

# Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 10-40966	)	
	)	
WARREN TAM	)	
	)	
Debtor	)	
	)	
	)	
WARREN TAM	)	
YAODI HU	)	
	)	
Plaintiffs	)	
	)	
vs.	)	PROC. NO. 10-4035
	)	
MMBC	)	
PAULINE KEMP	)	
	)	
Defendants	)	

## DECISION CONCERNING JURISDICTION AND ABSTENTION

At Fort Wayne, Indiana, on February 7, 2011.

Some years prior to filing a petition for relief under Chapter 11, the debtor, Warren Tam, sold several parcels of Illinois real estate to the Defendant, MMBC, pursuant to a land contract. He later transferred 5% of his interest in those properties and in the contract to Yaodi Hu. MMBC is alleged to have defaulted in making the payments required. By this adversary proceeding, both the debtor and Hu seek to enforce their rights under the contract and, inter alia, a forfeiture of the buyer's interest. The matter is before the court, on its own initiative, following a hearing and the submission of briefs, to consider whether it has subject matter jurisdiction over the action and, if so, whether it should abstain from hearing it. See, 28 U.S.C. § 1334.

Bankruptcy jurisdiction is created and given to the district courts by 28 U.S.C. § 1334. The

district courts are then authorized to refer that jurisdiction to the district's bankruptcy judges. 28 U.S.C. § 157(a).<sup>1</sup> As an action created by state law which would exist independently of the bankruptcy, there is no doubt that the debtor's claim against the defendant is "related to" his underlying bankruptcy case and the court has jurisdiction over it pursuant to § 1334(b); its resolution will affect the bankruptcy estate. See e.g., Xonics, 813 F.2d at 131; Fedpak Systems, 80 F.3d at 213-14 (7th Cir. 1989); Matter of Kubly, 818 F.2d 643, 645 (7th Cir. 1987); Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161 (7th Cir. 1994); Home Insurance Co. v. Cooper, 889 F.2d 746, 749 (7th Cir. 1989). It is not the debtor's claim against the defendant that creates a jurisdictional question but the presence of Mr. Hu's claim and his interest in the contract sued upon. Although not unknown, bankruptcy courts rarely have jurisdiction over claims between non-debtors, even when those claims overlap the debtor's affairs.<sup>2</sup> See e.g., Xonics, 813 F.2d at 131; FedPak Systems, 80 F.3d 214-15; Fort Wayne Telsat, Inc. v. Simon, 403 B.R. 590, 595-96 (Bankr. N.D. Ind. 2009).

In addition to the arising in, under, or related to jurisdiction of § 1334(b), the court also has

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<sup>1</sup>Paragraphs (b) and (c) of § 157 describe how bankruptcy judges are to exercise the jurisdiction referred to them, when they can enter a final decision and when they are to submit proposed findings to the district court. This makes the bankruptcy court's jurisdiction entirely derivative of that given to the district court. See, Matter of Fedpak Systems, Inc., 80 F.3d 207, 213 (7th Cir. 1996). Nonetheless, since § 157 is the vehicle by which jurisdiction is transferred to the bankruptcy court, some decisions will talk about the bankruptcy court having jurisdiction under different parts of § 157(b) or § 157(c), rather than § 1334. See e.g., Matter of Xonics, 813 F.2d 127, 131 (7th Cir. 1987). Despite this, the ultimate source of the bankruptcy court's authority is always § 1334, and jurisdiction must first be found there before consulting § 157 (b) or (c) regarding what to do with it.

<sup>2</sup>Since both plaintiffs' claims against the defendants arise out of the same contract and the court has jurisdiction over the debtor's claim, it might appear that the supplemental jurisdiction of 28 U.S.C. § 1367(a) would provide a basis for jurisdiction over Mr. Hu's claim. It does not. Even if § 1367(a) operates to expand the bankruptcy jurisdiction of § 1334, the district courts are not authorized to refer that expanded jurisdiction to bankruptcy judges. See, In re Seybold, 2008 WL 1321878 \*3 (Bankr. N.D. Ind. 2008).

“exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of [the] case, and of property of the estate.” 28 U.S.C. § 1334(e)(1). The land contract and the debtor’s claim against the defendants constitute property of the estate, see, 11 U.S.C. §§ 541(a); 1115(a), so § 1334(e)(1) also gives the court a source of jurisdiction. Yet, Hu is an indispensable party to any action involving the contract and, in his absence, it cannot proceed. See, In re Fine Paper Litigation State of Wash., 632 F.2d 1081, 1091 (3rd Cir. 1980) (partial assignee may not bring suit against the obligor unless all parties with an interest in the claim are joined); Kafka v. Bellevue Corp., 1991 WL 159828 (D. N.D. Ill. 1991) (joint obligees are generally considered indispensable parties). See also, Restatement (Second) of Contracts, § 298, comment (b) (“joint promisees are still required to join as plaintiffs or to be joined . . .”). As a result, the court cannot exercise its exclusive jurisdiction over the debtor’s claim unless it can also exercise jurisdiction over Hu’s interest in the same contract. The two claims are so intimately intertwined that they cannot be separated. Because of its jurisdiction over property of the estate and the impossibility of exercising that jurisdiction without also exercising jurisdiction over Hu’s claim against the defendants, this appears to be one of those rare and unusual situations in which the bankruptcy court has jurisdiction over claims being asserted by a non-debtor against a non-debtor. See, Home Insurance Company of Illinois v. Adco Oil Co., 154 F. 3d 739, 741 (7th Cir. 1998) (where non-debtor’s claim against third party was derived from the debtor and debtor had a stake in the outcome of the litigation, bankruptcy court had jurisdiction over non-debtor’s claim). See also, Xonics, Inc., 813 F.2d at 132 (describing circumstances where bankruptcy court would have jurisdiction over dispute between third parties); Home Insurance Co. v. Cooper & Cooper, Ltd., 889 F.2d at 750 (same).

At the time this action was filed, the plaintiffs had a similar action pending in Cook County, Illinois seeking much the same, if not identical, relief. The court became aware of that action in connection plaintiffs' motion to appoint a receiver and its jurisdictional inquiries. Upon doing so, it raised the issue of whether it should abstain from hearing the matter. See, 28 U.S.C. §1334(c)(1).

Pursuant to 28 U.S.C. § 1334(c)(1), the court may abstain from hearing a particular proceeding "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. §1334(c)(1). Whether the court does so is a matter committed to its discretion.<sup>3</sup> In considering whether or not it should abstain from hearing a particular proceeding the court generally considers and balances a number of different factors, which include:

(1) the effect or lack thereof on the efficient administration of the estate if [the] court

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<sup>3</sup>In their brief on the question of abstention the defendants raised for the first time the issue of mandatory abstention, under 28 U.S.C. § 1334(c)(2), which requires the court to abstain from hearing an action based upon a state law claim, related to a case under title 11, where "an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." Mandatory abstention does not apply here. Aside from the fact that defendants did not raise the issue of mandatory abstention when they first had the opportunity to do so, and, instead, waited until after the court mentioned the possibility of abstention, see, Response to Emergency Motion for Receiver, filed Oct. 26, 2010, see also, Robinson v. Michigan Consol. Gas Co., Inc., 918 F.2d 579, 584 (6th Cir. 1990) ("Mandatory abstention . . . must be raised in a timely motion."), because plaintiffs' state court action has since been dismissed there is nothing for this court to abstain in favor of. See, In re Worldwide Collection Services of Nevada, Inc., 149 B.R. 219, 223-24 (Bankr. M.D. Fla. 1992); In re Yobe, 75 B.R. 873, 876 (Bankr. W.D. Pa. 1987). Even if there were a pending action that could be given preference to this one, the court has not been given the information it needs to determine whether plaintiffs' claims "can be timely adjudicated" in the state court. In order to persuade this court that it is required to abstain, it was the defendants' burden to come forward with the necessary information about the state court proceeding and the state court's ability to timely adjudicate the dispute. See, In re Refco, Inc. Securities Litigation, 628 F. Supp. 2d 432, 445-46 (S.D. N.Y. 2008); In re Asousa Partnership, 264 B.R. 376, 389 (Bankr. E.D. Pa. 2001); In re Burgess, 51 B.R. 300, 302 (Bankr. S.D. Ohio 1985) ("naked assertion that the matter can be timely adjudicated in state court" insufficient to satisfy burden). See also, Indiana Troopers Association v. Campaign Resources, 2010 Bankr. LEXIS 1086 (Bankr. N.D. Ind. 2010). In the absence of such information, the court cannot simply assume that it is so, effectively creating a presumption that the party opposing the issue would have to rebut.

[abstains],

- (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 presence of a related proceeding commenced in state court or other non-bankruptcy court,
- (5) the jurisdictional basis, if any, other than . . . § 1334,
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- (7) the substance rather than form of an asserted ‘core’ proceeding,
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to bankruptcy court
- (9) the burden of the bankruptcy court’s docket,
- (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
- (11) the existence of a right to a jury trial, and
- (12) the presence in the proceeding of non-debtor parties. Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993). See also, In re LTV Steel Co., Inc., 357 B.R. 118, 120 (Bankr. N.D. Ohio 2006).

Of course, as with the consideration of any other list of factors that might be evaluated, not all of the factors will necessarily be present in any particular case, their relevance and importance will vary with the circumstances of each case, and no one factor will be determinative. Chicago, Milwaukee, St. Paul & Pacific R. Co., 6 F.3d at 1189.

As is often the case, some of these factors favor abstention and some do not.<sup>4</sup> To the extent

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<sup>4</sup>Defendant argues that factors “2, 4, 5, 9, 10 and 11 weigh heavily in favor of permissive abstention.” Defendant MMBC’s brief, filed Nov. 23, 2010, p. 4. Its argument concerning these factors and their significance to the case, however, is so perfunctory that it is of little use.

the efficient administration of the bankruptcy estate would involve coordinating the litigation between plaintiffs and defendants with expectations, deadlines, or events in the debtor's underlying bankruptcy case, this court is in a better position to do that. While this litigation predominately (if not exclusively) involves issues of state law, that will always be the case in any action involving the court's "related to" jurisdiction and so counts for relatively little, especially since there is no indication that the relevant state law is either unsettled or difficult. There is no basis for jurisdiction in this court other than § 1334, but, given the limited nature of the bankruptcy court's jurisdiction, that will always be the case. The litigation involves a significant asset of the estate and, so, is closely tied to debtor's underlying bankruptcy. It is not possible to sever any of the claims being asserted so as to allow some to be resolved here and others in state court. The case is no more burdensome to this court than any other pro se litigation. While there is some indication that the debtor may be involved in forum shopping, it is only a slight suggestion and the court has not been given enough information about the state court litigation to make it more than that. The fact that the state court action has been dismissed at the plaintiffs' (apparently unopposed) request could also suggest that the plaintiffs may simply have been seeking the most appropriate forum for the litigation given debtor's subsequent bankruptcy.<sup>5</sup> There is no issue of a jury trial. Hu's presence as a non-debtor plaintiff weighs in favor of abstention and is the strongest influence in that direction. The other factors, however, are either relatively ambivalent or weigh in favor of retaining jurisdiction.

Given that abstention is the exception, not the rule, and the court should be affirmatively persuaded that it is the appropriate thing to do, Colorado River Water Conservation Dist. v. United

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<sup>5</sup>Given the dismissal of the state court action, the parties' litigation has much the same posture it would have if a party had removed the action to this court, after bankruptcy, rather than the plaintiffs filing an independent action. See, 28 U.S.C. § 1452.

States, 424 U.S. 800, 813-14, 96 S.Ct. 1236, 1244 (1976), it will not do so here.

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