

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE PHOENIX CORPORATION,

Debtor.

BAP No. KS-05-039
BAP No. KS-05-041

GULF INSURANCE COMPANY and
GULF UNDERWRITERS
INSURANCE COMPANY,

Bankr. No. 04-24569-7
Adv. No. 05-6057
Chapter 7

Plaintiffs – Appellants,

v.

PHOENIX CORPORATION,

Defendant – Appellee,

JEFF FISCUS, ROSE FISCUS, CARL
FORD, DENISE FORD, MARK
SATALA, and STEVEN R. REBEIN,
Trustee,

Appellees.

GULF INSURANCE COMPANY and
GULF UNDERWRITERS
INSURANCE COMPANY,

Bankr. No. 04-24569-7
Chapter 7

Appellants,

v.

JEFF FISCUS, ROSE FISCUS, CARL
FORD, DENISE FORD, PHOENIX
CORPORATION, STEVEN R.
REBEIN, Trustee, and MARK

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

SATALA,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before BOHANON, MICHAEL, and McNIFF, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

Prior to filing its Chapter 7 bankruptcy petition, Phoenix Corporation (“Phoenix”) manufactured cranes. It had been sued for products liability in various state courts which complaints were, of course, stayed when the petition was filed. The Chapter 7 Trustee filed a report of no distribution. Some of the products liability claimants moved for relief from the stay to pursue their claims in order to seek redress from Phoenix’s insurers, which are Appellants Gulf Insurance Company and Gulf Underwriters Insurance Company (“Gulf”).

This appeal arises from a complaint brought by Gulf as an adversary proceeding in the bankruptcy court against some of the claimants and Phoenix. It seeks a judgment declaring that its policies do not cover the products liability claims.¹

The products liability claimants (“Appellees”) opposed the complaint, and the bankruptcy court granted them relief from the stay, dismissed the complaint for lack of subject matter jurisdiction and, alternatively, abstained from hearing it. It should be noted that the Phoenix Trustee claims no interest in the policies

¹ We review a bankruptcy court’s determination that it lacked jurisdiction over an adversary proceeding under the *de novo* standard of review. See Midgard Corp. v. Kennedy (In re Personette), 204 B.R. 764, 770 (10th Cir. BAP 1997) (citing In re Courtesy Inns, Ltd., 40 F.3d 1084, 1085 (10th Cir. 1994)). A decision to exercise permissive abstention is reviewed for abuse of discretion. See In re Petrie Retail, Inc., 304 F.3d 223, 232 (2nd Cir. 2002). A decision to grant relief from stay is reviewed for abuse of discretion. See Franklin Sav. Ass’n v. Office of Thrift Supervision, 31 F.3d 1020, 1023 (10th Cir. 1994).

and has elected not to become involved in this dispute between Gulf and the claimants. The bankruptcy case has been closed.

Discussion

In determining it was without subject matter jurisdiction to entertain Gulf's complaint, the bankruptcy court correctly relied upon In re Gardner, 913 F.2d 1515, 1518 (10th Cir. 1990). In that decision, the Court of Appeals for the Tenth Circuit adopted the Third Circuit's widely-cited Pacor test for determining whether a complaint comes within the "related to" jurisdiction and held that:

"The test for determining whether a civil proceeding is related in bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984). Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate.

Id. (Emphasis added).

Gulf argues that the outcome of the complaint will have an effect on the bankruptcy estate, citing cases in which courts have recognized that insurance policies or their proceeds may be an asset of the estate. But, in those cases, the estates had some assets to be administered and the availability of insurance proceeds affected the distribution of assets or the ability of the debtor to reorganize. In this case, the Trustee has no assets to administer and has no interest in the insurance policies. Phoenix will not reorganize.

Creditors of the estate will receive nothing from it, no matter how many claims may be asserted, with or without insurance. Outcome of the declaratory judgment complaint brought by Gulf would have no effect on the administration of the estate, and the bankruptcy court correctly concluded that the complaint was not sufficiently related to the bankruptcy case to confer jurisdiction.

Gulf also appeals the bankruptcy court's orders modifying the stay to allow the Appellees to proceed with their state court suits. The Bankruptcy Code

provides the court shall grant relief from the stay for cause. 11 U.S.C. § 362(d)(1). We have held in other cases that “cause” is a discretionary determination made on a case by case basis. See e.g., Carbaugh v. Carbaugh (In re Carbaugh), 278 B.R. 512, 525 (10th Cir. BAP 2002). In this case, there is absolutely no reason whatsoever not to determine that cause exists to allow these Appellees to pursue their claims in a court possessing subject matter jurisdiction to hear them. Additionally, the bankruptcy case has been closed and that, in itself, terminates the stay. See 11 U.S.C. § 362(c)(2)(A).

At the argument on the appeal, counsel for Gulf stated that legal fees and expenses reduce the monetary limits of the policies. If such be the case and Gulf is depleting possible recovery by the Appellees with contrived suits such as this, there must be some remedy, again in a court having subject matter jurisdiction.

We also conclude that the bankruptcy court did not abuse its discretion in its alternative holding to abstain pursuant to 28 U.S.C. § 1334(c)(1). We have considered the well-known factors for permissive abstention as discussed in Republic Reader’s Serv., Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader’s Serv., Inc.), 81 B.R. 422, 429 (Bankr. S.D. Tex. 1986), and believe that abstention was proper.² The key parties are not debtors. Abstention permits the

² Those factors are the following:

- (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
- (2) the extent to which state law issues predominate over bankruptcy issues,
- (3) the difficulty or unsettled nature of the applicable state law,
- (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- (7) the substance rather than form of an asserted “core” proceeding,
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
- (9) the burden of my docket,
- (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
- (11) the existence of a right to a jury

(continued...)

bankruptcy case to be closed, thereby aiding in efficient administration of the estate. State law issues predominate. Moreover, the actions are already pending in various state courts. Indeed, Gulf's actions could easily be construed as an attempt at forum-shopping so it could avoid litigating the state court actions as long as possible. Most strikingly, the adversary proceeding bears little legitimate relation to the administration of the bankruptcy case.

Conclusion

For the foregoing reasons, the orders of the bankruptcy court are
AFFIRMED.

² (...continued)
trial, and (12) the presence in the proceeding of nondebtor parties.

Id.