US DISTRICT COURT CLERK FILED 02 JAN -9 PM 3:27

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NO. 3:00CV-680-S

BROTHERHOOD MUTUAL INSURANCE COMPANY — PLAINTIFF

vs.

MEMORANDUM ON RENEWAL OF MOTION FOR INTERPLEADER INJUNCTIVE RELIEF

DANNY JOHNSON,
HEART OF FIRE MINISTRIES, INC.
d/b/a HEART OF FIRE CHURCH, et al. — DEFENDANTS

MAY IT PLEASE THE COURT:

This action was instituted on a combined COMPLAINT FOR DECLARATORY JUDGMENT and COMPLAINT FOR INTERPLEADER, the two of which are pled alternatively by the Plaintiff, the fire insurance company which had the policy in effect for Heart of Fire Church on Bardstown Road, near Fern Creek, that was consumed by a fire on June 12/13, 2000. The fire made the newspapers because it was pronounced arson by the Jefferson County Arson detectives and agents from the Bureau of Alcohol, Tobacco & Firearms, at the scene. Residue of petroleum distillate used as an accelerant was found throughout a good deal of the floor area of the structure(s) in which the fire occurred.

As set forth in the Complaint, and according to the written application by Pastor Dan Johnson, only one prior loss was reported to have occurred at Heart of Fire Church, whereas, there were several, undisclosed, large previous losses through the prior insurer.

It is Plaintiff's underwriting procedure to take Pastors, believing them to be Godly and truthful men, at their word on prior losses, until some definitive information comes forward after a

major untoward loss or event takes place. Therefore, loss history data reports and credit history information were not requested by the Plaintiff at the outset, to determine insurability of the risk, including Pastor Dan Johnson and his wife, individually.

However, this fire with the resultant total destruction of the improvements on the real property altered this approach. Subsequent to the fire, and in an effort to determine the continued insurability of the enterprise known as Heart of Fire Church, background information on the individual insureds, was requested and secured by Plaintiff's Underwriting Department, on a review of the application (copy attached of KRS 304.14-110) originally submitted by the Heart of Fire and Johnson Defendants, in order for the insurance company to reach a determination looking toward either cancellation of the policy or keeping it in force until an annual anniversary date. (Please see attached Affidavits of Robin Kay Young and Jay W. Carter.)

Insurance companies all subscribe through their underwriting departments, to national data banks, primarily ChoicePoint C.L.U.E. in Alpharetta, Georgia, which, on request from a subscriber, either by electronic media transmittal, or mail, supplies insurance companies with loss history, financial history, and status information on prospective as well as current insureds. This is information routinely gathered in the insurance industry on review for suitability of the risk for original issuance of a policy, or maintenance of a policy in continued force and effect. When arson is conclusively determined, in the cause and origin of a fire loss, such financial information is referred to, by the fire insurance company, as bearing on the three key factors of Motive, Method and Opportunity. It is a truism that upon investigation of many arson fires, the corporate or individual insureds, frequently are in varying states of financial distress. In our case, Heart of Fire Church was essentially bankrupt, owing far more on outstanding loans than it could ever pay, more than the property was worth, or would sell for, and more than the individual Guarantors for

these loans, Danny and Rebecca Johnson, were worth, or could pay. This is all a matter of established fact from the financial records obtained in great measure from the Johnsons' own attorney before suit, and later, on discovery in this lawsuit. Written FINANCIAL AND CLAIMS AUTHORIZATIONS were executed by Pastor Johnson and allowed access by the Plaintiff to additional financial and claims background data and records.

As a result of discovery and exchange of information among the Defendants and the Plaintiff, a Settlement Conference was agreed upon, for a date convenient with the parties, and the office of U.S. Magistrate Judge James D. Moyer, October 31, 2001, at 1:30 P.M. At this Settlement Conference, after strenuous and extended negotiations, Plaintiff and Defendants, Alanar, Inc. and Liberty Group, Inc., with the Johnsons abstaining, reached what they believed to be a fair and reasonable settlement, amounting to $500,000.00 for the property and improvements located on the church premises. The check for the remaining balance, $340,000.00 (see AGREED ORDER ON PROVISIONAL PAYMENT dated June 14, 2001), arrived within the time limits set forth in the Honorable Magistrate's REPORT AND ORDER dated November 5, 2001. Differences arose over the form and content of the closing documents including the Release and dispositive ORDER which the Johnson Defendants refused to sign, although they and their attorney did endorse the settlement check; and subsequently, a falling-out occurred between Plaintiff and the Alanar/Liberty Defendants, likewise over the closing documents. The check, now returned to Brotherhood Mutual Ins. Co., is being preserved intact, in hopes that it can be utilized, ultimately, to close out this segment of the case.

Meanwhile, apparently distressed over the fact that they "were not yet receiving anything for themselves," the Johnson Defendants have now attempted a flanking maneuver through giving notice as shown on Exhibits A, B, C and D herewith, of a projected Fair Credit Reporting Act

claim directed at Plaintiff's counsel's possession of credit history information on the Johnson Defendants. While all of the allegations surrounding this claim are roundly denied by the Plaintiff and its counsel, nonetheless, notice of claim has been given, involving integral areas of attorney - client/client - attorney communications, and the contents of Plaintiff's attorney's file in the present litigation. Of course, a claim such as this outlined in Exhibits A , B, C, and D, (see reply/rebuttal Exhibit E), strikes at the very heart of the work product privilege, whereby counsel is entitled to maintain the absolute integrity of his file and the documents relied upon in it, for the pre-litigation and litigation practice of the case, without intrusion by a party to the litigation *sub judice*. This privilege is referred to briefly, in Exhibit E. Furthermore, the Courts frown on, and rigorously discourage depositions of the practicing attorneys in the case, taken by adverse counsel. The cases on this subject are manifold. An example is *McMurry v. Eckert*, Ky., 833 S.W.2d 828 (1992), copy attached, citing cogent authorities.

More important, still, is the clear intent of Defendant, Johnson, to utilize a separate piece of litigation to circumvent the contractual restrictions on any fire insurance payouts in the present case, by trying to "come in the back door" and attempt to recover extra-contractual damages to recoup some of what he perceives as his uncompensated loss from the fire. Threats have also been made on behalf of Heart of Fire and the Johnsons, before the U.S. Magistrate Judge at a telephonic conference December 19, 2001, to sue the agent, Harvey Wendelgast, who took Pastor Johnson's application for the policy through Brotherhood Mutual Insurance Company for "errors and omissions," and against Alanar/Liberty Group, the defaulted mortgagor and bond trustee for the perceived offense of "settling too cheap." All of these claims and purported claims arise directly from, and are directly connected with the fire loss on June 12/13, 2000, the ensuing investigation and this litigation.

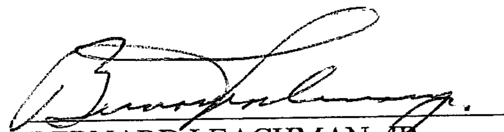
Federal Interpleader Practice envisions and encompasses situations such as this one, where peripheral and satellite claims and actions are threatened or instituted. 28 U.S.C. § 2361 provides the affected party with the right to Injunctive Relief against a multiplicity of peripheral or ancillary suits instituted outside the margins and bounds of pending Interpleader cases, so as to induce and compel the parties to litigate all issues in the singular comprehensive Interpleader case. The U.S. Supreme Court addressed these issues head-on, in *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 18 L.Ed.2d 270, 87 S.Ct. 1199, in 1967, finding the equities to rest with State Farm. *Tashire* has been regularly cited as the leading authority, including the reliance by the Southern District of Texas in *Aetna Cas & Surety Co., et al. vs. Ahrens, et al.*, 414 F. Supp. 1235 (S.D. Tex. 1976), involving a multitude of interpleader Defendants. Similarly, another example of the grant of Injunctive Relief in actions for Interpleader, is *Walmac Co., Inc. v. Isaacs*, 220 F.2d 108 (1st Cir. 1955), granting Injunction and finding the extraneous claims to be "ancillary" and therefore required to be presented within the Interpleader action, or be forever barred. Please also see *Guy v. Citizens Fidelity Bank & Trust Co.*, 429 F.2d 828 (6th Cir. 1970). Thus, although the Johnsons and Heart of Fire threaten and propose claims against Brotherhood Mutual's agent, Harvey Wendelgast, against Alanar, Inc. and Liberty Group, Inc., and those stated in Exhibits A, B, C, and D, these are, nonetheless, ancillary to the controversy embodied in the present litigation, and the individual and corporate Johnson Defendants should be enjoined from proceeding outside the margins and bounds of this case with such claims, which is provided for, in 28 U.S.C. § 2361. Instead, any said claims should be asserted in this present Interpleader action, or be forever barred.

Furthermore, in the absence of such Injunctive Relief, Plaintiff has no adequate remedy at law, and it is plainly obvious that seriously prejudicial invasions of the attorney - client and

attorney work product privileges directly concerned with this case, will occur, as well as a multiplicity of actions, contrary to the policy expressed in 28 U.S.C. § 2361. When Injunction is authorized by statute, as in the present circumstances, irreparable injury need not be alleged. *U.S. v. Resch*, 85 F. Supp. 389 (D.C. Ky. 1949), although intrusions into counsel's litigation file under the guise of pursuing discovery in other, ancillary litigation, certainly would be very likely to result in irreparable injury to Plaintiff's interests, including its ability to adequately pursue this present case. Moreover, the tendered ORDER FOR INTERPLEADER INJUNCTIVE RELIEF provides these putative claimants with an opportunity and a forum for presentation of any such alleged claims, and therefore does no harm or prejudice to these contending parties or their interests. It brings order out of chaos, and provides the Plaintiff insurance company with genuine Interpleader relief as accorded in the above-cited Federal Interpleader decisions.

Therefore, this Court should grant and enter the accompanying ORDER FOR INTERPLEADER INJUNCTIVE RELIEF.

Respectfully submitted,



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