

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-33669

RONNIE D. SEAGLE

Debtor

RONNIE D. SEAGLE

Plaintiff

v.

Adv. Proc. No. 04-3242

FIRST CENTURY BANK,
RANDY NICELY and wife, MARY NICELY,
TODD BOLINGER, MITCHELL'S GRADING, INC.
and JEFF MITCHELL, individually

Defendants

and

FIRST CENTURY BANK

Defendant, Cross-Claimant,
and Third Party Plaintiff

v.

JAMES SAMPLES and wife, ANITA SAMPLES

Third Party Defendants

and

RANDY NICELY and wife, MARY NICELY

Cross Defendants

**MEMORANDUM ON MOTION TO DETERMINE IF CORE PROCEEDING
AND MOTION TO DISMISS CROSS CLAIM OR HOLD IN ABEYANCE**

APPEARANCES: SCOTT LAW GROUP, P.C.
C. Dan Scott, Esq.
100 East Main Street
Suite 400
Sevierville, Tennessee 37862
Attorneys for Plaintiff/Debtor

DAVID L. BUUCK, ESQ.
Post Office Box 9305
Knoxville, Tennessee 37940-9305
Attorney for Defendants/Cross Defendants Randy and Mary Nicely

WISE & REEVES, P.C.
William A. Reeves, Esq.
Suite 160 Two Centre Square
625 S. Gay Street
Knoxville, Tennessee 37902

MOORE & BROOKS
James R. Moore, Esq.
Post Office Box 1790
Knoxville, Tennessee 37901-1790
Attorneys for Defendant/Cross-Claimant/
Third Party Plaintiff First Century Bank

WOOLF, McCLANE, BRIGHT, ALLEN & CARPENTER, PLLC
Gregory C. Logue, Esq.
900 Riverview Tower
900 S. Gay Street
Knoxville, Tennessee 37902
Attorneys for Defendant Todd Bolinger

LOCKRIDGE & VALONE, PLLC
John D. Lockridge, Esq.
1306 Papermill Pointe Way
Knoxville, Tennessee 37909
Attorneys for Defendants Mitchell's Grading, Inc. and Jeff Mitchell

BEN W. HOOPER, III, ESQ.
335 East Main Street
Newport, Tennessee 37821
Attorneys for Third Party Defendants Jerry and Anita Samples

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff on September 29, 2004, seeking a judgment against the Defendants, First Century Bank, Randy and Mary Nicely (Nicelys), Todd Bolinger (Bolinger), Mitchell's Grading, Inc. (Mitchell's Grading), and Jeff Mitchell (Mitchell), for breach of contract, conspiracy, fraud, negligence, and lender liability stemming from the development of a residential subdivision and the notes and agreements pertaining thereto. Pursuant to Rule 7008(a) of the Federal Rules of Bankruptcy Procedure,¹ the Complaint contains a statement that the Plaintiff's action is a core proceeding.

On October 25, 2004, the Nicelys filed an Answer, denying all allegations of wrongdoing and asserting estoppel, waiver, and unclean hands as affirmative defenses. Additionally, pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure,² the Nicelys dispute the core nature of the proceeding, expressly stating their lack of consent to entry of final orders by the bankruptcy court. Finally, the Nicelys demand a jury.

Mitchell's Grading and Mitchell filed a joint Answer on October 27, 2004, denying any allegation of fraud or conspiracy, asserting that the Complaint fails to state a claim upon which relief

¹ This Rule requires, *inter alia*, that

In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

FED. R. BANKR. P. 7008(a).

² This Rule requires in material part that:

A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

FED. R. BANKR. P. 7012(b).

can be granted, and raising estoppel, unclean hands, and lack of contract between the Debtor and themselves as affirmative defenses. The Answer filed by these Defendants does not comply with Rule 7012(b) because it does not admit or deny the core or non-core nature of the Plaintiff's action.

First Century Bank and Bolinger filed a joint Answer on November 18, 2004, denying any wrongdoing, asserting estoppel, waiver, and unclean hands as affirmative defenses, stating their agreement with the Plaintiff's averment that this is a core proceeding, and expressly consenting to the entry of final orders by the bankruptcy court. Additionally, First Century Bank filed a Cross-Complaint against the Nicelys and a Third-Party Complaint against Jerry and Anita Samples (Samples), all of whom are co-makers on the various notes at issue in this case, averring their default under those notes. On December 20, 2004, the Nicelys filed an Answer to the Cross-Complaint, and, on the same date, the Samples answered the Third-Party Complaint.

Presently before the court are the following motions filed by the Nicelys on December 20, 2004: (1) the Motion to Determine if Proceeding is a Core Proceeding (Core Proceeding Motion), asking the court to determine that the adversary proceeding is not core; and (2) the Motion of Cross-Defendants Randy D. Nicely and wife Mary Nicely to Dismiss Cross Claim by First Century Bank or to Hold Such Proceeding in Abeyance (Motion to Dismiss), seeking dismissal of the Nicelys as Cross Defendants, or in the alternative, holding adjudication of the Cross Complaint in abeyance pending adjudication of the same issues in a previously filed lawsuit in the Chancery Court for Knox County, Tennessee. The Plaintiff filed an untimely brief on January 18, 2005, in response to the Core Proceeding Motion.³ No other party filed a response to either motion.

³ The local rule governing motion practice states, in material part, as follows:

(continued...)

I

The Plaintiff filed the Voluntary Petition commencing his bankruptcy case under Chapter 11 of the Bankruptcy Code on July 12, 2004, and since that date, he has continued to operate as a debtor-in-possession pursuant to 11 U.S.C.A. § 1107 (West 2004). On September 29, 2004, the Plaintiff filed the Complaint initiating this adversary proceeding, which is based upon a failed residential land development. According to the Complaint, at some point prior to October 2001, the Plaintiff became interested in developing a residential subdivision on 90 acres of land he owned in the Gibbs Community of Knox County (Real Property). A realtor introduced the Plaintiff to Bolinger, a loan officer with First Century Bank, who in turn, introduced the Plaintiff to Randy Nicely to assist in the development. Thereafter, the Plaintiff entered into a Development Agreement with the Nicelys for the subdivision later named Christian Springs, whereby the Nicelys had full responsibility for developing the subdivision.

Through Bolinger, the Plaintiff and Randy Nicely (Nicely) secured a loan from First Century Bank to begin development of the subdivision. Pursuant thereto, on October 10, 2001, the Plaintiff executed a Loan Agreement setting forth the terms of the loan, a Multipurpose Note and Security Agreement secured by a Trust Deed on the Real Property, an Agreement to Furnish Insurance, and a Promissory Note in the amount of \$1,057,049.02 (collectively October 2001 Loan Documents).

³(...continued)

A motion filed in a[n adversary] proceeding shall be accompanied by a brief setting forth the facts and the law supporting the motion. Unless the court directs otherwise, the opposing party shall respond within twenty days after the date of filing of the motion. Any opposing response shall be supported by a brief setting forth the facts and the law in opposition to the motion. A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion. After the time for response has expired, the court may rule on the motion without a hearing.

E.D. Tenn. LBR 7007-1. Notwithstanding this rule, all motions must still be decided on their merits.

Because First Century Bank required a co-signer, the Plaintiff's aunt and uncle, the Samples, also executed the October 2001 Loan Documents. The Nicelys did not execute any of the October 2001 Loan Documents.

On October 10, 2002, First Century Bank made a second loan for development of the subdivision. In connection with the second loan, the Plaintiff, the Nicelys, and the Samples executed a Promissory Note in the amount of \$406,004.10, along with a Loan Agreement practically identical to the one executed by the Plaintiff in October 2001 (collectively October 2002 Loan Documents).⁴ The Plaintiff, Nicely, and the Samples also executed a Multipurpose Note and Security Agreement, pledging the Real Property as security for the loan, and an Agreement to Furnish Insurance.

As the development progressed, closings for the lots were scheduled and held. The Plaintiff believed that the proceeds from those closings, which were delivered directly to Bolinger, would be used to reduce the obligations owed to First Century Bank. The Plaintiff avers that he later discovered that Nicely made draws against the loans, resulting in little reduction to the loan balances. The subdivision also had construction cost overruns totaling more than \$200,000.00, and instead of taking one year to complete, it took two.

The Plaintiff contends that Bolinger and First Century Bank acted in violation of the October 2002 Loan Documents by allowing Nicely to take draws against the loans without the authorization of either the Plaintiff or the Samples, and that Bolinger and Nicely conspired to use the Plaintiff's loans to improve Nicely's weak financial condition. The Plaintiff also alleges that Nicely, Mitchell's Grading, and Mitchell conspired to defraud him by submitting overstated excavating invoices and

⁴ The October 2002 Loan Agreement is erroneously dated "October 10, 2001," and it references the loan amount as \$406,004.50 rather than \$406,004.10.

invoices for other subdivisions being developed by Nicely, which were paid by Nicely using funds from the October 2002 Loan. The Plaintiff further avers that Nicely breached the Development Agreement, and his actions constitute conversion and misrepresentation. In addition, the Plaintiff alleges that First Century Bank, Bolinger, and Nicely attempted to cover up the actual use of the proceeds received from the sale of Christian Springs lots by failing to provide a complete history of the loan, including documentation of disbursements and deposits. Finally, the Plaintiff avers that First Century Bank failed to negotiate in good faith to resolve these issues. In summary, the Complaint alleges breach of contract, conspiracy, fraud, negligence, and lender liability, and the Plaintiff prays for actual damages, including interest, costs, and attorney's fees, plus compensatory damages of \$500,000.00, punitive damages of \$2,000,000.00, and release of First Century Bank's lien on the Plaintiff's Real Property.

First Century Bank's Cross and Third Party Complaint against the Nicelys and the Samples is based upon those parties' liability as co-signers under the October 2001 Loan Documents and the October 2002 Loan Documents.

The Nicelys' Motions raise two issues. First, they challenge the core nature of the adversary proceeding, and second, they challenge the propriety of First Century Bank's Cross Complaint. In support of both Motions, the Nicelys argue that the Plaintiff's lender liability lawsuit is non-core, will not affect the bankruptcy case, and is not necessary for an effective reorganization. Additionally, the Nicelys argue that First Century Bank's Cross Complaint based upon default of the October 2002 Loan Documents is identical to the lawsuit currently pending in the Chancery Court for Knox County, Tennessee, and should be decided in that court, in which they have filed a third party claim against First Century Bank and made a jury demand.

II

The Nicelys first seek a determination whether the adversary proceeding itself is a core proceeding. Jurisdiction over bankruptcy matters is exclusive to the federal courts pursuant to 28 U.S.C.A. § 1334, which provides, as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) 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 abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C.A. § 1334 (West 1993 & Supp. 2004) (footnote omitted). This limited subject matter jurisdiction may not be waived, and it may be raised at any time. *Franzel v. Kerr Mfg. Co.*, 959 F.2d

628, 630 (6th Cir. 1992); *Robinson v. Mich. Consol. Gas Co., Inc.*, 918 F.2d 579, 582 (6th Cir. 1990); *Matuscak v. United States Bankr. Ct. Clerk (In re Rini)*, 782 F.2d 603, 608 (6th Cir. 1986) (“It is well established that parties cannot somehow waive jurisdictional objections, nor can they consent to the jurisdiction of a court when that court lacks jurisdiction over the subject matter of their dispute.”). The party alleging federal court jurisdiction bears the burden of proof. *Kmart Creditor Trust v. Conaway (In re Kmart Corp.)*, 307 B.R. 586, 590 (Bankr. E.D. Mich. 2004).

Section 1334 is supplemented by 28 U.S.C.A. § 157 (West 1993 & Supp. 2004), allowing bankruptcy courts to hear “core proceedings,” which encompass all actions arising under title 11 and/or arising in a case under title 11. Included among those proceedings designated as “core” are the following:

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharge;
- (K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C.A. § 157(b)(2). Simply stated, a core proceeding “invokes a substantive right created by federal bankruptcy law or one which could not exist outside of the bankruptcy.” *Sanders Confectionary Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 483 (6th Cir. 1992). Cases “under title 11” refer to the actual bankruptcy cases “commenced in a federal district court or bankruptcy court with the filing of a petition [initiating the bankruptcy].” *Robinson*, 918 F.2d at 583. “Arising in” and “arising under” actions include matters “that arise only in bankruptcy cases” such as adversary proceedings and contested matters concerning issues contained in or provided for by the Bankruptcy Code. *Dally v. Bank One, Chicago, N.A. (In re Dally)*, 202 B.R. 724, 727 (Bankr. N.D. Ill. 1996). Conversely, § 1334 also discusses “non-core” proceedings, which are those matters which are not core, but that the bankruptcy court may hear simply because they are “related to” the bankruptcy case.

Here, the Nicelys have questioned the core nature of the adversary proceeding. Upon review of the Complaint, the court finds that only the Plaintiff’s request for an order requiring First Century Bank to release its lien on the Real Property is a core proceeding, falling within the purview of § 157(b)(2)(K). The remaining issues concerning breach of contract, fraud, negligence, conspiracy, and lender liability, however, are non-core, clearly existing outside the scope of the Plaintiff’s bankruptcy case. Furthermore, the adversary proceeding did not arise in or under title 11, and none of the remaining causes of action are even bankruptcy-related.

Nevertheless, as previously stated, § 157(c) allows the bankruptcy court to hear non-core proceedings that are “related to” bankruptcy proceedings when “the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Robinson*, 918 F.2d at 583 (quoting *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984)). A court may exercise “related to” jurisdiction if there is “some nexus between the action and the debtor’s bankruptcy case[,]” *Beneficial Nat’l Bank USA v. Best Reception Sys., Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932, 944 (Bankr. E.D. Tenn. 1998), or “if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” *Robinson*, 918 F.2d at 583 (quoting *Pacor*, 743 F.2d at 994). The court’s “related to” jurisdiction is “‘comprehensive’ but not ‘limitless.’ It does extend to suits between non-debtor parties, but only if the action has ‘an effect on the bankruptcy estate.’” *Best Reception Systems*, 220 B.R. at 944 (quoting *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498 n.5 (1995)).

In this case, because the Plaintiff is a debtor-in-possession, any causes of action he possesses are “related to” the bankruptcy case, and an adjudication in his favor could affect the administration of the bankruptcy estate as a whole. In his prayer for relief, the Plaintiff has asked the court for damages of not less than \$2,500,000.00 and an order requiring First Century Bank to release its lien on his Real Property. Quite clearly, the granting of any relief sought would have a profound effect on the Plaintiff’s bankruptcy, by altering his options and liabilities and impacting both the Plaintiff and his creditors.

In summary, the court finds that the Plaintiff’s request for an order requiring First Century Bank to release its lien on the Plaintiff’s Real Property is a core proceeding. The remaining issues

raised in the Plaintiff's Complaint, while non-core, could impact, and thus, are "related to" the bankruptcy case by virtue of the Plaintiff's status as debtor-in-possession.

III

Under § 1334(c)(1), the bankruptcy court may, within its discretion, abstain from hearing either core or non-core proceedings. *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 232 (2d Cir. 2002). Courts generally look to the following factors when making the determination whether to abstain:

(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; (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) the 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 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.

Best Reception Systems, 220 B.R. at 953.⁵ Moreover, permissive abstention may be raised by the court *sua sponte*. *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1207 n.10 (5th Cir. 1996); *Smith v. Wal-Mart Stores, Inc.*, 305 F. Supp. 2d 652, 658 n.9 (S.D. Miss. 2003); *Scherer v. Carroll*, 150 B.R. 549, 552 (D. Vt. 1993); *LaRoche Indus., Inc. v. Orica Nitrogen LLC (In re LaRoche Indus., Inc.)*, 312 B.R. 249, 256

⁵ Deciding whether to abstain is a core proceeding under § 157(b)(2)(A). *Best Reception Systems*, 220 B.R. at 941.

(Bankr. D. Del. 2004). Based upon its analysis of the foregoing criteria, the court will exercise its discretion and abstain from hearing this adversary proceeding.⁶

The Plaintiff's Complaint is based upon the following: (1) breach of contract; (2) conspiracy; (3) fraud; (4) negligence; and (5) lender liability. Each of these causes of action is governed exclusively by the laws of the State of Tennessee, and none involve the Bankruptcy Code whatsoever. Generally, federal courts have subject matter jurisdiction over only two types of civil proceedings, those involving federal questions and those involving a diversity of citizenship. See 28 U.S.C.A. §§ 1331 (West 1993) and 1332 (West 1993 & Supp. 2004). Federal question jurisdiction involves causes of action arising under the Constitution and the United States Code. Diversity of citizenship jurisdiction requires the parties to be from different states and/or countries, plus the amount in controversy must exceed \$75,000.00.

Here, but for the Plaintiff's bankruptcy, the court would not have subject matter jurisdiction under title 11, and because all of the issues raised in the Complaint are state law claims, there is no federal question jurisdiction under § 1331. Furthermore, the parties are all citizens of Tennessee, so there is no diversity of citizenship. Accordingly, absent the Plaintiff's bankruptcy case, the court fails to see any other basis for federal subject matter jurisdiction.⁷

Also a factor is the Nicelys' demand for a jury trial. Parties have the right to a trial by jury under the Seventh Amendment, which states, as follows: "In Suits at common law, where the value

⁶ Not all of the *Best Reception* factors are present in every case. Consequently, in this case, the court only considered those factors that are applicable, addressed in this Memorandum in no specific order.

⁷ Additionally, because the Plaintiff is the debtor-in-possession, the automatic stay is not an issue. Therefore, there is nothing preventing the Plaintiff from filing this lawsuit against the Defendants in an appropriate state court, and in fact, First Century Bank has an action stemming from the default of the two loans at issue in this adversary proceeding pending against the Nicelys and the Samples in the Chancery Court for Knox County, Tennessee.

in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII. This has been determined by the Supreme Court to mean that a party to any lawsuit in which the court is to determine legal rights is entitled to a jury trial, in contradiction to suits in which the court determines equitable rights and remedies. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989).⁸ Specifically, courts must determine if a cause of action supports the right to a jury trial by examining the following factors: (1) compare the action with 18th Century actions in England prior to the merger of courts of law and equity; (2) determine if the remedy sought is legal or equitable in nature; and (3) determine if Congress has “assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder.” *Granfinanciera*, 109 S. Ct. at 290.

Here, the Plaintiff requests a judgment against the Defendants in an amount not less than \$500,000.00 in compensatory damages and \$2,000,000.00 in punitive damages for breach of contract, conspiracy, fraud, negligence, and lender liability. In addition, the Plaintiff seeks an order requiring First Century Bank to release its lien on the Plaintiff’s Real Property. Quite clearly, the relief the Plaintiff seeks is legal in nature, with the sole exception being the request for release of its lien. Nevertheless, if “[t]he complaint plainly seeks the type of relief traditionally provided by courts of law, and the remedies available at law are capable of providing the estate with complete and adequate

⁸ In the bankruptcy context,

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C.A. § 157(e). “Absent such designation by the district court or the consent of the parties, bankruptcy courts within the Sixth Circuit do not have the authority to conduct jury trials.” *Roberts, Inc. v. Palliser Furniture*, 291 B.R. 102, 104 (S.D. Ohio 2003). On February 27, 1995, the Judges of the United States District Court for the Eastern District of Tennessee entered an Order authorizing the bankruptcy judges in this district to conduct jury trials.

relief], annexing an equitable remedy to a legal or statutory cause of action will not transform the legal nature of an action into an action at equity.” *Crocker v. Namer (In re AVN Corp.)*, 235 B.R. 417, 421-22 (Bankr. W.D. Tenn. 1999).⁹

Moreover, the court’s decision to abstain will have little or no effect on the administration of the Plaintiff’s bankruptcy case. While the outcome of the adversary proceeding could have an effect on the case in terms of recovery for the Plaintiff and his unsecured creditors, the court’s abstention will not in any way hinder the administration of the estate. And, although the adjudication of these issues by the bankruptcy court, or a determination in the Plaintiff’s favor, could in some way affect the bankruptcy estate, giving rise to “related to” jurisdiction, all parties to the adversary proceeding have not expressly consented to having the bankruptcy court enter final orders, and in fact, the Nicelys have expressly withheld their consent.¹⁰

Finally, the bankruptcy court would be unable to hear this adversary proceeding because of the Nicelys’ jury demand.

[G]rave Seventh Amendment problems would arise if a jury trial is conducted by the bankruptcy court, because [28 U.S.C.] section 157(c)(1) requires *de novo* review by the

⁹ The court notes, however, that the October 21, 2002 Loan Agreement executed by the Nicelys expressly states the following:

8.5 WAIVER OF JURY. Borrower hereby unconditionally and irrevocably waives any and all right to trial by jury in any action, suit, counterclaim or cross claim arising in connection with, out of or otherwise relating to the Loan Agreement, any documentation relating to the Loan, or any transaction arising therefrom or related thereto.

COMPL. EX. 5. Because the Plaintiff has not moved to strike the jury demand and because the court is abstaining, it need not consider whether the Nicelys indeed waived their right to a jury trial.

¹⁰ Pursuant to 28 U.S.C.A. § 157(c)(1), the court, without the express consent of all parties to a proceeding that is non-core but otherwise related to a case under title 11, must “submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge”

district court of noncore matters. . . .^[11] [Thus,] where a jury trial is required and the parties refuse to consent to bankruptcy jurisdiction, withdrawal of the case to the district court is appropriate.

Taxel v. Elec. Sports Research (In re Cinematronics, Inc.), 916 F.2d 1444, 1451 (9th Cir. 1990); *accord Clay*, 35 F.3d at 194 (“*De novo* review by a district court is also impossible in practice, because a cold record cannot capture the atmosphere, the expressions, the attitudes that are the marrow of a jury trial.”); *Beard v. Braunstein*, 914 F.2d 434, 443 (3d Cir. 1990) (“The Seventh Amendment limitations on the review of jury findings are not compatible with section 157(c)(1), which requires that any contested finding by the bankruptcy court must be reviewed *de novo*.”); *Blackwell v. Zollino (In re Blackwell)*, 267 B.R. 724, 729 (Bankr. W.D. Tex. 2001) (“[B]eing subject to *de novo* review [by the district court] under the statute . . . means that the resulting procedure perforce violates the Seventh Amendment’s prohibition on the retrial of any matter decided by a jury.”).

For the foregoing reasons, the court will exercise its discretion under § 1334(c)(1) and abstain from hearing this adversary proceeding. The court, therefore, need not address

¹¹ See *supra* n.10.

the merits of the Nicelys' Motion to Dismiss. An order consistent with this Memorandum will be entered.

FILED: January 20, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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JAMES SAMPLES and wife, ANITA SAMPLES

Third Party Defendants

and

RANDY NICELY and wife, MARY NICELY,

Cross Defendants

ORDER

For the reasons set forth in the Memorandum on Motion to Determine if Core Proceeding and Motion to Dismiss Cross Claim or Hold in Abeyance filed this date, the court directs that it abstains from hearing this adversary proceeding pursuant to 28 U.S.C.A. § 1334(c)(1) (West 1993 & Supp. 2004).

SO ORDERED.

ENTER: January 20, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE