

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

EOD
05/07/2010

In re:

BUCKINGHAM FINANCIAL, LLC,

Debtor.

CASE NO. 09-43863

HELMUT LANDWEHR, GARY SOLOMON,
JOHN SAUNDERS, BASIL HAYMANN,
DOT HAYMANN, WARREN HARMEL,
KURT MAERSCHEL, AND STEVE SANDERS,

Plaintiffs,

v.

TODAY REALTY ADVISORS INC.,
TODAY FINANCIAL CORPORATION,
TODAY FINANCIAL, LLC,
TODAY REALTY INVESTMENTS INC.,
BUCKINGHAM FINANCIAL, LLC,
CDB HOLDINGS LP, WERNER ERIC BRAUSS,
CHRISTINE BRAUSS, AND
QUORUM EQUITIES GROUP LLC,

Defendants.

and

T.H. SONG-WINKLER, MICHELE ROELCKE
AND SUSAN BRAUSS,

Plaintiffs In Intervention,

v.

CDB HOLDINGS, LP, a Texas Limited Partnership,
CDBGP-1, LLC, a Texas Limited Liability
Company, TODAY TEXAS FUND 2, LP, a Texas
Limited Partnership, TODAY SIX FLAGS GP,
INC., A Texas Corporation, and
BUCKINGHAM FINANCIAL, LLC, a Texas
Limited Liability Company,

Quorum Equities, GRP	-	11,186,418.58
E&J Productions	-	124,973.71
Montgomery Bunker, GP	-	300.00
TRA Montgomery	-	12,500.00
Cross Dev/Montgomery	-	2,276,713.11
ACLP Swisher Road	-	9,500.00
TRA Westover Village	-	3,365.00
Cross Dev/Montgomery (Accrued Interest)	-	212,078.00

3. On November 23, 2009, the plaintiffs commenced the State Court Action against the Debtor and a number of other defendants, including Quorum Equities Group, LLC. The plaintiffs asserted claims and causes of action for money had and received, constructive trust, unjust enrichment, and conversion. The plaintiffs sought a temporary restraining order, temporary injunction, appointment of an auditor, declaratory judgment, and attorneys' fees.

4. On November 24, 2009, the State Court issued a temporary restraining order. The temporary restraining order was to remain in effect until 11:59 p.m. on December 9, 2009. The State Court scheduled a temporary injunction hearing for December 8, 2009.

5. Subsequent to the commencement of the State Court Action, STG Strategy Partners, LP and Watercrest Partners, LP intervened, asserting claims and causes of action against Christine Brauss, among others, on account of two promissory notes and guaranties executed for the benefit of such intervening plaintiffs. In addition, on November 30, 2009, T.H. Song Winkler, Michele Roelcke, and Susan Brauss filed a plea in intervention in the State Court Action, asserting claims and causes of action against the Debtor, among others, on account of debts allegedly due under eleven promissory notes.

6. All of the claims asserted by the parties are based on state law and concern the adjudication of rights under state law.

7. On December 6, 2009, the Debtor filed its voluntary petition for bankruptcy relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas. On or about December 6, 2009, the Debtor removed the State Court Action to the United States Bankruptcy Court for the Northern District of Texas.

8. On December 22, 2009, the plaintiffs filed their motion to remand the State Court Action. On the same date, the plaintiffs filed a notice of non-suit of the Debtor (without prejudice and subject to the motion to remand). On or about January 25, 2010, the State Court Action was transferred to this Court and assigned adversary proceeding number 10-4054.

9. On March 25, 2010, the Court converted the Debtor's bankruptcy case to a case under Chapter 7 of the Bankruptcy Code. On March 27, 2010, the Court appointed Linda Payne as the Chapter 7 trustee.

10. On April 23, 2010, the Chapter 7 trustee filed a cross-claim in this action. In the cross-claim, the Chapter 7 trustee asserts claims against Quorum Equities Group for breach of contract and/or or turnover of the sums the Chapter 7 trustee alleges are due to the Debtor under the contract.

11. The Chapter 7 trustee and the interveners oppose the remand of the State Court Action. The Chapter 7 trustee and the intervenors argue that the Chapter 7 trustee's turnover cross-claim is a "core" proceeding over which this Court has jurisdiction. *See* 28 U.S.C. § 157(b)(2)(E). The intervenors also argue that this Court has

“core” jurisdiction over the liquidation of their own claims against the Debtor. *See* 28 U.S.C. § 157(b)(2)(O).

DISCUSSION

The party invoking the removal jurisdiction of federal courts bears the burden of establishing federal jurisdiction over the state court suit. *See Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921-22 (5th Cir. 1997) (citing *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995)). The relevant federal removal statute, 28 U.S.C. § 1452(a), allows a party to remove a pending state proceeding to a district court “if such district court has jurisdiction of such claim or cause of action under [§] 1334 of this title.” Section 1334 of title 28 provides federal district courts with “original but not exclusive jurisdiction of all civil proceedings arising under title 11 [of the United States Code], or arising in or related to cases under title 11.” 28 U.S.C. § 1334.¹

Suits involving claims relating to the bankruptcy may, therefore, be removed to the bankruptcy court. *See Khan v. Hakim*, 201 Fed. Appx. 981, 982 (5th Cir. 2006). However, the existence of bankruptcy jurisdiction under § 1334(b) and § 1452 is not a mandate for a bankruptcy court to exercise it.

While Congress clearly intended to give the bankruptcy courts broad jurisdictional limits to allow for the efficient adjudication of types of matters affecting the bankruptcy estate, it also recognized that not all controversies should be determined by the bankruptcy court. Thus, Congress provided multiple avenues to allow a bankruptcy

¹ Section 157 of Title 28 provides that “[e]ach 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.” Pursuant to the “Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc” entered on August 6, 1984, the United States District Court for the Eastern District of Texas has provided that all cases under title 11 or proceedings arising under title 11 or arising in or related to cases under title 11 are referred to the United States Bankruptcy Court for the Eastern District of Texas for consideration and resolution.

court to prudently exercise its judgment by refraining from hearing those controversies which, though related to the bankruptcy case, should more properly be heard in another forum. These avenues for relief include petitions for mandatory abstention under 28 U.S.C. § 1334(c)(2) or for permissive abstention under 28 U.S.C. § 1334(c)(1). Section 1334 of title 28 defines both forms of abstention:

(c)(1) [Discretionary] Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding ... related to a case under title 11.

(2) [Mandatory] Upon timely motion of a party in a proceeding based upon a State law claim ..., related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

The plaintiffs have requested that this Court abstain from hearing this proceeding and remand it to State Court. The plaintiffs first argue that mandatory abstention applies pursuant to § 1334(c)(2). Under § 1334(c)(2), a bankruptcy court must abstain from hearing state law claims if: “(1) the claims have no independent basis for federal jurisdiction other than § 1334(b); (2) the claims are non-core; (3) an action has been commenced in state court; and (4) the action can be timely adjudicated in state court.” *Patterson v. Morris*, 337 B.R. 82, 92 (E.D. La. 2006) (citing *In re Rupp & Bowman Co.*, 109 F.3d 237, 239 (5th Cir. 1997)). In this case, however, the plaintiffs failed to establish that the State Court Action can be timely adjudicated in the State Court.

Next, the plaintiffs argue that permissive abstention applies. Under § 1334(c)(1), a bankruptcy court may, in its discretion, abstain from deciding either core or non-core proceedings if the interests of justice, comity, or respect for state law so require. *See In*

re Gober, 100 F.3d 1195, 1206 (5th Cir. 1996). In determining whether to abstain under § 1334(c)(1), most courts apply a non-exclusive list of factors:

1. The effect or lack thereof on the efficient administration of the estate if a court recommends abstention;
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 nonbankruptcy court;
5. The jurisdictional basis, if any, other than 28 U.S.C. § 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 the bankruptcy court;
9. The burden on 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;
12. The presence in the proceeding of nondebtor parties;
13. Comity; and
14. The possibility of prejudice to other parties in the action.

In re Brooks Mays Music Co., 363 B.R. 801, 817 (Bankr. N.D. Tex. 2007). *See also, e.g., Denton County Elec. Coop. v. Eldorado Ranch, Ltd. (In re Denton County Elec. Coop.)*, 281 B.R. 876, 881 (Bankr. N.D. Tex. 2002).

As argued by both parties in this case, many of the abstention or remand-related factors are neutral. However, the Court concludes that discretionary abstention is appropriate for the following reasons:

1. All of the disputed issues involve state law claims.
2. The State Court Action was pending pre-petition.

3. The State Court Action involves rights and obligations among many non-Debtor parties.²
4. There is no basis for jurisdiction other than 28 U.S.C. § 1334.
5. The Chapter 7 trustee's "turnover" action is not a "core" proceeding involving 11 U.S.C. § 542. Actions to collect disputed amounts based upon state law contract principles do not fall within the scope of turnover actions under this provision. *See, e.g., In re Satelco*, 58 B.R. 781 (Bankr. N.D. Tex. 1986); *In re Charter Co.*, 913 F.2d 1575, 1579 (11th Cir. 1990) ("Turnover proceedings are not to be used to liquidate disputed contract claims.").
6. The Debtor removed the State Court Action after the State Court issued a temporary restraining order and on the eve of a temporary injunction hearing. The Debtor's removal appears to be forum shopping.
7. Inasmuch as the automatic stay remains in place, the Debtor will not suffer any prejudice. The plaintiffs must obtain relief from the automatic stay before effectuating any settlement or taking any other action in the State Court Action that would affect the Debtor's estate. *See* 28 U.S.C. §§ 1334(c)(2) and 1334(d) (a decision to abstain under § 1334(c) "shall not be construed to limit applicability of the stay provided for by [section 362], as such section applies to an action affecting the property of the estate in bankruptcy"). *See also, e.g., Benedor Corp. v. Conejo Enterprises, Inc. (In re Conejo Enterprises, Inc.)*, 96 F.3d 346, 352 (9th Cir.1996) (holding that "a finding that mandatory

²The bankruptcy court's ability to enter final judgments as to issues between and amongst the non-Debtor entities in the State Court Action is questionable, because bankruptcy courts may not exercise supplemental jurisdiction. *See Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 570 (5th Cir. 1995).

abstention applies to the underlying state action does not preclude denial of relief from § 362's automatic stay”).

For the foregoing reasons, the Court finds and concludes that the plaintiffs have sustained their burden with respect to discretionary abstention. Accordingly, the Court finds and concludes that this matter should be remanded to the State Court for further proceedings.

IT IS THEREFORE ORDERED that the Court **ABSTAINS** and this adversary proceeding is hereby **REMANDED** to the 116th District Court for Dallas County, Texas.

IT IS FURTHER ORDERED that the stay imposed by 11 U.S.C. § 362(a) is not hereby modified or lifted.

Signed on 5/7/2010

Brenda T. Rhoades

SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE