



UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

St. Johnsbury Trucking Company, Inc.
Debtor-in-Possession.

Chapter 11 case
93 B 43136

In re:

St. Johnsbury Trucking Company, Inc.
Plaintiff,

v.

Liberty Mutual Insurance Company,
National Union Fire Insurance Company
Of Pittsburgh, Pa.,
Reliance Insurance Company,
Royal Insurance Company of America,
Transport Insurance Company, and
The Travelers Indemnity Company,
Defendants.

Adversary Proceeding
96-1023

#431-1

US BANKRUPTCY COURT
DISTRICT OF VERMONT

SEP 28 2000

FILED & ENTERED ON DOCKET
BY: DAVID A. SIME

**MEMORANDUM OF DECISION
ON LIBERTY MUTUAL'S MOTION FOR SUMMARY JUDGMENT AND
ST. JOHNSBURY'S APPLICATION FOR AWARD OF BAD FAITH DAMAGES**

On June 28, 1999, the Debtor/ Plaintiff, St. Johnsbury Trucking Company, Inc. ("St. Johnsbury") filed the *Application of St. Johnsbury Trucking Company, Inc. for Award of Bad Faith Damages Against Liberty Mutual Insurance Company Pursuant to this Court's May 17, 1999 Order* ("the Application for Bad Faith Damages"), seeking an award of bad faith damages based upon the conduct of Liberty. On August 31, 1999, Liberty Mutual Insurance Company ("Liberty") filed a *Motion for Summary Judgement on St. Johnsbury's Claim for Bad Faith Damages* ("the Motion for

Summary Judgment") requesting this Court to deny *in toto* St. Johnsbury's claim for bad faith damages. Both parties request that this Court construe the Debtor/ Plaintiff's entitlement to damages based upon the Memorandum of Decision and Order entered by this Court (Conrad, J.) on April 19, 1999 and May 17, 1999, respectively. Liberty seeks summary judgment on St. Johnsbury's bad faith claim based upon the record. The parties have filed memoranda of law with exhibits in support of their respective positions. For the reasons set forth below, the Application for Bad Faith Damages is denied in part and granted in part; and an evidentiary hearing is ordered regarding the amount of reasonable attorneys fees incurred by the Debtor in the Government litigation. The Motion for Summary Judgment is otherwise denied.

Jurisdiction

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334.

Background

In its Memorandum of Decision dated November 17, 1997 (Conrad, J.) ("Memorandum of Decision dated November 17, 1997") this Court instructed the parties to brief the remaining open issues. These issues were specifically stated as follows:

1. Did Liberty have a duty to defend Debtor under Vermont insurance law?;
2. Did Liberty breach that duty?;
3. Is Liberty bound by the settlement to repay Debtor the amounts actually paid by Debtor to the Government?; and
4. Is Liberty liable for Debtor's attorney's fees incurred in litigation with the Government?

See Memorandum of Decision dated November 17, 1997, at pp. 5-6.

Furthermore, Judge Conrad admonished the parties that answers to these issues were not difficult and that sanctions would be imposed upon any party taking liberties with the law and unduly prolonging these proceedings. *See* Memorandum of Decision, dated November 17, 1997, at p. 6.

Thereafter the parties submitted multiple briefs, memoranda and exhibits that attempted to address the four issues specifically presented by the Court and the motion for partial summary judgment subsequently filed by Liberty. Upon a careful review of the record, the matters submitted by the parties, and oral argument, the Court issued its decision granting in part and denying in part Liberty's motion for partial summary judgement.

The Court's Memorandum of Decision dated April 19, 1999 (Conrad, J.) ("the Memorandum of Decision") contains a Discussion section divided into four parts. The Court's presentation of its decision in this manner is noteworthy. The Court addressed the four specific issues posed to the parties in subsections which were titled to correspond to the four original questions, namely:

1. Liberty had a duty to defend debtor under Vermont Law, *Memorandum of Decision*, at p. 7;
2. Liberty breached its duty to defend debtor. *Memorandum of Decision*, at p. 14;
3. Debtor is not entitled to collect government settlement amounts from Liberty. *Memorandum of Decision*, at p. 14;
4. Liberty must pay debtors' attorneys' fees. *Memorandum of Decision*, at p. 15.

Each of these statements constitute rulings on the four issues identified by the Court and addressed by the parties pursuant to the directive of the Memorandum of Decision dated November 17, 1997.

The Court's first paragraph of section three is particularly instructive with regard to the issue

of the Debtor's entitlement to damages:

Debtor argues that Liberty is bound to the amount of the Government settlement and must reimburse Debtor the amount actually paid by Debtor to the Government. Liberty argues that Debtor has been fully compensated for its damages through settlements with other defendants and, therefore, Liberty is not obligated to reimburse Debtor. We agree.

Memorandum of Decision, at p. 14. This determination indicates that Judge Conrad concluded that the Debtor had already been fully compensated for its damages.

The Court's discussion of attorneys' fees makes two issues clear: first, that the Court was addressing the subject of fees only in connection with the Government litigation consistent with the Debtor's request; and second, that in order to award attorneys' fees there must be some degree of "bad faith" present. This is evident by the plain text of the Decision:

Debtor seeks to recover attorneys' fees incurred in litigation with the Government. Debtor is entitled to attorneys' fees if Liberty's denial of coverage was in bad faith and with disregard for the terms of the Policy and the claims against Debtor. Burlington Drug Co., Inc. v. Royal Globe Ins. Co., 616 F.Supp. 481, 483 (D.Vt. 1985).

Memorandum of Decision, at p. 15.

In the Memorandum of Decision, the Court makes absolutely no mention of attorney's fees in any litigation or suit other than the Government litigation. In addition, the Court does not indicate that the finding of bad faith is relevant to any issue beyond the inquiry into an award of attorney's fees regarding the Government litigation. *Memorandum of Decision*, at 17. The Court concluded that an award of attorney's fees for the Government litigation was appropriate and, therefore, a hearing must be scheduled to determine the amount of attorneys fees to be awarded. It appears Judge Conrad believed that a ruling on this remaining issue would conclude the matter.

On May 17, 1999, Judge Conrad entered an Order in connection with the subject

Memorandum of Decision ("the Order")¹. The terms of this Order may be responsible for some of the confusion underlying the pending summary judgment motion and application for damages. Item Number 7 of the Order states "Liberty Mutual shall pay the Debtor its damages including attorneys' fees and expenses incurred in litigating its claim against the Government and in litigating its coverage claim against the defendant insurers". The last part of that statement would appear to expand the scope of attorneys' fees liability well beyond the terms of the Memorandum of Decision. Thus, the Order and Memorandum of Decision appear to be in conflict. To the extent a judgment may be construed to conflict with the written decision upon which it is based, the written decision controls. *See, e.g., Seavey v. Chrysler Corp.*, 930 F. Supp. 103, 107 (S.D.N.Y. 1996); *Di Prospero v. Ford Motor Co.*, 480 N.Y.S.2d 784, 785 (3d Dep't 1984).

Furthermore, Section 8 of the Order states that a hearing shall be held "to determine the Debtor's damages in accordance with the Court's Memorandum of Decision filed April 19, 1999 and this Order." Similarly, the April 19, 1999 Memorandum of Decision directed that a hearing be scheduled "to determine damages in accordance with the terms of this decision." *See* Memorandum of Decision, at p. 17. However, the Memorandum of Decision only addressed attorney's fees to be awarded to the Debtor "that were incurred in litigation with the Government." When the relief granted in the Order does not conform to the Court's Decision, the Decision controls. *Cf. O'Donnell Transportation Co., Inc. v. City of New York*, 215 F.2d 92, 94 (2d Cir. 1954); *see Rowlee v. Dietrich*, 451 N.Y.S.2d 467 (4th Dept. 1982).

¹On May 27, 1999, the Court rejected Liberty's "Motion to Reconsider this Court's Order of May 17, 1999 Finding that Defendant Liberty Mutual Acted in Bad Faith", which failed to reference any statutory or procedural basis for filing the motion, because the Court found no mistake of either law or fact and no mistake, inadvertence, excusable neglect, newly discovered evidence nor fraud.

Based on the foregoing, this Court finds that pursuant to the Memorandum of Decision and Order previously entered in this case, the issue of bad faith has been determined and remains the law of the case at this time², and the only matter to be resolved is a determination of the extent of allowable attorneys' fees incurred by St. Johnsbury in the Government litigation. To the extent Liberty seeks summary judgment on the issue of bad faith, the motion is moot and denied on procedural grounds³. Likewise, to the extent St. Johnsbury seeks to recover a broad range of damages in excess of the attorneys fees incurred in the Government litigation and that damage claim is challenged by Liberty, the Application for Bad Faith Damages is denied in part.

In order to determine the amount of reasonable attorneys fees incurred by the Debtor in the Government litigation, St. Johnsbury directs this Court to consider the attorneys fees reportedly incurred from approximately November, 1993 to September, 1996, "without help or input" from Liberty, in the aggregate amount of \$61,500. *See St. Johnsbury's Declaration in Support of Recovery of Attorneys' Fees*, at Exhs. 1 - 4; *see also* Exh. 5 ("summary tabulation"). St. Johnsbury also directs this Court to consider additional attorneys fees purportedly incurred in the Government litigation regarding activities related to the Creditors' Committee in the aggregate amount of

² An appropriate motion for relief from the Order pursuant to the bankruptcy rules and federal rules of civil procedure has not been filed with this Court to date. See Panama Processes, S.A. v. Cities Service Co., 789 F.2d 991 (2d Cir. 1986); In re United States, 733 F.2d 10, 13 (2d Cir. 1984); Virgin Atlantic Airways, Ltd. v. National Mediation Board, 956 F.2d 1245, 1255 (2d Cir. 1992); see also Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979); Reitz v. United States, 37 Fed.Cl. 330, 333-34 (1997).

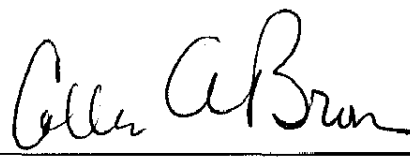
³ In addition to the procedural deficiencies referenced above, it is noteworthy that Liberty has previously advanced the position in these proceedings that the material facts underlying St. Johnsbury's allegations of bad faith are clearly disputed and should be resolved by a fact finder rather than the Court. See e.g., Liberty's Motion to Reconsider Order, dated May 27, 1999, at pp. 3; 23-25.

\$8,186.80. *See Declaration of Sarah L. Chenetz*, at Exh. C. Accordingly, it appears that the Debtor's computation of expenses incurred in defending against the Government claims totals \$69,686.80.

In its response, Liberty asserts that any St. Johnsbury's damage award should be limited to those fees incurred solely in St. Johnsbury's litigation with the Government in the "estimated" amount of \$61,000. While Liberty contends at length that it regards the additional fees in excess of \$900,000 purportedly incurred by St. Johnsbury in this litigation to be "unreasonable and not recoverable", it is not possible to discern from the various submittals whether there is any agreement regarding the reasonableness of the attorneys' fees "estimated" in the amount of \$61,000 or the additional claim of \$8,186.80. Moreover, it is likewise unclear whether any of the attorneys fees requested by St. Johnsbury have already been paid by others or approved as reasonable and necessary pursuant to any Orders issued by the United States Bankruptcy Court for the Southern District of New York. Unless the parties can stipulate to the amount of attorneys fees reasonably incurred by the Debtor in the Government litigation, then an evidentiary hearing will be required in order for this Court to make a determination of the amount of the reasonable attorneys fees due.

Based on the foregoing, the Application for Bad Faith Damages is denied in part, and granted in part, and the summary judgment motion is otherwise denied regarding the issue of bad faith. A hearing to determine the amount of reasonable attorney's fees incurred by the Debtor in connection with the Governmental Litigation is set for October 31, 2000 at the U.S. Bankruptcy Court in Rutland, Vermont.

Dated: September 27, 2000
Rutland, Vermont



Hon. Colleen A. Brown
United States Bankruptcy Judge

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