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UNPUBLISHED

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re)	
)	
RICHARD WILTON WHITE,)	Ancillary Case No. 91C-10003
)	
Debtor.)	
)	
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THOMAS AMERICAN STONE & BUILDING, INC.,)	
)	
Plaintiff,)	Adversary Proceeding No. 91PC-0178
)	
v.)	
)	
RICHARD WILTON WHITE,)	
)	
Defendant.)	

**MEMORANDUM OPINION AND ORDER OF REMAND AND
REPORT AND RECOMMENDATION ON MOTION FOR CHANGE OF VENUE**

There are three matters presently before the court in this ancillary proceeding:
A Motion for Remand filed by Thomas American Stone & Building, Inc. ("Thomas

American Stone"); a Motion for Change of Venue filed by the debtor, Richard Wilton White ("debtor"); and a request by Thomas American Stone for Bankruptcy Rule 9011 sanctions against the debtor for filing both the Petition for Removal and the Motion for Change of Venue.

A hearing on the Motion for Remand and the related request for sanctions was held on September 17, 1991. Scott E. Isaacson, Esq. appeared on behalf of Thomas American Stone. Mark R. Moore, representing himself to be an attorney and a member in good standing of the California State Bar, telephonically appeared on behalf of the debtor and indicated to the court that he intends to represent the debtor in this proceeding and the debtor's bankruptcy case in the Southern District of California, Case No. 91-01150-LM-11. Notwithstanding Local Rule 540, which requires an attorney appearing on behalf of a party to be a member of the bar of this court or to apply for admission pro hac vice and associate an active local member of the bar of this court, the court allowed Mr. Moore to proceed in view of the ancillary status of this proceeding. Counsel presented argument, after which the court informed the parties that pursuant to Bankruptcy Rule 9027(e), a report and recommendation would be transmitted to the district court and served upon the parties. The court has since determined that the 1991 amendments to Rule 9027 of the Bankruptcy Rules, made effective August 1, 1991, concerning the procedure for deciding motions for remand, govern this matter inasmuch as Thomas American Stone filed its Motion for Remand on August 9, 1991, this matter was heard by the court after the effective date of the

amendments, and it is not unjust or impracticable to do so. Therefore, in accordance with amended Rule 9027(d), this court will make a final determination on the Motion for Remand.

A hearing on the Motion for Change of Venue and the related request for sanctions was held on October 2, 1991. Mr. Isaacson appeared on behalf of Thomas American Stone. The court had once again agreed to accommodate Mr. Moore by allowing him to appear telephonically on behalf of the debtor, and a conference call was scheduled for 11:00 a.m. Salt Lake City time on the 2nd of October. At approximately 11:10 a.m. the court placed a conference call with Mr. Moore's office but was informed that Mr. Moore was not available. The hearing was held as scheduled, with Mr. Moore failing to be present. Mr. Isaacson presented argument to the court, after which the court indicated that a report and recommendation would be transmitted to the district court and served upon the parties, as required by Rule 404 of District Court Rules of Bankruptcy Practice and Procedure and In re Retirement Inn at Forest Lane, Ltd., 83 B.R. 795 (D. Utah 1988) (en banc). Mr. Moore subsequently transmitted a letter to the court requesting that this court consider the arguments presented in the letter.

The court has carefully considered and reviewed all arguments of counsel, the memoranda submitted by the parties, and all pertinent papers in the file. The court has further made an independent review of the applicable authorities. Now being fully advised, the court renders the following opinion and report and recommendation.

I. Background

In approximately March 1989, Thomas American Stone brought a civil state court action against the debtor in connection with the foreclosure of real property¹ located in Tooele County, State of Utah (hereinafter referred to as the "foreclosure action"). That action was subsequently removed to the United States District Court for the District of Utah, Case No. 89-C-752S, assigned to the Honorable David Sam, United States District Judge, and referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) (hereinafter referred to as the "Utah district court action").

On or about December 13, 1990, the debtor filed a petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Utah, Case No. 90B-07532. That case was subsequently dismissed on or about February 26, 1991.

On or about February 4, 1991, the debtor filed a Chapter 11 petition, this time in the United States Bankruptcy Court for the Southern District of California, Case No. 91-01150-LM-11 (hereinafter referred to as the "California bankruptcy case"). This case was assigned to the Honorable Louise Malugen, United States Bankruptcy Judge.

¹The real property that is the subject of this proceeding has been referred to by the parties as an "aragonite mine and mill" or an "ongoing aragonite mining operation."

On or about April 29, 1991, Thomas American Stone filed a Motion for Relief from the Automatic Stay in the California bankruptcy case. American Stone's motion sought relief to pursue the Utah district court action. A memorandum, including arguments detailing the equitable considerations for continuing the foreclosure action in the Utah district court, and declarations were filed in support of Thomas American Stone's motion.

On May 28, 1991, Judge Malugen executed an Order, which was apparently entered on June 3, 1991, granting Thomas American Stone's Motion for Relief from the Automatic Stay. Judge Malugen's order indicates that the debtor did not file any papers opposing the motion and that the court, in granting the motion, considered the papers filed and the lack of opposition. The order further specifically states:

IT IS HEREBY ORDERED that the motion of Thomas American Stone is granted. The automatic stay provided by 11 U.S.C. section 362 is immediately terminated to permit Thomas American Stone to proceed with the District Court litigation to judgment, and to take whatever other steps are necessary and proper in the course of that litigation to protect its rights and property, including but not limited to entry of judgment in the Movant's favor, perfection of that judgment, and foreclosure of their deed of trust, if appropriate.

The debtor apparently did not appeal Judge Malugen's order.

On May 30, 1991, the debtor filed a Petition for Removal in this court, apparently for the purpose of removing the Utah district court action to the bankruptcy court. Thomas American Stone thereafter filed its Motion for Remand, seeking to remand this proceeding to the district court. The debtor then filed on September 5, 1991, a Motion for Change of Venue, requesting that this proceeding

be transferred to the Southern District of California where the debtor's California bankruptcy case is pending.

On October 16, 1991, the debtor filed an Amended Petition for Removal. The Amended Petition includes a Verification signed by the debtor.

II. Discussion

A. Motion to Remand

28 U.S.C. § 1452 provides for removal of any claim or cause of action in a civil action to the district court for the district where the civil action is pending, if the district court has jurisdiction of the claim or cause of action under 28 U.S.C. § 1334. Under 28 U.S.C. § 1334, the district court has original jurisdiction of all civil proceedings arising under title 11 of the United States Code, or arising in or related to cases under title 11.² Bankruptcy Rule 9027(a), prior to the August 1, 1991

²Section 1452 refers generally to "any claim or cause of action in a civil action" and is not limited to removal of state court actions. Yet, this court questions whether removal of the Utah district court action, which is obviously pending in the District of Utah, to the district court for the District of Utah, is appropriate or serves any purpose. Removal under § 1452 comes into play because the district court has jurisdiction of proceedings arising under title 11, or arising in or related to a case under title 11. And with a general Order of Reference, such as that found in Rule B-105 of the District Court Rules of Bankruptcy Practice and Procedure and authorized in 28 U.S.C. § 157(a), the action is referred to the bankruptcy judges. (The court refers to Rule B-105, which is the predecessor of present Rule 404, because the debtor commenced his California bankruptcy case in February 1991 and filed the Petition for Removal on May 30, 1991, which are dates prior to the June 1, 1991, effective date of the amended Rules of Practice of the United States District Court for the District of Utah.) In effect, then, a petition for removal of a federal district court action under § 1452 is an effort to have the case heard by the bankruptcy judges for that district. It appears to the court that a motion to refer the proceeding to the bankruptcy judges may have been the more appropriate route. See, e.g., Thomas Steel Corp. v. Bethlehem Rebar Industries, Inc., 101 B.R. 16 (Bankr. N.D. Ill. 1989). Or, when a party is attempting to have a district court action arising under title 11, or arising in or related to a case under title 11, transferred to another district, a motion for change of venue in and of itself, which is heard in the first instance in this district by a bankruptcy judge, may serve that party's purposes.

(continued...)

amendments,³ further provides that an application for removal is "filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending."⁴

28 U.S.C. § 157(a) allows the district court to refer proceedings arising under title 11 or arising in or related to a case under title 11, to the bankruptcy judges for the district. Rule B-105 of the District Court Rules of Bankruptcy Practice and Procedure for the United States District Court for the District of Utah, which rule was in effect at the time debtor filed bankruptcy in California and also at the time he filed the Petition for Removal in this proceeding, provides that "all proceedings arising in or related to a case under Title [11] are referred to the bankruptcy judges for the District of Utah, for consideration and resolution consistent with the law." See also

²(...continued)

Despite the court's concern that removal may not be the ideal route in the present proceeding, the court need not decide this issue. Even if removal is procedurally correct, this proceeding should be remanded to and heard by the district court.

The court notes, too, that pursuant to 28 U.S.C. § 157(d), the district court, on its own motion, may withdraw a proceeding referred to the bankruptcy judges. For the reasons stated herein, the court recommends that the general reference of this proceeding be withdrawn by the district court.

³The court refers to the pre-August 1, 1991, amendments of Bankruptcy Rule 9027(a) inasmuch as that provision details the procedure for removal, and debtor filed the petition for removal on May 30, 1991, prior to the August 1 effective date of the amendments.

⁴Thomas American Stone has argued that the debtor did not properly effect a removal, having failed to comply with the verification and notice requirements of Bankruptcy Rule 9027 (pre-August 1, 1991, amendments). In light of the court's determination that remand is appropriate even assuming that removal was properly effected, the court need not address the effectuation issue and will simply refer to this proceeding as removed.

D. Ut. 404 (District Court Rules of Bankruptcy Practice and Procedure, made effective June 1, 1991).

28 U.S.C. § 1452(b) provides that the court to which an action is removed may remand the action on any equitable ground.

This court believes, based on its review of all pertinent papers, including exhibits, declarations, and affidavits, filed in this proceeding, that remand of this proceeding to the Utah district court is wholly proper.

Foremost among the reasons necessitating remand is Judge Malugen's order granting relief from the automatic stay permitting Thomas American Stone to proceed with the Utah district court action to judgment. Judge Malugen had before her Thomas American Stone's memorandum detailing, inter alia, reasons for allowing the Utah district court action to go forward in that forum.⁵ The order specifically allows Thomas American Stone to obtain judgment in the course of that action, including perfection of that judgment and foreclosure of its deed of trust.

⁵For example, Thomas American Stone's memorandum, at page 6, included the following argument:

In this instance, two years worth of pleadings and two years worth of discovery have already occurred. The location of the property is in Utah, and the litigation involves complex and unique questions involving mining rights and property, discovery abuses by the debtor, and the fact that the case was close to being resolved. [Thomas American Stone] would indeed suffer a tremendous hardship if it were required to relitigate the entire District Court action in this Court. Such action would also constitute a waste of judicial resources, and a burden on this Court.

Additionally, although numerous causes of action have been asserted in this proceeding, this is in effect a foreclosure action by Thomas American Stone. There is no reason in this court's view that this action should be heard or determined by a bankruptcy court.

Another important factor that supports remand in this case is the background of this proceeding. This action began in March of 1989, well over two and one-half years ago. Based on the papers submitted to the court, it appears that prosecution of this action has been ongoing over this length of time, certain discovery and pretrial matters have been heard, and rulings have been made. The district judge and magistrate judge appear to be familiar with and well-informed of the numerous claims and causes of action presented in this proceeding. The debtor's attempt, to now have a bankruptcy judge in California adjudicate the matters in this proceeding, has the effect of forum shopping.

The debtor asserts that the bankruptcy court is the proper forum because Thomas American Stone, as a creditor in debtor's California bankruptcy case, has filed a nondischargeability action in the bankruptcy court. As indicated in oral argument, the filing of a nondischargeability action before the requisite bar date is oftentimes a protective move by a creditor to preserve its rights. Even so, the court does not believe, in light of all reasons stated herein, that the filing or prosecution of the nondischargeability action in the California bankruptcy court necessitates the removal of this two and one-half year old foreclosure action to bankruptcy court. Furthermore,

it is possible that the nondischargeability action may be stayed pending the outcome of this action and also possible, based on the applicable law, that once the causes of action in this proceeding are adjudicated in the Utah district court, res judicata or collateral estoppel may apply in the nondischargeability action.

Based on these considerations, the court concludes that equitable grounds manifestly support remand of this proceeding to the district court.

B. Motion for Change of Venue

REPORT

28 U.S.C. § 1412 provides: "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." This court does not believe that a transfer of this proceeding to the Southern District of California meets the criteria set forth in § 1412. The equitable grounds supporting remand of this action, along with the reasons set forth below, are supportive of this opinion.

If this proceeding is transferred, it would be heard and decided by a judge in California. The subject of this foreclosure action is real property located in the state of Utah.⁶ The law to be applied will no doubt be Utah law, and the court believes that the district court in Utah, as opposed to a court in the Southern District of California, is the more appropriate forum to analyze and apply the applicable law.

⁶This action also involves causes of action for breach of contract, fraud and misrepresentation, conversion, and unjust enrichment, all appearing to require the application and interpretation of Utah law.

The debtor argues that since he resides in California, it would be difficult for him to pursue this action if this proceeding were to remain in the Utah district court. The court notes, however, that the debtor chose to do business and enter into transactions in Utah and availed himself of the jurisdiction of the courts in Utah. This proceeding concerns debtor's interest in real property located in this state; debtor cannot now complain, based on such contacts, that a court in Utah is not the more appropriate forum to determine rights to and interests in that real property and matters related thereto. See In re Wheeling-Pittsburg Steel Corp., 123 B.R. 537 (Bankr. W.D. Pa. 1991); In re Retirement Inn at Forest Lane, Ltd., 83 B.R. 795 (D. Utah 1988) (en banc) (case transferred to location of debtor's principal asset to promote efficient and economic administration of the estate). In transferring a bankruptcy case to the Northern District of Texas, the district court in Retirement Inn, 83 B.R. at 800, stated, as one of the most important considerations in deciding whether to transfer venue, that the "Texas Bankruptcy Court can resolve any litigation regarding Texas property law or valuation disputes in an expeditious manner and within the convenient access of expert witnesses, such as appraisers." This consideration clearly supports this proceeding remaining in Utah.

Since filing the Petition for Removal and papers in opposition to Thomas American Stone's Motion for Remand, the debtor has retained counsel in California in connection with the California bankruptcy case. Mr. Moore informed the court during the hearing on Thomas American Stone's Motion for Remand that he is now entering

an appearance and becoming attorney of record in the California bankruptcy case on behalf of the debtor and taking appropriate steps to be approved as counsel for the debtor. Presumably, then, counsel would represent the debtor in adversary proceedings filed in that case, including this action if change of venue is ordered, resulting in the incurring of attorney's fees. Obviously, if this action is remanded to the Utah district court, the debtor may be required to come to Utah to defend against Thomas American Stone's claims and, likewise, to prosecute the claims he has asserted against Thomas American Stone and a third-party defendant. This problem, of course, could be mitigated somewhat if debtor retains local counsel in Utah who could appear on behalf of the debtor in this action and who could work with debtor's California counsel to avoid any duplication of efforts.⁷

The court also notes, as pointed out by Thomas American Stone, that on August 12, 1991, the debtor filed a document captioned "Application for Extension of Time for Filing Motions for Removal Civil Actions and Change of Venue; and for More Time for Accepting or Rejecting Executory Contracts [Rule 9006(b)]." In that application, the debtor represented, inter alia, that he needed more time to prepare a

⁷The court notes that the debtor submitted an affidavit of Mark R. Moore, Esq., dated September 10, 1991, in support of the debtor's opposition to Thomas American Stone's Motion for Remand. In that affidavit, Mr. Moore predicts a judgment, apparently based on a successful appeal in a California state court action, unrelated to the present action, in excess of \$400,000.00 against a governmental entity and in favor of the debtor's estate. Mr. Moore further states that he has contacted specialized counsel in the area of construction contracts as well as mining law who are willing to represent the debtor's estate in matters currently before the California bankruptcy court. Surely, if other counsel are possibly being retained for specific purposes, the retention of local Utah counsel to pursue the Utah district court action appears consistent with Mr. Moore's declarations.

motion for "change of venue of adversary proceedings currently removed to the bankruptcy court in Utah" and requested a 60-day extension. On August 19, 1991, Judge Malugen declined to sign the proposed Order Granting Extension of Time, stating "Third request & no adequate cause shown." The debtor then filed a Motion for Change of Venue in this court on September 5, 1991. Although this court does not view debtor's Motion for Change of Venue in this proceeding as untimely, inasmuch as the pertinent statutory provisions and rules do not appear to preclude the filing in this proceeding, it is true that the debtor filed the motion after he requested an extension to file change of venue motions and Judge Malugen declined to grant that extension. In the court's view, this bears on whether a venue change at this stage is in the interest of justice.

Based on the nature of and circumstances surrounding this proceeding, which argue in favor of having this action remain in the Utah district court, it is the opinion of this court that change of venue is not in the interest of justice or for the convenience of the parties. This proceeding belongs in the District of Utah.

C. Request for Bankruptcy Rule 9011 Sanctions

Thomas American Stone has requested sanctions against the debtor in the amount of attorney's fees which Thomas American Stone has incurred in prosecuting the Motion for Remand and opposing the Motion for Change of Venue. As requested by the court, Thomas American Stone has submitted Affidavits of Attorney's Fees in support of its request.

After reviewing the papers filed in this proceeding and carefully considering Thomas American Stone's request for sanctions, the court has decided not to grant Thomas American Stone's request for sanctions, although the court believes that this is a close case. The court is not fully persuaded that debtor's pro se Petition for Removal or the supplemental materials in opposition to Thomas American Stone's Motion for Remand or debtor's Motion for Change of Venue were filed in bad faith or otherwise in violation of Bankruptcy Rule 9011.

ORDER

Accordingly, IT IS HEREBY ORDERED that Thomas American Stone's Motion for Remand is granted. Thomas American Stone's request for sanctions in connection with its Motion for Remand is denied. This court's order is appealable to the district court pursuant to 28 U.S.C. § 1452(b).

RECOMMENDATION


Further, it is the recommendation of this court that the district court deny debtor's Motion for Change of Venue. This court also recommends that Thomas American Stone's request for sanctions in connection with debtor's Motion for Change of Venue be denied.

Pursuant to Local Rule 404(d), copies of this report and recommendation are being served by mail upon the parties. Within ten (10) days after being served, a

party has the right to serve and file written objections hereto in the manner provided in Bankruptcy Rule 9033.

DATED this 27 day of November, 1991.

BY THE COURT:



GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT