

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

In re

Case No. 99-30466

CARIBBEAN CIGAR COMPANY
d/b/a CARIBBEAN CIGAR & TOBACCO CO.
d/b/a CARIBBEAN CIGAR COMPANY, INC.
CARIBBEAN CIGAR FACTORY
CARIBBEAN CIGAR HOLDING CORP.

Debtor

ANN MOSTOLLER, TRUSTEE

Plaintiff

v.

Adv. Pro. No. 00-3024

JAMES D. JOINER, INDIVIDUALLY,
TROPICAL REPUBLIC COCONUT
GROVE, INC., TROPICAL REPUBLIC
KEY WEST, INC., and DAVIE
WESTVIEW DEVELOPERS, INC.

Defendants

**MEMORANDUM ON DEFENDANTS'
MOTION FOR LEAVE TO AMEND PRETRIAL ORDER**

APPEARANCES: JENKINS & JENKINS ATTORNEYS, PLLC

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Attorneys for Ann Mostoller, Trustee

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Attorney for the Defendants

**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This matter is before the court on the Defendants' Motion for Leave to Amend Pretrial Order ("Motion") filed on October 12, 2000. By their Motion, the Defendants seek to add twenty-four issues to the Pre-Trial Order entered on October 3, 2000. The Defendants further seek to withdraw their consent to the entry of final orders and judgments by the bankruptcy judge over the non-core but related issues involved in this proceeding. The Plaintiff filed a brief in response to the Defendants' Motion on October 30, 2000.

I

This adversary proceeding is set for trial on March 19, 2001. At the scheduling conference held on September 7, 2000, the court directed the parties to submit a pretrial order. An order was subsequently prepared by the Plaintiff's counsel, submitted to the court on September 25, 2000, and entered on October 3, 2000.

The Plaintiff's counsel served a copy of the proposed Pre-Trial Order on the Defendants' counsel, Stephen Finta, by U.S. Mail on September 25, 2000. Also in the Plaintiff's Response and Brief in Support of Response to Defendants' Motion to Amend Pre-Trial Order, the Plaintiff avers that a proposed Pre-Trial Order was faxed to the Defendants' counsel on September 11, 2000. The Plaintiff additionally states that a second fax was sent to Mr. Finta on September 18, 2000, advising that the Pre-Trial Order would be submitted to the court in its original form if additional issues were not provided by September 20, 2000. Finally, the Plaintiff states that the Defendants' issues for inclusion were not received by the time the Pre-Trial Order was submitted on September 25.

The Defendants do not contend that they were unaware of the contents of the proposed Pre-Trial Order. They do state that their issues for inclusion were faxed to the Plaintiff's counsel "on or about" September 25. The Defendants additionally note their disagreement with the consent given by their counsel at the scheduling conference to have this court decide both core and non-core but "related to" issues.

II

The Defendants' proposed First Amended Pre-Trial Order appended to their Motion contains twenty-four additional issues for determination by the court. The Plaintiff does not object to the incorporation of these issues into the Pre-Trial Order. The Defendants' Motion, with respect to the inclusion of these additional issues, will therefore be granted with the caveat that the parties need to state the issues in a much more succinct manner.¹

III

The Defendants' Motion also seeks to modify the Pre-Trial Order by withdrawing their consent allowing this court to finally determine non-core but "related to" issues. The Plaintiff objects to this request.

A district court's jurisdiction over bankruptcy cases and proceedings is governed by 28 U.S.C.A. § 1334(a)-(b) (West 1993), which grants jurisdiction in four instances: (1) "cases under

¹ In addition to the twenty-four issues sought to be added by the Defendants, the October 3, 2000 Pre-Trial Order already contains seventeen issues, some of which are stated with subparts.

title 11"; (2) "proceedings arising under title 11"; (3) "proceedings . . . arising in . . . cases under title 11"; and (4) "proceedings . . . related to cases under title 11." 28 U.S.C.A. § 1334(a)-(b); see also *Beneficial Nat'l Bank USA v. Best Reception Sys., Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932, 942-44 (Bankr. E.D. Tenn. 1998). All bankruptcy proceedings must be, at a minimum, "related to" a case under title 11. Otherwise, subject matter jurisdiction does not exist. See *Best Reception Sys., Inc.*, 220 B.R. at 944.

Bankruptcy judges are authorized to hear, determine, and enter final orders and judgments in "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C.A. § 157(b)(1) (West 1993). Also, "with the consent of all the parties to the proceeding," the bankruptcy court may hear, determine, and enter final orders and judgments on proceedings "related to a case under title 11." 28 U.S.C.A. § 157(c)(2).

Procedurally, Rule 7008(a) of the Federal Rules of Bankruptcy Procedure requires in material part:

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).

Rule 7012(b) of the Federal Rules of Bankruptcy Procedure requires in material part:

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).

Neither the Plaintiff nor the Defendants complied with the procedural requirements of Rules 7008(a) and 7012(b).²

At the scheduling conference held on September 7, 2000,³ the court pointed out that this proceeding contains non-core but related issues. The following exchange took place between the court and counsel for the Defendants:

The court: What I'd like to emanate from this hearing is a pretrial order. You have filed a discovery plan on August 18. Incorporate that discovery plan. I note that both parties have treated this as a core proceeding; in fact, it has non-core but related issues. And I assume if you're willing to treat it as core, I would like this pretrial order to also go ahead and recite the core nature of the proceedings and then also recite that to the extent non-core but related matters might be involved, the parties consent to the entry of final orders and judgments from the bankruptcy judge per 28 U.S.C. 157(c)(2). Is that satisfactory, Mr. Finta?

Mr. Finta: It is, Judge.

² The Plaintiff, in paragraph 3 of her Complaint filed on March 14, 2000, avers only that "[t]he allegations of the Complaint present both core proceedings pursuant to 28 U.S.C. § 157(b)(2)(E) and/or (O) and non-core proceedings." The Defendants, in paragraph 3 of their individual answers filed on July 7, 2000, state only that "Paragraph Number 3 [of the Complaint] is admitted." The Defendant, Davie Westview Developers, Inc., in its Counterclaim of Davie Westview Developers, Inc., filed July 14, 2000, contains no statement that the counterclaim asserted by this Defendant is core or non-core.

³ Counsel for the Defendants, whose office is in Fort Lauderdale, Florida, participated in the scheduling conference by telephone.

The court: All right. That takes care of the jurisdictional hurdle that we seem to find in a lot of these bankruptcy matters.

Exc. of Tr. of Sept. 7, 2000 Scheduling Conf. at 2.

IV

Rule 16 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7016 of the Federal Rules of Bankruptcy Procedure, governs pretrial practice. With respect to pretrial orders, the Rule provides:

After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference *shall be modified only to prevent manifest injustice.*

FED. R. CIV. P. 16(e) (emphasis added). The Pre-Trial Order “controls the subsequent course of the proceedings and becomes the governing pattern of the lawsuit.” *Union Planters Nat’l Bank v. Commercial Credit Bus. Loans, Inc.*, 651 F.2d 1174, 1188 (6th Cir. 1981). The party seeking modification bears the burden of establishing such manifest injustice. *See Smith v. Ford Motor Co.*, 626 F.2d 784, 795 (10th Cir. 1980).

The Defendants have not demonstrated, or even attempted to demonstrate, that a manifest injustice would result from the court’s entry of final orders and judgments over the non-core and related to issues involved in this proceeding. At the scheduling conference, the Defendants, through their counsel, expressly consented to the court’s final disposition of the non-core issues pursuant to 28 U.S.C.A. § 157(c)(2). In the absence of “manifest injustice,” the Defendants are bound by their consent. *See United States v. Johnson*, 752 F.2d 206, 210 (6th Cir. 1985);

American Chem. Paint Co. v. Dow Chem. Co., 164 F.2d 208, 209 (6th Cir. 1947). The Defendants' Motion, with respect to the withdrawal of the consent previously given pursuant to § 157(c)(2), will therefore be denied.

An appropriate order will be entered.

FILED: November 7, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendants

ORDER

For the reasons stated in the Memorandum on Defendants' Motion for Leave to Amend Pretrial Order filed this date, the court directs the following:

1. To the extent the Defendants, by their Motion for Leave to Amend Pretrial Order filed October 12, 2000, seek to amend the Pre-Trial Order entered on October 3, 2000, by including additional issues, the Motion is GRANTED.

2. To the extent the Defendants, by their Motion for Leave to Amend Pretrial Order filed October 12, 2000, seek to amend the Pre-Trial Order entered on October 3, 2000, to withdraw

their consent to allow the court to enter final orders and judgments pursuant to 28 U.S.C.A. § 157(c)(2) (West 1993) regarding the non-core but related to aspects of this proceeding, the Motion is DENIED.

3. The Plaintiff and Defendants shall, within fourteen (14) days, submit an amended pretrial order which includes all paragraphs of the Pre-Trial Order entered by the court on October 3, 2000, with the exceptions of paragraphs 4 and 5, which shall be modified to include an amended statement of all issues to be resolved by the court. These issues shall be stated succinctly.

SO ORDERED.

ENTER: November 7, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE