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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
96 MAY -3 PM 4:38  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 94-14601  
)  
SERVISTEEL CORPORATION, ) Chapter 11  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**  
) **DENYING MOTIONS FOR**  
) **ABSTENTION, REMAND AND TO**  
) **LIFT STAY**

This case is before the Court on the Motions of Clifford E. Hemlinger (“Hemlinger”) for Abstention, for Remand, and for Relief from Stay filed in response to Debtor’s pending Objection to Hemlinger’s proof of claim. For the reasons stated below, the motions are denied.

**FACTS**

The relevant facts are not disputed and are set forth in the file, the briefs filed by the parties, and the transcript of proceedings held on February 22, 1996, as follows:

Debtor, Servisteel Corporation, filed a petition under Chapter 11 of the United States Bankruptcy Code on November 1, 1994. At the time of filing, Debtor was a defendant in the case of *Clifford E. Hemlinger v. Servisteel Corp., et al.*, Case No. 93-CV-11100, Lorain County Court of Common Pleas, Ohio. Hemlinger, a former employee of Debtor, seeks damages in the state court complaint based on wrongful discharge and promissory estoppel. The complaint includes a timely filed jury demand. Prior to the bankruptcy filing, the parties to the state court proceeding had completed discovery, the state court had ruled on a summary judgment motion,

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and a trial date was set. The bankruptcy filing stayed the state court proceeding pursuant to 11 U.S.C. § 362.

On July 27, 1995, Debtor's plan of reorganization was confirmed. The confirmed plan provided for Debtor's discharge and release from claims, as well as for the continuation of the § 362 stay pending further court order. (Article IX, Plan). Prior to the confirmation hearing, the Court set May 31, 1995 as the claims bar date in the Chapter 11 case. On May 31, 1995, Hemlinger filed a claim for wrongful discharge and promissory estoppel based on his state court complaint. Debtor filed an Objection to Hemlinger's claim on August 16, 1995 and Hemlinger filed a Response to the Objection on September 18, 1995.

Counsel for Hemlinger operated under the assumption that the claim would be tried by a jury, either in this Court or in the state court, but Debtor's counsel made no representations to that effect. (Transcript of Proceedings held on February 22, 1996 ("Trans.")). A pretrial hearing on January 4, 1996 was partly held and adjourned to allow the parties to address the jury trial issue. Debtor filed its brief on January 18, 1996, to which Hemlinger responded on January 30, 1996 with the three motions at issue, each of which is supported by the Memorandum of Clifford Hemlinger regarding his Right to a Jury Trial on His Claim against Debtor. Debtor filed a brief in joint opposition to the motions.

A preliminary hearing was held on the Hemlinger motions on February 22, 1996; that hearing was continued and consolidated with the final hearing on March 19, 1996. On March 19, 1996, the matters were submitted for decision without further hearing. Counsel for Hemlinger stated at the preliminary hearing that the state court's bailiff had advised him the matter could be re-set for trial quickly if the case is permitted to proceed in that court. (Trans.)

**DISCUSSION**

Hemlinger has filed three different motions in an attempt to protect his asserted right to a jury trial on the liquidation of his claim. The motions all seek to have this dispute decided by the state court and raise essentially the same argument: determination of the claim filed by Hemlinger is not a core proceeding because it is based on state law, the jury demand made in the state court case prevents this Court from hearing and determining the Hemlinger claim, and the advanced status of the state court lawsuit makes it equitable to let the suit go forward. Debtor argues that the claim determination is a core proceeding, there is no right to a jury in bankruptcy court with respect to the claim, and the Court should not abstain from hearing this matter because the state law involved is not complex, the motion is untimely, Debtor has an interest in having the bankruptcy court determine claims against it, and Hemlinger has not established that the state court will hear the matter promptly. Debtor expressly refuses to consent to a jury trial in this Court.

**JURISDICTION**

The Hemlinger motions raise issues regarding (1) whether this Court has jurisdiction over the claim allowance; (2) the nature of any such jurisdiction; and (3) whether any such jurisdiction should be exercised. The starting point for analyzing 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." That jurisdiction is, in turn, referred to this Court pursuant to 28 U.S.C. § 157(a) and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio.

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Bankruptcy jurisdiction is divided into “core” and “related” proceedings. 28 U.S.C. § 157. The bankruptcy court has jurisdiction to enter final orders with respect to core proceedings. 28 U.S.C. § 157 (b)(1). In non-core, related 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. The district court reviews the recommendation and enters the appropriate final order. 28 U.S.C. § 157(c). Although Hemlinger does not expressly question this Court’s jurisdiction to enter final orders, he does argue in his motions that his claim is not a core proceeding. As an initial matter, then, this Court is required to determine whether this proceeding is “core” or “otherwise related” to the bankruptcy case. 28 U.S.C. § 157(b)(3).

The Bankruptcy Code provides a non-exclusive list of proceedings which affect the bankruptcy estate and are deemed to be within the core jurisdiction of the bankruptcy court. 28 U.S.C. § 157(b)(2). Core proceedings include the “allowance or disallowance of claims against the estate . . . .” § 157(b)(2)(B). To institute a claim against the estate, the claimant files

. . . a proof of claim as provided by the bankruptcy rules. The filing of the proof invokes the special rules of bankruptcy concerning objections to the claim, estimation of the claim for allowance purposes, and the rights of the claimant to vote on the proposed distribution. Understood in this sense, a claim filed against the estate is a core proceeding because it could arise only in the context of bankruptcy.

*In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987). The critical event here is that Hemlinger filed a proof of claim with the bankruptcy court. By filing his proof of claim, Hemlinger submitted himself to the equitable jurisdiction of this Court and became a party to the bankruptcy

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proceeding. The allowance or disallowance of his claim is, therefore, a core proceeding. *In re Manville Forest Products Corp.*, 896 F.2d 1384 (2d Cir. 1990); *see In re McLaren*, 990 F.2d 850, 853 (6th Cir. 1993).

The filing of the state court lawsuit prior to the time of the bankruptcy filing does not alter this conclusion. Once a proof of claim is filed, the existence of a pre-petition state court action has no bearing on the characterization of the claim as a core proceeding. *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702 (2d Cir. 1995). Hemlinger's contention that this claim is non-core because it is based on state law is also unavailing because the Code specifically instructs that a "determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157(b)(3). Because this is clearly a core proceeding, there is no need to address in detail Hemlinger's argument that if the claim is non-core, there is no bankruptcy court jurisdiction whatsoever. It is enough to note that the Court also has jurisdiction to hear non-core, related matters as discussed above.

There is no right to a jury trial with respect to Hemlinger's claim. A creditor who files a proof of claim invokes this Court's equitable jurisdiction, as a result of which the Court hears the dispute without a jury. *Langenkamp v. Culp*, 498 U.S. 42 (1990). Hemlinger does not now challenge this result. Instead, realizing he had initiated a claim that would be heard by a judge rather than a jury, Hemlinger seeks in his motions to have his cause of action proceed in state court by having this Court abstain from exercising jurisdiction, and/or lift the automatic stay, and/or remand to state court. The determination of these motions are also core proceedings within this Court's jurisdiction. 28 U.S.C. §§ 157(b)(1), (b)(2)(A), (G), (O); Bankruptcy Rule 5011(b).

**I. MOTION FOR ABSTENTION**

In light of the conclusion that the Court has jurisdiction to hear and determine Hemlinger's claim, the next issue is whether that jurisdiction should be exercised. Hemlinger requests that the Court abstain from exercising jurisdiction under 28 U.S.C. § 1334(c), which provides:

- (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 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.

28 U.S.C. § 1334(c). “[T]he abstention provisions implicate the question whether the bankruptcy court should exercise jurisdiction, not whether the court has jurisdiction in the first instance.” *In re S.G. Phillips Constructors, Inc.* at 707. Hemlinger also cites § 305 of the Bankruptcy Code in support of his request for abstention. 11 U.S.C. § 305.

**A. Abstention under 11 U.S.C. § 305**

Section 305 of the Code gives a bankruptcy court discretion to abstain from hearing an entire bankruptcy case. The section does not apply to a request to abstain from hearing a proceeding within a case, which is the situation here. 2 Collier's on Bankruptcy, ¶ 305.01 (15th Ed. 1995).

**B. Mandatory Abstention**

Hemlinger argues this Court must abstain pursuant to 28 U.S.C. § 1334(c)(2) because his claim solely involves issues of state law and consequently is not a core proceeding. He also contends that his jury demand made in the state court lawsuit requires this court to abstain from exercising jurisdiction.

To invoke mandatory abstention, Hemlinger must prove that the proceeding: (1) is non-core; (2) is based on a state law cause of action; (3) lacks a federal jurisdictional basis other than bankruptcy; (4) is commenced in a state court of appropriate jurisdiction; and (5) can be timely adjudicated. *In re Dow Corning Corp.*, 1996 WL 163029, \_\_\_ F.3d \_\_\_ (6th Cir. 1996). The Hemlinger claim is a core proceeding. Hemlinger has not, therefore, satisfied the first requirement for mandatory abstention. As a movant must prove each of the statutory elements, Hemlinger's argument under 28 U.S.C. § 1334(c)(2) fails. The existence of a jury demand in the state court case is irrelevant to this conclusion.

**C. Permissive Abstention**

Alternatively, Hemlinger contends the Court should choose to abstain from the exercise of jurisdiction pursuant to § 1334(c)(1). In support, he argues again that the claim is not a core proceeding. Beyond that, Hemlinger asserts the jury demand, the nature of the proceedings already completed in the state court, and the state law that controls the claim. Debtor contends that the equities favor retaining jurisdiction because this is a core proceeding without a jury right, the state law involved is not complex, the motion was not timely filed, and Debtor has an interest in the prompt administration of the estate.

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The abstention provisions are intended to balance the broad grant of bankruptcy jurisdiction. This statutory framework is designed to prevent federal jurisdiction from becoming overextended. *In re Dow Corning Corp.* “Congress wisely chose a broad jurisdictional grant and a broad abstention doctrine over a narrower jurisdictional grant so that the district court could determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases.” *In re Salem Mortgage Co.*, 783 F.2d 626, 635 (6th Cir. 1986). A decision to abstain from exercising jurisdiction should, however, be the exception rather than the rule. *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 14 (1983), *quoting with approval Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976).

In determining whether to abstain from exercising jurisdiction, the court is guided by the interest of justice, comity with state courts, and respect for state law. Factors which are relevant to permissive abstention include:

- (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 existence of a proceeding commenced in state court;
- (5) the degree of relatedness to the bankruptcy case;
- (6) the burden on the bankruptcy court’s docket;
- (7) the existence of a right to a jury trial;
- (8) the presence in the proceeding of nondebtor parties;
- (9) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;
- (10) 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;
- (11) the substance rather than the form of a core proceeding;
- (12) the likelihood that commencement of the proceeding in bankruptcy court involves forum shopping; and
- (13) any other unusual or significant factor.



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*In re Hughes-Bechtol, Inc.*, 141 B.R. 946 (Bankr. S.D. Ohio 1992); *In re Republic Reader's Service, Inc.*, 81 B.R. 422 (Bankr. S.D. Tex. 1987).

Hemlinger points to three factors in support of his argument: his asserted right to a jury trial in the state court, the predominance of state law, and the existence of the pending state court proceeding. While the Hemlinger claim is the subject of a pending state court proceeding, the state law involved is quite straightforward. Hemlinger's counsel candidly acknowledged at the hearing that there are no significant unresolved questions of state law raised in this case. (Trans.) Bankruptcy courts routinely decide cases that are based on state law and the predominance of state law alone does not invoke comity concerns. That issue is raised where a federal court is called upon to decide questions of state law in the absence of guidance from state courts. *In re Chicago, Milwaukee, St. Paul S. Pacific Railroad Co.*, 6 F.3d 1184 (7th Cir. 1993); *In re United Security and Communications, Inc.*, 93 B.R. 945 (Bankr. S.D. Ohio 1988). The parties agree that is not the case here. (Trans.)

*In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985), cited by Hemlinger, does not support abstention under these facts. That decision involved the determination of an appropriate forum for the liquidation of numerous disputed, non-core tort claim actions pending in various federal and state courts.

Hemlinger then turns to the issue of prompt resolution of this dispute, pointing to the statement made to his counsel by state court personnel that this case can be set for trial promptly in that court. Debtor also has a significant interest in prompt resolution of this matter. Both counsel indicated at the hearing that they were in agreement to a July 1996 trial date. Leaving aside whether counsel's unsworn, unsupported statement is sufficient to raise this issue, the Court

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finds that hearing this claim will not impose an undue burden on the Court's docket and the matter can be set for trial in this Court consistent with counsel's timing request.

Debtor also argues that Hemlinger's motion is not timely. Unlike the mandatory abstention provisions, there is no statutory requirement that a motion for permissive abstention be timely filed. Nevertheless, the Court may consider any delay in filing under the category of other significant or unusual factors. Here, Hemlinger waited 15 months after the bankruptcy filing before seeking to have this matter heard in state court. That delay weighs against him, particularly because he filed a proof of claim. Debtor was entitled to rely on the filing of the proof of claim and the failure to request abstention or relief from stay at an earlier time as establishing that this dispute would be resolved in the bankruptcy court and without a jury.

Hemlinger argues he is entitled to a jury under all circumstances. As discussed above, by filing a proof of claim Hemlinger invoked this Court's equitable jurisdiction and he is not entitled to a jury resolution of the claim. Hemlinger has not cited any bankruptcy case law or statute in support of his position that the existence of a jury demand in state court requires abstention or relief from stay. Instead, he relies on the law that created a jury right in the state court. While that law does support the jury demand made in the state court complaint, there is nothing about it standing alone that requires this Court to refrain from exercising jurisdiction over this core proceeding. The existence of the right to a jury trial is merely one factor to be considered in the permissive abstention analysis. *In re Hughes-Bechtol, Inc.*; *In re Republic Reader's Service, Inc.* Moreover, the absence of a right to jury trial in the bankruptcy court has been cited as a factor weighing against abstention. *In re Statewide Pools, Inc.*, 126 B.R. 877 (Bankr. S.D. Ohio 1991).

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Hemlinger has failed to establish that abstention is in the interest of justice, comity and respect for state law and his motion for permissive abstention is not, therefore, well taken.

**II. MOTION FOR RELIEF FROM STAY**

Hemlinger also moves for relief from the automatic stay provisions of § 362 of the Bankruptcy Code to allow litigation of his state court action. The automatic stay is in effect and currently applies to the lawsuit under the terms of the Order of Confirmation. The stay can be lifted or modified “for cause.” 11 U.S.C. § 362 (d)(1). A permanent statutory injunction regarding discharged claims is also imposed by 11 U.S.C. § 524(a). Hemlinger’s ground for requesting relief is the jury demand and the asserted non-core nature of this proceeding. Those arguments are without merit for the reasons stated above. The Motion for relief from stay is, therefore, denied.

**III. MOTION FOR REMAND**

Again in the alternative, Hemlinger requests his claim be remanded to the state court pursuant to 28 U.S.C. § 1452. That statute provides that a party may remove to district court claims or causes of action related to bankruptcy cases. Removal is accomplished by following the procedures set forth in Bankruptcy Rule 9027, starting with filing a notice of removal with the court clerk. An action which has been removed to district court from another court may be remanded on any equitable ground. 28 U.S.C. § 1452 (b). Hemlinger requests remand in the apparent belief that the state court action was automatically removed to this forum upon commencement of the bankruptcy case. He does not cite any authority in support of this proposition. No action was taken in this case to remove the state court lawsuit to federal court and, consequently, the lawsuit remains pending (albeit stayed) in state court. Given that the state

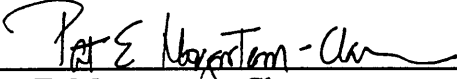
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court suit was never removed to the bankruptcy court, there is nothing to remand. The Motion to Remand is, therefore, denied.


**CONCLUSION**

The Motion for Abstention pursuant to 28 U.S.C. § 1334(c)(2) and 11 U.S.C. § 305 is denied because Hemlinger does not meet the statutory requirements. The Motion for Abstention pursuant to 28 U.S.C. § 1334(c)(1) is denied because Hemlinger did not establish abstention would be in the interests of justice, comity and respect for state law. The Motion for Relief From Stay is denied because there is not cause for relief pursuant to 11 U.S.C. § 362(d)(1). The Motion for Remand under 28 U.S.C. § 1452 is denied because the state court lawsuit was never removed to the bankruptcy court. This matter will be set for trial.

May 3, 1996

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served on: Jeffrey Baddeley, Esq. (by mail)  
Brent English, Esq. (by mail)  
Nicholas Satullo, Esq. (by mail)

By:  Secretary

Date: 5/3/96

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UNITED STATES BANKRUPTCY COURT  
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FILED

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NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re:	)	Case No. 94-14601
	)	
SERVISTEEL CORPORATION,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	<b>ORDER</b>

For the reasons stated in the Memorandum of Opinion Denying Motions filed this same date,

IT IS, THEREFORE, ORDERED that the Motion for Abstention pursuant to 28 U.S.C. §1334 (c)(2) and 11 U.S.C. § 305 is denied because Movant Hemlinger does not meet the statutory requirements. The Motion for Abstention pursuant to 28 U.S.C. §1334(c)(1) is denied because Movant Hemlinger did not establish abstention would be in the interests of justice , comity and respect for state law. The Motion for Relief From Stay is denied because there is not cause for relief pursuant to 11 U.S.C. 362(d)(1). The Motion for Remand under 28 U.S.C. §1452 is denied because the state court law suit was never removed to the bankruptcy court. This matter will be set for trial on **July 29, 1996 at 9:30 a.m.**

Date: 3 May 1996

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served on: Jeffrey Baddeley, Esq. (by mail)  
Brent English, Esq. (by mail)  
Nicholas Satullo, Esq. (by mail)

By: Joyce L. Gordon, Secretary

Date: 5/3/96