

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 07-11441)
)
CHAD MYRDDIN SEYBOLD)
LAURA REITER SEYBOLD)
Debtors)
)
)
SALIN BANK AND TRUST COMPANY)
Plaintiff)
)
vs.) PROC. NO. 07-1255
)
)
CHAD MYRDDIN SEYBOLD)
LAURA REITER SEYBOLD)
Defendants)
)
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CHAD MYRDDIN SEYBOLD)
LAURA REITER SEYBOLD)
Counter-Claimants)
)
)
vs.)
)
)
SALIN BANK AND TRUST COMPANY)
Counter-Defendant)

DECISION AND ORDER
DISMISSING COUNTERCLAIM

At Fort Wayne, Indiana, on March 11, 2008

By this adversary proceeding, the plaintiff, Salin Bank and Trust Company, has asked the court to determine the dischargeability of the debtor/defendants' obligations to it. The amended complaint is in four counts. Count I is based upon § 523(a)(2), fraud, false pretenses and false representations; Count II is based upon § 523(a)(4), fraud or defalcation in a fiduciary capacity; and Count III is based upon § 523(a)(6), willful and malicious injury. Count IV is based upon the same allegations of misconduct as the other three, but characterizes those actions as "bank fraud" under

I.C. 35-43-5-8, one of the crimes which Indiana law allows to serve as the basis for a civil action by the victim seeking treble damages and attorney fees. See, I.C. 34-24-3-1. That claim is also alleged to be non-dischargeable under § 523(a)(2), (4), and (6).

In their answer, the defendants denied the bank's allegations of misconduct. They also filed a counterclaim which, in essence, alleges that the assertion of Count IV constitutes an abuse of process, a tort committed upon them after the date of the petition, for which they seek to recover damages, including their attorney fees. On its own initiative, the court raised the issue of whether it had subject matter jurisdiction over the defendants' counterclaim, scheduled a hearing to consider the issue and invited the parties to submit legal briefs. That is the question now before it.¹

Although both parties argue – albeit for different reasons – that the court has subject matter jurisdiction over the issues raised by the counterclaim, that does not relieve the court of making an independent determination of the issue. In re Hashim, 188 B.R. 633, 640 (Bankr. D. Ariz. 1995) “[J]urisdiction is the power to decide. It must be conferred, not assumed.” Matter of Chicago, Rock Island and Pacific R. Co., 794 F.2d 1182, 1188 (7th Cir. 1986) (emphasis original). Furthermore, it must be conferred by Congress and not by the consent of the parties. See, Matter of Paso Del Norte Oil Co., 755 F.2d 421, 425 (5th Cir. 1985); In re Phelps Technologies, Inc., 238 B.R. 819, 825 (Bankr. W.D. Mo. 1999); Hashim, 188 B.R. at 640; In re City Wide Press, Inc., 107 B.R. 68 (Bankr. E.D. Pa. 1989)

Bankruptcy jurisdiction is initially conferred upon the district courts by 28 U.S.C. § 1334.

¹The bank has also filed a motion dismiss, arguing that the counterclaim fails to state a claim upon which relief can be granted. See, Fed. R. Civ. P. Rule 12(b)(6). Because the court concludes that it lacks subject matter jurisdiction over the counterclaim, it does not address the motion to dismiss.

In addition to jurisdiction over “cases under title 11,” 28 U.S.C. § 1334(a), the district courts are also given jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b). They are then authorized to refer that jurisdiction to the bankruptcy judges, 28 U.S.C. § 157(a), who exercise it in the manner set out in the other portions of § 157. In any consideration of this two step approach to the bankruptcy court’s authority, it is important to remember that jurisdiction itself is always created and defined by § 1334. Jurisdiction must first exist under that statute; if it does § 157 simply explains how that authority is to be exercised. Absent jurisdiction under § 1334, there is no need to proceed to § 157.²

The debtors acknowledge that jurisdiction over their counterclaim cannot be founded upon § 1334(b) and the court agrees. As an action seeking to recover damages for a tort allegedly committed upon the debtors after the date of the petition, it is not a civil proceeding arising under title 11, arising in or related to a case under title 11. The terms of that familiar litany have well developed meanings. “Arising under” jurisdiction requires a cause of action expressly created by the provisions of the Bankruptcy Code. “Arising in” jurisdiction involves a proceeding which, although not expressly created by the provisions of the Bankruptcy Code, could have no practical existence but for the underlying bankruptcy case of which it is a part. Finally, “related to” jurisdiction exists over proceedings will affect the amount of property available for distribution to

²This observation disposes of the bank’s argument for subject matter jurisdiction which is based upon § 157(b)(2)(C) and attempts to characterize the debtor’s counterclaim as a “counterclaim[] by the estate against [a] person[] filing claims against the estate.” Section 157(b)(2) is not grant of jurisdiction but only an illustrative list of the types of proceedings in which the bankruptcy judge may enter final orders and judgments. Furthermore, the counterclaim is not being asserted by the bankruptcy estate, but by the debtors. The interests of the bankruptcy estate are represented by the chapter 7 trustee, Fisher v. Apostolou, 155 F.3d 876, 879 (7th Cir. 1998), who is not a party to this litigation.

creditors or the manner in which that property may be distributed. See e.g., In re Conseco, 318 B.R. 425, 428 (Bankr. N.D. Ill. 2004); In re Spaulding & Co., 131 B.R. 84, 88-89 (Bankr. N.D. Ill. 1990). As a garden variety tort claim governed by state law and belonging to the debtors, rather than to their bankruptcy estate, the counterclaim has none of these attributes.

Even though § 1334 does not give the court jurisdiction over their counterclaim, the debtors maintain that the court, nonetheless, has jurisdiction over it because it constitutes a compulsory counterclaim, see, Fed. R. Bankr. P. Rule 7013, Fed. R. Civ. P. Rule 13, and falls within the scope of the supplemental jurisdiction of 28 U.S.C. § 1367. That argument is misplaced.

There are very few counterclaims in bankruptcy proceedings. This is largely because the claims process, which is unique to bankruptcy proceedings, makes them unnecessary. See, 11 U.S.C. §§ 501, 502; Fed. R. Bankr. P. Rules 3001-3008. See also, 10-7013 Collier on Bankruptcy ¶ 7013.03 (15th ed. rev.). The proper way to assert a pre-petition claim against the bankruptcy estate is to file a proof of claim. As a result, the opportunity for any kind of counterclaim – permissive or compulsory – will generally only exist when it is based upon events occurring after the date of the petition. Even then, however, unless it arises out of the same transaction or occurrence as the plaintiff’s claim, it only would be a permissive counterclaim. Fed. R. Bankr. P. Rule 13(b).

A compulsory counterclaim must arise out the same transaction or occurrence that is the subject of the plaintiff’s claim. Fed. R. Civ. P. Rule 13(a). Such a claim “is not a separate suit at all. It is simply another theory of relief in an existing suit, one leading to another possible outcome.” Tenneco, Inc. v. Saxony Bar & Tube, Inc., 776 F.2d 1375, 1379 (7th Cir. 1985). The court does not need an independent basis for its jurisdiction in such a situation because the two claims actually represent the same dispute, seen from different points of view. Thus, the same jurisdictional

foundation which permits the court to entertain a plaintiff's claim also allows it to hear a defendant's compulsory counterclaim.

In this instance, the plaintiff's claims against the defendants and the defendants' claim against the plaintiff do not arise out of the same transaction or occurrence. Plaintiff's claims of nondischargeability are based upon a series of events occurring in connection with loans that were made years before the debtors filed bankruptcy. The defendants' claim against the bank, on the other hand, is based upon events which took place after their petition was filed, when the bank filed the amended complaint. Therefore, the abuse of process counterclaim is merely permissive, accord, LaSalle National Bank v. Keystone Service Co., 1984 WL 865 *2 (D. N.D. Ill 1984), and requires an independent basis for the court's jurisdiction. Plant v. Blazer Financial Services, Inc. of Georgia, 598 F.2d 1357, 1359 (5th Cir. 1979); In re Yagow, 53 B.R. 737, 739 (Bankr. N.D. 1985).

The lack of any commonality between the events giving rise to the bank's claims against the debtors and their counterclaim against it dooms their reliance upon supplemental jurisdiction. Supplemental jurisdiction is the codification of what used to be known as pendent and ancillary jurisdiction. Williams Electronics Games, Inc. v. Garrity, 479 F. 3d 904, 907 (7th Cir. 2007). To come within the scope of this jurisdictional grant, the supplemental claims must be "so related to [the] claims [that provide the basis for the court's] original jurisdiction that they form part of the same case or controversy" 28 U.S.C. § 1367(a). As previously noted, the plaintiff's claims of nondischargeability and the defendants' claim of abuse of process are not part of the same case or controversy: they are two separate claims.

There are even deeper flaws in defendants' reliance upon supplemental jurisdiction as a basis for this court to hear their counterclaim. To begin with, there are serious doubts that the

supplemental jurisdiction of § 1367 expands the bankruptcy jurisdiction of § 1334. See, Chapman v. Currie Motors, Inc., 65 F.3d 78, 81 (7th Cir. 1995). The “related to” jurisdiction of § 1334(b) is sufficiently broad that it gives the court all the authority it needs in order to preside over the administration and distribution of bankruptcy estates, so there is no need to go beyond that authority by creating what has been characterized as “‘related to – related to’ jurisdiction.” In re Fisher, 151 B.R. 895, 899 (Bankr. N.D. Ill. 1993). Yet, even if § 1367 does extend the range of the district court’s bankruptcy jurisdiction, that does not mean that bankruptcy judges are authorized to exercise that expanded authority. Remember, the bankruptcy court’s authority is entirely derivative. It comes from the district court and the only jurisdiction district courts are permitted to refer to bankruptcy judges is that conferred by § 1334 – jurisdiction over “cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11.” 28 U.S.C. § 157(a). If federal jurisdiction is premised upon something other than § 1334, it cannot be referred to a bankruptcy judge. See, In re JMP-Newcor International, Inc., 223 B.R. 457 (Bankr. N.D. Ill. 1998). Thus, even if the district courts can exercise supplemental jurisdiction in connection with bankruptcy matters, bankruptcy courts may not. In re TXNB Internal Case, 483 F.3d 292, 300 (5th Cir. 2007); Matter of Walker, 51 F.3d 562, 571-573 (5th Cir. 1995); In re Enron Corp., 353 B.R. 51 (Bankr. S.D. N.Y. 2006); In re Ha-Lo Industries, Inc., 330 B.R. 663, 672-73 (Bankr. N.D. Ill. 2005).

For all of these reasons, the court concludes that it lacks jurisdiction over the debtor/defendants’ counterclaim against the plaintiff and that counterclaim is hereby dismissed.

SO ORDERED.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court