UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 98-14173-JMD
Chapter 7

Nipoporn Beckmeyer,
Debtor

Edmond J. Ford, Trustee,
Plaintiff

v. Adv. No. 99-01049-JMD

Joseph A. Clement,
Defendant

MEMORANDUM OPINION

I. BACKGROUND

Before the Court is a complaint filed by Edmond J. Ford, the Plaintiff in this adversary proceeding and the chapter 7 Trustee in the related bankruptcy case. The Plaintiff's complaint alleges that Nipoporn Beckmeyer, the Debtor in the related bankruptcy case, gave $1,500 to the Defendant, Joseph A. Clement, with the understanding that the Defendant would repay the same to the Debtor. The Plaintiff further alleges that he has made demand for repayment of the loaned sum, but to no avail. Based on these allegations, the Plaintiff brought suit against the Defendant seeking $1,500 plus costs and interest.[1] The Defendant failed to answer the Plaintiff's properly served summons and complaint.

This matter was first brought to the Court's attention at the initial pretrial conference at which the Plaintiff, but not the Defendant, appeared. Based on the Defendant's nonappearance and failure to answer, the Plaintiff requested that the Court issue an order entering default. The Court took the Plaintiff's request under advisement and now concludes that, in the interest of justice and in the interest

[1] The Plaintiff's Adversary Proceeding Cover Sheet states that his cause of action is premised upon 11 U.S.C. § 541, the primary section of the Bankruptcy Code concerning property of the bankruptcy estate. Although the Court questions whether such an action is properly brought under section 541, resolution of this issue is not crucial to its conclusions.

of comity with state courts, it will abstain from hearing the proceeding and derivative issues pursuant to 28 U.S.C. § 1334(c)(1).

II. RELEVANT STATUTORY AUTHORITY

A. Jurisdiction

As a threshold matter, the Court notes that the district court has original, but not exclusive jurisdiction over this proceeding. Section 1334(b) of title 28 provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Pursuant to 28 U.S.C. § 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.) (the "Standing Order of Referral"), this Court has jurisdiction over the subject matter and parties.

B. Core and Non-Core Matters

The Plaintiff alleges that this matter is a non-core proceeding. A core proceeding is generally one that arises under title 11 or arises in a case under title 11. See 3 Epstein et al., Bankruptcy § 12-1, at 197 (1992). Pursuant to 28 U.S.C. § 157(b)(1), bankruptcy courts may hear and determine core matters. In contrast, a bankruptcy court's power to hear and determine non-core matters is limited. Section 157(c)(1) provides that if a proceeding is non-core, but otherwise related to a case under title 11, a bankruptcy court may hear the proceeding but may not enter a final order or judgment. Instead, the bankruptcy court submits proposed findings of fact and conclusions of law to the district court which, after consideration, enters a final order or judgment. However, the bankruptcy court may enter a final order or judgment with respect to a non-core, but related, proceeding if all parties consent. See 28 U.S.C. § 157(c)(2).

Section 157(c) effectively creates three categories of proceedings: (1) a core proceeding, in which a bankruptcy court may hear the proceeding and make final determinations; (2) a non-core, related proceeding, in which a bankruptcy court may hear the proceeding, but cannot make final determinations

absent consent; and (3) proceedings that are non-core and not related to a case under title 11, wherein a bankruptcy court may not hear the proceeding.

C. Discretionary Abstention

Section 1334(c) of title 28 provides that a district court may abstain from hearing a particular proceeding arising under title 11, or arising in or related to a case under title 11. Abstention may be mandatory or discretionary. Mandatory abstention is only applicable to non-core proceedings related to a case under title 11. However, mandatory abstention is not available in this proceeding.[2] Discretionary abstention is provided for in section 1334(c)(1), which reads:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Discretionary abstention applies to both core and non-core proceedings. See 1 King et al., Collier on Bankruptcy ¶ 3.05[1], at 3-69 (15th rev. ed. 1998).

Although section 1334(c)(1) grants discretionary abstention power to the "district court," there is authority for the position that such power is also granted to the bankruptcy courts. See In re Elegant Concepts, LTD., 61 B.R. 723, 727 (Bankr. E.D.N.Y. 1986); In re Huddleston, 107 B.R. 102, 103 (Bankr. E.D. La. 1989); In re Weldpower Indus., Inc., 49 B.R. 46, 48 (Bankr. D.N.H. 1985) (bankruptcy court abstaining under 28 U.S.C. § 1334(c)(1)). The Court concludes that pursuant to the general referral structure of 28 U.S.C. §§ 1334 and 157, and the Standing Order of Referral, it has the power to abstain from hearing a particular proceeding.

[2] Section 1334(c)(2) of title 28 is the operative statutory section governing mandatory abstention. It requires, *inter alia,* the "timely motion of a party" to be triggered. Because the Plaintiff has not made such a motion and the Defendant has obviously been silent, mandatory abstention is not applicable.

III. DISCUSSION

A. Proceeding is a Non-Core, Related Matter

The line separating core proceedings from non-core proceedings is sometimes indistinct. Section 157(b)(2) of title 28 provides a list of core proceedings, but by its terms is not exclusive. "If an action would survive outside of bankruptcy, and in the absence of bankruptcy would have been initiated in a state or a district court, then it clearly involves a non-core matter." In re MEC Steel Bldgs, Inc., 136 B.R. 606, 609 (Bankr. D.P.R. 1992) (citing 1 King et al., Collier on Bankruptcy ¶ 3.01[1][c][iv], at 3-27 (15th rev. ed. 1991)). In In re Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987), the First Circuit reiterated the Supreme Court's view, as articulated in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982), that a bankruptcy court does not have the power to adjudicate a generic state law contract claim between a debtor in bankruptcy and a third party, where the debtor's claim is based upon a pre-petition debt. See Arnold, 815 F.2d at 165. However, relying upon one of the examples of a core proceeding provided by 28 U.S.C. § 157(b)(2), Arnold interpreted Marathon narrowly by holding that an action of a debtor-in-possession to collect a debt created entirely post-petition was a core proceeding. See id. at 168.

Although Arnold goes far in bringing light to the issue of what constitutes a core proceeding in this Circuit, it is not determinative under the facts in this proceeding. It is the Court's understanding that the alleged loan from the Debtor to the Defendant occurred pre-petition. However, it is not clear from the complaint whether the alleged debt became due pre-petition or even whether it is currently due. If it became due pre-petition, both Marathon and Arnold would dictate that this is a non-core proceeding. However, if the alleged debt became due post-petition, or if the Defendant is not yet liable, the issue is whether that is enough, under Arnold, to make the Plaintiff's action a core proceeding. Cases decided in the wake of Arnold have addressed this issue and have expressly, or implicitly, concluded that similar proceedings are non-core. See Ralls v. Docktor Pet Centers, Inc., 177 B.R. 420, 427 (Bankr. D. Mass. 1995) ("[t]he fortuitous occurrence of an alleged breach of contract post-petition--standing alone--should not render the estate's action to collect damages for that breach a core proceeding." (citing Nat'l Enters., Inc. v.

Koger Partnership, Ltd., 128 B.R. 956, 960 (E.D. Va. 1991))); In re Palmer Trucking Co., Inc., 201 B.R. 9, 18 (Bankr. D. Mass 1996) (citing Ralls with approval). These decisions ground their holdings in persuasive reasoning: unlike the post-petition contract in Arnold, a pre-petition contract is generally not entered into as part of administering a bankruptcy estate and, at the time of contracting, the counter-party presumably does not foresee potentially entering the domain of a bankruptcy court. The Court agrees with this reasoning, and the Plaintiff's position, and thus concludes that the instant proceeding is non-core, regardless of when the Defendant allegedly became liable on the debt. The opposite conclusion would stretch the holding of Arnold too far, especially when one considers the letter and spirit of the Marathon decision.

Given the conclusion that the proceeding is non-core, the next question is whether it is "related" under 28 U.S.C. §§ 1334(b) and 157(c). If this question is answered in the negative, then the ultimate question of whether the Court should abstain from the instant proceeding becomes moot. Because a bankruptcy court lacks the power to hear a non-core, non-related proceeding, the abstention provisions, 28 U.S.C. § 1334(c)(1) and (2), become superfluous in the context of such proceedings.[3]

The Third Circuit has established a much-cited standard for determining whether a proceeding is "related." In Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984), the Court described the test as whether "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." The First Circuit has recognized this standard. See In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991). In addition, numerous First Circuit district and bankruptcy courts have accepted and applied this test. See, e.g., In re Santa Clara County Child Care Consortium, 223 B.R. 40, 45 (B.A.P. 1st Cir. 1998) (providing a lengthy list of First Circuit district and bankruptcy courts adopting the Pacor test); In re Remington Dev. Group, Inc., 180 B.R. 365, 368 (Bankr. D.R.I. 1995). The Pacor test is generally viewed

[3] Section 1334(c)(1) applies only to proceedings arising under title 11, or arising in or related to a case under title 11 (i.e., core or non-core, but related, proceedings). Section 1334(c)(2) applies only to a proceeding related to a case under title 11 but not arising under title 11 or arising in a case under title 11 (i.e., non-core, but related, proceedings).

as a liberal standard. See Central Maine Restaurant Supply v. Omni Hotels Management Corp., 73 B.R. 1018, 1023 (D. Me. 1987) ("[t]he Pacor formulation . . . is still a rather broad formulation."). Some circuits, however, have adopted slightly different, and arguably more restrictive, tests of what constitutes a related proceeding. See, e.g., In re Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987) (a proceeding is related when "it affects the amount of property available for distribution or the allocation of property among creditors."); In re Turner, 724 F.2d 338, 341 (2d Cir. 1983). Although the Supreme Court has not yet resolved this issue, it appears to consider a proceeding related to a case under title 11 when it is based on a debtor's cause of action that became property of the estate under 11 U.S.C. § 541. See Celotex Corp. v. Edwards, 514 U.S. 300, 308, 115 S.Ct. 1493, 1499 (1995) (citing 1 King et al., Collier on Bankruptcy ¶ 3.01[1][c][iv], at 3-28 (15th rev. ed. 1994)). Given that the Plaintiff's recovery of the alleged debt would directly affect the size of the bankruptcy estate and that his complaint is based on an alleged cause of action that became property of the estate under section 541, it seems clear that this proceeding is related to a case under title 11.

B. Abstention

Since this proceeding is related to a case under title 11, discretionary abstention under 28 U.S.C. § 1334(c)(1) may be considered. This issue may be raised by the Court *sua sponte*. See Weldo, Inc. v. Lorch, 204 B.R. 1006, 1017 (Bankr. N.D. Ala. 1996). The statute provides that discretionary abstention is appropriate "where the interests of justice, comity with state courts, and respect for state law suggest that the matter should be heard by the state court." Garland & LaChance Constr. Co., Inc. v. City of Keene, 144 B.R. 586, 594 (D.N.H. 1991). There is no clear standard or test that governs when a court should exercise its discretion to abstain from hearing a proceeding. See In re DiMartino, 144 B.R. 225, 226 (Bankr. D.R.I. 1992) ("discretionary abstention is difficult to concretize into bright-line tests or specific balancing tests"). A bankruptcy court, however, retains broad discretion in determining whether to abstain under section 1334(c)(1). See Garland, 144 B.R. at 594 ("the District Court is given broad power to abstain"); DiMartino, 144 B.R. at 226 ("[t]he Bankruptcy Code gives the Court broad discretion in whether to hear matters that involve state law issues").

In In re P&P Oilfield Equip., Inc., 71 B.R. 621 (Bankr. D. Colo. 1987), the court faced facts similar to those found in this proceeding. In that case a chapter 7 trustee brought suit to recover money allegedly owed to the debtor arising from the debtor's pre-petition accounts receivable. The bankruptcy court had jurisdiction solely because the debtor filed a chapter 11 petition, which was later converted to a chapter 7 liquidation. Focusing on the fact that the claim was based solely on state law, and the congestion in the bankruptcy court's calendar, the court concluded that the elements of section 1334(c)(1) were met and stated:

> Put simply, this matter should not be in this Court. It is not a "core" proceeding, it concerns only questions of State law, and would never come before me absent P&P's bankruptcy. As such, I abstain from hearing the instant case . . . .

Many courts have employed multi-factor tests as an aid in their abstention analyses. See, e.g., Bane v. LeRoux, 157 B.R. 500, 505 (Bankr. D. Mass. 1993) (using a thirteen factor test); In re AK Servs., Inc., 159 B.R. 76, 80 (Bankr. D. Mass. 1993) (recognizing a twelve factor test). In In re Titan Energy, Inc., 837 F.2d 325 (8th Cir. 1988), the Eighth Circuit found three factors to be important in reaching its decision to direct abstention: (1) the proceeding involved state law issues only peripherally related to the bankruptcy case; (2) the proceeding could not have been brought in federal court absent bankruptcy jurisdiction; and (3) the issues could be timely decided in state court. The Eighth Circuit specifically stated that "[w]here a state court proceeding sounds in state law and bears a limited connection to debtor's bankruptcy case, abstention is particularly compelling." Titan, 837 F.2d at 332. The Fifth Circuit, in determining whether discretionary abstention is appropriate, has focused on similar factors. In In re Gober, 100 F.3d 1195 (5th Cir. 1996), the Fifth Circuit upheld the district court's decision to abstain on the ground that the relevant claim hinged solely on state law and that federal jurisdiction did not exist but for section 1334.

The factors relied upon by the Eighth and Fifth Circuits, when applied to this proceeding, favor abstention. The Plaintiff's claim involves issues exclusively within the province of state law, which, except for potentially affecting the size of the bankruptcy estate, are only peripherally related to the bankruptcy

case. The instant proceeding could not have been adjudicated in federal court absent section 1334.[4] Finally, the issues in this proceeding can be timely decided in state court. New Hampshire has established a small claims procedure that is specifically designed to expeditiously and efficiently handle matters involving small monetary claims. See RSA 503:1 (defining a small claim as a right of action in which the debt does not exceed $5,000). In state court a decision on the merits of the Plaintiff's claim, and enforcement of that decision, may proceed in one court on an expedited basis.

Some courts appear to apply a higher standard for discretionary abstention in reorganization as opposed to liquidation proceedings. In Flores Rivera v. Telemundo Group, 133 B.R. 674 (D.P.R. 1991), the court, citing Titan with approval, stated that the non-core nature of the defamation claim involved in the proceeding and the fact that it involved only state law issues weighed in favor of abstention. The court, however, ultimately concluded that abstention was not appropriate, relying in part on the observation that the plaintiff filed for chapter 13 bankruptcy due to the alleged defamation. In In re MEC Steel Bldgs., Inc., 136 B.R. 606 (Bankr. D.P.R. 1992), a chapter 11 debtor brought suit against a defendant to recover an alleged pre-petition debt, seeking a recovery of $15,500. The court decided not to abstain under section 1334(c)(1), notwithstanding the fact that the proceeding turned solely on state law because moving the suit to state court potentially could have resulted in a substantial delay to the effective reorganization of the debtor.

The claim in this proceeding is not as connected to the related bankruptcy case as the defamation claim in Flores Rivera, and was not a factor in the bankruptcy filing. The Plaintiff does not suggest that the resolution of the claim in this proceeding in a state court will interfere or delay the administration of the estate. Although undue delay in reorganizing a debtor could be a controlling factor in a decision to not abstain in another case, this Court need not decide in this case if the standard for abstention in a chapter 7 liquidation differs from the standard applicable to a reorganization under chapters 11 or 13. Here, proceeding in state court will not unduly delay, and may even enhance, administration of the bankruptcy

[4] The Plaintiff's complaint does not raise a federal question and the amount of the claim precludes diversity jurisdiction.

estate. Because this is a "related" proceeding, and the consent of all the parties to the Court entering a final order or judgment is not available,[5] not abstaining would require this Court to submit proposed findings of fact and conclusions of law to the district court,[6] after which the district court would need to review such proposals, deal with any objections and enter final orders. Enforcement of any final judgment entered by the district court may also result in additional bifurcated proceedings. In state court, the resolution of Plaintiff's claim will not be divided between two federal courts for purposes of hearing the claim and entering final orders. Furthermore, the Plaintiff may well have a more convenient, unitary venue at the state level for purposes of trial and enforcement of any judgment.[7]

At least one court has stated that "[t]he fundamental issue [in determining whether to exercise discretionary abstention] is which forum, [the state court] or the bankruptcy court, is better suited to adjudicate the present dispute . . . ." In re DiMartino, 144 B.R. 225, 226 (Bankr. D.R.I. 1992). A corollary to this question is where, from an efficiency perspective, would it be preferable to hear the proceeding? This question also flows from one of the factors relied upon by courts in determining whether to abstain: will abstention likely have a positive effect on the efficient administration of the estate? See In re Craft Architectural Metals Corp., 115 B.R. 423, 432 (E.D.N.Y. 1989) (a relevant factor is "the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention"); In re AK Servs., Inc., 159 B.R. 76, 80 (Bankr. D. Mass. 1993) (same). If it is more efficient overall to hear the proceeding in state court, then *a fortiori*, doing so would have a positive effect upon the administration of

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[5] It is doubtful that a party's failure to appear and respond would constitute consent under section 157(c)(2). See In re G.S.F. Corp., 938 F.2d 1467, 1477 (1st Cir. 1991) (stating that implicit consent will suffice, but citing cases involving some sort of affirmative act on the part of the party deemed to have given consent); In re Thrall, 196 B.R. 959, 969 (Bankr. D. Colo. 1996) (not finding express or implicit consent in the context of a default). This conclusion is strengthened by a reading of Fed. R. Bankr. P. 7012(b), which requires "express consent" to enter final orders and judgments in a non-core proceeding.

[6] The Court assumes, without deciding, that it would be empowered to issue an order entering default pursuant to LBR 7055-1 since such an order is not a final one. See In re Bernal, 223 B.R. 542, 545 (B.A.P. 9th Cir. 1998) (entry of default not an appealable final order). A default judgment, however, is a final order. See Wright et al., Federal Practice and Procedure, § 3914.5, at 524 (1992).

[7] Under RSA 502:26 and RSA 502-A:16, venue is proper in the municipality or judicial district in which either plaintiff or defendant resides.

the estate. When the Court compares the stream-lined nature of the small claims process in the state courts to the bifurcated proceedings that would result if the Plaintiff's complaint in this proceeding was heard in federal court, the relative inefficiency of not abstaining is obvious.

IV. CONCLUSION

For the reasons stated above, the Court concludes that in the "interest of justice" and in the "interest of comity with state courts" it shall exercise its power under 28 U.S.C. § 1334(c)(1) to abstain from hearing this adversary proceeding. The adversary proceeding shall be dismissed without prejudice to any litigation by the Plaintiff against the Defendant in an appropriate state court. A separate order shall issue.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DONE and ORDERED this 28th day of April, 1999.

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J. Michael Deasy
Bankruptcy Judge