

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

In re

Case No. 01-33797

DAVID RAY KITTS

Debtor

NARESH PATEL

Plaintiff

v.

Adv. Proc. No. 01-3183

DAVID RAY KITTS

Defendant

**MEMORANDUM ON MOTION FOR ABSTENTION**

APPEARANCES: GENTRY, TIPTON, KIZER & McLEMORE, P.C.  
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**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

The Plaintiff filed a Complaint on December 3, 2001, asking the court to find that his purported contract with the Defendant is unenforceable.<sup>1</sup> Now before the court is the January 4, 2002 Motion for Abstention, through which the Defendant asks the court to abstain from hearing the Complaint. Each party has submitted a brief supporting his views on the abstention issue.

The determination of whether to abstain is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) (West 1993); *Beneficial Nat'l Bank USA v. Best Receptions Sys., Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932, 941 (Bankr. E.D. Tenn. 1998).

## I

The Defendant filed a Voluntary Petition under Chapter 13 on August 3, 2001. Among the scheduled assets is a "contract with Naresh Patel re[: ] subdivision" (Contract). The Contract's value is listed as "indeterminate."

On Schedule F, the Defendant lists six creditors holding unsecured, nonpriority claims totaling \$725,000.00. The Defendant's Chapter 13 Plan, confirmed on November 19, 2001, provides that the claims of the six unsecured, nonpriority creditors "will not be paid through this plan as they are contingent and will be paid through a project" relating to the Contract. In his brief, the Defendant states that he scheduled the six debts because he thought he was personally

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<sup>1</sup> The Plaintiff also asks the court to enjoin the Defendant from coming on or about the real property that is the subject of the alleged contract.

liable on each as a guarantor. The Defendant now states that he only guaranteed one of the debts, in the amount of \$100,000.00 to creditor Sudia Patel.<sup>2</sup>

According to the Defendant, the Contract is an agreement "under which the defendant would a [sic] share of profits for managing sub-contracts on a project in Knox County, Tennessee." The Contract is evidenced by two documents signed by the parties prepetition. These documents state that the parties are to purchase certain land upon which they will, as partners, develop a condominium project.<sup>3</sup> In his Complaint, the Plaintiff contends that the Contract is unenforceable due to failure of, and/or lack of, consideration.

## II

Abstention is governed by 28 U.S.C.A. § 1334(c) (West Supp. 2001) which provides:

(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.

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<sup>2</sup> The Plaintiff (Naresh Patel) states that the first name of Sudia Patel (his wife) is correctly spelled "Sudha."

<sup>3</sup> If enforceable, the Contract is executory in nature because performance remains due on both sides. See *Terrell v. Albaugh (In re Terrell)*, 892 F.2d 469, 471 n.2 (6<sup>th</sup> Cir. 1989). However, the Defendant did not list the Contract on Schedule G to his Petition and, in fact, avers on Schedule G that he "has no executory contracts."

Subsection (c)(2) defines the circumstances under which a court must abstain from hearing a proceeding. Among the requirements of § 1334(c)(2) is that a proceeding must have already been commenced in state court. Because there is currently no pending state court action relating to the Contract's enforceability, the mandatory abstention provisions of subsection (c)(2) are inapplicable to this matter.

Before addressing the permissive abstention provisions of § 1334(c)(1), the court notes that the question of the Contract's enforceability is a non-core issue "related to" the Defendant's bankruptcy case.<sup>4</sup> Proceedings "related to a case under title 11" are those whose outcome "could conceivably have any effect on the estate being administered in bankruptcy." *Best Reception Sys.*, 220 B.R. at 944 (quoting *Robinson v. Michigan Consolidated Gas Co.*, 918 F.2d 579, 583 (6<sup>th</sup> Cir. 1990) (quoting *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984))). The present proceeding could certainly have an effect on the Defendant's Chapter 13 estate. Even though the purported guarantor debts are to be paid outside the Chapter 13 Plan, if the Contract is enforceable and if the Defendant's rights in the Contract are greater than the guarantor debts then the result will be a net gain for the estate.

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<sup>4</sup> The present state-law cause of action is not a core proceeding as it neither arises under title 11 nor does it arise in a case under title 11. See *Best Reception Sys.*, 220 B.R. at 943. Under 28 U.S.C.A. §§ 1334 and 157(b)(1) (West 1993), proceedings "arising under title 11" are those involving "a cause of action created or determined by a statutory provision of title 11." *Best Reception Sys.*, 220 B.R. at 943 (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5<sup>th</sup> Cir. 1987)). Proceedings "arising in a case under title 11" are those "that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *Best Reception Sys.*, 220 B.R. at 943 (quoting *Wood*, 825 F.2d at 97). The Plaintiff's state-law contract Complaint fits into neither of these categories. Further, the court cannot accept the Plaintiff's assertion that this is a core proceeding under 28 U.S.C.A. § 157(b)(2)(A) and (O). See *Best Reception Sys.*, 220 B.R. at 946 n.19.

Under § 1334(c)(1), the court may abstain from a “related” proceeding “in the interest of justice, or in the interest of comity with State courts or respect for State law[.]” 28 U.S.C.A.

§ 1334(c)(1). In deciding motions for abstention, courts commonly employ the following factors:

- (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.A. § 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 Sys.*, 220 B.R. at 953.

After weighing the pertinent factors, the court concludes that it should abstain from hearing the present adversary proceeding. Because the guarantor debts are to be paid outside the

Defendant's Plan, there is no indication that abstention would delay or disrupt the administration of the Defendant's estate. For the same reason, this proceeding is fairly remote from the bankruptcy case. In addition, there is no federal jurisdictional basis apart from 28 U.S.C.A. § 1334. Most importantly, state law issues clearly predominate over bankruptcy issues in this matter.

Accordingly, the Defendant's Motion for Abstention will be granted and the court will abstain from hearing this proceeding pursuant to 28 U.S.C.A. § 1334(c)(1). An appropriate order will be entered.

FILED: March 14, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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**ORDER**

For the reasons stated in the Memorandum on Motion for Abstention filed this date, the court directs the following:

1. The Motion for Abstention filed by the Defendant on January 4, 2002, is GRANTED.
2. The court abstains from hearing this adversary proceeding.

SO ORDERED.

ENTER: March 14, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE