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

Alexandria Division

LOU POLLER, Appellant,	)	
v.	)	Civil Action No. 82-0422-A Civil Action No. 82-0865-A
NOVA REAL ESTATE INVESTMENT TRUST, Appellee.	)	

MEMORANDUM OPINION

Appellant Lou Poller is an unsecured creditor of appellee Nova Real Estate Investment Trust (Nova). Poller has an unliquidated tort claim pending against the debtor in a Florida state court. Nova also was the subject of a recently terminated bankruptcy reorganization. Poller appeals from the order of the bankruptcy judge estimating his claim and confirming the debtor's plan of reorganization. The court has jurisdiction over this appeal pursuant to section 405(c) of the Bankruptcy Reform Act of 1978. See Pub. L. No. 95-598, § 405(c)(1)(C), 92 Stat. 2549 (1978).

I. FACTUAL BACKGROUND

On June 26, 1978, Poller instituted a suit in the Circuit Court for Dade County, Florida for claims arising from his participation in a real estate project. The defendants in this action were Nova, First Advisors, Inc. (Advisors), Arlington Mortgage Corp. (Arlington), and First Virginia Bankshares Corp. (Bankshares). Arlington and Advisors are wholly owned subsidiaries of Bankshares. Advisors was the original advisor to Nova. Thus, Bankshares effectively controlled Nova until Nova filed for reorganization.

Four counts of the complaint are still pending in the Florida state court: (1) a libel and slander claim against all the defendants; (2) a claim aginst Nova for settling a claim against Maryland Casualty Co. in bad faith; (3) a claim for an accounting of assets against all defendants; and (4) a claim for

preferential payments and other misconduct by Nova. The state court dismissed seven other counts on summary judgment. Poller plans to appeal the dismissal of these counts at the conclusion of the Florida litigation.

On October 30, 1980, Nova filed a petition for reorganization under chapter 11 in the United States Bankruptcy Court for the Eastern District of Virginia. See 11 U.S.C. §§ 1101-1174 (Supp. II 1978). On January 12, 1981, Nova attempted to remove the Florida litigation to the Virginia bankruptcy court. See 28 U.S.C. § 1478(a) (Supp. II 1978). The Virginia bankruptcy court, however, refused to rule on this motion, because it was not "the bankruptcy court for the district where such civil action is pending." Id. Nova then filed its removal motion in the bankruptcy court for the Florida district in which the civil action was pending. The Florida bankruptcy court denied the motion and remanded the case to the state court. See id. § 1478(b). This remand is not reviewable on appeal. See id.

After this denial of the removal motion, Poller filed a petition to modify the automatic stay precluding state court litigation. See 11 U.S.C. § 362(d) (Supp. II 1978). He requested permission to proceed with the Florida state-court litigation. On July 10, 1981, the Virginia bankruptcy court granted this motion on the condition that Poller would not attempt to enforce any judgment that he might obtain.

In June, 1981, Poller realized that the expiration date for filing claims with the bankruptcy court was approaching. He, therefore filed an unliquidated claim for $12 million based on the pending Florida case. See id. § 501(a). Failure to file this claim before the deadline would have resulted in its discharge upon confirmation of the plan. See id. § 1141(d)(1)(A).

Nova filed an objection to Poller's claim. See id. § 502(a). It also moved the court to estimate the claim under section 502(c)(1). See id. § 502(c)(1). Finally, Nova agreed to pay the full amount of the estimated claim, so that the claim fell into the category of unimpaired claims. This classification of the claim deprived Poller of any right to vote on acceptance of the reorganization plan. See id. § 1126(f).

Poller opposed estimation of his claim on the ground that the Florida state court alone had jurisdiction to determine the validity and amount of his claim. Poller further contended that estimation was a way to circumvent the Florida bankruptcy court's decision to remand the state court litigation. The bankruptcy court, nonetheless, granted the motion to estimate on the ground that awaiting liquidation of the claim in state court "would unduly delay the closing of the case." Id. § 502(c)(1). After an eight-day hearing, the bankruptcy court estimated the Poller claim at $2,225,000. This amount was sufficiently low to make the proposed reorganization plan feasible.

On March 29, 1982, the court announced its estimate and confirmed Nova's plan. Poller now appeals the confirmation and estimation orders on six major grounds. First, he claims that the bankruptcy court was without jurisdiction to estimate his claim, because the Florida bankruptcy court had denied removal and remanded the litigation to state court. Second, he asserts that the bankruptcy court was without jurisdiction over his claim under the Supreme Court's recent decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 50 U.S.L.W. 4892 (June 28, 1982). Third, he argues that the bankruptcy court erred in using the estimation procedure, because his claim was not amenable to estimation. Fourth, he contends that estimation without a jury deprived him of his due process right to have a jury decide his dispute with Nova. He had requested a jury in the Florida case. Fifth, he alleges that the bankruptcy court could not estimate his claim for purposes of determining the feasibiltiy of the plan, because the debtor had listed the claim as unimpaired. Finally, Poller claims that the bankruptcy court made errors in estimating the amount of the claim.

II. LEGAL ANALYSIS

Although there are numerous claims presented to this court on appeal, the threshold issues are the attack on jurisdictional power of the bankruptcy court and the standard of proof for a § 502(c)(1) estimation hearing.

For the reasons outlined below, the bankruptcy court's decision is AFFIRMED.

Appellant Poller attacks the power of the bankruptcy judge to hear and determine the validity of his claims against Nova. The Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co., supra, had no retroactive effect and was not to become effective until October 4, 1982. Under a special directive by the Supreme Court, that date was extended until December 24, 1982. Absent change by Northern Pipeline, supra, a bankruptcy judge retains jurisdiction under the Bankruptcy Act to conduct a § 502(c)(1) estimation hearing.

Poller next challenges the court's jurisdiction on the theory that it had somehow divested itself of jurisdiction when (1) it refused to remove the state proceeding and (2) when the Florida bankruptcy court denied removal, and remanded the litigation to state court. The Florida bankruptcy court did not divest the Virginia bankruptcy court of its original jurisdiction over the bankruptcy. See 28 U.S.C. § 1471(a). Nova filed for Chapter 11 reorganization in the Eastern District of Virginia, Alexandria division, and that is where the original jurisdiction remains.

The bankruptcy judge acted within his power when he conducted the § 502(c)(1) estimation hearing. It is this court's view that § 502(c)(1) hearings are within the jurisdictional purview established by 28 U.S.C. § 1471. As Judge Bostetter noted in his memorandum opinion, the language of § 502(c)(1) "is mandatory, not permissive, and creates in the Court an affirmative duty under proper circumstances to estimate any unliquidated claim such as Poller's." See Bankruptcy Judge's Memorandum Opin. at 5. The wording of the section and the intent of Congress, as reflected in the legislative history, supports the bankruptcy court's exercise of jurisdiction. In drafting § 502(c)(1), both the Senate and the House intended for the bankruptcy court to estimate any claim, actual liquidation of which would unduly delay closing of the estate. See House Report No. 95-595, 95th Cong., 1st Session, 354 (1977); Senate Report

No.95-989, 95th Cong., 2nd Session, 65 (1978). It is clear from the record that Judge Bostetter's assessment of the urgency of the situation was within his discretion. He made a judicial determination that to await the final outcome of the protracted Florida litigation would unduly delay the Chapter 11 reorganization plan. Judge Bostetter was therefore under a duty to hold the estimation hearing and establish dollar amounts for all unliquidated and contingent claims. It would have been impossible for Judge Bostetter to determine the feasibility of the plan under 11 U.S.C. § 1129(a)(11) without undertaking an estimation. Poller asserted that he had a $12 million claim against Nova. As the bankruptcy judge noted: "The debtor's Disclosure Statement notes that if the currently unliquidated claim is allowed in an amount exceeding $1.5 million, Poller's claim could affect the feasibility of the reorganization plan. In addition, the debtor's proposed second amended reorganization plan gave creditors who accepted it the right to withdraw those acceptances if the plan [was] not confirmed by this Court by March 31, 1982." See Bankruptcy Judge's Memorandum Opin. at 4. The decision to hold the estimation hearing was completely within the judge's discretion and will be upheld by this court.

Appellant's third contention is that the bankruptcy court was without jurisdiction to estimate the claim since the debtor had listed Poller as s "Class 3 creditor"--an unimpaired claim. This court disagrees and holds that Poller's claim was of such a nature as to fall within the purview of § 502(c). An unimpaired or "Class 3" claim is a general, unsecured claim against the debtor. One of the ramifications of a "Class 3" designation is that the claim is to be paid by the debtor in full, to the extent that the unsecured claim is both filed and allowed. Poller would have this court believe that a "Class 3" designation by itself, insures full payment. However, once designated as unimpaired, the claim must be determined to be allowable. An unliquidated or contingent claim is not an allowable one until it has been set in a dollar amount via the estimation hearing. Allowance is a prerequisite for participation in the reorg-

ization. Once proof of claim is filed, it is deemed allowed, unless a party in interest (which can be the bankrupt) objects. Nova objected to the Poller claim. Hence, § 502(c)(1) was triggered. Consequently, to the extent Poller's claim is given value it is allowed and thereby unimpaired. While the process seems clear cut, it is bothersome in several respects. Once a debtor lists a creditor's claim as unimpaired, under 11 U.S.C. § 1126(f) the creditor loses his right to vote on the reorganization plan. The plan needs the approval of a majority of the voting creditors. If a significant creditor is frozen out of the voting process by a "Class 3" status it can have a significant impact on the plan. Without a voice, the creditor is unable to protect his rights. In instances where the creditor's claim is already liquidated, the designation as unimpaired could be a windfall for that creditor. However, in situations such as Poller's, the unimpaired status is of little use until his claim attains value at the hearing. If, as it happened here, the judge essentially attaches zero value to the claim, the creditor has no recourse except to obtain a judgment in state court and seek a reconsideration of the reorganization plan under § 502(j) of the Code. See 11 U.S.C. § 502(j) (1979). The purpose of an estimation proceeding should be exactly what it purports to be--an estimation. If the estimation is determined to be erroneous by a state court, the creditor should have some recourse. If reconsideration of the plan is the only method of obtaining satisfaction of the judgment, it should be apparent from the bankruptcy judge's opinion that he will be willing to reassess the plan in light of the new circumstances. As noted in Judge Bostetter's opinion, Poller has that avenue open to him in the event of a favorable outcome in state court. See Bankruptcy Judge's Memorandum Opin. at 8. Poller and Nova have had extensive business dealings with each other. The claims presented in the estimation hearing were far from frivilous and deserve recognition if proven in the Florida proceedings.

In the estimation hearing, Poller demanded that a jury be impaneled to decide the issues of slander and libel. The bankruptcy judge denied this request and Poller asserts that this constituted a denial of due process. The question for consideration is whether Poller had a constitutional right to trial by jury on the disputed claim. This court affirms the decision of the bankruptcy judge and finds that the judge was within his discretionary power in denying the demand. By the nature of a § 502(c)(1) estimation hearing, it would appear that there is no constitutional right to jury trial since it is not a final disposition of the merits of the case. Regardless of how Poller has characterized the hearing, it was not a full trial on the merits. If he did not have a constitutional right, did Poller have a statutory right to a jury trial? Again, the bankruptcy judge decided in the negative and this court agrees. The law relating to jury trials in bankruptcy cases can be found at 28 U.S.C. § 1480. Section 1480 states:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

As suggested by Nova, it is of fundamental importance to ascertain whether the allowance or disallowance of a claim was the type of proceeding, as of September 30, 1979, which would entitle the claimant to a jury trial. The estimation procedure, as mandated by § 502(c)(1), is a necessary and integral part of the allowance of claims. A contingent or unliquidated claim cannot be allowed until a dollar amount has been attached. The estimation hearing is the equitable procedure designed to safeguard both the claimant's and the bankrupt's interests. The case of Katchen v. Landy, 382 U.S. 323 (1966), is cited in Collier on

Bankruptcy as the definitive statement on jury trials and the process of allowance and disallowance of claims. The Supreme Court states in Katchen that there is no right in such proceedings, as the proceedings are equitable in nature and within the exclusive control of the bankruptcy court. This analysis is applicable to the estimation of claims. The Court states:

> It is ... clear that the expressly granted power to "allow", "disallow" and "reconsider" claims, ... which is of 'basic importance in the administration of a bankruptcy estate,' is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit. This power to allow or to disallow claims includes 'full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based. This is essential to the performance of the duties imposed upon it. [citations omitted].

382 U.S. 323, 329. The goals of efficiency and expeditiousness as set out by Congress in the previous Bankruptcy Act are similar to those of the new Code. Thus, the allowance process "is subject to summary adjudication by a bankruptcy court." Id. at 330. As the Court noted, "the policy of expedition ... underlies the necessity of summary action in many other proceedings under the Act." Id.

The record and the briefs submitted on appeal indicate that the claims presented for estimation were complex. It was within the judge's discretion and authority to conduct the hearing without a jury. The judge is in the best position to hear the evidence and to rule on the claims in a summary fashion. Appellant's contention that he was denied due process of law because he did not have a jury is without merit.

The estimation hearing was conducted over eight days and culminated in a very extensive and thorough record. Unfortunately, as of yet, the Code, the Rules of Bankruptcy Procedure and the Suggested Interim Bankruptcy Rules have been silent as to the manner in which contingent or unliquidated claims are to be estimated. In reviewing the method of estimation, this court, acting as an appellate court, may reverse only if the bankruptcy court abused its discretion. "Abuse of

discretion" is a narrow standard of review. As emphasized in a recent Third Circuit opinion:

> The appellate court must defer to the congressional intent to accord wide latitude to the decisions of the tribunal in question. Section 502(c)(1) of the Code embodies Congress' determination that the bankruptcy courts are better equipped to evaluate the evidence supporting a particular claim within the context of a particular bankruptcy proceeding. Thus, an appellate court can impose its own judgment only when 'the factors considered [by the bankruptcy court] do not accord with those required by the policy underlying the substantive right or if the weight given to those factors is not consistent with that necessary to effectuate that policy...'

Bittner v. Borne Chemical Company, Inc., No. 82-5148, slip op. at 5 (3d Cir. October 8, 1982), citing Gurmankin v. Costanzo, 626 F.2d 1115, 1119-20 (3d Cir. 1980). The factors considered and balanced by the bankruptcy judge were many. First, the rights and interests of the secured creditors demanded that the reorganization be handled in the most efficient and expeditious manner. Second, the bankruptcy judge had to make a determination with regards to the Poller claim that would hopefully dispose of the uncertainties and allow the plan to go forward for the betterment of all. In Bittner, supra, the Third Circuit upheld the District Court's affimation of the bankruptcy court's assignment of a zero value to a claim in an estimation hearing. The Court noted:

> The principal consideration must be an accommodation to the underlying pruposes of the Code ... [W]here there is sufficient evidence on which to base a reasonable estimate of the claim, the bankruptcy judge should determine the value.

Id. at 4. In Bittner, the bankruptcy judge determined that the claimants' case was not supported by a preponderance or 51% of the evidence. The claimants appealed on the ground that the burden of proof was too high and that § 502(c)(1) required the estimate to be made in terms of the present value of the probability of success in the state court action. The preponderance of the evidence standard was held to be within the discretion conferred by § 502(c)(1). Id. at 6.

In the Poller case, Judge Bostetter made an unfortunate choice of words in characterizing the proof needed as "clear, cogent and convincing". See Bankruptcy Judge's Memorandum Opin. at 10. It appears from the record taken as a whole, from the evidence and from Judge Bostetter's opinion that, in actuality, he held the claimant to the lesser burden of a preponderance of the evidence. This court cannot find that such a valuation method is an abuse of discretion. Such a method, without further directives from Congress, does not seem to be inconsistent with the principles of Chapter 11.

Finally, Poller attacks the bankruptcy court's findings of fact as erroneous in light of the evidence. Rule 810 of the Rules of Bankruptcy Procedure permits this court, as an appellate court, to overturn a bankruptcy court's findings of fact only when they are clearly erroneous. This means that an appellate court does not have wide latitude to substitute its judgment for the findings of the bankruptcy court.

After a careful examination of the record and of the evidence adduced, the court's ultimate finding of fact as to the value of the Poller claim must be upheld since it cannot be said that it is clearly erroneous.

The estimation and the procedures employed by the bankruptcy judge are AFFIRMED.

Let the Clerk of the Court send a copy of this Memorandum Opinion and the attached Order to all counsel of record.

DATE: Dec. 2, 1982

Richard L. Williams
UNITED STATES DISTRICT JUDGE

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

Alexandria Division

LOU POLLER, Appellant,	)	
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NOVA REAL ESTATE INVESTMENT TRUST, Appellee.	)	

ORDER

This case is before the Court on appeal from a bankruptcy decision entered by Judge Bostetter. For the reasons stated in the accompanying Memorandum Opinion, the decision is AFFIRMED.

Let the Clerk of Court send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

DATE: Dec. 2, 1982

Richard L. Williams

UNITED STATES DISTRICT JUDGE