FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

March 9, 2010

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE GEORGE LOVE FARMING, LLC, Debtor.	BAP No. UT-08-094
GEORGE B. LOVE, VALAYNE LOVE, and SNOWVILLE FARMS, LLC, a Utah Limited Liability Company, Plaintiffs – Appellants, and GEORGE LOVE FARMING L.C., a Utah Limited Liability company, Plaintiff, v. BARNES BANKING CORPORATION, a Utah corporation, Defendant – Appellee.	Bankr. No. 06-20612 Adv. No. 08-02027 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before MICHAEL, BROWN, and ROMERO, Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

This appeal involves an ongoing dispute relating to the effect of a

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* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

confirmed Chapter 11 plan and its relationship with litigation brought by the proponents of the plan in a state court case (subsequently removed to the bankruptcy court).

This case raises several issues:

1. Whether the removed case could be considered a core proceeding, and if so, whether the bankruptcy court should have abstained from hearing the case, under either mandatory or discretionary abstention;
2. Whether the bankruptcy court could exercise jurisdiction over non-bankruptcy parties involved in the removed case; and
3. Whether the bankruptcy court erred in granting summary judgment in the removed case against the Plaintiff Debtors on their claim for breach of the implied covenant of good faith and fair dealing.

For the reasons set forth below, we AFFIRM.[1]

I. BACKGROUND FACTS

George Love is an individual who has engaged in farming on properties in Box Elder County, Utah. The factual background of this case is complex, and is best stated in the bankruptcy court's Order of March 23, 2007, denying the Motion to Convert of George Love Farming, LC in Bankruptcy Case No. 06-20612.[2] The following background is derived primarily from that Order, as well

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[1] On October 21, 2009, the Appellants filed a Notice of Stay of Present Appeal Pursuant to 11 U.S.C. § 362 (the "Notice"), seeking to stay this appeal, along with oral argument, scheduled (and held) on October 23, 2009. It is HEREBY ORDERED that the relief sought by the Notice is hereby DENIED.

[2] *Memorandum Decision Denying Debtor's Motion to Convert* (the "*Conversion Order*"), *in Appellee's Supplemental Appendix* at 433-460. There is some inconsistency in the record as to whether the Debtor in Case No. 06-20612 and the Plaintiff in Adversary Proceeding No. 08-02027 should be referred to as "George Love Farming, LC," or "George Love Farming, LLC." The bankruptcy court's docket in both the underlying case and the Adversary Proceeding lists the Debtor as "George Love Farming, LLC." However, the bankruptcy court's caption in its own orders lists the Debtor in the underlying case as "George Love Farming, LC." In the documents furnished by the parties, both designations

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as from the opinion issued by this Court in an appeal from the debtor's underlying consolidated bankruptcy case.[3]

On October 12, 2004, Snowville Farms, LLC ("Snowville") and Mr. George Love ("Mr. Love") commenced separate Chapter 11 bankruptcy cases. Mr. Love is a principal of Snowville. On May 15, 2005, the bankruptcy court ordered the substantive consolidation of the estates of Mr. Love and Snowville with the estates of the non-debtor entities George Love Farming, LC, George Love Farming Partnership, and George Love Family Partnership (hereinafter, these entities, debtors, and non-debtors will be referred to as the "Combined Entities").[4]

The primary assets of the Combined Entities were two large farming properties: one dry farm (the "Dry Farm") and one irrigated farm (the "Sanda Rosa Farm"). After the substantive consolidation, Mr. Love conducted farming operations on the Dry Farm and the Sanda Rosa Farm as a member and principal of the Combined Entities.

On December 19, 2005, the bankruptcy court entered its Order Confirming Joint Debtors' Plan of Reorganization (the "Plan").[5] Under the terms of the Plan,

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[2] (...continued)
appear. For clarity, this Court will use herein the designation contained on the bankruptcy court's orders, "George Love Farming, LC."

[3] *In re Snowville Farms, LLC*, , 368 B.R. 85, UT-06-034, 2007 WL 1302154 (10th Cir. BAP May 4, 2007), *in Appellee's Supplemental Appendix* at 461-469.

[4] The case number in the consolidated case is 04-36559.

[5] That Order's caption lists Snowville Farms, LLC and George B. Love as Joint Debtors-In-Possession, and George Love Farming LC, George Love Farming Partnership, and George Love Family Partnership as "Substantively Consolidated Entities." *Appellant's Appendix* at 196. Moreover, the first paragraph of the Plan states:

> Joint debtors-in-possession ("Debtors") Snowville Farms, LLC ("Snowville") and George B. Love ("Mr. Love") and George Love Farming, LC, George Love Farming Partnership, and George Love Family Partnership (jointly the "Love Farming Group" or "LFG" or the "Consolidated Parties") in the above-captioned Chapter 11 case, confirmed

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the Combined Entities were required to pay Barnes Banking Corporation ("Barnes") $550,000 by December 30, 2005, and to pay Life Investors Insurance Company of America/Aegon USA Realty Advisors, Inc. ("LIICOA") $320,000 by January 20, 2006. The Combined Entities failed to make the payments, and Barnes and LIICOA attempted to exercise their rights under the Plan by scheduling foreclosure sales on the real property and other collateral.

In an attempt to avoid foreclosure, the Combined Entities filed a Motion to Amend the Plan of Reorganization ("Motion to Amend") on January 26, 2006. Through the Motion to Amend, the Combined Entities sought to require Barnes and LIICOA to subordinate their security interests to the federal government so the Plan could be funded with a Farm Service Agency ("FSA") loan. After an evidentiary hearing, the bankruptcy court denied the Motion to Amend on February 1, 2006, finding the Plan already had been substantially consummated.

Thereafter, on February 14, 2006, the Combined Entities filed a Motion to Enforce Terms of Plan ("Motion to Enforce"), and, one day later, a Motion for Preliminary Injunction. Both the Motion to Enforce and the Motion for Preliminary Injunction sought the same or similar relief as that requested in the Motion to Amend, *i.e.*, to require Barnes and LIICOA to subordinate their liens to

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[5] (...continued)
the following Joint Plan of Reorganization[.]

Plan at 1, *in Appellant's Appendix* at 201.

Accordingly, it appears, first, that the Joint Debtors and the Combined Entities confirmed the Plan, but the Combined Entities were not debtors. Second, the Plan's first paragraph appears to define Snowville and Mr. Love as "Debtors" and the Consolidated Entities as the "Love Farming Group," suggesting Debtors and Love Farming Group are separate. However, the wording is ambiguous, and could be read to include the Debtors in Love Farming Group. Indeed, in its October 30, 2008 oral ruling on Barnes' Motion for Summary Judgment, the bankruptcy court remarked Mr. Love's reference to the Love Farming Group included "the consolidated debtors and possibly others," but concluded it did not need to "opine on what the Love Farming Group is or was[.]" *Transcript of Motion for Summary Judgment Ruling* ("*SJ Motion Tr.*") at 24, *ll.* 10-15, *in Appellant's Appendix* at 315.

an FSA loan. The bankruptcy court denied the Motion to Enforce and the Motion for Preliminary Injunction in open court on March 3, 2006.[6]

On March 6, 2006, the Combined Entities, with the exception of Mr. Love individually, filed a Motion to Convert ("Motion to Convert"), seeking to convert the Snowville Chapter 11 case to a case under Chapter 7. The bankruptcy court held a hearing that same day, and ruled it could not carve Mr. Love out of an order of conversion because the estates had been substantively consolidated. Counsel for the Combined Entities then amended the Motion to Convert to request dismissal rather than conversion. The bankruptcy court held the Combined Entities did not have an absolute right to convert because a Chapter 11 plan had been confirmed, and determined dismissal would not be in the best interests of creditors.

The next day, March 7, 2006, George Love Farming, LC, one of the non-debtor Combined Entities in the Chapter 11 case, filed a voluntary Chapter 7 petition, Case No. 06-20612. On March 27, 2006, Mr. Love and Snowville appealed the denial of the Motion to Enforce.

On May 4, 2007, another panel of this Court issued an order affirming the denial of the Motion to Enforce, stating:

> Snowville filed a motion for order enforcing the plan pursuant to 11 U.S.C. § 1142(b), arguing that because the FSA loan was contemplated in the confirmed plan, Barnes and LIICOA were breaching the plan by refusing to execute the lien waivers. The plan provided in pertinent part:
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> > The allowed claim of Barnes Banking Company ("Barnes") will continue to be secured as described in paragraph 5.3.2 and in addition will have a first priority lien on any property purchased with cash collateral of Barnes including but not limited to the grain/seed cleaning machine; this claim shall be paid $550,000 out of the proceeds of sale of the year 2005 crops, from the proceeds of any FSA loans, and any drought relief funds

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[6] On March 17, 2006, the court entered a written order denying the Motion to Enforce.

> on or before December 31, 2005, and shall be paid an additional $200,000 on the sale of the year 2006 crops. . . .
>
> However, the plan also specifically incorporated an April 21, 2005, cash collateral stipulation between Snowville and Barnes. The stipulation acknowledged that Snowville could request Barnes' assistance in acquiring an FSA loan in the future, but explicitly provided that Barnes was not required to consent.
>
> The bankruptcy court denied the motion to enforce because the plan did not mention that either Barnes or LIICOA would need to subordinate, release, or waive their liens. Additionally, the bankruptcy court found that even if LIICOA and Barnes had executed lien waivers, Snowville would not have been able to make the required plan payments with only $380,000 in loan proceeds without further concessions from Barnes and LIICOA for deferred payments. Thus, the court found Snowville, not Barnes or LIICOA, had breached the plan.
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> . . .
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> [B]y putting another entity in Chapter 7 bankruptcy, selling one of its farms, and allowing the other farm to be placed under contract, Snowville has effectively abandoned its plan. . . . [T]he bankruptcy court correctly found that Barnes and LIICOA did not breach the plan.[7]

In the meantime, LIICOA had filed an Emergency Motion to Dismiss George Love Farming, LC's Chapter 7 petition, or, in the alternative, for Relief from Stay. The bankruptcy court denied the Motion to Dismiss on March 13, 2006, at an evidentiary hearing at which counsel for George Love Farming, LC stated, "it would not be the intent of George Love Farming to continue to pester the Court with additional bites at the apple."[8] The bankruptcy court entered an Order Denying the Motion for Relief from Stay on May 10, 2006. That Order specifically stated: "[T]he other members of the chapter 11 estate did not join in this bankruptcy case, but at the hearing on this matter, they each represented to the Court that they would agree to be bound by the Court's determination in this

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[7] *In re Snowville Farms, LLC*, 368 B.R. 85, UT-06-034, 2007 WL 1302154 at *2-3 (10th Cir. BAP May 4, 2007) (footnotes and emphasis omitted), *in Appellee's Supplemental Appendix* at 464-67.

[8] *Conversion Order* at 7, *in Appellee's Supplemental Appendix* at 439.

matter."[9]

On May 25, 2006, the Chapter 7 Trustee for George Love Farming, LC (the "Trustee") filed a Motion to Sell Dry Farm Free and Clear of Liens Under § 363(b). George Love Farming, LC and Mr. Love objected to the sale, arguing George Love Farming, LC owned only 25% of the Dry Farm, with the other 75% owned by Mr. Love, Valayne Love, and Snowville. These arguments were raised despite the Combined Entities' agreement, as part of the Relief from Stay proceedings, that all interests in the subject real properties were fully subject to the Trustee's legal ownership, and despite a Relinquishment of Farming Interests filed by Valayne Love on May 16, 2005. The bankruptcy court denied the Trustee's Motion to Sell without prejudice, stating an 11 U.S.C. § 363[10] request requires an adversary proceeding.

The Trustee thereafter filed an adversary proceeding on June 28, 2006, seeking to sell both the Dry Farm and the Sanda Rosa Farm under § 363(b). On July 11, 2006, Mr. Love, Valayne Love, and Snowville conveyed their interests in the Dry Farm to the Trustee, thereby eliminating the need for the Trustee to continue the adversary proceeding as to the Dry Farm. The Trustee filed a Motion to Sell the Dry Farm on July 13, 2006. This Motion was granted by the bankruptcy court on August 10, 2006, and the sale closed soon thereafter.

With respect to the Sanda Rosa Farm, on October 3, 2006, the bankruptcy court entered a stipulated judgment in the adversary proceeding providing the Trustee with the authority to sell both the estate's interest and the interest of any co-owner in the Sanda Rosa Farm. On March 8, 2007, the Trustee filed a Motion

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[9] *Id.* at 8 (internal quotation marks omitted), *in Appellee's Supplemental Appendix* at 440.

[10] Unless otherwise noted, all future statutory references in the text will be to title 11 of the United States Code.

to Sell the Sanda Rosa Farm.[11] Apparently in an attempt to stop the sales effort by the Trustee, on March 14, 2007, George Love Farming, LC filed a Motion to Convert Case No. 06-20612 to Chapter 11, claiming it had only a 25% ownership interest in the Sanda Rosa Farm and the remaining ownership interest was held by the other Combined Entities.[12] On March 23, 2007, the bankruptcy court entered the Conversion Order, in which it concluded that George Love Farming, LC was the alter ego of, and therefore possessed all the assets and liabilities of, the Combined Entities.[13] A week later, the Court granted the Trustee's motion to sell Sanda Rosa Farm.[14]

On December 17, 2007, Mr. Love, Valayne Love, and Snowville (the "Appellants") filed a Complaint against Barnes in the First Judicial District Court in and for Box Elder County, Utah.[15] In its essence, the Complaint alleges claims based on similar, if not exact, facts, which were asserted in connection with the Motion to Enforce previously denied by the bankruptcy court.

On January 16, 2008, Barnes filed a Notice of Removal of the state court action to the United States Bankruptcy Court for the District of Utah.[16] The Appellants filed a Motion to Remand on February 19, 2008,[17] which was denied on April 30, 2008 (hereinafter, the state court action will be referred to as the

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[11] Docket Entry No. 172, *in Appellee's Supplemental Appendix* at 491.

[12] Docket Entry No. 188, *in Appellee's Supplemental Appendix* at 490; *see also Conversion Order* at 11, *in Appellee's Supplemental Appendix* at 443.

[13] *Id.* at 16, *in Appellee's Supplemental Appendix* at 448.

[14] Docket Entry No. 210, *in Appellee's Supplemental Appendix* at 487.

[15] *Complaint, in Appellant's Appendix* at 12-24.

[16] *Notice of Removal of Civil Action, in Appellant's Appendix* at 25-28.

[17] *Motion to Remand Civil Action, in Appellant's Appendix* at 29-66.

"Removed Case").[18] On August 28, 2008, Barnes filed its Motion for Summary Judgment (the "SJ Motion") in the Removed Case, seeking dismissal of all the Appellants' claims therein.[19] The bankruptcy court heard argument on the SJ Motion and related pleadings on October 29, 2008. The following day, the bankruptcy court made its oral ruling from the bench granting the SJ Motion.[20] The written order incorporating the oral ruling was issued on November 10, 2008.[21] The Appellants filed a Notice of Appeal on November 20, 2008, seeking review of (1) the bankruptcy court's November 10, 2008 Order Granting the SJ Motion and (2) the Remand Order.[22]

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, ord7ers, and decrees" and "with leave of court, from interlocutory orders and decrees" of bankruptcy courts within the Tenth Circuit, unless one of

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[18] *Order Denying Motion to Remand Civil Action* (the "*Remand Order*"), *in Appellant's Appendix* at 99–101. The Plaintiffs, as appellants, appealed the Remand Order (BAP Appeal No. UT-08-046), and on May 21, 2008, this Court issued an Order to Show Cause Why Appeal Should Not be Considered for Dismissal as Interlocutory. UT-08-046 was dismissed on July 10, 2008. Docket Entry Nos. 28 and 31, *in Appellant's Appendix* at 6-7.

[19] *SJ Motion, in Appellant's Appendix* at 102–128.

[20] *SJ Motion Tr., in Appellant's Appendix* at 251-320.

[21] *Order Granting SJ Motion, in Appellant's Appendix* at 244-245.

[22] *Notice of Appeal, in Appellant's Appendix* at 330-331. As noted above, the appeal of the Remand Order was dismissed July 10, 2008. However, the Order Granting the SJ Motion was a final determination on the merits, and made the earlier, interlocutory Remand Order, also appealable. *See Long v. St. Paul Fire and Marine Ins. Co.*, 589 F.3d 1075, 1078 n.2 (10th Cir. 2009) ("[O]nce the district court enters a final order, its earlier interlocutory orders merge into the final judgment and are reviewable on appeal."); *In re J.H. Inv. Servs., Inc.*, 418 B.R. 413, 420 (M.D. Fla. 2009) ("Interlocutory orders and rulings, to the extent they produce a final judgment, may be reviewed on appeal from that final judgment.").

the parties elects to have the district court hear the appeal.[23] Neither party elected to have this appeal heard by the United States District Court for the District of Utah. The parties have therefore consented to appellate review by this Court.[24]

III. STANDARD OF REVIEW

Factual findings of the bankruptcy court are reviewed for clear error and its legal findings *de novo*.[25] Determining whether the bankruptcy court erred in refusing to abstain from hearing a case may include some factual examination, but also includes evaluation of the bankruptcy court's application of 28 U.S.C. § 1334(c)(2), a question of law for *de novo* review.[26] In addition, issues regarding the jurisdiction of the bankruptcy court are reviewed *de novo*, [27] as are issues involving the granting of summary judgment.[28]

Discretionary abstention pursuant to 28 U.S.C. § 1334(c)(1) falls within the sound discretion of the bankruptcy court.[29] "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[30]

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[23] 28 U.S.C. § 158(a), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002(a).

[24] 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

[25] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

[26] *See In re Lanning*, 545 F.3d 1269, 1274 (10th Cir. 2008), *cert. granted in part*, 78 U.S.L.W. 3010 (U.S. Nov. 2, 2009) (No. 08-998); *O'Gilvie v. United States*, 66 F.3d 1550, 1555 (10th Cir. 1995), *aff'd*, 517 U.S. 79 (1996).

[27] *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 770 (10th Cir. BAP 1997).

[28] *Burke v. Utah Transit. Auth. & Local 382*, 462 F.3d 1253, 1257 (10th Cir. 2006).

[29] 28 U.S.C. § 1334(c)(1).

[30] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991). *See also Telluride*

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IV. DISCUSSION

A. Did the Bankruptcy Court Err in Denying the Motion to Remand the State Court Case?

1. Is the Removed Case a "Core" or "Related To" Proceeding Over Which the Bankruptcy Court Could Exercise Jurisdiction?

The Appellants assert the Removed Case contains only state law claims which could exist independently of the bankruptcy case, which do not have a close nexus to the bankruptcy case, and which do not belong to the bankruptcy estate.[31] As a result, they claim the Removed Case is neither a "core" proceeding nor a "related to" proceeding over which the bankruptcy court could exercise jurisdiction. In contrast, Barnes contends the claims raised in the Removed Case were claims belonging to the bankruptcy estate of George Love Farming, LC, not to the three Appellants, subject to administration by the Chapter 7 Trustee, making the Removed Case a "core" proceeding appropriate for the bankruptcy court's jurisdiction.[32]

Under 28 U.S.C. §§ 1334(c)(1) and 157(a), bankruptcy courts possess "only the jurisdiction and powers expressly or by necessary implication granted by Congress."[33] Pursuant to the jurisdictional grant of 28 U.S.C. § 157, a bankruptcy court may hear all cases under Title 11 and all "core" proceedings arising under that title. "Core" proceedings include matters concerning the administration of

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[30] (...continued)
Global Dev., LLC v. Bullock (In re Telluride Global Dev., LLC), 380 B.R. 585, 592 (10th Cir. BAP 2007).

[31] *Tr. of Hearing on Motion to Remand Civil Action* ("*Remand Motion Tr.*") at 70-76, *in Appellee's Supplemental Appendix* at 89-95.

[32] *Id. at 71*, *in Appellee's Supplemental Appendix* at 90.

[33] *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1517 (10th Cir. 1990) (per curiam).

the estate and proceedings affecting the liquidation of the assets of the estate.[34]

In the case of *Gardner v. United States (In re Gardner)*, the Tenth Circuit Court of Appeals stated: "Actions . . . which could proceed in another court are not core proceedings."[35] In that case, the Tenth Circuit dealt with an action brought by a debtor's ex-spouse seeking an order directing the bankruptcy trustee to turn over property awarded in the divorce action, and an order finding her interest in the property to be superior to that of the Internal Revenue Service ("IRS"). The Tenth Circuit held the bankruptcy court lacked jurisdiction to rule on the status of the IRS's claim against the property, because the property was no longer owned by the debtor or the bankruptcy estate, creating a third-party dispute between two creditors.[36]

By contrast, in the instant case, the dispute concerns whether the claims asserted in the Removed Case belong to the Trustee. Accordingly this Court agrees with the bankruptcy court's finding that the Removed Case is a core proceeding.[37]

Alternatively, even if the proceeding is not a core proceeding, it is at least a "related to" proceeding over which the bankruptcy court may exercise jurisdiction. A "related to" proceeding is a proceeding in which the outcome could conceivably have any effect on the estate being administered in bankruptcy.[38] "Proceedings 'related to' the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11

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[34] 28 U.S.C. § 157(b)(2)(A) and (O).

[35] *Gardner*, 913 F.2d at 1518.

[36] *Id.* at 1519.

[37] 28 U.S.C. § 157(b)(2)(A) and (O).

[38] *Gardner*, 913 F.2d at 1518 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984), *overruled on other grounds by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 134-35 (1995)).

U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate."[39] Since this case involves whether the claims constitute assets of the Chapter 7 estate, it clearly meets the "related to" standard.

In addition, the claims in the Removed Case involve the interpretation of the Plan and affect an ongoing Chapter 7 proceeding. Thus, the "close nexus" to the confirmed Plan and the Chapter 7 further supports the bankruptcy court's jurisdiction.[40]

Accordingly, the bankruptcy court properly exercised jurisdiction over the removed case, under either "core" or "related to" jurisdiction.

2. Should the Bankruptcy Court Have Abstained?

a. Mandatory Abstention

Under 28 U.S.C. § 1334(c)(2), a bankruptcy court must abstain from adjudicating a matter (mandatory abstention) when the following six elements are present: (1) the motion to abstain was timely; (2) the action is based on state law; (3) an action has been commenced in state court; (4) the action can be timely adjudicated in state court; (5) there is no independent basis for federal jurisdiction other than bankruptcy; and (6) the matter is non-core.[41]

As noted above, the bankruptcy court found the matter was a core proceeding, removing it from the purview of 28 U.S.C. § 1134(c)(2) because it

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[39] *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997).

[40] *See In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005) (quoting *In re Resorts Int'l, Inc.*, 372 F.3d 154, 166-67 (3rd Cir. 2004)) (discussing *Pacor* and employing a more stringent test in a post-confirmation situation, *i.e.*, there must be a "close nexus" to the bankruptcy plan or proceeding).

[41] 28 U.S.C. § 1334(c)(2). *See Telluride Asset Resolution, LLC v. Telluride Global Dev, LLC (In re Telluride Income Growth, LP)*, 364 B.R. 390, 398 (10th Cir. BAP 2007); *Midgard*, 204 B.R. at 768.

did not meet the sixth criterion.[42] However, even assuming for the sake of argument the matter was "non-core," nothing in the record conflicts with the bankruptcy court's finding that the complex nature and history of the proceeding would result in a substantial delay if it were to be tried in state court. The bankruptcy court was familiar with the matter and could more easily render an expeditious ruling.[43] Further, the bankruptcy court noted allowing the matter to proceed in state court could lead to inconsistent rulings by the state court and the bankruptcy court, which could result in further complications in the administration of an already complicated bankruptcy estate.[44] Thus, this case also fails to meet the fourth criterion for mandatory abstention, and this Court sees no error in the bankruptcy court's conclusion that mandatory abstention did not apply.

b. Discretionary Abstention

Discretionary abstention is governed by 28 U.S.C. § 1334(c)(1), which provides "nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from

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[42] Mandatory abstention applies only to non-core, "related to" proceedings. *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 708 (2d Cir. 1995); *N. Lily Mining Co. v. Keystone Surveys, Inc. (In re N. Lily Mining Co.)*, 289 B.R. 1, 4 (Bankr. D. Colo. 2002); *Mills v. Mills (In re Mills)*, 163 B.R. 198, 202 (Bankr. D. Kan. 1994).

[43] The bankruptcy court stated:

> [G]iven the complex nature of this proceeding and its long and complex history going back to the consolidated estates, it would take the state court some degree of time, and, in my opinion, some inordinate amount of time and effort to parse through the case and understand the complex proceeding that have taken place in all of these, because they are interrelated.
>
> Whereas, this Court is already familiar with the history and can efficiently and expeditiously rule on the issues asserted of the removed action[.]

Remand Motion Tr. at 79, *ll.* 6-18, *in Appellee's Supplemental Appendix* at 98.

[44] *Id.* at 78-79, *in Appellee's Supplemental Appendix* at 97-98.

abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." Abstention may be applied to proceedings removed to bankruptcy courts.[45] Where most of the factors for mandatory abstention are present, a strong case for discretionary abstention exists.[46]

The bankruptcy court here relied on the criteria enunciated in the case of *In re Chicago, Milwaukee, St. Paul & Pacific Railway*, specifically: (1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of applicable state law; (4) the presence of related proceedings commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than under 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of the asserted core proceeding; (8) the feasibility of severing state law claims from a core bankruptcy matter to allow judgment to be entered in the 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 the bankruptcy court involved 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 nondebtor parties.[47]

The factors used by the bankruptcy court can be combined to form two overarching questions for the application of discretionary abstention: (1) Is the nature of the proceeding better suited for state court or bankruptcy court? (2) How will the bankruptcy court's acceptance of jurisdiction or abstention from

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[45] *Midgard*, 204 B.R. at 774.

[46] *Braucher v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago (In re Illinois-California Express, Inc.*), 50 B.R. 232, 241 (Bankr. D. Colo. 1985).

[47] *In re Chicago, Milwaukee, St. Paul & Pac. Ry.*, 6 F.3d 1184, 1189 (7th Cir. 1993).

jurisdiction affect the administration of the case and the functioning of the courts involved? In this case, the bankruptcy court held the claims in the Removed Case would affect the administration of the bankruptcy estate because the court had previously ruled Debtor George Love Farming, LC was an alter ego of the Combined Entities, and state law issues, while present, did not predominate over bankruptcy issues.[48] Therefore, under the abuse of discretion standard applicable to this issue, there is no indication the bankruptcy court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.

B. Did the Bankruptcy Court Have Jurisdiction to Enter Summary Judgment Against Valayne Love?

In its findings on the Motion to Remand, the bankruptcy court disagreed with Appellants' assertion that it had no jurisdiction over the claims of Valayne Love. It stated Valayne Love's claims were closely intertwined with the claims of other plaintiffs and connected to the administration of the bankruptcy estate.[49]

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[48] Specifically, the bankruptcy court found:

> First, as previously stated, the Court believes that the claims asserted in the removed action against Barnes will have an affect [sic] on the administration of the estate. Contrary to plaintiffs' assertion that the resolution of claims will not effect [sic] the administration of the George Love Farming case, because it does not own those claims, the Court has previously ruled that this characterization is inaccurate. The Court has previously ruled that George Love Farming, LC is an alter ego of the consolidated estate and, therefore, any potential cause of action asserted by the consolidated entities will have an effect on the administration of the George Love Farming Bankruptcy Estate.
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> Second of all, the state law–while state law has some effect on the claims asserted in the removed action, the Court does not believe that they predominate over bankruptcy issues. The claims not only implicate the prior rulings of this Court and . . . place at issue the effect of those rulings, but also concern the administration of the pending Chapter 7 estate.

Remand Motion Tr. at 81-82, *ll.* 21-25, 1-19, *in Appellee's Supplemental Appendix* at 100-101.

[49] "Mrs. Love's claims propose to diminish the cash assets of this estate by allowing her to use the funds that belong to the estate to pay [the] Loves' home loan." *Id.* at 76-77, *ll.* 25, 1-3, *in Appellee's Supplemental Appendix* at 95-96.

Accordingly, the bankruptcy court found it had "related to" jurisdiction over the claims of all the plaintiffs, including Valayne Love. There is no evidence in the record to support a conclusion the bankruptcy court's factual findings as to Valayne Love's claims were clearly erroneous. Moreover, reviewed *de novo*, the bankruptcy court's determination as to the relationship of such claims to the estate is correct.[50] Therefore, this Court agrees the bankruptcy court could exercise jurisdiction over the claims of Valayne Love, including entering summary judgment respecting those claims.

C. Did the Bankruptcy Court Err in Granting Summary Judgment in Favor of Barnes?

A court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[51] The burden for establishing entitlement to summary judgment rests on the movant.[52] Summary judgment is not appropriate where a dispute exists as to facts which could affect the outcome of the suit under relevant law.[53] A genuine dispute over a material fact exists when the "evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."[54] When reviewing motions for summary judgment, the Court must view the

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[50] *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995); *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990) (per curiam); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997).

[51] Fed. R. Civ. P. 56(c), (as incorporated by Fed. R. Bankr. P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[52] *Catrett*, 477 U.S. at 324.

[53] *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987).

[54] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *First*

(continued...)

record in the light most favorable to the non-moving party.[55]

The bankruptcy court granted summary judgment because it found the claims in the Complaint were barred by the doctrine of the law of the case or by collateral estoppel.[56] The law of the case doctrine holds a legal decision made at one stage of litigation should "continue to govern the same issues in subsequent stages in the same case."[57] The law of the case doctrine also requires a court to follow the decisions in the case that are decisions of higher courts.[58]

With respect to the law of the case doctrine, Barnes' refusal to execute a lien waiver was previously litigated by the parties in connection with the argument that Barnes had breached the Plan.[59] In addition, issues relating to the ownership of the Combined Entities' assets and the absence of a duty by Barnes to execute a lien waiver were previously decided in the consolidated Chapter 11 cases.[60] Further, previous rulings of the bankruptcy court held the Combined Entities breached the Plan before Barnes' actions regarding the disputed funds, relieving Barnes of any obligation to honor a check drawn on an account of the Combined Entities.[61] There was sufficient justification for the bankruptcy court's conclusion that the law of the case mandated the granting of the SJ Motion.

Collateral estoppel, or issue preclusion, is a doctrine prohibiting the

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[54] (...continued)
Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-289 (1968)).

[55] *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988).

[56] *SJ Motion Tr.* at 20-27, *in Appellant's Appendix* at 311-318.

[57] *In re Scrivner*, 535 F.3d 1258, 1265 (10th Cir. 2008) (internal quotation marks omitted).

[58] *Id.*

[59] *SJ Motion Tr.* at 22, *ll.* 18-25, *in Appellant's Appendix* at 313.

[60] *SJ Motion Tr.* at 21, *ll.* 12-15, *in Appellant's Appendix* at 312.

[61] *SJ Motion Tr.* at 23, *ll.* 5-14, *in Appellant's Appendix* at 314.

relitigation of issues of ultimate fact between the same parties that have been "determined by a valid and final judgment."[62] Collateral estoppel applies when the following factors are met: (1) the issue previously decided is identical to that presented in the current action; (2) the prior action has been finally adjudicated on the merits; (3) the party against whom collateral estoppel is invoked was a party to or in privity with a party to the prior adjudication; and (4) the party against whom collateral estoppel is invoked had a full and fair opportunity to litigate the issue in the previous action.[63]

With respect to the doctrine of collateral estoppel, all the Appellants, with the exception of Valayne Love, are the same as the parties to the Chapter 11 and Chapter 7 cases.[64] Valayne Love, by virtue of her involvement in the cases and her waiver of her rights to the with respect to the bankruptcy estates, either is in privity with the parties to the Chapter 11 and Chapter 7 cases, or does not demonstrate standing to bring the claims she asserted in the state court Complaint.[65] There is nothing in the record to contradict the bankruptcy court's

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[62] *Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997) (internal quotation marks omitted). Collateral estoppel must be distinguished from *res judicata*, or claim preclusion, under which a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *See E. Plains Dev. Corp. v. King (In re Faires)*, 123 B.R. 397, 401 (Bankr. D. Colo. 1991).

[63] *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653, 662 (10th Cir. 2006).

[64] *SJ Motion Tr.* at 19-20, *in Appellant's Appendix* at 310-11.

[65] *See Plan* at 17, ¶ 3.1.10, *in Appellant's Appendix* at 217 (describing treatment of "[a]llowed subordinated claims and equity interests of the Debtors," which states in part: "[T]he equity interests in this class will remain in George B. Love, with the exception of the equity interests of the George Love Family Partnership, which will remain in the name of George B. Love and his sons Bryan and Alex Love (the interests of Mrs. Love having been relinquished to George B. Love prior to confirmation of the Plan.")). *See also SJ Motion Tr.* at 5, *ll.* 14-18, *in Appellant's Appendix* at 296, in which the bankruptcy court stated: "On April 24, '05, the plaintiff, Valayne Love, executed a relinquishment of her right, title and interest in the consolidated debtors and their assets to George B. Love[.]"

(continued...)

findings the Appellants had a full and fair opportunity to litigate these issues in both the Chapter 11 cases and the Chapter 7 case.[66]

For these reasons, the Appellants cannot now raise issues of breach of the Plan and breach of fiduciary duty and the covenant of good faith and fair dealing, and summary judgment was appropriate under both the law of the case and collateral estoppel doctrines.

V. CONCLUSION

The Appellants have not shown the bankruptcy court erred in finding it had jurisdiction over all Appellants, or in declining to abstain from hearing the case. Moreover, they have not shown the law of the case doctrine or the collateral estoppel doctrine did not apply to support the bankruptcy court's award of summary judgment. Therefore, the rulings of the bankruptcy court are AFFIRMED.

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[65] (...continued)
It should also be noted at the hearing on the SJ Motion, counsel for Barnes stated it was not trying to foreclose on the second deed of trust on the Love residence. *SJ Motion Tr.* at 13, *ll.* 7-14, *in Appellant's Appendix* at 263. Assuming the truth of Barnes' counsel's statement, and relying on the record which shows the residence as the only property in which Valayne Love has an interest, it is difficult to see why she would need the injunctive relief sought in the Complaint's fourth cause of action.

[66] *See SJ Motion Tr.* at 19-23, *in Appellant's Appendix* at 310-314.