

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS

IN RE: )  
)  
LARRY WAYNE BROWN, ) Case No. 92-21367  
Debtor. )  
\_\_\_\_\_)  
JOHN C. HAMMEKE, )  
Plaintiff, )  
vs. ) Adversary No. 93-6057  
)  
LARRY W. BROWN, DANIEL W. BROWN, )  
CLARK C. BURNS, and IMPERIAL, INC., )  
Defendants. )  
\_\_\_\_\_)

RECOMMENDATION FOR WITHDRAWAL OF REFERENCE

John C. Hammeke (hereinafter "plaintiff") filed a Motion for Withdrawal of Reference of Adversary Proceeding on May 6, 1993. The Court held a pretrial conference on July 7, 1993, and a status hearing on July 21, 1993. This recommendation is being prepared for transmission to the Clerk of the District Court under D. Kan. Rule 706.

Plaintiff appears by his attorneys, Paul A. Rupp and Neil S. Sader of Brown, Nachman & Sader, P.C., Kansas City, Missouri; defendant/debtor Larry W. Brown appears by his attorney, Kenneth C. Jones, Overland Park, Kansas; defendant Daniel W. Brown appears by his attorney, G. Thomas Williams, Overland Park, Kansas; defendant Clark C. Burns appears by his attorneys, Leonard Rose and Michael D Strong of Rose, Brouillette & Shapiro, P.C., Kansas City, Missouri. Imperial, Inc. was named as a defendant in the original Complaint.

However, on June 1, 1993, plaintiff filed a motion to dismiss without prejudice as to Imperial, Inc. On September 1, 1993, an order granting plaintiff's motion was entered.

Larry Wayne Brown (hereinafter "debtor") filed a voluntary Chapter 7 bankruptcy petition on June 19, 1992. On May 3, 1993, John C. Hammeke filed a Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. Section 523 and Debtor's Entitlement to the Granting of a Discharge Pursuant to 11 U.S.C. Section 727. Under the Complaint, plaintiff is seeking a judgment of \$298,000.00 plus interest, attorney's fees, costs, and punitive damages. Daniel W. Brown and Clark C. Burns were joined as defendants although they are not parties to the bankruptcy case.

The Complaint consists of the following sixteen counts:

- Count I - Plaintiff's Request for An Order of Nondischargeability Against Debtor Pursuant to 11 U.S.C. 523(a)(2)(A);
- Count II - Plaintiff's Request for Order of Nondischargeability Against Debtor Pursuant to 11 U.S.C. 523(a)(2)(B);
- Count III - Plaintiff's Request for Order of Nondischargeability Against Debtor Pursuant to 11 U.S.C. 523(a)(6);
- Count IV - Plaintiff's Request for an Order Denying Debtor a Discharge Pursuant to 11 U.S.C. 727(a);
- Count V - Offer and Sale of Securities in Violation of Section 12(1) of the 1933 Act;
- Count VI - Offer and Sale of Securities in Violation of Section 12(2) of the 1933 [sic] Act;
- Count VII - Sale of Securities in Violation of Section 10(b) and Rule 10b-5 of the 1934 Act;

- Count VIII - Sale of Unregistered, Non-Exempt Securities in Violation of K.S.A. Section 17-1255;
- Count IX - Offer to Sell and Sale of Securities in Violation of K.S.A. Section 17-1268(a);
- Count X - Common Law Fraud;
- Count XI - Fraud - Promise of Future Events;
- Count XII - Fraud by Silence;
- Count XIII - Negligent Representation;
- Count XIV - Conversion;
- Count XV - Civil Conspiracy; and
- Count XVI - Constructive Fraud.

In paragraph 9, the Complaint alleges that "Counts I through IV of this petition are core proceedings. Counts V through XVI are non-core related proceedings. The Bankruptcy Court has jurisdiction to hear these counts under 28 U.S.C. 1334, 28 U.S.C. 1367, 11 U.S.C. 1301 and under the Rules of Bankruptcy Procedure, Rules 7001 et seq."

Defendant Clark C. Burns and debtor Larry W. Brown admit that Counts I through IV of the Complaint are core proceedings, and that Counts V through XVI are non-core related proceedings, but they deny the remainder of the allegations contained in paragraph 9. Defendant Daniel W. Brown denies the allegations in paragraph 9. None of the parties have demanded a jury trial and plaintiff has not filed a proof of claim in the debtor's bankruptcy case.

On August 25, 1993, debtor filed a Motion to Require Plaintiff to Elect Between Proceeding on § 523 or § 727 Counts. The plaintiff filed a response on September 10, 1993, and the Court held a hearing

on the motion on September 14, 1993. The Court ruled that all proceedings on plaintiff's cause of action based upon 11 U.S.C. § 7 should be held in abeyance until plaintiff has fully resolved his claims arising under 11 U.S.C. § 523. An order was entered on this ruling September 27, 1993.

#### CONCLUSIONS OF LAW

The Court has jurisdiction by reference under 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and D. Kan. Rule 705. This reference is subject to withdrawal under 28 U.S.C. § 157(d) which provides:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d)(emphasis added).

District of Kansas Rule 706 sets forth the procedure for transfer to the District Court of a proceeding commenced in or removed to the Bankruptcy Court. Federal Rule of Bankruptcy Procedure 5011(a), which was enacted after Rule 706, provides, "A motion for withdrawal of a case or proceeding shall be heard by a district judge." Although Fed. R. Bankr. P. 5011(a) can be construed to require the District Court to take cognizance of the motion in the first instance, I have previously followed the procedure of D. Kan. Rule 706 regarding a withdrawal motion. In re Franklin Savings Corp., 133 B.R. 154 (Bankr. D. Kan. 1991). That case stated that "until the Kansas District Court decides to follow those courts

bypassing a bankruptcy court transfer procedure, this Court will follow District Court Rule 706." *Id.* at 158.

Plaintiff timely filed his motion for withdrawal of reference under D. Kan. Rule 706(b) which provides, "If movant is an original plaintiff, the motion shall be filed within 20 days after the proceeding is commenced."<sup>1</sup> In the present case, plaintiff filed his Complaint on May 3, 1993, and his Motion for Withdrawal of Reference of Adversary Proceeding on May 6, 1993.

Plaintiff's motion alleges that resolution of the Complaint will require consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. This ground for transfer is found in D. Kan. Rule 706(a)(4). That rule provides that a party seeking transfer shall file a motion certifying that "[r]esolution of the particular proceeding requires consideration of both Title 11 U.S.C. and other laws of the United States regulating organizations or activities affecting interstate commerce and thus must be withdrawn to this District Court under 28 U.S.C. § 157(d)."

Construing the mandatory withdrawal statute in In re Kuhlman Diecasting Co., 152 B.R. 310, 312 (D. Kan. 1993), Judge Rogers found "that withdrawal is reserved only for those cases where substantial

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<sup>1</sup> District of Kansas Rule 706 deals with transfers of proceedings to the District Court that for one reason or another may be outside the jurisdictional scope of the Bankruptcy Court. This being the case, there is some doubt about the wisdom of and the authority for the time limits set by the rule. See also In re McDonald, No. 92-21164-7, McDonald v. Home State Bank & Trust Co., Adv. No. 93-2144-JWL (D. Kan., Nov. 19, 1993).

and material consideration of the non-bankruptcy federal statutes is necessary for the resolution of the proceeding."

In In re Baker, 86 B.R. 234 (D. Colo. 1988), the court cited the following colloquy which occurred during the House debate on the final version of § 157(d):

Mr. KRAMER:

\* \* \* \* \*  
My question is this: The language 'activities affecting interstate commerce' is very broad language. What kinds of situations or circumstances does [sic] the gentlemen intend to cover here? Or will this language become an escape hatch through which most bankruptcy matters will be removed to a district court?

Mr. KASTENMEIER:

I thank the gentleman for his question.  
This language is to be construed narrowly. It would, for example, mean related cases which may require consideration of both title 11 issues and other Federal laws including cases involving the National Labor Relations Act, *civil rights laws*, Securities and Exchange Act of 1934, and similar laws.

*Id.* at 238 (citing 130 Cong. Rec. H1849-50 (daily ed. March 21, 1984))(second emphasis added).

Counts I through III of the Complaint allege dischargeability claims within the Bankruptcy Court's usual purview under 11 U.S.C. § 523(a)(2) and (a)(6). Counts V and VI allege violations of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* Count VII alleges violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Securities and Exchange Commission Rule 10b-5. Counts VIII and IX allege violations of state securities laws. Counts X through XVI allege fraud, negligence, conversion, and civil conspiracy.

The Securities Act of 1933 and the Securities Exchange Act of 1934 are non-bankruptcy federal statutes of the type contemplated in

28 U.S.C. § 157(d). In light of the various counts of plaintiff's Complaint seeking relief under the Bankruptcy Code and the Securities Acts of 1933 and 1934, I find that resolution of this adversary proceeding will necessitate substantial and material consideration of non-bankruptcy federal statutes. Furthermore, the suit involves non-debtor defendants who have asserted that non-core related proceedings are at issue over which the Bankruptcy Court has no final power without their consent.

If trial is held by the District Court, it may choose to determine the dischargeability issues along with the non-bankruptcy claims asserted by plaintiff. Or, trial in the District Court may bring into play the doctrine of collateral estoppel on the dischargeability issues should the plaintiff present them to the Bankruptcy Court later.

As previously ruled on September 23, 1993, the § 727 cause of action is held in abeyance until plaintiff has fully resolved his § 523 claims.

I therefore recommend that the District Court withdraw the reference of the above-captioned adversary proceeding, with the exception of the objection to discharge under 11 U.S.C. § 727. Accordingly, the Bankruptcy Clerk is directed to transmit this written recommendation to the Clerk of the District Court in accordance with D. Kan. Rule 706.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this \_\_\_\_\_ day of December, 1993.

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JOHN T. FLANNAGAN  
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above and foregoing Recommendation for Withdrawal of Reference were deposited in the United States mail, postage prepaid, on this \_\_\_\_\_ day of December, 1993, addressed to:

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BANKRUPTCY JUDGE