UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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Re: Loewen Group International, Inc. vs. Patricia Gilligan, et al.
Adv. Proc. No. 00-1205

Dear Counsel:

This is with respect to the Defendants' motion to dismiss (Doc. # 7). Because I find that Plaintiffs plead an adequate basis for enjoining the Defendants from prosecuting their pending state court action against certain of Plaintiffs' former and present employees, I will deny the motion.

The Plaintiffs and chapter 11 debtors, which include Loewen Group International, Inc. ("LGII") and Loewen (Kentucky) Inc., d/b/a Johnson-Vaughn Funeral Home ("Johnson-Vaughn") (together "Plaintiffs" or "Debtors") seek to enjoin the Defendants (together "Movants") from prosecuting a civil suit against certain former employees of Johnson-Vaughn pending in the state court of Kentucky ("State Court Action").

Movants, individually and as coexecutors of Dr. E. Kelly Thompson's estate, filed suit on May 28, 1999 against Johnson-Vaughn in the Warren District Court of Kentucky. Movants allege that Johnson-Vaughn failed to place a military grave marker on the grave site of their father although the United States government had shipped the marker to Johnson-Vaughn. They assert Johnson-Vaughn's conduct is part of a "systemic failure to place veterans' grave markers after taking funds from various grief stricken relatives of veterans" and that Johnson-Vaughn "consistently failed to place grave markers for military veterans on the graves of the veterans." Pro Se Response to Verified Complaint for Declaratory Injunctive Relief (Doc. # 10) ("Answer") at ¶ XI. Movants seek to determine "just how many veterans' graves have been defiled by the

actions of this individual funeral home, these former employees, and perhaps current employees of the debtor/plaintiff." Id.

On June 1, 1999, LGII, Johnson-Vaughn and approximately 830 related debtors filed for voluntary chapter 11 relief. Section 362(a)[1] stayed Movants' prosecution of the State Court Action against Johnson-Vaughn. Movants then amended their complaint to add David Turner as a defendant and later to remove Johnson-Vaughn as a defendant. The State Court Action now names David Turner, John Phelps, Brad Schulz, W.L. Miller, Buddy Mayes, Kenny Imes, Mark Engel, James Pendley and Eddie Smith as defendants. Apparently, as of September 29, 2000, Johnson-Vaughn no longer employs Turner, Imes, or Smith and Engel has died. On January 3, 2001, Johnson-Vaughn was sold to John Phelps.

On September 29, 2000, Plaintiffs filed this adversary complaint in which they seek a declaration that § 362 stays the ongoing prosecution of the State Court Action against the non-debtor employees, or alternatively, a preliminary and permanent injunction pursuant to § 105(a) staying the prosecution against the non-debtor defendants. On November 2, 2000, Movants filed their Answer and the present motion to dismiss.

With minimal elaboration and no citation to any legal authority, Movants request dismissal "[d]ue to the fact that the plaintiffs/debtors have no current relationship, nor any authority

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[1] Unless otherwise indicated, all references to "§___" herein are to a section of the Bankruptcy Code, 11 U.S.C. § 101 et seq.

to represent these parties misrepresentations have been made to this Court concerning the fact that these are employees of the plaintiffs/debtors. For this misrepresentation this adversary proceeding should be dismissed summarily." Motion to Dismiss at 2; see also Response to Objection of Debtors and Debtors in Possession to Defendants Motion to Dismiss (Doc. # 15) at ¶ I.

Under the circumstances, I will treat Movants' motion as one for dismissal based on lack of subject matter jurisdiction or alternatively as a failure to state a claim for which relief can be granted under Fed.R.Civ.P. 12(b)(1) and (b)(6) respectively.[2]

> The basic difference among the various 12(b) motions is, of course, that 12(b)(6) alone necessitates a ruling on the merits of the claim, the others deal with procedural defects. Because 12(b)(6) results in a determination on the merits at an early stage of plaintiff's case, the plaintiff is afforded the safeguard of having all its allegations taken as true and all inferences favorable to plaintiff will be drawn. The decision disposing the case is then purely on the legal sufficiency of plaintiff's case: even were plaintiff to prove all its allegations, he or she should would be unable to prevail. . . .
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> The procedure under a motion to dismiss for lack of subject matter jurisdiction is quite different. At the outset we must emphasize a crucial distinction, often overlooked, between 12(b)(1) motions that attack the complaint on its face and 12(b)(1) motions that attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings. The facial attack does offer similar safeguards to the plaintiff: the court must consider the allegations of the complaint as true. [A]t issue in a factual 12(b)(1) motion is the trial court's . . . very power to hear the case. ...
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> Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d

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[2] With modifications not relevant here, Fed.R.Bank.P. 7012 makes Fed.R.Civ.P. 12 applicable to adversary proceedings in bankruptcy.

> 884, 891 & n.16 (3d Cir. 1977) citing 5 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE s. 1350 (1969)("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court").

The issue here is not whether Plaintiffs will ultimately prevail on the merits of their case, but rather, whether their complaint adequately pleads a basis for subject matter jurisdiction and whether it is legally sufficient to state a claim upon which relief can be granted.

Movants' assertion that the Debtors no longer have a relationship with or an interest in representing their former employees is irrelevant for purposes of determining subject matter jurisdiction. Subject matter jurisdiction concerns my legal authority to hear and decide cases of a general class to which the particular case belongs. At issue is the nature of the cause of action itself, not the relationship between the parties.

I find that Plaintiffs adequately plead jurisdiction under the relevant statutes. They properly rely on 28 U.S.C. §§ 1334 and 157. The former vests district courts with "original and exclusive jurisdiction of all cases under title 11," 28 U.S.C. § 1334(a), and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The latter establishes bankruptcy court jurisdiction over core and non-core proceedings. Plaintiffs allege their complaint seeks enforcement and interpretation of the automatic stay and a preliminary injunction based on prepetition conduct of a chapter 11 debtor and its former

employees and is therefore a core proceeding under 28 U.S.C. § 157(b)(2)(A) ("matters concerning the administration of the estate"); (b)(2)(B)("allowance or disallowance of claims against the estate ... "); (b)(2)(G)("motion to terminate, annul, or modify the automatic stay"); and (b)(2)(0)("other proceedings...").

Movants do not challenge any of these allegations either factually or as a matter of law. They merely assert that the Debtors no longer employ the defendants in the State Court Action. This may be true but without more does not affect my authority to determine whether § 362 and § 105 of the Bankruptcy Code permits the Debtors to enjoin Movants from prosecution of the State Court Action against those defendants.

I also note that Movants' pleadings are inherently contradictory. They argue dismissal is appropriate because the defendants in the State Court Action no longer have any connection with the Debtors, yet they characterize the State Court Action as an allegation that Johnson-Vaughn and its employees systemically failed to place veterans' grave marker on grave sites and that "graves have been defiled by the actions of this individual funeral home, these former employees, and perhaps current employees of the debtor/plaintiff." Answer at ¶ XI (emphasis added).

Under these alleged facts, basic principles of agency may render Johnson-Vaughn and the Debtors liable even if Movants only pursue the former employees. Accord e.g., Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 884 (3d Cir. 1975)(the fraud of an officer

of a corporation is imputed to the corporation when the fraudulent conduct was within the course of employment and for the benefit of the corporation). Similarly, there is no ground for dismissing the complaint only because the Debtors do "not represent" their former employees and have no "client/attorney relationship" with them. Movants provide no legal authority for their implied conclusion that an employer's liability for the tortious acts of its employees committed while employed ends with termination of employment.

I also find that the adversary complaint states a cause of action for which relief can be granted. Section 362 governs application of the automatic stay. The provision states, in relevant part:

> [A] petition filed under. . . this title ... operates as a stay, applicable to all entities, of--the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title[.]
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> 11 U.S.C. S 362(a)(1).

The automatic stay clearly enjoins the State Court Action as against the debtor, Johnson-Vaughn. Section 362(a), however, does not necessarily stay an action against non-debtor co-defendants. E.g., Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1330 (10th Cir. 1984); Akers v. Bonifasi, 629 F.Supp. 1212, 1213 (M.D. Tenn. 1985) (the filing of a bankruptcy petition operated automatically to stay the commencement of actions as to the debtor, but not as to other persons named as defendants).

Courts, including this one, have nevertheless extended

the automatic stay to nondebtor third parties when "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." A.H. Robbins Co., Inc. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986); Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 677 (8th Cir. 1992) (noting existence of narrow exception to general rule for "unusual circumstances"); Am. Film Tech., Inc. v. Taritero (In re Am. Film Tech, Inc.), 175 B.R. 847, 855 (Bankr. D. Del. 1994).

Expanding the scope of the automatic stay is warranted in "unusual circumstances" where collateral estoppel may prevent a corporate debtor from re-litigating issues determined against its employees and agents in a prior suit if the corporate debtor is found to be a controlling party. Am. Film Tech, Inc., 175 B.R. at 850, 855. To refuse application of the stay in such a case could defeat the very purpose and intent of the statute. Piccinin, 788 F.2d at 999 ("An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case"). See also Am. Film Tech., 175 B.R. at 855 (granting preliminary injunction staying the prosecution of an action against current and former officers of the debtor because the debtor had an obligation to indemnify the officers and, in the event the officers were found liable, the debtor could be collaterally estopped from denying liability for their actions).

Under this rationale, Plaintiff's complaint states a

claim for which relief may be granted. Plaintiffs are entitled to submit evidence to establish "unusual circumstances" such that invocation of § 105 to issue a preliminary injunction order staying the State Court Action or to make effective the automatic stay of § 362 against the nondebtor employees is warranted. Dismissal under Fed.R.Civ.P. 12(b)(6) is therefore not appropriate and Movants' motion is denied.

SO ORDERED.

Very truly yours,

Peter J. Walsh

PJW:ipm