

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

In re

Case No. 02-35482

KINDRICK TRUCKING CO., INC.

Debtor

CITICAPITAL COMMERCIAL CORPORATION  
formerly Associates Commercial Corporation

Plaintiff

v.

Adv. Proc. No. 03-3002

KINDRICK TRUCKING CO., INC.,  
T A G TRANSPORT, INC.,  
HERBERT O. KINDRICK,  
EVELYN F. KINDRICK and  
GARY A. KINDRICK

Defendants

**MEMORANDUM**

**APPEARANCES:** STONE & HINDS, P.C.  
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Attorneys for Defendants Herbert O. Kindrick  
and Evelyn F. Kindrick

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

This adversary proceeding was removed to the bankruptcy court pursuant to the Notice of Removal filed on January 14, 2003, by CitiCapital Commercial Corporation (CitiCapital) pursuant to 28 U.S.C.A. § 1452 (West 1994) and Federal Rule of Bankruptcy Procedure 9027. CitiCapital originally commenced this civil action in the Chancery Court for Roane County, Tennessee, Docket Number 14378, on September 20, 2002, seeking a possessory hearing and issuance of a writ of possession together with a money judgment against the five Defendants.<sup>1</sup>

CitiCapital, pursuant to Rule 9027(a) of the Federal Rules of Bankruptcy Procedure, states in the Notice of Removal that this is a core proceeding pursuant to 28 U.S.C.A. § 157(b)(2)(B) and (K) (West 1993).

## I

CitiCapital is a secured creditor of the Debtor by virtue of an Agreement dated March 21, 2002, regarding several conditional sales contracts executed by the Debtor. As collateral, CitiCapital holds perfected security interests in thirty-nine Benson over-the-road trailers (the Collateral). The Debtor defaulted on its payments to CitiCapital but remains in possession of the Collateral and, in fact, has entered into a lease agreement with T A G Transport, Inc. (T A G) for lease of the Collateral for \$15,000.00 per month. By its Complaint filed on September 20, 2002, in the Chancery Court for Roane County, Tennessee, as amended by an Amended Complaint filed on October 9, 2002, CitiCapital seeks a possessory hearing and issuance of a writ of possession in order to gain possession of the Collateral. CitiCapital also seeks a money judgment against the

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<sup>1</sup> Two of the Defendants, T A G Transport, Inc. and Gary A. Kindrick, were dismissed "with full prejudice" pursuant to an Agreed Order entered by the state court on October 29, 2002.

Debtor and the remaining Defendants in the amount of \$1,413,618.58, plus attorneys' fees, expenses, and prejudgment interest.

Pursuant to the Notice of Application for Writ of Possession, a possessory hearing was scheduled in the state court for October 15, 2002. The Debtor requested an evidentiary hearing, which the Chancellor scheduled for October 19, 2002. This hearing was stayed, however, when the Debtor filed its voluntary petition initiating this Chapter 11 bankruptcy case on October 18, 2002.

CitiCapital filed the Motion for Relief from the Automatic Stay or Alternatively for Adequate Protection in the Debtor's case on November 6, 2002, the Supplemental Motion of CitiCapital for Relief from the Automatic Stay or Alternatively for Adequate Protection on December 3, 2002, and the Amended Motion of CitiCapital for Relief from the Automatic Stay or Alternatively for Adequate Protection on December 12, 2002 (collectively the Motion for Relief), seeking relief from the automatic stay in order to gain possession of the Collateral, or in the alternative, seeking adequate protection payments from the Debtor. The court held a hearing on the Motion for Relief on December 31, 2002, and an Agreed Order was entered pursuant thereto on January 13, 2003, in which it was ordered that the Debtor would make monthly adequate protection payments of \$15,000.00 to CitiCapital, and the parties would market the Collateral for sale.

On January 21, 2003, the Debtor filed a Motion to Sell Trailers, seeking permission to sell the thirty-nine Benson flatbed trailers for \$14,144.60 each to Benson Truck Bodies, Inc., free and

clear of all liens and encumbrances. Also on January 21, 2003, the Debtor filed a Motion to Sell Trailers and Tractors, seeking permission to sell forty Benson flatbed trailers, twelve Hyundai vans, sixteen "cask" trailers, three Fruehauf flatbed trailers, two Fruehauf double drop trailers, two Trailstar trailers, one Transcraft trailer, one Great Dane trailer, and two Kenworth tractors for \$1,180,500.00 to T A G, free and clear of all liens and encumbrances. CitiCapital filed objections to the Debtor's Motions on February 10, 2003. The court held a hearing on the Motions on February 20, 2003, and trial is scheduled for March 21, 2003, with the automatic stay to remain in effect, subject to conditions, pending resolution of the sale motion and timely receipt of rental payments. The court entered an Order on March 3, 2003, memorializing the trial and briefing schedule, and additionally providing:

5. That the Debtor shall remit to CitiCapital on or before February 26, 2003, the balance of the adequate protection payments due through February 6, 2003, in the amount of \$39,815.16;

6. That the automatic stay shall remain in effect until March 21, 2003, except as otherwise provided herein;

7. That upon the Debtor's default in payment of the adequate protection balance of \$39,815.16 due on February 26, 2003, or the Debtor's default in payment of the adequate protection payment due on March 6, 2003, the automatic stay with respect to the collateral claimed by CitiCapital shall be modified without further order of the Court to permit CitiCapital to take possession of the collateral[.]

*In re Kindrick Trucking Co., Inc.*, No. 02-35482, Order at 2 (Bankr. E.D. Tenn. Mar. 3, 2003).

On January 14, 2003, CitiCapital filed the Notice of Removal, thereby removing the Roane County Chancery Court action to this court. As previously noted, CitiCapital maintains in the Notice of Removal that the action against the Debtor is a core proceeding in that it concerns allowance or disallowance of claims; however, the action is a non-core proceeding against the remaining Defendants, Evelyn F. Kindrick and Herbert O. Kindrick (collectively the Kindricks),

and as such, CitiCapital, pursuant to 28 U.S.C.A. § 157(c)(2) (West 1993), consents to the entry of a final order by the bankruptcy judge. On January 24, 2003, the Kindricks filed a Statement in Response to Notice of Removal in which they state that they "do not consent to entry of a final order or judgment by the Bankruptcy Judge as a jury demand has been made, but do consent to entry of a final order or judgment by the U.S. District Court Judge."<sup>2</sup> A scheduling conference was held by the court on March 6, 2003, and an order was entered on March 10, 2003, directing the parties to file any motions seeking to add additional parties by March 20, 2003, and directing the parties to file a written statement of consent to having a jury trial conducted by the court within thirty days if they so consented.

On March 7, 2003, CitiCapital filed the Motion of CitiCapital Commercial Corporation to Join T A G Transport, Inc. as a Necessary Party, on the basis that T A G is currently in possession of the Collateral.<sup>3</sup> Additionally, on March 7, 2003, CitiCapital filed the Motion of CitiCapital Commercial Corporation for Expedited Writ of Possession Against the Debtor and T A G Transport, Inc. On consideration of CitiCapital's motions, the court entered an Order on March 10, 2003, scheduling an evidentiary hearing on the request for an expedited writ of possession and scheduling a hearing on the motion to join T A G as a necessary party for March 21, 2003. However, based upon the ruling in this Memorandum, CitiCapital's motions will

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<sup>2</sup> The Kindricks demanded a jury trial in their Answer filed in the state court. The court construes this language in the Statement in Response to Notice of Removal to mean that the Kindricks do not consent to a jury trial by the bankruptcy judge. See 28 U.S.C.A. § 157(e) (West 2003) ("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.").

<sup>3</sup> This poses an interesting question which the court does not purport to answer. Can T A G, having been dismissed by CitiCapital as a party Defendant "with full prejudice," now be brought back into this litigation? See *supra* n.1.

be rendered moot, and the hearings scheduled on March 21, 2003, regarding this remanded action will be stricken.

## II

CitiCapital removed this adversary proceeding from the Roane County Chancery Court pursuant to 28 U.S.C.A. § 1452 (West 1993), which states:

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision not to remand, 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.

28 U.S.C.A. § 1452; *see also* FED. R. BANKR. P. 9027.

28 U.S.C.A. § 1334 (West 1993 & Supp. 2002) governs jurisdiction of bankruptcy cases and proceedings and provides:

(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 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; *see also* FED. R. BANKR. P. 9027; FED. R. BANKR. P. 9030.<sup>4</sup>

Pursuant to § 1334(c)(1), the court may decide to abstain from either core or non-core proceedings sua sponte. *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 232 (2d Cir. 2002) (“Permissive abstention . . . under 28 U.S.C. § 1334(c)(1) is left to the bankruptcy court’s discretion.”); *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1206, 1207 n.10 (5<sup>th</sup> Cir. 1996) (“A court . . . may abstain at its discretion from deciding either core or

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<sup>4</sup> Procedurally, “all cases under title 11 and any and all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.” 28 U.S.C.A. § 157(a) (West 1993).



non-core proceedings under § 1334(c)(1) if the interests of justice, comity, or respect for state law so require.”). In deciding whether to abstain, courts generally look to 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. § 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.

*Beneficial Nat'l Bank USA v. Best Reception Sys., Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932, 953 (Bankr. E.D. Tenn. 1998).

Here, the primary concern of CitiCapital is gaining possession of the Collateral. “Congress has left the determination of property rights in the assets of a bankrupt’s estate to state law, since such property interests are created and defined by state law.” *Nobelman v. Am. Sav. Bank*, 113 S. Ct. 2106, 2110 (1993) (quoting *Butner v. United States*, 99 S. Ct. 914, 917-18 (1979)). Accordingly, state law governs this action. In Tennessee, actions to recover personal property include writs of possession and are governed by Title 29, Chapter 30 of the Tennessee Code Annotated. The procedure for expedited writs of possession is expressly detailed in Tennessee Code Annotated section 29-30-106, which provides in pertinent part:

**29-30-106. Procedure to expedite action for writ of possession.** — As an alternative to commencing an action to recover personal property as otherwise provided in this part, any party needing or desiring to expedite the proceeding may commence and expedite the action by proceeding as follows:

(1) Application for a writ of possession may be made to the appropriate court at the beginning of the first session of court during the day, or at such other time of day as the court, by local rule, has established. Either simultaneously with the making of such application or prior thereto, the party seeking a writ of possession shall file a verified complaint with which shall be exhibited a copy of any writing upon which the alleged claim to possession is founded. Upon the making of such application, the court shall hear the parties and shall order the writ of possession issued giving the plaintiff immediate possession of the property where the court finds either:

(A) That at least five (5) days prior to such application plaintiff mailed by certified mail or delivered to defendant a notice of the time and place of such application and that:

(i) Such notice had either been received by the defendant, or was directed to the defendant at the address stated in any writing, signed by the defendant, and on which the plaintiff's claim to possession is founded;

(ii) Such notice was accompanied by a copy of plaintiff's complaint, including a copy of any writing on which the plaintiff's claim to possession was founded; and

(iii) The plaintiff is entitled to possession of the property, or that there is no substantial controversy as to the plaintiff's right to such possession; or

.....

(B)(ii) That the defendant is

.....

(e) Seriously impairing the plaintiff's security interest in the property; such as by use in some manner other than that contemplated by the parties, or by failing to maintain hazard insurance on the property where the written instrument or agreement on which the plaintiff's claim is founded requires such insurance.

A writ of possession issued pursuant to this subdivision (B) shall be conditioned on the plaintiff's posting a bond in an amount fixed by the court which shall not be less than the value of the property.

. . . .

(3) Except for the provisions of this section which must be complied with in order to expedite the proceeding, actions commenced pursuant to this section shall be governed by the remaining provisions of the part.

TENN. CODE ANN. § 29-30-106 (2000). *See also* TENN. CODE ANN. § 29-30-101 through -108 (2000).

The primary bankruptcy issue in CitiCapital's cause of action has already been determined. CitiCapital may proceed with the action in the Roane County Chancery Court only if it is granted relief from the automatic stay provisions of 11 U.S.C.A. § 362.<sup>5</sup> Pursuant to the March 3, 2003 Order entered by the court in the Debtor's bankruptcy case, if the Debtor did not make its adequate protection payments by February 26, 2003, CitiCapital would have relief from the automatic stay to take possession of the Collateral without further order of the court. The Debtor

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<sup>5</sup> Section 362 provides, in pertinent part:

(a) [A] petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

. . . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to . . . enforce any lien against property of the estate;

(5) any act to . . . enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title[.]

11 U.S.C.A. § 362 (West 1993 & Supp. 2000).

did not comply. Thus, the automatic stay is lifted, allowing CitiCapital to proceed with its remedies at law to take possession of its Collateral.<sup>6</sup>

CitiCapital's remedies at law to gain possession of the Collateral are entirely governed by state law. Furthermore, the basis for CitiCapital's claims against the Debtor, the Kindricks, and T A G<sup>7</sup> are founded entirely upon state law issues of breach of contract and possession of personal property. Because state law so greatly predominates over any bankruptcy law issues, the court believes that the Chancery Court for Roane County, Tennessee, is better suited for entering judgment based upon CitiCapital's state law claims. The bankruptcy court does not often deal in the area of writs of possession, but these actions are expressly within the jurisdiction of the state chancery courts and are dealt with by those courts on a regular basis. See TENN. CODE ANN. § 29-30-102 (2000); *In re Williams*, 144 F.3d 544, 550 (7<sup>th</sup> Cir. 1998) (regarding a detainer action and modification of the automatic stay to keep the issue within the state court arena). Furthermore, most, if not all of CitiCapital's Collateral is alleged to be in the possession of T A G, which is not a debtor in bankruptcy court. Accordingly, the court exercises its discretion under § 1334(c)(1) and abstains from hearing this adversary proceeding removed from the Chancery Court for Roane County, Tennessee.<sup>8</sup>

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<sup>6</sup> CitiCapital has not obtained relief from the automatic stay to permit it to proceed with its claim for monetary relief against the Debtor, nor does the March 3, 2003 Order allow it to do anything other than "take possession of the collateral."

<sup>7</sup> *But see supra* n.1.

<sup>8</sup> For a detailed discussion regarding mandatory and permissive abstention, see *Beneficial Nat'l Bank USA v. Best Reception Sys., Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932 (Bankr. E.D. Tenn. 1998).

### III

The court, having exercised its authority to abstain from hearing this adversary proceeding, also determines that this action should be remanded back to the Chancery Court for Roane County, Tennessee. Remand of a removed proceeding is governed by 28 U.S.C.A. § 1452(b) and may be raised sua sponte for any equitable ground. See 11 U.S.C.A. § 1452(b); *Best Reception Sys., Inc.*, 220 B.R. at 958. Generally, a court makes the same considerations regarding abstention and remand, such that “where the facts before the court mandate or compel abstention, equitable grounds for remand exist under § 1452(b) and remand of the proceeding to state court is favored.” *Best Reception Sys., Inc.*, 220 B.R. at 958.

### IV

In summary, the court will abstain from hearing this adversary proceeding and will direct that it be remanded back to the Chancery Court for Roane County, Tennessee, for adjudication. As the automatic stay has already been lifted to allow CitiCapital to take possession of its Collateral, it may proceed to do so and may, of course, proceed with whatever other relief it seeks against the remaining parties, other than the Debtor.<sup>9</sup> The March 10, 2003 Orders of the court in this adversary proceeding scheduling hearings and setting deadlines are moot, and the hearings shall be stricken.

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<sup>9</sup> See *supra* n.6.

An order consistent with this Memorandum will be entered.

FILED: March 14, 2003

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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T A G TRANSPORT, INC.,  
HERBERT O. KINDRICK,  
EVELYN F. KINDRICK and  
GARY A. KINDRICK

Defendants

**ORDER**

For the reasons stated in the Memorandum filed this date, the court directs the following:

1. The court abstains from hearing this adversary proceeding.
2. The Plaintiff's action is remanded to the Chancery Court for Roane County, Tennessee.
3. The hearing scheduled for March 21, 2003, to consider the Motion of CitiCapital Commercial Corporation for Expedited Writ of Possession Against the Debtor and T A G Transport, Inc. and the Motion of CitiCapital Commercial Corporation to Join T A G Transport, Inc. as a Necessary Party, both filed by the Plaintiff on March 7, 2003, is STRICKEN.

SO ORDERED.

ENTER: March 14, 2003

BY THE COURT

*/s/*

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE