



The relief described hereinbelow is SO ORDERED.

SIGNED this 14th day of February, 2019.


Robert D. Berger
United States Bankruptcy Judge

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

In re:

MISSION RECREATION, INC.,

Debtor.

Case No. 17-22143

Chapter 11

**MISSION MART SHOPPING CENTER,
LLC,**

Plaintiff,

Adv. No. 18-6002

v.

**NATIONAL CATASTROPHE RESTORATION,
INC., and MISSION RECREATION, INC.,**

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART
NCR's MOTION FOR PERMISSIVE ABSTENTION**

Defendant National Catastrophe Restoration, Inc. (“**NCRI**”) moves this Court to abstain from hearing this adversary proceeding pursuant to 28 U.S.C.

§ 1334(c)(1) or, in the alternative, to dismiss Count I of plaintiff Mission Mart Shopping Center, LLC’s (“**Mission Mart**”) complaint on grounds of collateral estoppel. For the reasons stated below, NCRI’s motion for permissive abstention will be granted as to Count I of Mission Mart’s complaint, granted as to Debtor’s cross-claim, and denied as to Count II of Mission Mart’s complaint. Because the Court will abstain from hearing Count I, it need not reach NCRI’s collateral-estoppel argument.

I. FACTUAL ALLEGATIONS¹

Defendant Mission Recreation, Inc. (“**Debtor**”) owns a building (the Mission Bowl bowling alley, which Debtor also operates) on land it leases from Mission Mart. On April 3, 2015, a fire damaged portions of the building, including the roof. Debtor’s president and co-owner, Beverly McDonnell, subsequently entered into an “Emergency Work Authorization and Assignment of Insurance Proceeds” (the “**Agreement**”) with NCRI. NCRI performed work at Mission Bowl from April 3, 2015, until Debtor terminated the Agreement on either June 3, 2015, or June 9, 2015. NCRI sent invoices totaling \$903,506.27 to Debtor. Debtor, who was dissatisfied with NCRI’s work, refused to pay.

¹ The Court takes judicial notice of the pleadings (but not the truth thereof) in *Mission Recreation, Inc. v. National Catastrophe Restoration, Inc.*, No. 15CV06282 (Kan. 10th Judicial Dist. Ct.). *Cf.* Fed. R. Evid. 201; 21B Charles Alan Wright et al., *Fed. Prac. & Proc. Evid.* § 5106.4 (2d ed. 2018).

On July 14, 2015, NCRI filed a \$903,506.27 mechanic's lien encumbering both Debtor's building and Mission Mart's land. Debtor and NCRI then filed suit against each other in the district court of Johnson County, Kansas. In its Kansas complaint, Debtor alleged that NCRI's work was only worth \$194,559.16 and that NCRI's failure to secure the fire-damaged roof against water leaks had damaged Debtor's property (its wooden lanes and pin-setting equipment in particular) beyond the value of NCRI's work. Debtor asked (under a variety of legal theories)² that the amount of NCRI's lien be lowered to \$194,559.16, that NCRI be ordered to return Debtor's personal property, and for an award of damages and costs against NCRI. In its Kansas counterclaim (following consolidation of the two cases), NCRI alleged that Debtor owed it \$899,575.44. NCRI, which added Mission Mart as a defendant,³ asked for a judgment of \$899,575.44 plus interest, attorney's fees, and costs against Debtor for breach of the Agreement; additionally, NCRI sought to foreclose on both Debtor's building and Mission Mart's land under its mechanic's lien. In its answer to NCRI's counterclaim, Mission Mart argued that the lien was entirely invalid as against Mission Mart, but otherwise adopted Debtor's arguments and defenses.

Mission Mart filed a motion in the Kansas court on June 14, 2016, for judicial review and discharge of NCRI's lien under K.S.A. § 58-4301. In its motion, Mission

² Debtor's first amended complaint, filed July 21, 2016, asserts claims against NCRI for breach of contract, breach of implied warranty, negligence, invalidation of NCRI's lien under K.S.A. §§ 60-1108 and 58-4301, slander of title, fraudulent or negligent misrepresentation, replevin, and declaratory judgment.

³ NCRI also added Central Bank of Kansas City, Paragon Bank, and IJB Schroder Bank & Trust Company (also known as Mizuho Bank) as defendants; however, those banks were dismissed as parties by subsequent orders of the Kansas court.

Mart argued that the lien was invalid as against Mission Mart because the Agreement was only between NCRI and Debtor, such that NCRI did not have “a contract with the owner or with the trustee, agent or spouse of the owner” of the land as required by K.S.A. § 60-1101.⁴ NCRI responded that Debtor was acting as Mission Mart’s agent when Debtor entered into the Agreement. The Kansas court agreed with NCRI; it held that the lease agreement between Mission Mart and Debtor created both an express and an implied principal-agent relationship between the two. Accordingly, the Kansas court held that NCRI’s lien against Mission Mart was not fraudulent under K.S.A. § 58-4301.

The Kansas court scheduled a jury trial on the claims remaining in the case for the week of August 14, 2017. However, following a joint motion for continuance, which the parties filed in anticipation of this bankruptcy case, the court canceled the trial. The issues pending before the Kansas court at that time were (1) the value of the work performed by NCRI; (2) the amount of damages caused by NCRI; (3) the validity of NCRI’s lien under K.S.A. § 60-1101 as to Mission Mart’s land; and (4) the amount of NCRI’s lien under K.S.A. § 60-1101 as to Debtor’s building and Mission Mart’s land.

⁴ Although Mission Mart’s motion for review and discharge of NCRI’s lien also cited K.S.A. § 60-1101, a lien is presumed fraudulent under K.S.A. § 58-4301(e)(2)—the statute upon which Mission Mart’s motion was based—if it was not:

created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of [Kansas], or by *implied or express consent or agreement of an agent*, fiduciary or other representative of that person [emphasis added].

Debtor filed its Chapter 11 petition on November 3, 2017. NCRI filed a claim for \$1,418,396.14. Mission Mart filed a claim for \$1,311,407.94, comprising unpaid rent (both pre- and post-petition), the quoted cost of demolishing Debtor's fire-damaged property, and indemnification for any amount recoverable by NCRI against Mission Mart under the lien. Only two other creditors remain in Debtor's bankruptcy case: The Claims Group, with a \$113,665.57 unsecured claim for post-fire insurance consulting services, and TK Architects, with a \$26,314.53 unsecured claim for post-fire renovation. The only claim to which Debtor has objected is that of NCRI.

On January 8, 2018, Mission Mart filed an adversary complaint against Debtor and NCRI in the bankruptcy case. Count I of Mission Mart's complaint seeks to invalidate NCRI's lien as to Mission Mart; Count II asks, assuming NCRI's lien is valid, that Debtor indemnify Mission Mart for any amount needed to remove the lien. Debtor's amended answer contains a four-count cross-claim against NCRI. Count I of Debtor's cross-claim alleges breach of contract, Count II alleges breach of implied warranty, Count III addresses the validity, amount, and setoff of NCRI's lien, and Count IV seeks replevin of Debtor's personal property. Currently before this Court is NCRI's motion for permissive abstention under 28 U.S.C. § 1334(c)(1) or, in the alternative, to dismiss Count I of Mission Mart's complaint on grounds of collateral estoppel.⁵

⁵ NCRI also filed a motion in Debtor's main bankruptcy case for relief from the automatic stay under 11 U.S.C. § 362(d) to allow the Kansas case to proceed. This Court granted stay relief in a separate order.

II Analysis

Under 28 U.S.C. § 1334(c)(1), “nothing in this section prevents [this 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.” Courts evaluating a motion for permissive abstention under § 1334(c)(1) typically look to a set of non-exclusive factors set out by *Republic Reader’s Service, Inc. v. Magazine Service Bureau, Inc. (In re Republic Reader’s Service, Inc.)*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987):⁶

(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 state 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 jury trial, and (12) the presence in the proceeding of nondebtor parties.

A number of these factors favor abstention as to Debtor’s cross-claim and Count I of Mission Mart’s adversary complaint. Because § 362 precludes enforcement of any

⁶ See *In re Hall*, No. WO-12-084, 497 B.R. 167, at *2 and n.21 (B.A.P. 10th Cir. July 22, 2013) (unpublished).

judgment obtained in a nonbankruptcy forum, “any effect on the efficient administration of the estate will be minimal” (factor 1). *See Republic Reader’s Serv.*, 71 B.R. at 430. All of the legal issues presented are matters of Kansas law; there are no bankruptcy issues (factor 2). A case involving the same parties and operative facts, and duplicating Mission Mart’s Count I and Debtor’s cross-claim, is currently pending in Kansas (factor 4). Section 1334 provides the only jurisdictional basis for this proceeding (factor 5).⁷ It is entirely feasible to allow the claims in this adversary proceeding to be litigated in state court to the point of judgment, with enforcement stayed until further order of this court (factor 8).⁸ As observed by the bankruptcy court in *Republic Reader’s Service*, “[a]dversary proceedings . . . require an enormous expenditure of scarce judicial resources” (factor 9). *Id.* at 428. Finally, NCRI, a non-debtor party, has the right to a jury trial in the Kansas case (factors 11 and 12). Under these circumstances, the Court will grant NCRI’s motion for permissive abstention under § 1334(c)(1) as to Count I of Mission Mart’s complaint and as to Debtor’s cross-claim. The Court will deny NCRI’s motion as to Count II of

⁷ Mission Mart argues incorrectly that 28 U.S.C. § 157 provides jurisdiction here. Section 157 “is **not** an independent basis for conferring subject-matter jurisdiction to a bankruptcy court. Rather, 28 U.S.C. § 157(b) delineates the scope of the bankruptcy court’s power to exercise the subject-matter jurisdiction granted to the district court under 28 U.S.C. § 1334.” *In re RNI Wind Down Corp.*, 348 B.R. 286, 292 (Bankr. D. Del. 2006).

⁸ *See Republic Reader’s Serv.*, 81 B.R. at 427 (“Subparagraph (2) of subsection (c) of section 1334 supports the duality of allowing a claim to be adjudicated to final judgment in state court while preserving the issue of the status and enforceability of the claim to the bankruptcy court.”); *cf. Tuscon Estates*, 912 F.2d at 1168 (distinguishing “judgment in state court that could serve as the basis for a claim in bankruptcy court” from “treatment of the claim in the bankruptcy”).

Mission Mart's complaint, however, because that dispute is only between Debtor and Mission Mart (both of whom oppose abstention), and because the indemnification issue has not been raised in the Kansas case.

III. Conclusion

For the reasons stated above, NCRI's motion for permissive abstention is hereby granted under 28 U.S.C. § 1334(c)(1) as to Count I of Mission Mart's complaint and as to Debtor's cross-claim. The parties may proceed to judgment, but not execution, as to those issues in the Kansas district court. NCRI's motion is denied as to Count II of Mission Mart's complaint.

IT IS SO ORDERED.

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