

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re)	Bankruptcy Case No. 82C-00889
WILLIAM N. REEVES,)	
)	
Debtor.)	
)	
RED MOUNTAIN MINING CO.,)	Civil Proceeding No. 82PC-0709
INC., a corporation;)	
D. LAVOY ADAMS,)	
)	
Plaintiffs.)	
)	
vs.)	
)	
WILLIAM N. REEVES,)	
)	
Defendant.)	ORDER DENYING MOTION TO DISMISS

Plaintiffs filed this action seeking a determination that their debt is nondischargeable. On July 14, 1982, the defendant filed a motion to dismiss on two grounds: (1) that this Court lacks jurisdiction of the subject matter of the complaint and (2) that this action improperly seeks to remove a lawsuit from the Superior Court of the State of Arizona. It appears that the motion and its accompanying memorandum of authorities were mailed to plaintiffs' counsel but that no opposition to the motion has been filed.

The complaint filed by the plaintiffs incorporates by reference a cross-claim filed against the defendant in a law suit in the Superior Court of Maricopa County, Arizona, and alleges that the defendant's conduct, as alleged in the cross-claim, entitles the plaintiffs to a judgment that their debt is nondischargeable. The cross-claim alleges that the defendant breached a contract, made negligent misrepresentations, and is guilty of fraudulent misrepresentation or concealment.

Analysis of the pleadings filed in this action convinces the Court that although the complaint should not be dismissed at this time, the complaint should be amended.

The defendant alleges, and it in fact appears from the plaintiffs' complaint, that the plaintiff is asserting in this Court all of its claims in the state court lawsuit, including claims for breach of contract and negligent misrepresentation. This is evident from the prayer of plaintiffs' complaint which requests, in addition to a judgment that plaintiffs' debt is nondischargeable, that the Court "determine the remaining issues set forth in the Litigation."

Claims other than plaintiffs' claims under 11 U.S.C. § 523 could be brought before this Court by removing them from the state court to the Bankruptcy Court in Arizona and then securing an order transferring them to this Court. See 28 U.S.C. §§ 1478(a) and 1475. Implicit in the defendant's arguments is the assertion that removal is the exclusive method for bringing these claims before this Court. The removal procedure, however, does not bar plaintiffs from bring claims in this Court.

The Bankruptcy Court, in Northern Pipeline Construction Co. v. Marathon Pipeline Co. (In re Northern Pipeline Construction Co.), 3 C.B.C. 2d 456 (D. Minn. 1980) rev'd on other grounds 4 C.B.C. 2d 425 and 5 C.B.C. 2d 114, aff'd ___ U.S. ___ (1982), explained that "Section 1478 is not a bar to pursuing a pending claim other than by exercising the removal mechanisms of Section 1478. The removal provisions of Section 1478 provide one way to get an action pending in another court before the Bankruptcy Court -- it is not an exclusive avenue -- Northern has achieved its desire to litigate this case in its home district by commencing a new action in the Bankruptcy Court in the district where it filed its original petition. This alternative is permissible under the new Bankruptcy Code."

Thus, if plaintiffs' claims may otherwise be brought before this Court under the provisions of the Bankruptcy Code, removal is not the exclusive means for doing so.

The automatic stay, however, may prevent the filing or prosecution of claims other than claims under Section 523. This Court has previously ruled that creditors seeking to liquidate pre-petition claims against debtors violate the automatic stay by commencing lawsuits in the Bankruptcy Court without first securing relief from the automatic stay. See Alcorn v. Affleck, (In re AFCO Enterprises Corp., Bankr. No. 82-00577; In re AFCO Development Corp., Bankr. No. 82-00578; In re AFCO Investment Corp., Bankr. No. 82-00579) Civ. Pro. No. 82P-00333 (transcript of hearing June 23, 1982). This Court has also ruled that while the automatic stay does not bar a creditor from removing a foreclosure action to a bankruptcy court, the stay does prevent a creditor from prosecuting a foreclosure action after removal. See In re South Village, Inc., Bankr. No. 82-0040 (transcript of hearing April 1, 1982). It may be that in this case, the claims asserted in plaintiffs' cross-claim in the state court lawsuit could not be brought in this Court unless the Court first lifted the stay.

This Court has subject matter jurisdiction over plaintiffs' claim that its debt is nondischargeable. A nondischargeability action is a Federal cause of action distinct from any claims which may have been made in prior litigation. To the extent that plaintiffs' complaint alleges this Federal cause of action, therefore, this Court has subject matter jurisdiction.

Plaintiffs' complaint should be amended in order to avoid overbreadth and confusion caused by its wholesale incorporation of the state court cross-claim. If plaintiffs desire to have this Court determine matters subject to the stay, they must seek relief from the stay for that purpose.

IT IS THEREFORE ORDERED that plaintiffs file, within ten days from the date of service of this order, an amended complaint which includes only claims properly filed in this Court.

DATED this 7 day of August, 1982.


Glen E. Clark
United States Bankruptcy Judge