UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

Patricia A. Kluge BKY No. 93-3-2420

Debtor.

Rosemary Boyd, ADV. No. 93-30162

Plaintiff,

vs.

Patricia A. Kluge, ORDER
a/k/a Pat A. Kluge,

Defendant.

This matter came on for hearing March 20, 1996, before this Court on Patricia Kluge's motion to enforce a stipulation of settlement between the parties in this adversary proceeding.

Appearances were noted on the record. The Court, having reviewed and considered the moving papers, the arguments of counsel, and otherwise being fully advised on the matter, now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
FACTS

Rosemary Boyd purchased a house from Patricia Kluge in June 1992. Shortly after the purchase, Boyd discovered numerous undisclosed problems with the home. Kluge had concealed numerous defects, and misrepresented the overall condition of the house. (1)Boyd successfully pursued the matter before an arbitrator in a Fair Housing Disclosure arbitration proceeding. In his decision, issued April 21, 1993, the arbitrator concluded:

The buyer [Ms. Boyd] did establish that the seller [Ms. Kluge] was not frank in her responses in the real estate disclosure statement. The neighbor, Deb Bachrach, testified that the seller was always doing repairs, and always complaining about water in the walls. The seller not only did not refute this testimony but admitted that she did not disagree with the neighbor's testimony. In addition, she misstated that the roof was only 6 months old. While the pitched portion may have been recently replaced, the flat portion had not been replaced, and it was the flat portion that became the problem.

Additionally, the arbitrator determined that

Kluge took affirmative steps to cover-up the severity and extent of the water damage. He cited examples such as wallpapering and painting over water stains, and retexturing the ceiling. None of this was disclosed by Kluge to Boyd in the seller's real estate disclosure statement. The arbitrator concluded that Boyd was entitled to relief, including: a complete recision of the purchase contract; and, damages in the amount of $45,450.00.

Kluge filed for relief under Chapter 7 on May 15, 1993, less than one month after the award, and listed her obligation to Boyd as an unsecured debt. Boyd filed this adversary proceeding for judgment that Kluge's debt to Boyd would be excepted from discharge in her Chapter 7 case under 11 U.S.C. Section 523 (a)(2)(A). The parties subsequently agreed to settle the adversary, and received the Court's approval on June 6, 1994.(2)

The stipulation, settling the matter, provided that a judgment of nondischargeability be entered for $48,295, which included the arbitration award, and Boyd's fees and costs incurred in pursuing the adversary proceeding. In return, Boyd agreed to delay a state court action against Kluge for collection on the judgment. Instead, Boyd would commence a state civil action against the Truth in Housing Inspector, Murray Casserly, who had inspected the premises on Boyd's behalf prior to the purchase.

The suit was to be based on negligent inspection and breach of warranty.

As defined in the stipulation, Boyd was to use "best efforts" in pursuit of this action. The stipulation provided, in paragraph 3.A., in part:

Plaintiff [Boyd] agrees that she will not undertake a collection action against Defendant [Kluge] until she used her "best efforts" to obtain recovery and damages against the Truth in Housing Inspector, Murray Casserly. `Best efforts' shall be deemed to be a prosecution of her claims against Mr. Casserly through a reasonable settlement or final determination by a court of competent jurisdiction and exhaustion of reasonable collection efforts."

The stipulation also dealt with potential settlement of the Casserly litigation, in paragraph 3. B and C. The relevant language is:

B. "Reasonable settlement" shall mean an amount not less than $79,221.63 or such lesser amount if determined to be in Plaintiff's best interest after consulting with Defendant's counsel. Defendant's counsel shall not unreasonably object to any settlement of Plaintiff deemed to be in the best interest of Plaintiff.

C. Factors which may be deemed

`reasonable' cause for acceptance of a settlement in an amount less than $79,221.63 include, but are not limited to, limitations on Mr. Casserly's ability to respond in damages and inability of Plaintiff to prove damages equal to $79,221.63.

The stipulation provided that any money Boyd could collect from Murray Casserly would offset Boyd's judgment against Kluge, at a rate of 65 cents on the dollar. Boyd could then collect from Kluge the amount in excess of the offset.

Boyd commenced a state court action for negligent inspection and breach of warranty against Casserly on July 18, 1994. The parties exchanged written discovery, including: written interrogatories, requests for production of documents; and, they conducted three depositions.

The trial was scheduled for September 5, 1994. During the pre-trial stage, Casserly made a Rule 68 Offer of Settlement to Boyd of $10,000. Boyd made a Rule 68 Offer of Settlement for $45,000 to Casserly.(3)On the day of trial, counsel for Casserly brought several motions in limine. One of the motions sought to preclude the expert testimony of Mark Basagio, John Lindberg, and Tom Irmitter.

Each witness was to offer expert testimony in support of the damages claimed against Casserly. The trial judge granted the motion, and the witnesses were precluded from testifying at trial as experts, on the grounds that they had not been previously disclosed as experts.(4) The judge thereafter mediated the dispute on the same day, and the case was settled for $12,000.

Kluge subsequently filed this motion on March 9, 1996, for declaratory relief; and, for satisfaction of the judgment against her. Below is the relevant portion of her pleading:

6. Movant requests that the Court find that Plaintiff materially breached the Stipulation of Settlement between Plaintiff and Movant when she failed to use best efforts in pursuing their claims against Murray Casserly for only $12,000 without first obtaining the approval of Kluge's attorneys of record and that the appropriate remedy for Plaintiff's breach is for Movant to be fully released from the docketed judgment with a Satisfaction of Judgment.

7. Movant further requests that, pursuant to the Stipulation of Settlement, attorney's fees incurred by Movant in having to bring this motion be reimbursed by Plaintiff.

WHEREFORE, Movant moves the Court for an Order requiring Plaintiff to execute a Satisfaction of Judgment and pay Movant's attorney's fees and costs incurred in bringing this motion, and for such other relief as may be

just and equitable.

Kluge claims that Boyd breached the settlement agreement by:

failing to use "best efforts," as evidenced by lost opportunity to present the expert testimony of Basagio, Lindberg and Irmitter; and, by not consulting with Kluge and receiving approval on the day of trial prior to settling the case.

Boyd denies breaching the stipulation. She claims that the excluded testimony was not needed as expert testimony. Regarding the alleged failure to consult, Boyd claims that Kluge asserted before the day of trial through her attorney, that she would not approve a settlement for less than $45,000. According to Boyd, that kind of settlement was not possible, and Kluge's position was irresponsible.

III.
DISCUSSION

Nothing To Enforce.

Kluge argues that her motion seeks to enforce the Boyd/Kluge stipulation. The agreement contains this provision regarding enforcement:

E. Before commencement of a collection action against Defendant [Kluge], Plaintiff [Boyd] shall give not less than twenty days notice. During the twenty days, counsel for Defendant can review all actions taken by or on behalf of Plaintiff to determine whether the collection action is being undertaken in conformance with the Settlement Agreement, Defendant shall be liable to Plaintiff for all costs, including reasonable attorneys' fees incurred by Plaintiff in defending the motion. In the event the Bankruptcy Court determines that the proposed collection action is not in conformance with the Settlement Agreement, Defendant shall be entitled to recover her costs including attorneys' fees incurred by her in prosecuting the motion.

Boyd has given no notice of a collection action against Kluge. There is no proposed collection action; nor is there a collection action pending against the Defendant. Assuming that the Court otherwise has jurisdiction in the matter, there presently exists no provision of the stipulation to enforce. The dispute is not properly before the Court, for that reason.

Uncertain Jurisdiction.

Additionally, there is serious question whether the Court has jurisdiction to enforce the settlement, even if the dispute was otherwise properly before it. On June 6, 1994, this Court entered its order dismissing the adversary proceeding "without prejudice to its being reopened for the limited purpose of enforcing the

terms of the Stipulation..."Kluge is essentially seeking summary judgment on a breach of contract claim. The cause arises under state law as a common law contract action. See: Beach v. Anderson, 417 N.W.2d 709 (Minn. Ct. App. 1988). The alleged breach of a stipulation that provided consideration for the settlement of a federal suit does not provide an independent basis for federal jurisdiction. The United States Supreme Court clearly enunciated that in Kokkonen v. Guardian Life Insurance Company Of America, 114 S.Ct. 1673, 1677 (1994), wherein the Court stated:

The short of the matter is this: The suit involves a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit. No federal statute makes that connection breaches of contract are quite separate from the facts (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute. The facts to be determined with regard to such alleged breaches of contract are quite seprate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business.

At most, federal jurisdiction over enforcement of the settlement agreement is ancillary jurisdiction. The Supreme Court acknowledged, in Kokkonen, that:

The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal--either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. (Id., 1677)

The Eighth Circuit Court of Appeals, quoting Kokkonen, later stated:

Ancillary jurisdiction to enforce a settlement agreement exists only "if the parties' obligation to comply with the terms of the settlement agreement [is] made part of the order of dismissal--either by ... a provision 'retaining jurisdiction' over the settlement agreement [ ] or by incorporation of] the terms of the settlement agreement in the order." Kokkonen, --- U.S. at ----, 114 S.Ct. at 1677. Ancillary jurisdiction to enforce the agreement exists in these situations because breach of the agreement violates the district court's judgment. Id. Absent action making the settlement agreement part

of a dismissal order, "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction." Id.

Miener v. Missouri Department Of Mental Health, 62 F.3d 1126, 1127 (8th Cir. 1995).

This Court's June 6, 1994, order dismissing the adversary proceeding, did not incorporate the terms of the settlement agreement in the order. Whether the language allowing for the adversary to be "reopened for the limited purpose of enforcing the Stipulation," constituted a provision " `retaining jurisdiction' over the settlement agreement," is questionable.

Likely Abstention.

But, even assuming that this Court has ancillary jurisdiction to enforce the settlement, it is unlikely that the Court would exercise that jurisdiction in this situation. Ancillary jurisdiction is a concept "which recognizes federal court's jurisdiction over some matters (otherwise beyond their competence) that are incidental to matters properly before them." Kokkonen v. Guardian Life Insurance Company Of America, 114 S.Ct. 1673, 1676 (1994).

A proceeding to enforce the Boyd/Kluge stipulation would be neither a core, nor related, proceeding in connection with Kluge's bankruptcy case.(5) The term "core proceeding" is not defined by the Bankruptcy Code; but, certain proceedings are listed by 28 U.S.C.Section 157(b)(2) as core proceedings. Generally,

If one looks at core proceedings in the broadest possible sense, they are those in which a party seeks, or seeks to affect, the two basic categories of relief accorded under federal bankruptcy law: the Debtor's fundamental remedy of discharge; and those remedies which effectuate rights of the debtor's creditors in the bankruptcy context.

In re Fulda Independent Co-op, 130 B.R. 967, 974

130 B.R. 967, 974 (Bankr.D.Minn. 1991)

The term "related proceeding" is not defined by the Code, either.

But, it is recognized that [t]he status of a claim or cause of action as a "related proceeding" turns on whether the outcome of [the] proceeding could conceivably have any effect on the estate being administered in bankruptcy (Id.)

This Court would likely abstain from enforcement of the Boyd/Kluge stipulation, even if a proceeding was properly before the Court. The proceeding would not involve the enforcement of a bankruptcy right, or the application of a

bankruptcy law or remedy; nor would the estate be affected by it. There would exist no bankruptcy connection with the proceeding; and its determination by this Court would not facilitate, even incidentally, any bankruptcy purpose. The bankruptcy case itself has been fully administered, and it was closed on August 18, 1994.

The claim would more properly be considered and determined in the context of a defense to a collection action commenced by Boyd against Kluge in the appropriate state court. See: 28 U.S.C. Section 1334(c)(1); and, In re Fulda Independent Co-op 130 B.R.967 (Bankr.D.Minn. 1991).

Record Does Not Support The Relief Requested.

Finally, even if the matter was otherwise properly before the Court, and the Court agreed to hear it, the motion would be denied. The record does not support the relief requested.

Whether the stipulation was breached by Boyd; and, if it was breached, what harm was suffered by Kluge, and what remedy might be appropriate; are questions of material facts that are highly disputed. Breach of contract claims, by their nature, normally present factual disputes. This one presents substantial factual disputes regarding each element of the cause of action.

IV.
DISPOSITION

Based on the foregoing, it is hereby ordered: that Kluge's motion to enforce the stipulation of settlement is denied; and, that the Clerk close this adversary proceeding file 93-30162.

Dated: May 17, 1996 By The Court:

Dennis D. O'Brien
Chief U.S. Bankruptcy Judge

(1) Some of the matters that were concealed included the condition of the roof, the extent of water damage, defective fixtures, a leaking furnace and other appliances that were not in working order.

(2) The settlement was reached shortly after Kluge was unsuccessful in her motion for summary judgment.

(3) Minn.R.Civ.P. 68 provides that litigants may serve upon adverse parties offers of judgments

prior to 10 days before a scheduled trial. If an offer is not accepted, and the rejecting party does not thereafter obtain a judgment more favorable than the rejected offer, the rejecting offeree is liable for the offeror's costs and disbursements.

(4) An affidavit of Mark Solheim, counsel for Casserly, affirmed that these three witnesses were disclosed prior to trial, but listed as lay witnesses. He brought the motions in limine when Boyd's counsel revealed that he would be relying upon these witnesses for expert testimony.

(5) It is doubtful that a matter truly before a bankruptcy court by ancillary federal jurisdiction could ever be a core or related proceeding, given the inherent nature of federal ancillary jurisdiction. Independent, statutory federal jurisdiction lies in connection with core and related proceedings See: 28 U.S.C. Section 1334.