
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
LARRY ALLEN DENNIS)	
(Chapter 7 Case <u>93-40713</u>))	Number <u>93-4147</u>
)	
<i>Debtor</i>)	
)	
)	
JAMES L. DRAKE, JR.,)	
TRUSTEE))	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
LARRY DENNIS II)	
TAMMY ANN DENNIS)	
)	
<i>Defendants</i>)	

ORDER ON TRUSTEE'S MOTION FOR RECONSIDERATION

In the above case, James L. Drake, Jr. (hereinafter "Trustee"), instituted an adversary proceeding to void the transfers of real estate from the debtor, Larry Allen Dennis, to his son, Larry Dennis, II, and then from the son to the debtor's wife, Tammy Ann Dennis.

On October 4, 1994, this Court voided the previously mentioned transfers of real estate, vested title in Trustee, and ordered the defendants to surrender possession of the property. Trustee, in its motion of June 9, 1995, requested this Court to enforce its order of October 4, 1994, to compel the debtor to surrender possession. On September 20, 1995, this Court denied Trustee's motion and abstained from exercising its authority under §105 to compel surrender because the state court provides an alternate and more convenient forum. Trustee now requests this Court to reconsider its order of September 20, 1995. For the following reasons, this Court will continue to abstain and Trustee's motion will be denied.

28 U.S.C 1334(c), in pertinent part, provides,

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 cases under title 11.

Discretionary abstention under 28 U.S.C. § 1334(c)(1) permits a court to abstain in the interest of comity, out of respect for state law, or in the interest of justice. In *re Mill-Craft Building Systems, Inc.*, 57 B.R. 531, 533-34 (Bankr.E.D.Wisc. 1986). When considering whether abstention is appropriate under § 1334(c)(1), courts have weighed many factors, such as:

- (1) the effect or lack thereof on efficient administration of the estate;

- (2) the extent to which state law issues predominate over bankruptcy issues;
- (3) the difficulty or unsettled nature of 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 the 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 of 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; and
- (11) the presence of nondebtor parties.

In re Asher, 128 B.R. 639, 646 (Bankr.N.D.Ill. 1991) *citing* In re Republic Reader's Service, Inc., 81 B.R. 422, 429 (Bankr.S.D.Tex. 1987). Several of the previously mentioned factors are present in this case (at least Nos. 1, 2, 6, 9 and 11), and this court is convinced that discretionary abstention is appropriate here. As applied to the facts in this case, the overriding concern I have is the first factor - the effect of this decision on efficient administration of the bankruptcy estate.

In my original order denying the Trustee's motion and abstaining, I pointed

out the impact of the Eleventh Circuit decision of In re Lemco, 910 F.2d 784 (11th Cir. 1990), which suggested to me that there might be a question of this Court's subject matter jurisdiction to entertain this relief. The Trustee now argues that Lemco is distinguishable and that abstention in favor of a state law forum will delay these proceedings and might conceivably result in inconsistent rulings by federal and state courts. As to the former concern, I agree that, factually, Lemco is distinguishable and that since this issue involves possession of property of the bankruptcy estate, it is more clearly within the subject matter jurisdiction of this Court. However, it is important to recall that in Lemco I held a purchaser from a trustee in a bankruptcy court-authorized sale to be in contempt for failure to abide by one of the conditions of that sale. The Eleventh Circuit reversed, in part, because after the auction the property ceased to be estate property. Arguably the fact that the sale terms were violated might have supported a conclusion that the sale was not final, all performance by the purchaser not having been completed, which would support my belief that the bankruptcy court still had jurisdiction over the property. The Eleventh Circuit held otherwise.

While this case is factually distinguishable, in the confused thicket of bankruptcy jurisdictional questions I recognize that the distinction argued by the Trustee here might not be persuasive on any appeal of my decision. If subject matter jurisdiction is found lacking after an appeal the Trustee will then, after many months be forced to bring his action before the very court which he could petition now. The effect of such delay is much more to be

avoided that the comparatively minor delay which may be occasioned if I abstain. The courts of this state have unquestioned jurisdiction to determine the possessory rights of Debtor and Defendants, the expertise to adjudicate those rights, and the integrity to do so in light of my ruling that neither Debtor, nor Defendants have any title or color of title to the property in question. The Trustee's concern about inconsistent rulings is genuine but misplaced. This Court's judgment that title to the property in question is vested in the Debtor's estate and therefore subject to administration by the Trustee, is *res judicata*,¹ not subject to collateral attack in the state court system, and the only remaining issue is whether the Trustee, as owner of the property, can dispossess an uninvited occupant of that land.

Thus, while other factors also support abstention, the necessity for the quickest and surest resolution of this single, straightforward question is paramount, and leads me to this decision. In short, while this Court probably has subject matter jurisdiction to adjudicate this matter, the degree of uncertainty raised by Lemco persuades me to abstain from dispossessing debtor and the defendants when an alternate and convenient forum is present. If it is later determined on appeal that this Court does not possess subject matter jurisdiction, Trustee would be forced to proceed in state court after months of delay and perhaps substantial loss to the creditors. In the interests of judicial economy, I believe that

¹ "Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant, Larry Dennis, II, be, and hereby is, divested of title to the Property described in that certain Warranty Deed from PRH Enterprises, as Grantor, to Larry Dennis, II, as Grantee, dated February 20, 1990, recorded in Deed Book 3-C, pages 254-256, Jenkins County records, and title to said property is hereby vested in James L. Drake, Jr., as Trustee of the estate of Larry Allen Dennis, pursuant to Bankruptcy Rule 7070 and Rule 70 of the Federal Rules of Civil Procedure." Memorandum and Order of October 4, 1994, Adv. Pro. 93-4147, Ch. 7 Case No. 93-40713, slip op. at 17 (Bankr.S.D.Ga.)(Davis, J.).

the state court is the proper venue at this time.

ORDER

Pursuant to the above mentioned reasons, IT IS THE ORDER OF THIS COURT that the motion for reconsideration to compel surrender is DENIED. The Trustee is free to pursue his state court remedies.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of November, 1995.