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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 3, 2007
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DAVID L. SMITH, also known as David Lee Smith, also known as David Smith, and M. JULIA HOOK, also known as Mary Julia Hook, also known as Julia Hook, Debtors.	BAP No. CO-07-029
PHASE ONE LANDSCAPES, INC., Plaintiff – Counter-Defendant – Appellee, v. M. JULIA HOOK, Defendant – Counter-Claimant – Appellant.	Bankr. No. 06-15511-SBB Adv. No. 06-01809-SBB Chapter 11 ORDER AND JUDGMENT*

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

Before CLARK, MICHAEL, and KARLIN[1], Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

The state of Colorado is known for its picturesque mountain landscapes. The case before us exists because M. Julia Hook ("Hook") did not care for the condition of the landscape surrounding her home. She hired Phase One

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable Janice Miller Karlin, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Kansas, sitting by designation.

Landscapes, Inc. ("Phase One") to improve the beauty of her land. A dispute arose between Hook and Phase One which culminated in litigation, first in the state courts of Colorado, and then, after Hook sought protection under the United States Bankruptcy Code, in bankruptcy court. The only question we need answer is whether the bankruptcy court abused its discretion when it decided that the quarrel between Hook and Phase One belonged in the Colorado state courts, and entered its order abstaining from hearing the matter. Finding no error, we affirm the decision of the bankruptcy court in all respects.

I. BACKGROUND

Hook and Phase One were engaged in a business transaction in which Phase One agreed to perform landscaping services on Hook's residential property. A dispute arose between Hook and Phase One regarding the nature and quality of the services to be performed. On December 19, 2005, Phase One brought an action against Hook in Colorado state court, seeking damages for breach of contract, quantum meruit, and foreclosure of a mechanic's lien. Phase One also sought associated attorney's fees and costs arising under the landscaping contract. Hook counterclaimed, alleging breach of contract by Phase One, wrongful lien, offset, fraud, fraud in the inducement of a contract, and negligence.

On August 15, 2006, the state court set a trial on the matter for April 30, 2007, to May 4, 2007.[2] Three days later, Hook filed for Chapter 11 bankruptcy relief. Phase One then filed a proof of claim in the bankruptcy action for the amounts it claimed to be owed. Hook objected to the proof of claim, counterclaimed, and demanded a jury trial on all issues. As a result of the counterclaim, the bankruptcy court chose to treat the matter as an adversary proceeding, which was opened on September 29, 2006.

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[2] *See* Phase One's *Motion to Abstain and Remand Case to Denver District Court*, at 3, ¶ 7, *in* Appellant's App. at 84.

On December 5, 2006, before any scheduling order had been entered in the adversary, Phase One filed a Motion to Abstain and Remand Case to Denver District Court (the "Motion to Abstain").[3] Phase One argued that the bankruptcy court was required to abstain pursuant to the mandatory abstention provision of 28 U.S.C. § 1334(c)(2), or in the alternative, that the bankruptcy court should exercise its discretionary powers of abstention pursuant to 28 U.S.C. § 1334(c)(1). The bankruptcy court issued an Order Granting Plaintiff's Motion to Abstain (the "Abstention Order") on January 9, 2007.[4]

In the Abstention Order, the bankruptcy court determined that the adversary proceeding involved matters not solely "related to" a bankruptcy case, and therefore, mandatory abstention was not applicable. After applying a twelve-factor test developed by case law, the bankruptcy court concluded it should exercise its discretionary powers to abstain, and dismissed the adversary proceeding without prejudice. Hook then filed a Motion to Amend Findings or Make Additional Findings and to Amend the Judgment Accordingly; and Request for Oral Argument (the "Motion to Amend").[5] The bankruptcy court, finding that no new grounds existed for reconsideration, denied the Motion to Amend on February 2, 2007.[6] Hook now timely appeals the bankruptcy court's orders granting Phase One's Motion to Abstain and denying her Motion to Amend.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit,

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[3] *Id.*, *in* Appellant's App. at 82.

[4] Appellant's App. at 187.

[5] Appellant's App. at 190.

[6] *Order Denying Motion to Amend Findings or Make Additional Findings and to Amend the Judgment Accordingly; and Request for Oral Argument, in* Appellant's App. at 201.

unless one of the parties elects to have the district court hear the appeal.[7] Neither party elected to have this appeal heard by the United States District Court for the District of Colorado. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[8] Here, the bankruptcy court abstained from hearing and dismissed Hook's adversary proceeding. Nothing remains for the trial court's consideration. Thus, the order of the bankruptcy court is final for purposes of review.

III. STANDARD OF REVIEW

Permissive abstention pursuant to 28 U.S.C. § 1334(c)(1) is a matter within the sound discretion of the bankruptcy court.[9] Accordingly, we review the bankruptcy court's Abstention Order for abuse of that discretion. Review of the bankruptcy court's denial of Hook's Motion to Amend is also for abuse of discretion.[10] "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.'"[11]

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[7] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1(a) & (d).

[8] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[9] *In re Petrie Retail, Inc.*, 304 F.3d 223, 232 (2d Cir. 2002); *In re Thompson*, 231 B.R. 802, 806 (D. Colo. 1999).

[10] *Loughridge v. Chiles Power Supply Co., Inc.*, 431 F.3d 1268, 1275 (10th Cir. 2005) (citing *Minshall v. McGraw Hill Broad. Co., Inc.*, 323 F.3d 1273, 1287 (10th Cir. 2003)).

[11] *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)).

IV. ANALYSIS

The bankruptcy court did not abuse its discretion in exercising its discretionary power to abstain from hearing Hook's adversary proceeding pursuant to 28 U.S.C. § 1334. Section 1334(c)(1) provides as follows:

> [N]othing 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 abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.[12]

In determining whether it should abstain from hearing the adversary proceeding, the bankruptcy court analyzed the following twelve factors:

> (1) [t]he 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) jurisdictional basis, if any, other than 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 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 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.[13]

Applying the twelve factors, the bankruptcy court determined as follows: (1) the bankruptcy court's determination of the adversary proceeding will not materially advance efficient administration of the case, (2) the only issues involved are state law issues and they are identical to those pending before the state court, (3) no jurisdictional basis other than 28 U.S.C. § 1334 exists for the bankruptcy court to hear the dispute, (4) Hook failed to indicate why a release of the mechanic's lien claim is essential to the formation of her Chapter 11 plan; nonetheless, if entitled

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[12] 28 U.S.C. § 1334(c)(1).

[13] *Abstention Order* at 2 *in* Appellant's App. at 188 (quoting *Lucre Mgmt. Group, LLC v. Schempp Real Estate, LLC (In re Schempp Real Estate, LLC)*, 303 B.R. 866 (Bankr. D. Colo. 2003)).

to such relief, it is available to Hook in state court, (5) the matters in the adversary proceeding are severable from the state court proceedings as Hook may reassert her objection to Phase One's proof of claim following the state court's ruling on the mechanic's lien claim, (6) it is likely that Hook's Chapter 11 filing and the adversary proceeding were instituted, in part, by Hook as a means of forum shopping, (7) both parties requested jury trials with respect to some of their claims and counterclaims, (8) most importantly, the state court action includes additional parties necessary to the mechanic's lien claim who are not parties to the adversary proceeding, and (9) the remaining factors are neutral or weigh only minimally against abstention.[14]

On appeal, Hook does not contest the bankruptcy court's utilization of the twelve-factor test set forth above, nor does she dispute its conclusions upon application of those factors. Rather, Hook contends that the bankruptcy court should have considered the following six "additional factors": (1) Phase One submitted itself to the jurisdiction of the bankruptcy court by filing its proof of claim in the bankruptcy case, and therefore, the matter is a core proceeding and one involving property of the estate over which the bankruptcy court has exclusive jurisdiction, (2) the Motion to Abstain was not timely filed, (3) no grounds existed for remanding the case to state court because it had not been removed to the bankruptcy court, (4) the bankruptcy court struck her demand for a jury trial, and such ruling would be *res judicata* in state court, (5) Hook's husband was a party to the adversary proceeding before the bankruptcy court, but is not a party to the state court case, and (6) under all the facts and circumstances, abstention was not in the interest of justice or in the interest of comity with state

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[14] *Abstention Order* at 2, *in* Appellant's App. at 188.

courts.[15] Consideration of Hook's "additional factors" does not militate in favor of abstention by the bankruptcy court.

The claims in the adversary proceeding are based solely on state contract, tort, and property laws. Actions that do not depend on bankruptcy laws for their existence and which may proceed in another court are not core proceedings.[16] Additionally, the bankruptcy court specifically provided that Hook could reassert her objection to Phase One's proof of claim, if warranted, following the conclusion of the state court action. The fact that the bankruptcy court could have chosen to hear the adversary proceeding does not mean that it was compelled to do so, or that declining to hear the matter constituted an abuse of discretion.

The Motion to Abstain was not untimely. The adversary proceeding was opened September 29, 2006. Phase One filed its Motion to Abstain on December 5, 2006, before the filing of the Federal Rule of Civil Procedure 26(a) disclosures and any discovery took place. At the time abstention was sought, the adversary proceeding was in its infancy. Further, a timely motion is expressly required pursuant to 28 U.S.C. § 1334(c)(2) for mandatory abstention, but not under 28 U.S.C. § 1334(c)(1) for discretionary abstention.[17]

The bankruptcy court did not, as Hook suggests, "remand" the adversary proceeding to state court. Phase One's Motion to Abstain may have requested that the bankruptcy court remand the matter to state court. However, in the Abstention Order, the bankruptcy court simply abstained from hearing the adversary proceeding and dismissed it without prejudice. Hook's argument is little more than a matter of semantics.

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[15] Appellant's Brief at 6-8.

[16] *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1172-73 (10th Cir. 2000).

[17] At least one court has held that no time limit exists when it comes to the filing of a motion for discretionary abstention. *See Wood v. Wood (In re Wood)*, 84 B.R. 432, 434 (S.D. Miss. 1988).

Hook's claims notwithstanding, the bankruptcy court's ruling that Hook was not entitled to a jury trial in bankruptcy court does not operate as *res judicata* to prevent a jury trial in state court. In fact, Hook's demand for a jury trial is one of the factors that weighs in favor of abstention. Moreover, both parties are interested in presenting their claims to a jury.[18]

The argument that the bankruptcy court should retain jurisdiction over this dispute because Hook's husband is not a party to the action in state court is not well taken. Hook had the opportunity to add her husband as a party to the state court case and failed to do so.[19] Further, Hook only added her husband as a party to the adversary proceeding when she amended her counterclaim after all pleadings had been filed on the abstention issue. Hook's actions are of questionable motivation; it appears she may have added her husband to the adversary proceeding to create an argument against the bankruptcy court's abstention in the matter.

Finally, it is difficult to understand how Hook can argue that "[u]nder all the facts and circumstances, abstention was not 'in the interest of justice or in the interest of comity with State courts or respect for State law' under 28 U.S.C. § 1334(c)(1)."[20] Our view is that the bankruptcy court's action falls squarely within the doctrine of abstention based on comity: the decision to abstain will allow a state court, one which has already presided over discovery and pretrial issues and set the matter for trial, to continue to preside over a case consisting solely of state law issues. Such a result is not the creature of an abuse of discretion.

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[18] Appellee's Brief at 12.

[19] Counsel for Phase One informed this Court at oral argument that the state court had ruled that Hook could bring additional claims and add parties. Hook did amend to add claims and damages, but did not add her husband as a party.

[20] Appellant's Brief at 8.

We also conclude that the bankruptcy court did not abuse its discretion in denying the Motion to Amend. "A Rule 59(e) motion to alter or amend the judgment should be granted only to correct manifest errors of law or to present newly discovered evidence."[21] Hook argued nothing new to the bankruptcy court in her Motion to Amend that was not available or considered at the time the adversary was dismissed. Thus, no grounds existed for reconsideration of the order. There is no basis for this Court to conclude that the bankruptcy court made a clear error of judgment or exceeded the permissible bounds of choice in the circumstances.

V. CONCLUSION

The orders of the bankruptcy court granting Phase One's Motion to Abstain from hearing the adversary proceeding and denying Hook's Motion to Amend are affirmed.

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[21] *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted).