UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
FRUEHAUF TRAILER CORPORATION, et al.,	)	Case Nos. 96-1563 through 96-1572(PJW)
	)	
Debtors.	)	Jointly Administered
	)	
FRUEHUAF TRAILER CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 98-514(PJW)
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA and AMERICAN INTERNATIONAL GROUP, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

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Dated: March 2, 2007

WALSH, J.

This opinion is with respect to the motion (Adv. Doc. # 29) of National Union Fire Insurance Company of Pittsburgh, PA and American International Group, Inc. ("Defendants") to dismiss the complaint of Fruehauf Trailer Corporation ("Plaintiff") for failure to prosecute. For the reasons set forth below, I will deny the motion, subject to directing the matter to arbitration.

BACKGROUND

The following facts are not in dispute. Plaintiff is a reorganized Delaware corporation in the business of designing, manufacturing, selling, and servicing truck trailers, parts and accessories. (Adv. Doc. # 1, ¶¶ 6, 16.) Defendants are affiliated insurance companies that provided workers' compensation insurance services to Plaintiff through two insurance programs. Under the first program, which the parties have named the Retro Insurance Program, Defendants covered workers' compensation claims against Plaintiff that arose from July 13, 1990 through July 31, 1991. (Margarita M. Smith Aff., Adv. Doc. # 33, Ex. 1, ¶ 10.) Under that policy, Defendants periodically charged Plaintiff with retrospective payment adjustments based on the amounts that Defendants continued to pay out under the policy. (Id.) After Plaintiff failed to timely pay one of the adjustments, Plaintiff and Defendants entered into an installment plan that required Plaintiff to make 16 equal payments of $41,986. (Id. at ¶ 12.)

Plaintiff made three transfers to Defendants under the installment plan totaling $205,124, which Plaintiff now claims were preferential and therefore avoidable under 11 U.S.C. § 547. (Adv. Doc. # 33, p. 5.)

Under the second insurance program, which the parties have named the Cash Collateral Insurance Program, Defendants covered workers' compensation claims against Plaintiff that arose from August 1, 1991 through August 1, 1996.[1] (Smith Aff., Adv. Doc. # 33, Ex. 1, ¶ 13.) The Cash Collateral Insurance Program was essentially a self-insurance program, whereby Plaintiff was required to reimburse Defendants for all claims that Defendants paid on Plaintiff's behalf up to $250,000 per insured party. (Id. at ¶ 14.) Defendants were responsible for paying all amounts in excess of $250,000. (Id.) Plaintiffs were required to deposit cash collateral into an account to protect Defendants against a default by Plaintiff. (Id.) At each renewal date of the program, Defendants performed an actuarial review to determine how much collateral Plaintiff had to reserve to cover all of the cases within the program. (Id. at ¶ 16.) Based on the review, Plaintiff would either be required to pay more collateral or Defendants would be required to reimburse some of the collateral.

[1] Terms of the Cash Collateral Insurance Program are detailed in an August 1, 1993 Indemnity Agreement ("Indemnity Agreement") between Plaintiff and Defendant National Union Fire Company. (Adv. Doc. # 30, Ex. F.)

In September, 1996, Defendants performed an actuarial review and concluded that $7,547,000 of collateral was needed to secure Plaintiff's obligation to Defendants under the program. (Id. at ¶ 19.) Subtracting the estimated $4,684,000 that Plaintiff had on hand for collateral, Defendants claim that Plaintiff owed $2,895,500 in additional collateral.[2] (Id.)

Plaintiff filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code on October 7, 1996 along with several other affiliates and subsidiaries. Plaintiff included in its schedules a claim by Defendant National Union for $543,902.02. (Adv. Doc. # 1, ¶ 20). Defendants filed three proofs of claim in relation to the claim listed in Plaintiff's schedules. (Adv. Doc. # 30, p. 2-3.) On September 17, 1998, this Court confirmed the Debtors' Amended Joint Plan of Reorganization. (Doc. # 1524.) The plan appointed the End of the Road Trust as Plaintiff's successor in interest and Chriss Sweet was appointed trustee. (Adv. Doc. # 30, p. 2.)

On October 6, 1998, Plaintiff filed the complaint in this action seeking (1) to avoid allegedly preferential transfers in the amount of $205,124; (2) to disallow the scheduled claim of $543,902.02 and Defendants' proofs of claim; and (3) turnover of approximately $527,000 of excess collateral that Plaintiff claims Defendants are holding. (Adv. Doc. # 1.) On November 30, 1998,

[2] Ms. Smith's affidavit contains a miscalculation. $4,684,000 subtracted from $7,547,000 is $2,863,000.

Defendants filed an answer. (Adv. Doc. # 4.) The parties agreed on February 10, 1999 to exchange initial disclosures by February 24, 1999. (Adv. Doc. # 30, p. 3.) Defendants claim that on March 5, 1999 they invited the trustee to take possession of and copy six boxes of documents and requested a status update as to when the trustee's discovery would be available. (Id. at p. 4.) The trustee allegedly never picked up the boxes of documents nor provided any discovery to Defendants. (Id.) The trustee sent Defendants an email on May 19, 1999 asking Defendants to refrain from filing a motion to compel arbitration and stating that he was considering agreeing to arbitration. (Email from Michael S. Davis to David Neier (Feb. 10, 1999), Id. at Ex. A.) No pretrial conference was ever held. Defendants claim that they wrote to the trustee on October 29, 1999 stating, "Have received no letter, nor have I been advised of any date" for a pretrial conference. The trustee responded, "sorry about that. I don't think there is a date yet." (Id. at pp. 4-5.) Defendants claim that they did not hear from the trustee again.

After a period of inactivity, this Court issued a first Notice of Contemplated Dismissal for Failure to Prosecute on May 24, 2000 (Adv. Doc. # 5) and Plaintiff filed a response on June 27, 2000 stating that it needed more time to determine the extent of Defendants' liability. (Adv. Doc. # 6.) Over two years later, this Court issued a second Notice of Contemplated Dismissal for

Failure to Prosecute on September 19, 2002, which the Defendants did not respond to. (Adv. Doc. # 9.) Defendants point out that this notice incorrectly identified the case in the caption as "FRUEHAUF TRAILER CORPORATION VS ATEC ASSOCIATES, INC." Moreover, there is no certificate of notice attached to the second notice and therefore it is unclear whether Plaintiff ever received the notice. (Adv. Doc. # 33, p. 10.)

On August 1, 2005 a new trustee, Daniel W. Harrow, was appointed. (Adv. Doc. # 30, p. 6.) On November 15, 2005, Plaintiff filed a notice canceling a hearing that was to take place on November 16, 2005. (Adv. Doc. # 13.) This was Plaintiff's first filing since its response to the first Notice of Contemplated Dismissal for Failure to Prosecute on June 27, 2000. A status conference was held on December 19, 2006, where I granted leave to Defendants to file this motion. (Adv. Doc. # 28.)

DISCUSSION

I. Motion for Dismissal for Failure to Prosecute

Based on the lull of action in this case, Defendants move to dismiss for failure to prosecute. Rule 41(b) of the Federal Rules of Civil Procedure provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant." This rule is incorporated by Federal Rule of Bankruptcy Procedure 7041. The purpose of Rule

41(b) is to allow courts to sanction parties for undue delay and avoid calendar congestion. Link v. Wabash R.R. Co., 370 U.S. 626, 629-30 (1962). It is not necessary to show that a plaintiff has taken any positive steps to delay trial. Dismissal is appropriate under Rule 41(b) when a plaintiff delays trial merely by doing nothing, "knowing that until something is done there will be no trial." Adams v. Trustees of the N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 875 (3d Cir. 1994) (quoting Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 377 (E.D. Pa. 1961), aff'd 314 F.2d 944 (3d Cir. 1963) (per curiam), cert. denied, 375 U.S. 817 (1963)).

In Poulis v. State Farm Fire and Cas. Co., the Third Circuit articulated six factors that courts must consider when determining whether to grant a motion to dismiss under Rule 41(b):

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

747 F.2d 863, 868 (3d Cir. 1984). The moving party need not show that all of the Poulis factors weigh in its favor in order for a court to find that dismissal is warranted. Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988), cert. denied, 488 U.S. 1005 (1989).

However, as dismissal is a "'drastic sanction,'" it should be reserved for cases "'where there is a clear record of delay or contumacious conduct by the plaintiff.'" Sebrell v. Phila. Police Dep't, 159 Fed. Appx. 371, 373 (3d Cir. 2005) (quoting Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 342 (3d Cir. 1982)). Even where there may be some evidence in support of dismissal, "resolution of a case on the merits is preferred in this Circuit." See L. L. v. Vineland Bd. of Educ., 177 Fed. Appx. 244, 245 (3d Cir. 2006). Consideration of each Poulis factor is necessary for the resolution of Defendants' motion.

A. Extent of the Plaintiff's Personal Responsibility

Defendants contend that Plaintiff was entirely responsible for the delay arguing that the trustee has treated this case as though it were dismissed since June, 2000. Plaintiff responds that delay was necessary in order to accurately determine the true value of the workers' compensation claims that Defendants have been paying on Plaintiff's behalf. According to Plaintiff, Defendants previously estimated that workers' compensation claims would total $17,854,256, but actual claims have turned out to be only $14,439,658.

Furthermore, Plaintiff argues that Defendants tacitly agreed to the delay through their inaction. Clearly it is Plaintiff alone that has the responsibility to bring the case to trial. Lukensow v. Harley Cars, 124 F.R.D. 64, 66 (S.D.N.Y. 1989)

("It is not the duty of . . . defendants . . . to take any steps to bring this case to trial."). However, in order to free itself from the burden of pending litigation, it would have been advisable for Defendants to file a motion earlier. In the time that Plaintiff was able to postpone trial, Plaintiff's claims came into sharper focus as it became apparent that Defendants' estimates were apparently overstated.

B. Prejudice to Defendants

Defendants claim that they have been prejudiced in the years that this case has been on hold because two important witnesses have become unavailable. The accountant who was responsible for Plaintiff's account has died since the occurrence of the relevant events in this case, and Defendants have been unable to locate the underwriter who wrote the policies. (Adv. Doc. # 30, p. 7.) Defendants also note that they have been unable to locate five of the six boxes of documents that it first made available to the trustee in 1999. Assuming that the unavailable witnesses were necessary to Defendants' case (Defendants have not yet shown how they were necessary), such unavailability and the dimming of memories over time constitute prejudice against Defendants. Scarborough v. Eubanks, 747 F.2d 871, 876 (3d Cir. 1984). Although Plaintiff cannot be held entirely responsible for the loss of five boxes of documents that were in Defendants' possession, I do not hold Defendants entirely responsible either.

Defendants held the boxes for Plaintiff and asked Plaintiff to pick them up, which Plaintiff never did.

C. History of Dilatoriness

"Extensive or repeated delay or delinquency constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders." Adams, 29 F.3d at 874. It is undisputed that several years passed in which Plaintiff did not push for a preliminary hearing, discovery, or a trial. However, this does not necessarily constitute dilatoriness. Plaintiff has responded to all orders and actions of the court with the exception of the second Notice of Contemplated Dismissal for Failure to Prosecute on September 19, 2002. Plaintiff is excused from its failure to respond to this notice because it was captioned incorrectly and there is no evidence that Plaintiff ever received it.

D. Willfulness and Bad Faith

Defendants allege generally that Plaintiff's delay in this case was willful and in bad faith. However, Defendants do not present any specific evidence to suggest willfulness or bad faith.

As noted above, Chriss Street was originally appointed as the trustee in September 1998. He was succeeded in that position by Daniel W. Harrow who was appointed the new trustee in August 2005. On March 14, 2006 Mr. Harrow filed in the chapter 11 case a "Preliminary and First Report of Daniel W. Harrow, Recently

Appointed Successor Trustee of the End of the Road Trust." (Doc. # 1486.) Mr. Harrow's preliminary report makes serious allegations as to Mr. Street's trusteeship including, what according to Mr. Harrow "appears . . . to be a story of mismanagement. . . ." (Doc. # 1846, p. 1.) Whether Mr. Harrow's report will result in claims against Mr. Street, and if so any recoveries for the trust, remains to be seen. Given this unknown, to the extent the delay here is attributable to that alleged "mismanagement," I cannot conclude that the trust will be made whole if a meritorious cause of action in the matter before me is precluded by a dismissal.

E. Effectiveness of Sanctions Other than Dismissal

While it is clear that Plaintiff has not pushed for a trial in this case, that does not mean that a sanction as drastic as dismissal should be imposed. Plaintiff has a cause of action that, if successful, would provide a significant benefit to the estate. As it is apparent that the factual record has deteriorated with passage of time (due to circumstances noted in the subsection above on prejudice), I believe an appropriate sanction would be to rule that any issues of fact in this case that have become vague or unresolvable due to the passage of time, the fading of memories, or the unavailability of deceased witnesses or lost evidence should be construed in the light most favorable to Defendants. However, since, as discussed below, I am directing this matter to arbitration, I do not believe that I have jurisdiction to give

direction to the arbitrator in this regard. I leave it up to the arbitrator to determine whether to invoke such a ruling.

F. Meritoriousness of the Claim or Defense

At this stage of the proceeding, it is difficult to weigh the meritoriousness of Plaintiff's claims and Defendants' defenses because much depends on the development of the factual record. It is clear, however, that Plaintiff has done enough at this stage to allege cognizable claims against Defendants.

Plaintiff's objection to Defendants' claim for additional collateral under the Cash Collateral Insurance Program is highly fact-dependent. As Plaintiff noted in its brief, more than 4,000 claims were filed under the Cash Collateral Insurance Program, and the yearly reports generated in connection with the policy total approximately 1,500 pages. (Adv. Doc. # 33, p. 8.) According to Defendants' analysis of these materials, Plaintiff needed to deposit additional collateral totaling $2,895,500 in order to secure its obligations under the policy. Plaintiff, on the other hand, argues that Defendants were in possession of excess collateral totaling $527,000. Determining whose calculations are correct is going to involve further factual development.

Defendants claim that Plaintiff's preference claim should not succeed because Defendants had a right to setoff and recoupment. A party that is entitled to a setoff or recoupment is immune to preference claims that are less than or equal to the

amount of that party's setoff or recoupment right. Braniff Airways v. Exxon Co., 814 F.2d 1030, 1034 (5th Cir. 1987); see also 5 Collier on Bankruptcy ¶ 546.03[7] (15th ed. 2006) ("Provided that the right of setoff is equal to, or greater than, the amount of the payment, a creditor will not improve its position when it receives a payment if it had a right of setoff at the time of the payment."). As noted in the previous paragraph, it is not yet clear to me whether Plaintiff owes Defendants or whether Defendants owe Plaintiff under the Cash Collateral Insurance Program. Therefore Defendants do not yet have any right to setoff or recoup anything from Plaintiff.[3]

Based on the above analysis, it appears that the first and second factors weigh somewhat in favor of Defendants, the fifth

[3] Additionally establishing a right to setoff requires that Defendants show that Plaintiff's debt to Defendants and Defendants' debt to Plaintiff are mutual. In re Drexel Burnham Lambert Group, Inc., 113 B.R. 830, 847 (Bankr. S.D.N.Y. 1990) ("[T]he debts must be in the same right and between the same parties, standing in the same capacity.") (quoting 5 Collier on Bankruptcy ¶ 553.04[2]). In other words, Defendants must show that Plaintiff and Defendants were acting in the same "capacity" in the transactions that established both debts. 5 Collier on Bankruptcy ¶ 553.03[3][c] ("If . . . mutuality does not exist . . . , as a general rule, setoff is not permitted under section 553."). Plaintiff argues that the relationship between Plaintiff and Defendants is a contractual relationship with respect to the Retro Insurance Program, but it is a bailee/constructive trustee relationship with respect to the Cash Collateral Insurance Program. Plaintiff and Defendants acted in a different character under the Cash Collateral Insurance Program because Defendants are holding Plaintiff's cash collateral in constructive trust. Defendants claim there is no evidence that this was a trust relationship. The resolution of this issue requires further inquiry into the nature of the parties' relationship under the Cash Collateral Insurance Program.

factor weighs in favor of Plaintiff, and the third, fourth and sixth factors favor neither side. While it is not clear that Plaintiff should succeed on these claims, it is at least clear that they are cognizable claims that could bring some benefit to the estate. The delay in this case was certainly lengthy, however, that does not necessarily justify a sanction as drastic as dismissal. Giving Defendants the benefit of the doubt in all issues of fact that have become vague as a result of the passage of time is sufficient to counter-balance the prejudice to Defendants caused by the delay.

II. Referral to Arbitration

Defendant argues that, if this claim is allowed to go forward, it should be referred to arbitration pursuant to Article IX of the Indemnity Agreement. (Adv. Doc. # 30, p. 16.) That article provides in part,

> All disputes or differences arising out of the interpretation of this Agreement shall be submitted to the decision of two (2) Arbitrators, one to be chosen by each party, and in the event the Arbitrators fail to agree, to the decision of an Umpire to be chosen by the Arbitrators.

(Id. at Ex. F.) Plaintiff claims that arbitration is not mandated by this provision because the dispute between the parties does not involve "interpretation of this Agreement." (Adv. Doc. # 33, p. 15.) The dispute, according to Plaintiff, boils down to Bankruptcy

Code principles and a simple mathematical calculation of the appropriate amount of collateral. I disagree.

Plaintiff and Defendants' dispute centers on the appropriate calculation of the amount of additional cash collateral that Plaintiff owes Defendants or the amount of excess cash collateral that Defendants must return to Plaintiff. This calculation comes from Article VIII of the Indemnity Agreement, which states,

> The Cash Collateral will be reviewed by [the Debtor's] actuaries for adequacy at the intervals stated in the Schedules(s). If as a result of the actuarial review, it is found that an increase in Cash Collateral is required by [the Debtor], [Defendants] agree to provide such additional Cash Collateral. If as a result of the actuarial review it is found that a reduction in Cash Collateral is warranted, the Company shall return such excess Cash Collateral to Client.

(Adv. Doc. # 30, Ex. F.) Resolution of the dispute in this case would necessarily require an analysis of Defendants' "actuarial review." This term is not defined in the contract, and no specific details are given as to how it is to be performed. Therefore, resolution of the dispute will have to involve some interpretation of this term.

Additionally, Defendants point out that they disagree with Plaintiff as to the interpretation of Article I of the Indemnity Agreement, which provides that later renewals or revisions to the contract are subject to this agreement. (Adv. Doc. # 34, p. 10.) Defendants argue that this clause makes the

Indemnity Agreement and the several renewal agreements one single transaction: a requirement for Defendants to establish their right to recoup. In re HQ Global Holdings, Inc., 290 B.R. 78, 80 (Bankr. D. Del. 2003) ("Recoupment is an equitable remedy which permits the offset of mutual debts when the respective obligations are *based on the same transaction or occurrence*.") (emphasis added). Because Plaintiff denies that Defendants have a right to recoup, interpretation of Article I of the Indemnity Agreement is necessary to resolve the dispute.

The arbitration clause in the Indemnity Agreement is clearly triggered, and therefore it must be respected. Searson/American Express v. McMahon, 482 U.S. 220, 226-27 (1985). The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, 2, has established a strong policy in favor of arbitration, and requires that arbitration agreements be rigorously enforced. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985). As an exception to the FAA, courts are not compelled to enforce arbitration agreements where the party opposing arbitration can show that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." McMahon, 482 U.S. at 227. The Third Circuit has ruled that the FAA applies to bankruptcy cases just as it does to non-bankruptcy cases. Mintze v. American Financial Services, Inc. (In re Mintze), 434 F.3d 222, 230 (3d Cir. 2006). Plaintiffs have not attempted to argue that

Congress intended to preclude waiver of judicial remedies in the case at hand. Therefore, I am obligated to enforce the arbitration clause in the Indemnity Agreement and direct the parties to proceed with arbitration accordingly.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss for failure to prosecute is denied. Defendants' request that this case be referred to arbitration pursuant to the Indemnity Agreement is granted. The disposition of this adversary proceeding is stayed pending completion of the arbitration.

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NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA and AMERICAN INTERNATIONAL GROUP, INC.,	)	
	)	
Defendants.	)	

ORDER

For the reasons set forth in the Court's memorandum opinion of this date, Defendants' motion (Doc. # 29) to dismiss the complaint for failure to prosecute is **DENIED**, provided that this matter shall be determined by arbitration as called for in the controlling contract.

Peter J. Walsh
United States Bankruptcy Judge

Dated: March 2, 2007