

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

In re:

FINE AIR SERVICES, CORP., et al.,

Case Nos. 00-18671-BKC-AJC
through 00-18675-BKC-AJC

Debtor.

**ORDER GRANTING CREDITOR, MARINO MEDINA'S MOTION TO
PROCEED AGAINST AVAILABLE LIMITS OF INSURANCE COVERAGE**

THIS CAUSE came before the Court for hearing upon MARINO MEDINA's Motion to Proceed Against Available Limits of Insurance Coverage (CP 1385), upon the Response and Objection to Creditor, MARINO MEDINA's Motion filed by ARROW AIR HOLDINGS CORP. (CP 1386), and upon MARINO MEDINA's reply thereto. The Court has considered the Motion, Response, Reply, arguments of counsel, and the entire record in these proceedings and, for the reasons set forth in this Memorandum Opinion, finds and concludes there is sufficient cause to grant the relief requested in the Motion. To the extent any findings of fact constitute conclusions of law, they are adopted as such, and vice versa.

Background

On February 7, 2000, MARINO MEDINA ("MEDINA") suffered injuries while operating a Snorkelift Cherry Picker (the "Cherry Picker") on certain premises that were occupied by the Debtors. In that same accident, another worker of the Debtors, Benjamin Munoz ("Munoz") was fatally injured.

On September 27, 2000, the Debtors filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, et seq. Thereafter, on December 6, 2000, MEDINA's worker's compensation attorney filed a Proof of Claim on his behalf. On May 8, 2002, an Order Confirming

the Amended Plan was entered, pursuant to which ARROW AIR HOLDINGS CORP. (“Arrow Air”) purchased the estate assets of the Debtors in accordance with 11 U.S.C. §363.

On or about June 25, 2003, MEDINA filed a complaint for the damages he sustained while operating the Cherry Picker, in the 11th Judicial Circuit in and for Miami-Dade County, Florida against the Debtors, styled Marino Medina v. Scott Technologies, Inc., et al., Case No. 03-14907 CA 09. On August 1, 2003, MEDINA filed his Motion to Proceed Against Available Limits of Insurance Coverage (the “Motion”), herein at issue. In his Motion, MEDINA seeks relief to proceed against FINE AIR SERVICES CORPORATION, FINE AIR SERVICES CORPORATION OF DELAWARE, FINE AIRLINES, FINE AIR SERVICES, AGRO AIR ASSOCIATES, INC. and ARROW AIR (collectively the “Debtors”). MEDINA’s Motion asserts that he should be entitled to proceed against the Debtors in the State Court action solely to obtain a declaration of liability which would enable him to recover against the Debtors’ liability insurance carrier. Arrow Air maintains it would be prejudiced by the granting of such relief.

Analysis

A. No proven injury to the Debtors and Arrow Air by MEDINA’s state court lawsuit

MEDINA asserts the Debtors will not be prejudiced by participating in MEDINA’s State Court action to establish liability against the Debtors for the sole purpose of recovering from the Debtors’ insurer. The Court agrees. First, another individual involved in MEDINA’s accident, the Estate of Benjamin Munoz (“Munoz Estate”) has already been granted the same relief requested by MEDINA prior to the entry of the Confirmation Order - specifically, to proceed against the available limits of insurance coverage. The Munoz Estate’s lawsuit has been consolidated with MEDINA’s lawsuit in State Court for purposes of discovery. Additionally, the Debtors’ insurer has agreed to

defend the Debtors in the lawsuit. Thus, MEDINA's proceeding in a State Court action against the Debtors only to establish their liability will cause no prejudice to the Debtors or the Liquidating Trust.

Arrow Air contends that it will be prejudiced by virtue of the resources it is required to expend in personnel and staffing with regards to discovery and trial, and with the alleged increased costs of its insurance premiums going forward. In support of the second proposition, Arrow Air attached the Affidavit of Sally Schwarz, an insurance broker for Arrow Air, who stated that: "it is my understanding that the MEDINA case **may affect** [Arrow Air's] all risk/hull and liability policy rates going forward in addition to the worker's compensation coverage". The Court is not persuaded by this argument.

Arrow Air is not the debtor in this case or the Liquidating Trust. Arrow Air purchased assets pursuant to 11 U.S.C. § 363, free and clear of all liens and encumbrances. Arrow Air's assertion that its reorganization efforts will be impaired as will its "fresh start" are unavailing. The liability carrier is already defending the claim, and the Debtors, the Trust and Arrow Air are already involved with document retrieval, witnesses and depositions concerning this accident for the companion/consolidated case of the Munoz Estate for discovery purposes.

Moreover, case law is clear that an alleged or presumed impact on future premiums is insufficient in any circumstance to prevent a claimant from lifting the injunction and proceeding outside the bankruptcy case. See Hawxhurst v. Pettibone Corp., 40 F.3d 175, 182 (7th Cir. 1994).

As the Court stated in Hawxhurst:

... "the bankruptcy court should exercise its equitable powers with respect to substance and not technical consideration that will prevent substantial justice." Shondel, 950 F.2d at 1304. The bankruptcy court did not abuse its discretion in concluding that equitable

considerations weigh in favor of Hawxhurst. There has been no showing that Pettibone's ability to defend the suit has been hindered. The costs to Pettibone and American of defending this litigation were also present in Fernstrom, Shondel and Hendrix, and thus are not sufficient to prevent Hawxhurst's action. The bankruptcy court found that the impact of Hawxhurst's claim on Pettibone's future insurance premium was indefinite and speculative. 156 B.R. at 226. American [the liability carrier] is not prejudiced by the bankruptcy court's order because American assumed its obligations without knowing the number of existing claims for which it would be liable, and American will be paying no more than what it originally agreed to pay under the insurance policy.

Id. at 182. For the foregoing reasons, the Court believes there is no prejudice to the Debtors, the Trust or Arrow Air as a result of granting movant the relief requested.

B. MEDINA's filing of a Proof of Claim does not bar the requested relief

Arrow Air, relying on Langenkamp v. Culp, 498 U.S. 42 (1990), argues that, because MEDINA filed a Proof of Claim, he is not entitled to the requested relief as he has subjected himself to the equitable jurisdiction of the Bankruptcy Court and thus forfeited his right to a jury trial. Furthermore, Arrow Air asserts that MEDINA consented to the jurisdiction of the Bankruptcy Court by filing a Proof of Claim, by failing to timely move the Court for relief from the automatic stay pursuant to 11 U.S.C. § 362, and by failing to timely object to the proposed treatment of his claim(s) before the Confirmation Order was entered. Arrow Air argues that since MEDINA is a Creditor of the Estate, he is being given whatever benefits he is otherwise entitled to under the Debtors' Plan and having failed to object to this treatment as an unsecured contingent claimant he is entitled to no further relief. Arrow Air therefore argues that MEDINA is barred from seeking the requested relief in his Motion.

MEDINA contends that he is entitled to the requested relief despite the fact that he filed a

Proof of Claim and did not object to the proposed treatment of his claims under the Plan or seek relief from the automatic stay before the Confirmation Order was entered. MEDINA states that he is nonetheless entitled to the relief because he is not seeking to recover from the Debtors personally or from the Debtors' assets. See In re Doar, 234 B.R. 203, 205 (Bankr. N.D. Ga. 1999). The Court agrees. MEDINA is entitled to the requested relief because he is only seeking to proceed against the Debtors solely to establish their liability, which would then enable him to recover against the Debtors' liability insurer.

The Court rejects the arguments of Arrow Air. "Section 501(a) of the bankruptcy code allows, but does not require, creditors of the bankruptcy estate to file proofs of claim." See I.B.M. v. Fernstrom Storage and Van Co. (Matter of Fernstrom Storage and Van Co.), 938 F.2d 731, 733 (7th Cir. 1991). In Fernstrom, the Seventh Circuit held that the creditor's failure to file a proof of claim in the bankruptcy case did not bar the creditor from proceeding against the debtor to obtain a declaration of liability that would enable the creditor to recover from the debtor's insurance policies. See Id. at 734. The court in Fernstrom found support in its decision from the Eleventh Circuit Court of Appeals opinion in Owaski v. Jet Florida Systems, Inc. (In re Jet Florida Systems, Inc.), 883 F.2d 970, 973 (11th Cir. 1989) (holding that the creditor's failure to file a proof of claim did not bar the creditor from proceeding against the debtor to establish liability in order to enable the creditor to recover against the debtor's insurer). The Court in Fernstrom explained that the purpose of the proof of claim is merely to alert the court, trustee and other creditors, as well as the debtor, to claims against the estate. 938 F.2d at 734. The purpose is not to bar a creditor from proceeding with an action to recover against the Debtors' liability insurance carrier.

The fact that MEDINA filed a Proof of Claim in the bankruptcy case does not bar him from

electing to seek recovery against the Debtors' available limits of insurance coverage. See Doar, 234 B.R. at 205. In Doar, the court unequivocally stated that:

the filing or non-filing of a proof of claim even in an asset case would be completely irrelevant to the issue of whether a creditor may pursue a debtor's liability insurer after a discharge order has been entered in the debtor's bankruptcy case except to the extent that an ultimate judgment of liability against a debtor's liability insurer would have to be reduced to the extent that the creditor received a distribution on its claim the bankruptcy case.

Id. The Second Circuit Court of Appeals in Green v. Welsh, 956 F.2d 30 (2d Cir. 1992) also faced a similar situation. In Green, the debtors filed a schedule of liabilities in the bankruptcy court listing the creditor, Green, as an unsecured creditor with an unliquidated claim. Green failed to obtain relief from the automatic stay to pursue tort claims in the state court prior to the bankruptcy court granting the debtor a discharge of its liabilities. Green also did not seek exclusion of her claim from the discharge order. The Second Circuit in Green held that Green was allowed to proceed with her negligence action, so long as the action "remained confined to obtaining a judgment to be paid by the Welsh's liability insurer." See Id. The Second Circuit in Green explained that:

[the] relevant provisions of § 524, the purpose of the Bankruptcy Code, and the vast majority of cases in the bankruptcy courts that have considered this issue show that the district court properly allowed Green to maintain her suit.

Id. at 33.

Like the creditor in Green, even though MEDINA filed a Proof of Claim and did not seek relief from the automatic stay prior to the issuance of a discharge injunction, MEDINA is not barred from pursuing an action against the Debtors to establish his right to recover from the Debtors' insurer. See Green, 956 F.2d at 32. Distribution on his filed Proof of Claim will not fully

compensate him for the damages he asserts. To the extent that MEDINA can collect from the liability insurer, it can only benefit the Debtors' estates and the Liquidating Trust set up to resolve and pay creditor claims. This Court therefore finds that MEDINA is entitled to proceed in state court against the Debtors solely to establish the liability of the Debtors to recover from Debtor's liability insurer. **C. MEDINA's failure to seek the requested relief before the Confirmation Order was entered does not bar him from seeking the requested relief now**

Arrow Air asserts that the only way MEDINA can proceed with his claim is to seek relief from the Confirmation Order pursuant to Federal Rules of Civil Procedure 60(b). Arrow Air argues that MEDINA's requested relief should be denied because MEDINA failed to **timely** seek relief from the Confirmation Order pursuant to Rule 60(b). In response, MEDINA asserts that he is not barred by Rule 60(b) from seeking the requested relief, because Rule 60(b) is inapplicable to the situation at hand as MEDINA is seeking relief pursuant to 11 U.S.C. §524(e), which was specifically enacted to allow creditors to recover the debt of the debtor "from any third party" such as the debtor's insurer.

This Court is persuaded by MEDINA's argument and finds that the constraints of Federal Rule of Civil Procedure 60(b) do not apply to the facts of this case. Like Arrow Air asserts herein, the Debtors in Hawxhurst, argued that the bankruptcy court did not have subject matter jurisdiction to modify the discharge injunction on the ground that the creditor Hawxhurst's motion for reconsideration of the Confirmation Order was **untimely** under Federal Rule of Civil Procedure 60(b). 40 F.3d at 179. The court in Hawxhurst stated that the debtor's argument was incorrectly based on the assumption that a claimant must participate in a bankruptcy proceeding to obtain a declaration of liability against the debtor outside of bankruptcy. Id. The Hawxhurst Court explained

that Rule 60(b) does not bar the court's subject matter jurisdiction to consider this motion, in that §524 permits the bankruptcy court to modify a discharge injunction so as to allow a creditor to seek a declaration of liability against the debtor. Id.

As explained by the court in Hawxhurst, Rule 60(b) applies to situations where the creditor is seeking to modify or set aside a final judgment, an order or a ruling that will affect the estate of the debtor or the personal liability of the debtor. Id. Here, MEDINA does not seek to recover from the Debtors personally or from the Debtors' estate. Rather, MEDINA seeks only to obtain a declaration of liability against the Debtors in the State Court action to recover from a third party, namely the Debtors' liability insurance carrier, a party to whom the insurance premium has already been paid for this exact purpose.

This Court is persuaded that 11 U.S.C. § 524(e) applies to the facts of this case and not Rule 60(b). Section 524(a) of the Bankruptcy Code provides that a "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Because the statutory provision of 11 U.S.C. §524(a), on its face, only discharges judgments for the 'personal liability of the debtor,' and §524(e) expressly permits a creditor to seek recovery from any other entity, MEDINA is entitled to proceed with his personal injury action against the Debtors to establish the Debtors' liability upon which the damages would be owed by another entity, specifically the Debtors' insurer. See Jet Florida 883 F.2d at 973; Hawxhurst, 40 F.3d at 181; Fernstrom, 938 F.2d at 735; Green, 956 F.2d at 33. The purpose of enacting sections 524(a) and (e) was that:

Congress sought to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit. The legislative history accords with this view. [Citations omitted.]

See Green, 956 F.2d. at 33.

The Senate Report provides that '[s]ubsection (d) [sic] provides that the discharge of the debtor does not affect co-debtors or guarantors.' S. Rep. No. 989 at 81, reprinted in 1978 U.S.C.C.A.N. 5787, 5867. We believe, however, that this wording represents a non-exhaustive description of the most common types of third parties to which §524(e) applies and it in no way precludes the application of the section to third parties who may be indirectly liable to a plaintiff, such as the debtor's liability insurer.

See Green at 33, FN1.

The discharge effected by a Plan and Confirmation Order does not exempt non-debtor liability for the same indebtedness, and thus one who is "derivatively liable for the indebtedness of the debtor, such as its insurer" remains liable subsequent to confirmation and the debtor's discharge. See In re Jason Pharmaceuticals, Inc., 224 B.R. 315, 322 (Bankr. D.Md. 1998). Therefore, in this case, the Debtors' insurer remains derivatively liable for the indebtedness of the Debtors to MEDINA. The court in Walker made clear that:

... Any assertion that no liability can be established as against an insurance policy by virtue of the discharge injunction is incorrect as a matter of law...

151 B.R. at 1008 (creditor permitted to continue in a state court action against debtor if it is necessary to prove liability to recover from the debtor's insurer, citing Green, 956 F.2d at 33; Jet Florida, 883 F.2d at 973 and Lembke, 93 B.R. at 702). See also In re Petition of the Bd. of Directors of Hopewell Internat'l Ins., Ltd., 281 B.R. 200 (Bankr. S.D.N.Y. 2002) (court reaffirmed the holdings of Jet Florida, 883 F.2d 970, Hawxhurst, 40 F.3d 175, and Fernstrom, 938 F.2d 731, finding that a discharge does not bar a creditor from pursuing an insurer on a discharged claim where there can be no recovery against the debtor).

For the aforementioned reasons, this Court finds that relief under 11 U.S.C. §524(e) is the

proper method by which movant should proceed, rather than under Rule 60(b) because the discharge injunction does not bar the Creditor from seeking to recover the debt of the Debtors from a third party, particularly Debtors' liability insurer. Section 524(e) allows MEDINA, to proceed in the State Court action against the Debtors only to establish the Debtors' liability. To give "enforceability and life to section 524(e)", MEDINA will not be prevented by Rule 60 (b) from establishing the Debtors' liability so that MEDINA may proceed against the insurer. See In re Christian, 180 B.R. 548, 550 (Bankr. E.D. Mo. 1995).

D. Distinguishing the 7th Circuit Court of Appeals opinion relied upon by Arrow Air

Arrow Air relies upon Judge Posner's opinion in Gekas v. Pipin (Matter of Met-L-Wood Corp.), 861 F.2d 1012 (7th Cir. 1988) in asserting that MEDINA is barred from seeking the requested relief under Rule 60 (b). MEDINA argues that Met-L-Wood is inapplicable to this case because the creditor in Met-L-Wood sought relief that affects the debtor's estate. Unlike the creditor in Met-L-Wood, MEDINA seeks relief to proceed against the Debtors under § 524(e) solely to establish the Debtors' liability and recover from the Debtors' insurer – not to affect the Debtors' estate, the "Reorganized Debtor" and/or Arrow Air. MEDINA further argues that Judge Posner, in a more recent decision, joined in affirming Fernstrom which held that under § 524(e), a creditor is entitled to proceed against the debtor to obtain a declaration of liability against the debtor enabling the creditor to recover from the debtor's insurer. 938 F.2d 735.

This Court agrees with MEDINA's analysis of the Met-L-Wood opinion. In Met-L-Wood, the creditor was seeking to set aside a judicial sale of the debtor's bankruptcy assets. The court explained that the only way to set aside a final judicial order, such as a confirmed sale, is through Rule 60 (b). Met-L-Wood, 861 F.2d at 1018. The court found that the confirmed sale could not be

set aside under Rule 60 (b) because more than one (1) year had elapsed since the sale was confirmed. Judge Posner, in Met-L-Wood, explained that “the result may seem a harsh one’ it may seem to illustrate the penchant of courts (as some would see it) to work injustice through technicalities.” See id. at 1019. Although this Court agrees that deadlines established by the Bankruptcy Code must be adhered to, this Court finds that the facts of Met-L-Wood are clearly distinguishable and further finds that the strict language of Rule 60 (b) is inapplicable to the facts of this case. Unlike the creditor in Met-L-Wood, MEDINA does not seek to vacate a final order under Rule 60 (b). Rather, MEDINA seeks relief that does not affect the personal liability of the Debtors or the Debtors’ estate, but only to obtain a declaration of liability against the Debtors to recover from the Debtors’ liability insurer.

In Fernstrom, the Seventh Circuit was faced with the issue of whether a creditor was entitled to proceed against a debtor only to establish the debtor’s liability to recover from the debtor’s liability insurer under 11 U.S.C. §524. 938 F.2d at 731. The Seventh Circuit, subsequent to Met-L-Wood, found that under 11 U.S.C. §524, the creditor was entitled to proceed against the debtor to obtain a declaration of liability that would enable the creditor to recover from the debtor’s insurance policies notwithstanding the creditor’s failure to file a proof of claim. Fernstrom, 938 F.2d at 735.

Neither the Debtors’ estates nor the Debtors themselves will be prejudiced by allowing MEDINA to proceed with his personal injury action as he has agreed to collect only from the Debtors’ insurer. In fact, collection from the Debtor’s liability insurer may reduce the claim against the Debtors’ estates and Liquidating Trust and thus provide a benefit to the other unsecured creditors. Accordingly, it is

ORDERED AND ADJUDGED that the Creditor, MARINO MEDINA's Motion to Proceed Against the Available Limits of Insurance Coverage filed on August 1, 2003 and Incorporated Motion to Proceed Against the Available Limits of Insurance Coverage filed on September 9, 2003, is GRANTED and MARINO MEDINA may proceed with his State Court action against the Debtors, FINE AIR SERVICES CORPORATION, FINE AIR SERVICES CORPORATION OF DELAWARE, FINE AIRLINES, FINE AIR SERVICES, AGRO AIR ASSOCIATES, INC. and ARROW AIR, solely to obtain a declaration of liability which may enable him to recover from the Debtors' insurer and MEDINA may not recover from the Debtors personally or from the Debtors' Estate.

DONE AND ORDERED in Chambers, at Miami-Dade County, Florida this 17th day of May, 2005.

HONORABLE A. JAY CRISTOL
UNITED STATES BANKRUPTCY JUDGE

cc: Daren A. Stabinski, Esq.
Jonathan Vair, Esq.
David Haber, Esq.
Sidney Pertnoy, Esq.
AUST

Attorney Stabinski is hereby directed to mail a conformed copy of this Order to all interested parties immediately upon receipt thereof.