

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

IN RE:)	CASE NO. 06-50689
)	
RETAIL MAINTENANCE SERVICE,)	CHAPTER 7
LLC,)	
)	
DEBTOR(S))	
)	
SALON SEDONA, INC.)	ADVERSARY NO. 06-05117
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
CHIPOTLE MEXICAN GRILL OF)	
COLORADO, LLC, ET AL.)	MEMORANDUM OPINION GRANTING
)	PLAINTIFF’S REQUEST/MOTIONS
DEFENDANT(S).)	FOR ABSTENTION AND/OR REMAND

This adversary proceeding is before the Court on the Notice of Removal (docket #1) (“Notice”) filed by Chipotle Mexican Grill of Colorado, LLC (“Chipotle”) pursuant to Federal Rule

of Bankruptcy Procedure 9027(a)(3), and Salon Sedona, Inc.'s ("Salon Sedona") Objections to Removal and Request to Remand Pursuant to Bankruptcy Rule 9014 and/or Request for Abstention (docket #4) ("Request for Remand/Abstention"). The parties filed a sequence of pleadings and memoranda in support of their respective arguments.¹ After a pretrial conference on July 5, 2006, the matter was taken under advisement by the Court.

I. BACKGROUND

Retail Maintenance Service, LLC ("Debtor") filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code ("Main Case") on July 19, 2005 in the United States Bankruptcy Court for the Northern District of Ohio. The case was originally assigned to Judge Russ Kendig of the Canton Court. On or about December 5, 2005, a complaint was filed in the Court of Common Pleas, County of Cuyahoga, Ohio ("State Court"), bearing case number CV-05-577801 and entitled *Salon Sedona, Inc. v. Chipotle Mexican Grill of Colorado, LLC, et al* ("State Court Action").² Salon Sedona's claims arose out of water damage to its premises through a common wall shared with Chipotle. On February 8, 2006, Chipotle filed an answer, cross-claim, and counterclaim.³ Various responsive pleadings, discovery requests, and a partial motion to dismiss by Chipotle were

¹ See docket # 2 (Chipotle's Response to Salon Sedona's Request); docket #3 (Salon Sedona's Reply to Chipotle's Response); docket #6 (Salon Sedona's Renewed Motion for Remand), docket #9 (Chipotle's Response to Salon Sedona's Renewed Motion); docket #11 (Salon Sedona's Reply to Chipotle's Response); and docket #14 (Salon Sedona's Renewed Motion for Remand).

²The other named defendants in the case are Debtor, Dalad Construction Co. ("Dalad") and Rockside Corners, LTD ("Rockside").

³ Chipotle filed its cross-claim against Debtor for breach of contract and indemnification as a result of deficient performance in its repair of the premises. The counterclaim against Salon Sedona included claims for breach of contract and promissory estoppel.

subsequently filed in the case. On January 26, 2006, all the parties to the State Court Action received a Suggestion of Automatic Stay by Debtor.⁴

On February 23, 2006, Chipotle filed the Notice. Salon Sedona responded with a “Statement Denying the Removed Action is a Core Proceeding Pursuant to Bankruptcy Rule 9027(E)(3)” (Main Case, docket #102) (“Statement”). Salon Sedona filed the Request for Remand/Abstention on March 1, 2006. Upon the motion of the United States Trustee (docket #95), the Main Case was converted to Chapter 7 on March 31, 2006 (docket #135). Pursuant to motions by the Chapter 7 Trustee, Harold A. Corzin (docket #145, #148), it was reassigned to the Akron Court on May 3, 2006 so as to provide more efficient administration with another related bankruptcy case.⁵

This matter is before the Court under 28 U.S.C. § 157(a) and General Order No. 85 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. Determinations regarding remand and abstention are core proceedings under 28 U.S.C. § 157(b). *See also* Fed. R. Bankr. P. 9027.

The issues presented in this matter are: 1) whether this Court has jurisdiction over the State Court Action; and 2) if so, should such jurisdiction be exercised?

II. DISCUSSION

A. Introduction

⁴ In its argumentation Chipotle states that none of the parties was provided notice of the Main Case until Debtor mailed this Suggestion of Stay on January 25, 2006. This fact is not disputed by any of the parties.

⁵ *In re Commercial Maintenance & Repair, Inc.* (“CMR”), Case NO. 05-52803. CMR is an Ohio corporation which filed a voluntary petition under Chapter 7 on May 10, 2005 in this Court.

Chipotle argues that the State Court Action is one over which this Court has jurisdiction under the provisions of 28 U.S.C. § 1334(b), and that it may be moved to this Court pursuant to 28 U.S.C. § 1452(a). Specifically, Chipotle submits that the State Court Action is a core proceeding within the meaning of 28 U.S.C. 157(b)(2)(B), or in the alternative, is “related to” Debtor’s bankruptcy case and that it may only be properly resolved by this Court.

Salon Sedona objects to removal and requests remand on the basis of removal defects,⁶ abstention grounds (mandatory and permissive), and/or equitable remand principles under the provisions of 28 U.S.C. § 1334(c)(1), 28 U.S.C. § 1334(c)(2), and 28 U.S.C. § 1452(b).

B. Jurisdiction

The starting point for determining the Court’s jurisdiction is 28 U.S.C. 1334(b), which confers upon the district court “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” Bankruptcy jurisdiction is divided into core, and non-core, “related to” proceedings. 28 U.S.C. § 157. A core proceeding is one that arises under title 11 or arises in a case under title 11. 28 U.S.C. § 157(a). Core proceedings include but are not limited to matters concerning the administration of the estate and either invoke a substantive right

⁶ Salon Sedona contends that Chipotle failed to comply with the 30-day requirement of Bankruptcy Rule §9027(a)(3) since Chipotle received the complaint on December 5, 2005 but did not file the Notice until February 23, 2006. Chipotle responds that it timely filed the Notice because it did so within 30-days of receiving the Suggestion of Stay on January 25, 2006 (*See* fn. 3, *supra*). In light of the Court’s forthcoming decision in this Memorandum Opinion, discussion of this issue is irrelevant. Salon Sedona further contends that removal of a case from state court requires the unanimous consent of all defendants, and that Chipotle failed to obtain the consent of the other defendants, Dalad and Rockside. However, “[c]onsent of all the parties is not needed under § 1452(a) for removal of a case...” *In re National Century Financial Enterprises, Inc., Inv. Litigation*, 323 F. Supp. 2d 861, 872 (S.D. Ohio 2004). “...[A] single defendant may remove a claim or cause of action related to a bankruptcy proceeding.” *Id.* at 873.

created by federal bankruptcy law or one which would not exist but for debtor's bankruptcy. 28 U.S.C. § 157(b)(2); *Sanders Confectionary Prods. Inc. V. Heller Financial, Inc.*, 973 F.2d 474, 482 (6th Cir. 1992). The bankruptcy court has jurisdiction to enter final orders with respect to core proceedings. 28 U.S.C. § 157(b)(1).

A non-core proceeding “does not invoke a substantive right created by Federal Bankruptcy law and could exist outside of bankruptcy.” *In re: Webb*, 227 B.R. 494, 497 (Bankr. S.D. Ohio 1998); *Michigan Employment Security Comm’n v. Wolverine Radio Co., Inc.*, 930 F.2d 1132, 1144 (6th Cir. 1991). In non-core proceedings, the bankruptcy court cannot enter final orders absent consent of the parties, instead presenting proposed findings of fact and conclusions of law to the district court.⁷ The party seeking removal of a case from state court bears the burden of establishing federal subject matter jurisdiction. *In re National Century Financial Enterprises, Inc.*, 323 F. Supp. 2d 861, 867 (S.D. Ohio 2004), citing *Jerome-Duncan, Inc. V. Auto-By-Tel, L.L.C.*, 176 F. 3d 904, 907 (6th Cir. 1999).

This Court disagrees with Chipotle’s contention that the claims asserted in this adversary proceeding are core matters that must be tried in bankruptcy court. The claims in the State Court Action arise under state law, do not invoke any substantive bankruptcy rights, and are capable of existing outside of bankruptcy. The Main Case was not the genesis for this adversary proceeding, and the merits of the claims can be determined without reference to federal bankruptcy law.

This Court now turns to the question of whether this proceeding is “related to” the Main Case. Pursuant to 28 U.S.C. § 1452(a), a claim “related to” a bankruptcy case may be removed from state

⁷ Chipotle consents to this Court’s entry of final orders. *See* Notice at ¶4. Salon Sedona does not consent to the entry of any orders or judgments by this Court. *See* Statement, p. 2.

court to district court if the federal court has subject matter jurisdiction under 28 U.S.C. 1334. A proceeding is “related to” a case under title 11 if “the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *In re Dow Corning Corp.*, 86 F. 3d 482, 489 (6th Cir. 1996).

In *Dow Corning*, the Sixth Circuit concluded that contingent claims for contribution and indemnity by nondebtors against the debtor are sufficient to create “related to” jurisdiction. *In re Dow Corning*, 86 F. 3d at 492, 494; *see In re Wood*, 825 F. 2d 90, 94 (5th Cir. 1987); *see also In re National Century Financial Enterprises, Inc.*, 323 F. Supp 2d at 868; *In re Celotex Corp.* 124 F. 3d 619, 626 (4th Cir. 1997) (Finding jurisdiction because third party action could conceivably alter the liabilities of the bankruptcy estate). Further, Chipotle filed a proof of claim in the Main Case on February 24, 2006 based on its complaint for indemnification and/or contribution in the State Court action, thus invoking this Court’s equitable jurisdiction. Courts have consistently found that “related to” jurisdiction exists when defendants have filed proofs of claim in the bankruptcy proceedings based on indemnity claims. *In re National Century Financial Enterprises, Inc.* 323 F. Supp. 2d at 869; *see also Belculfine v. Aloe*, 112 F. 3d 633, 636-37 (3d Cir. 1997); *A.H. Robins Co., Inc. v. Piccinin*, 788 F. 2d 994, 999(4th Cir. 1986).

Based on the foregoing, this Court has sufficient basis to conclude that the State Court action is “related to” the Main Case and could be determined here. However, the pivotal question is whether such bankruptcy court jurisdiction should be exercised.

C. Discretionary Abstention and Equitable Remand

This Court has discretion to abstain from the exercise of jurisdiction under 28 U.S.C. §1334(c)(1) (permissive abstention), or to equitably remand the case under 28 U.S.C. §1452 (b).

Section 1334 (c)(1) 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 a case under title 11.

Federal courts may consider numerous factors in deciding whether to abstain from exercising jurisdiction:

- 1) the effect or lack of effect of abstention on the efficient administration of the estate;
- 2) the extent to which state law issues predominate over bankruptcy issues;
- 3) the difficulty or unsettled nature of the applicable state law;
- 4) the presence of a related proceeding commenced in state court or other non-bankruptcy 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 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 this 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 nondebtor parties; and
- 13) any unusual or other significant factors

In re National Century Financial Enterprises, Inc., Inv. Litigation, 323 F. Supp. 2d at 884-85; *Mann v. Waste Management of Ohio, Inc.*, 253 B.R. 211 214 (N.D. Ohio 2000); *In re Continental Holdings, Inc.*, 158 B.R. at 445-46; *In re Federated Dep’t Stores, Inc.*, 144 B.R. 998, 1001 (Bankr. S.D. Ohio 1992).

Section 1452 (b) provides, “The Court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.” Factors to consider in deciding whether to equitably remand a case include:

- 1) duplicative and uneconomical use of judicial resources in two forums;
- 2) prejudice to the involuntarily removed parties;
- 3) forum non conveniens;
- 4) the state court's ability to handle a suit involving questions of state law;
- 5) comity considerations;
- 6) lessened possibility of an inconsistent result; and
- 7) the expertise of the court in which the matter was originally pending.

In re National Century Financial Enterprises, Inc., 323 F. Supp. 2d at 885; *Mann*, 253 B.R. at 214-15; *In re Continental Holdings, Inc.*, 158 B.R. at 444; *Murray v. On-Line Business Systems, Inc.* (In re Revco D.S., Inc.), 99 B.R. 768, 776 (N.D. Ohio 1989).

The analysis under § 1334 (c)(1) is largely the same as under § 1452(b). *In re National Century Financial Enterprises, Inc.*, 323 F. Supp. 2d at 885; *Mann*, 253 B.R. at 215. (“Permissive abstention under § 1334 (c)(1) and equitable remand under § 1452(b) are essentially identical.”) Courts should apply these various factors flexibly because their relevance and importance will vary with the particular circumstances of each case, and no one single factor is necessarily determinative. *In re National Century Financial Enterprises, Inc.*, 323 F. Supp. 2d at 885.

A review of the complaint in the State Court Action indicates that state law issues, while not complicated, will predominate over any bankruptcy considerations. Chipotle does not contend that bankruptcy law will be a source of decision in this matter, nor does it identify any bankruptcy law issues that must be resolved. The only jurisdictional basis suggested by Chipotle is 28 U.S.C. § 1334. Also, Salon Sedona made a timely jury demand in its complaint. While bankruptcy courts in this district have jurisdiction to preside over jury trials with the express consent of all parties, 28 U.S.C. § 157(e), Salon Sedona has not consented to the bankruptcy court entering judgment in this matter. In addition, all of the parties except RMS are non-debtor parties. Therefore, the nexus between the Main Case and the State Court Action is minimal. Furthermore, the State Court Action has advanced

to the stage where the parties have engaged in written discovery, and Chipotle's partial motion to dismiss is pending. Thus, the State Court has already gained some familiarity with the factual and legal issues presented by this matter. Moreover, the State Court routinely resolves these particular state law claims, and has greater expertise with which to determine the action.

Contrary to Chipotle's contentions, allowing this matter to proceed in state court will not have any unfavorable effect on the administration of the bankruptcy estate. First, Chipotle has set forth no reason why this matter is incapable of timely adjudication in State Court. *See In re National Century Financial Enterprises, Inc., Inv. Litigation*, 323 F. Supp. 2d at 881, citing *In re Midgard Corp.*, 204 B.R.764,778(10th Cir. B.A.P. 1997) (Courts interpreting the phrase "timely adjudication" have focused on whether allowing an action to proceed in state court will have any unfavorable effect on the administration of a bankruptcy case.) Second, the Main Case has already been converted to Chapter 7. "[I]n a chapter 7 case....where the primary concern is the orderly accumulation and distribution of assets, the requirement of timely adjudication is seldom significant." *In re National Century Financial Enterprises, Inc., Inv. Litigation*, 323 F. Supp. 2d at 882, citing *In re Midgard Corp.*, 204 B.R. at 778-79. The timely adjudication requirement more likely presents an obstacle if the bankruptcy case involves an ongoing Chapter 11 reorganization. *Id.*

This Court certainly recognizes and understands that state court dockets are overburdened well beyond capacity. However, the addition of the State Court Action to this Court's case load would result in an undue burden under present circumstances. In the calendar year 2005, over 11,000 bankruptcy cases were filed in this Court, representing a 58% increase over the level of filings for calendar year 2004. Therefore, this Court is in no more favorable position to handle the State Court Action than is the State Court.

III. CONCLUSION

For the reasons stated above, Salon Sedona's Request for Remand/Abstention is hereby granted, and the State Court Action is remanded back to the State Court pursuant to 28 U.S. C. § 1334(c)(1) and 28 U.S.C. § 1452(b) for further proceedings. A separate order in accordance with this Memorandum of Opinion will be entered.

#

cc: Michael P. Harvey, Counsel for Salon Sedona
Michael S. Kolman, Counsel for Chipotle
Rick L. Brunner, Counsel for Chipotle
Joseph P. Hoerig, Counsel for Dalad and Rockside Corners
Bruce R. Schrader, II, Counsel for chapter 7 Trustee, Anne Piero Silagy
Saul Eisen, United States Trustee
Michael A. Steel, counsel for Committee of Unsecured Creditors