

**THIS OPINION IS NOT INTENDED FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE	)	
DEBORAH A. WILLIAMS,	)	CASE NO. 97-52537
Debtor.	)	
	)	ADV. NO. 98-5034
J. BOWERS CONSTRUCTION	)	
CO., INC.,	)	CHAPTER 7
Plaintiff,	)	
	)	JUDGE MARILYN SHEA-STONUM
v.	)	
	)	<b>ORDER GRANTING MOTION TO</b>
DEBORAH A. WILLIAMS, et al.,	)	<b>DISMISS FOR LACK OF</b>
Defendants.	)	<b>JURISDICTION</b>

This matter comes before the Court on the motion of National City Bank (the "Bank") to dismiss the Complaint of J. Bowers Construction Co., Inc. ("Plaintiff") for lack of subject matter jurisdiction. On October 14, 1998, the Court held an evidentiary hearing regarding the Bank's motion to dismiss. For the following reasons, this Court finds that Plaintiff's claims against the Bank in this adversary proceeding is a non-core unrelated proceeding, and consequently this Court is without jurisdiction to hear or decide Plaintiff's claims for relief against the Bank.

**I. FACTS**

**A. The Posture of the Bankruptcy Case**

On September 10, 1997, Deborah Williams ("Debtor") filed a chapter 7 bankruptcy petition. On November 7, 1997, the trustee filed a "no-asset" report and certified that Debtor's estate had been fully administered. On December 29, 1997, an Order was entered granting an extension of time for Plaintiff to file a complaint to determine the

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dischargeability of its claim against Debtor.

**B. The Parties' Allegations**

On February 13, 1997, Plaintiff filed its Complaint. Plaintiff named three defendants in the Complaint: (1) Debtor, (2) Debtor's ex-husband, Charles Williams, and (3) the Bank. In the Complaint, Plaintiff alleged that Plaintiff repaired fire damage to the home of Debtor and her ex-husband. The insurance company issued a settlement draft, payable to Plaintiff, Debtor, Debtor's ex-husband and the Bank.<sup>1</sup> Plaintiff further alleged that in 1994, Plaintiff and Debtor opened an account at the Bank and deposited the settlement draft in the account. By the end of 1995, Debtor and her ex-husband had withdrawn substantially all of the balance in the account but failed to pay Plaintiff for much of the repair work. Plaintiff contends that the Bank committed fraud and breached its agreement with, and its fiduciary duty to, Plaintiff by allowing withdrawals from the account without Plaintiff's authorization.

On March 13, 1998, Debtor filed an Answer and Cross-Claim. In the Answer, Debtor alleged that as a result of the Bank's demands, Debtor withdrew funds from the account and used the funds "in whole or in part" to pay the pre-existing indebtedness of Debtor and her ex-husband to the Bank. In order to evaluate whether the Bank directed or coerced Debtor to use the funds from the account to pay her debt to the Bank, or whether there was other joint conduct which would support the existence of subject matter jurisdiction over Plaintiff's claims against the Bank, the Court held an evidentiary hearing.

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Given the narrow scope of the evidentiary hearing, the parties did not explore the Bank's rights as a payee under the settlement draft.

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**C. Facts Established at the Evidentiary Hearing.**

At the evidentiary hearing, the following matters were established without any dispute. On October 25, 1994, Robert C. Motz, an agent of Plaintiff, and Debtor opened an account at the Bank (the "Account"), signed a signature card and deposited the settlement draft in the Account. The signature card did not refer to Plaintiff, but instead referred to Debtor and "Bob Motz".

Debtor and Mr. Motz testified that, when the Account was opened, Debtor and Mr. Motz informed the Bank's teller that they wanted an account on which two signatures would be required for money to be disbursed. Debtor further testified that she believed that two signatures were required to withdraw funds from the Account until she tried to withdraw funds without the signature of Mr. Motz. Debtor stated that she was "shocked" when she tried to withdraw funds from the Account without Mr. Motz's signature and the Bank honored Debtor's withdrawal request.

After the success of Debtor's initial attempt to withdraw funds without Mr. Motz's signature, Debtor continued to withdraw funds without Mr. Motz's signature in order to pay various expenses, including, but not limited to, her debt to the Bank. Although Debtor testified that she used some of the funds in the Account in response to foreclosure notices she received from the Bank, there was no evidence that the Bank instructed or advised Debtor to use the funds in the Account to do so. Rather Debtor chose this course of conduct.

By the end of 1995, Debtor and her ex-husband had withdrawn substantially all of the balance in the Account but failed to pay Plaintiff for much of the repair work. Debtor and her ex-husband sold the home which Plaintiff had repaired. Plaintiff had not perfected any lien rights with respect to that residence.

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### II. LAW

#### A. The Bases for Subject Matter Jurisdiction

Jurisdiction must be conferred upon a bankruptcy court by statute. Pursuant to 28 U.S.C. § 157, there exist three categories of proceedings in bankruptcy: core proceedings; non-core and related proceedings; and non-core and unrelated proceedings. In re Edwards, 100 B.R. 973 (Bankr. E.D. Tenn. 1989). The bankruptcy court lacks jurisdiction over any non-core and unrelated proceeding. 28 U.S.C. § 157(c).

The burden to prove that an issue is a core proceeding rests on the party seeking the bankruptcy court to assert jurisdiction. In re Edwards, *id.*, at 977. In the case at bar, Plaintiff's claims for relief against the Bank do not invoke substantive rights provided under the Bankruptcy Code or constitute causes of action which could arise only in the context of the bankruptcy proceedings. Accordingly, Plaintiff's claims for relief against the Bank are not core in nature.

In In re Salem Mortgage Co., 783 F.2d 626 (6<sup>th</sup> Cir. 1986), the Sixth Circuit Court of Appeals accepted, with certain caveats, the Third Circuit's articulation of the test for "related to" jurisdiction, as described in In re Pacor, Inc., 743 F.2d 984, 994 (3d Cir. 1984). In re Wolverine Radio Co., 930 F.2d 1132, 1142 (6<sup>th</sup> Cir. 1991). In Pacor, the Third Circuit held:

The usual articulation of the test for determining whether a civil proceeding is related to a bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. . . . 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 or the administration of the bankrupt estate.

In re Pacor, Inc., 743 F.2d at 984 (emphasis in original). While generally accepting the Third Circuit's description of the test for "related to" jurisdiction, the Sixth Circuit Court

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of Appeals has noted that "situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement". Salem Mortgage, 783 F.2d at 634. See also Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 584 (6<sup>th</sup> Cir. 1990). On the other hand, "where the parties '*are more intertwined*' than the parties in Pacor . . . the statute does not require a finding of definite liability of the estate as a condition precedent to holding an action related to a bankruptcy proceeding.'" Wolverine Radio, 930 F.2d at 1143 (emphasis added), *quoting* Salem Mortgage, 783 F.2d at 635. See also In re Wood, 825 F.2d 90, 94 (5<sup>th</sup> Cir. 1987)("when the plaintiff alleges liability resulting from the joint conduct of the debtor and nondebtor defendants, bankruptcy jurisdiction exists over all claims under section 1334 "), *citing* Salem Mortgage, 783 F.2d at 634.

**B. The Court Lacks Jurisdiction Over Plaintiff's Claims Against the Bank**

In light of the status of Debtor's bankruptcy case, Plaintiff's litigation against the Bank cannot impact Debtor's estate. The trustee has determined that there are no assets available for creditors, and neither Plaintiff nor Debtor contradicted that determination at the evidentiary hearing. Even if Plaintiff obtained a judgment against the Bank, Debtor's other creditors would receive no more or less from the estate than otherwise.

Because Plaintiff's claims for relief against the Bank will not impact the estate, the Bank and Debtor's conduct must be "intertwined" in order for there to be any possibility that the Court has subject matter jurisdiction over Plaintiff's claims against the Bank. However, the testimony elicited at the evidentiary hearing revealed that the Bank and Debtor did not collude to defraud Plaintiff regarding: (1) the type of bank account which was established or (2) Debtor's use of the funds in the Account. Debtor and Mr. Motz testified that they requested the opening of an account for which two signatures would be

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required for funds to be disbursed; both Debtor and Mr. Motz thought that such an account had been opened (although not in the name of Plaintiff). Based on the testimony given at the evidentiary hearing, Debtor did not direct the Bank to open an account for which she alone could authorize the disbursement of funds. Similarly, the Bank did not direct Debtor to use the funds in the Account to pay her debt to the Bank. Without receiving instruction to do so from the Bank, Debtor chose to use the funds in the Account in this manner.

Because the evidence presented at the hearing failed to show that Debtor's estate would be affected by Plaintiff's claims for relief against the Bank, that the Bank and Debtor colluded to mislead Plaintiff about the type of account which was opened, or that the Bank requested or coerced the Debtor to use the funds in the Account to pay her debt to the Bank, the Court does not have subject matter jurisdiction to adjudicate Plaintiff's claims for relief against the Bank. Therefore, this Court grants the Bank's motion to dismiss.

### **C. Dismissal of Other Claims**

The Bank's motion requested only the dismissal of Plaintiff's claims against the Bank. However, this Court's ruling on the motion to dismiss brings into question whether the Court has subject matter jurisdiction over Plaintiff's claims against Debtor's ex-husband and Debtor's Cross-Claim against the Bank. Moreover, based on the evidence adduced at the evidentiary hearing on the motion to dismiss, there is serious question whether Debtor has stated a claim against the Bank for which relief can be granted. Accordingly, the Court will set the matter for further pre-trial on **November 18, 1998 at 2:00 p.m.**, at which time the parties will be expected to address whether there are any factual issues still requiring evidentiary development. Prior to that pre-trial, counsel for

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the parties shall confer as to whether the parties should dismiss any of the pending claims, taking into account counsel's duties under Fed. R. Bankr. P. 9011.

**IT IS SO ORDERED.**

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MARILYN SHEA-STONUM  
Bankruptcy Judge

**DATED: 11/12/98**