

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

IN THE MATTER OF:)
)
OSAGE WATER COMPANY,) Case No. 17-42759-drd11
)
)
Debtor.)

PUBLIC WATER SUPPLY DISTRICT NO. 5)
OF CAMDEN COUNTY, LAKE AREA)
WASTER WATER ASSOCIATION, INC.,)
MISSOURI WATER ASSOCIATION, INC.,)
AND CEDAR GLEN CONDOMINIUM)
OWNERS ASSOCIATION, INC.,)
)
Plaintiffs,) Adversary No. 20-02004-drd
)
v.)
)
OSAGE WATER COMPANY., et al.)
)
Defendants.)

**TRUSTEE’S MOTION TO ABSTAIN FROM EXERCISING JURISDICTION
OVER PROCEEDING PURSUANT TO 28 U.S.C. § 1334(c)(1) AND
TO DISMISS THE COMPLAINT**

COMES NOW Jill D. Olsen, Chapter 11 Trustee for Osage Water Company (“Trustee”), by and through undersigned counsel, and respectfully moves this Court to abstain from exercising jurisdiction over the proceeding pursuant to 28 U.S.C. § 1334(c)(1) and to dismiss the Complaint. In support, the Trustee states as follows:

PROCEDURAL HISTORY AND SUMMARY OF ALLEGATIONS¹

1. Debtor Osage Water Company (“Debtor”) provides water and sewer services to customers in Camden County, Missouri. Complaint ¶ 12.

¹ Trustee assumes the truth of the facts asserted by Plaintiffs for the purpose of this Motion only.

2. On October 24, 2018, the Trustee held an auction for the Debtor's assets, resulting in Central States Water Resources ("Stalking Horse Purchaser") having the highest bid. Complaint ¶¶ 19, 21. Public Water Supply District No. 5 of Camden County, Lake Area Waste Water Association, Inc., Missouri Water Association, Inc., and Cedar Glen Condominium Owners Association, Inc. (collectively, the "Back-Up Bidders") submitted a joint bid which was determined to be the first back up-bid. Complaint ¶¶ 20-21.

3. On November 14, 2018, the Court issued an order (the "Sale Order") approving the sale agreement (the "Purchase Agreement") with the Stalking Horse Purchaser, and approving the Back-Up Bidders as the first back-up bidders. Complaint ¶ 22.

4. The Sale Order provided that no further approvals were necessary other than any "necessary approval" by state regulatory authorities. Complaint ¶ 24.

5. On April 8, 2020, the Missouri Public Service Commission issued a Report and Order (the "PSC Order") authorizing the transfer of Debtor's assets to Stalking Horse Purchaser. Complaint ¶ 27. The PSC Order had an effective date of May 8, 2020. Complaint ¶ 28.

6. On May 5, 2020, Back-Up Bidders and Cedar Glen Condominium Owners Association, Inc. (collectively, "Plaintiffs") filed a motion to stay the PSC Order. Complaint ¶ 32.

7. On May 7, 2020, the Plaintiffs filed an application for rehearing. Complaint ¶ 34.

8. On May 11, 2020, Plaintiffs filed a Petition for Alternative Writ of Certiorari and Writ of Mandamus and Suggestions in Support with the Missouri Court of Appeals in the Western District of Missouri Case WD83773.

9. On May 28, 2020, Plaintiffs filed the Complaint. Plaintiffs request that the Court grant injunctive relief to stop the sale to the Stalking Horse Purchaser. Complaint ¶ 46.

10. On June 3, 2020, the Missouri Court of Appeals issued an order denying the Movants' Petition for Alternative Writ of Certiorari and Writ of Mandamus.

11. On June 4, 2020, the Plaintiffs requested a hearing before this Court seeking a telephonic hearing to take up temporary restraining order relief. Doc. 6.

REQUESTED RELIEF

12. By this Motion, the Trustee seeks an Order from this Court:

- a. Abstaining from exercising jurisdiction over this proceeding under 28 U.S.C. § 1334(c)(1); and
- b. Dismissing this Complaint pursuant to either Federal Rule 12(b)(1) or 12(b)(6) as incorporated by Bankruptcy Rule 7012.

BASIS FOR RELIEF

A. This Court should exercise its authority to abstain under 28 U.S.C. § 1334(c)(1).

13. As stated in the Trustee's Suggestions in Opposition to Request for Temporary Restraining Order (the "Suggestions in Opposition"), which are incorporated herein by reference, the Court should abstain from ruling on Plaintiffs' Complaint. A bankruptcy court may abstain "from hearing a particular proceeding arising under title 11, or arising in or related to a case under title 11" "in the interest of justice, or in the interest of comity with State courts or respect for State Law." 28 U.S.C. § 1334(c)(1). While permissive abstention should be used sparingly, it is within the Court's discretion to do so. *See In re Kesar Enterprises, Inc.*, 330 B.R. 756, 761 (Bankr. W.D. Mo. 2005).

14. Courts consider the following factors with respect to permissive abstention:

- (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
- (2) the extent to which state law issues predominate over bankruptcy issues,

- (3) the difficult or unsettled nature of the applicable law,
- (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- (7) the substance rather than the form of an asserted “core” proceeding,
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
- (9) the burden on the bankruptcy court's docket,
- (10) the likelihood that the commencement of the proceeding involves forum shopping by one of the parties,
- (11) the existence of a right to a jury trial, and
- (12) the presence in the proceeding of nondebtor parties.

In re Pursell Holdings, LLC, 605 B.R. 914, 921 (Bankr. W.D. Mo. 2019). As this Court has recognized, the above factors should be applied “flexibly as their relevance and importance will vary depending on the specific facts of each case and no one factor is determinative.” *In re Kesar Enterprises, Inc.*, 330 B.R. at 761.

15. Application of these factors to the case at hand weighs in favor of abstention.
 - a. For the first factor, granting the Plaintiffs’ requested relief would negatively impact the efficient administration of the estate, as it could add years of delay if the Trustee is unable to close the Purchase Agreement.
 - b. For the second factor and third factors, to the extent the Plaintiffs are attempting to argue about the merits of their appeal of the PSC’s order, those are technical, state law issues.
 - c. For the fourth factor, there is already a state-law proceeding in which the Plaintiffs are seeking to stay the enforcement of the PSC Order. The PSC has the authority to grant a stay of its order. Mo. Rev. Stat. § 386.500.3. Once an appeal has been filed, the Missouri Court of Appeals may issue a stay upon the posting of an appropriate bond. Mo. Rev. Stat. § 386.520.

The Plaintiffs also sought a writ from the Missouri Court of Appeals, which has been denied.

- d. For the fifth factor, there is no other jurisdictional basis other than 28 U.S.C. § 1334. There is not diversity of jurisdiction and no federal question is involved.
- e. For the sixth factor, there is little relatedness to the main bankruptcy case. The Plaintiffs have couched their Complaint as seeking a determination as to whether a condition precedent has been satisfied for a contract that the Plaintiffs are not a party to. In reality, the Plaintiffs' Complaint is focused on their grievances with the PSC Proceeding.
- f. For the seventh factor, whether the Purchase Agreement can close is a matter affecting the administration of the estate. However, the substance of the Plaintiffs' Complaint is focused on the PSC Proceeding.
- g. For the eighth factor, the PSC and the Missouri Court of Appeals can decide the appropriateness of the sale to Osage Utility under the PSC's standards for transfer of assets. This Court has already authorized the sale to Osage Utility and no further approval is needed from this Court.
- h. For the ninth factor, this case creates an additional burden on the Court's docket.
- i. For the tenth factor, the Plaintiffs have clearly engaged in forum shopping. The Plaintiffs first filed a motion for stay with the PSC. Days later, they sought a writ from the Missouri Court of Appeals. Now, they are trying a third forum in case they do not receive a stay from the PSC. It is hard to imagine a clearer example of forum shopping.
- j. For the eleventh factor, the Plaintiffs have not requested a jury trial.
- k. For the twelfth factor, the PSC Proceeding involves entirely non-Debtor parties, favoring abstention.

16. Other bankruptcy courts have declined to grant injunctive relief under similar scenarios. The Bankruptcy Court for the Southern District of New York examined these issues in an analogous case. In *In re Go West Entertainment, Inc.*, debtor's liquor license was revoked by the New York State Liquor Authority. 387 B.R. 435, 437 (Bankr. S.D.N.Y. 2008). The debtor initiated an adversary proceeding seeking an injunction staying revocation pending appeal. *Id.*

17. In *Go West*, the bankruptcy court acknowledged that the debtor would be harmed by the decision, but ultimately declined to grant the requested injunctive relief. First, the court noted that the bankruptcy court “has no power to review or overturn a final State determination of the issues” related to the license revocation. *Id.* at 442. Second, granting an injunction “would directly violate the principle of comity and avoidance of needless friction between Federal and State courts that has been incorporated in several abstention doctrines.” *Id.* “The same comity principles apply with respect to State administrative proceedings” *Id.* at 443. Third, the court found that it lacked jurisdiction under *Rooker-Feldman*. *Id.* at 445-46.

18. Plaintiffs rely on 11 U.S.C. § 105 for their requested relief. Section 105(a), however, “does not permit courts to ‘act as roving commissions to do equity.’” *In re Amco Ins.*, 444 F.3d 690, 696 (5th Cir. 2006) (alterations omitted) (quoting *In re Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004)). Given that a substantial amount of the factors weigh in favor of abstention, the Court should decline the invitation to use its equitable powers to grant relief to the Plaintiffs on their Complaint.

B. The Court should dismiss the Complaint for failure to State a Claim under Federal Rule of Civil Procedure 12(b)(1) and (6).

1. The Plaintiffs lack standing to bring this Complaint.

19. The Complaint should be dismissed pursuant to Federal Rule 12(b)(1), incorporated by Federal Rule of Bankruptcy Procedure 7012, as Plaintiffs lack standing. *See Dalton v. NPC International, Inc.*, 932 F.3d 693, (8th Cir. 2019) (“A dismissal for lack of standing is a dismissal for lack of subject-matter jurisdiction.”).

20. As a rule, “[o]nly parties to a contract and any third-party beneficiaries of a contract have standing to enforce that contract.” *Verni v. Cleveland Chiropractic College*, 212 S.W.3d 150, 153 (Mo. banc. 2007). “To be bound as a third-party beneficiary, the terms of the

contract must clearly express intent to benefit that party or an identifiable class of which the party is a member.” *Id.* (quoting *Nitro Distributing, Inc., v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc. 2006)). Likewise, only a party with standing to enforce a contract has standing to seek a declaratory judgment action on a contract. *See Pegasus Satellite Television, Inc., v. DirectTV, Inc.*, 318 F. Supp.2d 968, 977 (C.D. Cal. 2004) (dismissing claims for declaratory relief when plaintiff was not a party to or third-party beneficiary of challenged contract).

21. The Plaintiffs are not a party to the Purchase Agreement, and the Purchase Agreement specifically states that there are no third-party beneficiaries to the Purchase Agreement. [Doc. 135-1 at 13-14]. Plaintiffs do not have standing to seek declaratory relief as to whether the conditions precedent for the Trustee to close the Purchase Agreement have been satisfied.

22. The agreement with the Back-Up Bidders contains the same language and is subject to the same conditions as the Purchase Agreement. However, the issue of what conditions precedent need to be satisfied for the Back-Up Bidders’ agreement is not ripe, and a decision on the same would be nothing more than an advisory opinion. *In re Boaz*, 386 B.R. 756, 757-58 (Bankr. D.N.D. 2008) (finding that case based on a hypothetical set of facts was not ripe for adjudication). The Court may not issue such advisory opinions. *Public Water Supply Dist. No. 8 of Clay County, Mo. v. City of Kearny, Mo.*, 401 F.3d 930, 932-33 (8th Cir. 2005).

2. The Complaint should be dismissed because it fails as a matter of law.

23. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, incorporated through Bankruptcy Rule 7012, the court accepts the plaintiff’s allegations as true. *Packard v. Darveau*, 759 F.3d 897, 899 n.2 (8th Cir. 2014). “To survive a Rule 12(b)(6) motion to dismiss, ‘a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that

is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).” (quoting *Bell Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007). A court may take judicial notice of public records, such as court documents, in ruling on a motion to dismiss. *Stahl v. U.S. Dep’t of Agriculture*, 327 F.3d 697, 700 (8th Cir. 2003).

24. Even if the Court finds that the Plaintiffs have standing, it should still dismiss the Complaint. The condition precedent for the buyer to close, which can be waived under the agreement, is that the “PSC and DNR shall have, if necessary, authorized or approved the sale, transfer or disposition of the Assets . . . in a form and substance . . . acceptable to [the buyer] in [the buyer’s] sole and absolute discretion.” [Doc. 135-1 at 8; Doc. 135-2 at 8-9]. The contract does not require a final, non-appealable approval. Likewise, the Sale Order only refers to “necessary approval,” not final, non-appealable approval. [Doc. 135 at 4, 5, 8, 10]. If the Court or the parties wanted to condition the sale on a non-appealable order, they could have done so. Accordingly, the Plaintiffs are manufacturing a requirement to a contract where non-exists and for which they are not a party. The Complaint should be dismissed as a matter of law.

WHEREFORE, Trustee respectfully requests the entry of an order granting the relief requested herein and for such other and further relief as the Court deems just and proper.

Date: June 8, 2020

Respectfully submitted,

SPENCER FANE LLP

By: /s/ Eric L. Johnson

Eric L. Johnson MO Bar No. 53131

Andrea M. Chase MO Bar No. 66019

Zach R.G. Fairlie MO Bar No. 68057

1000 Walnut Street, Suite 1400

Kansas City, MO 64106

Office: 816-474-8100

Facsimile: 816-474-3216

ejohnson@spencerfane.com

achase@spencerfane.com

zfairlie@spencerfane.com

COUNSEL FOR TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2020, a true and correct copy of the above and foregoing was served electronically upon those parties receiving electronic notification through the Court's cm/ecf system.

/s/ Eric L. Johnson

An attorney for the Trustee