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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AXIS SURPLUS INSURANCE COMPANY,

Plaintiff,

v.

ROBERT D. GERINGER; KIRBY D.
COCHRAN; ROBERT CLAWSON;
DOUGLAS W. CHILD; JEFF AUSTIN;
WILLIAM H. DAVIDSON; WILLIAM K.
WARWICK; WILLIAM GRUNDY; and
KEITH GREEN,

Defendants.

**MEMORANDUM IN OPPOSITION
TO MOTION TO INTERVENE**

Civil No. 2:14-CV-00244-DAK

Honorable Dale A. Kimball

Defendants Douglas W. Child, Kirby D. Cochran, Jeff Austin, William Grundy and Keith Green (the “Objecting Defendants”), by and through counsel, hereby oppose the motion to intervene filed in this interpleader suit by D. Ray Strong (the “Trustee”), as the post-confirmation estate representative of the Castle Arch Real Estate Investment Company, LLC, CAOP Managers, LLC, Castle Arch Kingman, LLC, Castle Arch Secured Development Fund, LLC, Castle Arch Smyrna, LLC, Castle Arch Opportunity Partners I, LLC and Castle Arch Opportunity Partners II, LLC (collectively, the “Debtors”), and the Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust, and the Castle Arch Opportunity Partners I, LLC Liquidating Trust, and the Castle Arch Opportunity Partners II, LLC Liquidating Trust (the “Trusts”).

The Trustee seeks to intervene in this matter to “assert the rights that Mr. Warwick assigned to [the Trustee] in the Settlement Agreement and make a claim under the [Policy].”¹ But the Settlement Agreement has not been approved. Until it is approved, the Trustee has no interest or assigned right which would allow him to make a claim under the Policy. The interest he seeks to protect belongs to Mr. Warwick, and Mr. Warwick is represented by counsel in this matter and has already filed an answer. The Trustee’s intervention in this matter is inappropriate and unnecessary at this time.

BACKGROUND

In December 2010, Plaintiff Axis Surplus Insurance Company (“Axis”) issued a \$1 million insurance policy (the “Policy”) providing coverage to the directors, officers, and

¹ Trustee’s Motion p. 4, Docket No. 36, filed June 4, 2014.

employees of Castle Arch Real Estate Investment Company, LLC (“CAREIC”).² The Defendants in this matter are the “Insureds” covered by the Policy and entitled to its proceeds (the “Policy Proceeds”).

CAREIC and its affiliates declared bankruptcy under Chapter 11 of the Bankruptcy Code in October 2011 (the “Bankruptcy Court”).³ The Trustee believes he has numerous claims against the Defendants, and in October 2013, he circulated a draft complaint to each.⁴ Based on the Trustee’s claims, each of the Defendants sought coverage under the Policy for defense and indemnity.⁵

On April 2, 2014, Axis filed the complaint for interpleader against the Defendants.⁶ In the complaint, Axis seeks to interplead \$589,661.61 in remaining Policy Proceeds to “resolve the competing demands for the policy’s remaining proceeds.”⁷ According to its complaint, “Each of the Insureds contends that he is entitled to some or all of the remaining Policy proceeds.”⁸ All of the Defendants are represented by counsel in this matter, and all but Robert Clawson and Robert Geringer have filed an answer.

² See Policy attached as Exhibit 1 to Axis’ Complaint for Interpleader, Docket No. 2, filed April 2, 2014.

³ Bankruptcy No. 11-35082, filed October 17, 2011, in the U.S. Bankruptcy Court for the District of Utah.

⁴ See Declaration of D. Ray Strong in Support of Motion to Intervene at ¶¶ 3-4 (“Strong Decl.”), Docket No. 36-1, filed June 4, 2014.

⁵ See Complaint for Interpleader at ¶ 28.

⁶ Docket No. 2.

⁷ *Id.* at ¶ 1.

⁸ *Id.* at ¶ 41.

On May 6, 2014, the Trustee and Defendant William Warwick entered into a settlement agreement (the “Settlement Agreement”), pursuant to which Mr. Warwick agreed to pay the Trustee \$400,000.⁹ Mr. Warwick agreed to pay \$200,000 of the settlement amount from his own personal funds, and the Trustee agreed to seek payment of the remaining \$200,000 from the Policy.¹⁰ The Settlement Agreement is conditioned on and subject to the Bankruptcy Court’s entry of (1) an order approving the Settlement Agreement, and (2) an order approving a contribution bar order which, among other things, bars the “Non-Settling Parties” from “filing, commencing, instituting, prosecuting or maintaining either directly or indirectly, representatively, or in any other capacity, any claim, counterclaim, cross-claim third-party claim of other action, including but not limited to claims for contribution and indemnity against Mr. Warwick” (the “Contribution Bar Order”).¹¹ On May 30, 2014, the Trustee filed a motion to approve the Settlement Agreement and Contribution Bar Order in the Bankruptcy Court.¹² The deadline to object to the Trustee’s motion is June 20, 2014, and a hearing is scheduled for June 30, 2014.¹³ The Objecting Defendants intend to object to the Trustee’s motion to approve the Settlement Agreement and file a motion to withdraw the reference.

⁹ See Settlement Agreement p. 4, attached as Exhibit B to the Strong Decl.

¹⁰ *Id.*

¹¹ Exhibit B (Proposed Order) to Joint Motion for Approval of Settlement Agreement Between Trustee and William Warwick Under Federal Rule of Bankruptcy Procedure 9019, Including Contribution Bar Required Under Settlement Agreement, Docket No. 925, filed May 30, 2014, in the Bankruptcy Court.

¹² *Id.*

ARGUMENT

The Trustee has no Interest in the Policy Proceeds, and any Interest he may obtain in the Future is Adequately Represented by Mr. Warwick

Under Rule 24(a)(2) (Intervention of Right) of the Federal Rules of Civil Procedure, the Trustee is entitled to intervention if he “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect his interest, unless existing parties adequately represent that interest.” The Trustee “must have an interest that could be adversely affected by the litigation. But practical judgment must be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention.”¹⁴

While the Trustee may claim an interest relating to the Policy Proceeds, that claim is unfounded. The Trustee’s interest in the Policy Proceeds is conditioned on the approval of the Settlement Agreement and the Contribution Bar Order by the Bankruptcy Court. The Defendants intend to contest the approval of the Settlement Agreement, and to file a motion to withdraw the reference. Until a final decision is made on these matters favorable to the Trustee, he has no interest in the Policy Proceeds. It would be most inefficient to allow the Trustee to intervene and pursue the motion for summary judgment he has already filed in this matter,¹⁵ only to have the Bankruptcy Court deny his motion to approve the Settlement Agreement.

¹³ See Notice and Opportunity for Hearing, Docket No. 930, filed June 3, 2014, in the Bankruptcy Court.

¹⁴ *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc) (denying conservation group’s motion to intervene because its interests were adequately represented by the defendants).

¹⁵ Docket No. 37, filed June 4, 2014.

In the meantime, the Trustee need not worry about Mr. Warwick's share of the Policy Proceeds. Any interest that the Trustee may obtain through an assignment from Mr. Warwick, will be more than adequately protected by Mr. Warwick himself. Mr. Warwick is represented by counsel in this matter and filed an answer in which he states that he "agrees to participate in the interpleader of all claims against the remaining funds held by AXIS in the CAREIC matter."¹⁶ Mr. Warwick has just as much of an incentive (if not more) as the Trustee, to protect his interest in the Policy Proceeds.

CONCLUSION

The Trustee's motion to intervene is premature. The Trustee's interest in the Policy Proceeds is derived from his Settlement Agreement with Defendant Warwick, which has not been approved by the Bankruptcy Court. Unless and until the Settlement Agreement is approved, the Trustee cannot show under Rule 24(a)(2) that he has an interest that needs protecting. Furthermore, until the Settlement Agreement is approved, Defendant Warwick will more than adequately protect his interest in the Policy Proceeds. For these reasons, intervention by the Trustee is unnecessary and inappropriate.

RESPECTFULLY SUBMITTED this 18th, day of June, 2014.

RAY QUINNEY & NEBEKER P.C.

/s/ Jennifer R. Korb

Loren E. Weiss

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¹⁶ Warwick Answer at p.4, Docket No. 21, filed April 21, 2014.

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/s/ Neil A. Kaplan _____

Neil A. Kaplan

Jennifer A. James

Attorneys for Defendant Kirby D. Cochran

Signed by filing party with permission

PERKINS COIE LLP

/s/ Schuyler G. Carroll _____

Schuyler G. Carroll

*Attorneys for Defendants Jeff Austin, Keith
Green and William Grundy*

Signed by filing party with permission

CERTIFICATE OF SERVICE

I hereby certify that on this 18th, day of June, 2014, I electronically filed the foregoing **MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE** with the Clerk of Court using the CM/ECF system which sent notification of such filing to all attorneys on notice in this matter.

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