

Dated: March 21, 2007
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

NETWORK CABLING & TECHNOLOGIES, LLC,
Debtor.

Case No. 04-24334-L
Chapter 7

American States Insurance Co.,
Plaintiff,

v.
Network Cabling & Technologies, LLC, and
Property Insurance Association of Louisiana,
Defendants.

Adversary No. 06-00018

MEMORANDUM OPINION AND ORDER
ON MOTION TO DISMISS OR ABSTAIN
FROM HEARING ADVERSARY PROCEEDING

This adversary proceeding was commenced by American States Insurance Company's complaint for a declaratory judgment as to the existence, validity, and scope of insurance coverage under pre-petition liability policies issued to the Defendant, chapter 7 Debtor, Network Cabling & Technologies, LLC. Presently before the court is the responsive motion of the Debtor's judgment creditor and other Defendant, Property Insurance Association of Louisiana, for the court to dismiss or abstain from adjudicating this proceeding. If the motion to dismiss or abstain is denied, the court

is asked to resolve the motion of American States Insurance Company for a default judgment against the Debtor, and the motion of Property Insurance Association of Louisiana to intervene in this proceeding on the Debtor's behalf. For the reasons that follow, the proceeding will be dismissed for lack of jurisdiction.

FACTS

Network Cabling & Technologies, LLC ("Debtor" or "Network"), filed its petition for chapter 7 relief on March 18, 2004. Prior to that time, on February 5, 2004, the Property Insurance Association of Louisiana ("PIAL") obtained a judgment in Louisiana state court in the amount of \$389,000 against the Debtor for damage to PIAL's computer databases and harm to its business operations. The damage resulted from Network's failure to perform as agreed to convert PIAL's old mainframe database to a Microsoft SQL 7.0 network database. American States Insurance Company ("Plaintiff" or "American States") was Network's liability insurance carrier. On August 3, 2004, PIAL was granted relief from the automatic stay by this court to pursue recovery of its judgment from American States. Thereafter, on October 30, 2004, the case trustee filed a "Trustee's Report of No Assets" in Network's chapter 7 case.

Meanwhile, PIAL filed a "Petition and Order to Make Judgment Executory and for Garnishment Under Writ of Fieri Facias" against American States in the Louisiana state court on September 27, 2004. American States was cited as garnishee and served with a writ of fieri facias and interrogatories on October 13, 2004. In answering the interrogatories, American States admitted having had policies of liability insurance in force insuring Network after March 2000, but asserted there was no coverage for the elements of damage contained in the judgment. Thus, it claimed that, to the best of its knowledge, American States was not obligated to Network nor had control over any property owed or belonging to Network. American States also stated that it had received no notice, prior to receipt of the writ and interrogatories, of PIAL's action against Network which constitutes a breach of the contract between the parties. The answers were provided by American States'

attorney whose signature thereon was acknowledged by a notary public on April 9, 2005. The answered interrogatories were mailed to PIAL's attorney in New Orleans, Louisiana, on April 11, 2005. There is no evidence in the record of any additional activity in either the Louisiana proceeding or Network's chapter 7 case until December 20, 2005, when a consent order was entered that granted American States' motion for relief from the stay to commence this adversary proceeding.

In January 2006, American States filed its complaint and amended complaint for declaratory judgment as to the scope of the insurance coverage provided by the policies issued to Network. According to the complaint, American States' policies did not provide coverage for the liability of Network to PIAL or, in the alternative, any claims of PIAL are expressly excluded by exclusions in the policies or the actions or inactions of Network, including failing to notify American States of the litigation with PIAL, constitute breach of the policy conditions. Network has not filed an answer or other response to the complaint. Consequently, on July 11, 2006, American States filed a Motion for Default Judgment against Network that is still pending. The motion for default judgment is supported by the affidavit of Mr. Herrin, counsel for American States, wherein he states that he obtained service of the complaint and summons in this adversary proceeding on Network by personal service on its registered agent for service of process, Mr. Dennis Hobbs, on February 1, 2006. In response to the complaint, PIAL filed its motion and amended motion to dismiss the complaint or for abstention asserting that American States' claim is not a core proceeding or otherwise related but is a question of state contract law. Additionally, the facts and legal issues raised in the complaint are the same as or are related to those raised in the prior state court action and, so, this court should dismiss the adversary proceeding because it lacks subject matter jurisdiction or, in the alternative, the court should enter an order of abstention pursuant to section 1334(c) of Title 28 of the United States Code.

The Plaintiff filed an objection to the motion to dismiss or abstain and a memorandum in support of same. In its memorandum, American States argues that the proceeding should not be

dismissed because the court has core or related to jurisdiction under section 1334(b) of title 28 given that determination of whether there is coverage affects administration of the estate. It further points out that the Debtor itself has failed to respond to the complaint and a motion for default judgment has been filed against the Debtor. According to American States, entry of a judgment in its favor would mean that the Debtor has no insurance coverage for payment of PIAL's judgment claim and would clearly impact administration of the estate.

American States additionally urges that abstention is not proper because all elements of abstention are not met here. Specifically absent is an action in a state forum of appropriate jurisdiction in which the coverage issues raised here can be timely adjudicated. It is American States' position that the action in Louisiana is merely a collection case and does not address the coverage issues raised in the complaints for declaratory judgment.

Finally, the Plaintiff asserts that there is federal diversity jurisdiction over this dispute absent the bankruptcy case. This is because the insurance contract in dispute is a Tennessee policy issued to the Debtor, a Tennessee limited liability corporation, by American States, whose parent company is a Delaware corporation, and whose domicile is in Washington. PIAL, the judgment creditor defendant claiming rights under the contract, is a Louisiana association. Additionally, there is more than \$75,000 in controversy. Accordingly, American States proposes that, if not heard by this court, its complaint for declaratory judgment could be heard by the United States District Court for the Western District of Tennessee either by this court's issuing an order to transfer venue or to withdraw the reference.

In its amended motion, PIAL argues that abstention is appropriate and that no diversity jurisdiction exists because it is a non-profit association created by Louisiana statute. PIAL contends that all licensed insurance carriers authorized to write insurance in Louisiana are required to belong to PIAL. Because PIAL is a non-profit "association" it has no legal identity separate from its members and its citizenship for purposes of diversity jurisdiction is the citizenship of each of its members. It has members who are "citizens" of Plaintiff's domicile state and so there is no complete

diversity.¹ PIAL again asserts that the matter is not core but rather is a question of state contract law interpretation that is the subject of state court litigation capable of timely adjudication. PIAL points out that the Debtor has not answered the complaint and since its chapter 7 is a no asset case, it will not be impacted by interpretation of the insurance contract.

Oral arguments on PIAL's motion to dismiss or abstain and American States' objections thereto were heard on October 12, 2006. At that time, the court noted that entry of the default judgment against Network in this proceeding would cut off any rights PIAL might have to recover under the policy issued to Network. Counsel for American States and PIAL, having already provided legal memoranda on the issue of whether the Court may have core or related to jurisdiction over this adversary proceeding, were directed to brief the issue of whether the matters pending in the Louisiana state court constitute a proper proceeding and forum for timely adjudication of the insurance policy coverage issues.

Simultaneous briefs were filed on January 25, 2007, and a reply brief was filed by American States on February 16, 2007. In support of its motion to dismiss or abstain, PIAL continues to assert the proceeding is not core nor related. It further contends that the Louisiana proceeding can provide for the timely adjudication of the insurance policy coverage issues because it has now filed, in that proceeding, a motion to traverse answers to interrogatories. In that motion, PIAL contests American States' answers to the interrogatories to the extent that they deny or disavow coverage under the policies issued to Network. Further, according to PIAL, that motion is set for hearing in the Louisiana state court which demonstrates that the state court matter is still pending. In support of that assertion, PIAL attached to its memorandum a copy of its motion to traverse and memorandum in support filed in the Louisiana court, in which it seeks an order commanding American States to pay the amount of the judgment, interest and costs entered against Network. The memorandum

¹ PIAL also attached to its memorandum the affidavit of John W. Waters, Jr., attorney for PIAL, and a copy of the Louisiana Department of Insurance registration form which shows that American States' domicile state is Indiana rather than Washington. Mr. Waters' affidavit states that PIAL has members in Indiana.

advances law and argument supporting PIAL's position that the judgment is covered under the policies issued by American States, thereby posing the question of American States' liability to the Louisiana state court. PIAL also asks to be allowed to intervene, pursuant to Federal Rule of Bankruptcy Procedure 7024, on Network's behalf as the real party in interest in this adversary proceeding.

American States argues that the motion to traverse is a summary proceeding that should have been filed within fifteen days after service upon PIAL of its answers to interrogatories under Louisiana law. Assuming, however, that the lack of timeliness does not moot the motion to traverse, American States asserts that it is an improper proceeding for resolving the coverage dispute at issue. It contends that this coverage contest is analogous to cases involving questions of the validity of a garnishee's title to property in his possession which Louisiana case law dictates may only be resolved by a direct suit brought to test the sufficiency of the title.

American States further argues that PIAL's motion to intervene is improper as it is already a party to the lawsuit and urges that its motion for a default judgment against Network should be entered. The motion to dismiss or abstain is now ripe for resolution.

ISSUES

At issue is whether the court has subject matter jurisdiction over the controversy and, if so, whether the proceeding is subject to mandatory abstention by this court or whether the court should exercise discretionary abstention. If jurisdiction is appropriate and the proceeding retained, the court is further asked to dispose of American States's motion for a default judgment against the Debtor/Defendant, Network, and PIAL's motion to intervene in this proceeding on the Debtor's behalf.

DISCUSSION

"[F]ederal courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them."

Mich. Emp. Sec. Comm. v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co., Inc.), 930 F.2d 1132, 1137 (6th Cir. 1991). “The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute. Title 28 U.S.C. § 1334(b) provides that ‘the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.’” *Celotex Corp. v. Edwards*, 514 U.S. 300, 307, 115 S. Ct. 1493, 1498 (1995). The district courts are authorized to refer all such proceedings to the bankruptcy judges for the district under section 157(a) of Title 28 of the United States Code. *Id.* “Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, . . . , and may enter appropriate orders and judgments, subject to review under section 158 of . . . title [28].” 28 U.S.C. § 157(b)(1). A bankruptcy judge may also hear a proceeding that is not a core proceeding but is otherwise related to a case under title 11 and, with the consent of the parties to the proceeding, determine and enter appropriate orders subject to review of the district court under section 158. Bankruptcy judges are charged with determining whether a proceeding is a core proceeding or otherwise related to a case under title 11 on their own motion or that of a party. A determination that a proceeding is not core is not to be made solely on the basis that its resolution may be affected by state law. 28 U.S.C. § 157(b)(3).

As set forth above, “core proceedings” are those proceedings that arise under title 11 or in a case under title 11. 28 U.S.C. § 157(b)(1). A nonexclusive list of sixteen core proceedings is provided at section 157(b)(2) of title 28 and includes, “matters concerning administration of the estate;” In essence, “[c]ore proceedings are actions by or against the debtor that arise under the [Bankruptcy] Code in the strong sense that the Code itself is the source of the claimant’s right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law, normally state law.” *In re U.S. Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997). An example is a preference action. *Id.* The Bankruptcy Code is not the source of the declaratory judgment remedy asserted by American States in this proceeding. Neither is the Code the source

of any defense that the Debtor might have thereto. Accordingly, the proceeding here is not a core proceeding that arose under title 11 or in a case under title 11.

Congress has not defined proceedings that are “related to” cases under title 11. *Celotex Corp.*, 504 U.S. at 307. The *Celotex* court, agreeing with the Third Circuit Court of Appeals, opined that Congress intended the “related to” language to give the bankruptcy courts comprehensive jurisdiction so that “they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,” but cautioned that the “‘related to’ jurisdiction cannot be limitless.” *Id.*, citing, *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3th Cir. 1984). As such, “bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.” *Id.* at 308, n. 6.

Not surprisingly, the Sixth Circuit Court of Appeals has adopted the following test for determining the existence of “related to” jurisdiction that was first espoused by the *Pacor* court:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy....* Thus, the proceeding need not necessarily be against the debtor or against the debtor’s property. An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” (emphasis in original; citations omitted).

Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984), quoted in *Robinson v. Mich. Cons. Gas Co., Inc.*, 918 F.2d 579, 583 (6th Cir. 1990). The Sixth Circuit adds the caveat that an extremely tenuous connection to the bankruptcy estate will not satisfy the jurisdictional requirement. *Id.*, at 584.

The outcome of this proceeding will be a judicial determination of whether PIAL may recover some or all of its judgment claim from American States under the provisions of the pre-petition liability insurance policies American States issued to Network. While it is true that PIAL obtained a pre-petition judgment against the Debtor, the chapter 7 trustee has determined that the estate includes no assets or funds available for distribution to creditors. A finding that the American

States' policies do not cover PIAL's damages would not diminish any estate assets otherwise available for distribution. Similarly, a determination that the damages suffered by PIAL are covered by the insurance policies would inure solely to the benefit of PIAL. Network is asserting no claim or defense on its behalf against either party. It has no stake in the outcome of the controversy. The litigation will have "no direct effect on the debtor or the estate and [will] in no way [implicate] the rehabilitation of the debtor or the administration of the debtor's estate," because no rehabilitation of the Debtor nor administration of the estate is anticipated. *See Wolverine*, 930 F.2d at 1139. The outcome of this proceeding can have no conceivable effect upon the Debtor or upon administration of the Debtor's estate and, thus, cannot be said to be "related" thereto.

Inasmuch as the proceeding is not core or related to a case under title 11, this court lacks subject matter jurisdiction. Consequently, the court is constrained to dismiss the proceeding; discretionary or mandatory abstention need not be considered.

The court is mindful that American States has asked, in the event it finds jurisdiction lacking, that the court order withdrawal of the reference or transfer of venue to the United States District Court for the Western District of Tennessee. Subject matter jurisdiction does not determine venue. A transfer of venue is not an appropriate vehicle for transfer of a proceeding from the bankruptcy court to the district court in the same judicial district upon a determination that the proceeding is not core or related to a case under title 11. *See* 28 U.S.C. § 1412. Rather, in the absence of core or related to jurisdiction, withdrawal of the reference may be appropriate to transfer the proceeding to the district court if there are independent, non-bankruptcy grounds for federal jurisdiction over the proceeding. 28 U. S.C. § 157(d). Whether or not withdrawal of the reference is warranted, however, is a matter for determination by the district court. *Id.*

American States is not left without a remedy, however. The court has previously granted relief from the automatic stay to permit the pending litigation in Louisiana to go forward.

CONCLUSION

From the foregoing, it is clear that the issues presented by this adversary proceeding involve contract interpretation and the scope of the insurance coverage, if any, provided under the Debtor's pre-petition policies. These are non-core issues of state law. Given the Debtor's posture as a no asset, chapter 7 debtor, the presence or absence of coverage under the policies will have no effect upon the Debtor or the bankruptcy estate. The proceeding is, therefore, not "related to" the Debtor's case under title 11. Accordingly, the court lacks subject matter jurisdiction over the proceeding.

Therefore, the motion to dismiss filed by PIAL is **GRANTED** with prejudice; and the objection thereto filed by American States is **OVERRULED**. It is not necessary for the court to address American States' motion for default judgment filed against the Debtor nor PIAL's motion to intervene on behalf of the Debtor as both of these motions are **MOOT**.

cc: Debtor
Attorney for Debtor
Plaintiff
Attorney for Plaintiff
Defendants
Attorney(s) for Defendants