

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

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| IN RE: CASE NO. 13-10529 |) |
| |) |
| ZACHARIA DUANE BOLEN |) |
| BETHANI LEERIN HINDENLANG-BOLEN |) |
| Debtors |) |
| |) |
| |) |
| DUSTIN M. ROACH |) |
| Plaintiff |) |
| |) |
| vs. |) |
| |) |
| STEVEN E. BARCUS |) |
| KARI J. ROMNEY |) |
| DOUGLAS P. ROMNEY |) |
| Defendants |) |

PROC. NO. 14-1123

DECISION AND ORDER DENYING MOTION TO DISMISS OR ABSTAIN

On December 16, 2014.

The trustee originally filed this action in the Allen Superior Court and subsequently removed it to this court. See, 28 U.S.C. § 1452; Fed. R. Bankr. P. Rule 9027. The parties were invited to address “whether removal was timely . . . and, if not, the consequences thereof” in connection with a scheduling conference held on November 3. Order for Pre-Trial/Scheduling Conference, dated Oct. 9, 2014. Neither of them accepted the invitation and, since the timeliness of removal is not jurisdictional, see, Farina v. Nokia, Inc., 625 F.3d 97, 114 (3rd Cir. 2010), the court has no need to consider it further. The matter is before the court on the defendant’s motion to dismiss or, in the alternative, to abstain from hearing this matter. The motion argues that the court lacks subject matter jurisdiction or, if jurisdiction is present, that it is required to abstain from the case.

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

have “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(b). The district courts are then authorized to refer that jurisdiction to the district’s bankruptcy judges. 28 U.S.C. § 157(a).¹ A proceeding is “related to” a bankruptcy case when it affects the amount of property available for distribution or the way in which property will be distributed. See e.g., Matter of Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987); Matter of Fedpak Systems, Inc., 80 F.3d 207, 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). In the underlying litigation, the trustee seeks to rescind the defendants’ sale of stock to the debtors, cancel any claims and debts they may have, and recover at least \$46,000. How those issues are resolved will unquestionably affect the size of the bankruptcy estate and how it is distributed. That is sufficient to give the court subject matter jurisdiction.

Defendants also argue that the court must abstain from hearing this proceeding. The court is required to abstain from hearing a proceeding based upon a state law claim, when the only basis for jurisdiction is the “related to” jurisdiction of § 1334(b), if “an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.” 28 U.S.C. § 1334(c)(2). While it

¹Paragraphs (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.

is true that the trustee's claims are based upon state law and the only basis for federal jurisdiction is that those claims are "related to" a case under title 11, the other requirements for mandatory abstention have not been satisfied.

Before the court can abstain from hearing a particular proceeding there must be something to abstain in favor of. Abstention does not terminate federal litigation: it merely stays it pending the disposition of a parallel action in state court. If the action washes out, the federal litigation may be resumed; if it ends in a disposition on the merits, res judicata and collateral estoppel may leave nothing for the federal court to do. See, Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 717-18 (7th Cir. 1982). Here, there is no pending state court action. The only litigation involving the parties is this litigation; while it may have begun in state court, it was subsequently removed to this court and removal effectively transported it from there to here. Since it is no longer pending in the state courts, there is nothing for this court to abstain in favor of. See, In re Duval County Ranch Co., 167 B.R. 848, 849 (Bankr. S.D. Tex. 1994) ("If this Court were to abstain, nothing would happen because there is only one lawsuit."); 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 over this one, the defendants have not provided the court with the information it needs to determine whether the plaintiff's claims "can be timely adjudicated" in state court. In order to do so the defendants had to come forward with the some type of information about the state court proceedings and the state court's ability to timely adjudicate the dispute. They did not. They simply quoted the statute and

then asserted that it was satisfied, without doing anything to corroborate the assertion.² That is not enough. 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).

Defendants’ motion to dismiss for lack of jurisdiction or, alternatively, to abstain is DENIED.

SO ORDERED.

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

²To the extent the defendants’ reply may have attempted to remedy this deficiency, the arguments come too late. See, James v. Sheahan, 137 F.3d 1003, 1008 (7th Cir. 2000) (“Arguments raised for the first time in a reply brief are waived.”). See also, United States v. Elizalde-Adame, 262 F.3d 637, 640 (7th Cir. 2001).