively "the Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. As of the Petition Date, the Debtors operated a number of health care facilities in Massachusetts and Connecticut. One of the Debtors, Pegasus Management Company, Inc. ("Pegasus"), operated skilled nursing facilities in Connecticut and Massachusetts under a Master Lease with Lahaina

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

Realty Limited Partnership ("Lahaina"), another Debtor.

On September 21, 2001, the Debtors filed a Motion to sell Pegasus free and clear of all liens, claims and encumbrances ("the Sale Motion"). On October 19, 2001, the Official Unsecured Creditors Committee ("the Committee") filed an emergency motion to dismiss the Pegasus case, which was granted. Consequently, on October 19, 2001, the Pegasus case was dismissed. Immediately following the dismissal, a Connecticut state court appointed a receiver to operate the Pegasus facilities.

On April 8, 2002, GMAC filed a claim asserting that it was the servicer of a loan to Lahaina secured by a mortgage on certain real estate in Connecticut and an assignment of the rents due by Pegasus under the Master Lease, which is now in default. GMAC contended that the Debtors had guaranteed the obligations under the Master Lease ("the Guaranty").

On May 6, 2002, the Debtors' Second Amended Joint Plan of Reorganization ("the Plan") was confirmed by the Court. Thereafter, the Liquidating Supervisor objected to the GMAC Claim in the Second Omnibus Objection.

II. JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 & 157(b)(2)(B).

III. DISCUSSION

The burden of proof for claims filed in bankruptcy cases

rests on different parties at different times. In re Allegheny Int'l Inc., 954 F.2d 167, 173 (3d Cir. 1992). Initially, the claimant must assert facts sufficient to establish the claim; if it does, the claim is prima facie valid. Id.; See also 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects").

Once the claimant's initial burden is satisfied, the burden of going forward shifts to the objecting party, which must produce evidence to negate one or more of the asserted facts. Id. Only if the objector can produce sufficient evidence to rebut the claim does the burden revert to the claimant. Id. at 174. Ultimately, the burden of persuasion is on the claimant to establish the validity of its claim by a preponderance of the evidence. Id.

A. Judicial Estoppel

GMAC attempts to satisfy its burden through the application of judicial estoppel. GMAC asserts that under the doctrine of judicial estoppel, the Debtors are estopped from denying the existence of the Guaranty. Judicial estoppel prevents a party from assuming a contrary legal position in a subsequent legal proceeding. See New Hampshire v. Maine, 532 U.S. 742, 749 (2001). Judicial estoppel is not intended to eliminate all inconsistencies; it is only intended to prevent litigants from playing fast and loose with the courts. See In re Chambers Dev. Co., Inc., 148 F.3d 214 (3d Cir. 1998). The doctrine does not

apply where an inconsistent position is asserted in good faith or through inadvertence. Id. at 229. Judicial estoppel is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996) (quoting Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 424 (3d Cir. 1988) (Stapleton, J., dissenting)). A court should not employ judicial estoppel unless it is "tailored to address the harm identified" and no lesser sanction would adequately remedy the damage done by the litigant's misconduct. Klein v. Stahl GMBH & Co., 185 F.3d 98, 108 (3d Cir. 1999) (citing Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 73 (3d Cir. 1994)).

The Third Circuit applies a three prong test to determine whether judicial estoppel should apply: (i) whether the party took irreconcilably inconsistent positions, (ii) whether the inconsistencies arose as the result of bad faith and (iii) whether a lesser sanction would adequately remedy the damage done. See Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 779 (3d Cir. 2001).

GMAC asserts that the Debtors should be judicially estopped from denying the existence of the Guaranty because of prior statements made by them in pleadings filed in this Court that acknowledge that the Debtors had guaranteed Pegasus' debt to Lahaina. Specifically, the bankruptcy schedules filed by Pegasus listed the Lahaina debt and stated that the Debtors were a co-

debtor of Pegasus. The Debtors' current position (that no guaranty exists) is inconsistent with that representation. However, since that statement was made by Pegasus, and not by the other Debtors, judicial estoppel is not applicable.

The Debtors' current position is also inconsistent with the statement made by the Debtors in the Sale Motion that "Olympus has guaranteed Pegasus' obligations to Lahaina under the Master Lease." For judicial estoppel to apply, however, the change in position must be done in bad faith. A finding of bad faith must be based on more than the presence of an inconsistency. Montrose, 243 F.3d at 781. A litigant has not acted in bad faith unless he behaved in a manner that is somehow culpable and where the inconsistent position was used as a means of obtaining an unfair advantage in an action before the court. Id. Guided by the Supreme Court's ruling in Cleveland v. Policy Management Systems Corp., the Third Circuit held that "it does not constitute bad faith to assert contrary positions in different proceedings when the initial claim was never accepted or adopted by a court." Montrose, 243 F.3d at 782 (applying Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805 (1999)).

In this case, the misstatement in the Sale Motion was not intended to improve the Debtors' position. Nor did the Court or any other party take any action in reliance on that statement. Since the Sale Motion was not granted, but was mooted by the dismissal of the Pegasus case, the statement regarding the Guaranty was never adopted by the Court. Thus, we conclude that

judicial estoppel does not prevent the Debtors from asserting their current position and does not satisfy GMAC's burden of proving its claim.

B. GMAC Claim

GMAC's claim against the remaining Debtors is premised on the existence of the Guaranty. GMAC, however, failed to attach the Guaranty to the proof of claim and did not produce it (or a copy) at the hearing on the objection to that claim.

The Debtors assert that GMAC has failed to meet its burden of establishing the validity of its claim because it failed to establish the existence of the Guaranty. The Statute of Frauds in both Delaware and Connecticut require that the guaranty of a lease be in writing. Conn. Gen. Stat. § 52-550; Del. Code Ann. tit. 6 § 2714. Therefore, GMAC must satisfy Bankruptcy Rule 3001(c) which provides that, if a claim is based on a writing, the original or a duplicate of the writing must be attached to the proof of claim. Fed. R. Bankr. P. 3001(c). If the writing is lost or destroyed, a statement explaining that occurrence must be filed. Id.

GMAC admits that it has no copy of the Guaranty. It asserts that it has attempted to obtain confirmation of the Guaranty. On October 24, 2001, GMAC sent a written request to counsel for the Debtors for a copy of the Guaranty; the Debtors responded that the Guaranty could not be found. On January 21, 2002, GMAC asked the Debtors to sign an Affidavit stating that the Guaranty did not exist; this request was refused. On March 27, 2002, GMAC

filed a motion for authority to depose the Debtors' CEO, Daniel J. Kane. The Motion was granted on April 16, 2002. At the deposition, Mr. Kane testified that he could not recall if there was a Guaranty but that he and the Debtors had been unable to locate a copy.

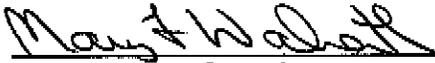
The only support for GMAC's conclusion that there was a Guaranty are the statements in the Sale Motion and Pegasus' schedules acknowledging that the Debtors are obligated to GMAC on the Master Lease. As we held above, they are insufficient to warrant judicial estoppel. Nor do they satisfy GMAC's burden of proving its claim under section 502(a), the requirements of Rule 3001(c) or the Statute of Frauds. Accordingly, we conclude that GMAC has failed to prove its Claim.

III. CONCLUSION

For the foregoing reasons we grant the Liquidating Trustee's Second Substantive Objection and disallow the claim asserted by GMAC Commercial Mortgage Servicer.

An appropriate Order is attached.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

Dated: January ²³, 2004

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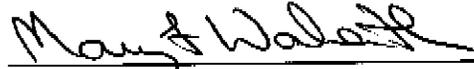
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O R D E R

AND NOW, this 23rd day of JANUARY 2004, upon consideration of the Liquidating Trustee Second Substantive Objection to the claim of GMAC Commercial Mortgage Servicer and the opposition thereto, for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the Objection is **SUSTAINED**; and it is further **ORDERED** that the claim filed by GMAC is hereby **DISALLOWED**.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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