

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 03-12833
	)	
KEVIN P. O'DONNELL,	)	Chapter 7
Debtor.	)	
	)	Adversary Proceeding No. 03-1453
WALDEMAR J. WOJCIK,	)	
CHAPTER 7 TRUSTEE,	)	
Plaintiff,	)	Judge Arthur I. Harris
	)	
v.	)	
	)	
KEVIN P. O'DONNELL, et al.,	)	
Defendants.	)	

MEMORANDUM OF OPINION AND DECISION

This Adversary Proceeding is currently before the Court on the motion of the plaintiff Chapter 7 trustee to remand this cause of action to the Probate Division of the Court of Common Pleas for Cuyahoga County, Ohio (Docket #12). After extensive briefing by the parties, the Court finds that this case was properly removed pursuant to 28 U.S.C. §§ 1447 and 1452(b) and that, on balance, equitable grounds do not support a remand of this cause of action back to the Probate Division of the Court of Common Pleas for Cuyahoga County, Ohio.

BACKGROUND

On March 10, 2003, the debtor defendant Kevin P. O'Donnell filed a Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Northern

District of Ohio. Thereafter, plaintiff Waldemar J. Wojcik was appointed trustee. Among Wojcik's duties are to "investigate the financial affairs of the debtor" and to "collect and reduce to money the property of the estate for which [he] serves." *See* 11 U.S.C. § 704. On July 31, 2003, the Chapter 7 trustee filed a complaint for declaratory judgment and other relief in the Probate Division of the Court of Common Pleas for Cuyahoga County, Ohio. Case No. 2003 ADV 0078999. Wojcik named as defendants Kevin P. O'Donnell, individually and as trustee of the Restated Kevin P. O'Donnell Trust, Kelly M. O'Donnell, and Margaret O'Donnell. On October 30, 2003, defendant Margaret O'Donnell filed a notice of removal, thereby removing the action from the state court to the U.S. Bankruptcy Court.

On November 26, 2003, Wojcik moved to remand this cause of action back to the Probate Division of the Court of Common Pleas for Cuyahoga County, Ohio (Docket # 12). After extensive briefing by the parties (Docket #s 12, 13, 20, 25) and oral argument on January 20, 2004, this matter is now ready for a ruling.

## DISCUSSION

Section 1447 of Title 28, United States Code, provides in pertinent part:

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . .

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .

Section 1452 of Title 28, United States Code, provides in pertinent part:

*Removal of claims related to bankruptcy cases*

(a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

The Supreme Court has indicated that courts should give effect to both sections 1447 and 1452. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) (“fact that § 1452 contains its own provision governing certain types of remands in bankruptcy . . . [does not mean that] §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context”).

In his motion to remand, Wojcik asserts that remand is appropriate because this Court lacks subject matter jurisdiction and because the notice of removal was filed more than 30 days after a defendant was served, purportedly in violation of 28 U.S.C. § 1446(b). The Court rejects both of these arguments.

First, subject matter jurisdiction undeniably exists under 28 U.S.C. § 1452 and relevant case law. *See Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996), *cert. denied*, 519 U.S. 1071 (1997).

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 bankruptcy estate.”

86 F.3d at 489 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

In the present case, the state court action, even though alleging a state cause of action, was filed by the Chapter 7 trustee for the benefit of creditors of the estate.

Therefore, the action clearly falls within the “related to” jurisdiction of 28 U.S.C. §§ 1334 and 1452.

Second, the alleged procedural deficiency in the notice of removal is contradicted by binding precedent from the Supreme Court and the Sixth Circuit. In *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), the Supreme Court held that the 30 day removal period began to run not when the defendant received a faxed, file-stamped copy of the complaint, but rather, when the defendant was later formally served by certified mail. In *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999), the Sixth Circuit

ruled:

[A]s a matter of fairness to later-served defendants, we hold that a later-served defendant has 30 days from the date of service to remove a case to federal district court, with the consent of the remaining defendants.

Since it is undisputed that the later-served defendant, Margaret O'Donnell, filed the notice of removal within 30 days from the date she was formally served, this alleged deficiency cannot be a proper basis for remand.

During oral argument on January 20, 2004, the Court asked the parties to address the "any equitable ground" basis for remand under section 1452, which the parties did not address in their initial briefs.

"There are numerous factors which courts may consider in determining whether to remand a case on equitable grounds." *In re Black & White Cab Co.*, 202 B.R. 977, 978-79 (Bankr. E.D. Ark. 1996)(citations omitted).

The court must consider whether:

- (1) there is duplication of judicial resources or uneconomical use of judicial resources;
- (2) the remand will adversely affect the administration of the bankruptcy estate;
- (3) the case involves questions of state law better addressed by a state court;
- (4) there are comity considerations;
- (5) there is prejudice to unremoved parties;
- (6) the remand lessens the possibility of inconsistent results; and
- (7) the court where the action originated has greater expertise.

*Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863, 867-68 (N.D. Ill. 1991). Additional factors include:

- (1) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;
- (2) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- (3) the substance rather than the form of the asserted 'core' proceeding;
- (4) the feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in state court with enforcement left to the bankruptcy court; the burden of the bankruptcy court's docket;
- (5) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; and
- (6) the presence of nondebtor parties.

*Citicorp Savings of Illinois v. Chapman*, 132 B.R. 153, 157-58 (Bankr.N.D.Ill.1991).

202 B.R. at 979. *Accord In re Briarpatch Film Corp.*, 281 B.R. 820, 828-29 (Bankr. S.D.N.Y. 2002)(citing factors).

Upon application of these factors to the present case, the Court finds that remand on equitable grounds is not warranted. While this Court is no better situated than the state court to resolve the trustee's state law claims pertaining to the creation of the qualifying Personal Residence Trust or QPRT at issue in this removed proceeding, one factor which tips the scales in favor of resolving this issue in bankruptcy court is the fact that this Court will inevitably have to immerse itself in related allegations of fraudulent conveyances and fraudulent transfers involving multiple debtors. For example, in Adversary Proceeding No. 04-1130, the trustee of three related debtor's estates is pursuing fraudulent transfer actions

against Kevin O'Donnell, Neil O'Donnell, and the O'Donnell Family Trust. And while the residence of Kevin O'Donnell that is the subject of Wojcik's lawsuit may not be directly at issue in Adversary Proceeding No. 04-1130, the circumstances that gave rise to the alleged fraudulent transfers in all of these proceedings are likely to overlap. Therefore, it appears that a single court can more efficiently address all of these matters, which in turn should result in lower costs for the parties and potentially greater recoveries for creditors, should such recoveries be appropriate.

This Court is also mindful of the Sixth Circuit's admonition, given in a different context of avoiding "jurisdictional ping-pong." *See Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1137(6th Cir 1991)(citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). As this case illustrates, ever since the notice of removal was filed on October 30, 2003, a great deal of time, energy, and money has been devoted, not to the resolution of this action on the merits, but to whether the dispute should be heard in a state forum or a federal forum. *Cf.* Fed. R. Bankr. P. 1001 (Bankruptcy Rules "shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding"). Given the often limited funds available to creditors in bankruptcy cases, the Court wishes to do everything in its power to refocus the efforts of the parties and their counsel toward securing, so far as remains possible, the just,

speedy, and inexpensive determination of this proceeding.

### CONCLUSION

For the foregoing reasons, the Court finds that this case was properly removed pursuant to 28 U.S.C. §§ 1447 and 1452(b) and that, on balance, equitable grounds do not support a remand of this cause of action back to the Probate Division of the Court of Common Pleas for Cuyahoga County, Ohio. A separate order shall be entered in accordance with this memorandum of opinion and decision.

IT IS SO ORDERED.

/s/ Arthur I. Harris 02/25/2004  
Arthur I. Harris  
United States Bankruptcy Judge