Dated: August 15, 2012
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re

CECIL RAY DAVIS,

Debtor.

Case No. 05-15794-GWE
Chapter 7

MICHAEL TABOR,
Chapter 7 Trustee,
Plaintiff,
v.
CHARLES KELLY, SR.,
Defendant.

Adv. Proc. No. 07-05181-L

RECOMMENDATION CONCERNING
MOTION FOR PERMISSIVE ABSTENTION

BEFORE THE BANKRUPTCY COURT is the motion of the Defendant Charles Kelly, Sr. ("Kelly" or "Defendant"), asking that the court abstain from hearing the Trustee's state law claims pursuant to the permissive abstention provisions of 28 U.S.C. § 1334(c)(1) (Dkt. No. 82). The Defendant states that all of the Trustee's remaining claims against Kelly arise under state law and

that but for the provisions of 28 U.S.C. § 1334(a), there would be no federal jurisdiction over those claims.

The Trustee has filed a response (Dkt. No. 97) in which he states that the factors that support abstention under 28 U.S.C. § 1334(c)(1) do not weigh in favor of abstention for three reasons: (1) he asserts that the state law issues are intertwined with federal law issues; (2) he asserts that there are no pending state law cases so that abstention would require him to file multiple new lawsuits in state court; and therefore, (3) he asserts that abstention would result in significant delay in the resolution of the pending adversary proceeding.

The Defendant filed a reply to the Trustee's response (Dkt. No. 98) in which he denies that there are federal law questions intertwined with the Trustee's remaining state law claims, and asserts that this is a case of novel, undecided state law issues and claims which are best decided by the state courts. Further, the Defendant asserts that further delay is not a compelling reason to deny abstention particularly when other factors overwhelmingly support abstention.

The claims that are at issue arise under Count I of the Complaint. Count I of the Complaint alleges that the Debtor, Cecil Ray Davis, made payments and/or transfers to the Defendant with a value of $52,125.00, that were fraudulent either under 11 U.S.C. § 548 if made within one year of the bankruptcy filing, or under 11 U.S.C. § 544(b)(1) and Tennessee Code Annotated §§ 66-3-101 et seq., 66-3-305, or 66-2-306. The Defendant admits receiving and negotiating nine checks from the Debtor in the aggregate amount of $54,125.00 over the period May 30, 2003 through March 18, 2005. An involuntary petition in bankruptcy was filed against the Debtor on December 22, 2005. In my prior recommendation, I recommended that summary judgment be granted to the Trustee pursuant to 11 U.S.C. § 548(a)(1) with respect to transfers in the amount of $8,125.00, representing

three checks. With respect to claims made under 11 U.S.C. § 544(b)(1), which permits a trustee in bankruptcy to pursue certain claims as if he were a lien creditor or successor to certain creditors and purchasers, I recommended that the parties' cross motions for summary judgment be denied without prejudice to being renewed with appropriate briefing. *Tabor v. Kelly (In re Davis)*, 2011 WL 5429095, *27 (October 11, 2011).

My recommendation was duly transmitted to the United States District Court for the Western District of Tennessee pursuant to 28 U.S.C. § 157(c)(1). In an order entered December 22, 2011, District Judge James D. Todd ordered that his decision as to Count I of the Complaint be held in abeyance pending renewal of the motions for summary judgment by the parties as to the Trustee's claims under section 544(b)(1), appropriate briefing, and my recommendation. *See* Order Dismissing Count II with Prejudice, Partially Denying Defendant's Objections as to Count I, and Holding Case in Abeyance Pending Further Proceedings in the Bankruptcy Court, *Tabor v. Kelly (In re Davis)*, Misc. No. 11-00012 (W.D. Tenn. Dec. 22, 2011). The parties have filed new cross motions for summary judgment, which are pending but not yet ripe for decision because other interested parties in related cases have been given until August 31, 2012, to submit motions or memoranda of law pertinent to those motions. *See* Case Management Agreed Order, July 12, 2012, (Dkt. No. 99).

United States Code title 28 section 1334(c)(1) provides:

> Except with respect to a case under Chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State court or respect for State law, from abstaining from hearing a particular proceeding arising under title 11, or arising in or related to a case under title 11.

This section speaks in terms of abstention with respect to a ***proceeding,*** meaning a civil proceeding, not in terms of particular counts within a civil proceeding. To abstain from hearing this particular proceeding would mean that Judge Todd would abstain from hearing *all of Count I* of the Complaint (Count II has already been dismissed). I do not believe that this is appropriate for reasons that I outline below.

The bankruptcy courts have developed the following non-exclusive list of twelve factors to consider when determining whether to abstain under the permissive abstention doctrine:

> (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;
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> (3) the difficulty or unsettled nature of the applicable law;
>
> (4) the presence of a related proceeding commenced in state court or other non-bankruptcy 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 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; and
>
> (12) the presence in the proceeding of non-debtor parties.

In re McKenzie, 471 B.R. 884, 912 (Bankr. E.D. Tenn. 2012) (citations omitted). The decision to voluntarily abstain is one that should be balanced using a court's equitable discretion. It is not necessary that each element be satisfied. *In re Southwest Sports Center, Inc.*, 2011 WL 4002559, *4 (Bankr. N. D. Ohio Sept. 6, 2011), citing *In re Dayton Title Agency, Inc.*, 304 B.R. 323, 330 (Bankr. S.D. Ohio 2004).

I have considered each of these factors and believe that it would be inappropriate to abstain from hearing the section 544(b)(1) claims at this stage in this proceeding for the following reasons:

First, this civil proceeding has been pending since July 7, 2007. The motion for abstention comes very late. I have already made a recommendation concerning the claims under section 548(b)(1), and Judge Todd has had an initial opportunity to review that recommendation. Judicial economy and the efficient administration of the bankruptcy estate dictate that the federal courts complete the hearing of this proceeding.

Second, although Count I raises some state law issues, they are ones that arise under the fraudulent conveyance laws. As the result of section 544(b)(1), these are laws that the bankruptcy courts frequently are called upon to interpret. Tennessee has two sets of fraudulent conveyance and transfer laws. The first, Tennessee Code Annotated section 66-3-101 et seq., codifies common law principles that have their genesis in *Twyne's Case,* 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber, 1601). There is little that could be new or unusual under that section. The second, Tennessee Code Annotated section 66-3-301 et seq., codifies the Uniform Fraudulent Transfer Act, a model statute "so closely resembling § 548 that the two are generally construed in consonance." *Farinash v. Bensusan (In re Prebul Jeep, Inc.*), 2009 WL 4581900, *3 (Bankr. E.D. Tenn. Nov. 30, 2009), citing *Creditor's Comm. of Jumer's Castle Lodge, Inc. v. Jumer*, 472 F.3d 943, 947 (7th Cir. 2007). The

differences between actions brought under section 548(a)(1) and section 544(b)(1) of the Bankruptcy Code are limited to the applicable state reach-back period (one year under section 548(a)(1) prior to amendment versus four years under Tennessee law), and the requirement under section 544(b)(1) that there be a creditor with an allowable claim who could have avoided the transfer under applicable law, a requirement not found in section 548(a)(1). *See Prebul Jeep,* at n.6.

Third, as noted above, the differences between the two statutes relate to the reach-back period. This is not a difficult or unsettled issue. The issues that have been raised by the parties for possible certification to the Tennessee Supreme Court relate primarily to the evidentiary weight to be given to a guilty plea in a related criminal case and the finding of the existence of a "Ponzi scheme." The parties also ask whether an objective or subjective test should be applied to the "good faith" defense provided at Tennessee Code Annotated section 66-3-309. These issues are not unique to Tennessee law and are routinely handled by the federal courts. I have addressed the questions proposed for certification to the Tennessee Supreme Court in my Recommendation Concerning Requests for Certification.

Fourth, there is no pending related proceeding in state court.

Fifth, the jurisdictional basis for the adversary proceeding relies entirely upon bankruptcy law. As I noted in my prior recommendation, the actions which are the subject of Count I of the Complaint *arise under* title 11 of the United States Code. The federal district courts have original, but not exclusive jurisdiction of all civil proceedings arising under title 11. *See* 28 U.S.C. § 1334(b). Although section 544(b)(1) permits the trustee in bankruptcy to assert certain claims provided by non-bankruptcy law, the trustee's right to do so is a creature of federal, not state law. While the Trustee could have filed his complaint in an appropriate state court, it would be unusual at this point

in history for a state court to consider claims brought under the Bankruptcy Code. These claims are the "bread and butter" of bankruptcy estate administration.

Sixth, the adversary proceeding is directly related to the augmentation of the bankruptcy estate.

Seventh, the substance of the adversary proceeding is consistent with its form. The adversary proceeding raises no unusual issues, other than the question of the evidentiary weight to be given to Davis's guilty plea.

Eighth, it would be feasible but impractical to sever state law issues from federal issues. Essentially the same underlying facts, other than the applicable reach-back period, will be used to determine both the section 548 claims and the section 544 claims.

Ninth, the burden on the bankruptcy court's docket is not an issue. Because a jury has been demanded and one of the parties has not consented to my hearing the jury trial, my docket will be impacted only with respect to pre-trial matters. I have adequate time to address those matters. The district court will have to consider its own trial schedule, of course.

Tenth, there is no evidence of forum shopping by the Trustee. I am troubled that the Defendant has waited so long to bring this motion, but note that new counsel became involved on his behalf about one year ago.

Eleventh, there does appear to be a right to jury trial and a jury trial has been demanded. The Defendant has not consented to trial in the bankruptcy court. Depending on the court's schedule, the district court is the appropriate court in which to conduct this jury trial.

Twelfth, there is a non-debtor Defendant, but the Plaintiff is the Trustee in Bankruptcy. This is not a case between two non-debtor parties.

RECOMMENDATION

I have considered each of the factors generally considered by bankruptcy courts in determining whether to abstain from hearing an adversary proceeding. Each of them either weighs in favor of retaining this proceeding or is neutral, with the possible exception of the district court's trial schedule. While the state courts do have concurrent jurisdiction to hear cases of this type, there is no state court case pending. Thus, if the federal courts were to abstain now, the Trustee would be compelled to start over. This case has been pending since July 7, 2007. I recommend that the case be retained in the federal courts, and that it be moved forward to trial as expeditiously as possible, if it cannot be resolved based upon the pending motions for summary judgment.