



SO ORDERED.

SIGNED this 29 day of December, 2006.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**GARY LEE FURGASON,
DEBORAH ANN FURGASON,

DEBTORS.**

**CASE NO. 06-40125-7
CHAPTER 7**

**PATRICIA E. HAMILTON, Trustee,

PLAINTIFF,**

v.

ADV. NO. 06-7063

**LONG McARTHUR, INC.,
FORD MOTOR COMPANY,
BANK OF AMERICA, N.A.,

DEFENDANTS.**

ORDER DENYING MOTION TO ABSTAIN AND REMAND

PROCEEDING BACK TO STATE COURT

This proceeding is before the Court on defendant Ford Motor Company's motion to abstain and to remand the case back to the state court from which it was removed. Ford appears by counsel Darren E. Fulcher. Plaintiff-Trustee Patricia E. Hamilton, appearing personally and also as attorney for the Trustee, opposes the motion; Barry Arbuckle has also appeared as co-counsel for the Trustee in this proceeding. The other defendants have not responded to the motion. The Court has reviewed the relevant materials and is now ready to rule.

FACTS

1. State Court Lawsuit over Allegedly Defective Van

In December 2004, the Debtors bought a Ford van from Long McArthur, Inc., a dealership doing business in Ellsworth County, Kansas. The Debtors live in the town of Ellsworth, and the dealership is headquartered in Salina. As part of the sale, the Debtors gave Long McArthur a promissory note and security agreement for over \$35,000. The dealership assigned the papers to the Bank of America, N.A.

As soon as they bought the van, the Debtors allege they began experiencing serious mechanical problems with it. Over the next five months, it spent 44 days in service shops being repaired. In February 2005, the Debtors made a written demand on Long McArthur and on Ford Motor Company, asking to have the transaction set aside and a new vehicle provided.

Not satisfied with the companies' responses to their demand, the next month, on

March 2, the Debtors sued Long McArthur, the Bank, and Ford in a state court in Ellsworth County, asserting two claims for relief under the Kansas Consumer Protection Act, one claim under the federal Magnusson-Moss Warranty Act, and one claim under the Kansas Uniform Commercial Code (“Defective Van claims”). Barry Arbuckle, an attorney from Wichita, Kansas, filed their petition for them. All three defendants filed answers to the complaint; none of them asserted a counterclaim. Long McArthur appeared by counsel Robert G. German of Salina, Kansas, the Bank appeared by counsel Thomas M. Martin of Kansas City, Missouri, and Ford appeared by Darren Fulcher of Kansas City, Missouri (the attorney representing it here). In November 2005, the state court ordered the parties to participate in mediation, which they did in January 2006, without reaching a settlement.

The Bank deposited with the state court all the money the Debtors had paid to it, and reassigned their note and security agreement to Long McArthur. Then early in August 2006, the Bank filed a motion for summary judgment, alleging the deposit and the reassignment had negated any claims the Debtors might have had against it.

2. *Removal of Defective Van Lawsuit from State Court to Bankruptcy Court*

On March 10, 2006, the Debtors filed a Chapter 7 bankruptcy petition. In May, the Trustee sought permission to hire Mr. Arbuckle, the attorney who had been representing the Debtors in the Defective Van suit. No objections were filed and he was authorized to represent the bankruptcy estate in the suit. His agreement with the Trustee called for expenses to be paid first from any recovery and a \$500 retainer the Debtors had

paid, and for him to be paid a 33% contingent fee out of any net recovery. Needing the Debtors' cooperation in pursuing the suit, the Trustee agreed they would receive 30% of any recovery remaining after Mr. Arbuckle's fees and expenses were paid.

On August 18, 2006, the Trustee filed with this Court a notice of removal of the Debtors' Defective Van lawsuit, and mailed a copy to the clerk of the state court. When the copy of the notice was filed with the state court, removal of the suit to this Court was effected.¹ Here, the suit was assigned Adversary No. 06-7063. Less than 30 days after the Trustee filed the notice of removal, Ford filed a motion asking the Court to abstain under 28 U.S.C.A. § 1334(c)(1) and send the Defective Van suit back to the state court.

3. *Lien Avoidance Lawsuit*

On the day that she filed the notice of removal, the Trustee also filed a separate complaint against Long McArthur and the Bank, Adversary No. 06-7062 ("Lien Avoidance suit"), seeking a declaration that under Kansas law, the Debtors had properly revoked their acceptance of the van, extinguishing any lien either defendant might claim on the van, or alternatively, seeking to avoid the defendants' lien on the van under § 548(a)(1) of the Bankruptcy Code. On September 28, the Trustee filed a notice voluntarily dismissing her claims against the Bank. She has obtained a summons and an alias summons to serve on Long McArthur, but as of December 26, had not filed any return showing the corporation was served with this complaint. The later summons gave

¹See Fed. R. Bankr. P. 9027(c); 28 U.S.C.A. § 1452(a). Nothing showing that the notice was actually received and filed in the state court has been provided, but the Court assumes that occurred.

Long McArthur until October 19 to respond to the complaint, but as of December 26, the corporation had not filed an answer or other response.

4. *Order Granting Bank of America's Motion for Summary Judgment*

On October 13, 2006, this Court signed an order granting the Bank's motion for summary judgment, in effect dismissing the Bank from the Defective Van suit. The Trustee had agreed to the entry of this order. The Court assumes this agreement is also why the Trustee dismissed her claims against the Bank in the Lien Avoidance suit. At any rate, the Bank is no longer involved in either of the Trustee's adversary proceedings.

DISCUSSION

Removal of cases from state courts to bankruptcy courts is governed by 28

U.S.C.A. § 1452, which provides in relevant part:

(a) A party may remove any claim or cause of action in a civil action other than [certain types of cases not involved here] 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. . . .

Because the District Court for the District of Kansas has referred bankruptcy matters to the bankruptcy judges for the District,² the Trustee's action under § 1452(a) brought the Debtors' Defective Van lawsuit to this Court.

Ford does not question the Court's jurisdiction under § 1334, but asks the Court to

²See 28 U.S.C.A. § 157(a); D. Kan. Standing Order dated Aug. 1, 1984, but effective July 10, 1984, referring bankruptcy matters to District's bankruptcy judges, referred to in D. Kan. Rule 83.8.5, and quoted in Preface to 2006 D. Kan. Bankr. Rules at page v.

exercise its discretion under § 1334(c)(1) to abstain from hearing the Defective Van suit. That provision declares, “[N]othing 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,” despite having jurisdiction to hear it. Ford argues: (1) in the Defective Van suit, state law issues predominate over bankruptcy issues; (2) sending the Defective Van suit back to the state court will enhance the efficient administration of the bankruptcy estate because the litigation has already progressed substantially there; (3) one of the claims the Trustee is making in the Lien Avoidance suit is the same as the fourth claim asserted in the Defective Van petition, and (4) the fact the Defective Van suit had progressed so far in the state court before the Trustee removed it suggests the Trustee engaged in forum shopping by bringing it here. In response, the Trustee argues: (1) the Defective Van claims became property of the estate when the Debtors filed for bankruptcy; (2) the Lien Avoidance suit involves claims based on the same facts as those involved in the Defective Van suit and the state court cannot decide the Lien Avoidance suit; (3) denying remand will allow both the Defective Van suit and the Lien Avoidance suit to be resolved promptly in one forum; (4) remanding the Defective Van case would place an unfair burden on the bankruptcy estate but refusing to do so would place no burden on the defendants; and (5) the defendants have not obtained relief from the automatic stay as required for them to proceed with the Defective Van suit in the state court.

Abstention under § 1334(c) and remand under § 1452(b) are conceptually distinct,

although some courts have reasoned that circumstances supporting permissive abstention under the former can qualify as equitable grounds for remand under the latter.³ This Court believes it is more appropriate to maintain the distinction between the processes, and will treat Ford's motion as one seeking remand to the state court. In *Norton Bankruptcy Law and Practice 2d*, the authors have this to say about remand of lawsuits that have been removed to bankruptcy courts:

A number of factors are considered in deciding whether a cause of action should be remanded under § 1452(a). These factors include the following:

1. Whether judicial resources will be duplicated;
2. What is the most economical use of judicial resources;
3. What will be the effect of remand on the administration of the bankruptcy estate;
4. Whether questions of state law, which are better addressed by a state court, are involved;
5. Whether considerations of comity exist;
6. The degree of prejudice, if any, to the involuntarily removed parties;
7. Whether the possibility of an inconsistent result is lessened by remand; and
8. The expertise of the court where the action originated.

The weight of authority, however, encourages exercise of federal jurisdiction by the federal courts in the absence of some compelling reason to return a case to a non-bankruptcy forum by means of a remand or abstention.⁴

The *Norton* description of remand makes clear that the burden of convincing the Court to send the Defective Van lawsuit back to state court falls on Ford. The Court believes that some factors favor remand, but others indicate the Court should keep the suit

³See *Allied Signal Recovery Trust v. Allied Signal Inc.*, 298 F.3d 263, 269 (3d Cir. 2002) (concluding permissive abstention under § 1334(c)(1) falls under remand provision of § 1452(b)).

⁴1 *Norton Bankruptcy Law and Practice 2d* § 7:2 at p. 7-9 (Norton, author and ed.-in-chief 2006).

here. Two circumstances suggest remand would be appropriate. The Defective Van suit was pending in the state court for more than a year before the Trustee removed it here. The only fact witnesses who appear to be likely to testify about the Debtors' transaction with Long McArthur would be the Debtors, who live in Ellsworth, and Long McArthur's employees, who presumably live in or near Salina. The Ellsworth County courthouse would be somewhat closer to these witnesses than the federal courthouse in Topeka, making it more convenient for them to travel to the state court for a trial than to this Court. On the other hand, nothing presented suggests the state court itself (as opposed to the parties) gained significant familiarity with the suit during the time it was pending there, and the witnesses would not have to travel a great distance to reach the Topeka courthouse, so these factors do not strongly favor remand. It is true that three of the four Defective Van claims arise under Kansas law, but the fourth claim is made under the federal Magnusson-Moss Warranty Act, so the suit involves federal as well as state law, reducing any need for the Court to defer to the state court's expertise in state law.

Other circumstances suggest the Defective Van suit should remain before this Court, or at least that keeping it here would cause no harm. Nothing has been presented to indicate how crowded the state court's docket might be, but the Court is aware its own docket will allow it to handle the suit expeditiously. Ford does not suggest that the state law governing three of the four claims is difficult or unsettled. To the extent the Court has received any indication, it appears the state law disputes will be factual ones about whether the Debtors (and consequently, their bankruptcy estate) qualify for relief under

the relevant statutes, not legal ones about what the statutes mean. The entire Defective Van suit has been brought to this Court, so no claims or parties remain to be dealt with in the state court and no inconsistent results could be caused by keeping the suit here. No duplicative proceedings will occur if the suit remains here. Because the Defective Van claims are property of the bankruptcy estate, 28 U.S.C.A. § 1334(e)(1) gives this Court exclusive jurisdiction over the claims, a fact that weighs heavily in favor of keeping the suit here. Keeping the suit in Topeka would reduce the amount of travel required for Ford's attorney and for the Trustee herself, would make no difference for the Trustee's co-counsel, and would require a bit more travel for Long McArthur's attorney (who has not filed anything in the suit since it was removed to Topeka).

The Court notes that some of the Trustee's arguments against remand are not convincing. She argues sending the Defective Van lawsuit back to state court would force her to go there to litigate that case even as she litigates the Lien Avoidance suit before this Court (apparently, this is the burden she claims would be unfair). But Long McArthur has not responded to her Lien Avoidance complaint, and after she filed her brief opposing Ford's motion, she dismissed her Lien Avoidance claims against the Bank. Right now, there is no indication that the Lien Avoidance suit will result in any litigation, so that proceeding should have no impact on the Court's resolution of Ford's motion. The Trustee also suggests the defendants need stay relief to be able to defend themselves if the Defective Van suit is remanded to state court. This Court, however, agrees with the majority view that the automatic stay does not apply to claims a debtor is making against

others,⁵ and that those being sued do not violate the stay by asserting their defenses to such claims.⁶

Under the circumstances, Ford has failed to convince the Court it should exercise its discretion and send the Defective Van claims back to the state court. After considering factors relevant to remand, the Court concludes it should retain the Defective Van suit and proceed with it here.

CONCLUSION

For these reasons, Ford's motion to abstain and remand this proceeding back to state court is denied.

#

⁵See, e.g., *Aiello v. Providian Financial Corp.*, 239 F.3d 876, 880 (7th Cir. 2001); *Alpern v. Lieb*, 11 F.3d 689, 690 (7th Cir. 1993); *Brown v. Armstrong*, 949 F.2d 1007, 1009-10 (8th Cir. 1991); see also *Shaiken & Woolery, Automatic Stay Litigation in Bankruptcy*, § 2.9 at 21 (1996) (describing this as majority view).

⁶*Brown v. Armstrong*, 949 F.2d at 1009-10; *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989); *United States Abatement Corp. v. Mobile Exploration & Producing, U.S., Inc. (In re United States Abatement Corp.)*, 39 F.3d 563, 568 (5th Cir. 1994).