

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 96-12478

Chapter 7

ON-CALL, INC.

Debtor(s)

RICHARD P. JAHN, JR., TRUSTEE

Plaintiff

v.

Adversary Proceeding

No. 98-1089

VOLUNTEER BANK & TRUST and
M.T. HAYMES AND COMPANY, INC.

Defendant

MEMORANDUM

Appearances: Richard P. Jahn, Jr., Chattanooga, Tennessee, Attorney for Plaintiff

Douglas R. Johnson, Johnson, Gilbert & Mulroony, P.C., Chattanooga,
Tennessee, Attorney for Defendant, Volunteer Bank & Trust

Fred T. Hanzelik, Hanzelik & James, Chattanooga, Tennessee, Attorney for
Defendant, M.T. Haymes and Company, Inc.

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The bankruptcy trustee for On-Call, Inc., brought this suit against Volunteer Bank & Trust (“Bank”) and M. T. Haymes & Company to recover payments that On-Call made to the Bank. The complaint alleges the payments were fraudulent transfers. In its answer, the Bank included a cross-claim against M. T. Haymes & Company and a third party complaint against M. T. Haymes, Sr., and M. T. Haymes, Jr. This opinion deals with a motion by M. T. Haymes & Company, M. T. Haymes, Sr., and M. T. Haymes, Jr., to dismiss the Bank’s cross-claim and the third party complaint. The motion to dismiss asserts that the court does not have subject matter jurisdiction. For the reasons stated, the court shall dismiss the Bank’s cross-claim and third party complaint on the basis of abstention rather than lack of subject matter jurisdiction.

The complaint alleges: M. T. Haymes & Company obtained loans from Volunteer Bank; none of the money from the loans went to On-Call; representatives of M. T. Haymes & Company, who had financial control of On-Call, caused it to make payments on the loans, even though On-Call received no benefit from the loans; and as a result, the loan payments made by On-Call to Volunteer Bank were fraudulent as to On-Call’s creditors.

In the cross-claim and third party complaint, Volunteer Bank alleges that it can recover from M. T. Haymes & Company, M. T. Haymes, Sr., and M. T. Haymes, Jr., any amount that the trustee recovers from it. The bank asserts the right to recover on two grounds. First, the bank alleges that M. T. Haymes & Company, M. T. Haymes, Sr., and M. T. Haymes, Jr., obtained the partial or full benefit of the loans. Second, the bank alleges that M. T. Haymes & Company has breached certain statements, warranties or representations it made in connection with the loans, and

that these statements, warranties, or representations were guaranteed by M. T. Haymes, Sr., and M. T. Haymes, Jr.

The subject matter jurisdiction of the bankruptcy courts includes the bankruptcy case, civil proceedings arising in the bankruptcy case, civil proceedings related to the bankruptcy case, and civil proceedings arising under the Bankruptcy Code. 28 U.S.C. § 1334(a), (b). The Bank's cross-claim and third party complaint are obviously not the bankruptcy case or a civil proceeding arising under the Bankruptcy Code.

The Bank's cross-claim and third party complaint are not civil proceedings arising in the bankruptcy case. They are an integral part of the trustee's claims against the Bank and M. T. Haymes & Company. The court can decide the trustee's claims without deciding the dispute between the Bank and the other parties.

The idea that the claims are an integral part of the dispute raised by the trustee's complaint is similar to an argument for supplemental jurisdiction, either ancillary or pendent. The court agrees with those cases holding that supplemental jurisdiction does not apply in this situation. *Boyajian v. DeLuca (In re Remington Development Group, Inc.)*, 180 B.R. 365 (Bankr. D. R. I. 1995); *Prudential Securities v. Bennett (In re Foundation for New Era Philanthropy)*, 201 B.R. 382 (Bankr. E. D. Pa. 1996); *Rouse v. Pinegar Chevrolet, Inc. (In re Chambers)*, 125 B.R. 788 (Bankr. W. D. Mo. 1991); *Spaulding & Co. v. Buchanan (In re Spaulding & Co.)*, 111 B.R. 689 (Bankr. N. D. Ill. 1990).

This leaves on the possibility that the cross-claim and third party complaint are proceedings related to the bankruptcy case. To determine whether a particular dispute is a related proceeding, the question is: will the outcome of the proceeding conceivably have any effect on the bankruptcy estate? *Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 488-490 (6th Cir. 1996); *Michigan Employment Security Commission v. Wolverine Radio Corp.*, 930 F.2d 1132, 1140-43 (6th Cir. 1991); *Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 635 (6th Cir. 1986).

One argument for jurisdiction is based on the theory that a decision will determine who among the defendants and third party defendants has a claim against the bankruptcy estate. The argument begins with the proposition that if the bankruptcy trustee recovers from the Bank, the Bank will have a claim against the bankruptcy estate. Next, according to this argument, the Bank will have a claim against M. T. Haymes & Company, M. T. Haymes, Sr., and M. T. Haymes, Jr., for all or part of the amount it was forced to pay the trustee. And finally, to the extent the Bank recovers from M. T. Haymes & Company, Mr. Haymes, Sr., or Mr. Haymes, Jr., then the company, Mr. Haymes, Sr., or Mr. Haymes, Jr., will succeed to the Bank's claim against the bankruptcy estate. Thus, the argument is that the court has jurisdiction who ultimately has a claim against the bankruptcy estate. Of course, this assumes the trustee recovers from the Bank.

In a similar situation, Judge Cook held that the court lacked subject matter jurisdiction of a third party complaint. Judge Cook reasoned that if the defendant recovered from the third party defendant, the third party defendant might be subrogated to the defendant's claim against the bankruptcy estate. That result, however, would only change the identity of the claimant from the

defendant to the third party defendant. It would not change the amount of the claim against the bankruptcy estate. *Still v. Frist (In re Frist)*, Adv. Proc. No. 97-1200, Bankr. Case No. 97-12269 (Bankr. E. D. Tenn. Jul. 2, 1998).

Other courts have also decided that they do not have subject matter or supplemental jurisdiction of a complaint filed by the defendant in a preference or fraudulent transfer suit to recover contribution or indemnity from a third party. *Boyajian v. DeLuca (In re Remington Development Group, Inc.)*, 180 B.R. 365 (Bankr. D. R. I. 1995); *Prudential Securities v. Bennett (In re Foundation for New Era Philanthropy)*, 201 B.R. 382 (Bankr. E. D. Pa. 1996); *Marlow v. United States (In re Julien Co.)*, 136 B.R. 760 (Bankr. W. D. Tenn. 1991); *Rouse v. Pinegar Chevrolet, Inc. (In re Chambers)*, 125 B.R. 788 (Bankr. W. D. Mo. 1991); *Spaulding & Co. v. Buchanan (In re Spaulding & Co.)*, 111 B.R. 689 (Bankr. N. D. Ill. 1990). Not all courts agree with this conclusion. *Raleigh v. Schottenstein (In re Wieboldt Stores, Inc.)*, 111 B.R. 162 (N. D. Ill. 1990) (ancillary jurisdiction); *Young v. Sultan Ltd. (In re Lucasa International Ltd.)*, 6 B.R. 717 (Bankr. S. D. N. Y. 1980).

The Bank may have a better argument for subject matter jurisdiction of the cross-claim against M. T. Haymes & Company, but jurisdiction of the cross-claim is also doubtful. *Kandel v. Wampum Hardware (In re K & R Mining, Inc.)*, 135 B.R. 269 (Bankr. N. D. Ohio 1991).

Deciding who has a claim against the bankruptcy estate can sometimes be within the court's subject matter jurisdiction. Nevertheless, the court is of the opinion it does not have subject matter jurisdiction of the Bank's third party complaint and its cross-claim.

Assuming the court does have subject matter jurisdiction, this is a proper situation for discretionary abstention. The court has discretion to abstain in the interest of justice or in the interest of comity with state courts or respect for state law. 28 U.S.C. § 1334(c)(1). The court can raise the question of discretionary abstention without a motion from one of the parties. *Compare* 28 U.S.C. § 1334(c)(1) and (c)(2); *see Gober v. Terra + Corporation (In re Gober)*, 100 F.3d 1195 (5th Cir. 1996); *Beneficial National Bank USA v. Best Reception Systems, Inc. (In re Best Reception Systems, Inc.)*, 220 B.R. 932 (Bankr. E. D. Tenn. 1998).

The Bank's claims appear to be controlled entirely by state law. This court can decide the trustee's claims against the Bank and M. T. Haymes & Company without deciding the Bank's claims against M. T. Haymes & Company and the two Mr. Haymes. There may be some overlap in the evidence, but the Bank's cross-claim and third party complaint raise disputes that are not relevant to whether the trustee can recover from the Bank or M. T. Haymes & Company. Indeed, it makes more sense for the court to decide the trustee's claims first, without dealing with the Bank's claims at the same time, because the Bank's claims depend on whether it loses to the trustee. In this situation, the Bank can just as well try its claims later in state court if it does lose to the trustee. Trying the Bank's claims will complicate the proceedings for the trustee and the court without necessarily achieving any definite gain in the administration of the bankruptcy estate.

The Bank's cross-claim and third party complaint may be irrelevant to the administration of the bankruptcy case for other reasons. Their effect on the bankruptcy estate depends on whether the Bank, if it loses to the trustee, will have a claim against the bankruptcy estate that may pass to M. T. Haymes & Company or either Mr. Haymes, if the Bank recovers from them.

However, Bankruptcy Code § 502(h) does not create a claim against the bankruptcy estate for every defendant that loses a fraudulent transfer case to the bankruptcy trustee. 11 U.S.C. § 502(h); *see Verco Industries v. Spartan Plastics (In re Verco Industries)*, 704 F.2d 1134 (9th Cir. 1983); *In re Hough*, 4 B.R. 217 (Bankr. S. D. Cal. 1980). Furthermore, the facts do not show that there is likely to be a dividend from the bankruptcy estate on non-priority unsecured claims. The court sees no need for an immediate decision in this court on the Bank's claims. Of course, the Bank would like a quick decision. But a trial of the Bank's claims in this court will complicate the trial of the trustee's claims while providing only a very speculative benefit in the administration of the bankruptcy estate.

For these reasons, abstention is justified even if the court has subject matter jurisdiction of the Bank's cross-claim and third party complaint. *See Kandel v. Wampum Hardware (In re K & R Mining, Inc.)*, 135 B.R. 269 (Bankr. N. D. Ohio 1991).

This memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

entered May 21, 1999

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ORDER

In accordance with the court's memorandum opinion entered this date,

It is ORDERED that the motion by M.T. Haymes & Company, M.T. Haymes, Sr., and M.T. Haymes, Jr., is GRANTED and the cross-claim and third party compliant filed on behalf of Volunteer Bank & Trust is DISMISSED.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

entered May 21, 1999