



IT IS ORDERED as set forth below:

Date: July 09, 2008

W. H. Drake
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
MICHAEL CASEY PARKER	:	BANKRUPTCY CASE
GINA DARLENE PARKER,	:	NO. 05-13511-WHD
	:	
Debtors.	:	
_____	:	
	:	
PROGRESSIVE SOUTHEASTERN	:	
INSURANCE COMPANY,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 08-1002
v.	:	
	:	
THEO D. MANN, Trustee	:	
SELES HARDAWAY	:	
DANIEL HARDAWAY,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendants.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Dismiss Complaint of Progressive

Southeastern Insurance Company (hereinafter “Progressive”), filed by Theo Mann (hereinafter the “Trustee”) in his capacity as the trustee of the bankruptcy estate of Gina Parker (hereinafter the Debtor).

PROCEDURAL HISTORY

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 5, 2005. Following a meeting of creditors, the Trustee filed a report of no distribution. On January 20, 2006, the Court entered the discharge order, and the Clerk closed the Debtor’s case. On January 24, 2007, the Hardaways filed a motion to reopen the bankruptcy case and for the reappointment of a trustee.

In support of the Motion to Reopen, the Hardaways asserted that the case should be reopened to permit the Debtor to schedule as a liability a prepetition personal injury claim held by the Hardaways against the Debtor and to disclose as an asset a prepetition claim for bad faith failure to settle held by the Parkers against Progressive Southeastern Insurance Company (hereinafter the “Progressive”), the Debtor’s insurer. According to the Motion to Reopen, the Debtor was involved in an automobile accident in September 2004, prior to the filing of her bankruptcy petition. In the Motion to Reopen, the Hardaways contended that the existence of the undisclosed cause of action against Progressive required the reappointment of

a trustee to pursue the claim for the estate's benefit. Progressive opposed the motion to reopen the case, arguing that no bad faith failure to settle claim existed at the time the Debtor filed her petition and, therefore, such a claim could not have become property of the Debtor's bankruptcy estate. On March 6, 2007, following a hearing held on March 2, 2007, the Court granted the Motion to Reopen.

On January 18, 2008, Progressive filed a complaint in the Superior Court of Coweta County in which it seeks a declaration, pursuant to O.C.G.A. § 9-4-1, *et seq.*, that Progressive is not obligated to provide coverage, indemnification, or a defense under the Debtor's policy. On January 24, 2008, the Trustee filed a notice of removal, thus removing Progressive's complaint to this Court, pursuant to 28 U.S.C. § 1452(a). On January 24, 2008, the Trustee filed his answer to Progressive's complaint and a counterclaim. The Trustee also filed the instant motion to dismiss. Progressive answered the Trustee's counterclaim and responded to the Trustee's motion to dismiss on February 13, 2008. On February 8, 2008, the Hardaways also filed a brief in support of the Trustee's motion to dismiss.

FACTS

The Debtor was insured under a Progressive Georgia Motor Vehicle Policy, Policy No. 42111962-1 ("Policy"). Complaint, ¶ 5. The effective dates of the Policy

were June 15, 2004 to December 15, 2004. Progressive filed a copy of the Policy as an exhibit to the Complaint. The Debtor was involved in an automobile accident with Seles Hardaway on September 17, 2004. Complaint, ¶ 6. The Hardaways filed suit against the Debtor in State Court of Coweta County on September 12, 2006 seeking damages for injuries allegedly arising out of the accident. Complaint, ¶ 7.

After the case was reopened and the Trustee was reappointed, the Hardaways filed a motion to substitute the Trustee as the correct defendant in the state court suit. The state court granted that motion, stating in its order that the Debtor is no longer a party to the state court suit. Complaint, ¶ 11-12.

The Trustee sought from Progressive coverage, defense, and indemnity for the claims against the estate. Complaint, ¶ 11-12. Progressive notified the Trustee of certain issues surrounding this coverage and made a reservation of its rights with regard to the Policy, but, nonetheless, retained counsel to defend the Trustee subject to that reservation. Complaint, ¶ 13.

The relevant terms of the Policy include:

Subject to the Limits of Liability, if you pay the premium for liability coverage, we will pay damages for bodily injury and property damage for which an insured person becomes legally responsible because of an accident arising out of the: ownership, maintenance, or use of a vehicle Damages include prejudgment interest awarded against an insured person. We will settle or defend, at our option, any claim for damages covered by this Part.

Insured Person and Insured Persons mean:

- a. you or a relative with respect to an accident arising out of the ownership, maintenance, or use of a covered vehicle;

Policy- Part I.

* * *

This policy may not be transferred to another person without [Progressive's] written consent.

* * *

The bankruptcy or insolvency of an insured person will not relieve [Progressive] of any obligations under this policy.

Policy- General Provisions.

CONCLUSIONS OF LAW

Progressive's complaint seeks a declaratory judgment resolving the questions of: 1) whether the Policy entitles the Trustee to coverage for the Hardaways' claim; and 2) whether Progressive has a duty to indemnify or defend the Trustee with regard to those claims. In Count I, Progressive asserts that the Trustee may not be an "insured person" within the meaning of the Policy. In Count II, Progressive argues that the Policy may be ineffective with regard to the Trustee because the rights under the Policy have been impermissibly transferred to the Trustee without Progressive's

written consent. Similarly, Count III questions whether the Trustee's demand for coverage, indemnification, and defense constitutes an impermissible change in the Policy that voids Progressive's obligations thereunder. Finally, in Count IV, Progressive asserts that the bankruptcy discharge may have relieved the Trustee of the legal responsibility to pay damages arising out of the accident and, accordingly, should relieve Progressive of the obligation to indemnify or defend the Trustee.

The Trustee contends that Progressive's complaint for declaratory judgment must be dismissed for failure to state a claim upon which relief may be granted. Pursuant to Federal Rule of Bankruptcy Procedure 7012(b), which makes Federal Rule of Civil Procedure 12(b) applicable to this proceeding, dismissal is proper when the plaintiff's complaint fails to state a claim upon which relief can be granted. FED. R. BANKR. P. 7012(b); FED. R. CIV. P. 12(b)(6). When reviewing a complaint for purposes of adjudicating a motion to dismiss for failure to state a claim, the Court must accept as true all of the factual allegations contained in the complaint and, on the basis of those facts, determine whether the plaintiff is entitled to relief. *See Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp.*, 459 F.3d 1249 (11th Cir. 2006) (court must "view the complaint in the light most favorable to the plaintiff and accept the well-pleaded facts as true"). The facts asserted in the complaint need only comprise a

“short and plain statement” that shows that the plaintiff has a claim to relief that is “plausible on its face.” See FED. R. BANKR. P. 7008; Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955 (2007); see also *Schaaf v. Residential Funding Corp.*, 517 F.3d 544 (8th Cir. 2008) (“The plaintiffs need not provide specific facts in support of their allegations, *Erickson v. Pardus*, --- U.S. ----, 127 S. Ct. 2197 (2007) (per curiam), but they must include sufficient factual information to provide the ‘grounds’ on which the claim rests, and to raise a right to relief above a speculative level. *Twombly*, 127 S.Ct. at 1964-65 & n. 3.”).

“The relevant record under consideration consists of the complaint and any ‘document integral or explicitly relied on in the complaint.’” *In re New Century Holdings, Inc.*, __ B.R. __ , 2008 WL 1829587 (Bankr. D. Del. Apr. 23, 2008) (quoting *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir.2002); see also *In re Raymond Professional Group, Inc.*, __ B.R. __, 2008 WL 1752166 (Bankr. N.D. Ill. Apr. 9, 2008) (“A court may consider only the contents of the pleadings,” which include “‘the complaint, the answer, and any written instruments attached as exhibits,’ . . . , including documents incorporated by reference in the pleadings.”).

To obtain a judgment for declaratory relief, a party must prove (1) that the plaintiff has a present bona fide need for a declaration; (2) that the plaintiff is in

doubt as to his rights; (3) that all parties necessary to the resolution of these issues are presently before the court; and (4) that the plaintiff is not merely seeking legal advice, but is rather seeking a resolution of his rights regarding a present controversy. *See In re Pro Greens, Inc.*, 305 B.R. 356 (Bankr. M.D. Fla. 2003); *see also GE Life Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 1348, 1355 (M.D. Ga. 2002) (to obtain a declaratory judgment, “there must be an actual issue in controversy as opposed to one that is hypothetical or contrived, the case must not be the medium for securing an advisory opinion, the matter must be definite and concrete, the parties' positions must be defined and adversarial and the issues must be susceptible to judicial determination”).

In this case, Progressive asserts that it is in need of a determination as to whether it has an obligation to defend and indemnify the Trustee. A bona fide dispute exists with regard to this point, as there is currently pending in state court a suit filed by the Hardaways, for which the Trustee demands a defense. *See In re Quigley Co., Inc.*, 361 B.R. 723, 738 (Bankr. S.D.N.Y. 2003).

The main thrust of Progressive’s argument, however, appears to stem from the fact that the Trustee was substituted as the defendant in the state court suit. Consequently, Progressive, while acknowledging its duty to defend the Debtor, asserts that, because the Debtor is no longer subject to suit, it no longer has any duty

under the insurance policy to defend against or pay any claim arising out of the state court suit. Progressive's argument forms the basis of Count I, under which Progressive contends that it is not obligated to defend or indemnify the Trustee because the Trustee is not an "insured person" within the meaning of the Policy. Along the same lines, Progressive essentially argues that the Policy obligates Progressive to pay only if damages are awarded against an "insured person," and the Trustee, the only named party, is not an "insured person." Accordingly, Progressive submits that the substitution of the Trustee for the Debtor eliminates Progressive's duties to defend because there can be no judgment for damages awarded against the Debtor when she is not a named defendant. It appears to the Court that most of the confusion and time spent litigating this case could have been avoided if the Hardaways had added the Trustee, as the representative of the bankruptcy estate, as a defendant while maintaining the Debtor as a nominal defendant.

The Trustee does not argue that he satisfies the contractual definition of "insured person." The Trustee is not, however, asking to be defended personally or for Progressive to pay a claim arising from his personal conduct. Notwithstanding the filing of the Debtor's bankruptcy case, the Hardaway's claim remains against the Debtor for her pre-petition conduct. The Trustee's position with regard to this matter is solely as the representative of the estate. *See* 11 U.S.C. § 323(a). The Trustee has

the duty and obligation to defend against the claim in order to protect the assets of the estate for the Debtor's other creditors. He has the capacity to be sued in the estate's name, *see* 11 U.S.C. § 323(b), and to make decisions about whether to defend or settle the claim. Only in that sense is he a proper party to be named. This legal point does not change the fact that it is the Debtor whose actions are at issue in the litigation, that the Debtor was in fact an "insured person," and that it is the Debtor, along with the estate, against whom the Hardaways should be seeking a judgment.¹ Even now that the Debtor has received her discharge, the Hardaway's claim remains against the Debtor because her actions allegedly caused damages to the Hardaways. The discharge does not eliminate the claim, but merely renders it unenforceable against the Debtor personally. *See In re Jet Florida Systems, Inc.*, 888 F.2d 970 (11th Cir. 1989). The bankruptcy filing and discharge also do not eliminate a third party's obligation to pay a claim. *See id.* at 976 ("Even under section 16 of the former Bankruptcy Act which had more limited language than section 524(e), . . . the court held in *In re Bracy*, 449 F.Supp. 70, 71 (D. Mont.1978), that: 'if an insurance company is as a matter of state law liable to a plaintiff in a personal injury

¹ Although the Court finds that the substitution of the Trustee and the estate for the Debtor does not affect the Hardaway's case or eliminate Progressive's duties, the most expedient solution to end all doubt with regard to this issue is for the Hardaways or the Trustee to join the Debtor as a nominal defendant in the state court suit.

action, subsequent discharge of the assured in bankruptcy does not alter the obligation of the insurance company. It seems clear that it is the policy of the law to discharge the bankrupt but not to release from liability those who are liable with him.’ The same result must follow under the broader language of Section 524(e).”) The fact that the Trustee does not meet the contractual definition of an “insured” does not relieve Progressive of the duty and obligation to defend against and pay the Hardaway’s claim. To hold otherwise would effectively eliminate the insurer’s obligation to pay a claim held by a tort victim contrary to settled law.

In Count II, Progressive argues that the Policy may be ineffective with regard to the Trustee because the rights under the Policy have been impermissibly transferred to the Trustee without Progressive’s written consent. Similarly, Count III suggests that the Trustee’s demand for coverage, indemnification, and defense constitutes an impermissible change in the Policy that voids Progressive’s obligations thereunder. Both counts lack merit.

As the Trustee notes, upon the commencement of the Debtor’s case, the Debtor had a right that obligated Progressive to defend her against the Hardaways’ claim and to pay any judgment arising from that claim. These rights were transferred to her bankruptcy estate on the petition date. *See* 11 U.S.C. § 541(a); *In re Titan Energy, Inc.*, 837 F.3d 325 (8th Cir. 1988) (“In the instant case, if the policies are held to

cover the damage claims, that holding will reduce the total amount of damage claims lodged against the estate. If the court finds coverage lacking, then [plaintiff] will join the general creditor queue, and each creditor will receive a smaller share of the . . . pie. Though the policy proceeds do not flow directly into the coffers of the estate, they do serve to reduce some claims and permit more extensive distribution of available assets in the liquidation of the estate. . . . [T]he policies here are property of . . . [the] estate because the estate is worth more with them than without them.”).

The Court concurs with the arguments made in the Trustee's brief that the language of the Policy itself anticipates and allows a transfer of these rights to the Debtor's estate. *See* Policy (“The bankruptcy or insolvency of an insured person will not relieve [Progressive] of any obligations under this policy.”). Even if the Court were to find that the Policy forbids this type of transfer, the Court again agrees with the Trustee that the Debtor's rights under the Policy came into the Debtor's bankruptcy estate notwithstanding any such restriction. *See* 11 U.S.C. § 541(c)(1) (“[A]n interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law . . . (A) that restricts or conditions transfer of such interest by the debtor; or (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case

under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.”).

For the reasons already discussed above, there is no impermissible change in the Policy. The Trustee is not asking Progressive to defend him personally or to pay damages arising from his conduct, but is merely asking Progressive to perform those obligations under the Policy that had, prior to the filing of the Debtor’s petition, already been triggered by the Debtor’s pre-petition conduct. In this regard, the Trustee does not ask Progressive to do anything other than what it agreed to do – defend the Debtor’s actions and pay any damage award granted up to the policy limits. The fact that the Trustee, as representative of the estate, now has the capacity to be sued in the Debtor’s stead changes nothing with regard to Progressive’s obligation and should, therefore, not void the terms of the Policy.

Progressive’s final argument, that the Trustee, or rather the bankruptcy estate, could raise the defense of discharge against having to pay any damage claim awarded to the Hardaways lacks any legal authority. Assuming assets are available within the bankruptcy estate, they remain available to satisfy any claims filed against the estate. *See* 11 U.S.C. § 726(a) (“Except as provided in section 510 of this title, property of

the estate shall be distributed . . . first in payment of claims of the kind specified in . . . section 507; . . . second, in payment of any allowed unsecured claim . . .”). For this reason, Count IV clearly fails.

CONCLUSION

Having concluded that, as a matter of law, Progressive has a duty to indemnify and defend the bankruptcy estate with regard to the Hardaways' claims, Progressive's request for declaratory judgment to the contrary cannot be granted. Accordingly, the Court finds that the Trustee's Motion to Dismiss should be, and hereby is, **GRANTED**. All counts of the complaint filed by Progressive are hereby **DISMISSED**.

END OF DOCUMENT

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