

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
UNPUBLISHED OPINION

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In re)
)
HEINZ LEHWALDER, dba) Bankruptcy Case No. 81C-02888
Lehwalder Industries,)
)
Debtor.)
)
SANDY STATE BANK, a Utah)
Corporation,)
)
Plaintiff.)
)
-vs-) Civil Proceeding No. 82PC-0882
)
CLARK B. FETZER, Trustee for)
the Estate of Heinz Lehwalder,)
dba Lehwalder Industries,)
MORNING SURF CORPORATION, a)
Utah Corporation, MORNING)
SURF EAST, INC., a)
Corporation, and DICK MILNE)
dba Flotation Waterbeds,)
)
Defendants.) MEMORANDUM OPINION AND ORDER
)
CLARK B. FETZER, Trustee for)
the Estate of Heinz Lehwalder)
dba Lehwalder Industries,)
)
Crossclaimant.)
)
-vs-)
)
MORNING SURF CORPORATION,)
a Utah Corporation, MORNING)
SURF EAST, INC., a Corporation)
FLOTATION WATERBEDS, a)
Corporation, and DICK MILNE,)
dba Flotation Waterbeds,)
)
Cross-Defendants.)

APPEARANCES

Blaine R. Ferguson, MCKAY, BURTON, THURMAN & CONDIE, Salt Lake City, Utah, for the debtor; Stephen B. Mitchell, BURBIDGE, MABEY & MITCHELL, Salt Lake City, Utah, for the plaintiff; Gary R. Howe, GREENE, CALLISTER & NEBEKER, Salt Lake City, Utah, for defendant Morning Surf, defendant Morning Surf East, and defendant Dick Milne dba Flotation Mart; Clark B. Fetzer, NIELSEN & SENIOR, Salt Lake City, Utah, Chapter 7 trustee, and John R. Brems, BOYDEN, KENNEDY & ROMNEY, Salt Lake City, Utah, for the Chapter 7 trustee.

CASE SUMMARY

In this case the Court is called upon to reconsider its decision of April 4, 1983, granting plaintiff's motion for summary judgment. For the reasons set forth, the defendant's objection to the judgment is overruled and summary judgment will enter as prayed.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a "core" proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).

FACTS AND PROCEDURAL BACKGROUND

The debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on September 16, 1981. This adversary proceeding was commenced by the plaintiff, Sandy State Bank ("Bank"), on July 29, 1982. In its complaint, the Bank prayed for (1) relief from the automatic stay so that it could pursue collection of accounts receivable in which it claimed a senior security interest and (2) judgment against the several defendants in the sum of \$36,152.47 jointly.¹ The complaint was served personally on Louis Haynie, an agent of Morning Surf and Morning Surf East, and by mail on Blaine R. Ferguson, attorney for the debtor.

On October 15, 1982, the plaintiff filed an amendment to the complaint, setting forth a "Second Cause of Action"² against defendant "Dick Milne dba Flotation Waterbeds," seeking to recover from the accounts receivable owing from Milne to the debtor the sum of \$9,000.00 and from defendant Morning Surf the sum of \$6,421.00, which Morning Surf had purportedly collected from these same accounts receivable.

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Prior to August 1, 1983, the effective date of the new Bankruptcy Rules, a party requesting relief from the automatic stay was required to proceed by filing a complaint. The new rules permit automatic stay litigation by motion. See Bankruptcy Rules 4001, 9014. See also Rule 27, Local Rules of Practice for the United States Bankruptcy Court for the District of Utah.

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The Federal Rules of Civil Procedure speak of "claims for relief," not "causes of action." See, e.g., Rule 8, Fed.R.Civ.P.

The amendment to the complaint was duly mailed to the defendants, including Dick Milne dba Flotation Waterbeds.

On November 11, 1982, the plaintiff filed with the Court a motion for summary judgment against Morning Surf for the sum of \$35,977.50. This motion, an accompanying memorandum, together with the affidavit of Dan Bradshaw and a notice of hearing, setting the hearing date for November 30, 1982, were served upon Blaine R. Ferguson, debtor's attorney, and Gary R. Howe, attorney for Morning Surf and Morning Surf East.

On December 21, 1982, the debtor's Chapter 11 bankruptcy case, under which this adversary proceeding was initiated, was converted to a case under Chapter 7.

On December 22, 1982, the plaintiff, apparently as a concession to attorney Gary R. Howe, filed a new notice of hearing, which continued the hearing on the initial summary judgment motion from November 30, 1982 to February 15, 1983.

On January 20, 1983, the plaintiff Bank filed a second motion for summary judgment against "Dick Milne dba Flotation Services." This motion, a supplemental memorandum, and a notice of hearing, setting the hearing on this motion for the same time, place, and date as the hearing on the first summary judgment motion, viz., February 15, 1983, was duly served by mail upon Blaine R. Ferguson, as debtor's attorney, and Gary R. Howe, as attorney for Morning Surf, Morning Surf East, and Dick Milne.

On February 15, 1983, the scheduled hearing was held on both summary judgment motions. At that time, the Court asked counsel to note their appearances for the record. Stephen B. Mitchell appeared for the plaintiff; Blaine R. Ferguson appeared for the debtor; John R. Brems appeared for the Chapter 7 trustee. And Gary R. Howe noted his appearance for Morning Surf Corporation, Morning Surf East, Inc., and "Dick Milne dba Flotation Mart." See Sandy State Bank v. Heinz Lehwalder, Civ. Pro. No. 83PC-0882, Transcript of Hearing of February 15, 1983, at p. 3 ("Transcript").

Stephen B. Mitchell stated that the plaintiff Bank was "seeking summary judgment against Morning Surf Corporation for the full amount of the accounts receivable as purportedly collected on the basis that [the Bank's] security interest [was] prior in right." Mr. Mitchell made it clear that the Bank was "also seeking summary judgment against Morning Surf East for the amount of the debt which it owed the debtor which was not satisfied by its payment to Morning Surf and from Mr. Milne on the same basis." (Transcript, p. 4.)

At this hearing, Mr. Howe mentioned that he believed that Dick Milne had not been served in this action, but produced neither affidavit or testimony to that effect. Mr. Howe also represented that Dick Milne was improperly designated as "Dick Milne dba Flotation Waterbeds," and that Mr. Howe believed that this defendant was a corporation. But, again, no affidavit or

testimony was produced to establish this as a fact before the Court; nor did Mr. Howe assert as a defense to the motions for summary judgment insufficiency of service of process or lack of in personam jurisdiction of the defendants. His only defense was that the case should be dismissed "on the basis of [the Court's] lack of subject matter jurisdiction." (Transcript, p. 4.)

The Court then heard the arguments of counsel. No evidence was taken, other than the affidavit of Dan Bradshaw. John R. Brems, attorney for the trustee, requested a continuance so that the issue of subject matter jurisdiction could be briefed. This the Court allowed.

At the close of the hearing, Mr. Mitchell made the following uncontradicted statement:

Your Honor, may I just note for the record that Mr. Howe has filed an answer in this action on behalf of the defendants Morning Surf, Morning Surf East, Inc., and Dick Milne.

(Transcript, p. 7.)

On April 4, 1983, this Court handed down its Memorandum Decision in this matter. Addressing both motions for summary judgment as one, the Court stated:

Plaintiff's motion for summary judgment is unopposed. Because it appears from the file that the motion is meritorious and because there is no opposition, the motion is granted as prayed. Plaintiff's counsel shall submit an order.

Shortly after the entry of this decision, plaintiff's counsel prepared for court signature a judgment. On April 12, 1983, Gary R. Howe, as attorney for Morning Surf and "Flotation Waterbed" filed an objection to entry of summary judgment in which he argued that judgment should not enter because:

(1) Defendant's counsel at no time received either a Motion for Partial Summary Judgment against co-defendants, Morning Surf East, Inc. or Dick Milne dba Flotation Waterbeds (properly designated "Flotation Specialists, a Utah corporation"). To this date, counsel has not received either said Motion or a Notice of Hearing on said Motion. [See, Objection to Entry of Summary Judgment, filed April 12, 1983, at page 3 ("Objection").]

(2) Counsel for defendant Morning Surf Corporation did not enter his appearance as counsel for co-defendants Morning Surf East, Inc. or Flotation Specialists until the 15th day of February, 1983 - the date of the hearing on the then existent motions. [See, Objection, p. 3.]

(3) Defendant Dick Milne dba Flotation Waterbeds has been improperly designated. Attached hereto as Exhibit "A" is a certified copy of the Articles of Incorporation of Flotation Specialists, a Utah Corporation, wherein Richard K. Milne is denominated as both an initial director and incorporator of said corporation. [See, Objection, p. 3.]

On January 9, 1984, the plaintiff served on counsel for all defendants a notice of hearing on this objection. The hearing was scheduled for February 8, 1984. Plaintiff's attorney filed his affidavit, setting forth the facts surrounding the service of the pleadings in question in this proceeding.

On February 8, 1984, a hearing on the objection was held before this Court. Stephen B. Mitchell appeared for the plaintiff Bank; Gary R. Howe, for the other defendants; and Clark B. Fetzer, as trustee, appeared pro se. The Court heard brief arguments and, again, took the matter under advisement.

DECISION

The Court will first address defendants' argument that they received neither the motion for summary judgment against Morning Surf East, Inc. or Dick Milne dba Flotation Waterbeds (properly designated Flotation Specialists, a Utah corporation). The Court's file contains two certificates of service. The first shows that the debtor's attorney as well as the appropriate agent of Morning Surf Corporation and Morning Surf East, Inc. were properly served with the original summonses and copies of the original complaint. The second certificate of service shows that copies of the amendment to the complaint and accompanying summonses were properly served on the above mentioned defendants, as well as upon Dick Milne, either personally or as agent for the corporation Flotation Specialists. These services of process were made properly pursuant to Bankruptcy Rule 7004.

Moreover, there exists in the Court's file mailing certificates showing that plaintiff's motion for summary judgment against Morning Surf for \$35,977.50 and plaintiff's motion for summary judgment against Morning Surf East and Dick Milne (either

individually or as agent of the Flotation Specialists Corporation), with accompanying memoranda and notices of hearing, were properly served by mail on the attorney for the trustee and on the attorney for all the other defendants (Morning Surf, Morning Surf East, and Dick Milne, either individually or as agent of the Flotation Specialists corporation), pursuant to Bankruptcy Rule 7004(b).

No affidavits or testimony has ever been presented to this Court to contradict these certificates of service.

Bankruptcy Rule 7056, which incorporates by reference the provisions of Rule 56 of the Federal Rules of Civil Procedure, provides in pertinent part:

The [summary judgment] motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith 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.

. . .

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

By virtue of this rule, the defendants, Morning Surf East, Inc. and Dick Milne, were required to present opposing affidavits setting forth the facts upon which they predicated their defense that they had not received proper notice of plaintiff's summary judgment motion. The rule expressly prohibits an adverse party to a summary judgment motion from resting "upon mere allegations or denials," but affirmatively requires such party to "set forth specific facts showing that there is a genuine issue for trial" by affidavit. Since no such affidavits were filed, the Court is obliged to accept as true the facts of service set forth in the uncontradicted mailing certificates in the file.³

The Court now turns to defendants' second argument that "counsel for defendant Morning Surf Corporation did not enter his appearance as counsel for co-defendants Morning Surf East, Inc. or Flotation Specialists until the 15th of February, 1983 - the date of the hearing on the then existent motion."

What counsel implies by this assertion is that until February 15, 1983, when he appeared for Morning Surf East, Inc. and Flotation Specialists, the Court did not have in personam jurisdiction over these defendants. This is not true.

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Cf. In re Independent Clearing House Co., 41 B.R. 985, 996 (Bky. D. Utah 1984) (The burden on a party opposing summary judgment is not a heavy one; he simply is required to show specific facts, as opposed to general allegations, that present a genuine issue for trial).

Jurisdiction of the person embraces two elements: (1) basis; and (2) process. Basis refers to the relationship between the defendant and the forum. Process refers to the procedural steps which must be taken to connect the defendant to the Court's authority. See generally, R. Casad, Jurisdiction in Civil Actions, ¶ 1.01[2][a], at 1-5 to 1-7 (1983). At the time this adversary proceeding was commenced, the basis of this Court's jurisdiction was 28 U.S.C. § 1471. Process was effected by mail in accordance with Bankruptcy Rule 7004.

The Court acquired in personam jurisdiction over these defendants by virtue of the service upon them of the original summonses and the copies of the original complaint and, later, the amendment to the complaint with its summonses. Once in personam jurisdiction was perfected by this service of process, the defendants were properly before the Court. As has been already stated, all the defendants received service by mail of both motions for summary judgment, and were therefore required to respond to those motions as provided in Bankruptcy Rule 7056.

At the hearing held on February 15, 1983, Gary R. Howe not only noted his appearance on behalf of Morning Surf, Morning Surf East, and Dick Milne, but at the end of the hearing, he did not contradict the representation of plaintiff's attorney that he had filed answers on behalf of them all.

These defendants were not only properly before the Court, they were represented by counsel, who had filed answers for them,

and who had attended the hearing on the motions for summary judgment in their behalf.

At the hearing, these defendants' counsel did not raise any objections to service of process or to any other deficiency in the in personam jurisdiction of the Court. He did not offer any evidence in support of any claim that the process was insufficient or that in personam jurisdiction had not been properly perfected. He did not ask for a continuance of the hearing, as did the attorney for the trustee. He did not ask for leave to file affidavits on this or any other point pursuant to Bankruptcy Rule 7056(f). He questioned only the subject matter jurisdiction of this Court. Because this question was raised, the Court allowed counsel to brief this issue, and took the matter under advisement. Then on April 4, 1983, the Court, rejecting counsel's contention that the Court lacked subject matter jurisdiction of the case, rendered its decision granting summary judgment on both motions, considered for convenience as one.

It appears that defendants seek by way of an objection to the entry of judgment (which presumably should be limited to objection to the form of the judgment or to an inconsistency in the judgment and the memorandum decision as rendered by the Court) to be raised for the first time those defenses that should have been raised at the hearing of February 15, 1983. This is clearly contrary to Rule 7056, and the Court will not allow it. Counsel, when they appear at hearings on summary judgment

motions, must come prepared to raise all their legal defenses and must be prepared to assert by affidavit, deposition, admission, sworn testimony, or as otherwise provided in the Rule, any and all evidence which counsel believes raises a genuine issue of material fact that will defeat the entry of judgment and require a hearing or trial of those issues. Failure to do this can be fatal.

Defendants have had their day in court, and it is improper to try to resuscitate for reconsideration the summary judgment motion by the filing of an objection to the entry of judgment.

The Bankruptcy Rules contemplate that the Court may reconsider its orders. Rule 9023 incorporates by reference Federal Rule 59(e), which allows the Court, on motion of a party, to alter or amend a judgment. Bankruptcy Rule 9024 adopts Rule 60(a) and (b) of the Federal Rules of Civil Procedure in permitting the Court to correct clerical mistakes in the judgment or granting relief from the judgment on a showing of the grounds specified in the rule. Bankruptcy Rule 3008 permits the Court to reconsider an order allowing or disallowing a claim. Bankruptcy Rule 7055 adopts Federal Rule 55, which states that the court may for good cause set aside the entry of default or default judgment.

In this case, if these defendants' objection was intended as a motion under Rules 9023(c) or 9024(a), it cannot be granted because no grounds exist on which to alter or amend the judgment

after a new trial and no clerical mistakes exist which need correction. If this motion was intended as a motion for relief from judgment under Bankruptcy Rule 9024(b), it cannot be granted because it does not assert any of the necessary grounds.

From time to time, the Court will allow motions for reconsideration, as a matter of policy under the powers conferred upon it under 11 U.S.C. 105. But even if this objection were construed to be such a motion, the defendants have supplied therewith no facts on which the Court could find that in personam jurisdiction was lacking or that service of process was insufficient.

The Court now turns to defendants' third argument that "defendant Dick Milne dba Flotation Waterbeds has been improperly designated, and that judgment should be granted against the corporation." In substantiation of this position, the Court finds in the record before it a certified copy of the Articles of Incorporation of Flotation Specialists, a Utah Corporation, wherein Richard K. Milne is denominated as both an initial director and incorporator of said corporation. However, defendant Dick Milne was served personally and individually; it also appears that the motion for summary judgment was also made against him as an individual. If this defendant had so desired, he could have set forth this defense at the hearing of February 15, 1983, or could have moved for a continuance of the hearing or for leave to file an affidavit asserting that it was

the Flotation Specialists corporation and not Dick Milne the individual who should have been named in the suit. But this the defendant failed to do.

Even if the Court were to consider this defendant's objection to the entry of judgment as a motion to reconsider or a motion made under Bankruptcy Rule 9024(b), and even if the Court were to accept Dick Milne's assertion that the corporation was the entity that should have been sued as the defense of "failure to state a claim upon which relief may be granted," which can be raised at any time, pursuant to Bankruptcy Rule 7012(h)(2), incorporating Federal Rule 12(h)(2), this Court would still be unable to grant relief to this defendant because there is no evidence before the Court, other than the representations of counsel, upon which the Court could find that the Specialists Flotation corporation, and not Dick Milne, was the party against whom summary judgment should be granted.

CONCLUSION

For all of the reasons set forth herein, the Court, whether treating this objection as a motion for reconsideration, a motion under Bankruptcy Rule 9023, a motion under Bankruptcy Rule 9024(a), or a motion under Bankruptcy Rule 9024(b), cannot grant relief to these defendants.

Accordingly, the objection of the defendants is overruled, and the judgment predicated on this Court's decision of April 4, 1983 shall enter forthwith.

DATED this 4 day of February, 1985.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE