

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

In the matter of: )  
)  
CATHLEEN M. FULTON )  
a/k/a Kathleen M. Fulton )  
(Chapter 13 Case 99-21521) )

*Debtor*

THE MONEY TREE OF )  
GEORGIA, INC. )

*Plaintiff*

v. )  
)  
CATHLEEN M. FULTON )

*Defendant*

Adversary Proceeding

Number 00-2005

**FILED**

at 11 O'clock & 00 min. AM  
Date 6-30-00

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

MEMORANDUM AND ORDER

The above-styled proceeding came before this court on March 9, 2000 as an adversary pre-trial to determine removal of a claim or cause of action from this Court. Plaintiff in this adversary proceeding, The Money Tree of Georgia, Inc., filed a suit on account in the Magistrate Court of Glynn County on November 5, 1999, for the amount of \$2142.98 and \$48.00 in interest. Defendant Cathleen M. Fulton filed an answer and counterclaim on December 3, 1999, admitting that she failed to make payments in a timely manner to the Plaintiff but disputing the amount owed and alleging that Plaintiff instituted aggressive collection efforts including but not limited to calling

Defendant at her home and place of work, causing emotional trauma to the Defendant's emotionally and physically disabled son, and altering a post-dated check from the Defendant. Defendant counterclaimed for actual damages and punitive damages in the amount of \$500,000.00 or greater. (See Plaintiff's Memorandum Regarding Abstention, Attachment 2).

On or about December 8, 1999, Debtor initiated a Chapter 13 Petition. On December 13, 1999, the Defendant also initiated a Motion to Transfer requesting that the Magistrate Court of Glynn County transfer the matter to the State Court of Glynn County. The Plaintiff then filed a notice of removal of the claim to this Court, to which the Defendant answered requesting that the Bankruptcy Court take jurisdiction over the core matters before it, but leave all other matters to the State or Superior Court of Glynn County.

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

(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.

Section 1334(c)(1) gives courts the discretion to abstain from hearing state law claims while 1334(c)(2) requires that courts abstain from hearing a state law claim for which there is no independent basis for jurisdiction. Mandatory abstention as described in 1334(c)(2) applies only to non-core proceedings—that is 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 (5<sup>th</sup> Cir. 1996).

The cause of action at issue in this case is not a core proceeding as defined by 28 U.S.C. § 157(b)(2) and therefore mandatory abstention as defined by section 1334(c)(2) is appropriate in this instance. Courts must abstain from hearing a state law claim if the following factors are met: (1) The claim has no independent basis for jurisdiction other than § 1334(b); (2) the claim is a non-core proceeding, i.e. it is related to a case under title 11 but does not arise under or in a case under title 11; (3) an action has been commenced in state court; and (4) the action could be adjudicated timely in state court. In re Rupp & Bowman Co., 109 F.3d 237, 239 (5<sup>th</sup> Cir. 1997)(citing In re Grober, 100 F.3d 1195, 1206 (5<sup>th</sup> Cir. 1996)).

In order to apply mandatory abstention, this court must find that the cause of action is “related to” a case under title 11. Proceedings “related to” bankruptcy include (1) causes of action owned by the debtor which would 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 (1995). To determine if a civil proceeding is related to a bankruptcy proceeding for purposes of section 1334, the Eleventh Circuit adopted the test set forth by Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3<sup>rd</sup> Cir. 1984), which states:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

In re Lemco Gypsum, Inc., 910 F.2d 784, 787 (11<sup>th</sup> Cir. 1990)(quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3<sup>rd</sup> Cir. 1984).

The causes of action in this case, the suit on account and counterclaim arising from said suit alleging state law actions of forgery and harassment, were commenced prior to the filing of the bankruptcy proceeding in the magistrate court of Glynn County, not in Federal Court as part of the Bankruptcy case, and can be adjudicated in a timely matter in a court in Glynn County. Also, the Defendant does not dispute that a debt is owed to the Plaintiff and has listed Plaintiff in her Chapter 13 schedules as a Creditor with a secured claim, which will be handled as part of the Bankruptcy proceedings. The remaining issues concerning the amount of the underlying debt between the parties, forgery, and harassment are therefore those of state law related to a case under title 11 but not arising under title 11 or arising in a case under title 11, which could not have been independently brought before this Court. However, they could alter the debtor's rights and freedom of action with regards to the petition in the case of a positive outcome in favor of the Defendant.

I hold that the action at issue be bifurcated with the disposition of the underlying debt remaining in the Bankruptcy Court and the remaining state law issues being adjudicated in an

appropriate court in Glynn County. As a non-core proceeding that can be timely adjudicated in State Court, this Court is required, under the provisions of 28 U.S.C. §1334(c)(2) to abstain from hearing the suit on account filed by the Money Tree and the counterclaims raised by Defendant Cathleen Fulton. Those issues shall be adjudicated in the state courts of Glynn County.

Alternatively, this Court may also abstain from hearing this matter under 28 U.S.C. §1334 (c)(1), which allows the district or bankruptcy court, in the interest of justice or in the interest of comity with State courts or respect for State law, to abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Discretionary or permissive abstention is available in core as well as non-core proceedings. In re Republic Reader's Service, Inc., 81 B.R. 422 (Bankr. S.D. Tx. 1987). This proceeding was originally filed in State court and the issues to be adjudicated in this case, specifically forgery and harassment, are predominately state law claims. Cf. In re Finley, 62 B.R. 361 (Bankr. N.D. Ga. 1986)(finding that Section 1334(c)(1) was not appropriate as no unsettled questions of state law were presented and no important state interests were implicated). "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)). See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)(holding that bankruptcy judges cannot finally determine state law claims and that "related to" jurisdiction was not to be exercised finally by bankruptcy judges).

Several factors may be considered when determining if 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 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); In re Robino, 243 B.R. 472, 493 (Bankr. N.D. Ala. 1999) (citing In re Tucson Estates, Inc. 912 F.2d 1162, 1167 (9<sup>th</sup> Cir. 1990)). The totality of the circumstances must be examined when determining if a bankruptcy court should abstain. In re Robino, 243 B.R. 472, 493 n. 40 (Bankr. N.D. Ala. 1999).

This Court's abstention from hearing the underlying suit and counterclaim will not affect the administration of the estate as the debt owed by the Defendant, Cathleen Fulton, to the Plaintiff, The Money Tree, is acknowledged in the Defendant's Bankruptcy petition. The action was commenced prior to the filing of the Bankruptcy petition. The issues presented in the Defendant's counterclaim are those of state, not federal, law and are ancillary to the core bankruptcy proceeding and should therefore remain in the appropriate state court in order for the most efficient adjudication of those issues to take place. After examining the totality of the circumstances

surrounding this proceeding, this Court finds that abstention is also appropriate under section 1334(c)(1).

ORDER

As such, it is the ORDER of this Court that the proceedings involving the Counterclaim by Cathleen M. Fulton arising from the suit on account brought by The Money Tree of Georgia remain in the courts of Glynn County, with the underlying debt between the parties to be administered in this Bankruptcy Court.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 29<sup>th</sup> day of June, 2000.