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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

UNPUBLISHED OPINION

In re	)	Bankruptcy Case No. 83C-03251
	)	
LARRY DAVID LARSON and MARGARET P. LARSON,	)	
	)	
Debtors.	)	
	)	
LARRY D. LARSON,	)	Civil Proceeding No. 84PC-1950
	)	
Plaintiff.	)	
	)	
-vs-	)	
	)	
ZION'S FIRST NATIONAL BANK,	)	
	)	
Defendant.	)	MEMORANDUM DECISION AND ORDER

CASE SUMMARY

This matter is before the Court on the motion of Zion's First National Bank ("Zion's") for a determination of whether this is a "core" or "related" proceeding within the meaning of 28 U.S.C. 157(b)(2), and for a determination of whether plaintiff's adversary proceeding should be dismissed or, in the alternative, whether the Court should abstain from hearing the proceeding, or strike certain portions of the complaint as irrelevant. Zion's has made a request for a ruling on this matter as an uncalendared motion pursuant to Local Rule 5(i).

FACTS

The material facts, as they appear from the pleadings herein, are as follows:

In August of 1974, Parley Probst sold, on a contract, his property in Heber City, Utah to Terry L. Kodatt. This property is known as the Flying "V" Motel and Cafe.

In 1975, Probst conveyed his interest in that contract to Zion's First National Bank as trustee for the Parley Probst Trust, created for the benefit of Parley's handicapped son, Jack.

In 1976, Kodatt assigned his interest in the contract of sale to the debtor, Larry D. Larson and Rosemary Larson (Larry's then wife).

In 1979, Larson conveyed his equitable buyer's interest in the property to Gerald L. and Carolyn Lynn Potter.

A dispute arose between the Larsons and the Potters. This precipitated the filing of two lawsuits in the Fourth Judicial District Court of Wasatch County, Utah. The Larsons and Potters agreed that the Potters should make their payments under the contract of sale directly to Zion's Bank.

Unfortunately, during the lawsuit, a fire damaged a portion of the property, and there then arose an additional dispute between the Larsons and Potters as to who was entitled to the insurance proceeds.

The dispute became very heated, and the Potters and the Larsons both sought restraining orders against one another on various grounds.

On the motions for restraining orders, the state court ruled on September 9, 1982 that:

(1) The Potters were entitled to a restraining order against Larson;

(2) Zion's was to disburse and distribute the insurance proceeds as per its agreement with the Potters; and

(3) Larson had no authority or interest in the insurance proceeds.

The state court made its final findings of fact and conclusions of law in the case in March of 1983. A judgment was entered on April 1, 1983. By that time Zion's, pursuant to the order of the court on the motion for the restraining orders, had already disbursed the insurance proceeds, made improvements and changes in the property in accordance with the Potters' instructions and otherwise cooperated with the Potters in accordance with the state court's September 9th ruling.

On December 8, 1983, Larson filed a petition under Chapter 11. Thereafter, Zion's filed a Motion to Terminate the Automatic Stay so it could foreclose its lien against the property.

On December 24, 1984, Larson commenced this adversary proceeding alleging three causes of action: (1) breach of contract; (2) conversion; and (3) tortious interference with the debtor's business. Zion's then brought this motion for a determination of whether or not the adversary proceeding was a "core" or "related" matter, and also to dismiss the complaint, cause the Court to abstain, or to strike irrelevant matter from the Larson complaint. Zion's requested that the Court rule on this matter as an uncalendared motion in accordance with Local Rule 5(i). Larson has not opposed this procedure but has submitted a memorandum in opposition to the relief requested.

DECISION

The Court must first determine whether this adversary proceeding is a core proceeding as to which this Court may enter a final judgment. 28 U.S.C. § 157(b)(2) provides:

> (2) Core proceedings include, but are not limited to --
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> (A) matters concerning the administration of the estate;
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> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

> (C) counterclaims by the estate against persons filing claims against the estate;
> (D) orders in respect to obtaining credit;
> (E) orders to turn over property of the estate;
> (F) proceedings to determine, avoid, or recover preferences;
> (G) motions to terminate, annul or modify the automatic stay;
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
> (I) determinations as to the dischargeability of particular debts;
> (J) objections to discharges;
> (K) determinations of the validity, extent, or priority of liens;
> (L) confirmations of plans;
> (M) orders approving the use or lease of property, including the use of cash collateral;
> (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Congress intended for most litigated matters in bankruptcy cases to be core proceedings.[1] It should be noted that the word "include" in Section 157(b)(2) is not limiting. Furthermore, the specific illustrations of core proceedings contain two

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1 During the House debate on H.R. 5174, Congressmen Kastenmeir and Kindness argued that 95 percent of all bankruptcy matters were core proceedings. 130 Cong. Rec. H 1846-48 (daily ed. March 21, 1984).

"catchalls" -- "matters concerning the administration of the estate," 28 U.S.C. § 157(b)(2)(A), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship. . . ." 28 U.S.C. § 157(b)(2)(O).

In this Court's view, this complaint for breach of contract, conversion, and tortious interference with business does not fall within any of the examples of core proceedings identified in Section 157(b)(2)(A) through (O). It might appear to involve an "adjustment of the debtor-creditor relationship" and arguably fall within the language of Section 157(b)(2)(O). However, upon closer examination of that subdivision and its derivation, this Court concludes that it is inapplicable here.

Section 157(b)(2)(O) is apparently derived from the following language of the Supreme Court in the landmark Marathon decision:

> But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.

Northern Pipeline Construction Company v. Marathon Pipe Line Co., 458 U.S. 50, 71, 102 S.Ct. 2858, 2871, 73 L.Ed.2d 598 (1982) (emphasis added). See 1 COLLIER ON BANKRUPTCY ¶ 3.01[b][iii], at 3-32 (15th ed. 1985). Commenting on the relationship between

Marathon and Section 157(b)(2)(O), COLLIER observes: "Marathon at least states that if one of the assets of an estate is a cause of action owned by the debtor at the commencement of the case, a suit filed by the trustee in an attempt to liquidate that asset will not be a core proceeding." Id.

Given that this case primarily involves "the adjudication of state-created private rights," the Court concludes that this lawsuit is not a core proceeding. Having made this determination, the Court must next address Zion's collateral estoppel argument.

Zion's asks this Court to dismiss the plaintiff's complaint. It argues that even if the plaintiff has instituted an adversary proceeding that is a "core" matter, that proceeding should be dismissed on grounds that collateral estoppel prevents Larson from relitigating issues finally determined in the state court action.

It is true that the doctrine of collateral estoppel would preclude Larson from relitigating issues actually and necessarily decided in the state court action. The Tenth Circuit has recently reiterated the requirements for application of the doctrine:

> It can only be applied to subsequent actions when (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a

> party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Matter of Lombard, 739 F.2d 499, 502 (10th Cir. 1984). However, in order for this Court to make that determination, it must consider the entirety of the state court record. Since that record is not before this Court, the question of the application of collateral estoppel cannot be resolved.

Zion's also argues that even if the collateral estoppel requirements are not met, the adversary proceeding should be dismissed because the Larsons are seeking to raise as causes of action in an adversary proceeding before this Court which should have been raised as a compulsory counterclaim in Zion's foreclosure action in state court. The debtor's allegations in this adversary proceeding, it is argued, arise out of the same transactions that formed the basis of Zion's foreclosure action.

The pertinent facts of the transaction may be summarized as follows: Probst sold the motel on a contract to Kodatt, who assigned his equitable buyer's interest in that contract to Larson, who in turn conveyed his equitable buyer's interest in the contract to Potter. Probst also conveyed by warranty deed his seller's interest in the contract to Zion's as trustee for a trust in which Jack Probst was to hold the beneficial interest. Apparently Potter or Larson defaulted on the contract. Then

Zion's, standing in the shoes of Probst, foreclosed against Larson.

Larson's allegations of breach of contract, tortious interference with business, and conversion clearly grew out of the same contractual transaction that formed the basis of Zion's foreclosure action. Cf. Moore v. New York Cotton Exchange, 270 U.S. 593, 610, 46 S.Ct. 367, 70 L.Ed. 750 (1926) (whether or not the operative facts constitute a "transaction" depends upon their logical relationship). Rule 13(a) of the Utah Rules of Civil Procedure and Rule 13(a) of the Federal Rules of Civil Procedure are identical and state:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 13(a) is designed to prevent multiple litigation and to promote judicial economy. Larson's allegations would appear to constitute a compulsory counterclaim under both the Utah and Federal Rules. Therefore, the proper action in which to raise

those claims was the state court foreclosure action commenced by Zion's. See Local Union No. 11 Intern. Brother. of Elec. Workers, AFL-CIO v. G.P. Thompson Elec., Inc., 363 F.2d 181 (9th Cir. 1966) (If a party fails to plead a compulsory counterclaim, he is held to waive it and is precluded by res judicata from ever suing upon it again).

In order to make its prima facie showing, the party seeking dismissal of claims as violative of the compulsory counterclaim rule need only show that the subject allegations grew out of a transaction or occurrence of the same transaction that forms the basis of another and prior lawsuit in which such allegations should have been raised as part of a compulsory counterclaim. The party opposing the dismissal on these grounds has the burden of presenting evidence to show that the allegations that should have formed the compulsory counterclaim fall within the exceptions to Rule 13. Koesling v. Basamakis, 539 P.2d 1043 (Utah 1973) (Once the proponent of a proposition has produced evidence which proves or tends to prove the proposition asserted, the burden of producing evidence disproving or tending to disprove the proposition shifts to the opponent, and he must introduce such evidence as may be necessary to avoid the risk of a directed verdict or a peremptory finding against him as the existence of the proposition).

In this case, Zion's has not made its prima facie showing that the Larson's complaint should have been set forth as a compulsory counterclaim in the state court, for there is no evidence before the Court that Zion's has, in fact, commenced a lawsuit for foreclosure prior to the filing of this adversary proceeding in which Larson could have asserted a compulsory counterclaim.

Zion's next argues that if plaintiff's complaint does not violate the compulsory counterclaim rule, then this Court should, nevertheless, dismiss the complaint because the plaintiff failed to properly plead the jurisdiction of this Court.[2] Zion's cites no authority for the proposition that failure to plead jurisdiction properly is fatal. The Court rejects this view in light of the liberal notice pleading and amendment provisions of the Federal Rules of Civil Procedure which are incorporated by Bankruptcy Rules 7001, et seq. This is particularly true in a case like this where the jurisdictional basis of the suit has

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2 In the jurisdictional allegation of his complaint, plaintiff stated that this Court had jurisdiction pursuant to 28 U.S.C. § 1471. The jurisdictional basis of the bankruptcy court was, of course, changed by Congress under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (July 10, 1984), and Section 1471 was repealed. The jurisdiction of the bankruptcy court over adversary proceedings is pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference of the United States District Court for the District of Utah dated July 10, 1984, entered pursuant to 28 U.S.C. § 157(a).

been recently changed by act of Congress. Defective jurisdictional averments may be amended. Such defects are not fatal if the operative facts pleaded bring the case within the court's jurisdiction. 2A, J. Moore, MOORE'S FEDERAL PRACTICE ¶ 8.07[1], at 8-43 through 8-45 (2d ed. 1984). In light of Zion's objection to the erroneous jurisdictional allegation in the plaintiff's complaint, the plaintiff is hereby granted leave to amend, within twenty days of the date of this Memorandum Decision and Order, its complaint to properly reflect the jurisdictional basis of the Court to hear this adversary proceeding.

Zion's next argues that if plaintiff's complaint is not dismissed for failure to properly allege the basis of the Court's jurisdiction, then the Court should abstain from adjudicating the causes of action raised in the plaintiff's complaint in the interest of justice pursuant to 28 U.S.C. 1334(c)(1) and (2), which provides:

> (c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
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> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain

> from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

Abstention is possible only in a case where the same action can be timely adjudicated in a state forum of appropriate jurisdiction and presently there is no evidence before the Court that there is, in fact, an action pending in state court that can be timely adjudicated.

Zion's final argument is that certain of plaintiff's allegations are "redundant" in violation of Bankruptcy Rule of Procedure 7012(f), and the Court should, therefore, strike plaintiff's third cause of action. Motions to strike alleged redundant matter are not favored and matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. 2A, MOORE'S FEDERAL PRACTICE supra, ¶ 12.21[2], at 2429.

The Court has reviewed the causes of action in the plaintiff's complaint, and while it is true that the three causes of action are not models of clear, concise, and specific notice pleading under the rules, it is clear to the Court, after a number of readings, that the plaintiff has set out a first cause

of action for breach of contract, a second cause of action for conversion and possibly conspiracy, and a third cause of action for tortious interference with the debtor's business. The modern philosophy of pleadings is that they do little more than indicate generally the type of litigation that is involved. 2A, MOORE'S FEDERAL PRACTICE supra, ¶ 8.03, at 8-21. Since the plaintiff, however inartfully, attempts to set forth in his third cause of action a basis for relief different from that asserted in the first two, the Court will not grant defendant's motion to strike. Accordingly, it is hereby

ADJUDGED AND DECREED that this adversary proceeding is not a core proceeding within the meaning of 28 U.S.C. § 157(b), but is otherwise related to a case under title 11; and it is further

ORDERED, that defendant's motion to dismiss, or, in the alternative, to abstain, and to strike portions of plaintiff's complaint, be, and the same hereby is, denied.

DATED this 22 day of June, 1985.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE