United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Wells Fargo Bank N.A., as Indenture Trustee for The Grand Pacific Business Loan Trust 2005-1, Plaintiff, v. Transcontinental Realty Investors, Inc., and EQK Bridgeview Plaza, Inc., Defendant
Adv. Case No. 10-341

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

January 24, 2011

James W. McNeilly, Jr., McNeilly Law Offices, LLC, La Crosse, WI, and Jonathan C. Myers, Jaffe Raitt Heuer & Weiss, P.C., Southfield, MI, for plaintiff
Andrew R. Bosshard, Bosshard Parke Ltd., La Crosse, WI, for defendants

Thomas S. Utschig, United States Bankruptcy Judge

ORDER

On November 19, 2010, the defendant Transcontinental Realty Investors, Inc., initiated this adversary proceeding by filing a notice of removal with the clerk of the bankruptcy court, thereby removing litigation pending in the circuit court of La Crosse County, Wisconsin. The basis for removal was the October 4, 2010, bankruptcy filing of its co-defendant, EQK Bridgeview Plaza, Inc., in the bankruptcy court for the Northern District of Texas.[1] Transcontinental also filed a motion to transfer venue of this adversary proceeding to the Northern District of Texas. The plaintiff, Wells Fargo, objected to the transfer of the case and also filed a motion to remand the matter to the state court. The Court conducted a telephonic conference on January 6, 2011, on the pending motions and the legal memorandum submitted by the parties.[2] The parties indicated that they had no further argument to submit, and the Court indicated that it would issue an appropriate order.

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[1] The Texas case is styled as In re EQK Bridgeview Plaza, Inc., Case No. 10-37054-sgj-11.

[2] Attorneys James W. McNeilly, Jr., and Jonathan C. Myers appeared on behalf of Wells Fargo, and Attorney Andrew R. Bosshard appeared on behalf of Transcontinental.

In its state court complaint, the plaintiff sought judgment against both EQK Bridgeview Plaza and Transcontinental in connection with a promissory note in the original amount of $7,197,000. EQK Bridgeview Plaza was the principal obligor under the note and had executed a mortgage in favor of the plaintiff, which the plaintiff sought to foreclose.[3] The plaintiff also asserted that Transcontinental was liable for the note balance under an absolute and unconditional guaranty. In its notice of removal, Transcontinental indicated that it believed removal was appropriate because the state court action was "related to" the bankruptcy case in accordance with 28 U.S.C. § 1334(b). In that regard, Transcontinental alleges that should it be found liable on the guaranty, it would in turn have a claim for indemnification against the debtor, a claim that would necessarily impact the bankruptcy estate and would be the "functional equivalent" of a judgment against the debtor. The plaintiff, of course, contests this conclusion and believes that the case should be remanded to state court due to either procedural defects, a lack of jurisdiction, or the principals of mandatory and/or permissive abstention found in 28 U.S.C. §§ 1334(c)(2) and1334(c)(1).

The alleged procedural defect is that the notice of removal was filed with the bankruptcy court, rather than the district court. 28 U.S.C. § 1452(a) provides that "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending." Fed. R. Bankr. P. 9027(a)(1) provides that "[a] notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending." Under Fed. R. Bankr. P. 9001(3), "Clerk" is defined as meaning the bankruptcy clerk. In a jurisdictional context, all bankruptcy matters have been referred to the bankruptcy court by the district court pursuant to a standing order. Consequently, the notice of removal was properly filed with the bankruptcy court. See 10 Collier on Bankruptcy ¶ 9027.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("Since Rule 9001(3) defines clerk as the bankruptcy clerk, and the bankruptcy court is a unit of the district court, the notice of removal is filed with the bankruptcy clerk rather than the district court clerk."); see also Lennar Corp. v. Briarwood Capital LLC, 430 B.R. 253, 257 (Bankr. S.D. Fla. 2010) (notice of removal should have been filed with the clerk of the bankruptcy court); In re Aztec Industries, Inc., 84 B.R. 464, 468 (Bankr. N.D. Ohio 1987) ("Notwithstanding the use of the term 'District Court' in § 1452(a), the majority of Courts have allowed parties to file Petitions for Removal of state court cases with the Bankruptcy Court.").

[3] According to the plaintiff, the bankruptcy was filed after the state court granted its request for the appointment of a receiver. On November 30, 2010, the plaintiff and the debtor apparently reached an agreement terminating the receivership. The plaintiff indicates that the only claim pending in the litigation involves Transcontinental's guaranty.

As the notice of removal was properly filed with the bankruptcy clerk, the larger issue is whether this Court should consider the plaintiff's additional arguments in support of remand or simply transfer the case to Texas, where that court could consider the issues of jurisdiction and abstention. Courts are divided on this issue. Some have adopted the philosophy that in this context the court to which a matter is removed is simply a "conduit," and that it is more appropriate for the "home court" (i.e., the court where the main case is pending) to determine whether to retain the case. Everett v. Friedman's Inc., 329 B.R. 40, 42 (S.D. Miss. 2005) (it is appropriate for the home court to "make the determination whether the case may or should remain in federal court"); see also Aztec Industries, 84 B.R. at 467 (a final ruling on various issues raised in context of venue, remand, and abstention should be left to the "home" court). Other courts have adopted the position that the initial court is a "gatekeeper," and that it should not simply rubber stamp a transfer of venue but should investigate these issues on its own. Lennar Corp., 430 B.R. at 261 ("the bankruptcy court to which the action is removed serves a gatekeeper function in which two jurisdictional issues can and should be decided"); Rayonier Wood Prods., L.L.C. v. ScanWare, Inc., 420 B.R. 915, 919 (S.D. Ga. 2009) (the language of 28 U.S.C. §§ 1412 and 1452 "suggests that the local bankruptcy court, does not act merely as a conduit, but actually plays a more active role in the abstain/remand question").

In this case, Transcontinental alleges that its possible indemnification claim will have a significant impact upon the debtor's bankruptcy estate, and that any judgment in the plaintiff's favor is tantamount to a judgment against the debtor. The plaintiff argues that the outcome will have "no impact whatsoever" on the debtor's bankruptcy estate. See Plaintiff's Statement Denying Allegations in Notice of Removal at ¶ 1. The plaintiff also suggests that this Court should fully consider the issues raised by its motion for remand before considering whether to transfer the case, as a ruling on the motion to remand may render the transfer motion moot. Clearly, the Texas bankruptcy court would be in a better position to determine the possible impact this proceeding might have on the debtor's estate, as the EQK Bridgeview Plaza bankruptcy has been pending there for several months. But if this Court is indeed obligated to guard the jurisdictional gates, a full review of the merits of the remand request would be appropriate despite the practical considerations that would lean toward allowing the "home" court to address those issues.

Under 28 U.S.C. § 1452(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." Likewise, 28 U.S.C. § 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." Fed. R. Bankr. P. 7087 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 . . . ." In each instance, the statute or rule uses the word "may" rather than

the word "shall," a usage which typically denotes that the court possesses a measure of discretion in determining how to proceed. See In re Mravik, 399 B.R. 202, 206-207 (Bankr. E.D. Wis. 2008) (use of the word "may" in a statute "suggests that discretion exists").

The "gatekeeper" courts emphasize the fact that § 1452(b) references the "court to which such claim or cause of action is removed" as having the power to remand the action. See Rayonier Wood Prods., 420 B.R. at 919. In Lennar Corp., the court observed:

> Deciding the jurisdictional issue first is consistent with the removal procedures in the statute. Removal jurisdiction is based upon the pendency of a bankruptcy case, here the Bankruptcy Cases pending in the Southern District of California. Nevertheless, when a case is removed under 28 U.S.C. § 1452(b), it is not removed to the district where the bankruptcy case is pending, but rather to the district where the state court case was pending. Moreover, under § 1452(b), "the court to which such claim or cause of action is removed" has the authority to "remand such claim or cause of action."

430 B.R. at 260-61. By focusing on the ability of the local court to remand the cause of action, these courts believe that "as a logical and practical matter, the [local] court should determine *whether any* bankruptcy court should hear a proceeding before it determines *which* bankruptcy court should hear it." Lone Star Industries, Inc. v. Liberty Mut. Ins., 131 B.R. 269, 273 (D. Del. 1991) (emphasis in original). The existence of authority, however, does not automatically mandate the exercise of it. Nothing in § 1452(b) *requires* the local court to consider whether the matter should be remanded to state court when the court's jurisdiction is premised solely upon the pendency of a bankruptcy case in a distant venue. Instead, the court *may* remand the case "on any equitable ground," which clearly contemplates that the court may review the facts and decide on an appropriate course of action.

Meanwhile, "conduit" courts place great weight upon the familiarity the "home" court may have with the likely impact of the litigation on the debtor's estate, as well as its own docket. In Aztec Industries, the court stated:

> The venue issues raised by the parties require an examination of both the case to be transferred and its relationship to the [debtor's] Bankruptcy case. Obviously, the [home] Court is more familiar with the pending Bankruptcy case and what may be required for its efficient administration. In addition, the Court which would try the case can better evaluate all the interests involved, and determine its own expertise in the particular areas of the law which form the basis of the action, as well as its own scheduling and time constraints. *This Court's speculation on these matters would not be an adequate substitute*

for a knowledgeable determination based upon the actual facts and circumstances.

84 B.R. at 467 (emphasis added). However, a "presumption" in favor of the home court which renders transfer to the home court "virtually automatic" has been criticized as an improper limitation upon the court's simultaneous discretion *to transfer the case.* See Irwin v. Beloit Corp. (In re Harnischfeger Indus.), 246 B.R. 421, 436 n.42 (Bankr. N.D. Ala. 2000) ("since the statutory scheme both permits proceedings to be removed to a district other than the home court and plainly does not make the transfer mandatory, this Court rejects those cases which stand for the notion that a court has no discretion when considering a motion to transfer").

Transfer of venue pursuant to § 1412 contemplates a case-by-case analysis and is subject to the "broad discretion" of the court. Id. Under the statute, transfer is predicated upon either "the interest of justice" or "the convenience of the parties." As one court observed, it might be appropriate for a local court to remand a case rather than transfer it because "the transfer will only cause further delay or result in a waste of judicial resources in a matter." Ni Fuel Co. v. Jackson, 257 B.R. 600, 611-12 (N.D. Okla. 2000). Indeed, in Irwin the court rejected a transfer request in part because of the expense and difficulty associated with litigation in a distant forum which was likely to be imposed upon the plaintiff, an individual alleging a personal injury. 246 B.R. at 445.[4]

Consequently, it does not appear that it is appropriate to fashion a hard and fast rule in these situations. The statutes provide this Court with the authority to remand the case if the particular facts dictate that result. They also allow the Court the latitude to defer consideration of a remand request to the "home" court should that appear to be the better course of action. In general, this Court agrees with the notion that the "home" court is in a better position to evaluate what might be required for the efficient administration of the debtor's case and whether an action is sufficiently "related to" that case that the court should exercise jurisdiction over it. For example, in this case the state court action could have a substantial impact upon administration of a chapter 11 reorganization in another forum. The parties are fully capable of presenting their arguments to the Texas bankruptcy court, and there will be very little prejudice to the plaintiff if the matter is transferred before the motion for remand is fully considered.[5] There may be cases in which the equities

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[4] In Irwin, the denial of the transfer request occurred without regard to the plaintiff's motion for remand, which had not yet been scheduled for hearing. See 246 B.R. at 427 n.6. This illustrates that it is perhaps less important to decide which motion should be heard first than it is to consider the equities associated with the particular case.

[5] As the plaintiff acknowledges, it is already involved in the Texas proceeding and has worked with the debtor to resolve questions regarding the state court receivership.

tilt in a different direction because of the delay, the waste of judicial resources, the difficulty of litigation in the distant forum, or because of other prejudice to the parties affected by the removal. In this case, however, the most appropriate conclusion is for the Court to transfer the matter to the bankruptcy court for the Northern District of Texas, where the plaintiff may renew its motion for remand on the grounds not resolved by this order.[6]

Accordingly,

IT IS ORDERED that this adversary proceeding is transferred to the bankruptcy court for the Northern District of Texas, to be affiliated with the pending case styled In re EQK Bridgeview Plaza, Inc., Case No. 10-37054-sgj-11. The plaintiff may renew its motion for remand before that court.

[6] As indicated previously, the plaintiff had argued that the notice of removal was procedurally defective. This Court was obligated to confirm that the removal was procedurally proper prior to transferring it to Texas.