UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

GAINEY CORPORATION, *et al.*,	Case No. DG 08-09092
	Chapter 11
Debtors.	Hon. Scott W. Dales

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MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

Barry P. Lefkowitz, the Liquidation Trustee of Gainey Corporation and various affiliates,[1] filed an objection (the "Objection," DN 2895) to two related proofs of claim filed by creditor Larry Cannioto. Mr. Cannioto filed a response (DN 2905), and the court held a hearing on August 21, 2014, in Grand Rapids, Michigan, at which Mr. Cannioto appeared *pro se*, and the Liquidating Trustee appeared through counsel. The parties did not request an evidentiary hearing, and it appears to the court that it may resolve this dispute by reference to the documents on file and applicable law.

I. JURISDICTION AND AUTHORITY

The United States District Court has jurisdiction over the Debtors' bankruptcy cases pursuant to 28 U.S.C. § 1334(a), and has referred the cases and related proceedings to the United States Bankruptcy Court pursuant to 28 U.S.C. § 157 and LCivR 83.2(a) (W.D. Mich.). Because the contested matter involves the claims allowance process —at the heart of the bankruptcy

[1] Mr. Lefkowitz (the "Liquidating Trustee") was appointed to serve with respect to the estates of the following Debtors: Gainey Corporation (Case No. 08-09092); Gainey Transportation Services, Inc. (Case No. 08-09094); Super Service, Inc. (Case No. 08-09096); Freight Brokers of America, Inc. (Case No. 08-09109); Lester Coggins Trucking, Inc. (Case No. 08-09095); and Gainey Insurance Services, Inc. (Case No. 08-09097).

court's traditional authority— the court does not hesitate to enter a final order resolving the controversy, notwithstanding *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594 (2011), and related authorities.

II. ANALYSIS

For purposes of the Objection, the parties evidently agree that Mr. Cannioto and one of the Debtors' truck drivers were involved in a motor vehicle accident on or about September 17, 2006, in Maryland. The accident occurred well before the Debtors filed for relief in this court on October 14, 2008 (the "Petition Date").

Alleging property damage, lost wages, and personal injuries as a result of the prepetition accident, Mr. Cannioto filed Claim No. 78 (for property damage and lost wages) and Claim No. 243 (for personal injury) (the "Claims"). The Liquidating Trustee objects to the Claims on the grounds that Mr. Cannioto did not timely prosecute them against the Debtors' insurance carriers as contemplated in Debtors' First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Finally Modified (the "Plan," DN 1752), and the court's order confirming the Plan (the "Confirmation Order," DN 1749).[2]

More specifically, the Liquidating Trustee asserts without contradiction that, given the nature of the Claims, Mr. Cannioto holds "Unsecured Liability Claims" falling under Class V of the Plan. *See* Plan at § 1.94 (defining term). With respect to such claims, the Plan requires claimants such as Mr. Cannioto to pursue recovery from the Debtors' insurance carriers in a non-bankruptcy court, up to applicable policy limits, and to obtain either a settlement or final court

[2] Until the Liquidating Trustee filed a timely Objection, Mr. Cannioto's claim was "deemed allowed" under § 502(a). *See* 11 U.S.C. § 502(a) (claim is deemed allowed unless a party in interest objects); *see also* Plan at § 1.6 ("Allowed" means, with reference to any claim, that the claimant has timely filed proof of the claim … "as to which no objection to the allowance thereof . . . has been interposed within the applicable period of limitation fixed by the Plan . . ."). Now that the well-supported Objection has been filed, the Claims are no longer presumptively allowed.

order establishing their claims. To the extent that any Class V claim exceeds the amount of the insurance coverage, the claimant may share *pro rata* with similarly situated creditors from a $200,000.00 fund established for the purpose of paying such excess liability claims. *See, generally*, Plan at § 4.5.

The Liquidating Trustee contends, again without contradiction, that Maryland law specifies a three-year limitation period for accident-related claims such as those that Mr. Cannioto asserts. *See, e.g.*, Md. Cts. & Jus. Proc. Code § 5-101 *et seq*. He recognizes, of course, that the automatic stay enjoined Mr. Cannioto from pursuing the Claims, and that the limitation period was tolled as a matter of federal law while the stay remained in effect. *See* 11 U.S.C. §§ 108(c) (tolling) and 362(a) (automatic stay). The Liquidating Trustee argues, however, that the automatic stay expired on January 19, 2010 (the "Effective Date" of the Plan), as set forth in the Confirmation Order, and that Mr. Cannioto failed to commence suit against the Debtors' insurance carriers, contrary to the Plan's requirements for allowing Class V claims. *See* Confirmation Order at ¶ 53; *see also* Plan at § 4.5(b). According to the Liquidating Trustee, the period for timely commencing suit on the Claims expired under the applicable statute of limitations as tolled, thirty days after the automatic stay terminated —on February 18, 2010 by the court's calculation.

Mr. Cannioto does not dispute that the three year period applies to the Claims, and does not contend that he ever filed suit against the Debtors' insurance carriers. Instead, he argues that he never received formal notice that the automatic stay was terminated either because the Debtors sent the Confirmation Order to his former address or because they sent it to his former lawyer. He also relies on Maryland's "discovery rule" to

insulate him from the consequences of not filing suit against the insurers within the time prescribed in the Plan.

As for the argument that Mr. Cannioto lacked notice of the entry of the Confirmation Order (and therefore the termination of the automatic stay), the certificate of service (DN 1758) establishes that the Debtors timely served the notice of entry of the Confirmation Order upon Mr. Cannioto by mail at 84 Pleasant Street, in Wellsville, New York —the same address reflected on both proofs of claim. Under the applicable rule, "a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address." Fed. R. Bankr. P. 2002(g). Moreover, the instructions accompanying the official proof of claim form (including the version of the form that Mr. Cannioto used) admonish creditors that they "have a continuing obligation to keep the court informed of [their] current address." *See* Form B10 (Official Form 10) (12/08) (Instructions for Proof of Claim Form). If Mr. Cannioto did not receive notice of the entry of the Confirmation Order shortly after its entry, it is because he did not update his address with the court, as the rule and proof of claim form require.

As for the arguments based upon Maryland's three-year limitations period or the discovery rule of tort law,[3] the court finds it unnecessary to resolve this aspect of the parties' dispute. Limitations or time-bar arguments are part of the process of liquidating any claim, but in this case the Plan assigns the task of liquidating Unsecured Liability

[3] The court assumes Mr. Cannioto is arguing that his cause of action accrued when he "in fact knew or reasonably should have known of the wrong." *Poffenberger v. Risser*, 431 A.2d 677, 680 (Md. 1981). Certainly, his presence in his truck at the time of the accident must have alerted him to something. From his statements during oral argument, it appears that he is not invoking Md. Cts. & Jus. Proc. Code § 5-203, governing situations in which "the knowledge of a cause of action is kept from a party by the fraud of an adverse party . . . ." Indeed, he never hinted at any fraud on the part of the Debtors or the Liquidating Trustee, and simply suggested that he did not know the extent of his injuries until fairly recently.

Claims to a non-bankruptcy forum: the Plan requires Class V claims to be liquidated "by a court of competent jurisdiction," and lifts the automatic stay on the Effective Date for that purpose. The Plan also states, in relevant part, as follows:

> *To the extent* that any holders of an Unsecured Liability Claim shall be determined by a Final Order, or by an agreement acceptable to any applicable Insurers and the Debtors, after consultation with the Committee, to hold a claim in excess of the amounts payable under any applicable insurance of the Debtors, *such Unsecured Liability Claim shall only be Allowed in such excess amount* and, in satisfaction thereof, each holder of an Unsecured Liability Claim shall receive its Pro Rata share of $200,000, payable in Cash within thirty (30) days of the date of the entry of a Final Order determining all such Unsecured Liability Claims.

Plan at § 4.5(b) (emphasis added). In other words, Mr. Cannioto is not entitled to participate in any distribution under the Plan for personal injury or property-related claims (i) until a non-bankruptcy court has reduced his Claims to a money judgment (or the parties reach a settlement), and (ii) unless the amount of the judgment (or settlement) exceeds the insurance policy limits. Because he did not pursue this avenue of relief and cannot establish in this court that his Claims exceed the policy limits, the court cannot allow his Claims, regardless of any state law limitations period.[4]

Given that most Unsecured Liability Claims would likely involve personal injury torts, it makes sense for the Plan to assign the liquidation of such claims to a non-bankruptcy tribunal: a bankruptcy court lacks the authority to resolve personal injury claims. *See* 28 U.S.C. § 157(b)(5). In effect, a ruling such as the Liquidation Trustee requests that Mr. Cannioto's personal injury claim is time-barred would exceed the

[4] Indeed, with respect to Claim No. 78 (the property damage and lost wages claim against Gainey Transportation Services, Inc.), the amount of the claim falls far below the $1,000,000 insurance cap described in the Plan, and so could in no event give rise to any excess over that cap, even if Mr. Cannioto had filed suit against an appropriate insurance company.

court's authority under the Plan and the Judicial Code. Ruling on the limitations argument would amount to granting declaratory relief concerning Mr. Cannioto's unfiled lawsuit to recover money from the Debtors' insurance carriers. Procedurally, this would require an adversary proceeding, assuming, *arguendo*, the bankruptcy court had authority to preside. *See* Fed. R. Bankr. P. 3007(b) and 7001(9).

To resolve the Objection, it is enough to find, as the court does, that Mr. Cannioto does not hold an "Allowed" Unsecured Liability Claim because he has not taken the steps necessary under the Plan to qualify his Claims for allowance. Therefore, the court will sustain the Objection on that ground, without resolving the statute of limitations arguments.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Objection (DN 2895) is SUSTAINED to the extent set forth herein.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Gainey Corporation, Barry P. Lefkowitz, Larry Cannioto, the United States Trustee, and all parties requesting notice of these proceedings.

END OF ORDER

IT IS SO ORDERED.

Dated August 29, 2014

Scott W. Dales
United States Bankruptcy Judge