

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WENDY BLAIR : CIVIL ACTION
 :
 v. :
 :
 PROTECTIVE NATIONAL INSURANCE :
 COMPANY OF OMAHA : NO. 96-8438

MEMORANDUM AND ORDER

Fullam, Sr. J.

May , 1997

In May 1983, plaintiff was injured in an accident involving a bus owned and operated by Edwards Trailways, Inc. In 1985, plaintiff sued that firm and its driver, one Kelly, in the Court of Common Pleas of Philadelphia County. At about the same time, Edwards Trailways, Inc., a Pennsylvania corporation, merged with its parent, TCI, Inc., a Delaware corporation. In 1987, while the state court action was pending, TCI, Inc. was declared bankrupt, in involuntary proceedings brought by its creditors in Louisiana.

Apparently, plaintiff did not immediately learn of the Louisiana bankruptcy. Eventually, in proceedings brought to hold plaintiff and her counsel in contempt for pursuing the Philadelphia litigation notwithstanding the automatic stay in the bankruptcy proceeding, the bankruptcy court approved an arrangement whereby plaintiff and other similarly-situated personal injury claimants could proceed with pending litigation against the debtor, so long as the property of the debtor could not be held liable for any

ensuing judgments (i.e., judgments and settlements would be the responsibility of the debtor's liability insurance carriers).

In the meantime, the Philadelphia state court permitted plaintiff's litigation to proceed, apparently accepting plaintiff's argument that Edwards Trailways, Inc. was a separate entity from TCI, Inc., the bankrupt, and that plaintiff had received no notification of the bankruptcy and was not involved in any way in that proceeding.

Ranger Insurance Company was a liability carrier for the debtor, covering the liabilities of Edwards Trailways, Inc. and Mr. Kelly. But Ranger refused to defend the Philadelphia action, apparently in the belief that the bankruptcy stay precluded such lawsuits. Ranger Insurance Company did not, however, appeal the ruling of the Common Pleas Court to the contrary, and permitted a default judgment against Edward Trailways, Inc. and Mr. Kelly. Damage issues were submitted to a jury, and plaintiff obtained a judgment against Edwards Trailways and Kelly in the amount of \$1,913,330 on July 1, 1994.

Plaintiff then brought a direct action against Ranger Insurance Company in this court, Civil Action No. 95-8025, invoking 40 Pa. C.S.A. §117, which permits such actions against insurance companies when a judgment has been obtained against the insured, and the insured is in bankruptcy. In that action, I entered judgment against Ranger in the sum of \$500,000, its policy limits.

Plaintiff has now brought the present action against Protective National Insurance Company of Omaha, an excess carrier, to recover the balance of its judgment. Protective seeks dismissal

for lack of subject-matter jurisdiction, and for failure to state a valid claim.

The first question to be addressed is whether there is complete diversity of citizenship between plaintiff and the defendant Protective. Plaintiff is a citizen of Pennsylvania, and Protective is a citizen of Nebraska. But 28 U.S.C. § 1332(c)(1) provides:

A corporation shall be deemed to be a citizen of any state by which it has been incorporated and of the state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party defendant, such insurer shall be deemed a citizen of the state of which the insured is a citizen...

Defendant points out that, at the time of the accident, Edwards Trailways, Inc. was a citizen of Pennsylvania.

Plaintiff counters this assertion by pointing out that, by the time the state court lawsuit was filed, and at all times since, Edwards Trailways had been merged into TCI, a Delaware corporation and undoubtedly a citizen of states other than Pennsylvania. Conceding the accuracy of these assertions, defendant nevertheless argues (1) that plaintiff is judicially estopped from relying on the citizenship of TCI, because plaintiff had contended in the state court litigation that Edwards was separate and distinct from TCI; and (2) that Edwards Trailways, Inc. is still listed as an inactive Pennsylvania corporation, on certain records in the office of the Secretary of this Commonwealth.

Our Court of Appeals had determined, in Myers v. State

Farm Ins. Co., 842 F.2d 705 (3d Cir. 1988) that Section 1332(c)(1) refers to "direct action" statutes similar to those in Louisiana and Wisconsin, where an injured party can sue a liability insurance company directly, without naming its insured; the intent being to exclude from federal courts purely local tort cases between citizens of the same state, notwithstanding the fact that the defendant happened to be insured by an out of state insurance company. Thus, suits on the insurance contract, or for improper handling of claims, are not the kind of "direct action" statutes contemplated by 1332(c)(1). The present case is not quite so clear cut as in the Myers situation, since it involves an attempt to collect a judgment based on the liability of the insured. On the other hand, plaintiff is not attempting to establish tort liability but is asserting the defendant's contractual obligation to pay the judgment. On the basis of the Myers decision and the legislative history discussed in that case, I feel reasonably confident that the citizenship of the insured should not be imputed to the defendant in these circumstances.

In the alternative, and more important, it seems entirely clear that Edwards Trailways, Inc., by virtue of its 1985 merger into TCI, was and is a citizen of Delaware, not Pennsylvania. And I believe that it is the obligation of this Court to resolve jurisdictional matters. Just as the parties cannot establish federal jurisdiction by stipulation or estoppel, they cannot, in my view, destroy federal jurisdiction in that fashion. It may be that, in 1985 and for some time thereafter, plaintiff mistakenly argued in state court that Edwards was entirely separate from, and

unaffected by, the TCI bankruptcy proceeding, but there is neither occasion nor necessity for perpetuating that error in this case. The defendant was not a party to that litigation.

I conclude, therefore, that there is complete diversity of citizenship between plaintiff and the defendant in this case, and that the action involves more than the requisite jurisdictional amount. This Court has subject-matter jurisdiction.

Defendant also seeks dismissal for failure to state a claim upon which relief can be granted, Federal Rule of Civil Procedure 12(b)(6). Much of this argument is devoted to the proposition that the state-court judgment obtained by plaintiff is void, because in conflict with the reorganization plan in the bankruptcy proceeding. These are the same arguments advanced by the defendant Ranger in the earlier litigation, and I see no need to revisit them here. For the reasons expressed in the various opinions in the Ranger litigation, I conclude that, at least for purposes of a Rule 12(b)(6) motion, this action cannot be dismissed because of any alleged infirmity in the state-court judgment. On the other hand, defendant may be on firmer ground in arguing that the state-court judgment cannot be given collateral estoppel effect with respect to any issue in this case, since liability was established by default, and damages were ascertained in an ex parte proceeding, and, of particular significance, the present defendant apparently may not have had adequate notice of the proceeding or opportunity to be heard.

But these questions, and various possible policy defenses which may be available to defendant, cannot properly be resolved on

a motion to dismiss.

An order follows.

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v.	:	
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PROTECTIVE NATIONAL INSURANCE	:	
COMPANY OF OMAHA	:	NO. 96-8438

ORDER

AND NOW, this day of May, 1997, IT IS ORDERED:

That the motion of defendant Protective National Insurance Company of Omaha to dismiss plaintiff's complaint is DENIED.

John P. Fullam, Sr. J.

