

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
HENRICKS COMMERCE PARK, LLC, *
* CASE NUMBER 02-43841
*
Debtor. *
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HENRICKS COMMERCE PARK, LLC, *
*
Plaintiff, *
*
vs. * ADVERSARY NUMBER 04-4257
*
CIVIL & ENVIRONMENTAL *
CONSULTANTS, INC., *
*
Defendant. *
*

ORDER REGARDING JURY DEMAND

Henricks Commerce Park, LLC ("Henricks") filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code on August 28, 2002. An Order Confirming the Corrected Third Amended Joint Plan of Reorganization was entered by this Court on March 30, 2005.

Prior to confirmation, Henricks commenced this adversary proceeding against Civil & Environmental Consultants, Inc. ("CEC") by filing a Complaint on December 23, 2004. CEC timely filed Answer of Defendant Civil & Environmental Consultants, Inc. (Demand for Jury Trial indorsed [sic] herein) ("Answer") on March 11, 2005. After conducting discovery and participating in mediation, on

January 12, 2006, the parties filed a Notice of Unsuccessful Mediation and Revised Joint Discovery Plan ("Notice"), which provides that all discovery will be complete by August 31, 2006 and estimates that the case will be ready for trial (with four days estimated for trial) by November 1, 2006. The Notice further notes that CEC's jury demand requires this Court to make a determination pursuant to Section 7 of the Adversary Case Management Order that governs this case.

As a consequence, this Court addresses CEC's jury demand, as follows:

The Complaint sets forth three claims for relief, all arising out of a pre-petition contract between Henricks (as the assignee of Upon the Rock Construction, Inc.) and CEC relating to a Phase I environmental assessment for property that Henricks subsequently purchased. The claims for relief are as follows: Claim I - CEC's failure to perform its contractual responsibilities in a good and workmanlike manner and in accordance with industry standards; Claim II - CEC's breach of implied warranties that its services would be good and workmanlike and free from defects and deficiencies; and Claim III - CEC's breach of contract by preparing the assessment inconsistent with the express guaranties. Each of these claims is essentially a breach of contract theory, even those allegedly sounding in tort. There are two issues to be addressed: (i) is this adversary proceeding a core proceeding, as defined in 28 U.S.C. § 157; and (ii) is there a right to jury trial on these claims for relief?

CORE V. NON-CORE PROCEEDINGS

Core proceedings are defined in 28 U.S.C. § 157(b)(2), but the definition is non-exclusive. Neither breach of contract claims nor tort claims (other than personal injury or wrongful death claims) are mentioned in Section 157. This section expressly states 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). The relevant provisions in Section 157 that might encompass the claims for relief in this adversary proceeding are:

- (A) matters concerning the administration of the estate; and
- (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship; except personal injury tort or wrongful death claims.

In the instant case, Henricks asserts damages arising out of breach of contract and negligent performance of contract. The contract in question is a pre-petition contract that was fully performed prior to the petition date. Henricks seeks money damages as a result of CEC's alleged conduct. "In determining whether this proceeding is core or non-core, both the form and the substance of the proceeding must be examined." *Hughes-Bechtol, Inc. v. Ohio Dept. of Rehabilitation and Correction, (In re Hughes-Bechtol)*, 141 B.R. 946, 949 (Bankr. S.D. Ohio 1992), citing *Michigan Employment Sec. Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1144 (6th Cir. 1991).

A non-core proceeding is identified by the following characteristics - a proceeding filed in the bankruptcy court alleging a cause of action which:

- 1) is not specifically identified as a core proceeding under § 157(b)(2)(B) through (N),
- 2) existed prior to the filing of the bankruptcy case,
- 3) would continue to exist independent of the provisions of Title 11, and
- 4) the parties' rights, obligations, or both are not significantly affected as a result of the filing of the bankruptcy case.

Hughes-Bechtol at 948-49, citing *Hughes-Bechtol, Inc. v. Air Enterprises, Inc. (In re Hughes-Bechtol, Inc.)*, 107 B.R. 552, 556 (Bankr. S.D. Ohio 1989); [*In re*] *Walton*, 104 B.R. [861] at 864 [(Bankr. S.D. Ohio 1988)]; *Commercial Heat Treating of Dayton, Inc. v. Atlas Indus., Inc. (In re Commercial Heat Treatment of Dayton, Inc.)*, 80 B.R. 880, 888 (Bankr. S.D. Ohio 1987).

Based on the criteria set forth above, this adversary proceeding is non-core. The claims for relief are not specified in § 157(b)(2)(B) through (N). Henricks' claims, as set forth in the Complaint, existed prior to the filing of the bankruptcy case. Henricks' claims would continue to exist independent of the provisions of Title 11. And, finally, the parties' rights, obligations or both are not significantly affected as a result of the filing of the bankruptcy case.

The "catch-all" provision in subsection O is not availing to convert this non-core adversary proceeding into a core

proceeding. Arguably almost all non-core proceedings could fall within the purview of subsection O because it would be unusual to have a lawsuit filed in the bankruptcy court that didn't affect a debtor-creditor relationship or affect the liquidation of assets of the estate. If, however, subsection O was meant to be read broadly enough to encompass all such actions as core proceedings, there would not be any reason to delineate between core and non-core proceedings. As a consequence, this Court finds and holds that the instant case is a non-core proceeding (*i.e.*, it is a "proceeding that is otherwise related to a case under title 11"). 28 U.S.C. § 157(b)(3).

JURY DEMAND

There are three factors to examine to determine if a litigant is entitled to a jury trial. *Keck, Mahin & Cate v. Bowytz (In re Keck, Mahin & Cate)*, 2001 U.S. Dist. LEXIS 3409, (N.D. Ill. 2001); *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33 (1989). These factors are: (i) whether the action could have been brought in the courts of England prior to the merger of the courts of law and equity; (ii) whether the remedy sought is legal or equitable; and (iii) whether the cause of action involves a matter of private or public right. *Granfinanciera* at 42 and 53. In the instant case, the causes of action - breach of contract and negligence - asserted were all claims for which there was a jury trial right in 18th century England. Likewise, Henricks seeks only money damages from CEC, which is "clearly a legal remedy in that plaintiff[] seek[s] monetary damages of a fixed amount." *Keck, Mahin & Cate* at 6.

Last, this is purely a proceeding between two private litigants; no governmental entity is involved and the parties do not rely upon any statute asserting a public right. Thus, under this standard, CEC is entitled to a jury trial and the demand is well taken.

28 U.S.C. § 157(e) provides that "[i]f the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all parties." 28 U.S.C. § 157 (e). See also FED. R. BANKR. P. 9015. The bankruptcy courts in the Northern District of Ohio are specially designated to exercise such jurisdiction by General Order No. 84 dated July 16, 1984 issued by former Chief Judge Frank Battisti for the United States District Court, Northern District of Ohio. This Order refers to the Bankruptcy Judges of the District "any and all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11." Because the instant action is a proceeding that is related to a case under Title 11, this Court has jurisdiction thereof. As a consequence, the parties are directed to file a joint statement with the Court, on or before February 20, 2006, stating expressly whether they consent to a trial by jury in this Court.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**