

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 95-13285
Chapter 7

RELIANCE HEALTHCARE
OF McMINNVILLE, INC.

Debtor

THOMAS R. NOTARO, et. al.

Plaintiffs

vs.

Adversary Proceeding
No. 96-1001

RELIANCE HEALTHCARE OF
McMINNVILLE, INC.,

Defendant/
Counter Plaintiff

HI-TECH HEALTHCARE, INC.

Defendant

NATIONAL PREMIER FINANCIAL
SERVICES and NPF IV, INC.,

Intervening Defendants/
Counter Plaintiffs

AND

NPF IV, INC.

Plaintiff

v.

Adversary Proceeding
No. 96-1116

THOMAS R. NOTARO, et. al.,

Defendants

MEMORANDUM

Appearances: John P. Branham and Donald Capparella, Branham & Day, P.C., Nashville, Tennessee, Attorneys for National Premier Financial Services and NPF IV, INC.

Randolph C. Wiseman, Bricker & Eckler, Columbus, Ohio, Attorneys for National Premier Financial Services and NPF IV, INC.

Stephen R. Beckham, Grant, Konvalinka & Harrison, P.C., Chattanooga, Tennessee, Attorneys for National Premier Financial Services and NPF IV, INC.

Tim Kincaid, Purcell & Scott, Dublin, Ohio, Attorneys for National Premier Financial Services and NPF IV, INC.

Ernest B. Williams, IV, Williams & Prochaska, Nashville, Tennessee, Attorneys for Thomas R. Notaro, Amater Traylor, Virene Traylor, Amie C. Huang, Eyring Realty, Inc., Gene P. Lorentz, Gail Lorentz George Yee and Rose Yee

Keith S. Smartt, Smartt & Dorris, McMinnville, Tennessee, Attorneys for Thomas R. Notaro, Amater Traylor, Virene Traylor, Amie C. Huang, Eyring Realty, Inc., Gene P. Lorentz, Gail Lorentz George Yee and Rose Yee

Timothy A. Priest, Swafford, Peters & Priest, Winchester, Tennessee, Attorneys for Richard Martin and Denise Martin

F. Scott Leroy, Leitner, Warner, Moffitt, Williams, Dooley & Napolitan, PLLC, Chattanooga, Tennessee, Attorneys for Servicemaster Diversified Health Services and Norman Haley

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

These two adversary proceedings generally involve the same parties and the same facts. This memorandum deals with a motion to dismiss in one of the proceedings. The court will review the procedural history of the case.

The debtor, Reliance Healthcare of McMinnville, Inc., (“Reliance”) operated a nursing home in this district on property leased from Thomas R. Notaro, Trustee for the Lois Notaro Trust, Amater Traylor, Virene Traylor, Amie C. Huang, Eyring Realty, Inc., Gene P. Lorentz, Gail Lorentz, Richard Martin, Denise Martin, George Yee and Rose Yee. The court will refer to them as the property owners or some similar term.

The property owners initiated an action in state court to have Reliance evicted from the property. The state court appointed Norman Haley (“Haley) as receiver for Reliance. National Premier Financial Services and NPF IV, Inc., (NPF IV”) intervened in the state court suit because NPF IV claimed a security interest in accounts receivable and proceeds that were under the control of the receiver.

While the owners’ suit was pending in the state court, creditors, including the property owners, filed an involuntary bankruptcy petition against Reliance. The court entered an order for relief against Reliance under Chapter 7 of the Bankruptcy Code on October 4, 1995. C. Kenneth Still was appointed trustee.

In November 1995, NPF IV brought suit in the federal district court against the property owners and Haley. NPF IV’s suit in the federal district court named two other defendants. One is Richard C. Newman (“Newman”), whom the complaint alleges is the property owners’ agent and acted on their behalf in the state court suit; the other is

Servicemaster Diversified Health Services (“Servicemaster”), which operated the nursing home after Reliance and which the complaint alleges employed Haley as the manager of the nursing home. The complaint also alleges Haley acted as the agent for Servicemaster in his role as receiver. NPF IV’s complaint alleges a variety of legal wrongs, but the suit is basically a suit for conversion of NPF IV’s collateral, the accounts receivable and their proceeds, and for an accounting of the activities of the receiver.

On January 2, 1996 the property owners removed the state court suit to this court. (Adversary Proceeding No. 96-1001)

The record does not reveal when it happened, but the state court turned over to the bankruptcy trustee the money it was holding in the state court suit. This occurred sometime before January 19, 1995. On that date NPF IV filed a motion to compel the trustee to abandon the money. According to NPF IV’s brief, it is about \$163,000. NPF IV asserted that it is the owner of the money or the money is subject to its security interest and the security interest is superior to the rights of the bankruptcy trustee. The property owners filed a response opposing abandonment. The response asserted that the right to the funds was in dispute in the pending adversary proceeding — meaning the state court lawsuit that the owners had removed to this court a few weeks earlier.

Next, the bankruptcy trustee proposed a settlement under which the bankruptcy estate would receive \$16,300 and would turn the remaining cash over to NPF IV. (Motion filed March 26, 1996). The trustee reasoned that most of the money would go back to the property owners and NPF IV even if he succeeded in proving a claim superior

to both the owners and NPF IV. The court denied approval of the settlement, because the proposal did not protect the alleged rights of the property owners. (Order dated April 4, 1996).

The trustee then filed a motion to be allowed to recover trustee's commission, expenses, and attorney's fees out of the money. (Motion filed May 24, 1996). The court denied that motion, also. (Order dated June 27, 1996).

In February 1996 the property owners had filed a motion to dismiss in the district court. The motion asserts three grounds for dismissal: (1) lack of subject matter jurisdiction, (2) failure to state a claim, and (3) failure to join Reliance and the bankruptcy trustee. *Fed.R.Bankr.P.* 7012(b); *Fed.R.Civ.P.* 12(b)(1), (6) & (7). On June 21, 1996 the district court referred NPF IV'S suit to the bankruptcy court because of the suit's connection to Reliance's bankruptcy case, without ruling on the pending motion to dismiss.

The property owners' brief raises two points regarding subject matter jurisdiction. First, the complaint bases jurisdiction on diversity of citizenship but fails to plead the citizenship of the owners. 28 U.S.C. § 1332 Second, there was a suit already pending in another court between the same parties and dealing with the same disputes.

The question regarding diversity of citizenship is moot at the moment because the proceeding has been transferred to this court based on bankruptcy jurisdiction, which does not depend on diversity of citizenship. 28 U.S.C. § 1334(b).

Likewise, the argument regarding a prior suit pending in another court appears moot because both suits are now pending in this court.

With regard to failure to state a claim, the motion focuses again on the effect of the state court suit. The owners assert that NPF IV can not recover because its claims are based on actions taken in the owners' suit and that suit is still pending. There may be a problem with NPF IV's claims in this regard, but it has been lessened, if not totally mooted, by having both lawsuits in this court. At the least, the argument needs to be refined. The court will reserve ruling on this argument.

With regard to failure to join necessary parties, the owners' contend that Reliance must be joined as a party. This contention may be mooted by the removal of the state court suit to this court. Reliance is a party to that lawsuit. In any event, the court will refrain from ruling on this issue because later events may remove it as an issue.

This reasoning does not apply to the owners' argument that the bankruptcy trustee must be joined as a party. The complaint by NPF IV suggests careful drafting to avoid revealing the connection of NPF IV's claims to Reliance's bankruptcy. The complaint in essence alleges conversion by the defendants of NPF IV's collateral, the accounts receivable and their proceeds. The complaint asks that defendants be held liable for damages. It does not seek to recover part of the property allegedly converted, the money being held by the state court and now held by the trustee. NPF IV may prove a right to recover from the defendants the amount of accounts receivable and proceeds that they acquired or collected during the receivership. The money held by the trustee may be part

of those proceeds and subject to a superior claim by NPF IV. NPF IV has already asserted that they are. NPF IV and the defendants could be entitled to have the money paid to NPF IV. See *Lance Productions, Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 214 (Tenn. App. 1988) (plaintiff had duty to mitigate damages by retaking possession of converted property). The only barrier is the possibility of a superior claim by the bankruptcy trustee or other creditors. Those questions can be dealt with most efficiently in Reliance's bankruptcy case. Certainly, there is no need to try this lawsuit or the owners' suit and then have a separate suit in this court as to the trustee's rights or the claims of other creditors.

Therefore, the court concludes that the trustee is a person to be joined if feasible. The trustee must be a party to this suit in order to afford complete relief among NPF IV and the defendants. *Fed.R.Bankr.P.* 7019; *Fed.R.Civ.P.* 19(a)(1); *Ric-Wil, Inc. v. First Pennsylvania Banking & Trust Co.*, 352 F.Supp. 782 (E. D. Pa. 1973); *Dimon v. Retirement Plan for Employees of Michael Baker Corp.*, 582 F.Supp. 892 (W. D. Pa. 1983); *Cass Clay, Inc. v. Northwestern Public Service Co.*, 63 F.R.D. 34 (D. S.D. 1974).

Joinder of the trustee is feasible. Adding the trustee as a party will not affect jurisdiction or venue, and the trustee is subject to service of process from this court.

Dismissal is not the proper remedy for NPF IV's failure to include the trustee as a party. "If the person has not been so joined, the court shall order that the person be made a party." *Fed.R.Bankr.P.* 7019; *Fed.R.Civ.P.* 19(a); *DeWit v. Firststar Corp.*, 879 F.Supp. 947 (N. D. Iowa 1995) *on reconsideration*, 904 F. Supp. 1476 (N.D. Iowa 1995);

see generally Charles A. Wright, et al., Federal Practice and Procedure § 1609 (1986).

The court will enter an order accordingly.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 9/13/96]

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No. 96-1116

THOMAS R. NOTARO, et. al.,

Defendant

ORDER

In accordance with the court's memorandum opinion entered this date, it is ordered that the defendants' motion to dismiss is denied to the extent it is based on lack of subject matter jurisdiction and failure to join the bankruptcy trustee as a party.

It is further ordered that the court reserves ruling on the other grounds for dismissal until further developments in these adversary proceedings.

It is further ordered that the plaintiff, NPF IV, shall file an amended complaint asserting its claims to the funds being held by the trustee, C. Kenneth Still, and shall serve the trustee with a summons and a copy of the complaint requiring him to answer.

ENTER:

BY THE COURT

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE

[entered 9/13/96]