United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **HomeLoan.com,Inc. v. William Loughborough, et al.**
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Description:	Proposed Findings of Fact and Conclusions of Law by Judge James S. Starzynski Re: [6-1] Motion For Abstention by Philip R. Doepfner, [5-1] Motion To Dismiss Adversary Proceeding due to Plaintiff's lack of capacity to sue, failure to state a claim upon which relief can be granted and for lack of jurisdiction by Philip R. Doepfner .		
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Comments:	*Proposed Findings of Fact and Conclusions of Law and Memorandum Opinion on Motion to Dismiss Due to Plaintiff's Lack of Capacity to Sue, Failure to State a Claim Upon Which Relief Can Be Granted, and For Lack of Jurisdiction -and- Alternative Motion for Abstention (14)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
LORACA INTERNATIONAL, INC. and
LEXUS COMPANIES, INC., and
CALUMET SECURITIES, and
HOMELOAN.COM, INC.
Debtors. No. 11-02-12925 SA

HOMELOAN.COM, INC.,
Plaintiff,
v. Adv. No. 02-1244 S

WILLIAM LOUGHBOROUGH and
PHILLIP R. DOEPFNER,
Defendants.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MEMORANDUM OPINION ON MOTION TO DISMISS DUE TO PLAINTIFF'S LACK OF CAPACITY TO SUE, FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND FOR LACK OF JURISDICTION
-and-
ALTERNATIVE MOTION FOR ABSTENTION

This matter is before the Court on Defendant Phillip R. Doepfner's ("Doepfner's") Motion to Dismiss Due to Plaintiff's Lack of Capacity to Sue, Failure to State a Claim Upon Which Relief Can Be Granted, and for Lack of Jurisdiction, and, Alternative Motion for Abstention ("Motion")(docs. 5 & 6), and Doepfner's Supplemental Brief in Support of Motion to Dismiss: Specifically Pertaining to Lack of Capacity (doc. 9). Doepfner is self-represented. Defendant William Loughborough, through his attorney Modrall, Sperling, Roehl, Harris & Sisk, P.A. (Douglas R. Vadnais), filed a joinder in the Motion.

(doc. 10). Plaintiffs, the jointly administered Debtors Loraca International, Inc., Lexus Companies, Inc., Calumet Securities, and HomeLoan.com, Inc. filed an objection to the motions through their attorney Davis & Pierce, P.C. (Cynthia M. Tessman and William F. Davis). (doc. 11). Doepfner filed a reply (doc. 13), in which Loughborough joined. (doc. 14).

Plaintiff's complaint alleges that this is a core proceeding under 28 U.S.C. § 157(b)(2)(F) and (H)[1]. As discussed below, the Bankruptcy Court finds that this adversary proceeding is a mixture of core and non-core proceedings. Therefore, proposed findings of fact and conclusions of law are submitted to the United States District Court pursuant to Federal Bankruptcy Rule 9033[2]. The complaint has four counts. The first count seeks avoidance of a preferential transfer to defendant Loughborough only. It seeks a return of the amount preferentially transferred plus costs and pre- and post-judgment interest. The second count

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[1] 28 U.S.C. § 157(b)(2)(F) and (H) provide:
Core proceedings include, but are not limited to-- ...
(F) proceedings to determine, avoid, or recover preferences;
...
(H) proceedings to determine, avoid, or recover fraudulent conveyances.

[2] Pursuant to Federal Bankruptcy Rule 9033(b), parties must serve and file written objections to these Proposed Findings of Fact and Conclusions of Law within 10 days after being served with this document.

alleges that Loughborough and Doepfner breached fiduciary duties owed to Plaintiff arising from their previous roles as officer and director of and attorney for Plaintiff. Plaintiff claims damages in Count 2 in the same amount as the alleged Count 1 preferential transfer plus costs, attorneys fees, expenses, and punitive damages, plus pre- and post-judgment interest. Count 3 sounds in prima facie tort against both Defendants and seeks damages in an amount to be determined at trial, plus punitive damages, attorneys fees and costs, and pre- and post-judgment interest. Count 4 is a malpractice claim against Defendant Doepfner only, and seeks damages, punitive damages, attorneys fees and costs, and pre- and post-judgment interest.

Count 1 is based on federal bankruptcy law. Counts 2 through 4 are based on state tort law. Federal courts apply the conflict of law rules of the state in which they are located. Mountain Fuel Supply v. Reliance Insurance Company, 933 F.2d 882, 887 (10th Cir. 1991). New Mexico generally follows the doctrine of lex loci delicti, meaning the law of the place where the wrong took place. Matter of Estate of Gilmore, 124 N.M. 119, 122, 946 P.2d 1130, 1133 (Ct. App. 1997)(citations omitted.); Purple Onion Foods, Inc. v. Blue Moose of Boulder, Inc., 45 F.Supp.2d 1255, 1261-62 (D. N.M.

1999). The complaint in this case indicates that both defendants live in Texas, the state court lawsuit was in Texas, the garnishment of funds was in Texas, and the alleged wrongful actions of defendants took place in Texas. Therefore, Texas tort law should apply to Counts 2 through 4.

Doepfner's Motion seeks dismissal due to Plaintiff's alleged lack of capacity to sue. It also asks for a dismissal for failure to state a claim, and dismissal for lack of subject matter jurisdiction. Alternatively, Doepfner asks the Court to abstain either under the mandatory abstention or permissive abstention statutes. The Court will first address the subject matter jurisdiction defense, then lack of capacity, failure to state a claim, and finally abstention.

1. BANKRUPTCY COURT JURISDICTION

Bankruptcy Court jurisdiction is established by 28 U.S.C. § 1334, which lists four types of matters over which the district court has bankruptcy jurisdiction: 1) cases “under” title 11 (which are the bankruptcy cases themselves, initiated by the filing of a Chapter 7, Chapter 11, etc. petition), 2) proceedings “arising under” title 11 (such as a preference recovery action under §547), 3) proceedings “arising in” a case under title 11 (such as plan confirmation), and 4) proceedings “related to” a case under title 11 (such as a

collection action against a third party for a pre-petition debt). Wood v. Wood (In re Wood), 825 F.2d 90, 92 (5th Cir. 1987). In the District of New Mexico, all four types have been referred to the bankruptcy court. See 28 U.S.C. § 157(a); Administrative Order, Misc. No. 84-0324 (D. N.M. March 19, 1992).

Jurisdiction is then further broken down by 28 U.S.C. § 157, which grants full judicial power to bankruptcy courts not only over cases "under" title 11 but also over "core" proceedings, §157(b)(1), but grants only limited judicial power over "related" or "non-core" proceedings, §157(c)(1). Wood, 825 F.2d at 91; Personette v. Kennedy (In re Midgard Corporation), 204 B.R. 764, 771 (10th Cir. B.A.P. 1997). This core/non-core distinction is important, because it defines the extent of the Bankruptcy Court's jurisdiction and the standard by which the District Court (or Bankruptcy Appellate Panel) reviews the factual findings. Halper v. Halper, 164 F.3d 830, 836 (3rd Cir. 1999).

Core proceedings

"Core" proceedings are matters "arising under" and "arising in" cases under title 11. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Matters "arise under" title 11 if they involve a cause of action created or determined by a

statutory provision of title 11. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Matters "arise in" a bankruptcy if they concern the administration of the bankruptcy case and have no existence outside of the bankruptcy. Wood, 825 F.2d at 97; Midgard, 204 B.R. at 771. Bankruptcy judges may hear and determine core proceedings and enter final orders and judgments. 28 U.S.C. § 157(b)(1). 28 U.S.C. § 157(b)(2) contains a nonexclusive list of 15 types of core proceedings.

Non-core proceedings

"Non-core" proceedings are those that do not depend on the bankruptcy laws for their existence and that could proceed in another court even in the absence of bankruptcy. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. "Proceedings 'related to' the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate." Celotex Corporation v. Edwards, 514 U.S. 300, 307 n.5 (1995). The Tenth Circuit has adopted the widely used Pacor, Inc. v. Higgins[3] test to determine if a proceeding is related: "the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in

[3] 743 F.2d 984, 994 (3rd Cir. 1984)

any way, thereby impacting on the handling and administration of the bankruptcy case." Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990).

Bankruptcy courts have jurisdiction over non-core proceedings if they are at least "related to" a case under title 11. 28 U.S.C. § 157(c)(1)("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.") However, unless all parties consent otherwise, 28 U.S.C. § 157(c)(2), bankruptcy judges do not enter final orders or judgments in non-core proceedings. Rather, they submit proposed findings of fact and conclusions of law to the district court, which enters final orders and judgments after de novo review. 28 U.S.C. § 157(c)(1); Federal Bankruptcy Rule 9033. See also Orion Pictures Corporation v. Showtime Networks, Inc. (In re Orion Pictures Corporation), 4 F.3d 1095, 1100-01 (2nd Cir. 1993)(discussing Section 157's classification scheme).

28 U.S.C. § 157(b)(2) gives a nonexclusive list of 15 "core proceedings." The fact that a matter is listed among the "core proceedings" of 28 U.S.C. § 157(b)(2) cannot end the inquiry, however. In Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 76 (1982), the United States Supreme Court ruled that Article III of the

Constitution "bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws." In Marathon, the debtor sought damages for alleged breaches of contract and warranty, misrepresentation, coercion, and duress. Id. at 56. The Supreme Court distinguished this adjudication of "state-created private rights" from the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." Id. at 71. The Court found that the broad grant of jurisdiction to the bankruptcy courts found in 28 U.S.C. § 1471 (1976 ed., Supp.IV) was unconstitutional because it "impermissibly removed most, if not all, of the 'essential attributes of the judicial power' from the Art. III district court" and vested those attributes in the bankruptcy court. Id. at 87. Congress responded with the current jurisdictional scheme which categorizes matters as either core or non-core. Any determination by the Bankruptcy Court of the core status of a matter should be done with the dictates of Marathon in mind. See Adams v. Grand Traverse Band of Ottawa and Chippewa Indians Economic Development Authority (In re Adams), 133 B.R. 191, 196 (Bankr. W.D. Mi. 1991)("[Section] 157(b)(2)(A) [matters concerning the administration of the estate] was not meant to confer core status on all proceedings

having some effect on the estate. If that was the intent behind § 157(b)(2)(A), then there would be no distinction between 'related to' and 'core' proceedings.")

The Court of Appeals for the Tenth Circuit has not specifically addressed the treatment of cases when they involve both core and non-core matters. In Halper, 164 F.3d 830, the Court of Appeals for the Third Circuit addressed this issue. Some Bankruptcy Courts determine the extent of their jurisdiction on a claim by claim basis. Id. at 838. Others look to whether the core aspects heavily predominate the whole case, and if they do then they treat the entire proceeding as core. Id. at 839. The Halper court adopted the claim-by-claim approach as "the only one consistent with the teachings of Marathon [Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)]". Id. See also Hudgins v. Shah (In re Systems Engineering & Energy Management Associates, Inc.), 252 B.R. 635, 643 n. 3 & 4 (Bankr. E.D. Va. 2000)(listing cases that have applied the predominant approach and the claim-by-claim approach, and adopting the latter.) This Court also believes that the claim-by-claim approach is most consistent with Marathon. Therefore, the next step is to apply the core/non-core tests to each count of the complaint.

Count 1 - Preference Action

A Preference action is specifically listed as a core proceeding by 28 U.S.C. § 157(b)(2)(F). Furthermore, a preference action is a matter “arising in” a case under title 11 that has no existence outside of bankruptcy. And preferences "arise under" title 11 because they are a cause of action created and determined by a statutory provision of title 11. Count 1 is therefore core.

Counts 2, 3 and 4 - Breach of Fiduciary Duty, Prima Facie Tort, and Malpractice

Counts 2, 3 and 4 are not listed among the examples of core proceedings by 28 U.S.C. § 157(b)(2)[4]. The three theories of recovery are not based upon 11 U.S.C. and therefore do not "arise under" Title 11. They also exist independently of Debtor's bankruptcy case and therefore do not "arise in" a case under Title 11. They are, however, "related to" a case under Title 11 because they are causes of action owned by the debtor which became property of the estate

[4] Plaintiff's complaint alleges that the case is core pursuant to § 157(b)(2)(F) and (H). Count 1 is clearly a 157(b)(2)(F) matter (“proceedings to determine, avoid or recover preferences”). Taking the term “fraudulent conveyances” as it is commonly understood in bankruptcy and insolvency contexts, the Court does not understand how any of Counts 2, 3 or 4 would fit into § 157(b)(2)(H) (“proceedings to determine, avoid or recover fraudulent conveyances”).

pursuant to 11 U.S.C. § 541[5]. See Celotex Corporation, 514 U.S. at 307 n.5. Furthermore, counts 2, 3 and 4 seek to liquidate assets of the debtor for administration in the estate, and success on any of these counts will increase the assets available to creditors of the estate. The Bankruptcy Court would find that counts 2, 3 and 4 are non-core proceedings.

In summary, this adversary proceeding is a mixture of core and non-core "related to" proceedings. The bankruptcy court has jurisdiction over the entire adversary proceeding by virtue of 28 U.S.C. 1334(b), but final orders and judgments for Counts 2, 3 and 4 must be entered by the United States District Court. Count 1 is a core proceeding for which the Bankruptcy Court can enter final judgment. The motion to dismiss for lack of subject matter jurisdiction therefore should be denied.

2. MOTION TO DISMISS FOR LACK OF CAPACITY

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[5] Bankruptcy code section 541 states, in part:
(a) The commencement of a case ... creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
(1) ... [A]ll legal or equitable interests of the debtor in property as of the commencement of the case.

Defendants defense of lack of capacity applies to the entire lawsuit. Defendants claim that Plaintiff lacks capacity to bring this lawsuit because Homeloan.Com, Inc., a Delaware corporation, was no longer in existence or good standing under the laws of Delaware because it failed to pay taxes. Defendant Doepfner's Exhibit A (doc. 5, 6) is a certificate issued by the Delaware Secretary of State that certifies that Homeloan.com, Inc. was no longer in existence and good standing, "having become inoperative and void" on March 1, 2002 for non-payment of taxes.

Under Delaware law a corporation continues for at least three years after dissolution for purposes of lawsuits and for winding up its affairs. See 8 Del. Code Ann. tit. 8 § 275[6]. See also City Investing Company Liquidating Trust v. Continental Casualty Co., 624 A.2d 1191, 1195 (Del. 1993)("By its terms, Section 278 provides an automatic extension of

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[6]This statute provides, in relevant part:
All corporations, whether they expire by their own limitations or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution ..., bodies corporate for the purpose of prosecuting and defending suits, ... by or against them, and of enabling them gradually to settle and close their business ..., but not for the purpose of continuing the business for which the corporation was organized.

corporate existence for three years."); Illinois Central Gulf Railroad Company v. Arbox Three Corporation, 700 F.Supp. 389, 390 (N.D. Ill. 1988)("[A] Delaware corporation dissolved for nonpayment of state franchise taxes falls within the purview of section 278 and continues to exist as a body corporate for the purposes stated therein."). Accord First National Bank of Liberal, Kansas v. Liberal Mack Sales, Inc. (In re Liberal Mack Sales, Inc.), 24 B.R. 707, 710-11 (Bankr. D. Kan. 1982)(Kansas statute patterned after Del. Code Ann. tit. 8 § 278 allowed involuntary chapter 7 petition against dissolved Kansas corporation.) Therefore, Homeloan.com, Inc. has until 2005 to file lawsuits and wind up its affairs. The Court disagrees with Doepfner's claim that this lawsuit is in effect continuing the business for which the corporation was organized. See Motion, doc. 13, p.4. The motion to dismiss on these grounds should be denied.

3. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

"A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley v. Gibson, 355 U.S. 41 (1957)). For the purposes of a motion to dismiss, a plaintiff's allegations must be taken as true. Id.

Count 1 - Preference action

Count 1 alleges a transfer to Loughborough, a creditor, based on an antecedent debt, made while the Debtor was insolvent and during the 90 days before the bankruptcy petition, that allowed Loughborough to receive more than he would in a chapter 7 case if the transfer had not been made and he received payment of his claim to the extent provided by the bankruptcy code. This states a cause of action under 11 U.S.C. § 547. See generally 5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy, ¶547.01 at 547-7 (15th ed. rev.)

Count 2 - Damages for Breach of Fiduciary Duty

The complaint ¶ 6 alleges that Loughborough is a former director and president of HomeLoan.com. An officer/director has fiduciary duties to the corporation. Icom Systems, Inc. v. Davies, 990 S.W.2d 408, 410 (Tex. App. 1999). The complaint ¶ 7 alleges that Doepfner was, at all times material, the attorney for HomeLoan.com, Inc. or defendant Loughborough. An attorney has fiduciary duties to the client. Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App. 2002). The attorney has this fiduciary relationship as a matter of law. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App. 2001). In fact, Texas recognizes a broad

spectrum of situations that give rise to fiduciary duty. "A fiduciary relationship may arise from informal moral, social, domestic, or personal dealings as well as from technical relationships such as attorney-client." Brazosport Bank of Texas v. Oak Park Townhouses, 889 S.W.2d 676, 683 (Tex. App. 1994).

> A fiduciary relationship exists where a party is under a duty to act or give advice for the benefit of another or where a special confidence is reposed in one who in equity and good conscience should be bound to act in the best interests of the one reposing confidence.

Id. (citation omitted). For the purposes of this motion to dismiss, the Court should presume that Defendants were in a fiduciary relationship with Plaintiff. Breach of fiduciary duty is a tort under Texas law. Hawthorne v. Guenther, 917 S.W.2d 924, 936 (Tex. App. 1996); F.D.I.C. v. Henderson, 849 F.Supp. 495, 497 (E.D. Tx. 1994) aff'd. 61 F.3d 421 (1995).

Plaintiff alleges the fiduciary relationship, breach of that relationship through a lawsuit in which Doefpner represented Loughborough contrary to Doefpner's express agreement with his client HomeLoan.com to not do so, and damages. Count 2 alleges a fiduciary duty owed to Plaintiff by both defendants, a willful, wanton and malicious breach, causation, and damages. Allegations in Count 4 bolster those of Count 2 as to Defendant Doepfner: an agreement that

Doepfner would not represent Loughborough in any actions against Plaintiff, an unwaived conflict of interest, actions violating the standards of care required by a Texas attorney. Count 2 should not be dismissed.

Count 3 - Prima facie tort

Texas does not recognize prima facie tort as a cause of action. Leon Ltd. v. Albuquerque Commons Partnership, 862 S.W.2d 693, 709 (Tex. App. 1993); A.G. Services, Inc. v. Peat, Marwick, Mitchell & Co., 757 S.W.2d 503, 507 (Tex. App. 1988); Martin v. Trevino, 578 S.W.2d 763, 772-73 (Tex. Civ. App. 1978). See also RRR Farms, Ltd. v. American Horse Protection Association, Inc., 957 S.W.2d 121, 125 n.2 (Tex. App. 1997)(plaintiff in that case concedes that there is no cause of action for prima facie tort in Texas). Therefore, the Court recommends that this Count be dismissed.

Count 4 - Legal malpractice

Count 4 alleges that Doepfner was an attorney for Plaintiff and he specifically agreed not to represent Loughborough in any actions against HomeLoan.com, Inc. Plaintiff claims that there was an actual conflict of interest that was never waived. Plaintiff alleges that Doepfner breached his duties by rendering advice to Loughborough and by pursuing litigation on his behalf against Plaintiff.

Plaintiff alleges that Doepfner's actions and omissions violated the standard of care required by an attorney, that Plaintiff relied on his actions and omissions, and was damaged and that the proximate cause of the damages were the omissions and violations of care by Doepfner.

In Texas, attorney malpractice actions are based on negligence. Cosgrove v. Grimes, 774 S.W.2d 662, 664 (1989)(op. on reh'g). An action in negligence is based on four elements, duty, breach, proximate cause, and damages. Id. at 665.

In Kimleco Petroleum Inc., 91 S.W.3d 921, the Texas Court of Appeals discussed the differences between an attorney malpractice claim and a breach of duty claim against an attorney.

> We agree with Appellants that an attorney has a fiduciary duty to his client. ... The focus of breach of fiduciary duty is whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client.
>
> The essence of a breach of fiduciary duty involves the integrity and fidelity of an attorney. A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing, or making misrepresentations.
>
> Unlike a claim for breach of fiduciary duty, legal malpractice is based on negligence, because such claims arise from an attorney's alleged failure

> to exercise ordinary care. A cause of action for legal malpractice arises from an attorney giving a client bad legal advice or otherwise improperly representing the client.

Id. at 923 (Citations and internal punctuation omitted.)

The Court has reviewed the allegations in Count 4, and finds that it is really a claim for breach of fiduciary duty, not malpractice. Plaintiff's complaint is not bad legal advice, it is the alleged breach of its relationship with its attorney that is the focus of the allegations. See also Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 188 (Tex. App. 2002)(If gist of complaint is failure to disclose conflict of interest, failure to withdraw and failure to advise client to retain separate counsel rather than a failure to provide care, skill and diligence, it is a breach of fiduciary claim rather than malpractice claim.) The Court will recommend that Count 4 be dismissed for failure to state a cause of action under malpractice, and recommend that the Count 4 allegations be combined with the Count 2 allegations.

4. MOTION FOR ABSTENTION

Federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. Quackenbush v. Allstate Insurance Company, 517 U.S. 706, 716 (1996). "This duty is not, however, absolute." Id. Discretion may be somewhat greater in the bankruptcy context.

See 11 U.S.C. § 1334(c)(1); Republic Reader's Service, Inc. v. Magazine Service Bureau, Inc. (In re Republic Reader's Service, Inc.), 81 B.R. 422, 425 (Bankr. S.D. Tx. 1987)("The 1984 amendments to the abstention provisions contained in section 1334(c) thus reflect a clear expansion of the abstention doctrine within the realm of bankruptcy.")

Mandatory Abstention

Mandatory abstention is governed by 28 U.S.C. § 1334(c):

> (1) 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.
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. (emphasis added.)

Section 1334(c)(2), the "mandatory abstention" provision, requires a bankruptcy court to abstain from hearing a purely state law question that is only "related to" a bankruptcy if an action "is commenced" that can be timely adjudicated. Midgard, 204 B.R. at 779-80; Worldwide Collection Services of

Nevada, Inc. v. Aaron (In re Worldwide Collection Services of Nevada, Inc.), 149 B.R. 219, 223 (Bankr. M.D. Fl. 1992).

In the case before the Court, there is no action that has been commenced that can be timely adjudicated[7]. Mandatory abstention is therefore inappropriate. Furthermore, abstention would be inappropriate for count 1 because it is a core proceeding rather than a related to proceeding based on state law.

Permissive Abstention

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[7] Doepfner's Motion misconstrues the law. The statute clearly requires an action that "is commenced." Doepfner's motion states that abstention is required only if the case "can be timely adjudicated in a state forum of appropriate jurisdiction." See Motion, doc. 5-6, p.7 ¶ 19, and p.8 ¶ 23. The significant majority of the cases require that the state court action have been commenced prior to the bankruptcy case or adversary proceeding having been filed. See Security Farms v. International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers, 124 F.3d 999, 1009 (9th Cir. 1997); S.G. Phillips Constructors, Inc. v. City of Burlington, Vermont (In re S.G. Phillips Constructors, Inc.), 45 F.3d 702, 708 (2nd Cir. 1995); Rivera v. Telemundo Group, 133 B.R. 674, 676 (D. P.R. 1991); Container Transport, Inc. v. Scott Paper Company (In re Container Transport, Inc.), 86 B.R. 804, 806 (E.D. Pa. 1988); TTS, Inc. v. Stackfleth (In re Total Technical Services, Inc.), 142 B.R. 96, 100 (Bankr. D. De. 1992); Foster v. Farmers and Merchants Bank of Eatonton (In re Foster), 105 B.R. 746, 749 (Bankr. M.D. Ga. 1989); Kolinsky v. Russ (In re Kolinsky), 100 B.R. 695, 704 (Bankr. S.D. N.Y. 1989); contra, World Solar Corp. v. Steinbaum (In re World Solar Corp.), 81 B.R. 603, 609 (Bankr. S.D. Cal. 1988). At a minimum, if Doepfner is relying on the minority position as the basis for his characterization of that particular requirement of the statute, he should have said so in his papers.

When mandatory abstention is not required, permissive abstention may be appropriate based on various factors. Republic Reader's Service, Inc., 81 B.R. at 428. Relevant factors considered by that court were:

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden on [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

Id. at 429.

The Court will apply these twelve factors. Since the Court would never abstain on count 1 (preference action) and since counts 3 and 4 should be dismissed, the following discussion pertains only to count 2, although it could be applicable to counts 3 and 4 as well.

Abstention would not likely affect the efficient administration of the estate in one way or the other. State

law predominates over the bankruptcy issues, if any. Count 2 is not a difficult or unsettled matter of Texas law. There are no related proceedings. There is no jurisdictional basis other than 28 U.S.C. § 1334. The case is, in some respects, related to the main bankruptcy case; count 2 is based on many of the same facts as the count 1 preference action. Counts 2 is a non-core proceeding that could be severed from count 1. There is no significant impact on the Court's docket if the case is retained. This case does not appear to be forum shopping because Count 1 is a core matter that the bankruptcy court must hear, and the other counts are factually related. The issue of a jury trial has not been raised. The defendants are all nondebtors; the plaintiff, however, is the debtor so there is a connection of all the counts to the bankruptcy case. The decision is a close call but overall the Court recommends that it should retain jurisdiction over the entire case.

SUMMARY OF RECOMMENDATIONS

The Bankruptcy Court recommends that the United States District Court:

1) Declare that the Bankruptcy Court has jurisdiction over the adversary proceeding, and find that Count 1 is a core

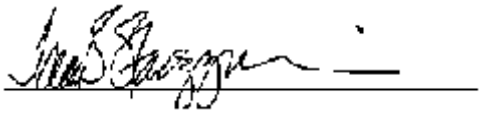
proceeding, and that Counts 2, 3 and 4 are non-core "related to" proceedings.

2) Deny Defendants' Motion to Dismiss for lack of capacity.

3) Deny Defendants' Motion to Dismiss for Failure to State a Claim as to Counts 1 and 2

4) Grant Defendants' Motion to Dismiss for Failure to State a Claim as to Counts 3 and 4.

5) Deny Defendants' Motion to Abstain.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 26, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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