

FILED

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

2012 DEC 13 A 9:36
CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

F. EDWIN HARBACH,)
et al.,)
)
Plaintiffs,)
)
v.)
)
JOHN DeGROOTE,)
)
Defendant.)

Case No. 1:12cv1434 ATT/JFA

NOTICE OF REMOVAL

The Defendant, John DeGroote ("DeGroote"), removes this action pursuant to 28 U.S.C. §§ 1331, 1332, 1334, 1441 & 1452 from the Circuit Court of Fairfax County, Virginia, to the Alexandria Division of the United States District Court for the Eastern District of Virginia. The grounds for this removal are:

1. On November 15, 2012, the named Plaintiffs, F. Edwin Harbach, Roderick C. McGeary and Edward [sic] Munson (together, the "Former Directors"), filed the Complaint in this case in the Circuit Court of Fairfax County. An accurate and complete copy of that Complaint is attached as Exhibit A. The Plaintiffs allege that the sole Defendant, DeGroote, supposedly committed legal malpractice and defrauded them. (E.g., Compl. ¶¶ 46-53, 56-60.)

2. This case is properly removed to this Court pursuant to 28 U.S.C. §§ 1334 and 1452 and Bankruptcy Rule 9027 because it is a civil action arising in and related to a bankruptcy case under Title 11 and concerns its property and/or estate.

3. In addition, this case is properly removed to this Court pursuant to 28 U.S.C. §§ 1332 (a) and 1441 because this Court has subject matter jurisdiction over this case on the basis of complete diversity of citizenship between each of the named Plaintiffs and the Defendant.

4. DeGroote has also satisfied each of the procedural requirements for removal under 28 U.S.C. § 1446.

A. This Court Has Subject Matter Jurisdiction Pursuant to 28 U.S.C. §§ 1331 & 1334.

5. This Court has original jurisdiction pursuant to 28 U.S.C. § 1334(b) because this is a civil action "arising in" and "related to" a proceeding under Title 11.

6. Each of the Plaintiffs and DeGroote were Directors and/or Officers of BearingPoint, Inc. ("BearingPoint"), a company that filed for protection under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") on February 18, 2009, in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Case").

7. In their Complaint, the Former Directors allege that DeGroote, during the pendency of the Bankruptcy Case, and in furtherance of his appointment as the Liquidating Trustee of the BearingPoint, Inc. Liquidating Trust, supposedly committed malpractice and fraud in connection with advice that he provided during the Company's Board meetings regarding BearingPoint's bankruptcy plan. (Compl. ¶¶ 21, 23, 50-52 & 57-60.)

8. In particular, the Complaint alleges that limitations imposed by the Bankruptcy Court on proposed releases from personal liability, that the Former Directors had sought in BearingPoint's bankruptcy plan, were supposedly the result of DeGroote's alleged misconduct. (*Id.* at ¶ 34.) These release limitations, however, were also the subject of extensive briefing and argument in the Bankruptcy Case. The Bankruptcy Court ordered limited releases of the Former Directors in its December 22, 2009 Order confirming BearingPoint's, and certain of its affiliates',

bankruptcy plan (the "Confirmation Order"). An accurate and complete copy of the Confirmation Order is attached as Exhibit B.

9. The Confirmation Order also contains release, injunction and exculpation provisions that expressly provide broad releases by the holders of claims and equity interests in BearingPoint to DeGroote, releasing him from liability for actions taken prior to the effective date of the plan or in connection with the plan. The Former Directors, each of whom held claims and equity interests in BearingPoint during the relevant time period, are bound by these releases and they are enjoined from bringing the claims alleged in the Complaint. (Confirmation Order, Exhibit B, at ¶¶ 30, 34(a).)

10. In its Confirmation Order, the Bankruptcy Court also ordered that it, together with the United States District Court for the Southern District of New York, would retain "*exclusive jurisdiction*" over claims against any releasee – including DeGroote. (*Id.* at ¶ 34(c).)

11. A case "arises in" a Chapter 11 proceeding when "it would have no practical existence *but for* the bankruptcy." *Grausz v. Englander*, 321 F.3d 467, 471-72 (4th Cir. 2003) (finding bankruptcy jurisdiction "over a malpractice claim against a lawyer for providing negligent advice . . . in a bankruptcy case."). This action "arises in" the Bankruptcy Case because it: (a) explicitly involves the advice DeGroote allegedly gave regarding the releases contained in the Confirmation Plan; and (b) calls into question the Bankruptcy Court's appointment of DeGroote as the Liquidating Trustee. (Compl. ¶¶ 34, 44.)

12. A case is "related to" a Chapter 11 proceeding if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Bay Vista of Virginia, Inc.*, 394 B.R. 820, 839 (Bankr. E.D. Va. 2008). This action is "related to" the Bankruptcy Case because, among other things, it is barred by the Confirmation Order; it

collaterally attacks and violates various orders entered in the Bankruptcy Case; and it adversely affects the assets of the Trust based on the indemnification of the DeGroote for his defense of this action.¹

13. Accordingly, this Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1334(b), and this action may be removed to this Court by DeGroote, pursuant to 28 U.S.C. § 1452(a), because the action both "arises in" and is "related to" the pending Chapter 11 Bankruptcy Case. *Grausz*, 321 F.3d at 471-72; *Bay Vista*, 394 B.R. at 839.

14. Pursuant to Rule 9027(a)(1) of the Federal Rules of Bankruptcy Procedure, DeGroote states that the claims asserted against him are "core" claims within the meaning of 28 U.S.C. § 157(b)(2).

B. This Court Also Has Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1332(a)(1).

15. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because this is a civil action in which the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and it is between citizens of different States.

16. The Plaintiffs seek up to \$1.88 billion in compensatory damages in this action, as well as an unstated amount of punitive damages. (Compl., Prayer for Relief ¶(a).) Thus, the amount in controversy exceeds the jurisdictional minimum prescribed by 28 U.S.C. § 1332(a).

17. DeGroote is, and was at the time Plaintiffs commenced this action, a citizen of the State of Texas. (Compl. at 1.)

¹ Indeed, DeGroote has contemporaneously filed a Motion, in the Bankruptcy Court, for the entry of an Order (A) Enforcing the Confirmation Order, (B) Holding F. Edwin Harbach, Roderick C. McGeary, and Eddie R. Munson In Contempt, and (C) Imposing Sanctions for Willful Violation of the Confirmation Injunction based on the filing of the Complaint in this case.

18. Although none of the Plaintiffs has alleged his citizenship in the Complaint, the same named Plaintiffs, and others, improperly removed another action to this Court (and it was later remanded to State court), and expressly stated, in their Notice of Removal, that: (a) F. Edwin Harbach is a resident of the State of Florida; (b) Roderick C. McGeary is a resident of the State of California; and (c) Eddie R. Munson is a resident of the State of Michigan. (*John DeGroot Services, LLC v. Harbach, et al.*, No. 1:11cv959 (JCC/TRJ), Document No. 1, Defendants' Notice of Removal ¶¶ 13, 15 & 21 (an accurate copy of this Notice of Removal, but not including the extensive exhibits attached to that Notice, is attached as Exhibit C).) Upon information and belief, each Plaintiff remains a citizen of the State identified in that pleading.

19. There is, therefore, complete diversity between each of the named Plaintiffs and DeGroot.

C. The Defendant Has Satisfied All of the Procedural Requirements for Removal.

20. On November 28, 2012, DeGroot received from the Former Directors' counsel a copy of the Complaint and a summons, and DeGroot subsequently agreed, on November 30, 2012, to accept service of process. Thus, this Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b).

21. Venue is proper in this Court pursuant to 28 U.S.C. § 127(a) because it is the "district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

22. No previous application has been made for the relief requested in this Notice of Removal.

23. There are no other defendants in this case. Therefore, no other party is required to consent to the removal of this action to this Court.

24. As required by 28 U.S.C. § 1446(a), accurate and complete copies of the Complaint, and all other pleadings that have been filed in the State court action, are attached to this Notice as Exhibit D.

25. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for the Plaintiffs, and a copy is also being filed with the Clerk of the Circuit Court of Fairfax County. A copy of the Notice of Filing Notice of Removal is attached as Exhibit E.

26. DeGroot makes no admission of fact, law, or liability by filing this Notice of Removal, and he expressly reserves all defenses, affirmative defenses and motions otherwise available to him.

JOHN DeGROOTE

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CERTIFICATE OF SERVICE

I certify that, on December 13, 2012, a copy of this Notice of Removal was e-mailed and hand-delivered to the offices of:

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- and -

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In addition, on the same date, a copy of this Notice of Removal was e-mailed and mailed to the offices of:

Paul C. Curnin, Esquire
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