

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

In the matter of:)
)
DANIEL G. HIPKINS)
SONJA D. HIPKINS)
(Chapter 7 Case 00-20473))
)
Debtors)
)
)
THOMAS B. MARTIN)
KAREN S. MARTIN)
)
Plaintiffs)
)
)
v.)
)
DANIEL G. HIPKINS)
SONJA D. HIPKINS)
)
Defendants)

Adversary Proceeding

Number 00-2046

FILED
at 3 O'clock & 30 min P.M.
Date 12/22/00

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia *RMH*

MEMORANDUM AND ORDER

The above-captioned proceeding came before this court in an adversary pre-trial conference on October 12, 2000. The Plaintiffs in this proceeding, Thomas B. Martin and Karen S. Martin ("the Martins") contend that the Debtors/Defendants, Daniel G. Hipkins and Sonja D. Hipkins ("the Hipkins") are indebted to them in the sum of \$259,374.00 for obtaining property by false pretenses, false representations and actual fraud, in addition to other damages to be determined by the Georgia Racketeer Influenced and Corrupt Organizations Act. Plaintiffs seek

a trial by jury in this matter. The Debtors/Defendants deny these allegations and have filed a counterclaim alleging that the Plaintiffs owe under the terms of the contract between the parties, additional incidental costs arising from construction, together with attorneys fees and related damages.

The underlying facts in this case are as follows. The Debtors/Defendants in this matter entered into a contract with the Plaintiffs to construct a house, according to specifications, on a lot located on Saint Simons Island, Georgia. The parties scheduled the closing date as June 19, 1997, but that date was not met and closing was rescheduled to July 10, 1997. Prior to this closing date, the Plaintiffs inspected the house and found that construction did not meet the specifications as agreed upon by the parties.

The events occurring on July 10 and the days following are subject to dispute by the parties. Among the allegations made by the Plaintiffs are that at closing, Defendants, along with other individuals not party to this Adversary proceeding, made false statements about their reliability and the satisfaction of their other clients, causing Plaintiffs to rely on these statements, in addition to promises to correct the house so that it met specifications, and proceed with closing. In addition, Plaintiffs allege that Defendants concealed structural and cosmetic defects present in the house. *See* Complaint, paragraphs 9-19. The Defendants deny these allegations. *See* Answer and Counterclaim. Plaintiffs argue that the debt owed to them by the Defendants is non-dischargeable under Section 523(a)(2) of the Bankruptcy Code which provides that an individual

is not discharged from debts obtained by false pretenses, false representation, or actual fraud. 11 U.S.C. § 523(a)(2). Plaintiffs filed a civil action in the Superior Court of Glynn County alleging fraud and seeking to collect the same amount sued for in this Adversary Proceeding, which was stayed upon the filing of this bankruptcy petition by the Defendants.

The narrow issue before this Court as a result of the pre-trial conference is whether this Court should abstain from hearing the adversary proceeding and instead let the parties litigate this matter in the Superior Court of Glynn County. In determining this issue, special attention must be given to the Plaintiffs demand for a jury trial in this matter.

Abstention can be mandatory or discretionary. 28 U.S.C. §1334 (c) states in relevant part:

(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.

Mandatory abstention, under 1334(c)(2) applies only to non-core proceedings, those proceedings "related to a case under title 11" but not "arising under title 11, or arising in a case under title 11" while discretionary abstention can apply to core or non-core proceedings. In re Grober, 100 F.3d 1195, 1206 (5th Cir. 1996). This matter is a core proceeding under 28 U.S.C. §157(2)(I), which designates determinations as to the dischargeability of certain debts as a core proceeding. As such, mandatory abstention is not appropriate in this instance.

This Court, can, however, choose to abstain from hearing this matter under 11 U.S.C. §1334(c)(1), which allows for abstention in the interest of justice or in the interest of comity with State courts or respect for State law. "It is the court's duty to [abstain] when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered." In re Robino, 243 B.R. 472, 495 (Bankr. N.D. Ala. 1999)(quoting Meredith v. City of Winter Haven, 320 U.S. 228, 236 (1943)). This Court considers several factors when determining if this type of discretionary abstention is appropriate. They include: (1) the effect of abstention on the efficient administration of the bankruptcy estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the basis of bankruptcy jurisdiction, 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 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; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties. See The Money Tree of Georgia, Inc. v. Cathleen M. Fulton (*In re* Cathleen M. Fulton) Ch. 13 Case No. 99-21521, Adv. No. 00-2005 (Bankr. S.D. Ga. June 20, 2000); Estate of Dorothy Pritchett v. Loretta Van Damm (*In re* Loretta Van Damm), Ch. 13 Case No. 98-42149 (Bankr. S.D. Ga. Sept 1, 1999).

Application of the preceding factors shows that discretionary abstention is appropriate in this case based on several of the enumerated factors: Abstention will not delay these proceedings since state court litigation can proceed in parallel with this case. (Factor 1). State law issues clearly predominate over bankruptcy issues in this instance. The allegations present in this case arise from Georgia criminal statutes, including the Georgia Racketeer Influenced and Corrupt Organizations Act, rather than Bankruptcy law. Determinations of State law liability issues related to criminal conspiracy, in addition to money damages, are at the heart of this case, and these issues are more suited to adjudication in Superior Court. (Factor 2). The Superior Court proceeding has been pending for over two years, and was filed prior to the filing of the bankruptcy petition in this case. (Factor 4).

The issues of bifurcation (Factor 8) and the existence of non-debtor parties in

the Superior Court action (Factor 12) also favor discretionary abstention in this case. Bifurcation of the case between this Court and the Superior Court of Glynn County would result in the litigation of the same issues in two different forums with different defendants, rather than a consolidation of the proceedings in one forum with all defendants, placing a greater burden than necessary on the dockets of both Courts (Factor 9) and all parties involved. In fact, the State law determination of liability between the parties is an essential fact that the Bankruptcy Court needs prior to its determination of dischargeability. In the interest of judicial economy, it would be far more efficient for the issues of liability be determined in Superior Court, in a proceeding with all Defendants, and then for this Court to deal with the dischargeability issue, if appropriate, at a later time.

Furthermore, should this matter be tried in the Bankruptcy Court, the parties could not be afforded a jury trial (Factor 11), a right which both parties chose to exercise in Superior Court and a right which the Plaintiffs have requested in the Bankruptcy Court. Allowing a jury the right to determine if there is liability between the parties, and if so, the amount of that liability, satisfies the initial request made by both parties upon the filing of the Superior Court case, which has been pending in Glynn County for over two years.

For the foregoing reasons, This Court will abstain from hearing any matters between the above Parties until resolution of the suit in Superior Court of Glynn County which can determine the liability, if any, and the legal basis for liability in this case. Application of

those legal and factual findings to the federal question of dischargeability is reserved to this Court.

The case will be scheduled for a status conference in the June 2001 term of Court.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of December, 2000.