

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:) Chapter 11
)
PROTARGA, INC., f/k/a) Case No. 03-12564 (PJW)
NEUROMEDICA, INC.,)
)
Debtor.)
)

PROTARGA, INC.,)
)
Plaintiff,)
)
v.) Adv. Proc. No. 04-53374
)
NIGEL L. WEBB and FIVE PALMS)
CORPORATION, LTD.,)
)
Defendants.)
)

NIGEL L. WEBB,)
)
Third-Party)
Plaintiff,)
)
v.)
)
ROBERT DICKEY, IV,)
)
Third-Party)
Defendant.)

MEMORANDUM OPINION

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Dated: August 25, 2004

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Ltd.

WALSH, J. 

This opinion is with respect to plaintiff Protarga, Inc.'s (the "Debtor") motion (Doc. # 8) to dismiss the counterclaim and third-party complaint of defendant Nigel L. Webb ("Webb"). For the reasons set forth below, the Court will deny the Debtor's motion to dismiss Webb's counterclaim but will grant the Debtor's motion to dismiss Webb's third-party complaint.

BACKGROUND

On August 14, 2003, the Debtor filed a voluntary petition under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"). Prior to the sale of substantially all of its assets in its chapter 11 case, the Debtor operated as a drug development company.

From 1993 until July 2003, Webb acted as president and chief executive officer of the Debtor. In August 2000, Webb was elected chairman of the board of directors. Over the course of his tenure with the Debtor, Webb entered into three successive employment agreements, the last of which was set to expire on May 31, 2006.¹

On or about October 29, 2003 Webb filed a proof of claim for unpaid separation pay, bonus pay, vacation pay, expenses,

¹In their pleadings, the parties refer to employment agreements, indemnification agreements, and the Debtor's by-laws (collectively, the "Agreements"). However, the parties have not filed complete versions of any of these documents and therefore I am not in a position to rule on certain of the parties claims.

Cobra-period benefits, and liquidated damages. On May 7, 2004, the Debtor objected to Webb's proof of claim by commencing this adversary proceeding. In addition to its objection to the Webb claim, the Debtor asserted a counterclaim against Webb and a third-party complaint against Five Palms Corporation (a company controlled by Webb). Among other things, the Debtor alleged that Webb and Five Palms Corporation wrongfully received benefits from the Debtor through Webb's illegal use of the Debtor's resources. In response to these allegations, Webb asserted a counterclaim against the Debtor for indemnification and made a third-party complaint requesting the Court to equitably subordinate the claims of Robert Dickey, IV ("Dickey") pursuant to Bankruptcy Code § 510(c). Through his pleadings, Webb states that Dickey is a director and the sole officer of the Debtor as well as a creditor holding a general unsecured claim in the amount of \$275,000 or more. Webb's third-party complaint alleges that Dickey wasted the Debtor's assets, misappropriated funds, and breached certain fiduciary duties.

The Debtor now moves to dismiss both Webb's counterclaim for indemnification and his request for equitable subordination of Dickey's claim. Webb, of course, has filed his opposition to the Debtor's motion to dismiss.

The narrow issues presented in the instant matter are (a) whether Webb's counterclaim should be dismissed pursuant to Rule

12(b)(6) of the Federal Rules of Civil Procedure² for failure to state a claim upon which relief can be granted and (b) whether Webb's request for equitable subordination should be dismissed because it fails to qualify as a third-party complaint under Rule 14(a) of the Federal Rules of Civil Procedure.³

DISCUSSION

A. Webb's Counterclaim

The Debtor moves to dismiss Webb's counterclaim for indemnification pursuant to Rule 12(b)(6) arguing that the complaint fails to state a claim upon which relief can be granted. In deciding a motion to dismiss, a court is required to determine whether, under any reasonable reading of the pleadings, a plaintiff (or a counterclaiming defendant) may be entitled to relief, and must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). In considering a Rule 12(b)(6) motion, the court should not inquire whether the plaintiffs will ultimately prevail, only whether they are entitled to offer evidence in support of their claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Thus, a court should not

²Rule 7012(b) of the Federal Rules of Bankruptcy Procedure states that "Rule 12 (b)-(h) FR Civ P applies in adversary proceedings."

³Rule 7014 of the Federal Rules of Bankruptcy Procedure states that "Rule 14 FR Civ P applies in adversary proceedings."

grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, (1957).

In his counterclaim, Webb claims that he is entitled to indemnification based on (1) title 8 of the Delaware Code ("Delaware General Corporation Law") and (2) the Agreements. Because I find that Webb may be able to prove sufficient facts to support his request for indemnification, I will deny the Debtor's motion to dismiss for failure to state a claim. In doing so, I express no opinion as to the merits of Webb's indemnification claim, rather, I simply hold that upon a reasonable reading of the pleadings, Webb has withstood the test of a Rule 12(b)(6) motion.

1) Delaware General Corporation Law

Title 8, section 145(c) of the Delaware Code provides:

To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

Del. Code Ann. tit. 8, § 145(c) (2001).

Section 145(c) provides grounds for denying the Debtor's Rule 12(b)(6) motion. Under section 145(c) Webb would be entitled to indemnification for successfully defending against the Debtor's

claims. See Green v. Westcap Corp. of Del., 492 A.2d 260, 265 (Del. Super. Ct. 1985) (stating that director/officer "is entitled to be indemnified . . . if the prior proceeding arose by reason of the fact that he is or was a director, officer, or employee of the corporation"); Witco Corp. v. Beekhuis, 38 F.3d 682, 691 (3d Cir. 1994) ("Section 145(c) is a mandatory provision that applies to all Delaware corporations and grants an absolute right of indemnification"). Because Webb has alleged that section 145(c) will apply if he is successful in his defense and because case law shows that indemnification would in fact be proper, I find that Webb has stated a claim for relief and may therefore proceed with his counterclaim.

Furthermore, title 8, section 145(b) of the Delaware Code provides:

A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made

in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

Del. Code Ann. tit. 8, § 145(b) (2001).

In his pleadings Webb states that the Debtor's by-laws provide for indemnification and that he acted "at all times in good faith and in a manner he reasonably believed to be in (or not opposed to) the best interests of the Debtor." (Doc. # 5 at 13.) If both of these claims hold, Webb may be entitled to indemnification pursuant to section 145(b). Because I must accept Webb's statements as true for purposes of this ruling, I must deny the Debtor's motion to dismiss for failure to state a claim.

2) Indemnification under the Agreements

Because I have already found that Delaware General Corporation Law provides sufficient grounds to deny the Debtor's Rule 12(b)(6) motion and because the parties have failed to provide complete copies of the relevant materials, I decline to make any ruling with respect to the Agreements.

B. Webb's Third-Party Complaint

The Debtor moves to dismiss Webb's complaint for equitable subordination of Dickey's claim on the grounds that it

fails to qualify as a third-party complaint under Rule 14(a) of the Federal Rules of Civil Procedure.

Rule 14(a) of the Federal Rules of Civil Procedure states in relevant part:

[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Fed. R. Civ. P. 14(a).

"A third-party plaintiff's claim may be asserted under Rule 14(a) only when the third party's liability is 'in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant.'" Foulke v. Dugan, 212 F.R.D. 265, 269 (E.D. Pa. 2002) (quoting 6 Charles Alan Wright et al., Federal Practice and Procedure § 1446 (2d ed. 1990)); Fed. Deposit Ins. Corp. v. Bathgate, 27 F.3d 850, 873 (3d Cir. 1994).

Webb's third-party complaint alleges misappropriation of funds, waste of assets, breach of fiduciary duties, and requests equitable subordination of Dickey's claims. Although it is true that subordination of Dickey's claim could yield a larger payout to remaining creditors, Webb fails to show how that result is somehow dependent upon the dispute between himself and the Debtor. Furthermore, Webb does not even allege that Dickey bears any burden of secondary liability. The dispute between Webb and the Debtor consists of a disagreement over Webb's proof of claim, whether Webb

is entitled to indemnification, and whether Webb improperly used corporate assets. Because Webb has not shown any connection between his potential liability to the Debtor and his claim for equitable subordination, I must grant the Debtor's motion to dismiss Webb's third-party complaint.

Claims for equitable subordination must be brought as a separate adversary proceeding pursuant to Rule 7001(8) of the Federal Rules of Bankruptcy Procedure. This ruling in no way prejudices Webb from filing an independent complaint that would be procedurally sustainable.

As an additional matter, the Debtor argues that if Webb's third-party complaint was procedurally proper, dismissal was still required because Webb lacks standing to bring the claim for equitable subordination. Courts disagree whether or not individual creditors have standing to pursue equitable subordination claims. Mark D. Sherrill, The Uncertain Ground of Creditors' Standing in Equitable Subordination Actions, Norton Bankruptcy Law Advisor, Feb. 2003, at 15. Because I have determined that the request for equitable subordination is improperly before me in this adversary proceeding, I need not reach a decision on Webb's standing at this time.

CONCLUSION

For the reasons set forth above, this Court will deny the Debtor's motion to dismiss Webb's counterclaim but will grant the Debtor's motion to dismiss Webb's third-party complaint.

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ORDER

For the reasons set forth in the Court's Memorandum Opinion of this date, Protarga Inc.'s motion (Doc. # 8) to dismiss Nigel L. Webb's counterclaim and to dismiss Nigel L. Webb's third-party complaint is **DENIED** as to the counterclaim but is **GRANTED** as to the third-party complaint.


Peter J. Walsh
United States Bankruptcy Judge

Dated: August 25, 2004