IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	
	)	
PA CO-MAN, INC.,	)	**Bankruptcy No. 20-20422-JAD**
	)	
Debtor.	)	**Chapter 7**
_____	**X**	
	)	**Related to ECF 369**
AUA PRIVATE EQUITY PARTNERS, LLC and AOG, LLC,	)	
	)	
Movant,	)	
	)	
- v -	)	
	)	
KIND OPERATIONS, INC.,	)	
	)	
Respondent.	)	
_____	**X**	

ORDER DENYING
THE CHAPTER 7 TRUSTEE'S
MOTION TO ALTER OR AMEND JUDGMENT

Pending before the Court is a motion filed at ECF 369 titled: *Trustee Crawford's Motion to Alter or Amend a Judgment under Bankruptcy Rule 9023* [sic] *the Court's Memorandum Opinion Limited to Trustee's Request that the Memorandum Order Omit References to the Trustee or in the Alternative The Memorandum Opinion Include Clarifying Facts Noting the Basis for the Trustee's Actions* (the "Motion to Alter or Amend").

The Motion to Alter or Amend is a core proceeding which the Court has jurisdiction to hear and decide on a final basis. See 28 U.S.C. §§ 157(b)(2)(A), 157(b)(2)(B), 157(b)(2)(E),157(b)(2)(G), 157(b)(2)(M), 157(b)(2)(O) and 1334.

By the Motion to Alter or Amend, the Chapter 7 Trustee takes issue with statements contained in the *Memorandum Opinion* issued by the Court at ECF 364, which explained why the Court was entering a final order at ECF 365 which, in-turn, enforced the automatic stay against Kind Operations, Inc. ("Kind").

Because the Court writes for the parties, the Court need not re-hash the background of this case and incorporates herein both its *Memorandum Opinion* found at ECF 364 and its opinion reported at Kind Operations, Inc. v. Cadence Bank et al. (In re Pa-Co Man, Inc.), 644 B.R. 553 (Bankr. W.D. Pa. 2022).

The Court appreciates the Chapter 7 Trustee's motion, and, respectfully, reminds the Chapter 7 Trustee that the Court is fully aware of the details of this case and the estate's assignment of certain of the estate's causes of action to Kind.

Upon review of the Court's *Memorandum Opinion* at ECF 364, the Court finds that nothing that the Court wrote is erroneous.

Indeed, the Court is surprised that the Chapter 7 Trustee is of the view that she is powerless to hold Kind to its responsibility of not putting its own self-interest ahead of the estate's interest with respect to the assigned causes of action.

Stated in other words, the Court is surprised that the Chapter 7 Trustee believes she is muted from seeking judicial redress to any efforts by Kind to unilaterally usurp for its own benefit assets which are protected by the automatic stay.

The record is clear that Kind was authorized to pursue the estate's causes

of action as assignee of the Chapter 7 Trustee, and that (a) the bankruptcy estate owns a residuary 15% interest in the recoveries and (b) Kind (since it is funding the litigation) owns a residuary 85% interest in the recoveries. See *Settlement Agreement* at para. 5(g).

Suggesting that the Chapter 7 Trustee's agreement with Kind operates as a full abdication of the Chapter 7 Trustee's duties is contrary to the sharing agreement between Kind and the estate. Such a belief is also inconsistent to the Chapter 7 Trustee's duties under 11 U.S.C. § 704, and is contrary to representations made to the Court throughout this bankruptcy case.

For example, in the joint motion supporting the assignment of estate claims to Kind for prosecution, Kind acknowledged that the Chapter 7 Trustee's arrangement with Kind is "a collaboration with and transfer of risk to [Kind] for pursuing third party claims on behalf of all creditors[.] See ECF 135, p. 4.

This joint motion further represented to the Court that "[Kind] is offering the estate its best opportunity to provide recovery to creditors." Id. at p. 5.

At the February 19, 2021 hearing on the joint motion approving the settlement, the Court expressly inquired regarding the potential conflicting interests between Kind and the Chapter 7 Trustee. See *Transcript of Hearing Held February 19, 2021* (ECF 144) at p. 25. In this regard, the Court pressed counsel with the following question:

> Now in terms of these third party claims . . . that the trustee would turnover to [Kind] to carry the laboring oar and prosecute[,] tell me how would they be

> prosecuted? Because if [Kind] may very well have its own independent actions against these parties. Again, my comment shouldn't be viewed as ruling either positively or negatively there, but there's always a possibility. But then of course there are generalized claims that the estate would have against these folks. So explain to me under this settlement agreement if [Kind] is carrying the laboring oar and making prosecutorial decisions on these civil actions how will these decisions be managed so that the bankruptcy estate's remaining interest will be effectively represented and not abandoned after. . . you folks leave here today?

See ECF 144 at pp. 25-26.

Counsel to Kind responded to this question by representing that the Chapter 7 Trustee will not be "cut out of the loop" as to the prosecution of the estate's causes of action and said:

> Judge, I can answer that directly in a couple of different ways. One, the trustee will absolutely continue to be part of the process to understand where we are, what kind of decisions are being made, if there's potential settlements. Determinations as to whether the claims are valid or not valid[,] the trustee will one hundreds percent be kept in the loop.

Id. at p. 26.

Obviously, the Court's questioning of counsel was to insure that the estate's interests are being pursued under the settlement agreement (and that Kind would not be abandoning valuable estate claims in favor of Kind's own self-interest).

Along this same vein, and at a May 4, 2021 hearing held thereafter when counsel for Kind was seeking Bankruptcy Rule 2004 discovery to advance the estate's causes of action, counsel to Kind reiterated its representations that Kind

was pursuing the causes of action assigned under the settlement agreement for the estate's "residual benefit." See *Transcript of Hearing Held May 4, 2021* (ECF 347) at pp. 8-9.[1]

In the course of granting Kind's motion for Bankruptcy Rule 2004 discovery, the Court made its view known (with nary an objection by Kind or the Chapter 7 Trustee) and held:

> I'm inclined to authorize 2004 discovery. The estate is not [a party] to that [i.e., New York state court] litigation. There is no prior pending action involving the estate. [Kind's] discovery is concerning potential estate causes of action. The estate should be permitted to undertake 2004 discovery to determine whether any of these estate claims and causes of action are viable.
>
> I appreciate the fact that targets of 2004 discovery don't like being a recipient of it. I get that. I also appreciate the fact that some of the targets here are parties to that non-bankruptcy forum litigation, and I get that.
>
> But, again, the estate is entitled to pursue its 2004 discovery. And [Kind] is an assignee of those estate causes of action. And in fact they have the fiduciary duty to pursue them.
>
> When we had the hearing on the motion to approve settlement, I raised questions and had a colloquy with counsel in terms of, you have [Kind] has its direct claims, the estate has its own claims and about the fact that [Kind] should not be putting its own interest ahead of the estate when it owns both claims, because there is a commitment in the settlement agreement to

[1] Counsel also emphatically represented that it was not counsel to Kind in certain New York state litigation where Kind was pursuing its own self-interest, and that the New York state court litigation was dismissed with respect to successor liability litigation against AUA Private Equity Partners, LLC and AOG, LLC. See ECF 347 at pp. 9-11 and 21-22.

> remit back to the estate its portion of any type of either settlement proceeds or recoveries in any type of those estate causes of action. So, there is definitely an estate interest here.

Id. at p. 31-32.

With the estate having a residuary interest in the litigation being prosecuted by Kind, the Chapter 7 Trustee certainly has the duty to protect the estate's interests.

The Court reaches this conclusion because (1) the record supports the Court's conclusions, (2) the settlement agreement provides for the estate retaining its 15% residuary interest, (3) Kind has acknowledged that it is prosecuting the estate claims for the benefit of the estate's creditors (which includes Kind), (4) the automatic stay of 11 U.S.C. § 362(a) protects assets of the estate, (5) the Chapter 7 Trustee has the requisite standing to seek enforcement of the automatic stay, Böhm v. Howard (In re Howard), 428 B.R. 335, 337-38 (Bankr. W.D. Pa. 2011)(relying on In re Atlantic Business And Community Corporation, 901 F.2d 325 (3d Cir.1990) and holding that a bankruptcy trustee may seek damages for a willful violation of the stay), and (6) 11 U.S.C. § 704 provides that the Chapter 7 Trustee is accountable for all property of the estate.

Not to be lost in this analysis is the fact that the Chapter 7 Trustee takes issue with respect to the Court's observation about the potential conflict position counsel for Kind found itself. Here, the Chapter 7 Trustee correctly points out that counsel for Kind was not appointed by the Court as special counsel for the

Chapter 7 Trustee pursuant to 11 U.S.C. § 327.

What the Chapter 7 Trustee neglects to consider, however, is that the Court's observations regarding conflicts of interest had nothing to do with 11 U.S.C. § 327. Rather, the Court's comments were directed to a matter of professional responsibility.

Here, the facts of this case are that counsel was well aware that the successor liability cause of action is property of the bankruptcy estate, that the estate held a residuary interest, that (because Kind was assigned and reposed with the authority to prosecute the successor liability action for the benefit of all creditors) Kind was a fiduciary with respect to the same, that the Court expected counsel to Kind would prosecute the action for the benefit of all beneficiaries of the cause of action and keep the Chapter 7 Trustee "in the loop," and that counsel inexplicably put Kind's interests ahead of the estate's interests. Thus, the Court raised its concern regarding conflicts of interest.

Rule 1.7 of Pennsylvania's Rules of Professional Conduct supports the Court's observation, and this rule states, in pertinent part, that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." See Pa.R.P.C. 1.7.

Rule 1.7 states that a "concurrent conflict of interest" exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person[.]"

Clearly, a fiduciary duty towards the estate with respect to the prosecution

of the assigned actions is a "responsibility" to a "third person" that falls within the ambit of the attorney ethical rules in Pennsylvania. Accordingly, the Chapter 7 Trustee's complaint is not persuasive.

Federal Rule of Civil Procedure 59(e), incorporated into this bankruptcy case by operation of Federal Rule of Bankruptcy Procedure 9023, affords bankruptcy courts with the power to alter or amend judgments after their entry.

Applicable law provides that such motions, like the Motion to Alter or Amend, will not be granted absent extraordinary circumstances. Ellenberg v. Bd. of Regents of Univ. Sys. of Ga. (In re Midland Mechanical Contractors, Inc.), 200 B.R. 453, 456 (Bankr. N.D. Ga. 1996).

The standard for relief is high. In re Secivanovic, Civ. No. 06-3098 (GEB), 2006 WL 3109007 at *3 (D.N.J. 2006). When asking for Rule 59(e) relief, the movant has the burden of demonstrating either: (1) an intervening change in controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3rd Cir. 1999)(citing N. River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194, 1218 (3rd Cir. 1995)).

Upon a complete review of the motion as written, the Court concludes that the Chapter 7 Trustee has not met her burden under these applicable standards.

The Court further notes that under applicable law, "[t]he Court will grant a motion for reconsideration only when its prior decision has overlooked a factual

or legal issue that ***may alter*** the disposition of the matter." In re Secivanovic, at *3 (emphasis added)(citing United States v. Compaction Sys. Corp., 88 F. Supp. 2d 339, 345 (D.N.J. 1999)).

The Motion to Alter or Amend filed by the Chapter 7 Trustee has no quarrel with the actual order or judgment entered by the Court at ECF 365. For instance the Motion to Alter or Amend states: "Trustee Crawford is not challenging this Honorable Court's findings against Kind[.]" See ECF 369 at p.2. It further states that "Trustee Crawford is not disputing this Honorable Court's Order as to the finding against Kind[.]" See also id. at p. 5.

The face of the Court's order at ECF 365 reflects that it is a final order or judgment against Kind. No judgment has been entered against the Chapter 7 Trustee. Even if the Chapter 7 Trustee's motion was accepted as true in all respects, her motion objects only to words stated in the Court's *Memorandum Opinion* (with respect to the Chapter 7 Trustee's duties), and raises no real case or controversy since the motion does not seek *vacatur* or modification of the Court's order entered at ECF 365 enforcing the automatic stay against Kind. For this reason, it is appropriate to deny the Motion to Alter or Amend. Cf. Black v. Cutter Laboratories, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956)(judgments are appealed from, not words in opinions); Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1540 (Fed.Cir.1983)(same).

For all of these reasons, the Motion to Alter or Amend is DENIED.

The Honorable Jeffery A. Deller
United States Bankruptcy Judge

cc: All Counsel of Record

FILED
8/24/23 7:48 am
CLERK
U.S. BANKRUPTCY
COURT - WDPA