

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
HEARTLAND PROMOTIONS, INC.,) CASE NO. BK94-81541
)
DEBTOR) CH. 11

MEMORANDUM

Hearing was held on July 28, 1997, on the Letter by Meyer H. Feldman. Appearances: Jeffrey Wegner for the debtor and Meyer Feldman pro se. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52.

Procedural and Factual History

The procedural and factual history of the Debtor, Heartland Promotions, Inc (hereafter "Heartland") is quite extensive and only the history required for determination of the current issues will be recited. Heartland voluntarily filed for Chapter 11 bankruptcy on October 6, 1994. Heartland is a reorganized debtor, operating under a modified plan confirmed in the "Amended and Restated Order Confirming Plan As Modified And Authorizing Sale Fee and Clear of Liens and Claims" (filing No. 403). The sale authorized was the sale of Heartland's "appointment book". Pursuant to the Order, the reorganized debtor entered into negotiations with Wordsquare Publishing Co. ("Wordsquare") for the sale.

On April 24, 1997, Meyer H. Feldman, an approximately 20% minority shareholder and member of Heartland's Board of Directors (hereafter "Feldman"), sent a letter (filing No. 404) directly to this judge. In the letter, Feldman discussed the sale to Wordsquare and alleged that during the sale negotiations he had "expressed his disapproval" of the amount of consideration to be paid in return for Messrs. Dean's and Mueller's (the other two majority shareholders and officers of Heartland) non competition agreements and that he believed the money should have been paid to Heartland. Feldman hired an attorney to advance his objections and in the course of that representation incurred a significant amount of attorney's fees. Feldman moved this Court to order Heartland to pay his attorney fees. Feldman asserts that his involvement in the

sale process benefitted the corporation because the end result was a division of the non-compete funds amongst all the shareholders and the addition of a provision which allows the Heartland Board of Directors to divert the future "non-compete" payments to the corporation, if necessary. Additionally, Feldman claims that Heartland paid for Messrs. Dean and Mueller's attorney's fees by having corporate counsel represent them in their personal capacity, with the cost paid by Heartland.

In response to Feldman's letter, Heartland was required to submit a status report and to address the allegations contained in the letter. On May 22, 1997 Heartland submitted a status report (filing No. 406) which extensively reviewed Heartland's financial condition, its status under the modified plan and addressed Mr. Feldman's letter. Specifically, the report indicated that Wordsquare, the purchaser, had insisted on the non-compete agreements and insisted that consideration be paid to ensure enforceability. The status report stated that Feldman had released his right to attorney fees, if any, and attached a settlement letter from Feldman's counsel (exhibit "A" to filing No. 406).

Feldman then renewed his request for payment of his attorney fees and requested a hearing. At the hearing, argument was advanced by both Feldman and counsel for Heartland and both submitted exhibits, which were received into evidence.

Discussion

Before addressing the arguments raised by either party, subject matter jurisdiction must be considered. Subject matter jurisdiction is provided to the district court, and, by reference, to the bankruptcy court in 28 U.S.C. § 1334, which states, in part, that:

(b) Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district court, the district court shall have 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) (emphasis supplied).

Pursuant to the statute, subject matter jurisdiction must be based on either (a) arising under title 11 or (b) related to cases under title 11.

a. "Arising Under" Jurisdiction

The phrase "arising under" is well defined and has a broad jurisdictional meaning. Nat'l City Bank v. Coopers and Lybrand, 802 F.2d 990, 993 (8th Cir. 1986). The grant of jurisdiction over all proceedings "arising under title 11" allows the bankruptcy court "to hear any matter under which a claim is made under a provision of Title 11." Id. at 994. Mr. Feldman has not advanced a claim for payment of attorney's fees under Title 11, rather his claim appears to be based on state corporate law theories or unjust enrichment to the corporation. Therefore, his purported claim does not "arise under" Title 11 as required for subject matter jurisdiction.

b. "Related To" Jurisdiction

If subject matter jurisdiction is to exist as a "related to" action "there must be some nexus between the civil proceeding and the Title 11 case." Specialty Mill, Inc. v. Citizens State Bank, 51 F.3d 770, 774 (8th Cir. 1995) citing Matter of Lemco Gypsum, Inc., 910 F.2d 784, 787(11th Cir. 1990). The "related to" proceeding must "have some effect on the administration of the debtor's estate." Id. citing In re Dogpatch U.S.A., Inc., 810 F.2d 782, 786 (8th Cir. 1987)(quoting Zweygardt v. Colorado Nat'l Bank, 52 B.R. 229, 233(Bankr. D. Colo. 1985). The Court of Appeals for the Eighth Circuit in Speciality Mills noted that it has adopted the "conceivable effect" test for determining whether a civil proceeding is related to a bankruptcy case. The conceivable effect test is:

The test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in the bankruptcy...

An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action ... and which in any way impacts upon the handling and administration of the bankruptcy estate

Specialty Mills, 51 F.3d at 774.

Applying the "conceivable effects" test to the present case, it must be determined if Mr. Feldman's claim is related to the bankruptcy case. Under the facts presented, it appears that the outcome of Feldman's claim will not have any effect on the bankruptcy estate. Feldman's claim arose post-petition and after confirmation of the Chapter 11 plan. The claim is against the reorganized debtor and/or the other two shareholders and it has no relation to the administration of the reorganization plan. The claim does not concern any pre-petition or pre-confirmation liabilities, claims, creditors' rights or Heartland's obligations.

An argument might be raised that paragraph 10.05(d) of the First Amended Plan of Reorganization, which retains "jurisdiction" in the bankruptcy court "to hear and determine all claims, controversies, suits and disputes against the Debtor." provides subject matter jurisdiction. However, it is well settled law that all Federal Courts are courts of limited jurisdiction and subject matter jurisdiction cannot be granted by the parties to a dispute. Heartland's reorganization plan can not grant this Court jurisdiction that exceeds the statutory limitations imposed by Congress.

c. Abstention

Assuming, only for purposes of argument, that the issues raised by Feldman are "related to" Heartland's Chapter 13 case and subject matter jurisdiction is present, it may be appropriate to abstain from hearing a particular proceeding out of respect for State law. See 28 U.S.C. § 1334(c)(1). Even if there is subject matter jurisdiction, this is an issue that fits the abstention doctrine.

Feldman's claim is grounded in state law and equity principles. He may have a claim under the Nebraska Business Corporation Act, which became effective in January 1996 and provides:

On the termination of the derivative proceeding the court may:

- (1) Order the corporation to pay the plaintiff's reasonable expenses, including attorney's fees,

incurred in the proceeding if the court finds that the proceeding has resulted in a substantial benefit to the corporation;

Neb. Rev. Stat. §21-2076 (1996).

The Nebraska Business Corporations Act also defines a derivative proceedings in part as "a civil suit or action in the right of a domestic corporation..."Neb. Rev. Stat. §21-2070 (1996). Did Feldman confer a "substantial benefit" to Heartland in securing the possibility of future payments to the corporation? Does the threat of filing a derivative suit, which results in a settlement, satisfy the derivative proceeding requirements? Neither statutory section nor these specific issues have yet been addressed by the Nebraska courts. Additionally, Feldman's equitable arguments that either it was improper for Heartland to have paid Messrs. Dean and Mueller's attorney's fees by having corporate counsel represent them and thus they should be required to disgorge to Heartland the costs of that representation or that it was proper for Heartland to pay all of the shareholders' attorney's fees, including his, are also issues of state law.

d. Release of claims

Heartland raises in defense that Feldman released his right to proceed on this claim, as part of the settlement. In Exhibit A to Exhibit 4, which was received into evidence at the July 28, 1997 hearing, is a letter from Feldman's counsel outlining the settlement of the dispute regarding the non-compete payments. The letter states in part, "Finally, Mueller, Dean and Feldman release **any claims** which they may have against each other or Heartland **in connection with the sale** of the appointment book business to Wordsquare." (page 2, ¶1 Exhibit A to Exhibit 4)(emphasis supplied). Was Feldman's objection to the non-compete payments "in connection with the sale" or an allegation of breach of fiduciary duty of Messrs. Mueller and Dean? Does the "release" extend to the Nebraska Business Corporation Act statutory rights, if applicable to Feldman, to seek court order of attorney's fees? Again, these are issues of purely state law.

Conclusion

The Motion to Order payment of Mr. Feldman's attorney

fees is denied on the basis of lack of subject matter jurisdiction. Mr. Feldman may have a claim under Nebraska law for his attorney's fees or he may have waived that right, if any, in the settlement. This court is not the appropriate venue to determine the issues presented.

Separate journal entry to be filed.

DATED: August 20, 1997.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
Jeffrey Wegner 346-1148 (13)

Copies mailed by the Court to:
*Meyer H. Feldman, 10050 Regency Cir., Ste 103 Regency One
Bldg., Omaha, NE 68114
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.