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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

BRANDY L. RITT, et al.,)	Miscellaneous Proceeding No. 04-112
)	
Plaintiffs.)	
)	Judge Pat E. Morgenstern-Clarren
v.)	
)	
BILLY BLANKS, et al.,)	<u>MEMORANDUM OF OPINION</u>
)	
Defendants.)	

Plaintiffs move to remand this adversary proceeding to the Ohio state court. The defendants oppose the motion. Additionally, defendants Integrity Global Marketing, LLC and Shape the Future International LLC move to transfer venue to the United States Bankruptcy Court for the District of Nevada. The defendant debtor NCP Marketing Group, Inc. joins in the motion and the plaintiffs oppose it.¹

PROCEDURAL HISTORY AND JURISDICTION

In 2000, plaintiffs filed a class action lawsuit against several defendants, including NCP Marketing Group, Inc., in the Cuyahoga County Court of Common Pleas (the state court).² On April 13, 2004, NCP filed a chapter 11 case in the United States Bankruptcy Court for Nevada. NCP then removed the state court lawsuit to the United States District Court for the Northern

¹ Docket 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 29, 35. Defendants West Corporation and West Telemarketing Corporation filed docket 8 under seal. After reviewing the filing and determining that the contents do not warrant such protection, the court instructed counsel at oral argument to refile it as an open document with the exception of the exhibit. The court has treated it as such in this memorandum of opinion.

² On February 21, 2005, after the court took this issue under submission, the plaintiffs filed a voluntary dismissal with prejudice as to defendants Billy Blanks, Billy Blanks's World Karate Center, Inc., and BG Star Productions, Inc. (Docket 34).

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District of Ohio. This court has jurisdiction under an order of referral entered by the District Court on November 1, 2004 in *Brandy L. Ritt, et al. v. Billy Blanks, et al.*, Case No. 1:04CV1298 (N.D. Ohio). The motions to transfer venue and for remand or abstention are core proceedings under 28 U.S.C. § 157(b)(2)(A). See *H.J. Rowe, Inc. v. Sea Products, Inc. (In re Talon Holdings, Inc.)*, 221 B.R. 214, 217 (Bankr. N.D. Ill. 1998) (holding that motions for remand and abstention are core proceedings); *Sudbury, Inc. v. Dlott (In re Sudbury, Inc.)*, 149 B.R. 489, 491-92 (Bankr. N.D. Ohio 1993) (holding that a motion to change venue is a core proceeding).

DISCUSSION

The plaintiffs move to remand this action to state court for lack of federal jurisdiction or, alternatively, for mandatory or permissive abstention. All defendants argue that the bankruptcy court has at least related to jurisdiction. Integrity Global, Shape the Future, and the debtor argue that the court should make a finding of federal jurisdiction and then transfer the action to the Nevada bankruptcy court for a decision on the remand/abstention issues. The plaintiffs oppose that approach.

I. Bankruptcy Jurisdiction

The debtor removed this action from the state court to the district court under 28 U.S.C. § 1452(a), which states:

(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.

28 U.S.C. § 1452(a). For removal to be proper under §1452(a), then, jurisdiction must exist under 28 U.S.C. § 1334. Section 1334 provides for “original and exclusive jurisdiction of all

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cases under title 11” and “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. §§ 1334(a) and (b). “Congressional intent [as reflected in § 1334] was ‘to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.’” *Lindsey v. O’Brien, Tanski, Tanzer and Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995)). To come within the jurisdictional grant of § 1334, “a proceeding need only be ‘related to’ a case under title 11.” *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 482 (6th Cir. 1992).

A civil proceeding is related to a bankruptcy case if “the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Dow Corning*, 86 F.3d at 489 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Related to jurisdiction exists “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.” *Id.* An action does not have to be against the debtor or the debtor’s property to be related and suits between non-debtor parties may come within the scope of this jurisdiction. *See Dow Corning*, 86 F.3d at 493-94. However, the mere existence of common questions of fact is insufficient to establish jurisdiction; there must be a nexus between the action and the debtor’s bankruptcy case. *See Dow Corning*, 86 F.3d at 489.

The positions of the parties

The plaintiffs base their jurisdictional argument on this promise: if the case is remanded to state court, they will proceed only against the non-debtor defendants. They argue that such an

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action could not have an impact on the debtor and, without such impact, there is no related to jurisdiction.

All defendants argue that the court has related to jurisdiction for multiple reasons, including the existence of indemnification provisions. West Corporation and West Telemarketing Corporation (WTC) (collectively, West) and MemberWorks state that they have indemnification provisions with the debtor³ and with each other. Integrity Global and Shape the Future argue that they have an equitable right to indemnity from the debtor. They base this on the allegations in the fourth amended complaint that the debtor is a division of Integrity Global and Shape the Future is the debtor's successor in interest. The defendants represent that they have all entered into a tolling agreement not to go forward with such claims for the time being.⁴ Any decision against the non-debtor defendants in the state court lawsuit would, however, result

³ The agreement between the debtor and MemberWorks states that NCP agrees to indemnify MemberWorks: "from and against any and all claims, suits, actions, causes of action, damages, costs, or expenses, including reasonable attorney's fees, arising out of any breach of NCP's or its agents' responsibilities, representations, warranties and covenants herein and its or its agents performance or failure to perform any obligation contained herein." (Docket 3 at 6). The WTC agreement with NCP provides: "[NCP] shall indemnify and hold harmless WTC from any and all claims, actions, suits, proceedings, costs, expenses, damages, and liabilities including reasonable attorneys' fees, which arise out of or result from [NCP's] use of the Service except those resulting from the negligence of WTC or a breach by WTC of the terms of this Agreement. WTC shall indemnify and hold [NCP] harmless from any and all claims, actions, suits, proceedings, costs, expenses, damages, and liabilities, including reasonable attorneys' fees, which arise out of or result from the negligence of WTC or a breach by WTC of any term of this Agreement." (Docket 8 at 4). Plaintiffs submitted (under seal) an agreement between and among the debtor, MemberWorks, and West Corporation under which those parties agreed to refrain from asserting claims (including claims for indemnity and contribution) against one another in the pending litigation. They also agreed to submit all their claims to binding arbitration at the conclusion of the litigation and that findings of fact made in the litigation will not be deemed binding in the arbitration proceedings. (Docket 35).

⁴ The tolling agreement filed by the plaintiffs is only between and among the debtor, West Corporation, and MemberWorks. (Docket 35).

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in those defendants bringing claims against the debtor in the bankruptcy court. And a successful claim would impact the debtor's assets. The plaintiffs respond that the debtor's contracts do not have an indemnity provision that governs the conduct at issue. They deny that Integrity Global and Shape the Future have any rights under the doctrine of equitable indemnification. They also claim that the tolling agreement does not support related to jurisdiction.

Related to jurisdiction

The removed state action is clearly related to the debtor's chapter 11 case. Although the plaintiffs state they will not prosecute their claims against the debtor defendant in state court, that is just one way in which the action could impact the bankruptcy estate. The nexus to the chapter 11 case that exists here is that the plaintiffs' success in this action may give rise to claims for indemnification (some based on contract) by the non-debtor defendants against the debtor. This is so even as to West Corporation and MemberWorks despite their tolling agreement with the debtor that any findings of fact in this action will not be binding. The plaintiffs argue that the indemnification claims will ultimately be unsuccessful based on the contractual language and the circumstances of the case. The court is not required at this point to determine that issue conclusively. The defendants have stated a reasonable legal basis for the assertion of such claims and, in the case of MemberWorks and West, supported it with the relevant documents. This potential impact on the debtor's estate is sufficient to invoke related to jurisdiction. *See Parrett v. Bank One, N.A. (In re Nat'l Century Fin. Enters., Inc.)*, 323 F. Supp. 2d 861, 868-869 (S.D. Ohio 2004). Because there is related to jurisdiction under § 1334, the removal under § 1452(a) was justified.

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The Debtor's additional arguments: Core jurisdiction and 28 U.S.C. § 959(a)

The debtor makes two additional arguments. First, the court has core jurisdiction under 28 U.S.C. § 157(b)(2), which states that core proceedings include “allowance or disallowance of claims against the estate.” At oral argument, the debtor withdrew this position because the plaintiffs did not file a claim in the chapter 11 and the bar date has passed.

The debtor's second argument is that jurisdiction exists under 28 U.S.C. § 959(a). Under that statute:

Trustees . . . of any property, including debtors in possession, may be sued . . . with respect to any of their acts or transactions in carrying on business connected with such property.

28 U.S.C. § 959(a). The argument is that the complaint asks for injunctive relief which, if granted, would affect how the debtor carries out its business. The only case cited in support, *Robinson v. Michigan Consol. Gas Co., Inc.*, 918 F.2d 579 (6th Cir. 1990), is factually distinguishable and cannot reasonably be extended to this case. In *Robinson*, the plaintiff sued a chapter 7 trustee for acts undertaken in that capacity. Here, the acts at issue took place before the debtor filed its chapter 11; under a plain reading of § 959(a), they do not fall into the category of a suit against the debtor complaining of acts undertaken in carrying out its debtor responsibilities. The request for injunctive relief does not allow the debtor to shoehorn itself into § 959(a).

II. Motion to transfer to the United States Bankruptcy Court for the District of Nevada

In lieu of this court deciding the motion to remand or to abstain from hearing the state court lawsuit, Integrity Global, Shape the Future, and the debtor move to transfer the action to the

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Nevada bankruptcy court.⁵ This issue is governed by 28 U.S.C. § 1412:

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

28 U.S.C. § 1412.⁶ The plaintiffs oppose the motion. The movants must prove that a change of venue is warranted. *See GEX Kentucky, Inc. v. Wolf Creek Collieries Co. (In re GEX Kentucky, Inc.)*, 85 B.R. 431, 435 (Bankr. N.D. Ohio 1987).

“Because the criteria under § 1412 is phrased in the disjunctive, [a] bankruptcy . . . proceeding is transferrable upon a showing of either the interest of justice or for the convenience of the parties.” *Harnischfeger*, 246 B.R. at 435. The defendants rely on the interest of justice prong. The general presumption is that the court where the bankruptcy is pending is the proper venue for all related proceedings. *See Hohl v. Bastian*, 279 B.R. 165, 177-78 (W.D. Pa. 2002); *Harnishfeger*, 246 B.R. 436-37; *Sudbury, Inc. v. Dlott (In re Sudbury, Inc.)*, 149 B.R. 489, 492-93 (Bankr. N.D. Ohio 1993). A number of other factors may also be considered on this issue. These include: (1) the economic administration of the bankruptcy estate; (2) judicial efficiency; (3) the ability to receive a fair trial; (4) a state’s interest in having local controversies decided

⁵ In the Nevada district court “[a]ll cases and proceedings within the bankruptcy jurisdiction of the courts are referred to the bankruptcy judges.” Local Rule 1001(b)(2) for the United States District Court for the District of Nevada.

⁶ The venue issue is addressed under 28 U.S.C. § 1412 because most courts turn to that section to determine whether to transfer venue of a cause of action that has been removed to bankruptcy court and the parties have addressed the venue issue under that section. Other courts refer to 28 U.S.C. § 1404(a). *See Irwin v. Beloit Corp. (In re Harnischfeger Indus., Inc.)*, 246 B.R. 421, 434-435 (Bankr. N.D. Ala. 2000) (discussing this issue and concluding that § 1412 is the applicable statute for determining whether a transfer of proceedings related to a bankruptcy case is appropriate).

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within its borders; (5) the enforceability of any judgment rendered; and (6) the plaintiff's original choice of forum. *See Harnishfeger*, 246 B.R. 436-37.

Most of the factors do not favor a particular venue for this action. As the plaintiffs concede, "the ability to receive a fair trial, the state's interest in having local controversies decided within its borders and the enforceability of any judgment are not issues in this case." (Plaintiffs' amended opposition at 7, docket 11). On balance, the remaining factors weigh in favor of the transfer. The presumption is that matters related to the debtor's chapter 11 case should be litigated in the Nevada bankruptcy court. Transfer will allow the Nevada bankruptcy court to resolve the remand request. That court is familiar with NCP's chapter 11 case and is in the best position to analyze the impact of the state court lawsuit venue on the chapter 11 case. Moreover, the plaintiffs' interest in having the matter proceed in their chosen forum will not be adversely affected by the transfer as that will be an issue before the Nevada court when it considers the motion to remand.

The plaintiffs make several arguments against transfer. They initially argued that the presumption to transfer should not apply because the debtor had not requested transfer; the debtor has since joined in the transfer request. The plaintiffs also argue that transfer will be inefficient and waste judicial resources because: (1) they will not consent to the bankruptcy court's entry of a final order; and (2) they have requested a jury trial and will not consent to the bankruptcy court presiding over such a trial. These arguments do not merit a different result. The Nevada bankruptcy court can determine the issues of remand and abstention without the plaintiffs' consent because those are core proceedings in which the bankruptcy court may enter a final order. *See H.J. Rowe, Inc. v. Sea Products, Inc. (In re Talon Holdings, Inc.)*, 221 B.R. 214,

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217 (Bankr. N.D. Ill. 1998). And the plaintiffs do not have a right to a jury trial on the remand issue. Any right to a jury trial on the underlying merits of the state court lawsuit will be considered by the Nevada bankruptcy court in determining the correct forum. In sum, a transfer will permit the remand issue to be decided by the court with the greatest factual understanding of the chapter 11 case and will not result in a waste of judicial resources.

CONCLUSION

For the reasons stated, the motion of Integrity Global and Shape the Future to transfer venue to the Nevada bankruptcy court as joined by the debtor NCP Marketing Group, Inc. is granted. A separate order will be entered reflecting this decision.

Date: 12 Feb 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

