

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

In re

Case No. 00-30531

DONALD ALGOT TANGWALL

Debtor

PHYLLIS JEAN DALBY

Plaintiff

v.

Adv. Proc. No. 00-3042

DONALD ALGOT TANGWALL

Defendant

MEMORANDUM ON CHANGE OF VENUE

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding was commenced on April 17, 2000, by the Plaintiff's filing of a Complaint to Determine Dischargeability of Indebtedness. On June 19, 2000, the Plaintiff filed a Motion for Change of Venue (Motion), seeking to transfer her action to the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division, located in Bay City, Michigan. The Defendant (hereinafter Debtor) filed a Response to Motion for Change of Venue on July 6, 2000.¹ At a hearing held on July 13, 2000, the court summarily denied the Plaintiff's Motion, and a one-paragraph Order memorializing that ruling was entered on July 14, 2000. On August 10, 2000, the court, having determined that the venue question warranted more extensive consideration, vacated its July 14, 2000 Order *sua sponte*. Additionally, the court suspended all discovery and related pretrial proceedings pending resolution of the Motion.

In addition to the venue issue raised by the Plaintiff's Motion in this adversary proceeding, the court, *sua sponte*, will address the issue of venue as it relates to two contested matters pending in the Debtor's case. First is a motion filed by the Debtor on June 12, 2000, entitled "Motion for Rule to Show Cause Against Renee E. Nesbit and Heather Ferguson for Violation of Automatic Stay Provisions of Section 362 of Bankruptcy Code." By this motion, the Debtor seeks damages pursuant to 11 U.S.C.A. § 362(h) (West 1993) against the Plaintiff's attorney, Renee Nesbit, and Heather Ferguson, a clerk for the 34th Judicial Circuit Court of the State of Michigan, relative to postpetition actions allegedly taken to enforce a judgment entered in the Circuit Court for Arenac County, Michigan, which is the subject matter of the Plaintiff's nondischargeability action.

¹ The Debtor is not represented by counsel either in his defense of this adversary proceeding or in his bankruptcy case.

Second is a motion filed by the Debtor on August 8, 2000, entitled “Second Motion for Rule to Show Cause Against Renee E Nesbit Attorney and Phyllis J Dalby Creditor for Violation of Automatic Stay Provisions of Section 362 of Bankruptcy Code and for Appropriate Sanctions per 362h.” By this second motion, the Debtor again seeks damages pursuant to § 362(h) against Ms. Nesbit and includes the Plaintiff as a respondent. The claims asserted by the Debtor in this motion also relate to the Michigan Circuit Court action involving the Plaintiff and Debtor and encompass alleged stay violations most of which could and should have been addressed by the Debtor in his June 12, 2000 motion.

These are core proceedings. 28 U.S.C.A. § 157(b)(2)(A), (G) (West 1993).

I

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on February 11, 2000. The Plaintiff is the Debtor’s largest creditor, asserting a \$230,000 claim arising from a judgment entered by default in the Circuit Court for Arenac County, Michigan, on December 29, 1998. The judgment for damages was thereafter entered on October 27, 1999. The Plaintiff, by her present action, contends her claim is nondischargeable pursuant to 11 U.S.C.A. § 523(a)(6) (West 1993).

Upon the commencement of his Chapter 7 case, the Debtor listed his address in his Voluntary Petition as 642 Wears Valley Road, Townsend, Tennessee 37462. On April 11, 2000, he filed a First Amended Voluntary Petition designating his mailing address as 145 Santiago Road, Turner, Michigan 48765. The Turner, Michigan address appears on the Answer to Complaint

to Determine Dischargeability of Indebtedness filed by the Debtor on July 12, 2000, on the Response to Motion for Change of Venue filed by the Debtor on July 6, 2000, and on the first stay violation motion filed by the Debtor in his case on June 12, 2000. The Debtor, however, lists a third address, 576 Foothills Plaza Drive, Maryville, Tennessee 37801, on the second stay violation motion filed in his case on August 8, 2000.

The Plaintiff and Debtor are, or were at one time, married. The Debtor has referred to the Plaintiff as his ex-wife, but there are also indications that the two are merely separated. Regardless of the parties' current marital status, there appears to exist a great amount of animosity between the two.

Numerous motions and responses have been filed with the court in the Debtor's case relating to the proceedings in the Circuit Court of Arenac County, Michigan, which involved a personal injury action filed against the Debtor by the Plaintiff on April 10, 1998. In February 2000, that court found the Debtor in contempt and briefly jailed him for both failure to appear and failure to convey certain property to the Plaintiff. As conditions of the Debtor's release, he was ordered to appear before that court monthly and to obtain permission before leaving the state.

The Debtor asserts that these restrictions have since been lifted. However, a July 21, 2000 Order of the Arenac County Circuit Court indicates otherwise, and the Debtor now faces further contempt charges for failure to appear as required. The Debtor's response to these events are the two alleged stay violation motions filed in his case against Renee Nesbit, Heather Ferguson, and the Plaintiff.

II

TRANSFER OF THE ADVERSARY PROCEEDING

(A) Authority

Rule 7087 of the Federal Rules of Bankruptcy Procedure addresses the transfer of adversary proceedings. It provides that “[o]n motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412” FED. R. BANKR. P. 7087. Section 1412 provides that “[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.” 28 U.S.C.A. § 1412 (West 1993).

In the recent decision in *Irwin v. Beloit Corp. (In re Harnischfeger Industries, Inc.)*, 246 B.R. 421 (Bankr. N.D. Ala. 2000), the court examined in detail the analysis required for determining whether to grant a motion to change the venue of an adversary proceeding under § 1412. It began by recognizing the distinction between venue and jurisdiction, which is that “[j]urisdiction is the power to adjudicate, while venue, which relates to the place where judicial authority may be exercised, *is intended for the convenience of the litigants.*” *Id.* at 431 (quoting *Still v. Rossville Crushed Stone Co.*, 370 F.2d 324, 325 (6th Cir. 1966) (per curiam) (emphasis added)). Because the language of § 1412 is disjunctive, the court concluded that a motion to transfer may be granted upon a showing of either the interest of justice or the convenience of the parties. *See Harnischfeger Indus., Inc.*, 246 B.R. at 435; *see also Things Remembered, Inc. v. BGTV, Inc. (In re Things Remembered, Inc.)*, 151 B.R. 827, 832 (Bankr. N.D. Ohio 1993).

Courts have broad discretion in ruling on such motions, which must be considered on a case by case basis. See *Harnischfeger Indus., Inc.*, 246 B.R. at 435. The moving party carries the burden of proving that a transfer is appropriate by a preponderance of the evidence. See *McLemore v. Thomasson (In re Thomasson)*, 60 B.R. 629 (Bankr. M.D. Tenn. 1986).

The *Harnischfeger* court examined the “interest of justice” prong first, explaining that it is a “broad and flexible standard which must be applied on a case by case basis.” *Harnischfeger Indus., Inc.*, 246 B.R. at 435 (quoting *Gulf States Exploration Co. v. Manville Forest Products Corp. (In re Manville Forest Products Corp.)*, 896 F.2d 1384, 1391 (2d Cir. 1990)). It also noted that courts apply a list of factors in order to determine whether a transfer is in the interest of justice and that “[s]ome courts have held that the most important factor . . . is whether the transfer would promote the economic and efficient administration of the bankruptcy estate.” *Harnischfeger Indus., Inc.*, 246 B.R. at 435; see also *In re HME Records, Inc.*, 62 B.R. 611 (Bankr. M.D. Tenn. 1986). Drawing from numerous other decisions, the court set forth the factors to be considered:

- (a) Economics of estate administration
- (b) Presumption in favor of the “home court”²
- (c) Judicial efficiency
- (d) Ability to receive a fair trial
- (e) The state’s interest in having local controversies decided within its borders by those familiar with its laws
- (f) Enforceability of any judgment rendered

² “The ‘home court’ is the court in which the debtor’s bankruptcy case is pending.” *Harnischfeger Indus., Inc.*, 246 B.R. at 429 n.15.

(g) Plaintiff's original choice of forum

Harnischfeger Indus., Inc., 246 B.R. at 435-37 (footnotes omitted); see also *Things Remembered, Inc.*, 151 B.R. at 832 (using similar factors).

The court then addressed the second prong, which concerns the “convenience of the parties.” See *Harnischfeger Indus., Inc.*, 246 B.R. at 437. It explained that although § 1412 does not explicitly mention the convenience of witnesses, that factor should be considered in the analysis. See *id.* Drawing once more from numerous other decisions, the court set forth a list of considerations regarding the convenience of the parties:

- (a) Location of the plaintiff and defendant
- (b) Ease of access to necessary proof
- (c) Convenience of the witnesses
- (d) Availability of subpoena power for the unwilling witnesses
- (e) Expense related to obtaining witnesses

Id. (footnotes omitted). The change of venue motion should be denied “where the movant only shows that inconvenience will merely be shifted from one party to another” *Id.*

(B) “In the Interest of Justice”

As noted in *Harnischfeger*, the efficient and economic administration of the estate is the principal concern in determining whether venue should be transferred in the interest of justice. See *id.* at 437; see also *In re Gurley*, 215 B.R. 703, 709 (Bankr. W.D. Tenn. 1997). In analyzing the efficient administration factor, considerations particularly relevant to the present case are the efficiency of consolidating similar matters, the potential for delay, and the impact of transfer on the Debtor.

The proponent of venue transfer in *Harnischfeger* wanted the adversary proceeding shifted from a distant forum to the bankruptcy court where the debtor’s Chapter 11 case was pending. The movant asserted that consolidation of all matters relating to the case would increase the efficiency of estate administration. On the facts of that case, however, the court disagreed. Particularly noting the potential for increased litigation costs to the estate, the court determined that more efficient administration would result if the adversary proceeding and main bankruptcy case were heard in two separate venues. *Harnischfeger Indus., Inc.*, 246 B.R. at 438.

A brief review of the results of the current state of consolidation should be instructive. Since June 12, 2000, the bulk of the activity regarding the Debtor’s estate has been a series of documents questioning the timing and validity of the February Michigan contempt order. Additionally, in his recent “Second Motion for Rule to Show Cause Against Renee E Nesbit and Phyllis J Dalby Creditor for Violation of Automatic Stay Provisions of Section 362 of Bankruptcy Code and for Appropriate Sanctions per 362h,” the Debtor asserts that “his hectic court schedule”

has left him “broke, sick, and unable to work to earn a living.” Clearly, the current venue structure is not producing an effective or efficient administration of the estate. The judicial system has an interest in allocating its limited resources in the most effective and efficient manner possible. *Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482, 487 (6th Cir. 1996).

(C) “For the Convenience of the Parties”

The court must also consider the second prong of 28 U.S.C.A. § 1412, whether a change of venue is warranted for the convenience of the parties. Considering the factors set out in *Harnischfeger*, the court concludes that a transfer of venue is appropriate.

The Plaintiff lives in Michigan. The Debtor maintains an address in that state and, although insistent that he is now a domiciliary of Tennessee, is under order to remain in Michigan according to the most current evidence before this court. Judicial records relevant to the resolution of the adversary proceeding are in Michigan as well. The parties have designated at least 14 potential witnesses, all of whom appear to be Michigan residents.³ The inconvenience and expense involved in deposing and in calling these persons would be dramatically reduced by a transfer of venue to Michigan.

In summary, each of the “convenience of the parties” factors set out in *Harnischfeger* weighs in favor of the Plaintiff. A transfer of venue would be more than a “mere shift of

³ In the Plaintiff’s Preliminary Witness and Exhibit List filed by the Plaintiff on August 7, 2000, she lists ten potential witnesses, including herself, all of whom reside in Michigan. In the Names of Witnesses filed by the Debtor on July 28, 2000, he lists four witnesses, excluding the Plaintiff, all of whom the court presumes to reside in Michigan.

inconvenience from one party to another.” *See Harnischfeger Indus., Inc.*, 246 B.R. at 437. The Plaintiff has demonstrated by a preponderance of the evidence that this Michigan-based proceeding would be most efficiently and effectively resolved in that state. Therefore, in the interest of justice and for the convenience of the parties, the Plaintiff’s Motion for Change of Venue will be granted.

III

TRANSFER OF CONTESTED MATTERS

(A) Authority

A court’s consideration of venue change under its own motion is appropriate if extraordinary circumstances are present. *See Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998). Extraordinary circumstances include repetitive litigation and an absence of connection with the forum state. *See Davis v. Reagan*, No. 88-6419, 1989 WL 40200 (6th Cir. April 20, 1989). “Extraordinary circumstances” has also been defined as “[f]actors of time, place, etc., which are not usually associated with a particular thing or event; out of the ordinary factors.” BLACK’S LAW DICTIONARY 586 (6th ed. 1990).

As discussed, the Debtor’s case has substantially more connections with Michigan than with Tennessee. Assets, witnesses, the largest creditor, and, according to a Michigan court order, the Debtor himself, are tied to Michigan. Further, more than one litigant has accused the Debtor of using his bankruptcy filing for the purposes of harassment and delay. While the court makes no finding to that effect, both are improper purposes prohibited by Rule 9011(b) of the Federal Rules of Bankruptcy Procedure. The court is presently without sufficient evidence to pass judgment on

the Debtor's motivations, but it is at least clear that this case's protracted and repetitive litigation has wasted judicial resources and become a destructive source of stress for all parties involved, including the Debtor.

The court finds that the limited connections with the State of Tennessee, the occurrence of repetitive litigation, and the identity of the parties all constitute "extraordinary circumstances" warranting transfer of the two contested matters filed by the Debtor in his case.

(B) "In the Interest of Justice or for the Convenience of the Parties"

The same analysis applies to the contested matters as applies to the Plaintiff's Motion for Change of Venue in the adversary proceeding. The court will not repeat that analysis.

For the above reasons, the court will grant the Plaintiff's Motion and will transfer this adversary proceeding to the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division, located in Bay City, Michigan. Additionally, the court, on its own motion, will transfer the Debtor's June 12, 2000 "Motion for Rule to Show Cause Against Renee E. Nesbit and Heather Ferguson for Violation of Automatic Stay Provisions of Section 362 of Bankruptcy Code" and the Debtor's August 8, 2000 "Second Motion for Rule to Show Cause Against Renee E Nesbit Attorney and Phyllis J Dalby Creditor for Violation of Automatic Stay Provisions of Section 362 of Bankruptcy Code and for Appropriate Sanctions per 362h" as filed in the Debtor's case, together with all responses, motions and related documents, to the Michigan Bankruptcy Court.

Appropriate orders will be entered.

FILED: September 19, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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

In re

Case No. 00-30531

DONALD ALGOT TANGWALL

Debtor

ORDER

For the reasons stated in the Memorandum on Change of Venue filed this date in Adversary Proceeding No. 00-3042, styled *Phyllis Jean Dalby v. Donald Algot Tangwall*, which Memorandum is to be cross-docketed by the clerk to the Debtor's case, the court, *sua sponte*, directs the following:

1. The motion filed by the Debtor on June 12, 2000, entitled "Motion for Rule to Show Cause Against Renee E. Nesbit and Heather Ferguson for Violation of Automatic Stay Provisions of Section 362 of Bankruptcy Code," and all matters related thereto are transferred to the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division, located in Bay City.

2. The motion filed by the Debtor on August 8, 2000, entitled "Second Motion for Rule to Show Cause Against Renee E Nesbit Attorney and Phyllis J Dalby Creditor for Violation of Automatic Stay of Section 362 of Bankruptcy Code and for Appropriate Sanctions per 362h," and all matters related thereto are transferred to the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division, located in Bay City.

SO ORDERED.

ENTER: September 19, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Plaintiff

v.

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DONALD ALGOT TANGWALL

Defendant

ORDER

For the reasons stated in the Memorandum on Change of Venue filed this date, the court directs the following:

1. The Plaintiff's Motion for Change of Venue filed June 19, 2000, is GRANTED.
2. This adversary proceeding is transferred to the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division, located in Bay City.

SO ORDERED.

ENTER: September 19, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE