

#318

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re)	Bankruptcy Case No. 86C-00490
)	
DAVIDSON LUMBER SALES, INC.,)	
)	
Debtor.)	
_____)	
)	
ZIONS FIRST NATIONAL BANK, N.A.,)	Adversary Proceeding Number 90PC-0044
)	
Plaintiff,)	
)	
vs.)	
)	
CHRISTIANSEN BROTHERS, INC.,)	
DIEHL LUMBER PRODUCTS, INC.,)	
and JACOBSEN-ROBBINS)	
CONSTRUCTION COMPANY,)	
)	
Defendants.)	MEMORANDUM OPINION

The matter presently before the court is a motion by Zions First National Bank ("Zions") for summary judgment against Jacobsen-Robbins Construction Company ("Jacobsen") in the above-captioned adversary proceeding. A hearing was held on October 29, 1990. J. Randall Call and Sally B. McMinimee appeared on behalf of

Zions. David O. Black appeared on behalf of Jacobsen. During argument, the court sua sponte raised the issue of whether it had subject matter jurisdiction over the proceeding. The matter was thereafter taken under advisement. Subsequently, Zions, Jacobsen, and Christiansen Brothers, Inc. submitted memoranda addressing the jurisdiction issue.¹ The court has carefully considered and reviewed the arguments of counsel and the memoranda submitted by the parties and has made an independent review of the pertinent authorities. Now being fully advised, the court concludes that it does not have subject matter jurisdiction over this proceeding and, therefore, it will be DISMISSED.

FACTS

On February 5, 1986, the debtor, Davidson Lumber Sales, Inc. ("the debtor"), filed a petition for relief under Chapter 11 of the Bankruptcy Code. It continued to operate its business as a debtor-in-possession until April 30, 1987 when its case was converted to a case under Chapter 7 of the Code. Harriet E. Styler was appointed as Chapter 7 trustee.

¹Although there are three defendants in this proceeding, the present motion was brought against Jacobsen. Facts regarding Christiansen Brothers, Inc. were not presented to the court. Accordingly, the court will deal solely with the facts as they pertain to Jacobsen.

While in operation, the debtor was a supplier to building contractors. It obtained some of its supplies from Diehl Lumber Products, Inc. ("Diehl"). Jacobsen was a customer of the debtor.

In October of 1986, Jacobsen purchased building materials from the debtor thereby creating an account receivable in the amount of approximately \$185,590.00. The goods that it had purchased from the debtor were supplies that the debtor had purchased on a credit from Diehl. The debtor did not pay Diehl for the supplies. In an attempt to collect the debt, Diehl traced the goods that it had sold to the debtor to Jacobsen's construction project and filed a mechanic's lien against the project. Jacobsen thereafter paid Diehl the monies that the debtor owed and the lien was removed.

Shortly after it filed bankruptcy, the debtor entered into a stipulation for post-petition financing with Zions. The court authorized agreement provided that Zions would extend a line of credit to the debtor in exchange for a first priority lien on its post-petition accounts receivable and inventory.

On September 7, 1987, the Chapter 7 trustee commenced two adversary proceedings, one against Diehl and Christiansen Brothers, Inc. and one against Jacobsen, in which she sought to collect accounts receivable which were reflected as owing on the debtor's books. In 1989, the trustee abandoned the proceedings on the basis that the accounts receivable were the property of Zions. Zions was substituted

as a party plaintiff in the trustee's proceedings. In addition, Zions had initiated a separate adversary proceeding against all three of the defendants. Zions' proceeding subsequently was consolidated with the trustee's proceeding.

DISCUSSION

The question that must first be addressed is whether this court has jurisdiction over the dispute between Zions and Jacobsen, both of whom are non-debtors. This problem was recently addressed by the Tenth Circuit in Gardner v. United States (In re Gardner), 913 F.2d 1515 (10th Cir. 1990). In Gardner, the United States had filed a tax lien against the debtor's property. Subsequently, the debtor and his wife were divorced and a divorce decree was entered which awarded practically all of the marital property to the non-debtor wife. The marital property in question was also the subject of the United States' tax lien. The wife thereafter filed an adversary proceeding against the Chapter 7 trustee and the United States in which she sought to recover the property that had been awarded to her in the divorce action. The bankruptcy court determined that the wife was entitled to the property in question and that the tax lien against said property was extinguished. On appeal, the district court affirmed the bankruptcy court concluding that the tax lien was terminated because the divorce decree divested the debtor of his interest in the property. The Tenth Circuit affirmed the district court's holding that the debtor did not have an interest in the property, but

vacated the judgment and remanded the proceeding to the bankruptcy court with the instructions to dismiss it for lack of subject matter jurisdiction. The court held that "the bankruptcy court lacked jurisdiction to determine whether Mrs. Gardner's interests were superior to those of the government after concluding that Mr. Gardner had no interest in the property." *Id.* at 1517. In so holding, the court stated:

Bankruptcy courts have only the jurisdiction and powers expressly or by necessary implication granted by Congress. ... Bankruptcy courts have jurisdiction over core proceedings. ... Core proceedings are proceedings which have no existence outside of bankruptcy. ... Although determination of whether the marital property is part of the bankruptcy estate is a core proceeding, the later determination of the ownership of the marital property as between third parties, such as Mrs. Gardner and the government, is not a core proceeding. ...

Bankruptcy courts also have jurisdiction over related proceedings, under the authority of 28 U.S.C. § 1471(b),² which confers jurisdiction on district courts for cases related to title 11 proceedings. ... Related proceedings are civil proceedings that, in the absence of a bankruptcy petition, could have been brought in a district court or state court. ... '[T]he test for determining whether a civil proceeding is related in bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.' ... Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate. ...

²The Tenth Circuit should have cited 28 U.S.C. § 1334(b). Section 1471 was repealed in 1984 and replaced by § 1334. The substance of the court's opinion, however, is not affected inasmuch as the language of § 1471(b) is identical to that of § 1334(b).

A bankruptcy court has jurisdiction over disputes regarding alleged property of the bankruptcy estate at the outset of the case. ... When property leaves the bankruptcy estate, however, the bankruptcy court's jurisdiction typically lapses, ... and the property's relationship to the bankruptcy proceeding comes to an end. ... Thus, the bankruptcy court lacks related jurisdiction to resolve controversies between third party creditors which do not involve the debtor or his property unless the court cannot complete administrative duties without resolving the controversy. ...

In this case, the dispute between the government and Mrs. Gardner does not involve identification of the debtor's property interest, since the bankruptcy court had determined Mr. Gardner had no interest in the property. ... Rather, this case involves the conflict between two creditors over property no longer a part of the bankruptcy estate. ...

Since the dispute is not otherwise related and would not affect the distribution of assets and administration of the bankruptcy estate, we hold the bankruptcy court lacked jurisdiction to resolve the dispute between Mrs. Gardner and the government regarding a lien on nonestate property. ... To hold otherwise would lead to almost unlimited jurisdiction by the bankruptcy court.

Id. at 1517-19 (citations omitted) (emphasis added); see also In re Shirley Duke Assoc., 611 F.2d 15, 18 (2d Cir. 1979); In re S & S Flavors, Inc., 20 B.C.D. 1558, 1559 (Bankr. E.D.N.Y. 1990); In re Stein & Day, Inc., 113 B.R. 157 (Bankr. S.D.N.Y. 1990).

The fact scenario in the present case is similar to that in Gardner. Here, the Chapter 7 trustee abandoned the estate's cause of action against the defendants because she determined that any monies that she could recover from them would

belong to Zions. Upon abandonment, the cause of action ceased to be property of the estate. Dewsnup v. Timm (In re Dewsnup), 908 F.2d 588, 590 (10th Cir. 1990); 4 COLLIER ON BANKRUPTCY ¶ 554.02[2] (15th Ed. 1990). The court therefore concludes that it lacks jurisdiction over the proceeding because it involves non-estate property, is between non-debtor parties, and the administration of the estate will not be affected by its resolution. In so holding, the court rejects Jacobsen's argument that the post-petition financing order confers the court with jurisdiction. See S & S Flavors, 20 B.C.D. at 1560 (although a stipulation entered into between the debtor, its principle officers, and the state taxing authority was "so ordered" by the bankruptcy court, it did not have the effect of extending the bankruptcy's court's jurisdiction over a dispute which arose between the officers and the taxing authority and did not involve the debtor's property).

Accordingly, IT IS HEREBY ORDERED that the complaint be DISMISSED for lack of jurisdiction.

DATED this 9 day of January, 1991.

BY THE COURT:



GLÉN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT