

and facts and now renders the following memorandum and order.

Background

Appellants were counsel for Littletree Inns-Layton, Inc., ("Littletree") in a Chapter 11 bankruptcy case No. 86C-01516 in the District of Utah. Littletree owns and operates a hotel in Layton, Utah. State Savings and Loan Association holds a first deed of trust upon the hotel real property. FSLIC is the Receiver for State Savings and Loan Association. On or about August 20, 1986, the bankruptcy court granted FSLIC relief from the automatic stay and ruled that rental income from the operation of the Littletree Inn is cash collateral of the Receiver. On August 22, 1986, a Trustee was appointed. On February 4, 1987, the Honorable J. Thomas Greene affirmed these orders.¹ In December, 1987, the bankruptcy court ordered the Trustee to abandon the cash collateral and to assign its causes of action against the appellants to the Receiver.

On January 12, 1988, FSLIC filed a complaint against Smith alleging, first, Smith received cash collateral from Littletree in the sum of \$8,000.00 or more without the Receiver's consent or the bankruptcy court's authorization in violation of

¹ The court stated: "[A]ll income from the rental of rooms is rent within the definition of cash collateral in 11 U.S.C. § 363(a)." No. 86NC-111G. The court further stated it was not error "for the Bankruptcy Court to appoint a trustee in order to adequately protect the interest of the Receiver in cash collateral from the unauthorized use of that cash collateral" Id.

11 U.S.C. § 363(c)(2).² FSLIC asserted, second, a right to recover the alleged post-petition transfers pursuant to 11 U.S.C. §§ 549 and 550 because the Trustee assigned this cause of action to FSLIC, the Receiver. On January 21, 1988, the Bankruptcy Court entered an order closing the Debtor's bankruptcy case pursuant to 11 U.S.C. § 350.

On February 11, 1988, Smith filed a motion to dismiss FSLIC's complaint for lack of subject matter jurisdiction. Subsequently, FSLIC voluntarily dismissed its causes of action pursuant to 11 U.S.C. §§ 549 and 550, but retained its cause of action pursuant to 11 U.S.C. § 363(c)(2). On May 22, 1988, the bankruptcy court ruled it has jurisdiction over the remaining cause of action and that the proceeding is a core proceeding under 28 U.S.C. § 157.³

Smith appeals this order arguing that the bankruptcy

² FSLIC alleges:

The Debtor, during the pendency of the unsuccessful reorganization proceeding improperly transferred to its attorneys, Alan R. Smith and the law firm of Smith & Corder, the collateral of the Receiver.... after the Bankruptcy Court denied the request of the defendants to use the collateral of the Receiver.

Appellee Brief at 2-3. Smith admits that sometime prior to December 15, 1986, the Debtor transferred \$8,000.00 or more to it but claims the funds transferred were not cash collateral. Defendants' Response to Plaintiff's first set of Request for Admission.

³ In the hearing on Smiths' motion to dismiss, the bankruptcy court stated that a "case involving the protection of the creditor's rights in cash collateral is a core proceeding." Transcript of hearing on Motion to Dismiss at 9-10.

court does not have jurisdiction over FSLIC's complaint. Smith also argues on appeal that because 11 U.S.C. § 363 does not provide affirmative relief for a creditor against a non-debtor third party, its complaint fails to state a claim.

The question before this court is whether the bankruptcy court erred as a matter of law in deciding FSLIC's cause of action to recover funds transferred from the debtor in possession to its attorney allegedly in violation of 11 U.S.C. § 363 (c)(2) is a core proceeding conferring jurisdiction upon that court.

Discussion

In reviewing the decision of the bankruptcy court, this court must accept the findings of fact of the bankruptcy court unless the findings are clearly erroneous. Bankr. Rule 8013; Rowe International v. Herd, 840 F.2d 757, 759 (10th Cir. 1988). In addition, this court must make a de novo review of the bankruptcy court's legal conclusions. Id.

Jurisdiction

28 U.S.C. § 1334 (a) confers original and exclusive jurisdiction of all cases under title 11 in the district court. 28 U.S.C. § 1334 (b) confers original but not exclusive jurisdiction of all civil proceedings arising under, or arising in, or related to cases under title 11 in the district court. The district court may refer bankruptcy cases or proceedings to the bankruptcy court. 28 U.S.C. § 157 (a). In the district of Utah, the district court has referred all bankruptcy cases and

proceedings to the bankruptcy court. See Rule B-105, District Court Rules of Bankruptcy Practice and Procedure.

Proceedings arising under or arising in the title 11 cases are called core proceedings. Proceedings related to cases under title 11 are called non-core proceedings. The distinction between core proceedings and related matters is important because "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings ... and may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157 (b)(1). On the other hand, unless the parties consent otherwise, a bankruptcy judge may only submit proposed findings of fact and conclusions of law to the district court regarding a non-core proceeding. 28 U.S.C. § 157 (c)(1), (2). Furthermore, upon timely motion by a party the court must abstain from hearing certain related matters, such as "State law claim[s] or State law cause of action[s], ... which ... could not have been commenced in a court of the United States absent jurisdiction under [28 U.S.C. § 1334] ... if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334 (c)(2).

Procedurally, the bankruptcy judge decides whether a matter is core. Rule B-107, District Court Rules of Bankruptcy Practice and Procedure. The judge is not to decide a matter is non-core, however, solely because "its resolution may be affected by State law." 28 U.S.C. § 157 (b) (3). "The source of the cause of action, not the governing substantive law, is to be

determinative." 1 Collier on Bankruptcy ¶ 3.01 [2][c] at 3-50 (1988). In fact, in Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 71 (1982), the United States Supreme Court stated that "the restructuring of debtor-creditor relations [typically a state law concern] ... is at the core of the federal bankruptcy power."⁴ In addition, 28 U.S.C. § 157 (b) (2) (M) specifically includes "orders approving the use or lease of property, including the use of cash collateral" as core-proceeding examples.

The right FSLIC alleges in its complaint regards the debtor's unauthorized transfer of cash collateral to the appellants "in violation of the provisions of 11 U.S.C. § 363." Appellee Brief at 9. FSLIC's position with respect to the cash collateral was created by and is peculiar to bankruptcy law.⁵

⁴ One commentator states: "[T]he very purpose of bankruptcy is to modify the rights of the debtors and creditors, and the bankruptcy code authorizes the bankruptcy court to abrogate or modify State-created obligations in many ways." 1 Collier on Bankruptcy ¶ 3.01 [2][b][ii] at 3-37(1988) (quoting 130 Cong. Rec. H1110 (daily ed. March 20, 1984)).

On the other hand, "damages for breach of contract and misrepresentation, involve a right created by state law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court." Marathon, 458 U.S. at 84.

⁵ The appellees aptly state:

The Bankruptcy Code attempts to create a balance between the rights of the debtor and its creditors in a bankruptcy case....[T]he creditor is precluded from enforcing its contractual rights of repossession and sale.... In return, the Bankruptcy Code protects the rights of the secured creditor by forbidding the debtor from using the cash collateral generated by the sale

In other words, prior to Littletree's bankruptcy filing, FSLIC was a secured creditor with rights in the cash collateral proceeds from the Littletree Motel. After the filing date, FSLIC was automatically stayed from enforcing these rights against the Debtor. 11 U.S.C. § 362. In this case, the bankruptcy court ordered relief from the stay and appointed a Trustee to protect FSLIC's interest in the cash collateral. Thereafter, the Trustee abandoned this property. Nonetheless, FSLIC's interest, vis-a-vis the cash collateral, was defined by the Bankruptcy Code in 11 U.S.C. § 363. Consequently, its claim regards an interest in cash collateral that arose under title 11. Moreover, during oral argument before this court, both parties agreed that 11 U.S.C. § 157 (b) (2) (M) would apply to the unauthorized use of cash collateral. Although appellants agree that a transfer occurred but dispute that cash collateral was involved, the claim regards the unauthorized use of cash collateral. Whether the monies transferred were actually cash collateral is an evidentiary question for the bankruptcy court to address.

Appellants next argue that "[t]he closing of a bankruptcy case ordinarily results in the dismissal of all remaining adversary proceedings, absent extraordinary

without the consent of the secured creditor or an order of the bankruptcy court.

Appellee Brief at 19.

circumstances." Appellant Brief at 3. Appellants assert the court should follow the "normal rule of dismissing adversary proceedings upon closing the bankruptcy case." Appellant Brief at 4-5.⁶ The cases appellant cites for the "normal rule," however, deal with bankruptcy cases that were dismissed as opposed to cases closed after the Trustees fully administered the estates.

FSLIC does not dispute that a bankruptcy case dismissal normally results in the dismissal of civil proceedings. But, FSLIC argues that even in a dismissed case the court may "retain jurisdiction of [an] adversary proceeding ... to protect the rights of a creditor acquired in reliance upon the bankruptcy Code." Appellee Brief at 11. In fact, the most recent case appellant cites states that the district courts may decide whether to maintain jurisdiction over adversary proceedings weighing the following factors: "judicial economy, fairness and convenience to the parties[,] and the degree of difficulty of the state law issues involved." Stardust, 70 B.R. at 891. Accord, Pocklington, 21 B.R. at 202. Even by analogy to a dismissed case, with respect to this case, it is more economic to maintain jurisdiction in the bankruptcy court which has the expertise to hear a matter concerning interests created by the bankruptcy code in property of a bankruptcy estate.

⁶ Appellant cites Stardust Inn, Inc. v. Doshi, 70 B.R. 888 (Bkrtcy E.D.Pa. 1987); Pocklington v. Auto Action, Inc., 21 B.R. 199 (Bkrtcy S.D. Cal. 1982).

The Littletree bankruptcy case, however, was not dismissed. It was closed and, consequently, the bankruptcy court has express discretion to hear FSLIC's complaint. As FSLIC notes, closing a bankruptcy case, as opposed to dismissing the case, is merely a ministerial act performed by the clerk of the court. 11 U.S.C. § 350(b) provides for the reopening of a closed case "in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." (emphasis added).⁷ The court believes "for other cause" includes the protection of the creditor right alleged in this case, permitting the bankruptcy court to reopen the case.

Finally, appellants allege FSLIC's complaint fails to state a claim because affirmative relief is not created in favor of a creditor against a non-debtor third party by 11 U.S.C. § 363. First, appellants argue the cause of action under § 363(c)(2) exists only against the trustee or debtor in possession because "this section does not prohibit a third party from

⁷ 11 U.S.C. § 350 provides:

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

See also Stardust Inn, 70 B.R. at 890 ("Obviously, the Bankruptcy Code itself contemplates that the Bankruptcy Court will have the jurisdiction to consider certain matters even after the case is closed.")

receiving cash collateral." Appellant Brief at 6. Second, appellants argue "[t]he only right to recover from the transferee of an avoided transfer is set forth in [11 U.S.C.] § 550." Id.

First, after imposition of the bankruptcy automatic stay, application of 11 U.S.C. § 363 created FSLIC's right to the collateral. FSLIC claims a violation of this right under this section. Because this is a core matter, it is certainly appropriate for FSLIC to seek relief from the tribunal which granted its right in the first place.

Second, the language of 11 U.S.C. § 550 merely permits the Trustee to recover "for the benefit of the estate" certain property transfers. It does not appear to prevent one whose rights in the bankruptcy case have been violated from alleging a claim before the bankruptcy court. Furthermore, in this case, after the automatic stay was lifted with regard to the Littletree Motel rental income and this was declared the cash collateral of FSLIC, the estate had no interest in the rental income. Therefore, the Trustee had no need to recover any transfer of the rental income because it could no longer benefit the estate. Because it was of no benefit to the estate, the Trustee abandoned its interest in this property and thereafter the case was closed.

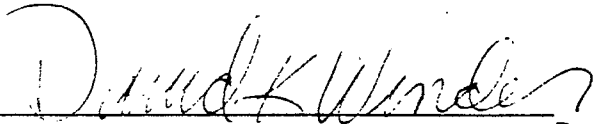
Conclusion

The bankruptcy court concluded that FSLIC's cause of action to recover funds transferred from the debtor in possession to its attorney allegedly in violation of 11 U.S.C. § 363 (c)(2) is a core proceeding. Consequently, the bankruptcy court found

it had jurisdiction over that claim. Based on its de novo review, this court is of the opinion that court ruled correctly.

Accordingly, IT IS HEREBY ORDERED that the bankruptcy court's Order, dated, May 22, 1988, is affirmed.

Dated this 3rd day of April, 1989.



David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this _____ day of October, 1988.

Secretary

Copies mailed, 4-3-89jm
Herschel J. Saperstein, Esq.
Alan R. Smith, Esq.

Marilyn Weaver
Bankruptcy Appeals Clerk