

following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Movants commenced an action against Debtor in Chatham County Superior Court prior to Debtor filing its petition under Chapter 11. In the action, Movants allege, *inter alia*, that Debtor charged for work that was not actually performed, charged for replacement parts when none were actually used, and sold used replacement parts as new. The suit is based upon fraud, breach of contract, state RICO laws, and other state law causes of actions.

Counsel for Movants represented to the court that the parties were more than four months into discovery, that the matter should be ready for trial by the end of this year, and that Movants were unwilling to waive their right to a jury trial. Movants have not filed a proof of claim in Debtor's case.

Based on the fact that the suit in state court has progressed to the point of trial, Movants seek relief from the automatic stay under 11 U.S.C. Section 362(d) to proceed with their suit to judgment in Superior Court. In opposing the motion, Debtor indicated that it wished to have the suit removed to this Court. Debtor represented to the court that there could potentially be forty or more civil actions pending against it other than the one which is the subject of this Motion. Debtor contends that defending these actions in various state courts will be so costly that it will prevent it from being able to reorganize its business under Chapter 11 of the Bankruptcy Code.

CONCLUSIONS OF LAW

As previously noted, Debtor's basic defense to Movants' motion is that the suit should be removed to this court. Debtor has not, however, made application to remove the suit to this court in conformity with the procedures set forth in Bankruptcy Rule 9027. Therefore, the issue of removal and abstention are not ripe for decision by this court. The sole issue to be decided is whether Movants' motion for relief from stay should be granted to allow it to proceed to judgment in Chatham Superior Court.

Resolution of this issue requires evaluation of countervailing considerations. On one hand, Movants have a right to have their action against Debtor adjudicated in a just and speedy manner. On the other, one of the primary protections of bankruptcy is the automatic stay, which prevents a debtor from having to expend valuable resources litigating suits in multiple forums. In balancing these considerations, several courts have held that the following three factors should be considered:

- 1) Whether any "great prejudice" to either the estate or debtor will result from continuation of the civil suit;
- 2) Whether the hardship to movant resulting from maintaining the stay considerably outweighs the hardship of the debtor; and
- 3) Whether the movant has a probability of prevailing on the merits of its case.

See e.g., Matter of Video Cassette Games, Inc., 108 B.R. 347, 349 (Bankr.N.D.Ga. 1989);

In re Pro Football Weekly, Inc., 60 B.R. 824, 826 (N.D.Ill. 1986); In re Bock Laundry Machine Co., 37 B.R. 564, 566 (Bankr.N.D. Ohio 1984). *See also* In re Micro Design, Inc., 120 B.R. 363, 369 (E.D.Pa. 1990). Applying these factors to the facts before me, I reach the following conclusions.

1. Prejudice to the Estate

Debtor contends that it will be prejudiced if this motion is granted because the expense of defending this and the forty or more other lawsuits which have been or may be brought against it in various state courts will prevent it from being able to effectively reorganize. Debtor's contention is not without merit. The financial burden of defending multiple suits in multiple forums can be significant.

This motion, however, involves only Movants' suit, which was four months into discovery when Debtor filed its bankruptcy petition and is essentially ready for trial. In fact, Movants indicate that the case can be tried by the end of this year or soon thereafter, and Debtor does not dispute this fact. Several courts have recognized that where a suit is ready for trial in state court, it is appropriate to lift the stay and allow the suit to proceed to judgment. *See e.g.*, In re Castlerock Properties, 781 F.2d 159 (9th Cir. 1986); In re Kemble, 776 F.2d 802 (9th Cir. 1985); Matter of Holtkamp, 669 F.2d 505 (7th Cir. 1982). *See also* In re Republic Reader's Service, Inc., 81 B.R. 422, 426 (Bankr.S.D.Tex. 1987) ("Where a cause of action for monetary damages based primarily on state law can be litigated in state court without substantial delay and disruption to the orderly administration of the estate, the best forum for resolution of that action is state court, *irrespective* of whether the legal issues present unsettled question of state law.") (emphasis original).

Moreover, there is no reason to believe that the suit could be tried any more expediently in this court. In fact, it is probable that such a trial would take significantly longer in this court than it would if tried in state court. Movants' suit is not a matter which is core to Debtor's bankruptcy under 28 U.S.C. Section 157(b)(2), and as a result, this court does not possess the authority to render a final judgment in the matter. Therefore, unless the consent of all parties is obtained, this court would be permitted only to make proposed findings of fact and conclusions of law and refer the case to the district court for entry of final order. *See* 28 U.S.C. Section 157(c). Such a process would necessarily require an extended period of time.

Finally, the court notes that both the Chatham County Superior Court and this court are located in Savannah, Georgia. Thus, there is absolutely no evidence which suggests that a savings in legal fees and other related costs would inure to Debtor's benefit if the suit were tried in this court. Therefore, this Court does not perceive any significant prejudice to Debtor or its estate in allowing Movants' suit to proceed to judgment in Chatham County Superior Court.

2. Hardship to Movants in Maintaining the Stay

Maintenance of the stay may effectively deny Movants an opportunity to have their suit heard by any court. Under Bankruptcy Rule 9027(a)(2), when a civil action is pending at the time a bankruptcy case is filed, a notice of removal must be filed within 90

days after the order for relief is entered in the bankruptcy case.¹ Movants' suit was pending when Debtor filed its Chapter 11 petition, and more than 90 days have passed since the order for relief in Debtor's case was entered. Therefore, Movants would be unable to seek removal of the case to this court if their motion for relief is denied, and Movants would be unable to proceed with their suit in either court.

Furthermore, Movants indicated an unwillingness to waive their rights to a jury trial. This court's ability to impanel a jury on a matter which is not core to Debtor's bankruptcy proceeding is very doubtful.²

In contrast, if the stay is lifted, Rule 9027(a)(2) allows Debtor thirty days from the date the Order is entered to file a notice of removal. Of course, Movants would have the opportunity to move this court to abstain from hearing the suit under 28 U.S.C.

¹ Bankruptcy Rule 9027(a)(2) provides in full:

If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after the entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

Fed.R.Bankr.P. 9027(a)(2).

² Compare In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 408 (1990), *reinstated* 924 F.2d 36 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2041, 114 L.Ed.2d 126 (1991) (holding that bankruptcy court has the statutory and constitutional authority to conduct jury trials in *core* proceedings) with In re United Missouri Bank of Kansas City, N.A., 901 F.2d 1449 (8th Cir. 1990) (bankruptcy judge does not have the authority to conduct jury trials); In re Baker & Getty Financial Services, Inc., 954 F.2d 1169 (6th Cir. 1992) (bankruptcy judge does not have the authority to conduct jury trials); In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990) (bankruptcy judge does not have the authority to conduct jury trials).

Section 1334(c).³

3. Movants' Likelihood of Success on the Merits

Not having heard the merits of Movants' case, this court is not in a position to make a determination of Movants' likelihood of success on the merits of their claims against Debtor. However, there has been no suggestion that Movants' claims are frivolous or otherwise without merit.

CONCLUSION

Lifting the stay to allow Movants' suit to proceed to judgment would not significantly prejudice Debtor or its estate. This court would still retain jurisdiction over the

³ 28 U.S.C. Section 1334(c) provides:

(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 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. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

Thus, the district court has discretion under section 1334 (c)(1) to abstain from hearing certain matters. When the conditions specified in section 1334(c)(2) are present, however, abstention is mandatory. *See e.g., In re Revco D.S., Inc.*, 99 B.R. 768, 773-74 (N.D. Ohio 1989).

allowance of a claim based upon any judgment which might be rendered against Debtor in Movants' suit. On the other hand, the hardship imposed upon Movants if the stay is not lifted would be considerable. Movants would effectively be denied the opportunity to have the merits of their suit adjudicated since, absent the entry of an order lifting the stay, the deadline for filing a notice of removal has passed under Bankruptcy Rule 9027(a)(2). Therefore, the court finds that "cause" exists for lifting the stay to allow Movants to proceed with their suit in Chatham County Superior Court to judgment.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Movants' Motion for Relief from Stay be granted to allow them to proceed to judgment with their suit in Chatham County Superior Court.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of December, 1993.