

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In Re:

PICO MOUNTAIN, INC.,
Debtor

Case # 96-10756
Chapter 7

JOHN R. CANNEY, III, TRUSTEE,
Plaintiff

v.

A.E.I. MUSIC NETWORK, ET AL.,
Defendants

Adversary Proceeding
97-1036

Appearances:

James B. Anderson, Esq.
Ryan, Smith & Carbine
Rutland, VT
Attorney for CVPS

Mary Kehoe, Esq.
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Burlington, VT
Attorney for Harold and Edith Herbert

MEMORANDUM OF DECISION

GRANTING MOTION OF CENTRAL VERMONT PUBLIC SERVICE CORPORATION

On July 28, 2002, Central Vermont Public Service Corporation (“CVPS”) filed a Motion to Determine Scope of Injunctive Order (doc. #52) seeking a determination that a prior injunction of this Court (hereinafter, the “Injunction”)¹ does not bar CVPS from now intervening in a state court action to collect the balance of a pre-petition debt owed to it by the Debtor, Pico Mountain, Inc. Harold and Edith Herbert (the “Herberts”), prior principals of the Debtor, oppose such an interpretation, arguing that the language of the Injunction unequivocally bars any such collection efforts (hereinafter, the “Opposition”).² For the reasons set forth below, the Court finds that CVPS’s intervention in the state court action is not barred by the Injunction.

¹ See Stipulated Order Approving Settlement and Granting Permanent Injunctive Relief (doc. #25), filed October 29, 1997.

² See Herberts’ Opposition to CVPS’s Motion to Determine Scope of Injunction and Cross Motion for Determination that the Bankruptcy Injunction Prohibits CVPS from Gaining Access to the Herberts’ Funds Held in Escrow (doc. #s 62 and 63).

I. JURISDICTION

This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§1334 and 157(b)(2)(O) and has authority to construe the scope of its prior orders pursuant to 11 U.S.C. §105.

II. FACTS

On October 3, 2002, the United States District Court entered an Order addressing the validity of the Injunction and affirming this Court's ruling that the Injunction could not now be set aside as void for lack of jurisdiction. See Central Vermont Public Service Corp. v. Harold and Edith Herbert, No.: 1:02cv187, slip op. (D. Vt. Oct. 3, 2002). For purposes of this proceeding, this Court adopts the district court's cogent recitation of the salient facts:

In December 1993, Harold and Edith Herbert purchased from The Howard Bank the mortgage and security agreements that encumbered the real estate and personal assets of Pico Ski Resort. In May 1995, they commenced an ultimately successful state court foreclosure action against Pico Ski Resort. In August 1995, the Herberts incorporated Pico Ski Resort as "Pico Mountain, Inc.," becoming its sole shareholders, officers and directors.

. . . On August 2, 1995, Harold Herbert orally promised Central Vermont Power Service Corp. (hereinafter "CVPS") that Pico's then outstanding utility bill would be paid if CVPS would continue utility service to the resort. [T]he parties disagree as to whether Mr. Herbert personally guaranteed payment or whether his promise to pay the arrearage was made in his capacity as a representative of a corporation. It appears that the outstanding bill was paid on the resort's behalf, and CVPS continued to supply Pico with power through the filing of its Chapter 7 petition on July 22, 1996.

On January 3, 1996, the Herberts acquired title through a Judgment and Decree of Foreclosure and Replevin to all of the real estate, equipment, inventory, accounts receivable, and other assets of Pico Ski Resort. The redemption date expired on January 18, 1996, and the Herberts took possession of the assets on January 19, 1996.

On July 2, 1996, the Herberts formed two other entities, Sherburne Pass Mountain Properties, LLC and Pico Mountain Operating Company, LLC. Subsequently, they conveyed Pico Ski Resort's real estate to Sherburne Pass Mountain Properties, and its tangible and intangible personal property assets to Pico Mountain Operating Company. On July 22, 1996, Pico Mountain, Inc. (d/b/a Pico Mountain Resort) filed its Chapter 7 petition. It scheduled no significant assets and over \$2.7 million of unsecured debts. On or about January 21, 1997, CVPS filed a proof of claim for electrical power it had supplied to the resort. As of August 2, 1996, the unpaid utility bill was \$214,802.79.

On December 9, 1996, the Herberts and their affiliated corporations [(collectively, the "Sellers")] sold the real and personal assets of Pico Ski Resort to Pico Management Co. and American Skiing Company, Inc. [(collectively, the "Buyers")]. The Herberts directly or indirectly received benefits at the closing totaling nearly \$2.5 million.

According to CVPS, under the [1996] Sales Agreement [hereafter, the “1996 Sales Agreement”)], Pico Management Co. was obligated to pay the outstanding utility bill. Pico Management Co. placed in escrow \$214,802.79 of sales proceeds to pay the CVPS bill.³ The Herberts did not disburse any closing funds to the creditors of Pico Mountain, Inc., including CVPS.

Apparently as a result of the Herberts’ transactions, the trustee of the bankruptcy estate of Pico Mountain, Inc., John Canney, investigated causes of action against Harold and Edith Herbert for alleged breaches of fiduciary duty toward the debtor. As a result, the Herberts and the trustee entered into a settlement agreement whereby the Herberts agreed to pay \$120,000 or thirty percent, whichever was less, of the allowed unsecured claims against Pico Mountain, Inc.

On or about May 28, 1997, Canney instituted an adversary proceeding in which he asked the Bankruptcy Court to approve his settlement with the Herberts and to enjoin creditors, including CVPS, from attempting any actions against the Herberts on the basis of alter-ego or other derivative liability theory.

On or about June 16, 1997, the summons and complaint was served on CVPS. Despite notice of the adversary proceedings, it is undisputed that CVPS did not enter an appearance or otherwise defend the trustee’s action to settle claims.

On October 29, 1997, [this] Court (Conrad, B.J.) entered the Stipulated Order Approving Settlement and Granting Permanent Injunctive Relief in Adversary Proceeding No. 97-1036. In pertinent part, the Order enjoins all creditors of the bankruptcy estate who filed proofs of claim against debtor from commencing or continuing any claim, or suit of any kind against Harold or Edith Herbert. On December 2, 1997, Judge Conrad entered Judgment by Default and ordered that the trustee did not have to serve the defaulting parties, including CVPS, with a copy of the injunction order.

Currently pending in Chittenden Superior Court is Harold Herbert and Edith Herbert v. Pico Management Co. and American Skiing Company, Inc. In that litigation, the Herberts allege they are entitled to the \$214,802.79 which was placed in escrow [(hereinafter, the “escrowed funds”)] to pay the CVPS utility bill. They rely on their agreement with the trustee, in which they paid the bankruptcy estate \$120,000 in exchange for an injunction and resolution of CVPS’ claim for unpaid utility bills. Because of the agreement and injunction approved by the Bankruptcy Court, CVPS claims it is unable to pursue its third-party creditor action against the Herberts and assert its entitlement to the escrowed funds. According to CVPS, on February 2, 2001, it received a payment of \$96,081.00, leaving an unpaid balance of \$193,399.00, plus interest.

On February 13, 2002, CVPS first appeared in the Adversary Proceeding and filed motions for relief from the default and injunction

Id. (internal citations omitted) (footnote added).

³Apparently, from the papers currently under consideration, it was American Ski Company, Inc. (“ASC”), not Pico Ski Area Management Company, that was holding the escrowed funds. The funds have subsequently been turned over to counsel for the Herberts and continue to be held in trust until such time as ownership of said funds can be determined by a court of competent jurisdiction. For convenience, the Court shall refer to the Buyers as the holders of the escrowed funds in question, although this does not alter the fact that said funds continue to be held in trust until such time as ownership of the funds is determined.

III. ISSUE PRESENTED

Despite the complexity of the underlying transaction, the possibly inconsistent terms of the 1996 Sales Agreement, and the myriad legal proceedings to date, the sole issue before the Court is whether the Court's 1997 Injunction (doc. #25-1) entered by the Court (Conrad, J.) bars CVPS from intervening in the state court action entitled Harold Herbert and Edith Herbert v. Pico Ski Area Management Company & American Skiing Company, Inc., No. S1268-00CnC (Vt. filed Sept. 28, 2000). Specifically, the question of whether CVPS has any right to the escrowed funds which are the subject of the state court action is *not* before the Court. If this Court determines that CVPS is not barred from intervening, then the state court will determine the validity of CVPS's claim against the escrowed funds.

IV. DISCUSSION

The injunction language at issue in this proceeding is, on its face, quite straightforward. It provides:

3. Pursuant to 11 U.S.C. Section 105, all creditors of the bankruptcy estate who were (a) listed by the Debtor on its schedules, or (b) have filed proofs of claim against Debtor, or (c) were listed as defendants in this action, are hereby permanently enjoined from commencing or continuing any claims, complaint, demand, action, cause of action, or suit of any kind or nature, direct or derivative, against Harold L. Herbert or Edith Herbert, or their heirs, executors, administrator, agents, and attorneys, and all such creditors are deemed to have waived such claim, complaint, demand, action, cause of action, or suit of any kind of nature, direct or derivative against Harold L. Herbert or Edith Herbert, or their heirs, executors, administrators, agents, and attorneys.

Injunction at 2 (doc. #25-1). While the parties argue for different interpretations of the Injunction, the focus of both parties' arguments concern three particular terms within the Injunction, paraphrased as:

- (1) the bar against any *direct suit* against the Herberts;
- (2) the bar against any *derivative suit* against the Herberts; and
- (3) the bar against any suit against *an agent* of the Herberts.

(For convenience, the Court will hereafter collectively refer to the above-italicized phrases as "the key provisions".) CVPS argues that intervening in the current state court action is not barred by the Injunction

because their attempt to collect the debt from the escrowed funds being held from the 1996 closing is neither (a) a direct suit against the Herberts; nor (b) a derivative suit against shareholders of the Debtor; nor (c) a suit against an agent of the Herberts. Conversely, the Herberts argue that CVPS's intervention into the state court action violates all three of the key provisions of the Injunction.

A. Whether This is a Direct Suit

Both the arguments of counsel and the documents filed in this proceeding to date make it clear that CVPS wishes to intervene in the state court action to claim a right to the escrowed funds held by the Buyers. See, e.g., Buyers' Motion for Joinder at 2, attached as Ex. C to Herberts' Opposition (doc. #s 62 and 63). It is CVPS's position that the escrowed funds are being held for the specific purpose of paying a utility bill owed to CVPS. Thus, CVPS argues the escrowed funds do not belong to the Herberts.

A determination on whether CVPS is attempting to engage in a direct suit against the Herberts cannot be made, however, until the state court rules on the issue of ownership of the escrowed funds. At this point, therefore, this Court can make only a contingent ruling on this particular issue. To the extent the state court finds the escrowed funds do belong to the Herberts, this Court finds the Injunction prohibits CVPS from pursuing any claim to the funds. Conversely, to the extent the state court finds the escrowed funds do not belong to the Herberts, and/or that the funds are being held by the Buyers as stakeholders, then the Court finds that CVPS is not barred by the Injunction from pursuing its claim for payment. Indeed, the Herberts concede this point. See Herberts' Opposition at 1 ("The Herberts concede that the injunction in dispute does not bar any direct claims CV[PS] may have against [the Buyers].").

B. Whether This is a Derivative Suit

The Herberts argue that any claim that was originally against them, but is now being interposed against another party is, by definition, "derivative." Unfortunately, the Herberts' definition is too broad. As CVPS persuasively argues, "derivative" is a term of art, with a specific, narrow meaning. To support its argument, CVPS refers the Court's attention to Fed. R. Civ. P. Rule 23.1, addressing derivative actions by shareholders. Rule 23.1 deals with derivative actions by shareholders, where a right is asserted by shareholders on behalf

of a corporation after the corporation has failed to enforce the right. See Rule 23.1; cf., BLACK’S LAW DICTIONARY 443-44 (6th ed. 1990) (“**Derivative action.** A suit by a shareholder to enforce a corporate cause of action. . . . An action is a derivative action when the action is based upon a primary right of the corporation, but is asserted on its behalf by the stockholder because of the corporation’s failure, deliberate or otherwise, to act upon the primary right.”). The Court agrees with CVPS that the use of “derivative” connotes a specific, narrow type of action, namely, one brought by a shareholder on behalf of a corporation. Accordingly, the Court finds CVPS’s intervention in the state court action does not constitute a derivative suit against the Herberts as that term is commonly used within the legal community and as that term is used within the context of the Injunction. See, e.g., Trustee’s Verified Complaint for Injunctive Relief at ¶3, ¶9, and ¶2 of prayer for relief (p.23) (doc. #1).

C. Whether This is a Suit Against an Agent

The Herberts argue that the Buyers hold the escrowed funds as an agent of the Herberts, see Herberts’ Opposition at 6; and, therefore, CVPS’s attempt to intervene in the state court action violates the Injunction since the Injunction bars any action against an agent of the Herberts. In support of this argument, the Herberts direct the Court’s attention to the Buyers’ Motion for Joinder. See Ex. C. to Herberts’ Opposition (hereinafter, the “Buyers’ Motion for Joinder”). However, the Buyers’ Motion for Joinder does not support the Herberts’ characterization of the Buyers’ relationship to the Herberts. Rather, it contradicts the Herberts’ assertion that the Buyers are the Herberts’ agent. In their Motion for Joinder, the Buyers identify themselves as stakeholders of the monies in question. See Buyers’ Motion for Joinder at 2. Moreover, they “take no position as to who is properly entitled to the money,” id. at 3, although they acknowledge that both the Herberts and CVPS may have claims to the money. See id.

A stakeholder is “[a] disinterested third party who holds money or property, the right to which is disputed between two or more *other* parties.” BLACK’S LAW DICTIONARY 1412 (7th ed. 1999) (emphasis added). Conversely, an agent is one who has permission to act on behalf of another. See, e.g., Springfield Hydroelectric Co. v. Copp, 172 Vt. 311, 317 (2001) (quoting Kimco Leasing Co. v. Lake Hortonia Properties,

161 Vt. 425, 429 (1993) (“An agency relationship results when one party consents to another party acting as its agent.”); *and* quoting RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”)). In this instance, the Court finds no evidence that the Buyers are the agents of the Herberts.⁴ The simple fact that the Buyers “refused to give the Herberts the [escrowed] money until the Herberts obtained an agreement from CVPS that the Herberts are entitled to the money,” Buyers Motions for Joinder at 2, flies in the face of the Herberts’ assertion that the Buyers are, indeed, the Herberts’ agent. There is no credible evidence before the Court that the Buyers intended to be, or perceive themselves to be, acting on behalf of the Herberts. Given the record before it, the Court is persuaded that the Buyers are merely stakeholders in this dispute. Hence, the Court finds the Buyers are not the Herberts’ agent and that a claim by CVPS against the Buyers is not barred by the Injunction’s language prohibiting suits against agents of the Herberts.

CONCLUSION

For the reasons set forth above, the Court finds that CVPS is not barred by the Injunction from intervening in the Vermont state court action entitled Harold Herbert and Edith Herbert v. Pico Management Co. and American Skiing Company, Inc., No. S1268-00CnC (Vt. filed Sept. 28, 2000), provided CVPS takes no action against funds determined to be property of the Herberts and takes no action which is inconsistent with this Memorandum of Decision.

This Memorandum constitutes the Court’s findings of fact and conclusions of law.

November 26, 2002
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge

⁴Since there is no evidence of an escrow agreement, the Court need not address whether the Buyers are escrow agents in this transaction.