

NO. D-1-GV-08-001572

STATE OF TEXAS, Plaintiff	§	IN THE DISTRICT COURT OF
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
ESQUIRE TITLE, LLC, Defendant	§	261st JUDICIAL DISTRICT

**SPECIAL DEPUTY RECEIVER’S RESPONSE IN OPPOSITION TO THE
MOTION FOR RELIEF FROM STAY
CELESTINE CAPITAL, L.L.C.**

To the Honorable District Court:

Cantilo & Bennett, L.L.P., solely in its capacity as the Special Deputy Receiver of Esquire Title, LLC (the “SDR” and “Esquire,” respectively), files this Response in Opposition to the Motion for Relief from Stay filed by Celestine Capital, L.L.C. (the “Response”).

I. INTRODUCTION AND SUMMARY

1.1 The SDR objects to the motion for relief from stay (the “Motion”) filed by Celestine Capital, L.L.C. (“Celestine”). Celestine wants to sue the SDR in Dallas County District Court. The Motion should be denied because Celestine does not meet the strict requirements for lifting the stay and fails to address the existing Permanent Injunction barring actions against the SDR in any forum outside of the receivership proceeding. Legally, Celestine fails to meet the statutory requirements of TEX. INS. CODE § 443.008 (h) for the relief it seeks. Factually, Celestine does not meet the very high burden of proof imposed by the Texas Legislature that it present “clear and convincing evidence” on the merits of its Motion.

1.2 Celestine’s Motion is silent on the Permanent Injunction barring claims against Esquire in any forum outside the receivership proceeding. Accordingly, even if Celestine was entitled to relief from the stay (which it is not), the Motion should be denied under the Permanent Injunction.

1.3 The relief that Celestine requests would result in the preferential treatment of one alleged creditor among the many creditors of this estate, and an ensuing avalanche of litigation. This Court should deny Celestine's Motion in order to avoid preferences and legal expenses that will dissipate the assets of this insolvent estate.

II. BACKGROUND

2.1 Esquire was placed in receivership in this proceeding on July 22, 2008. The Court entered a *Permanent Injunction and Order Appointing Permanent Receiver* (the "Permanent Injunction") on July 22, 2008, appointing the Texas Commissioner of Insurance as Permanent Receiver. The Receiver designated Cantilo & Bennett, L.L.P. as SDR of Esquire effective as of September 15, 2008.

2.2 The Special Deputy Receiver is authorized to file this Response pursuant to TEX. INS. CODE § 443.151, which provides that the SDR is to conduct the business of the estate. The subject matter of Celestine's Motion has been referred to the Special Master appointed in this proceeding in accordance with paragraph III of the Order of Reference to Master entered on August 22, 2008.

2.3 Esquire was declared an "impaired agent" on July 23, 2008. As of that date, the Texas Title Insurance Guaranty Association ("TTIGA") became responsible for the payment of "covered claims" as defined by Chapter 2602 of the Insurance Code. On September 22, 2008, this Court entered an order granting the TTIGA's application for the transfer of escrow funds and request for claims filing deadline. The court established April 22, 2009, as the deadline to file claims with TTIGA.

2.4 Esquire was a title insurance agency with its offices in Harris and surrounding counties. Esquire is not an insurance company; it acted as an agent for a solvent title insurance

company. The title insurance company continues to process and pay claims on title insurance policies issued by Esquire. As an agency, Esquire did not have any reserves, any reinsurance, or any significant assets. Pursuant to this Court's order, the SDR has transferred all escrow funds to the TTIGA. Administration of the estate has been financed by loans by the Texas Department of Insurance from the Abandoned Property Fund in accordance with TEX. INS. CODE § 443.304(c).

2.5 The subject matter of this Application has been referred to the Special Master appointed in this proceeding in accordance with paragraph III of the Order of Reference to Master entered on August 22, 2008.

III. RESPONSE TO CELESTINE'S MOTION

3.1 Celestine requests that the automatic stay be lifted so as to allow it to sue Esquire and others in Cause No. DC-08-12616-H in the 160th District Court of Dallas County, Texas (the "Dallas County Lawsuit"). It claims that a liability insurance policy will pay any judgment against Esquire and it offers to agree to look only to the insurance policy for recovery on any judgment. However, Celestine presents no evidence that the insurance carrier has accepted coverage, whether there are any reservations of rights, and, most importantly, how Esquire can pay for those expenses not covered or reimbursed under a liability policy. The SDR has a pending claim seeking to recover policy limits on the same policy. Any recovery by the SDR would be for the benefit of all creditors. Any recovery by Celestine would be for itself.

3.2 Celestine makes two legal arguments for lifting the stay: first, that the policy and its proceeds are not "property of the estate" and, second, that "cause" exists under TEX. INS. CODE § 443.008 (h) (2).

3.3 Celestine first contends that a liability insurance policy is not “property of the estate” and that it is therefore entitled to sue the SDR in the Dallas County Lawsuit.¹ However, Texas, unlike Louisiana, is not a direct action state. In order to recover on a liability policy, Celestine has to sue the SDR and obtain a judgment. Celestine has no legal rights under Esquire’s policy.

3.4 Next, Celestine claims that it can sue the SDR in the Dallas County Lawsuit even if the policy is property of the estate under TEX. INS. CODE § 443.008 (h) (2) claiming that the SDR has no “equity” in the policy. Celestine’s Motion does not seek relief against “property”. There is no office building, title plant, or reinsurance trust at issue here. Celestine wants the right to sue the SDR in Dallas. Subsection (h)(2) simply does not apply here. What Celestine wants is to require the SDR to use this estate’s limited assets to defend a lawsuit outside of the receivership forum.

3.5 Celestine bears a heavy burden to establish relief from the stay. TEX. INS. CODE § 443.008(j) provides that “[i]n any hearing under Subsection (h), the party seeking relief from the stay has the burden of proof on each issue, which must be established by clear and convincing evidence.” Celestine cannot meet this very high standard of proof in the face of the SDR’s verified response.

3.6 Celestine argues that bankruptcy case law under 11 U.S.C. § 362 is applicable to its Motion. The United States Bankruptcy Code does not govern this proceeding, and bankruptcy case law is only instructive in situations where the *Insurer Receivership Act* mirrors the Bankruptcy Code. However, here the *Insurer Receivership Act* does not mirror the United States Bankruptcy Code regarding the automatic stay. Bankruptcy case law is relevant only if

¹ The policy is “property of the estate” as that term is defined in TEX. INS. CODE § 443.004 (20), but the question is not relevant to the issue before the Receivership Court.

the statutes use the same language and the cited case acknowledges the expressed public policy interest enunciated by the Texas Legislature in enacting the Texas Insurer Receivership Act. *See, e.g.*, TEX. INS. CODE § 443.001 (e). In the instant case, the lift stay provisions of the Texas receivership statute are **not** the same as those enumerated in the Bankruptcy Code. A side by side comparison of 11 U.S.C. § 362 with TEX. INS. CODE § 443.008 evidences the vast differences between the statutes. Thus, Celestine's cited case law is not controlling or even, given the very different statutes in question, persuasive.

IV. THE PERMANENT INJUNCTION

4.1 TEX. INS. CODE § 443.008 provides that the Receivership Court may issue any order, process, or judgment, including stays, injunctions, or other orders, as necessary or appropriate to carry out the provisions of the *Insurer Receivership Act*. Pursuant to this authority, this Court entered the *Order Appointing Liquidator and Permanent Injunction* on July 22, 2008, which enjoins any party from “[m]aking any claim, charge or offset, or commencing or prosecuting any action, appeal, or arbitration, including administrative proceedings, or obtaining any preference, judgment, attachment, garnishment, or other lien, or making any levy against Defendant, Defendant’s Property or any part thereof, or against the Liquidator, except as permitted by TEX. INS. CODE Chapter 443, Subchapter F”. Permanent Injunction, p. 7, ¶ 3.8.

4.2 Celestine fails to even address the Permanent Injunction that bars it from continuing the Dallas County Lawsuit. Pursuant to TEX. INS. CODE § 443.055(b), the Permanent Injunction constitutes a final judgment. Celestine has not shown any authority for modifying this judgment. Further, there is no provision in the United States Bankruptcy Code for an analogous permanent injunction, so Celestine’s argument that bankruptcy law should be applied by analogy fails.

V. APPLICATION OF THE STAY AND PERMANENT INJUNCTION

5.1 Celestine's Motion illustrates why the Texas Legislature provided for a stay and injunctive relief in an insurance receivership proceeding. Celestine contends that the existence of a policy of insurance covering Esquire creates sufficient cause for relief from the stay and the Permanent Injunction.

5.2 The SDR does not contest that the policy of insurance referenced by Celestine exists. In fact, the SDR has its own policy limits claim pending with the carrier. Like most insurance policies of this type, costs of defense are deducted from the limits available to pay claims. Accordingly, if the stay was lifted and assuming the carrier paid some of the costs of defense, the value of the policy will decline. Thus, requiring the SDR to defend the Dallas County Lawsuit would waste an asset of the estate.

5.3 Celestine's Motion also ignores the unreimbursed costs that would be imposed on the receivership estate, which the estate can ill afford. The movant fails to account for how the SDR is supposed to pay for monitoring a lawsuit against the estate in a distant forum. Requiring the SDR to spend estate assets to defend the Dallas County Lawsuit would create a preference for Celestine because the money would otherwise be spent pursuant to the priority system established under TEX. INS. CODE § 443.301. Even if the insurance company pays for defense counsel, (and there is no guarantee or evidence that it will do so), the SDR is still going to have to confer with counsel, respond to discovery requests, and handle matters not covered by the policy. Lifting the stay and modifying the Permanent Injunction requires the estate to spend money (which it clearly does not have) for the benefit of one, very solvent alleged creditor, Celestine. Significantly, Celestine does not provide any documentation from the insurance

carrier in question. There is no mention of coverage defenses or any other matter that may impair the insurance company's defense of the underlying case.

5.4 Celestine has filed its proof of claim in this estate. Once adjudicated, it can respond to the SDR's determination pursuant to the *Insurer Receivership Act*.

VI. NOTICE

6.1 Pursuant to TEX. INS. CODE ANN § 443.007(d), this Response has been served on the entire service list for this proceeding, including TTIGA, in the manner shown on the Certificate of Service.

VII. OFFER OF PROOF AND VERIFICATION

7.1 This Response is verified as required by the Texas Rules of Civil Procedure by the affidavit and certification pursuant to TEX. INS. CODE § 443.017(b) by Joseph West, Partner in Cantilo & Bennett, L.L.P., Special Deputy Receiver of Esquire Title, LLC.

VIII. NOTICE OF ELECTRONIC SERVICE REQUIREMENT

8.1 Pursuant to the *Order Granting SDR's Application to Use Electronic Service of Pleadings and Notices* entered on November 24, 2008, all pleadings filed in connection with this Response or in regards to this estate shall be served by e-mail on the undersigned counsel, and all parties shown in the attached Certificate of Service.

IX. CONCLUSION

9.1 In conclusion, the SDR urges the Court to deny Celestine's Motion. The Motion fails to address how an alleged creditor can sue the SDR outside of the Receivership Court, it assumes, without evidence, that an insurance company is going to pay everything, and neglects to even refer to the Permanent Injunction barring such claims.

PRAYER

WHEREFORE PREMISES CONSIDERED, Cantilo & Bennett, L.L.P., solely in its capacity as the Special Deputy Receiver of Esquire Title, LLC, respectfully requests this Court to deny Celestine's Motion, and grant such further relief to which it may show itself to be justly entitled.

Respectfully submitted,

By: Christopher Fuller
Christopher Fuller
Texas Bar No. 07515500
4612 Ridge Oak Drive
Austin, Texas 78731
Tel: (512) 470-9544
Fax: (512) 374-0957
cfuller@fullerlaw.org

Attorney for Cantilo & Bennett, L.L.P.,
Special Deputy Receiver of Esquire Title, LLC

CERTIFICATE OF SERVICE

I certify that on May 12, 2010, a true and correct copy of this Response was served pursuant to the Order of Reference, the Texas Rules of Civil Procedure, and TEX. INS. CODE ANN. § 443.007 (d) on the following:

David W. Dodge, Esq.
McCathern | Mooty L.L.P.
3710 Rawlins Street, Suite 1600
Dallas, Texas 75219
ddodge@mm-llp.com
Attorney for the Plaintiff

Tom Collins, Special Master
c/o Ms. Jean Sustaita
P.O. Box 149104
Mail Code 305-1D
Austin, Texas 78701
Jean.Sustaita@tdi.state.tx.us

Mitchell, Williams, Selig, Gates & Woodyard, PLLC
Attorneys for the Texas Title Insurance Guaranty Association
P.O. Box 2212
Austin, Texas 78768-2212
bburner@mwlaw.com
bmccandless@mwlaw.com

Catherine Fryer, Esq.
Bickerstaff Heath Delgado Acosta LLP
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443
cfryer@bickerstaff.com

Mr. Joshua Godbey
Assistant Attorney General
Financial Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548
joshua.godbey@oag.state.tx.us

Mark Mosley, Esq.
Attorney & Counselor at Law
1410 G Avenue, Suite 400
Plano, Texas 75074
i_c_law@sbcglobal.net

Ms. Jo Ann Howard
Jo Ann Howard & Associates, P.C.
P.O. Box 160130
Austin, Texas 78716
iamanrd3@aol.com

Internal Revenue Service
Special Procedures Branch
P.O. Box 250
300 East 8th Street, Suite 352
Mail Stop 5022A
Austin, Texas 78701

Angel Garrett, Director
Texas Department of Insurance
Financial/Rehabilitation & Liquidation Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, Texas 78701
Angel.Garrett@tdi.state.tx.us

Ms. Rachel Giani
Texas Department of Insurance
Financial/Rehabilitation & Liquidation Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, Texas 78701
Rachel.Giani@tdi.state.tx.us

Christopher L. Kurzner, Esq.
Kurzner PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201
ckurzner@kurzner.com

Silvia Tiller, Esq.
14090 Southwest Freeway, Suite 300
Sugar Land, Texas 77478
stiller@tillerandassociatespc.com
Attorney for Esquire Title, LLC

Terence Norman, Esq.
6069 Broadway Street
Pearland, Texas 77581
tcnorman@lawyer.com
Attorney for Eraka Childs and Chris Watson

Ms. Eraka Childs
8325 Broadway, Suite 202
Pearland, Texas 77584
erakachilds@gmail.com

Yolanda Bartee, Esq.
The Law Office of Yolanda Molock Bartee, P.L.L.C.
P.O. Box 180446
Arlington, Texas 76096-0446
Ybartee_esq@hotmail.com

Texas Workforce Commission
Regulatory Enforcement Division
101 E. 15th Street
Austin, Texas 78778-0001

Ms. Leanne Layne
Texas Department of Insurance
Financial/Rehabilitation & Liquidation Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, Texas 78701
Leanne.Layne@tdi.state.tx.us

Mr. John Walker
Texas Department of Insurance
Financial/Rehabilitation & Liquidation Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, Texas 78701
John.Walker@tdi.state.tx.us

Ms. Jemmie Russell
Texas Department of Insurance
Financial/Rehabilitation & Liquidation Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, Texas 78701
Jemmie.Russell@tdi.state.tx.us

Henry L. Campbell, III, Esq.
Attorney and Counselor at Law
1700 Commerce, Suite 1555
Dallas, Texas 75201

Via First Class Mail:
Mr. Dwayne Hines
411 Eules Drive
Cedar Hill, Texas 75104-3190

Christopher Fuller
Christopher Fuller

**SPECIAL DEPUTY RECEIVER'S CERTIFICATION PURSUANT TO
TEX. INS. CODE § 443.017-AFFIDAVIT OF JOSEPH WEST**

State of Texas

County of Travis

BEFORE ME, the undersigned authority appeared Joseph West, who after being by me duly sworn, stated the following under oath:

1. "My name is Joseph West. I am competent to make this affidavit. The statements of fact set forth herein are true and correct, and are within my personal knowledge.

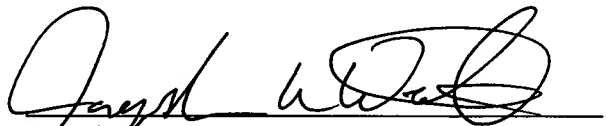
2. "I am a partner in Cantilo & Bennett, L.L.P., Special Deputy Receiver of Esquire Title, LLC (the "SDR" and "Esquire"). I am duly authorized to make this Certification and Affidavit on behalf of the SDR.

3. "I certify that the exhibits, books, accounts, records, papers, correspondence, and/or other records and documents attached hereto were produced pursuant to TEX. INS. CODE ANN §443.017(b), are true and correct copies of records created by and filed with the Receiver's office in connection with the receivership of this delinquent insurer, and are held by the Special Deputy Receiver in its official capacity.

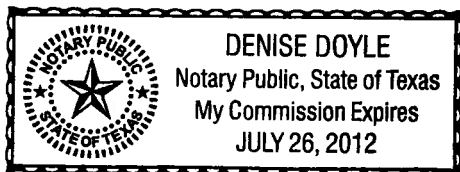
4. "I further state that I have read the statements contained in the attached Application and that they are true and correct based on my personal knowledge, my review of estate records and my consultation with my staff and sub-contractors."

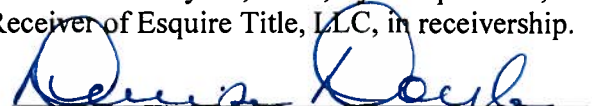
5. Further affiant sayeth not.

By:


Joseph West

SUBSCRIBED AND SWORN TO BEFORE ME on May 11, 2010, by Joseph West, on behalf of Cantilo & Bennett, L.L.P., Special Deputy Receiver of Esquire Title, LLC, in receivership.




Notary Public in and for the State of Texas

STATE OF TEXAS,
Plaintiff

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

v.

TRAVIS COUNTY, TEXAS

ESQUIRE TITLE, LLC,
Defendant

261st JUDICIAL DISTRICT

**ORDER DENYING MOTION FOR RELIEF FROM STAY
CELESTINE CAPITAL, L.L.C.**

The Court considered the Motion for Relief from Stay filed by Celestine Capital, L.L.C. (the “Celestine Motion”). Cantilo & Bennett, L.L.P., solely in its capacity as Special Deputy Receiver of Esquire Title, LLC (the “SDR” and “Esquire,” respectively), and the Texas Title Insurance Guaranty Association (“TTIGA”) appeared in opposition to the motion. When called for hearing, all parties announced ready and the matter proceeded to hearing.

Having considered the Celestine Motion, the Court finds as follows:

1. The *Order of Reference to Master* (“Order of Reference”) entered by this Court provides that applications filed pursuant to TEX. INS. CODE § 443.008 are referred to the Special Master appointed in this proceeding;
2. The Celestine Motion was submitted to the Special Master in accordance with the Order of Reference;
3. The Special Master issued a recommendation that the Celestine Motion should be denied pursuant to Rule 171 of the Texas Rules of Civil Procedure.
5. The Court has jurisdiction over the Celestine Motion and the parties affected hereunder; and
6. The Celestine Motion should be DENIED in all respects.

It is, accordingly, **ORDERED** as follows:

1. The Motion for Relief from Stay filed by Celestine Capital, L.L.C. is DENIED.

SIGNED _____, 2010.

JUDGE PRESIDING