

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11
:
MONTGOMERY WARD & CO., : Bankruptcy Case No. 97-1409-PJW
INCORPORATED, et al., :
:
Debtors. :
:

RELIANCE INSURANCE COMPANY; :
UNITED PACIFIC INSURANCE :
COMPANY; RELIANCE SURETY :
COMPANY, and RELIANCE :
NATIONAL INDEMNITY COMPANY, :
:
Plaintiffs and :
Counterdefendants, :
:
v. : Civil Action No. 01-421-JJF
:
COLONIAL PENN FRANKLIN :
INSURANCE COMPANY, :
:
Defendant and :
Counterplaintiff. :

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Of Counsel: Brian P. Flaherty, Esquire and Mark J. Smith, Esquire of WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP, Philadelphia, Pennsylvania.
Counsel for Plaintiffs and Counterdefendants.

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Of Counsel: Donald Flayton, Esquire and Kenneth M. Gorenberg, Esquire of WILDMAN, HARROLD, ALLEN & DIXON, Chicago, Illinois.
Counsel for Defendant and Counterplaintiff.

MEMORANDUM OPINION

February 13, 2004
Wilmington, Delaware

Farnan, District Judge.

This action stems from an adversary proceeding before the United States Bankruptcy Court for the District of Delaware involving the interpretation and enforcement of a contract among Reliance Surety Company, Reliance Insurance Company, United Pacific Insurance Company and Reliance National Indemnity Company ("Reliance"), Forum Insurance Company¹ ("Forum") and Montgomery Ward & Co., Inc. ("Montgomery Ward"). The Bankruptcy Court held a bench trial and issued a Memorandum Opinion constituting the court's findings of facts and conclusions of law. In so doing, the Bankruptcy Court ruled in favor of Forum and against Reliance and entered a Judgment Order in accordance with its rulings. Thereafter, Reliance filed Objections To The Bankruptcy Court's Proposed Findings Of Fact And Conclusions Of Law (D.I. 37, 38), and a Notice of Appeal. Forum responded with its own Notice of Appeal, and an Emergency Motion To Strike The Objections.

The Court denied Forum's Emergency Motion To Strike Plaintiffs' Objections and remanded this matter to the Bankruptcy Court for a determination of whether this matter is a core or non-core proceeding. On remand, the Bankruptcy Court expressed the view that this matter is a non-core, "related to" matter and

¹ Defendant Colonial Penn Franklin Insurance Company is the successor in interest by merger to Forum Insurance Company. Because the party at the time of the transaction was Forum, Defendant will be referred to as "Forum" for purposes of this Memorandum Opinion.

that in lieu of its Judgment Order, its findings and conclusions should be treated as recommendations pursuant to Federal Rule of Bankruptcy Procedure 9033.

The Court agreed with the Bankruptcy Court's determination that this was a non-core matter and entered a Memorandum Order indicating that the Bankruptcy Court's judgment shall be treated as a recommendation rather than a final judgment. Briefing has been completed on the parties' respective objections, and therefore, this matter is ripe for the Court's review.

II. Standard of Review

Pursuant to 28 U.S.C. 157(c) and Bankruptcy Rule 9033(d), the Court applies a de novo standard of review to the Bankruptcy Court's proposed findings of fact and conclusions of law. The Court may "accept, reject or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instruction." Fed. R. Bankr. P. 9033(d). In conducting a de novo review, the Court must consider all of the Bankruptcy Court's findings and conclusions and afford them no presumption of validity. Collier on Bankruptcy § 9033.09.

III. DISCUSSION

After thoroughly reviewing the parties' submissions, the record evidence and the proposed findings of fact and conclusions of law issued by the Bankruptcy Court, the Court finds that the

Bankruptcy Court's proposed findings of fact and conclusions of law should be adopted in their entirety. In making this determination, the Court further overrules each of the objections made by Reliance to the Bankruptcy Court's proposed findings of fact and conclusions of law. In this regard, Reliance advances three primary objections which the Court will address in turn.

A. Reliance's Objection To The Bankruptcy Court's Entry Of A Judgment Order Dismissing Reliance's Complaint

Reliance's first objection is directed to the procedural decision of the Bankruptcy Court to issue a Judgment Order in this case. Reliance contends that because this is a non-core proceeding, the Bankruptcy Court's Memorandum Opinion should be treated by the Court as a recommendation.

The Court has previously addressed this issue by its October 23, 2002 Memorandum Order in which the Court concluded that the Bankruptcy Court's opinion should be considered proposed findings of facts and conclusions of law, rather than a final judgment. Accordingly, this objection has been mooted and further discussion of this objection is not required.

B. Reliance's Objection To The Bankruptcy Court's Partial Denial Of Reliance's Motion For Summary Judgment

Reliance next contends that the Bankruptcy Court erred in concluding that the language at issue in the Forum Agreement is ambiguous. Reliance contends that the Bankruptcy Court's reading of the Forum Agreement is unreasonable and that it conflicts with

the court's reading of the similarly worded Montgomery Ward Agreement, which the Bankruptcy Court found was a cross-indemnity.

The portion of the Forum Agreement at issue provides:

THIS AGREEMENT is made by the Undersigned for the continuing benefit of RELIANCE INSURANCE COMPANY, UNITED PACIFIC INSURANCE COMPANY, RELIANCE NATIONAL INDEMNITY COMPANY and/or RELIANCE SURETY COMPANY (hereinafter referred to collectively as the Surety) for the purpose of saving each and all of them harmless and indemnifying each and all of them from all loss and expense in connection with any Bonds executed on behalf of any one or more of the following persons, firms or corporations: Forum Insurance Company and Montgomery Ward & Co., Incorporated (hereinafter referred to as Applicant).

(D.I. 34, Ex. D at RSC 01488) (emphasis added)

The Court agrees with the Bankruptcy Court's conclusion that the Forum Agreement is ambiguous based on the singular use of the word "Applicant" in connection with the phrase "any one or more of the following persons, firms or corporations." This conclusion is based on a reasonable interpretation of the agreement and is not inconsistent with any conclusions by the Bankruptcy Court that the Montgomery Ward Agreement created a cross-indemnity. The Bankruptcy Court's conclusion that the similarly worded Montgomery Ward Agreement was a cross-indemnity was not based exclusively on the wording of the Montgomery Ward Agreement, but on the extrinsic evidence related to the formation of that agreement, including a resolution by Montgomery Ward pertaining to the indemnification as well as, what the parties

refer to as the "side-letter" confirming that both parties intended the Montgomery Ward Agreement to be a cross-indemnification. No such resolutions or letters existed with respect to the Forum Agreement. To the contrary, the extrinsic evidence adduced at trial demonstrated that Forum was only willing to give an indemnity with respect to the two bonds for which it had applied and that Forum did not intend to indemnify Reliance for Montgomery Ward's bonds. Further, the evidence established that Reliance never communicated its intention to obtain a cross-indemnity from Forum for the Montgomery Ward bonds to anyone at Forum, and Reliance did not follow its own underwriting policies to create such a cross-indemnification. Because the Forum Agreement was reasonably interpreted by the Bankruptcy Court to be ambiguous, it was appropriate for the court to consider extrinsic evidence related to the parties' intent. FDIC v. W.R. Grace & Co., 877 F.2d 614, 620 (7th Cir. 1989); see also Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 164 (3d Cir. 2001). Further, it is well established that ambiguities in a contract are resolved against the drafter. Zwayer v. Ford Motor Credit Co., 665 N.E. 2d 843, 846 (Ill. App. 1st Dist. 1996); see also Casey v. Employers Mut. Cas. Co., 189 F.3d 414, 417 (3d Cir. 1999). Accordingly, Reliance's objection to the Bankruptcy Court's partial denial of its summary judgment motion is overruled.

C. Reliance's Objection To The Bankruptcy Court's
Recommended Findings Of Fact And Conclusions Of Law As
Contrary To Law And Against The Weight Of The Evidence

The Court has reviewed each of Reliance's objections in this regard and finds the objections to be without merit. Several of Reliance's objections repeat its arguments, touched on above, that the Bankruptcy Court should not have considered extrinsic evidence related to the parties' intent. Reliance also contends that the evidence adduced at trial did not support the Bankruptcy Court's findings. Reliance's other objections relate to the Bankruptcy Court's understanding of cross-indemnification and the admissibility and/or weight it chose to give to certain testimony and evidence. Reviewing de novo the extrinsic evidence adduced at trial, the Court is persuaded that Reliance did not establish, by a preponderance of the evidence, that the parties mutually agreed that Forum would indemnify Reliance for the Montgomery Ward bonds. Further, the Court concludes that the Bankruptcy Court's findings of fact are well-supported by the record and its legal conclusions are sound. Accordingly, the Court will overrule Reliance's objections to the Bankruptcy Court's proposed findings of fact and conclusions of law.

Having overruled Reliance's objections, the Court further concludes, upon a de novo review of the record, that the Bankruptcy Court's proposed findings of fact and conclusions of

law should be adopted.² Accordingly, the Bankruptcy Court's proposed findings of fact and conclusions of law shall be appended to this Memorandum Opinion and shall be adopted by the Court and incorporated herein as the findings of fact and conclusions of law of this Court.

IV. CONCLUSION

For the reasons discussed, Reliance's Objections will be overruled, and the findings of fact and conclusions of law issued by the Bankruptcy Court will be adopted by the Court.

An Order consistent with this Memorandum Opinion will be entered, and a Final Judgment Order reflecting the Judgment of the Court will also be entered.

² Because the Court adopts the proposed findings of facts and conclusions of law issued by the Bankruptcy Court, the Court declines to address Forum's Counter-Objections which were lodged with the Court as alternative arguments in the event that the Court declined to adopt the Bankruptcy Court's proposed findings of fact and conclusions of law.

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FOR THE DISTRICT OF DELAWARE

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Debtors.	:	
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COLONIAL PENN FRANKLIN	:	
INSURANCE COMPANY,	:	
	:	
Defendant and	:	
Counterplaintiff.	:	

ORDER

At Wilmington, this 13th day of February 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiffs' Objections To The Bankruptcy Court's Proposed Findings Of Fact And Conclusions Of Law are OVERRULED.

2. The Bankruptcy Court's proposed findings of fact and conclusions of law entered on June 1, 2001 are adopted by this Court and are attached to and incorporated by reference into the Court's Memorandum Opinion accompanying this Order.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

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FINAL JUDGMENT ORDER

For the reasons set forth in the Court's Memorandum Opinion issued this date, including the proposed findings of fact and conclusions of law issued by the Bankruptcy Court and adopted by the Court in their entirety,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Judgment be and is entered in favor of Defendant and against Plaintiffs.
2. Plaintiffs' Complaint is dismissed with prejudice.

Dated: February 13, 2004

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

ANITA BOLTON
(By) Deputy Clerk