

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-12547-JMD
Chapter 11

Bizfon, Inc.,
Debtor

Systolic Networks, Inc.,
Plaintiff

v.

Adv. No. 01-1216-JMD

Bizfon, Inc.,
Defendant

Jeffrey E. Francis, Esq.
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Attorney for Plaintiff

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Attorney for Debtor/Defendant

MEMORANDUM OPINION

I. BACKGROUND

On July 23, 2001, Systolic Networks, Inc. (“Systolic”) filed a complaint for injunctive and declaratory relief in Suffolk County Superior Court in the Commonwealth of Massachusetts (the “Complaint”). The Complaint set forth four causes of action: breach of contract, breach of implied covenant of good faith and fair dealing, declaratory judgment, and violation of Mass. Gen. L. c. 93A. Along with its complaint, Systolic filed a motion for preliminary injunction requesting that the state court order the Debtor to execute a stockholder agreement as required by certain agreements signed during late 2000 and

early 2001, and that the state court enjoin the Debtor and its officers, directors, employees, etc. from terminating or representing as terminated a license agreement between the parties, pending arbitration.¹

On August 2, 2001, after a hearing, the Suffolk County Superior Court entered a preliminary injunction that required the Debtor to sign the stockholder agreement. The judge, however, did not enjoin the Debtor from terminating or representing as terminated the license agreement, pending arbitration. On August 6, 2001, upon the Debtor's motion, the judge clarified his order by stating that "[i]t was the Court's intention to render relief relating to the matters within its ambit—execution of the stockholders agreement—and leave for the arbitrators the matters within theirs—the issue of the continued existence of the License Agreement." The judge further stated that "Bizfon's execution of the stockholders agreement pursuant to the order of this Court shall not be deemed to be a waiver of its position regarding the termination of the License Agreement." The Debtor did not execute the stockholder agreement as ordered. However, the Debtor did institute an arbitration proceeding in Massachusetts on August 10, 2001, the same day the Debtor filed a Chapter 11 bankruptcy petition with this Court, which stayed the Complaint and the related arbitration.

On September 7, 2001, the Debtor filed a notice of removal in order to remove the Complaint to federal court pursuant to Federal Rule of Bankruptcy Procedure 9027. The notice of removal was filed with the United States Bankruptcy Court for the District of Massachusetts. On September 17, 2001, the Debtor filed a motion to transfer venue from the United States Bankruptcy Court for the District of Massachusetts to this Court, and on October 9, 2001, Systolic filed a motion for remand. Judge William Hillman of the United States Bankruptcy Court for the District of Massachusetts held a hearing on the motions on October 31, 2001 at which he ruled that the Complaint should be transferred to this Court. Judge Hillman further ruled that all other pending matters, including the motion for remand, should be transferred to this Court for decision. The Complaint was transferred on December 11, 2001.

¹ The license agreement contained a provision requiring arbitration, administered by the American Arbitration Association, to occur in Boston regarding any non-equitable dispute arising under the agreement.

This Court held a hearing on the motion for remand on January 23, 2001, at which the Court learned that Systolic is no longer seeking to have the injunction enforced nor is it claiming that the license agreement is still in effect. Rather, Systolic simply seeks to liquidate its claim against the Debtor, a claim that is based on the Debtor's alleged breach of contract, its alleged breach of the implied covenant of good faith and fair dealing, and its alleged violation of Mass. Gen. L. c. 93A. Systolic argued that the Complaint is non-core and that it must be remanded for equitable reasons. The Debtor argued that the Complaint is nothing more than a claims dispute, a core matter of which the Court has jurisdiction. Systolic has filed a proof of claim in the Debtor's bankruptcy case in the amount of \$25,737.650.00.

II. DISCUSSION

Section 1452(b) of Title 28 permits the court to which a claim or cause of action has been removed to remand such claim or cause of action on "any equitable ground." 28 U.S.C. § 1452(b). See also Southern Marine and Indus. Servs., Inc. v. AK Eng'r, Inc. (In re AK Servs., Inc.), 159 B.R. 76, 80 (Bankr. D. Mass. 1993). At issue is whether the removed Complaint should be remanded to the Suffolk County Superior Court. The courts have identified several equitable grounds for remand:

1. Forum non conveniens
2. A holding that, if the civil action had been bifurcated by removal, the entire action should be tried in the same court;
3. A holding that a state court is better able to respond to questions involving state law;
4. Expertise of a particular court;
5. Duplicative and uneconomic effort of judicial resources in two forums;
6. Prejudice to the involuntarily removed parties;
7. Comity considerations; and
8. A lessened possibility of an inconsistent result.

Id. Equitable grounds for remand may include consideration of some of the elements relevant to a decision regarding abstention. Id. at 84.

Systolic argues that the claims outlined in the Complaint are "non-core" and that the Court must abstain from hearing the Complaint. The Bankruptcy Code does not define "core" or "non-core." Rather, 28 U.S.C. § 157(b)(2) contains a non-exclusive list of matters that are "core." The list includes "allowance

or disallowance of claims against the estate . . . and estimation of claims or interests for the purposes of confirming a plan under chapter 11” and “counterclaims by the estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(B), (C). See also In re Bedford Computer Corp., 61 B.R. 594 (Bankr. D.N.H. 1986). Systolic’s Complaint is not technically a proof of claim; however, the Complaint essentially sets forth the basis for Systolic’s \$25.7 million claim against the Debtor.² While the Debtor has not yet filed an answer to the Complaint,³ the Debtor’s answer will essentially set forth the Debtor’s objection to Systolic’s claim. Even if Systolic had not filed the Complaint, the substantive issues raised in the Complaint would be raised in an objection to the claim, which, although not yet filed, will need to be filed as part of the Debtor’s reorganization effort given the Debtor’s obvious dispute with Systolic. Accordingly, it makes sense to view Systolic’s complaint and the Debtor’s anticipated answer and counterclaims in that light, i.e., to consider substance over form.

Courts have held that resolving a disputed claim is a core matter under 28 U.S.C. § 157(b)(2)(B) to be decided by the bankruptcy court, even when the basis for the creditor’s claim involves a prepetition breach of contract claim brought by the creditor prepetition. “The same facts which might be asserted by a creditor in a State Court suit, totally independent of the bankruptcy case, when ‘procedurally characterized’ as a claim in the bankruptcy case, may be finally determined by the Bankruptcy Court. Similarly, a [debtor-in-possession]’s claim based on State law, ‘procedurally characterized’ as a counterclaim to a creditor’s proof of claim, may be finally determined by this Court in the process of determining whether the creditor’s claim should be allowed.” Colvard v. Gulf States Drilling Co., Inc. (In re Bar M Petroleum Co., Inc.), 63 B.R. 343, 346-47 (Bankr. W.D. Tex. 1986). See Southeastern Sprinkler Co., Inc. v. Meyertech Corp. (In re Meyertech Corp.), 831 F.2d 410, 418 (3^d Cir. 1987) (concluding that the creditor’s cause of action for

² Systolic did file a proof of claim in the Debtor’s bankruptcy case on November 1, 2001. See POC No. 86.

³ The Debtor filed a motion on September 17, 2001 seeking to suspend the deadline for filing a responsive pleading. The United States Bankruptcy Court for the District of Massachusetts did not rule on the motion. This Court has not yet ruled on the motion either.

breach of warranty based on state law was correctly characterized as a claim against the debtor and the litigation of its merits was a core proceeding under 28 U.S.C. § 157(b)(2)(B)); Cibro Petroleum Products, Inc. v. City of Albany (In re Winimo Realty Corp.), 270 B.R. 108, 120 (S.D.N.Y. 2001) (“[W]here a defendant to a pre-petition contract action has filed a proof of claim against the estate, the defendant has ‘sought the benefits of the bankruptcy court’s jurisdiction’ and the matter will be deemed core.”). Cf. Mauldin v. Peoples Bank of Indianola (In re Mauldin), 52 B.R. 838, 841 (Bankr. N.D. Miss. 1985) (The court concluded that the debtors’ claim for breach of contract was a non-core matter but stated that “[t]he Court hastens to add at this point that the provisions of 28 U.S.C. § 157(b)(2)(C) are not applicable to this matter in that no objection has been filed to the Defendant’s proof of claim, and neither the complaint nor the proposed amended complaint are structured as a counterclaim. Conceivably, if the pleadings were restructured, a different result might well be forthcoming as to whether this proceeding was, in fact, a core proceeding.”). Thus, “[w]hen a creditor files a proof of claim it submits itself to the bankruptcy court’s equitable power, and the claims, even though arising under state law, become core proceedings within the jurisdiction of the bankruptcy court. . . . Additionally, 28 U.S.C. § 157(b)(3) provides that the determination that a proceeding is non-core ‘shall not be made solely on the basis that its resolution may be affected by State law.’” Pan Am. World Airways, Inc. v. Evergreen Int’l Airlines, Inc., 132 B.R. 4, 7 (S.D.N.Y. 1991) (citations omitted). See also Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.), 815 F.2d 165, 169 (1st Cir. 1987) (“[T]he fact that a claim in a bankruptcy matter raises issues of state, rather than federal, law does not by itself determine that it is non-core, rather than core.”); Bar M Petroleum, 63 B.R. at 346. By filing the Complaint, Systolic sought to recover damages from the Debtor. By filing a proof of claim, Systolic has become a party in interest in the Debtor’s Chapter 11 case, and Systolic has asserted its right to participate in any distribution under the Debtor’s plan of reorganization. See Bar M Petroleum, 63 B.R. at 346. Given the current posture of the case, i.e., Systolic is seeking only a determination as to whether the Debtor is liable to it for breach of contract, for breach of the implied covenant of good faith and fair dealing, and for violation of Mass. Gen. L. c. 93A, the Court finds that the

substantive issues involve whether Systolic has a claim against the Debtor and whether the Debtor has counterclaims against Systolic. These are core matters pursuant to 28 U.S.C. § 157(b)(2)(B) and (C) over which the Court has jurisdiction, especially given the First Circuit Court of Appeal's opinion in Arnold Print Works, where the court stated that "'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits." Arnold Print Works, 815 F.2d at 168. See also Peachtree Lane Assoc., Ltd., 150 F.3d 788, 797 (7th Cir. 1998) ("[N]othing [] suggests that it makes any difference whether the filing of the adversary proceeding precedes or follows the submission of a claim against the bankruptcy estate. In either case, the submission of the claim would still trigger the process of allowance and disallowance of claims, thereby subjecting the claimant to the bankruptcy court's equitable jurisdiction.") (cited in Winimo Realty, 270 B.R. at 121).

The Court notes further that Systolic's claim exceeds \$25 million dollars and, if allowed, it is likely to constitute more than eighty percent of the debt that the Debtor will seek to restructure in its bankruptcy case. See Chadwick Bay Hotel Assocs. V. City of Dunkirk (In re Chadwick Bay Hotel Assocs.), 178 B.R. 618, 619 (Bankr. W.D.N.Y. 1995). For that reason, the Court also finds that the matter is "core" under 28 U.S.C. § 157(b)(2)(O) as a proceeding "affecting . . . the adjustment of the debtor-creditor . . . relationship." Because the Complaint is a "core" proceeding, the Court finds no basis for abstaining.

Turning to other equitable grounds for remand, the Court finds that there is no inconvenience to the parties by hearing the Complaint in this Court as both the Debtor and Systolic are located in New Hampshire nor does the Court believe that the Complaint involves unique or complicated issues that require the special expertise of the Suffolk County Superior Court. Systolic has indicated that Delaware law governs the disputes, except the Mass. Gen. L. c. 93A claim, due to the choice of law provisions in the agreements executed by the parties. In the Court's view, Systolic will not suffer any prejudice as an "involuntarily removed party" since Systolic has filed a proof of claim in the Debtor's bankruptcy case and has thus subjected itself to this Court's jurisdiction.

While Systolic has suggested that it intends to bring claims against non-debtor third parties, which cannot be joined in the Complaint if the Complaint remains in this Court, the Court is not persuaded that this alone is sufficient to warrant remand in this case. To date, Systolic has not brought suit against these non-debtor third parties even though the automatic stay has not prevented it from doing so. In addition, by adding additional parties to the litigation, the litigation is likely to become more complex and, as a result, is less likely to be resolved quickly, a concern for this Debtor. Although bringing suit against non-debtor third parties in a different court may involve duplicative and uneconomic effort on the part of Systolic and may result in inconsistent findings by the courts, the same will be true if the Complaint is remanded as the Debtor may be forced to object to Systolic's claim or to file a motion to estimate its claim in this Court in order to proceed with confirmation of the Debtor's plan. This too may result in duplicative and uneconomic effort on the part of the Debtor. Accordingly, this factor does not support remand.

Systolic argues that comity considerations require remand. Systolic states that the matter should be remanded due to the Debtor's flagrant disregard for the preliminary injunction issued by the Suffolk County Superior Court and that court's interest in enforcing its own orders. While the Suffolk County Superior Court certainly has an interest in obtaining compliance with its orders, Systolic ignores the fact that it no longer seeks to have the Debtor sign the stockholder agreement and that instead it is pursuing only damages. Any damage resulting from the Debtor's failure to comply with the preliminary injunction will be part of its claim in the Debtor's bankruptcy.

Lastly, even if the Court were to remand the Complaint, Systolic would still be faced with the restrictions imposed by the automatic stay and would be required to file a motion for relief in order to proceed with the Complaint. See 11 U.S.C. § 362(a). Given all of these factors, the Court does not find sufficient equitable grounds to require remand of the Complaint.

III. CONCLUSION

For the reasons outlined above, the Court finds that this is a core proceeding and that no basis exists to abstain from hearing the matter or to remand it to the Suffolk County Superior Court. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue separate orders denying Systolic's motion for remand and setting a continued pretrial hearing.

DATED this 29th day of January, 2002, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge