

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION**

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**IN RE**

**Sam McLemore and  
Ann McLemore dba  
McLemore Development Co.**

**Case No. 02-13652**

**Chapter 11**

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**MEMORANDUM OPINION AND ORDER RE  
MOTION FILED BY DEBTOR TO LIFT THE AUTOMATIC STAY and  
OBJECTION TO DEBTOR'S MOTION TO LIFT STAY filed by  
DR. STEPHEN JOHNSTON and DR. GINA JOHNSTON**

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The Johnstons purchased a home from the debtors in June 1999 for \$366,000.00. Shortly thereafter, the Johnstons discovered that the property was subject to severe flooding. Believing that the McLemores knew about this problem at the time of the sale, the Johnstons filed a complaint against the debtors in the Circuit Court for Madison County, Tennessee on May 7, 2002.<sup>1</sup> Chuck Miller, Golden Key Realty, Robert Browning, Dale Cartlett and A to Z Home Buyers Inspection Service were also named as defendants. The Johnstons stated in the complaint that all of the defendants were residents of Jackson, Tennessee.

According to the circuit court complaint, the Johnstons alleged that in failing to inform them of the serious flooding problems the McLemores were liable for negligent/intentional misrepresentation, breach of contract, breach of warranty and violation of the Tennessee Consumer Protection Act. The Johnstons asked for actual compensatory damages, treble damages pursuant to the Tennessee Consumer Protection Act, and punitive damages. The Johnstons also asked for a trial by jury.

The McLemores filed for chapter 11 bankruptcy relief on August 14, 2002. The Johnstons filed a claim in the case on November 15, 2002, in the amount of \$366,000.00. On December 10, 2002, the Johnstons filed an adversary proceeding against the debtors in which they allege that the debtors' failure to disclose the severe flooding problem amounted to a willful and malicious injury which is non-dischargeable under 11 U.S.C. § 523(a)(6). According to the adversary complaint, the Johnstons asked the Court for a non-dischargeable judgment in the amount of \$366,000.00 plus interest from June 1999. The debtors filed an answer to the complaint on January 8, 2003.

On February 28, 2003, the debtors filed a Motion to Lift the Automatic Stay to proceed with the Madison County Circuit Court lawsuit. The Johnstons filed an objection to the debtors' motion on March

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<sup>1</sup>An amended complaint was filed on June 7, 2002.

28, 2003. The Court conducted a hearing on the debtors' Motion to Lift the Automatic Stay and the Johnstons' objection thereto on April 2, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2)(A), this is a core proceeding. The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

The decision of whether or not to lift the automatic stay in this case hinges on the issue of abstention. The abstention doctrine is set forth at 28 U.S.C. § 1334(c). There are two types of abstention: permissive and mandatory. If, "in the interest of justice, or in the interest of comity with State courts or respect for State law," a bankruptcy court wishes to abstain from hearing a core or non-core proceeding, it may do so and decline to exercise its jurisdiction. 11 U.S.C. § 1334(c)(1). A court may raise the issue of permissive abstention sua sponte. *In re Best Reception Systems, Inc.*, 220 B.R. 932, 952 (Bankr. E.D. Tenn. 1998). If, on the other hand, (i) a party makes a timely motion; (ii) the proceeding is based on a state law claim or cause of action; (iii) the proceeding is a non-core proceeding; (iv) an action on the claim or cause of action could not have been brought in federal court absent the bankruptcy case; (v) the action is commenced in the state court; and (vi) the action can be timely adjudicated in the state court, then the bankruptcy court must abstain from exercising jurisdiction over a particular proceeding. 11 U.S.C. § 1334(c)(2).

There is no disputing that the adversary proceeding filed by the Johnstons is a core proceeding. 28 U.S.C. § 157(b)(2)(I). As a result, the Court may abstain from hearing the matter only if it finds that permissive abstention is proper. The decision to abstain is within the discretion of the bankruptcy judge. *Baker v. Baker (In re Baker)*, 195 B.R. 883, 884 (Bankr. S.D. Ohio 1996). In considering whether or not permissive abstention is appropriate in a given matter, courts generally look to the following 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 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.A. § 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 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.

*Best Reception Systems, Inc.*, 220 B.R. at 953 (citations omitted).

In examining the case at bar, there are several factors which lead the Court to conclude that abstention is appropriate in this instance. First, there are five other parties named as defendants in the Johnstons' state court complaint. Secondly, the circuit court lawsuit was filed three months prior to the filing of the bankruptcy case. Thirdly, the debtors' liability is not a federal question nor is there any basis for diversity jurisdiction so there is no independent basis for federal jurisdiction absent the chapter 11 case. Fourthly, the Johnstons have made a jury demand in their circuit court complaint and although bankruptcy courts have the authority to conduct jury trials, surely the Madison County Circuit Court is better suited for a jury trial on a state law cause of action. Finally, and most importantly, while it is true that only a bankruptcy court may determine the dischargeability of a § 523(a)(6) claim,<sup>2</sup> the initial determination of liability and damages is not within the exclusive jurisdiction of the bankruptcy court:

“Where a claim asserted against an estate involves legal issues in which state law predominates, a claim can be litigated in state court to the point of judgment, with enforcement of the judgment stayed until further order of the bankruptcy court.”

*Best Reception Systems, Inc.*, 220 B.R. at 955 (quoting *Republic Reader's Serv., Inc., v. Magazine Serv. Bureau, Inc.*, (*In re Republic Reader's Serv., Inc.*), 81 B.R. 422, 426 (Bankr. S.D. Tex. 1987); *see also*, *Moore v. Pagano (In re Pagano)*, 85 B.R. 56, 60 (Bankr. S.D. Ohio 1988) (“This court has exclusive jurisdiction to determine the dischargeability of the debt in this case. However, the question of the damages which will comprise the amount of debt is another matter.”). As a result of these factors, the Court will enter an order lifting the automatic stay to allow the state court litigation to proceed to determine liability and damages; however, enforcement of any judgment against the debtors will be stayed until further order of this Court.

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<sup>2</sup>*See*, 11 U.S.C. § 523(c)(1).

**ORDER**

It is therefore **ORDERED**:

1. That the Debtors' Motion to Lift the Automatic Stay is **GRANTED IN PART** to permit the litigation to proceed in the Circuit Court for Madison County, Tennessee, to the point of determining liability and damages;

2. That the Johnston's Objection to the Debtors' Motion to Lift the Automatic Stay is **OVERRULED IN PART**;

3. That the Debtors' Motion to Lift the Automatic Stay is **DENIED IN PART** insofar as enforcement of any judgment obtained against the debtor will be stayed until further order of this Court.

**IT IS SO ORDERED,**

**BY THE COURT,**

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**G. HARVEY BOSWELL**  
**United States Bankruptcy Judge**

**Date: April 16, 2003**