

IN THE UNITED STATES BANKRUPTCY COURT FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

FOR THE DISTRICT OF UTAH -- CENTRAL DIVISION DEC 15 1989

In re:

SHANNON LINDSAY,
Debtor.

ASSOCIATED BUILDERS AND CONTRACTORS OF UTAH, INC.,
a Utah Corporation,
Plaintiff,

vs.

UNITED BANK, a Utah corporation,
Defendant.

UNITED BANK, a Utah banking corporation,
Third-Party Plaintiff,

vs.

SHANNON LINDSAY and LYNNE LINDSAY, a/k/a ANNA LINDSAY,
Third-Party Defendants.

MARKUS B. ZIMMER, CLERK
BY _____
DEPUTY CLERK

Bankruptcy Number 89B-04234
[Chapter 7]

89 M 333S

Adversary Proceeding Number
89PB-0550

(Civil No. 880907217CV
Removed to Bankruptcy Court)

REPORT AND RECOMMENDATION CONCERNING
PLAINTIFF'S MOTION FOR REMAND
OR, IN THE ALTERNATIVE, MANDATORY ABSTENTION

J. Bruce Reading, Esq., Scalley & Reading, of Salt Lake City, Utah, appeared on behalf of Associated Builders and Contractors of Utah, plaintiff.

Michael A. Katz, Esq., Burbidge & Mitchell, of Salt Lake City, Utah, appeared on behalf of United Bank, defendant and third-party plaintiff.

D. Kendall Perkins, Esq., of Salt Lake City, Utah, on the pleading, represented Shannon Lindsay, debtor and third party defendant, and Lynne Lindsay, third party defendant.

The issues in this case arise from the removal to this court of a state court action brought by Associated Builders and Contractors of Utah, Inc., (Associated) against United Bank (United). The removed action includes a third party action by United against Shannon Lindsay, the debtor in this case and against Lynne Lindsay. Associated now seeks to sever the original portion of the case and to remand it to state court or, in the alternative, for mandatory abstention.

28 U.S.C. § 1452(b) provides that an order remanding a claim, or a decision not to remand, is not reviewable by appeal or otherwise. To provide consistency with the premise that such a determination should be made by an Article III judge and pursuant to Bankruptcy Rule 9027(e), the bankruptcy court submits this report and recommendation to the district court. *Paxton Nat'l Ins. Co. v. British Am. Assoc. (In re Pacor, Inc.)*, 72 B.R. 927, 932 (Bankr. E.D. Pa. 1987). For the reasons set forth below, this court

respectfully recommends the motion of Associated for remand or alternatively for abstention be denied.

REPORT

STATUS OF THE CASE

United issued certain Visa credit cards to Shannon Lindsay (Debtor) and to Lynne Lindsay (a/k/a Anna Lindsay). At the time of issuance, the Debtor was Associated's executive director, though not an officer or director. Upon the alleged representation of the Debtor that the credit cards were for the benefit of Associated, United collateralized the cards with a certificate of deposit belonging to Associated which was on deposit with United. Associated asserts that the pledge of its property was unauthorized. The Lindsays' Visa liability was not paid and a certificate of deposit in the approximate amount of \$9,500 was used by United to offset the liability. Associated attempted to withdraw the balance of its funds from United and was informed that United required \$15,000 to remain on deposit as collateral to secure any residual debt owed as a result of the Lindsays' use of the Visa credit cards.

An action was commenced in state court by Associated against United pleading that United negligently relied upon the representations of a non-officer and non-

director to collateralize the personal debt of the Lindsays with funds owned by Associated. Associated further pled that United breached both a fiduciary duty to safeguard the deposits of Associated, as well as its contractual duty to manage and safeguard Associated's funds. The final claim for relief asserted United breached an obligation of good faith and fair dealing in failing to supply certain documents related to the transactions to Associated.

United answered and affirmatively defended on the basis of laches, waiver, estoppel and ratification. United also counterclaimed against Associated alleging non-payment of the cards in the approximate amount of \$10,105.23. United apparently filed a third-party complaint against the Debtor and Lynne Lindsay, a/k/a Anna Lindsay. If Associated was found by the state court not to be liable for the full amount, then United alleged it was entitled to recover from the third-party defendants any sums owing by United to Associated.

The Debtor then sought relief in this court by filing a chapter 7 petition. United timely filed a Notice of Removal pursuant to 28 U.S.C. § 1452(a) and Bankruptcy Rule 9027 and posted the applicable bond. United next amended its third-party complaint in this court, pleading that any claim of United against the Debtor was incurred through false pretenses, false representations and the actual fraud of the Debtor and that the claim was not dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). The third-party defendants answered, denied making any representations to United and asserted the cards were issued at the insistence of Associated and used for its benefit.

Associated now moves this court pursuant to 28 U.S.C. § 1452(b) to remand the original action to state court. To do so would require the court to sever the original action from the third-party complaint pursuant to Bankruptcy Rule 7014(a). If the court declines to sever and remand, Associated asserts the court is required by 28 U.S.C. § 1334(c)(2) to abstain from hearing the matter. United objects and the third-party defendants have not responded to the motion nor appeared to argue.

DISCUSSION

A. Remand

28 U.S.C. § 1452¹ provides the mechanism for transferring a claim related to a bankruptcy case from a court in which it may be pending upon filing of a bankruptcy case. The claim is transferred to the district court which has jurisdiction over such claim or cause of action under section 1334 of title 28. Section 1334 indicates the district court

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§ 1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise.

shall have original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11. The matter is then referred to the bankruptcy court pursuant to 28 U.S.C. § 157(a).

1. Propriety of Removal

The court must determine if the removal of this action from state court was appropriate. The test is whether the action as removed arises under title 11, or arises in, or is related to a case under title 11, thus giving the court jurisdiction. Associated argues that the original action between Associated and United does not arise under title 11. It further argues that the action is not related to a case under title 11. Though not specifically plead, Associated's argument requires this court to sever the third-party action and consider only the original portion of the action in determining if removal was proper. The court is compelled, however, to look at the total matter as removed. To do less would deny United the rights afforded it in its third party action and would artificially structure the action.²

² Associated relies upon *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984) (decided under pre-Bankruptcy Amendments Act authority) in support of its position that an action can be bifurcated with the third-party action including the debtor being retained by the bankruptcy court, while the non-debtor action is remanded to state court. In *Pacor*, Higgins sought damages allegedly caused by his work-related exposure to asbestos, which was supplied by Pacor. Pacor filed a third-party complaint impleading the Johns-Manville Corporation which was the original manufacturer of the asbestos. The original action was brought in the Pennsylvania Court of Common Pleas. After Johns-Manville filed a chapter 11 petition in the Southern District of New York, the Court of Common Pleas severed the third-party action. Pacor filed a Petition for Removal in the Eastern District of Pennsylvania seeking to remove the entire controversy to bankruptcy court and to transfer venue to the Southern District of New York.

It must be noted that the Third Circuit relied upon 28 U.S.C. § 1478, now superceded by 28 U.S.C. § 1452, 28 U.S.C. § 157 and the emerging series of cases interpreting core versus non-core matters. A close reading of *Pacor* indicates the proceeding had already been severed by the state court prior to removal. Such is not the case before this court. Unlike *Pacor*, the matter removed involves not only

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The initial analysis is whether the action removed was a core matter. To determine if a matter is core, the court need only ask itself whether or not the proceeding in question could have been brought absent a case under the Bankruptcy Code. If not, and if the action could have been brought in either state or federal district court, the action is merely a related proceeding. *St. George Island, Ltd. v. Pelham*, 104 B.R. 429, 430 (Bankr. N.D. Fla. 1989); *Ziglin v. Peterson (In re Peterson)*, 104 B.R. 94 (Bankr. E.D. Wis. 1989). This court may hear non-core proceedings that are related to a bankruptcy case and, unless the parties have consented to entry of a final order by this court, may make recommended findings to the district court for a final order.

As applied to this removed case, neither the original action nor the third-party action deal with substantive rights created by the Bankruptcy Code. It is an action originally brought in state court with state law claims for relief and is not a core matter.

However, in this court's view, the matter removed is related to the bankruptcy case. First, the action in its totality seeks to establish liability for a debt arising from the Debtor's alleged unauthorized pledge of Associated's property. Therefore, United has a contingent, unliquidated claim against the Debtor.² Establishing such liability against the Debtor is an action which is related to this case. A determination of the

²(...continued)

liquidation of a claim against the estate, but a determination of the same facts which would give rise to a nondischargeable obligation.

³ A claim is defined by 11 U.S.C. 101(4) as the right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

liability between Associated and United may not establish the debt owed by the Debtor, but such a determination will serve to ripen the claim in this bankruptcy, therefore having a direct effect on the estate.

Second, adjudication of whether the Debtor acted with or without authority in pledging Associated's assets establishes the factual basis of United's nondischargeability action against the Debtor as well as the alleged liability of United. Those factual issues are so intertwined with Associated's claim against United that they cannot properly be severed from the main action. As set forth by the court in *Carr v. Michigan Real Estate Ins. Trust (In re Michigan Real Estate Insurance Trust)*, 87 B.R. 447, 454-455 (E.D. Mich. 1988), "[a]s the parties' only relationship with one another radiates from the debtor, the actions of the debtor are central in the determination of this cause of action. The negligence and misrepresentation theories also allege actions and omissions which arise from the parties' interrelationship with the debtor." Further, at p. 463, the court noted "since there are some clearly bankruptcy (i.e.: federal) causes of action included within the lawsuit, which arise from a common nucleus of operative fact with the non-federal causes of action, it could and ought to exert pendent jurisdiction . . . over the remaining non-federal counts." *See also Salem Mortg. Co.*, 783 F.2d 626 (6th Cir. 1986).

A state court adjudication of the factual issues regarding the Debtor's conduct may result in issue preclusion as to elements of the nondischargeability action. Resolution of those issues are related to the bankruptcy case because they impact not only

on the claims of this estate, but also upon the nondischargeability of the claim and the fresh start of the Debtor.

2. Determination of Remand

A decision to remand requires the court to conclude that severance of the action pursuant to Bankruptcy Rule 7014(a) is appropriate. Whether this court should sever the actions is a matter within the court's discretion. *Easton v. City of Boulder Colo.*, 776 F.2d 1441 (10th Cir. 1985). This court must balance the convenience and economy to be gained by conducting a single trial against any prejudice to the parties. This issue may be viewed in conjunction with Associated's argument setting forth the equitable grounds for remand allowed in 28 U.S.C. § 1452(b).

Associated asserts it is more convenient to proceed in state court and that the state court is better able to deal with actions of this nature than this court. It further asserts that this court cannot enter a final order in this non-core matter therefore requiring de novo review of the case in the event of any objections to the report and recommendation. The first two grounds are not well taken. This court is only three blocks from the state court. Convenience should not be a factor. Associated admitted at oral argument that this court is competent to hear issues of this nature.

Regarding the objection that the right to have a trial de novo would somehow prejudice Associated, any objections pursuant to 28 U.S.C. 157(c) must be made in good faith and relate only to matters to which a specific objection is made. Bankruptcy Rule 9033(d). A complete new trial is not required. The district court has great flexibility

in reviewing transcripts, motions, or other data relating to specific factual issues and need not conduct a new hearing if sufficient evidence is contained in the record for the court's review. *Specialty Retail Concepts, Inc. v. RSB, Inc. and Sandra Burch (In re Specialty Retail Concepts, Inc.)*, ___ B.R. ___ 1989 WL 141358 (W.D. N.C. 1989). Since Associated does not know whether it will have cause to object to the report and recommendation of the bankruptcy court, that argument should not be controlling. Associated's assumption that the entire case must be retried de novo by the district court is incorrect.

The matter is further complicated by the amended counterclaim which pleads a nondischargeability claim against the Debtor. Equity would not be served by remanding the original action to state court, waiting until it is adjudicated and United's claim against the Debtor is liquidated, and then requiring United to return to this court to litigate its dischargeability action upon the same facts. Two courts may interpret the facts differently. The Debtor would be forced to have her conduct examined twice. The dischargeability action would sit dormant in this court until the claim ripened in state court. Then, if the dischargeability action was dismissed as failing to state a claim, the bar date might preclude relief to United. On equitable grounds, the case should not be severed and Associated's motion to remand should be denied.

B. Mandatory Abstention

Associated next argues that the facts of this case compel this court to abstain from hearing the case. Since the court declines to sever, the action must be reviewed in

its totality. The argument can be made that 28 U.S.C. § 1334(c)(2) is not applicable. Section 1452(b) states that the only basis for remand is upon equitable grounds. As set forth in *General Am. Corp. v. Merrill Lynch Commodities, Inc., (In re Ross)*, 64 B.R. 829, 834 (Bankr. S.D. N.Y. 1986)

[H]ad Congress wanted the court to look to 28 U.S.C. § 1334(c)(1) or (2) in determining whether a removed action should be remanded to the court from which it came Congress would have so stated in 28 U.S.C. § 1452(b). An express reference to § 1334 was added in § 1452(a), yet none was added to § 1452(b).

If it is appropriate for the court to consider mandatory abstention under the circumstances, a review of the statute indicates it is inapplicable in this case. 28 U.S.C. § 1334(c)(2) sets forth the conditions for mandatory abstention which should be applied to this case.⁴ This motion is timely made by Associated as required by the statute. The discussion above has established that the liquidation of the contingent claim of United against this Debtor and a determination of the factual circumstances of the Debtor's

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28 U.S.C. § 1334(c)(2) provides:

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 if the estate in bankruptcy.

actions are matters related to a case under title 11. Apparently there is no independent jurisdictional basis for the removed action in the district court because there is no diversity and no federal question is present. However, as the action is now structured, the counterclaim as amended states a nondischargeability action. Such a claim is clearly inappropriate for the state court to consider. *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed. 2d 767 (1979).

The final issue is whether the matter can be timely adjudicated in the state court. The parties dispute whether they are ready for trial. Associated indicates its case would take approximately two hours and could be tried forthwith. United indicates its case would not take much longer, but that it is not ready for trial and that additional discovery remains to be done. Neither party indicated the scheduling currently available in state court. This court's calendar is not so committed that a one-day trial within the next two or three months is unreasonable if the parties are prepared.

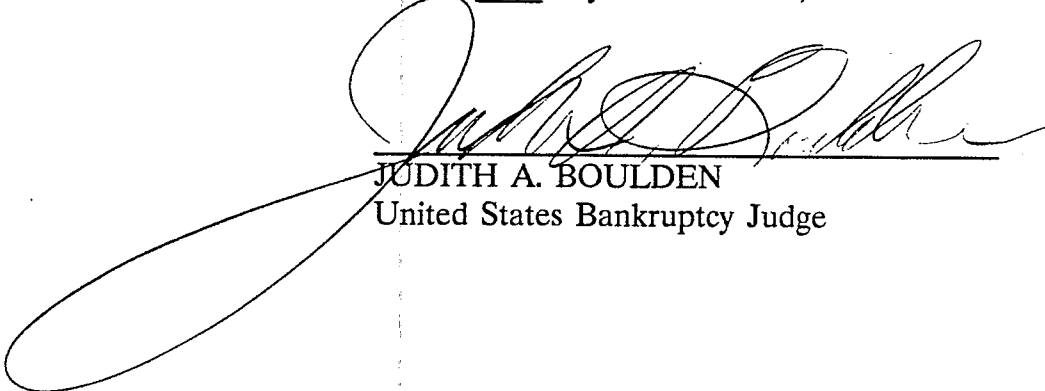
An element of judicial economy is inherent in the consideration of whether a matter can be timely adjudicated. Associated's claims for relief against United, and United's counterclaim against Associated hinge on the conduct of the Debtor and each party's rights and responsibilities arising as a result of such conduct. One court should hear the facts and apply the facts to the law. There is no economy in having two courts hear the same facts, and then apply those facts to different claims for relief in two separate trials. While the state court could hear the state created claims for relief, the nondischargeability claim can only be heard by this court. Therefore, the most economical

use of both the court's, as well as the parties' time, is to have only one trial, to have that trial as soon as the parties are prepared, and to adjudicate all issues at one time. Abstention will not serve this end.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the bankruptcy court that the district court deny Associated's motion for remand and the alternative request for mandatory abstention.

RESPECTFULLY SUBMITTED this 15th day of December, 1989.



JUDITH A. BOULDEN
United States Bankruptcy Judge