

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:

WASHINGTON MANUFACTURING
COMPANY, ET AL.,

Debtors.

TIMOTHY F. FINLEY,

Plaintiff,

v.

SIKES & KOHN'S COUNTRY MALL,

Defendant.

Nos. 388-01467-WHB
388-01468
388-01469

Chapter 11
Jointly Administered
Judge William H. Brown

Adversary Proceeding
No. 390-0129A

**MEMORANDUM OPINION AND ORDER ON
DEFENDANT'S MOTION TO DISMISS COMPLAINT
OR TRANSFER VENUE**

This cause is before the Court on the Motion of Sikes & Kohn's Country Mall ("defendant") to dismiss the preferential transfer complaint filed against it by Timothy F. Finley ("Trustee") the Trustee for these Chapter 11 bankruptcy cases, or to transfer venue of this action. At issue in this core proceeding¹ is whether the Trustee's complaint is subject to dismissal because service was improper or the complaint fails to state a proper claim. Additionally at issue is whether the action against this defendant may be severed and venue changed.

FACTUAL SUMMARY

¹ See, 28 U.S.C. §157(b)(2)(A), (F) and (O).

The record reflects that the above named debtors filed voluntary petitions for Chapter 11 relief with this Court on March 1, 1988. The cases were consolidated for joint administration purposes and Timothy F. Finley was appointed Chapter 11 Trustee on March 18, 1988. In this capacity, the Trustee filed a complaint to recover preferences on March 17, 1990 naming, inter alia, the defendant herein as the recipient of a preferential transfer of "at least \$8,242.85." (Complaint, ¶17)

The defendant filed its motion and amended motion to dismiss in response to the complaint asserting that service of the complaint was improper; the complaint failed to state a claim; venue was improper; and the joinder of the parties in the complaint was improper.

FINDINGS AND CONCLUSIONS

Turning first to the issue of improper service, it is the defendant's position that service was improper because the complaint was served upon an employee of the defendant with "no authority or dispensation to bind the defendant" rather than upon an officer, managing agent or agent authorized to accept service as required by F.R.B.P. 7004(b)(3).² (Brief in Support of the Motion to Dismiss, p. 3). Conversely, the Trustee asserts that service was proper because the rule only requires that a copy of the summons and complaint be mailed "to the attention of" a managing agent.

The summons and complaint here were in fact sent by certified mail to the attention of Mr. James S. Sikes, the undisputed managing partner of the defendant. The return receipt however indicates that delivery was accepted by Mr. Bruce Thomas.

² F.R.B.P. 7004(b)(3) provides in pertinent part: . . . service may be made within the United States by first class mail postage prepaid as follows: . . . (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

As quoted above, the rule governing service of process allows such to be made by postage prepaid mail. Additionally, when service is upon a domestic or foreign partnership³ it may be accomplished by the mailing of the summons and complaint "to the attention of" the "managing agent" of the defendant. (Emphasis added) As discussed above, the summons and complaint in the instant proceeding were mailed to the attention of the defendant's managing agent, Mr. Sikes. Clearly, this mailing was in compliance with the requirements of the rule and sufficient to obtain service of process on the defendant. See, In re Martin-Trigona, 763 F. 2d 503, 505 (2nd Cir. 1985), cert. den. 474 U.S. 1061, 106 S. Ct. 807, 88 L. Ed. 2d 782 (1986); In re Lencoke Trucking, Inc., 99 B.R. 200, 201 (W.D.N.Y. 1989). Consequently, the motion of the defendant to dismiss the complaint on the basis of improper service will be denied.

Given its potential dispositive effect on the action against this defendant, the Court will next consider whether the complaint should be dismissed for failure to state a proper claim against the defendant.

According to the defendant, the claim is improper because it seeks relief on behalf of the bankruptcy estate of Washington Manufacturing Company ("Washington") when the entity with which the defendant transacted business was National Stores Corporation ("National Stores"). Although there is no dispute that National Stores was merged with Washington in 1986, the defendant contends that because it had no notice of Washington's connection with National Stores and relied upon the credit of National Stores in transacting business, the Trustee is estopped to assert its claim on behalf of Washington.

In support of its contention, the defendant has submitted a copy of the Articles of Merger between Washington and National Stores and copies of the invoice sent to and check received from National Stores.

In response, the Trustee asserts that National Stores was at all times pertinent an operating division of Washington and the defendant's lack of knowledge of such is irrelevant to the instant dispute given that the Trustee is seeking to recover property of the bankruptcy estate. It is well settled that "every action shall be prosecuted in the name of the real party in interest." F.R.B.P. 7017(a). Given that National Stores was

³ The defendant here is a partnership. (Brief in Support of Motion to Dismiss . . . , p. 3)

merged into Washington prior to the transaction with the defendant, it appears that the Trustee for Washington is indeed the real party in interest for purposes of prosecuting this proceeding.

It is further well settled that "a complaint is subject to dismissal if it fails to allege a required element which is necessary to obtain the relief sought." In re Noroton Heights Enterprises Corp., 96 B.R. 11, 13 (Bankr. D. Conn. 1989). The elements required of a claim are set forth at F.R.C.P. 8(a)⁴ as follows:

Claims for Relief - A pleading which sets forth a claim for relief, . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Most pertinent to this proceeding is section (a)(2) which requires a short statement showing that the pleader is entitled to relief. As noted above, the complaint at issue here asserts that the plaintiff, as the Trustee of the bankruptcy estate of Washington, is entitled to recovery of the transfers described therein for the benefit of the estate. As further noted above, there is no dispute here over whether National Stores was merged with the debtor, Washington, prior to its transaction with the defendant. Therefore, although the issues raised by the defendant may constitute valid defenses to the Trustee's complaint, the Court can not conclude that the complaint fails to state a proper claim and is thus subject to dismissal for that reason.

The Court will next consider whether the action against the defendant is subject to severance for improper joinder of parties. There is no dispute that the complaint at issue seeks recovery of preferential transfers from ten (10) different defendants. Therefore, according to the defendant, neither the transactions, facts, or lawsuit at issue are common to all the defendants contrary to F.R.B.P. 7020 and the action against this defendant should be severed and venue changed.

⁴ F.R.C.P. 8 is made applicable to bankruptcy proceedings by F.R.B.P. 7008.

In response, the Trustee asserts that the claims against the defendants named in the complaint arise out of a "series of transactions," i.e., payments by the debtor to creditors during the ninety days preceding the bankruptcy petition, thus, joinder is proper under F.R.B.P. 7020.

Federal Rule of Civil Procedure 20 is made applicable to adversary proceedings in the bankruptcy context by Federal Rule of Bankruptcy Procedure 7020. It is styled "Permissive Joinder of Parties" and provides, in pertinent part:

(a) . . . All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate trials. The Court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

It is evident from this language that the Court has broad discretion with respect to the permissive joinder of parties. Moreover, it is generally held that this rule is to be construed liberally to prevent multiple litigation. In re Lee Way Holding Co., 104 B.R. 881, 884 (Bankr. S.D. Ohio 1989). Even so, in order to allow such, there must be a determination that the right to the relief asserted arises out of the same series of transactions and that some question of law or fact is common to all defendants. Id.

The complaint here seeks recovery of alleged preferential transfers from each defendant. In order to prove that such transfers occurred, the Trustee must present facts which establish that the §547(b) elements of a preferential transfer exist with respect to each transfer and defendant. Thus it may be concluded that although various defenses may be raised, some question of law and fact is common to all these defendants. Moreover, it appears from the complaint as filed that at least to the extent of the debtors' participation, the

transfers complained of constitute a "series of transactions." Accordingly, it may be concluded that permissive joinder may be allowed here.

This conclusion does not end the inquiry for purposes of this proceeding however because, as set forth at part (b) of the rule, the Court is also granted broad discretion with respect to the severance of claims against any party to prevent that party from being put to unnecessary expense or "to prevent delay or prejudice." The defendant here asserts that it will incur significant expense if the claim against it is not severed. Moreover, the defendant asserts no claim against any other party nor does any party besides the Trustee assert a claim against this defendant. Therefore, the Court concludes that the claim against this defendant may be severed for trial from the claims against the remaining nine defendants.

In addition to seeking severance of the claim, the defendant seeks to have the venue, for purposes of the trial of the issues raised against it, changed to the United States Bankruptcy Court for the Middle District of Alabama or the Circuit Court of Montgomery County, Alabama under F.R.B.P. 7019 and 7021.⁵

It is well settled that "a proceeding arising under Title 11 or arising in or related to a case under Title 11 may be commenced in the district court⁶ in which such case is pending." 28 U.S.C. §1409(a). It is equally well settled that a "proceeding under title 11" may be transferred "to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. §1412.

The "transfer of venue is discretionary" with the Court where the dispute at issue does not concern a postpetition claim or one arising from the postpetition operation of the debtor's business. In re Thomasson, 60

⁵ Both rules provide the Court with discretion to sever claims and parties for separate disposition. F.R.B.P. 7019 further provides that venue may be changed pursuant to 28 U.S.C. §1412.

⁶ 28 U.S.C. §157 provides that the district court may provide that "any or all cases under Title 11 and any or all proceedings arising under title 11 . . . shall be referred to the bankruptcy judges for the district." Such a reference is in effect in this district.

B.R. 629, 632 (Bankr. M.D. Tenn. 1986); see also In re Continental Airlines, Inc., 61 B.R. 758, 769-70 (S.D. Tx. 1986); 28 U.S.C. §1409(d), (e).

Moreover, the moving party must establish that such a transfer is warranted by a preponderance of the evidence. In re Thomasson, 60 B.R. 632. Relevant factors include:

- (1) the proximity of creditors to the court;
- (2) the proximity of the debtor to the court;
- (3) the proximity of necessary witnesses;
- (4) the location of assets;
- (5) the economics of administration of the estate;
- (6) the relative ease of access to sources of proof;
- (7) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses;
- (8) the enforceability of judgment;
- (9) relative advantages and obstacles to a fair trial; and
- (10) a state's interest in having local controversies decided within its borders.

Id.

The defendant contends in the case at bar that transfer of venue is proper here because of the expense and inconvenience it will incur in having to defend this action in the Middle District of Tennessee. According to the defendant, the only business it has ever transacted in Tennessee was the transaction which the Trustee seeks to avoid here as preferential. All its records and witnesses are in Alabama and given that this complaint seeks to compel the defendant to turn over the purchase price for goods it has forfeited, transfer is justified. (Affidavit of James S. Sikes, Ex. F to Brief in Support of Motion to Dismiss . . .) However, the defendant further states, through Mr. Sikes, that "all evidence, and testimony, and documents can be developed from deposition(s)" should the case go to trial. Moreover, Mr. Sikes indicates there are no known unwilling witnesses. Id.

From these facts, it is evident that the proximity of this defendant and the defendant's necessary witnesses to the Court is less than of the plaintiff. Moreover, any judgment obtained against this defendant would have to be enforced in Alabama, as that is the location of the defendant's assets.

On the other hand, it is further evident that there are no unwilling witnesses, no obstacles to a fair trial in this forum, and that access to sources of proof may be developed through depositions. In addition, the economics of administration of the estate clearly favor the retention of this proceeding by this Court. There has been no showing that any judgment in favor of the plaintiff could not be enforced in Alabama.

Consideration of these factors leads the Court to conclude that cause for transfer of venue of this claim has not been established by preponderance of the evidence. Thus, the defendant's motion for such will be denied.

From the above findings and conclusions, **IT IS HEREBY ORDERED THAT:**

1. The defendant's motion to dismiss the complaint for improper service is denied;
2. The defendant's motion to dismiss the complaint for failure to state a proper claim is denied;
3. The defendant's motion for severance of this claim for trial purposes is granted;
4. The defendant's motion to transfer venue is denied;
5. Counsel for the parties are to appear, in person or by telephone, for a pre-trial conference on September 11, 1991, at 9:00 a.m. in Room 216, Customs House, 701 Broadway, Nashville, Tennessee.

SO ORDERED this 23rd day of July, 1991.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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