
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:) Chapter 11 Case
) Number 85-40639
DONALD E. AUSTIN)
)
Debtor)
)
DONALD E. AUSTIN)
)
Plaintiff)
)
vs.) Adversary Proceeding
) Number 89-4020
JOHN M. TATUM, JOHN R. CALHOUN,)
MARK M. SILVERS, JR.,) District Court
KRAN RIDDLE, MICHAEL W. TAYLOR,) Civil Action
RONALD S. OTTAVIO,) No. CV489-003
JOSEPH G. BOWDEN, JR.,) No. CV489-004
BENJAMIN C. ACKERLY,)
individually, and BANK OF)
VIRGINIA now known as SIGNET)
BANK, BVA CREDIT CORPORATION,)
now known as SIGNET CREDIT)
CORPORATION, AETNA CASUALTY AND)
SURETY COMPANY, a Connecticut)
Corporation)
)
Defendants)

REPORT AND RECOMMENDATION FOR DISPOSITION
OF PLAINTIFF'S MOTION FOR ABSTENTION AND REMAND

Plaintiff, Donald E. Austin, brought suit in the Superior Court of Chatham County, Georgia on December 6, 1988, against defendants, John M. Tatum, John R. Calhoun, Mark M.

Silvers, Jr., Kran Riddle, Michael W. Taylor, Ronald S. Ottavio, Joseph G. Bowden, Jr., Benjamin C. Ackerly, Bank of Virginia now known as Signet Bank, BVA Credit Corporation now known as Signet Credit Corporation, and Aetna Casualty and Surety Company. Plaintiff's complaint consisted of 126 pages and with the attached documents, exceeded 800 pages. The desultory complaint asserts five different causes of action against the defendants and seeks \$400 million in punitive and compensatory damages. The plaintiff has labeled these causes of action: 1) Unlawful interference with advantageous economic relations; 2) Breach of duty of good faith and fair dealing; 3) Willful and deliberate infliction of mental pain and distress - tort of outrage; 4) Common scheme and device to defraud; and 5) Conspiracy to deprive plaintiff of rights secured by law. The plaintiff's complaint is based on causes of action arising under the laws of the State of Georgia.

On January 4, 1989, defendant Mark M. Silvers, Jr. petitioned for removal of the case from the superior court to the United States District Court for the Southern District of Georgia pursuant to 28 U.S.C. §1452(a).¹ On January 5, 1989, defendants,

¹28 U.S.C. 1452(a) states in relevant part:

A party may remove any claim or cause of action in a civil action . . . , to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

Signet Bank, Signet Credit Corporation, John M. Tatum, Michael W.

Taylor, Ronald S. Ottavio, Joseph G. Bowden, Jr., and Benjamin C. Ackerly (collectively hereinafter referred to as the bank defendants) also moved for removal of the case to the district court. The petitioning defendants agree that the only basis for removal to the district court is the plaintiff's pending Chapter 11 bankruptcy case, In re: Donald E. Austin, No. 485-00639 (Bankr. S.D. Ga. 1985). The plaintiff has moved to have the district court abstain from hearing the complaint and to remand it to superior court for trial.

DISCUSSION

A district court has original, but not exclusive, jurisdiction over cases "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(b),² Resolution

²28 U.S.C. §1334 states:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) 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.

(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

of this motion rests upon a determination of whether the causes of action alleged by the plaintiff either 1) arise under Title 11; or 2) arise in a case under Title 11; or 3) are related to a case under Title 11. The defendants seeking removal contend that the action is one arising in a case under title 11.

Therefore, these defendants argue that the action is within the jurisdiction of the district court and may be removed from the superior court.

This proceeding does not arise under title 11. A civil action arising under title 11 is an action "created by title 11 or which is concerned with what are called 'matters concerning 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 made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

administration of the estate' in 28 U.S.C. §157(b)(2)(A), in the sense that no adverse third party is involved (e.g., a dispute between the debtor and the trustee regarding a claim to exemptions)." 1 Collier on Bankruptcy ¶3.01(c)(iii) (L. King 15th Ed. 1989). The pending action involves numerous adverse parties, and the parties agree that the action does not arise under title 11.

This action may not be construed "as arising in" a case under title 11. The meaning of 'arising in' proceedings, encompasses administrative matters³, counterclaims by the estate against persons filing claims against the estate, orders to turn over property of the estate, and determinations of the validity, extent, or priority of liens. 1 Collier on Bankruptcy ¶3.01(c)(v) (L. King 15th Ed. 1989). Matters which are not "related" proceedings and do not "arise under title 11" fall into this classification. Plaintiff's complaint asserts no cause of action which could be construed to fall within this category. A cause of action which arises in a case under title 11 are those

³"The term 'administrative matters,' . . . may constitute the principal constituent of 'arising in' jurisdiction. This category is illustrated by such things as allowance and disallowance of claims, orders in respect to obtaining credit, determining the dischargeability of debts, discharges, confirmation of plans, orders permitting the assumption or rejection of contracts, and like matters." 1 Collier on Bankruptcy ¶3.01(c)(v) (L. King 15th Ed. 1989).

"that secondarily spring from a pending bankruptcy case and which,

although not dependent upon the Bankruptcy Code for a legal basis, would not have existed but for the fact that a bankruptcy case was filed." Production Credit Association v. Yagow, 53 B.R. 737 (Bankr. N.D. 1985).

After a thorough review of the plaintiff's lengthy and rambling complaint, the court concludes that count one of the complaint alleges that the defendants, Tatum, Calhoun, Silvers, Riddle, Taylor, Ottavio, Bowden, Signet Bank, and Signet Credit Corporation, conspired to ruin the plaintiff financially and forced the plaintiff into bankruptcy by interfering with the plaintiff's state created rights and by filing frivolous legal actions in the state courts against the plaintiff. The complaint also alleges a lender liability claim against Signet Bank and Signet Credit Corporation. Counts two through five rely on these same scenarios to establish different causes of action under state law.

In addition, the plaintiff alleges that the defendants set forth above, and defendants Ackerly and Aetna Casualty and Surety Company, allegedly conspired to interfere by fraudulent or tortious misconduct with the plaintiff's state created economic and contractual relations after he filed his petition

under title 11. The complaint is based entirely on state law and could exist without the plaintiff's bankruptcy proceeding.

The causes of action asserted by the debtor are "related to a case under title 11." "In light of the Marathon case, the legislative history surrounding the 1984 jurisdictional provisions, and the post-1984 case law, it seems clear that cases encompassed by section 1334(b) 'related proceedings' are those which (1) involve causes of action owned by the debtor that became property of the estate under section 541, and (2) concern suits between third parties which in one way or another affect the administration of the title 11 case." 1 Collier on Bankruptcy ¶3.01(c) (iv) (L. King 15th Ed. 1989).

To the extent that these claims are based on facts that occurred prior to the debtor filing for protection under title 11, these alleged causes of action belonged to the debtor at the time the debtor filed his bankruptcy petition and became part of the debtor's bankruptcy estate. By definition, these claims are related proceedings since they involve causes of action owned by the debtor at the time he filed for protection under title 11. 1 Collier on Bankruptcy ¶3.01(c) (iv) (L. King 15th Ed. 1989).

Furthermore, to the extent that the complaint alleges any cause of action that occurred after the plaintiff filed for protection under title 11, the allegations involve third parties which in

one way or another affect the administration of the debtor's bankruptcy case. Plaintiff's allegations, therefore, are related to a case under title 11, but do not arise under title 11 or arise in a case under title 11.

Pursuant to 28 U.S.C. §1334, the district court would have original, but not exclusive, jurisdiction over the plaintiff's complaint since the complaint involves claims related to a case under title 11. Under 28 U.S.C. §1452, a party could remove this cause of action from a state court to the district court. The plaintiff's cause of action, therefore, would be subject to removal to the district court in Savannah.

Remaining for resolution, however, is the plaintiff's timely motion for the district court to abstain and remand. Of the two types of abstention authorized by 28 U.S.C. §1334(c), §1334(c)(1) authorizes the court to voluntarily abstain from hearing a cause of action arising under title 11 or arising in or related to a case under title 11 "in the interest of justice, or in the interest of comity with State courts or respect for State law;" and §1334(c)(2) requires the court to abstain "upon the 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 . . . if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

The latter provision, mandatory abstention, gives the court no discretion to hear a case related to a cause of action under title 11 if a proceeding has been commenced, and can be timely adjudicated, in a State forum. In this case, a related proceeding, the mandatory abstention provision must be followed.

The bank defendants contend, however, that since this action was begun in the superior court and removed to federal court, the mandatory abstention provisions do not apply. The bank defendants contend that in order for the mandatory abstention provisions to apply, two actions must exist simultaneously - - one in the district or bankruptcy court and one in a state court. See Paul v. Chemical Bank, 57 B.R. 8 (Bankr. S.D.N.Y. 1985); Bleichner, Bonta Martinez & Brown Inc. v. National Bank of Georgia, 72 B.R. 63 (Bankr. N.D. Ga. 1987) [approving the reasoning of Paul, but remanding the action on equitable grounds under Section 1452(b)].

In Paul the court concluded that Section 1334(c)(2), the mandatory abstention provision, did not apply to actions removed under Section 1452(a), stating:

If Congress had intended that in considering whether to remand a removed action, the court should look to 1334(c)(2) it would have been a simple matter to insert the appropriate cross-reference to 1452(b), just as a cross reference to 1334 was added in 1452(a). The absence of such a cross-reference is striking since removed actions would principally be state court actions and presumably be based on state law."

Paul, supra at 12.

To follow this reasoning, however, would essentially deletes subsection (c)(2) from section 1334. The plain meaning of the jurisdictional reference in section 1452(a) is that section 1334 applies in its entirety to cases which are to be removed from a

state court to a federal court. Chiodo v. NBC Bank-Brooks Field, 88 B.R. 780 (W.D. Tex. 1988). See also Murray v. On-Line Business Systems, 99 B.R. 768 (N.D. Ohio 1989). The jurisdictional requirement set forth in section 1452(a) in order for a case to be removed to district court does not state that any action may be removed if the district court has jurisdiction under section 1334(b), but rather incorporates the entire text of section 1334. This reference includes §1334(c)(2), the mandatory abstention provision. Chiodo, supra at 784. Therefore, the absence of a reference to section 1334(c)(2) in section 1452(b), the remand provision, is not determinative as

the entire text of section 1334 is incorporated into the jurisdictional requirements for removal set forth in section 1452(a). The mandatory abstention provisions set forth in section 1334(c)(2) applies to removed actions.

The plaintiff's complaint covers matters related to a case under title 11. The cause of action was commenced in a state forum, and no party has demonstrated that the case cannot be timely adjudicated in that forum. Therefore, on the timely motion of the plaintiff, the district court is required to abstain from hearing the plaintiff's cause of action pursuant to 28 U.S.C. §1334(c)(2), the mandatory abstention provision.

CONCLUSION

It is, therefore, the recommendation of this court that the district court enter an order finding:

- 1) That the district court has original, but not exclusive jurisdiction, over this action pursuant to 28 U.S.C. §1334 as a cause of action related to a proceeding under title 11;
- 2) That this action was properly removed pursuant to 28 U.S.C. §1452(a);
- 3) That pursuant to the plaintiff's timely filed motion, the court is required to abstain from hearing the action under 28 U.S.C. §1334(c)(2), the mandatory abstention provision; and, therefore,
- 4) That remand under 28 U.S.C. §1452(b) is appropriate.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this ____ day of November, 1989.