

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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September 14, 2001

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**Re: Montague S. Claybrook vs. Donegal Mutual Insurance Co.
Adv. Proc. No. 98-475**

Dear Counsel:

This is my ruling on the Trustee's motion (Doc. # 10) for summary judgment and Donegal Mutual Insurance Co.'s ("Donegal") cross-motion (Doc. # 13) for summary judgment.

The summary judgment standard is clear: summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).¹ Neither motion satisfies the standard.

The central issue in this adversary proceeding is whether the debtor, Jeffrey Liberto ("Liberto"), sufficiently cooperated with Donegal, including submitting to questions under oath if appropriate, in establishing the validity of his claim as required by the insurance policy. In reliance on an affidavit and numerous documents attached to his motion papers, the Trustee argues "yes". In reliance upon affidavits and equally numerous documents, Donegal argues "no".

In his opening memorandum the Trustee indicates (Doc. # 10, p.6) that in response to the motion Donegal would likely argue that Liberto failed to cooperate with Donegal in its investigation. But, according to the Trustee: "This is absolutely not the case (see paragraphs three and four of Exhibit "C"). The debtor timely provided Donegal with all requested information." (Doc. # 10, p.6). The two paragraphs referred to in Exhibit C read as follows:

3. In connection with the loss, the Debtor timely reported the claim to Donegal. On or around April 7, 1999 the Debtor submitted to the Defendant a copy of the Insured's Statement and Claim Form (attached hereto and made a part hereto as Exhibit "1" is a copy of the Insured's Statement and Claim Form

¹ Fed. R. Bank. P. 7056 makes Fed. R. Civ. P. 56(c) applicable to adversary proceedings in bankruptcy.

(the "Statement").

4. Prior to submitting the Statement, Debtor communicated with the Defendant on several occasions and provided Debtor's agent with requested information (attached hereto a [sic] made a part hereof as Exhibit "2" is a copy of the correspondence between Debtor and Defendant's agent).

(Doc. # 10, Exhibit C).

Exhibits 1 and 2 obviously constitute a significant package of documents and communications which presumably were furnished to Donegal by Liberto.

However, in its response, Donegal recites a long chronology of its failed attempts to question Liberto under oath as it apparently was entitled to by the terms of the policy. This chronology is supported by the affidavit of John D. Brinkmann ("Brinkmann"), which affidavit attaches numerous pieces of correspondence between counsel for Donegal and counsel for the Trustee and Liberto regarding efforts to schedule Liberto's deposition. The series of correspondence concludes with an August 19, 1999 letter from Brinkmann to Liberto's attorney in which Brinkmann concludes that Liberto's refusal to submit to examination under oath in violation of the policy provisions resulted in his claim being denied. In its response, Donegal asserts that the claim was denied "[b]ecause it had become abundantly clear to Donegal that Mr. Liberto and his counsel had not and would not cooperate with its investigation..." (Doc. # 13, § 13).

In his supplemental reply (Doc. # 24), the Trustee references a significant number of documents which he obtained from Donegal pursuant to a document production request and argues that these documents demonstrate that Liberto did cooperate in the insurance company's investigation of the claim.

Specifically, the Trustee alleges:

The documents that Donegal produced to the Trustee do not explain the basis for the denial of the Debtor's claim. As the Trustee previously argued, Donegal has denied the claim as part of a strategy to support its Cross-Motion for Summary Judgment. Moreover, the information supplied from Donegal through the discovery process fails to elaborate upon the denial of the claim.

(Doc. # 24 at ¶ 4).

Not surprisingly, in its response to the supplemental reply Donegal claims that "[t]he documents that Donegal produced to the Trustee demonstrate a consistent pattern by the debtor of not cooperating with Donegal's investigation nor with the requirements of the debtor's contract of insurance with Donegal."

(Doc. # 25 at ¶ 4). Further on in that response, Donegal claims that "all of the evidence demonstrates that the debtor was completely unresponsive to Donegal's request for an examination under oath to investigate its claim, as required by the debtor's policy." (Doc. # 25 at ¶ 7).

Aside from the difficulty of evaluating the import of the various documents at this pleadings stage of the proceeding, the matter before me raises a number of questions, including, but

not limited to, the following:

(1) Given the information furnished to Donegal by Liberto was Donegal still entitled as a matter of right to depose him and if so could it do so through a court order such as a Fed.R. Bank. P. 2004 order?

(2) To what extent, if any, is the Trustee required, in pursuit of the claim, to cause (by subpoena or other court order) Liberto to be deposed by Donegal?

(3) Since the claim is property of the debtor's estate was Donegal required to deal with Liberto through the Trustee, particularly after October 1998 when Donegal was served with the complaint?

(4) Absent the alleged failure of Liberto to cooperate with Donegal's investigation, did Donegal have an obligation to pursue its investigation with the Trustee and was the Trustee in turn required to demand Liberto's cooperation?

Essentially, the parties are asking the Court to review all of the affidavits and documents, answer the types of questions noted above, and make a factual determination as to whether Liberto sufficiently complied with the policy requirements of cooperating with Donegal's investigation of the claim. It is patently clear that this cannot be done in the context of a motion for summary judgment. Indeed, it is worth noting that notwithstanding Donegal's assertion that because of

his failure to cooperate Liberto does not have a valid claim, Donegal goes on to state: "Or, at the very least, there is a preliminary issue of fact as to whether Mr. Liberto is entitled to payment. This issue must be resolved before it may be determined whether Donegal has an obligation to turn over alleged insurance proceeds in the amount demanded by the Trustee." (Doc. # 13 at ¶ 18) (Emphasis added.) I quite agree.

The Trustee's motion (Doc. # 10) for summary judgment and Donegal's motion (Doc. # 13) for summary judgment are hereby DENIED.

Very truly yours,

Peter J. Walsh

PJW:ipm