

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In Re:

WENDY LUBETSKY,

Debtor.

WENDY LUBETSKY,

Plaintiff,

v.

MARILYN R. THOMASSEN, DAVID L. BURNELL,
MARILYN THOMASSEN and ASSOCIATES, P.C., LAW
OFFICES of MARILY THOMASSEN, THOMASSEN
LAW GROUP, et al,

Defendants.

Chapter 7

Case No.: 12-30829 (DHS)

Adv. No.: 12-1861 (DHS)

Hearing Date: February 26, 2013

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION
FOR DETERMINATION OF CORE/NON-CORE STATUS**

On the brief:

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PRELIMINARY STATEMENT

Defendants Marilyn R. Thomassen (a lawyer admitted to the bar of the State of California), David L. Burnell, Marilyn Thomassen and Associates, P.C., Law Offices of Marilyn Thomassen, and Thomassen Law Group (collectively the “Defendants”) submit this Memorandum of Law in support of their motion seeking a determination of whether this Adversary Proceeding constitutes a core or non-core proceeding. Defendants also rely upon the Declaration of Glenn R. Reiser (“Reiser Decl.”) filed herewith.

Defendants have asserted a jury trial demand in their responding Answer. The within motion represents step one of a two-part process by Defendants to preserve their right to have a jury decide the outcome of this case. They intend to move for withdrawal of the reference once the Bankruptcy Court makes the threshold core vs. non-core determination; in the alternative, Defendants may also move for abstention once the Bankruptcy Court makes this threshold determination.

For the reasons more specifically demonstrated infra, Defendants ask the Bankruptcy Court to find that Plaintiff’s claims constitute a non-core proceeding. In fact, Plaintiff’s Complaint reflects her own uncertainty about whether her claims constitute a core proceeding.¹

¹ In paragraph 5 of her Complaint Plaintiff states:

This matter is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order. However, in the event this case is determined to be a non-core proceeding then and in that event the Plaintiff consents to the entry of a final order by the Bankruptcy Judge.

Complaint at ¶ 5, annexed as Exhibit 1 to Reiser Cert.

PROCEDURAL HISTORY

Plaintiff filed a voluntary Chapter 7 bankruptcy petition on August 22, 2012 (the "Petition Date"). In response to question # 21 of Schedule B of her bankruptcy petition, Plaintiff disclosed an "unknown" value of contingent and unliquidated claims against Defendants which she listed at "not less than \$5,000.00". On Schedule C of her bankruptcy petition Plaintiff listed these same claims as exempt with the amount "unknown."

On August 23, 2012 Plaintiff filed this Adversary Proceeding asserting a kitchen sink variety of claims against the Defendants predicated on New Jersey common law and statutory law, and for alleged violations of the debt relief agency provisions found in 11 U.S.C. § 526 527 and 528. On the same day Donald V. Biase was appointed as Chapter 7 Trustee ("Trustee").

A first meeting of creditors was scheduled and conducted in the underlying Chapter 7 case on September 21, 2012. On October 13, 2012 Plaintiff filed an Amended Schedule C asserting a \$6,576.08 exemption for her contingent and unliquidated claims against the Defendants. On October 19, 2012, the Trustee issued a Notice of Assets stemming solely from Plaintiff's contingent and unliquidated claims against Defendants.

On November 28, 2012, the Trustee filed an application to employ Plaintiff's counsel Scott J. Goldstein, Esq. as his special counsel to prosecute this Adversary Proceeding. On November 30, 2012 the Debtor received her bankruptcy discharge.² And on December 6, 2012 the Court entered an Order approving Mr. Goldstein's retention as the Trustee's special counsel.

² Obviously, the Trustee retained Mr. Goldstein to remedy Plaintiff's lack of standing to use her Chapter 7 bankruptcy case as the means of establishing jurisdiction to pursue individual claims that would benefit no one but herself in a no-asset case.

Defendants filed their Answer on December 21, 2012 which includes a jury demand. Pursuant to a Joint Scheduling Order entered on January 24, 2013, the discovery end date is May 31, 2013 and the trial date is August 15, 2013.

CONCISE FACTUAL BACKGROUND

Plaintiff alleges that she retained the Defendants to provide debt settlement services so that she could pay her creditors and avoid a bankruptcy filing. Plaintiff's Complaint pleads the following causes of action, all predicated on the Defendants' alleged pre-petition conduct in attempting to settle her creditor claims for less than the amounts owed:

- Violation of Debt Relief Agency Obligations as per 11 U.S.C. §§ 526, 527 and 528 (First Count);
- Unlicensed Practice of Law (Second Count);³
- Violations of the New Jersey Debt Adjustment Act (Third Count);
- Illegal Contract (Fourth Count);
- Common Law Fraud (Fifth Count);
- Violations of the New Jersey Consumer Fraud Act (Sixth Count);⁴
- Unlawful Conversion (Seventh Count);
- Violation of New Jersey Criminal RICO statute (Eighth Count); and
- Aiding and Abetting (Ninth Count).

Complaint, annexed as Exhibit 1 to Reiser Decl.

³ Pursuant to New Jersey Court Rule 1:22, the New Jersey Supreme Court is vested with the authority to appoint a committee for the unauthorized practice of law. Once appointed, the committee "shall have jurisdiction over and shall inquire into and consider complaints alleging the unauthorized practice of law by any natural or other persons or entity." New Jersey Court Rule 1:22-2.

⁴ Plaintiff did not serve the Complaint upon the New Jersey Attorney General so as to afford the opportunity for the State to intervene, in violation of N.J.S.A. 56:8-20.

Throughout her Complaint, Plaintiff makes multiple references to the Defendants' alleged misconduct as constituting the reason for her resorting to a Chapter 7 bankruptcy filing. In fact, Plaintiff represents that she retained Defendants to settle her debts "with the express intent of avoiding filing a case under the Bankruptcy Code." Complaint at ¶ 47, annexed as Exhibit 1 to Reiser Decl.

The entire premise of Plaintiff's federal law claims against Defendants rests on the following allegations of her Complaint:

49. At some point in Defendants' relationship with Plaintiff, it became apparent that Plaintiff could no longer afford to attempt to settle her debts. At that point an agent or employee of the Defendants advised Plaintiff that she should seek relief under the Bankruptcy Code if she could no longer afford to pay the Defendants.

50. This advice constituted "bankruptcy advice" as defined in 11 U.S.C. 109, however Defendants did not provide the disclosures required by 11 U.S.C. 527.

Complaint, at ¶¶ 49-50, annexed as Exhibit 1 to Reiser Decl.

In their Answer to the Complaint, Defendants deny that this Adversary Proceeding constitutes a core proceeding and have asserted a jury demand. See Exhibit 2 to Reiser Decl.

LEGAL ARGUMENT

THIS ADVERSARY ACTION CONSTITUTES A NON-CORE PROCEEDING BECAUSE THE CAUSES OF ACTION PLEAD ARE NOT DEPENDENT ON THE BANKRUPTCY COURT'S EXCLUSIVE JURISDICTION, AND MAY NOT EVEN CONSTITUTE AN ASSET OF THE ESTATE IF THE RECOVERY DOES NOT EXCEED THE DEBTOR'S CLAIMED EXEMPTION

A. Withdrawal of the Reference in General

As a general matter, district courts have jurisdiction over all matters arising under the Bankruptcy Code or arising in or relating to a bankruptcy case, but may refer such

matters to the bankruptcy court. See 28 U.S.C. § 1334. In this District, these cases are automatically referred pursuant to a Standing Order dated July 23, 1984. See 28 U.S.C. § 157(a) (“Each district court may provide that any or 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 shall be referred to the bankruptcy judges for the district.”).

Under 28 U.S.C. § 157(d), a district court must withdraw a reference to the bankruptcy court if the proceeding would require “consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce,” and may withdraw a reference “for cause shown.” 28 U.S.C. § 157(d). “Although there is no statutory definition of what constitutes ‘cause shown’ under 28 U.S.C. § 157(d) for permissive withdrawal of reference, ‘the statute requires in clear terms that cause be shown before the reference can be withdrawn.’” Nw. Institute of Psychiatry, Inc. v. Travelers Indemnity Co., 272 B.R. 104, 107 (E.D. Pa. 2001) (quoting In re Pruitt, 910 F.2d 1160, 1168 (3d Cir. 1990)). In evaluating the meaning of “cause” in this context, the Third Circuit has stated that a court should consider: “the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors’ and creditors’ resources, and expediting the bankruptcy process.” Pruitt, 910 F.2d at 1168. However, the “factors listed in Pruitt were not designed to be exhaustive; they are only minimal standards.” NDEP Corp., 203 B.R. at 908. Relevant considerations might also include “the nature of the proceedings (*i.e.*, core or non-core) and judicial economy.” Hatzel & Buehler, Inc. v. Orange & Rockland Utilities, Inc., 107 B.R. 34, 39 (D. Del. 1989). Another factor which should be considered is “whether the parties have

requested a jury trial.” Hatzel & Buehler, Inc. v. Central Hudson Gas & Elec. Corp., 106 B.R. 367, 371 (D. Del. 1989).

Indeed, courts in this District often require the bankruptcy court to make a determination of whether the proceeding is “core” or “non-core” before addressing the issue of whether the district court should withdraw the reference. (See p. 8 *infra* for discussion of core proceeding jurisdiction, and p. 11 *infra* for discussion of non-core proceeding jurisdiction.) See In re Kara Homes, Inc., No. 09-1775 (MLC), 2009 WL 2223035, at *2 (D.N.J. July 22, 2009) (“[The] motion to withdraw the reference to the Bankruptcy Court [because of a jury demand] is premature since the Bankruptcy Court has not yet determined whether the Adversary Proceeding is a core or non-core proceeding. The core or non-core determination is a ‘threshold factor’ in the withdrawal analysis, and should be made in the first instance by the Bankruptcy Court”); In re E.W. Trade Partners, Inc., No. 06-1812 (RBK), 2007 WL 1213393, at *3-4 (D.N.J. April 23, 2007) (On a motion to withdraw the reference in order to hold a jury trial, the court “finds that 28 U.S.C. § 157(b)(3) requires the bankruptcy judge to determine whether a proceeding is core or non-core. . . . [T]he bankruptcy judge must make the initial determination of whether this case presents a core or non-core proceeding. Therefore, [the] motion is not ripe for consideration by this court.”); see also In re Montgomery Ward & Co., Inc., 428 F.3d 154, 159-160 (3d Cir. 2005) (discussing with approval the district court’s remand to the bankruptcy court for a core/non-core determination).

(i) Jury Demand Factors Into Withdrawing The Reference

The right to a jury trial is an important factor in determining a motion to withdraw the reference. This is so because absent the express consent of both parties and a special

designation of jurisdiction by the district court, the bankruptcy court may not hold a jury trial in a non-core proceeding. See 28 U.S.C. § 157(e). The Seventh Amendment states, “In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ” U.S. CONST. Amend. VII. In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989), the Supreme Court explained that “suits at common law” referred to controversies in which legal rights were to be determined, as distinguished from cases in which only equitable rights were recognized and only equitable remedies were administered. Furthermore, the Court stated that the Seventh Amendment only requires a jury trial if a cause of action is legal in nature and it involves a matter of private right. Id. at 42 n.4.

A number of courts in this District have allowed the bankruptcy court to preside over the pretrial stages of the case until the matter is ripe for jury trial, such that the bankruptcy court performs a similar function as that of a magistrate at the district court level. See e.g., Gen. Elec. Capital Corp. v. Teo, No. 01-1686, 2001 U.S. Dist. LEXIS 22266, at *14 (D.N.J. Dec. 14, 2001) (citing Stalford v. Blue Mack Transp. (In re Lands End Leasing, Inc.), 193 B.R. 426, 436 (Bankr. D.N.J. 1996)) (held there is no reason why the bankruptcy court may not preside over an adversary proceeding and adjudicate discovery disputes and motions only until such time as the case is ready for trial); [T]he mere fact that a [d]efendant has asserted a right to trial by jury is not sufficient to immediately justify withdrawal of an action from bankruptcy.”).

B. Core Proceeding Jurisdiction and Final Orders

A core proceeding is one that arises under Title 11 or arises in a case under Title 11. 28 U.S.C. § 157(b)(1). A proceeding is one “arising under title 11” if the claims asserted in

the matter are predicated on a right created or determined by title 11. In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 267 (3rd Cir. 1991). A proceeding “arising in” a case under title 11 includes various administrative matters “that are found only in bankruptcy and which do not exist outside of a bankruptcy case.” Id. (citation omitted).

“A bankruptcy court may enter final judgments only to ‘core proceedings’ absent consent of the parties.” Schubert v. Lucent Techs. Inc. (In re Winstar Commc’ns, Inc.), 554 F.3d 382, 405 (3d Cir. 2009) (citing 28 U.S.C. § 157(b)-(c)). A non-exhaustive list of core proceedings is recited in 28 U.S.C. § 157(b)(2).⁵

⁵ Core proceedings under 11 U.S.C. 157(b)(2) include:

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purpose of confirming a plan under Chapter 11, 12, or 13
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharge
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property, including the use of cash collateral;
- (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
- (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; and
- (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

Ibid.

The Third Circuit “has adopted a two-step process to determine whether a claim is a core proceeding.” In re Winstar Commc’ns, Inc., 554 F.3d at 405. “ First, ‘a court must consult § 157(b)’ to determine if the claim at issue fits within that provision’s ‘illustrative list of proceedings that may be considered core.’ If so, ‘a proceeding is core [1] if it invokes a substantive right provided by title 11 or [2] if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case.’” Id. (alteration in original) (internal quotation marks and citations omitted) (quoting Halper v. Halper, 164 F.3d 830, 836 (3d Cir. 1999)).

Second, “[e]ven if a claim is not a core proceeding, a bankruptcy court may still have jurisdiction over the claim if the claim is ‘related to a case under title 11,’ i.e. the Bankruptcy Code.” Winstar Commc’ns, Inc., 554 F.3d at 405 (citing 28 U.S.C. § 157(c)(1)). According to the Third Circuit, a civil proceeding “falls within the bankruptcy court’s ‘related to’ jurisdiction if ‘the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.’” Winstar Commc’ns, Inc., 554 F.3d at 405 (quoting Halper, 164 F.3d at 837).

In the instant case Defendants maintain that Plaintiff’s claims do not rise to the level of a core proceeding. The only provision that Plaintiff could conceivably point to in trying to establish core proceeding jurisdiction is 28 U.S.C. § 157(b)(2)(A) – “matters concerning the administration of the estate.” Ibid. But that requires Plaintiff securing a recovery that exceeds her \$6,576.08 claimed exemption in Schedule C of her bankruptcy petition. In other words, absent receiving more than \$6,576.08 for her claims there is no estate for the Trustee to administer. The causes of action plead by Plaintiff are personal to her, and do not arise under any of the specific avoidance powers granted to the Trustee under Sections

544, 547, 548, 549 or 550 of the Bankruptcy Code. In particular, the Bankruptcy Court does not have primary jurisdiction to adjudicate Plaintiff's claim that Defendants engaged in the unauthorized practice of law. In fact, pursuant to New Jersey Court Rule 1:22, the New Jersey Supreme Court is vested with the authority to appoint a committee for the unauthorized practice of law, and this committee has "jurisdiction to inquire and consider complaints alleging the unauthorized practice of law by any natural or other persons or entity." N.J. Court Rule 1:22-2.⁶

Plaintiff attempts to bootstrap the Bankruptcy Court's jurisdiction created by her underlying Chapter 7 filing by resorting to allegations that the Defendants engaged in pre-petition violations applicable to debt relief agencies pursuant to 11 U.S.C. §§ 526, 527, and 528. However, a close examination of these Bankruptcy Code sections demonstrate that they cannot possibly apply to the scenario painted by Plaintiff's Complaint. See Section 526(a)(1)(applying to debt relief agency that fails to perform a promised service "in connection with a case or proceeding under this title"); Section 527(contemplates assisting person in filing for bankruptcy; and Section 528 (setting forth requirements for debt relief agencies providing bankruptcy assistance). But Plaintiff does not allege that Defendants assisted her with preparing a bankruptcy petition or that she consulted with Defendants in

⁶ Plaintiff's attempt to prosecute a private cause of action against Defendants for the unauthorized practice of law pursuant to N.J.S.A. 2C:22-21a is premature until such time as that issue is presented to, and adjudicated by, the Committee on the Unauthorized Practice of Law appointed by the New Jersey Supreme Court under New Jersey Court Rule 1:22, or similar administrative agency in California that is vested with such authority. Allowing Plaintiff to pursue a private cause of action for the unauthorized practice of law, either before or in the absence of a specific adjudication by the New Jersey Supreme Court Committee or corresponding agency in California could result in inconsistent rulings. The New Jersey Legislature could not have envisioned giving citizens of this State the right to litigate a private cause of action for the unauthorized practice of law independent of the New Jersey Supreme Court Committee's jurisdiction over the very same claims.

anticipation of a bankruptcy filing. To the contrary, she claims she retained them to avoid bankruptcy altogether. Complaint at ¶ 47, annexed as Exhibit 1 to Reiser Decl. The balance of Plaintiff's claims are based on New Jersey common law and statutory law that exist independent of the Bankruptcy Code.

C. Non-Core Proceedings

As previously mentioned, the Bankruptcy Court's jurisdiction can also be established if the claim is "related to" a case under Title 11. Proceedings "related to" a case under title 11 are generally described as those "non-core" proceedings otherwise related to a case under title 11 and whose outcome could conceivably have an effect on the administration of the bankruptcy estate. In re The Guild & Gallery Plus, Inc., 72 F.3d 1171, 1181 (3d Cir. 1996)(stating that an action is related to a bankruptcy case "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankrupt estate"); Pacor v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), rev'd on other grounds (test for "determining whether a proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy"). See 28 U.S.C. § 157(c)(1).

Plaintiff's best case scenario is to prove "related to" jurisdiction as a non-core proceeding on the basis that this Adversary Proceeding "could conceivably have an effect on the administration of the bankruptcy estate" – but only if she recovers more than her \$6,576.08 bankruptcy exemption in the causes of action. The Debtor already has received her bankruptcy discharge. And as stated earlier, there is no bankruptcy estate for the Trustee to administer unless Plaintiff recovers more than her \$6,576.08 claimed

exemption. Even if she succeeds in that regard, it is unlikely that the award would be meaningful enough to provide a payment to anyone other than Plaintiff's attorney and the Trustee.

CONCLUSION

For the foregoing reasons and authorities cited, Defendants respectfully submit that the Court should declare the entirety of Plaintiff's claims as constituting non-core proceedings. Subject to the Court's determination of this threshold issue, Defendants will then move to withdraw the reference so as to preserve their jury demand, and may alternatively move for abstention.

Respectfully submitted,
LoFARO & REISER, LLP
Attorneys for Defendants

/s/ Glenn R. Reiser
Glenn R. Reiser

Dated: January 30, 2013