

Glazier Group, Inc. v Premium Supply Co., Inc.

2013 NY Slip Op 33293(U)

April 16, 2013

Supreme Court, New York County

Docket Number: 650259/12

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK
Justice

PART 39

glazier group, inc.

INDEX NO.

650259/12

MOTION DATE

- v -

MOTION SEQ. NO.

001

Premier supply co., inc.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/16/13


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DENIED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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THE GLAZIER GROUP, INC.,

Plaintiff,

- against -

PREMIUM SUPPLY CO., INC.,

Defendant.

-----x

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 650259/12
Mot. Seq. No. 001

The instant motion requires the application of Title 11 of the United States Code (the "Bankruptcy Code"). Plaintiff is The Glazier Group, Inc. ("GGI"), the debtor whose Chapter 11 plan of reorganization became effective on or about January 13, 2012. GGI commenced this action on January 27, 2012 against defendant Premium Supply Co., Inc. ("Premium"). GGI's Complaint asserts three causes of action for breach of contract, malicious prosecution and prima facie tort. Premium now moves to dismiss the Complaint pursuant to CPLR 3211 (a), arguing that plaintiff lacks standing to pursue any of the causes of action, and that such causes of action are barred by *res judicata*.

Background

The following facts are generally undisputed, unless noted otherwise. GGI provided management services to several of its

restaurant affiliates (collectively, the "Affiliates"). Prior to GGI's bankruptcy filing, disputes arose between Premium, GGI and the Affiliates as to monies owed for the restaurant supply products provided by Premium to the Affiliates. These disputes were resolved by an agreement dated October 21, 2008 (the "Settlement Agreement"), whereby Premium agreed that GGI would not be liable for the debts owed by the Affiliates, and that the Affiliates and Peter Glazier, as one of GGI's principal owners and partial payment guarantor, would continue to be liable for a portion of the indebtedness owed by the Affiliates to Premium.

On November 15, 2010, GGI filed a voluntary petition for bankruptcy relief under Chapter 11 of the Bankruptcy Code with the U.S. Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), although none of the Affiliates filed for bankruptcy. On the "List of Creditors Holding 20 Largest Unsecured Claims" filed with the Bankruptcy Court, GGI listed Premium as holding a claim in the amount of \$95,887.50. However, Premium later filed its own proof of claim against GGI, dated March 14, 2011, asserting an unsecured claim in the amount of \$237,709.09. By objection filed with the Bankruptcy Court on May 19, 2011, GGI sought to expunge Premium's filed claim, and a hearing on the objection was held on June 30, 2011. By Order dated August 10, 2011, the Bankruptcy Court expunged Premium's proof of claim based,

inter alia, on the terms of the Settlement Agreement, which provided that GGI would not be liable for the Affiliates' debts owed to Premium (the "Expunging Order").

On September 8, 2011, the Bankruptcy Court entered an Order which, among other things, approved GGI's disclosure statement¹ and vote solicitation materials, and established deadlines and procedures for filing objections to the confirmation of GGI's proposed Chapter 11 plan of reorganization (the "Disclosure Statement Order"). A hearing to consider confirmation of GGI's Chapter 11 plan (as amended, the "Plan") was held on December 12, 2011. By Order dated December 13, 2011, the Bankruptcy Court confirmed the Plan (the "Confirmation Order"), which became effective on January 13, 2012 (the "Effective Date"). Simultaneously with the occurrence of the Effective Date and subsequent thereto, GGI, as the reorganized debtor, made distributions to creditors pursuant to the terms of the confirmed Plan. On or about February 14, 2012, GGI achieved "substantial consummation" of the Plan in accordance with section 1101 of the

¹ Under Chapter 11 of the Bankruptcy Code, a debtor must provide a disclosure statement to its creditors that contains "adequate information" so as to enable the creditors to make an informed decision as to whether they should vote in favor or against its proposed Chapter 11 plan. 11 U.S.C. § 1125.

Bankruptcy Code. 11 U.S.C. § 1101 (2). On February 15, 2012, a motion for a final decree closing GGI's Chapter 11 case was filed.

The Complaint alleges that Premium breached the contract (i.e., the Settlement Agreement) by asserting a false and malicious claim against GGI in the Chapter 11 case, which required GGI to expend substantial legal fees in expunging the claim as well as paying for counsel for the creditors' committee appointed in its Chapter 11 case (the "Committee"). The Complaint seeks monetary damages of not less than \$300,000 due to Premium's alleged tortious conduct.

Discussion

Premium's motion seeking dismissal of the Complaint does not address the merits of the causes of action asserted therein; rather, it argues that (1) GGI does not have legal standing to bring this action because GGI's creditors are the real parties in interest; and (2) the claims plaintiff raises herein clearly could have been raised by GGI in the Bankruptcy Court, and thus they are barred by the doctrine of *res judicata*.

Legal Standing

In its opening brief, Premium argues that GGI, as the reorganized debtor, does not have legal standing to pursue causes

of action that belonged to GGI, as the debtor-in-possession.² Premium contends that because GGI failed to schedule these causes of action in its schedules of assets and liabilities, GGI cannot pursue them post-confirmation.

The cases cited by Premium in support of its argument involved, primarily, Chapter 7 debtors³ who failed to list causes of action belonging to the debtors that accrued pre-petition (i.e., before the bankruptcy filing) in their filed schedules of assets and liabilities, or the debtors failed to disclose the causes of action to the Chapter 7 trustees. As explained below, these cases are inapposite. The purpose of requiring a debtor to file schedules is to disclose the debtor's assets and liabilities as of the date the bankruptcy petition is filed. 4 Collier on Bankruptcy ¶ 521.06 [3][a] (16th ed 2012) ("The schedules require only a listing

² Under Chapter 11, the debtor-in-possession is the debtor, unless and until the bankruptcy court, on request of a party in interest and after notice and a hearing, appoints a Chapter 11 trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management...." 11 U.S.C. §§ 1101, 1104. No trustee was appointed in GGI's Chapter 11 case.

³ In Chapter 7, the bankruptcy trustee liquidates the debtor's assets and distributes the proceeds to creditors, and the debtor obtains a bankruptcy discharge in the exchange. 11 U.S.C. §§ 704, 726 and 727. In Chapter 11, the debtor in possession proposes a Chapter 11 plan that must satisfy specific requirements of the Bankruptcy Code, and the plan must be accepted by creditors and confirmed by the bankruptcy court before the debtor obtains a discharge. 11 U.S.C. §§ 1123, 1126, 1129 and 1141.

of property owned [by the debtor] at the time the petition is filed ... Otherwise, the schedules would have to be amended almost daily."); see also *Cusano v Klein*, 264 F3d 936, 947 (9th Cir 2001) ("generally, a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy"). Thus, a debtor is not required to schedule a cause of action that accrued post-petition. Moreover, the reason for requiring a Chapter 7 debtor to disclose a cause of action to the Chapter 7 trustee is that the failure to disclose may have the effect of "precluding the potential benefit of the property [i.e., causes of action belonging to the debtor] from accruing to his creditors, and then, after obtaining a release from his debts [via bankruptcy], assert title to the property." *Schepmoes v Hilles*, 122 AD2d 35, 36 (2d Dept 1986).

In this case, GGI was a Chapter 11 debtor and the causes of action against Premium clearly accrued post-petition, during the Chapter 11 proceedings and after the Bankruptcy Court entered the Expunging Order disallowing Premium's claim. Also, as discussed more fully below, the Confirmation Order specifically states in paragraph 11 (1) that all members of the Committee appointed in GGI's Chapter 11 case, except Premium (a former member), will not be liable for acts or omissions relating to or arising from the Chapter 11 case, except for certain bad acts. Therefore, any argument that the Committee and/or the Bankruptcy Court was totally

unaware of the potential causes of action against Premium is tenuous. More importantly, the Confirmation Order also states that, "[p]ursuant to Section 1141 (b) of the Bankruptcy Code, on the Effective Date, title to all properties and assets of the Debtor and its Estate shall vest in the Reorganized Debtor free and clear of all liens, claims and encumbrances, except as expressly provided in the Plan or in this Order" Confirmation Order, ¶ 5.

Despite the foregoing, Premium contends that because these causes of action against Premium arose pre-confirmation (albeit accruing post-petition), GGI should have disclosed them in its disclosure statement and/or Chapter 11 plan so that the creditors could make an informed decision as to whether they would vote for or against the Plan, as any recovery from these causes of action would benefit the creditors, who are the real parties in interest. In support of its contention, Premium relies primarily upon the case of *Rosenshein v Kleban*, 918 F Supp 98, 103 (SDNY 1996), in which the Court stated that "undisclosed claims do not revert to the debtor free of the claims of creditors." The Court also noted that even though there was a general retention of claims clause in the debtor's reorganization plan, the debtor could not retain the right to enforce any cause of action that was property of his bankruptcy estate. *Id.* at n. 4. Specifically, the Court held that "Rosenshein may not . . . rely on a general retention clause to

preserve undisclosed causes of action known to him when he filed for bankruptcy." *Id.* (citation omitted, emphasis added).

In the instant case, the causes of action against Premium were unknown to GGI when it filed for bankruptcy relief. Indeed, as discussed above, they arose during the course of GGI's Chapter 11 proceedings. Hence, *Rosenshein* is both distinguishable and inapplicable. As also discussed, the Confirmation Order states, in relevant part, that

[n]either the Debtor, the Reorganized Debtor, the Committee (as to itself or any of the Committee Members) ... (excluding former Creditors' Committee member Premium Supply Co., Inc.) ... shall have or incur any liability ... for any act or omission ... in connection with ... the administration of the Plan or the property to be distributed under the Plan, except for acts or omissions that are the result of fraud, gross negligence or willful misconduct;

Confirmation Order, ¶ 11 (i) (emphasis added). This specific provision evidences that counsel for the Committee, as well as the Bankruptcy Court, was cognizant of the fact that while many players or parties in interest in GGI's Chapter 11 case are exculpated from liability under the Confirmation Order, such exculpation does not extend to Premium.⁴ Standing alone, the foregoing does not

⁴ Other provisions in the Confirmation Order also identified parties against whom the releases and exculpations in the Plan and/or the Confirmation Order would not waive claims. Confirmation Order, ¶ 10. These provisions were apparently negotiated by the relevant parties, and their agreement was

explicitly state that the causes of action against Premium are vested in reorganized GGI. However, it does indicate, at a minimum, that Premium will likely be sued, post-confirmation, for acts that it allegedly committed during GGI's Chapter 11 proceedings. When the foregoing is coupled with the specific language of the "Revesting of Assets" provision in paragraph 5 of the Confirmation Order, as to which no party in interest in GGI's Chapter 11 case (including the Committee) had objected, the allegations are more than sufficient to withstand Premium's motion to dismiss.

It is also noteworthy that at the oral argument held on the record on June 20, 2012, GGI's counsel handed up a "Liquidation Analysis" to rebut Premium's assertion that these causes of action should have been disclosed in the disclosure statement, because the potential recovery from such causes of action (\$300,000) would have been material to the creditors' decision as to whether they would vote for the Plan. (Transcript, at 8-10; 16-18). The one-page liquidation analysis was an exhibit to GGI's disclosure statement. Based on the figures in the liquidation analysis, which were explained to this Court by GGI's counsel, the amounts of secured claims and administrative expenses claims against GGI were about \$7 million and \$1 million, respectively. Because the amount of GGI's

reflected by and incorporated into the Confirmation Order.

assets was less than \$1 million, the unsecured creditors of GGI, who were the only class of creditors entitled to vote on the Plan, would receive no distribution for their unsecured claims under the priority scheme set forth in the Bankruptcy Code, if GGI's assets were liquidated and the proceeds were distributed to creditors, such as in a Chapter 7 case. (Transcript, at 18-19). On the other hand, because the distributions under the Plan to creditors would be funded by an outside source, unsecured creditors of GGI would receive about 20 cents on the dollar for their unsecured claims (and thus they would likely elect to vote in favor of the Plan). (*Id.* at 18-20).

Apparently without taking into consideration, among other things, the deficiency claim⁵ of the secured creditor General Electric Capital Corporation ("G.E."), counsel for Premium contended on the record that "the \$300,000 addition to distribution would be extremely material to those unsecured creditors and it would push the distribution numbers, without any outside infusion, to roughly 42 or 43 cents on the dollar compared to 20 cents on the

⁵ The deficiency claim is the difference between the amount of the secured claim and the value of the collateral securing such claim. 11 U.S.C. § 506 (a). The deficiency claim is treated as an unsecured claim, and the secured creditor is also entitled to vote on account of the unsecured claim. It appears that G.E.'s deficiency claim (about \$6 million) would have overwhelmed other unsecured claims in the voting class.

dollar." (*Id.* at 20). Premium's counsel's unsubstantiated contention was rebutted by GGI's counsel, as follows:

[O]pposing counsel's hypothetical aside, I know for [a] fact that opposing counsel has not read the G.E. loan documents. I am intimately familiar with them because I've been dealing with them for the past years ... [W]ithout question G.E. has had a security interest in absolutely everything, including causes of action, and therefore, under a liquidation analysis ... instead of G.E. getting a 14 percent distribution and everybody else getting nothing if there was a distribution from [GGI] assets, if you add \$300,000 [recovery], G.E. would have gotten an 18 percent distribution and everybody else still would have gotten nothing.

(*Id.* at 25). Based on GGI's counsel's statements, which this Court finds persuasive, the disclosure of the causes of action against Premium in the disclosure statement would not have been material, because it was unlikely to have affected the unsecured creditors' vote on the Plan.⁶

In any event, the Bankruptcy Court approved GGI's disclosure statement by entering the Disclosure Statement Order, and such order is *res judicata* as to whether GGI's disclosure statement contained "adequate information" within the meaning of section 1125 of the Bankruptcy Code. Because Premium participated in GGI's Chapter 11 case, and failed to challenge the Disclosure Statement Order, Premium is precluded from collaterally attacking the

⁶ In fact, the Confirmation Order reflects that all nine unsecured creditors who voted on the reorganization plan (Class 3) voted in favor of the Plan. Confirmation Order, ¶ S.

Disclosure Statement Order in this Court.⁷ Indeed, this Court is required to give full faith and credit to the Disclosure Statement Order, as the Bankruptcy Court is the proper jurisdiction to hear and determine all issues relating to the adequacy of information contained in the disclosure statement. 28 U.S.C. §§ 157, 1409. Similarly, principles of *res judicata* and full faith and credit apply to the Confirmation Order, which provides, among other things, that the assets of GGI's bankruptcy estate are vested in reorganized GGI. *Id.*

Accordingly, Premium's argument that GGI, as the reorganized debtor, lacks the legal standing to pursue the instant causes of action against Premium, is without merit.

Res Judicata (and Judicial Estoppel)

Initially, Premium argues that the doctrine of *res judicata* bars GGI from bringing these causes of action in this Court now because they should have been brought in the Bankruptcy Court in conjunction with GGI's objection to Premium's claim, which resulted in the entry of the Expungement Order. Premium argues, in effect, that *res judicata* prevents GGI from litigating any issue or defense that could have been raised and decided by the Bankruptcy Court in

⁷ It is questionable whether Premium would have standing to even challenge the Disclosure Statement Order, because it was no longer a GGI creditor after the Expungement Order was entered.

the claim objection process. In opposition, GGI contends that it was not required to assert these claims in the context of a claim objection, because objections to proofs of claim are "contested matters" governed by Bankruptcy Rule 9014, which do not incorporate the rule for compulsory counterclaims. See *Sure-Snap Corp. v Bradford Nat. Bank*, 128 BR 885, 888 n 4 (D Vt), *aff'd* 948 F2d 869 (2d Cir 1991). In its reply papers, Premium concedes that it is not asserting that the instant action had to be brought as a compulsory counterclaim in the context of a claims objection in GGI's bankruptcy. Rather, Premium asserts that the "triggering event" for said claims occurred four months before the proposal of the Plan, and thus the claims should have been included in the Plan as an asset of the debtor for the Creditors to consider. Consequently, defendant argues that the doctrines of "failing to sue in the name of the real party in interest and/or judicial estoppel apply."

The doctrine of judicial estoppel has two elements: (1) "the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding;" and (2) "the prior inconsistent position must have been adopted by the court in some manner." *Bates v Long Island R.R. Co.*, 997 F2d 1028, 1038 (2d Cir 1993) cert den 510 US 992 (1993). Premium does not explain how this doctrine and its elements are applied to the facts of this case. Instead, it relies on *Rosenshein, supra*, for the proposition

that a debtor cannot be allowed to "obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding." *Rosenshein*, 918 F Supp at 104. As explained above, *Rosenshein* involved claims that accrued pre-petition, and its rationale and holding is inapposite to this case because the instant causes of action against Premium accrued post-petition.

In a more recent decision, the Bankruptcy Court observed that because the defendant "did not show, or even allege, any facts" that would satisfy the two elements for judicial estoppel, the purported doctrine, as argued by the defendant, would not bar the subsequent action. *In re Perry H. Koplik & Sons, Inc.*, 357 BR 231, 247 (SDNY 2006), lv den 377 BR 69 (SDNY 2007). Moreover, the Court noted that the general reservation in the debtor's reorganization plan regarding post-confirmation claims was sufficient to reserve the subject claims, even though such claims were not specifically identified. *Id.* at 246-247; see also *In re I. Appel Corp.*, 300 BR 564, 569 (SDNY 2003), aff'd 104 Fed Appx 199 (2d Cir 2004) ("It is neither reasonable nor practical to expect a debtor to identify in its plan of reorganization or disclosure schedules every outstanding claim it intends to pursue with the degree of specificity that [defendants] would require.").

In the instant case, as discussed above, the Confirmation Order expressly states that the assets of GGI's estate are revested in reorganized GGI. The Confirmation Order also indicates Premium as a potential defendant in a post-confirmation suit, and the Plan as well as the Confirmation Order do not provide for an exculpation. As such, the principle of *res judicata* or judicial estoppel is inapplicable, despite Premium's contention to the contrary.

Accordingly, Premium's motion seeking dismissal of the instant action must be denied. Denial of the motion, however, does not prejudice Premium's right, if any, to petition the Bankruptcy Court to re-open GGI's Chapter 11 case so as to hear and determine the instant causes of action.⁸ Indeed, Premium indicates that it might do so if GGI refuses to seek such relief from the Bankruptcy Court. Unless and until the Bankruptcy Court enters an order staying the instant action, this action may continue against Premium in this Court.

⁸ It should be noted that the Confirmation Order contains a comprehensive listing of matters as to which the Bankruptcy Court shall retain jurisdiction, including, inter alia, the retention of jurisdiction to "hear and determine disputes arising in connection with the execution, interpretation, implementation, consummation or enforcement of the Plan." Confirmation Order, ¶ 22(x). The Confirmation Order further states that "[i]f the Bankruptcy Court abstains from exercising, or declines to exercise, jurisdiction ... this Section shall have no effect upon and shall not control, prohibit or limit the exercise of jurisdiction by any other court having competent jurisdiction with respect to such matter." *Id.*

Defendant shall file and serve an Answer to plaintiff's Complaint within 30 days of the notice of e-filing of this decision. Counsel shall appear for a conference in IA Part 39, 60 Centre Street, Rm. 208 on June 5, 2013 at 11:30 a.m. to schedule discovery and to discuss plaintiff's pending motion to consolidate this action with several other actions filed by defendant Premium (mot. seq. no. 002).

This constitutes the decision and order of this Court.

Dated: April 16, 2013



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.