

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

MID-CITY VENTURERS, a Tennessee
General Partnership,
Debtor.

CASE NO. 91-25369-WHB
Chapter 11

PAULINE COPEN,
Plaintiff,

v.

Adversary No. 91-0570

FIRST NEW YORK BANK FOR BUSINESS,
Defendant.

MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION TO
DISMISS OR ABSTAIN

In this Chapter 11 case, Pauline Copen, as plaintiff, filed an adversary proceeding on October 21, 1991, against First New York Bank For Business ("Bank"), which complaint seeks equitable subordination under 11 U.S.C. §510 of all claims of the Bank and of other non-defendant entities "to the allowed claims of all other creditors of this bankruptcy estate." Complaint, p. 8. The Bank filed a Motion to Dismiss on December 23, 1991, which motion in the alternative seeks abstention pursuant to 28 U.S.C. §1334(c)(1) or transfer of the adversary proceeding to the Southern District of New York. The Bank's motion also seeks sanctions in the form of attorney fees and costs, but the Court finds no basis for sanctions against the plaintiff or her attorneys, and in fact, sanctions were not argued when the Bank's motion was orally presented on January 28, 1992.

HISTORY OF CASE AND PROCEEDING

This voluntary Chapter 11 case was filed on May 15, 1991, with a single asset consisting of an office building known as the Mid-City Office Tower in Memphis, Tennessee. The debtor was lessor of a ground lease upon which the office building was constructed. The debtor moved to assume that lease, which motion

was opposed. Thereafter, the debtor, after the appointment of an examiner, succeeded in obtaining an order from this Court permitting the debtor to cure and assume the ground lease and to sell the office building to a new corporation, MICI, Inc., formed for the purpose of acquiring the building. Financing was obtained for that purchase; however, the financing depended upon several conditions, which included the compromise and payment of ground lease defaults and of mechanics liens. The purchase was further conditioned upon the satisfaction of the first mortgage held by Mutual Life Insurance Company of New York ("MONY"). First New York Bank For Business compromised its large second mortgage claim and agreed to accept \$300,000 cash at the closing and a \$500,000 non-interest bearing note and second leasehold deed of trust from MICI, Inc.

The Court's order approving the sale of the debtor's only asset was entered October 30, 1991, and that order retained jurisdiction for the Court to determine whether one tenant lease with Drs. Payne and Kinnard could be assumed. The reason for the Court's retention of jurisdiction as to this tenant lease was that a hearing on the lease assumption could not be held prior to the necessary sale closing date, and was it necessary for the Court to determine if that tenant lease was in default and could be assumed. All necessary parties consented to the retention of jurisdiction, and subsequently, the debtor, MICI, and the doctors have cooperated in efforts to cure all defaults and to make progress toward formal assumption.

The October 30, 1991, order also noted that Mrs. Copen had filed her adversary proceeding but that she only made a claim against any interest of the Bank in the proceeds of the sale. In other words, Mrs. Copen, who had originally filed an objection to the sale, made no effort to block the sale of the debtor's only asset, and the October 30, 1991, order does not mention retention of jurisdiction by the Court over this adversary proceeding. The order does provide that at the closing, pursuant to an agreement between Mrs. Copen and the Bank, the \$300,000 cash and the \$500,000 note would be escrowed, pending further order of this Court.

The closing of the sale did occur, and the case now is in limbo, pending final resolution of the issue involving the assumption of the doctors' tenant lease and the resolution of this adversary proceeding. On January 28, 1992, at the oral hearing on the Bank's motion, counsel for the debtor appeared and advised the

Court that, except for administrative claims, and possibly Mrs. Copen, there were no remaining creditors of the debtor. All other creditors were satisfied out of the sale proceeds. The Bank, of course, compromised its claim against the debtor and now holds cash in escrow and a note, not from the debtor, but from MICI, Inc., the purchaser.

THE COMPLAINT

Mrs. Copen's complaint names only the Bank as a defendant. However, the complaint names as co-conspirators with the Bank, Martin C. Barell, an attorney in New York; Donald D. Shank, an attorney in New York; Steven R. Frankel, an attorney in New York; and Golenbock & Barell, a New York law firm. The complaint alleges that the co-conspirators, in the fall of 1987, improperly obtained a loan from Peter Copen, the son of this plaintiff. Mrs. Copen filed a proof of claim in this case on September 16, 1991, in the amount of \$1,969,568.75, and she asserts that she is the assignee of her son's claim. As stated earlier, this complaint prays that the claims of the Bank, Barell, Frankel, Shack, and Golenbock & Barell be equitably subordinated to the claims of all other creditors, due to the alleged inequitable and fraudulent conduct of these alleged co-conspirators.

DISCUSSION

There appears to be no dispute about the fact that Mrs. Copen is the only potential creditor of this debtor, other than potential administrative claimants. The Court is not aware of any unpaid administrative claims other than partial fees for the debtor's attorney and for the examiner. The debtor's attorney, at the hearing on the Bank's motion, supported the Bank's motion. There have been no objections yet to Mrs. Copen's filed claim; although, such an objection could still be filed. The debtor has no incentive to object to the claim because, for all practical purposes, the debtor has been liquidated. The sale of the debtor's only asset and the satisfaction of all of the creditors, except for Mrs. Copen's claim, leaves the debtor in the position of having no real stake in the allowance or disallowance of Mrs. Copen's claim. The Bank is no longer a creditor of this debtor as a result of the Bank's compromise and release of its claim against the debtor. The Bank is now a creditor of MICI, Inc., the purchaser of the debtor's asset. Nevertheless, the Bank

questions the validity of Mrs. Copen's claim.

Section 510(c) permits equitable subordination of an "allowed claim" in whole or in part to other "allowed claim[s]" or "allowed interest[s]." The Court recognizes that allowance or disallowance of claims is ordinarily a core proceeding. 28 U.S.C. §157(b)(2)(B). And, the Court recognizes that proceedings "arising under title 11" are routinely core. 28 U.S.C. §157(b)(1). At first blush, therefore, this complaint would appear to be core. However, this Court has earlier recognized that what may start out to be core may cease to be core when the outcome of the proceeding no longer has any effect on the bankruptcy estate or case. See, e.g., In re G. Weeks Securities, Inc., 89 B.R. 697 (Bankr. W.D. Tenn. 1988). As this Court noted in Weeks, a proceeding is core if it "invokes substantive rights provided by Title 11 ... or if it is a proceeding which by its nature could arise only in the context of a bankruptcy case." Id. at 705. Certainly, §510(c) is a part of title 11, but the more important question is whether Mrs. Copen's complaint could only arise in the context of a bankruptcy case. In that regard, this Court concludes that Mrs. Copen's complaint is not core, and the Court's conclusion is based upon the realities of this particular case. In the context of this case, Mrs. Copen's complaint is neither a core or otherwise related proceeding, because its outcome will have no conceivable effect on this bankruptcy estate or case. See In re Salem Mortgage Co., 783 F.2d 626, 634 (6th Cir. 1986).

These conclusions are borne out by the undisputed facts of this case and proceeding. First, as noted, Mrs. Copen is now the only non-administrative creditor of this estate. There are no assets left in this estate from which to pay either Mrs. Copen or administrative claimants. All of the debtor's assets have been sold by this Court's order, and the Court did not address retention of jurisdiction over this adversary proceeding in its order approving the sale. The Court merely ordered the proceeds payable to the Bank to be escrowed pending further order of this Court. Assuming that this Court tried this complaint and found in favor of Mrs. Copen, there are no other creditors, other than Mrs. Copen and possible administrative claims, to which the claims of the Bank may be equitably subordinated. In fact, the Bank has no allowable claim against this estate because the Bank compromised and released its claim against this debtor. The Bank now has a claim against MICI, Inc. Since §510(c) speaks of subordination of "allowed claim[s]," that section would no longer seem

applicable. Moreover, the trial of the complaint would involve a potential attack by the Bank, which may no longer have standing in this case, on the allowance of Mrs. Copen's claim.

This distorted approach to §510(c) seems meaningless in view of the reality that the dispute presented in this complaint is now a two party dispute between Mrs. Copen, a resident of New York, and the Bank, a New York institution. In the context of this case, a victory for Mrs. Copen in this adversary proceeding would amount to a judgment in her favor against the Bank. Why then should this Court accept subject matter jurisdiction over this proceeding?

The gravamen of Mrs. Copen's argument at the hearing on the Bank's motion was that this Court could hear the proceeding much quicker than a suit could be heard either in New York state or federal courts. Counsel for the Bank disputed this, at least insofar as trial in the New York federal courts. Moreover, this Court, at the hearing, pointed out to counsel for the parties that this Court's calendar is filled past the brim. For example, the Court has before it The Julien Company, case number 90-20283B, the largest single bankruptcy case filed in this district, and its related case Julien J. Hohenberg, case number 91-20777B, both of which cases have numerous complex adversary proceedings. In those two cases, the Court recently reported to the Sixth Circuit a 5700% increase in matters under advisement longer than sixty days. In addition to those cases and proceedings, the Court has its regular large draw of cases and proceedings in the Western District, and the Court has been assigned by the Sixth Circuit to several cases in the Middle District of Tennessee. Three of the Middle District cases, Washington Manufacturing Co., et al., case numbers 388-01467, 388-01468, and 388-01469, represent the largest filing in the Middle District as of 1988. In the Washington Manufacturing cases, the Court is beginning a three week trial on a \$50+ million fraudulent conveyance/leveraged buyout complaint, as to one defendant, on March 2, 1992, and there are 90+ remaining defendants to be tried in that adversary proceeding alone. This explanation is not meant to justify this Court refusing to accept jurisdiction over this or any other adversary proceeding or motion for which jurisdiction is proper in this Court. Rather, the Court is merely putting into perspective that this Court's calendar will not justify giving this proceeding any higher priority than would another court in New York give the complaint.

The Bank effectively argues that all but one of the witnesses are residents of New York and that all of the parties essential to this litigation are residents of New York. Moreover, Mrs. Copen already has pending in the United States District Court for the Southern District of New York a complaint against other alleged co-conspirators. It is true that Mrs. Copen has not yet sued the Bank in that pending action nor is any suit against the Bank pending in any other court. However, there has been no explanation for why Mrs. Copen did not sue the Bank in New York other than her desire to get a quick decision out of this Court. While the Court is sympathetic with Mrs. Copen's desire for speedy disposition of her suit, that alone is not a basis for this Court accepting or retaining jurisdiction over this particular adversary proceeding. If Mrs. Copen is so concerned about speed, the Court wonders why Mrs. Copen did not sue the Bank earlier in New York. More importantly, if this Court accepted subject matter jurisdiction merely because of an allegation that a complaint could be tried quicker here than in some other court, this Court would have accepted responsibility for another court's alleged but unproven backlog. Mrs. Copen must accept responsibility for waiting until now to sue this Bank when her suit against other alleged co-conspirators has been pending in New York since December, 1990.

The Bank moved, as one alternative, to transfer this proceeding to the United States District Court for the Southern District of New York. This Court sees no justification for such a transfer. The Court has concluded that this is a two party suit that will not affect this bankruptcy estate; therefore, there is no reason to burden the district or bankruptcy courts in New York with a transfer based upon alleged bankruptcy core or otherwise related jurisdiction. The Bank moved, as another alternative, for dismissal of this complaint on various grounds. However, this Court does not find dismissal to be the appropriate remedy because the validity of Mrs. Copen's complaint is not yet fully developed. Rather, this Court concludes that the appropriate remedy in response to the Bank's motion is for this Court to abstain under its discretionary abstention authority found in 28 U.S.C. §1334(c)(1). In the interest of justice to the parties and necessary witnesses, and in light of the status of this bankruptcy case, as previously discussed, this Court finds it appropriate to abstain from hearing this litigation between Mrs. Copen and the Bank. The abstention is

without prejudice to Mrs. Copen bringing suit against the Bank in an appropriate forum in New York. It is true that no action is presently pending between this plaintiff and this defendant either in state or federal court in New York, but there has been no allegation that Mrs. Copen is barred from suing the Bank there.

Mrs. Copen's counsel has argued that this Court should not abstain because this is a core proceeding. The Court has discussed its conclusion that the proceeding is no longer core. However, assuming that the proceeding were core or otherwise related, abstention is not inappropriate under the peculiar facts and circumstances existing here. As the Second Circuit has recognized, abstention in a core proceeding may be appropriate under 28 U.S.C. §1334(c)(1). In re Ben Cooper, Inc., 924 F.2d 36, 38 (2d Cir. 1991), cert. denied, 111 S.Ct. 2041(1991). A district court has recently agreed that discretionary abstention is an appropriate option for the bankruptcy court to consider in core proceedings. Williams v. Stefan, 133 B.R. 119, 122-23 (N.D. Ill. 1991). The Williams Court noted that abstention is the "exception rather than the rule for federal courts." Id. at 123. This Court agrees. But, this Court also agrees with the Williams Court in its analysis of factors which the bankruptcy court may consider in a discretionary abstention determination:

...the effect of abstention on the administration of the estate;
the extent to which state law issues predominate over bankruptcy
law issues; the difficulty or uncertain nature of the state law
issues involved; the degree of relatedness to the bankruptcy
proceeding; and the likelihood that forum shopping may have been
practiced by one of the parties.

Id. (citations omitted).

Application of those factors to this proceeding weighs in favor of abstention, even if this is a core proceeding. This estate is effectively fully administered except for the pending tenant lease assumption issue (which is so far being resolved by cooperation and consent of the pertinent parties) and this adversary proceeding. Abstention will permit this bankruptcy estate to be closed in the near future. The Court has concluded that this is a two party dispute, with no effect on the bankruptcy estate. Furthermore, §510(c) is based upon equity rather than upon bankruptcy statutory elements. The allegations against the Bank concern events that took place in New York; therefore, New York equity principles will control rather than bankruptcy law. This Court certainly has no expertise in New York equity law. And, as the Court has previously

discussed, the primary argument put forward at the hearing by Mrs. Copen's counsel was that the litigation could be resolved quicker and cheaper here than in New York. That certainly sounds like forum shopping.

The Court does not mean to be critical of Mrs. Copen nor her counsel. Rather, the Court is simply persuaded that the outcome of this adversary proceeding will not affect this bankruptcy estate. There is no justification, other than Mrs. Copen's legitimate desire to obtain a speedy resolution, for this Court accepting subject matter jurisdiction over this proceeding.

CONCLUSION

Based upon the foregoing discussion and conclusions, this Court grants the motion of New York Bank for Business to abstain from hearing this adversary proceeding. 11 U.S.C. §1334(c)(1). Federal Rule of Bankruptcy Procedure 5011(b) has been amended to delete the restriction which limited bankruptcy judges to making recommendations on abstention to the district court. Rather, this Court may now enter final orders on abstention, subject to the normal appeal right under 28 U.S.C. §158. This change in the rule is consistent with §309(b) of the Judicial Improvements Act of 1990, which amended §1334(c) so that it allows an appeal to the district court of a bankruptcy court's final order on abstention.

IT IS THEREFORE ORDERED, that

1. First New York Bank For Business's motion to dismiss the complaint is denied;
2. First New York Bank For Business's motion for sanctions is denied;
3. First New York Bank For Business's motion for transfer of this proceeding to the Southern District of New York is denied;
4. First New York Bank For Business's motion for discretionary abstention is granted; pursuant to 11 U.S.C. §1334(c)(1), without prejudice to Mrs. Copen filing suit against the Bank in an appropriate forum in New York or elsewhere, and
5. In order to protect the plaintiff and provide an opportunity for her to file suit in an appropriate forum, the escrowed \$300,000 cash and \$500,000 note shall remain in escrow for sixty (60) days from entry of this order. This is intended to allow Mrs. Copen adequate time to file suit against the Bank in an

appropriate forum and to ask that court for further extraordinary relief as to the escrowed cash and note. Should no order as to the escrowed cash and note be obtained from another court within that sixty days, the escrow shall be released to the Bank. Such a release of the escrow is not intended by this Court to preclude Mrs. Copen pursuing litigation against the Bank.

IT IS SO ORDERED, this 20th day of February, 1992.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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