

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BANK OF AMERICA, NT&SA,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
GARY NICKELE, et al.	:	NO. 98-1501

MEMORANDUM AND ORDER

Yohn, J.

April 16, 1998

On March 19, 1998, Liberty House, Inc. ("Liberty House") filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Hawaii (the "Hawaii Bankruptcy Court"). Just several hours prior to this filing, the plaintiff in the instant action, Bank of America, sought and received an injunction in the Philadelphia Court of Common Pleas preventing the defendants Gary Nickele, H. Rigel Barber, Neil Bluhm, Kenneth Foreman, Burton E. Glazov, Judd Malkin, and Steven R. Plonsker (collectively, "the defendants") from taking any action on behalf Liberty House. Notice of Removal Ex. C. Invoking the jurisdictional provision, 28 U.S.C. § 1334(b) (1993), the defendants removed this case to the United States District Court for the Eastern District of Pennsylvania. Notice of Removal at 3. On the heels of this removal notice, the defendants filed the instant motion to transfer this case to the Hawaii Bankruptcy Court or the United States District Court for the District of Hawaii.¹ Bank of America not only opposed this motion but filed

¹ The defendants' motion to transfer requests this court to transfer the case to the United States Bankruptcy Court for the District of Hawaii. At oral argument on the motion, however, the defendants' counsel agreed that removal to the District Court of

its own motion to abstain or remand the case to the Philadelphia Court of Common Pleas. I will grant the defendants' motion to transfer this case and deny in part and defer judgment in part on the plaintiff's motion to abstain or remand.

Background

Liberty House, a corporation organized under the laws of Pennsylvania but based in Hawaii, is one of the Pacific's largest retail chains, with 12 department stores and 25 resort and specialty shops in Hawaii and Guam. *Nickele Aff., Ex. A. Defs.' M. Transfer.* Liberty House has assets of approximately \$270 million and employs about 4,000 employees, virtually all in Hawaii and the Pacific region. *Id.* On March 19, 1998, Liberty House filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code in the Hawaii Bankruptcy Court. Liberty House is currently a debtor-in-possession in a Chapter 11 case pending in Hawaii. *Defs.' M. Transfer at 1.*

The plaintiff, Bank of America, is the administrative agent for a group of lenders ("the lenders") who have lent over \$173 million to Liberty House pursuant to a Credit Agreement and a Pledge Agreement, which are governed by Hawaii law, and a Voting Trust Agreement, which is governed by Pennsylvania law. *App. M. Remand Exs. A-G.* On the same day that Liberty House initiated Chapter 11 proceedings, Bank of America attempted to exercise its contractual rights under the abovementioned agreements "to remove and replace [Liberty House's] directors in the hope that, under new direction, [Liberty House] will be able to satisfactorily manage its debt." *Pl.'s Compl. ¶3.*

Hawaii or the Hawaii Bankruptcy Court would be proper. *Tr. Prelim. Inj. Hr'g, 3/25/98, at 22.*

Specifically, Bank of America invoked § 7(a) of the Pledge Agreement, which provided that upon default, Bank of America would have the right “to obtain immediate control over the voting rights that attached to all [of Liberty House’s] outstanding common stock.” *Id.* ¶33. Claiming to be the sole voting stockholder of Liberty House, Bank of America removed the instant defendants, the then current directors of Liberty House, and replaced them with a new slate of directors. *Id.* ¶49. Then, just several hours prior to the commencement of Liberty House’s Chapter 11 proceedings, Bank of America sought and received, in the Philadelphia Court of Common Pleas, an injunction preventing the defendants from, among other things, “taking any action on behalf of Liberty House, Inc.” Notice of Removal Ex. C. at 3.

The defendants countered the plaintiff’s injunction by removing this case to the Eastern District of Pennsylvania and, immediately thereafter, filing the instant motion to transfer this case to the Hawaii Bankruptcy Court. They contend that under 28 U.S.C. §§ 1404 and 1412 (1993 & Supp. 1997), this case should be transferred to Hawaii based on the close ties between this action and the pending bankruptcy proceeding. Defs.’ M. Transfer at 2. Bank of America, on the other hand, asserts that this case is unrelated to the bankruptcy action because it raises only issues of state law. Thus, Bank of America opposes the motion to transfer and requests that this court either abstain or remand the case to the state court.

DISCUSSION

I. The Motion to Abstain or Remand

The defendants argue that, pursuant to 28 U.S.C § 1334(c)(2) (Supp. 1997), this court must either abstain from hearing this case or remand it to state court. This section provides:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such a proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2) (emphasis supplied). Thus, mandatory abstention is only appropriate if this action is "related to" a case under title 11 but not "arising under" or "arising in" such a case. In the Third Circuit, a proceeding found to be arising under title 11 or arising in a case under title 11 constitutes a "core proceeding." Burke v. Donington, Karcher, Salmond, Ronan, & Rianone, P.A. (In re Donington, Karcher, Ronan, & Rianone, P.A.), 194 B.R. 740, 757 (D.N.J. 1996).

Section 157 of the Bankruptcy Code further defines core proceedings:

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section . . .

(2) Core proceedings include, but are not limited to -

(A) matters concerning the administration of the estate;

. . . .

28 U.S.C. § 157(b)(1)-(2)(A).³ The Third Circuit has held that a "core proceeding" is

³ Congress passed this section in response to Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). In Marathon, the Court held that

one which “invokes a substantive right provided by title 11 or which, by its nature, could arise only in the context of a bankruptcy case.” Torkelson v. Maggio (In re the Guild and Gallery Plus, Inc.), 72 F.3d 1171, 1178 (3d Cir. 1996); In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 267 (3d Cir. 1991). An action invokes a substantive right provided by title 11 if it fits under one of the categories listed in § 157(b)(2). Torkelson, 72 F.3d at 1173 (a matter concerning the administration of the estate under §157b(2)(A) is a “core proceeding”).

In Johns-Manville Corp. v. Equity Securities Holders Comm., 801 F.2d 60 (2d Cir. 1986), the Second Circuit held that an action similar to the instant one constituted a core proceeding under § 157(b)(2)(A). There, the bankruptcy court appointed an Equity Security Holders Committee (“the committee”) to represent the interests of stockholders in the debtor's reorganization proceedings. Id. at 61. Displeased with the proposed reorganization plan, the committee brought an action in state court to compel the debtor to hold a shareholders' meeting pursuant to state law. Id. at 62. The avowed purpose of this action was to replace the debtor’s directors so that a new board might consider submitting a different plan. Id. The debtor countered by requesting the bankruptcy court to issue an injunction preventing the committee from pursuing state action on the ground that it may interfere with the debtor’s reorganization proceedings.

bankruptcy courts do not have the power to adjudicate “state-created private rights” that are the province of Article III courts. 456 U.S. at 71. Reacting to Marathon, Congress passed § 157(b)(1), which codified the core/non-core distinction and provided that bankruptcy judges may hear and enter final judgments in “core proceedings.” Additionally, Congress provided a nonexhaustive list of the types of actions that constitute core proceedings. See 28 U.S.C. § 157(b)(2)(A-O).

Id. at 63.

Appealing this injunction, the committee argued that the debtor's action did not constitute a core proceeding and, therefore, the bankruptcy court did not have jurisdiction to issue the equitable relief. Id. Disagreeing, the Second Circuit concluded that "an action brought to restrain interference resulting from proceedings in conflict with reorganization clearly may by its nature be core, . . . , since it will likely affect the administration of the estate." Id. The critical factor was the likelihood that the debtor's injunctive relief would affect the reorganization.

Likewise, Elsinore Shore Assocs. v. Local 54, Hotel Employees & Restaurant Employees Int'l Union, 820 F.2d 62 (3d Cir. 1987), concluded that an injunction brought by the debtor-in-possession against a union representing the debtor's employees pursuant to a collective bargaining agreement would likely affect the administration of the estate. Here, the principal disagreement between the parties concerned the interpretation of the collective bargaining agreement, particularly whether the labor dispute was subject to mandatory arbitration prior to a strike. Id. at 64. Despite the contractual nature of the disputed issue and the union's tenuous connection to the bankruptcy proceeding, the court found that the debtor's attempt to prevent the union from striking was a "matter concerning the administration of the estate" under § 157(b)(2)(A). Id. at 66. Thus, the action amounted to a core proceeding. Id.

In the same vein, an action between nondebtor parties "seeking determination of the ownership and control of a debtor-in-possession" is a core proceeding. SCK Corp. v.

Rosenblum (In re SCK Corp.), 54 B.R. 165, 169 (Bankr. D.N.J. 1984). There, Rosenblum, a former shareholder of a debtor corporation ("SCK"), filed a complaint in state court against the present shareholders of SCK. Id. Rosenblum sought a declaration that he remained the president and sole shareholder of the debtor corporation. Id. The court concluded that because "control of a debtor-in-possession goes to the very heart of the administration of the debtor's estate, it necessarily follows that the bankruptcy court may properly determine where such control resides." Id. (emphasis supplied).

In the instant case, Bank of America, the representative of Liberty House's lenders, allegedly took control of the debtor pursuant to rights created in several loan documents. Commencing the instant take-over action in state court, Bank of America successfully obtained an injunction which ordered the defendants not to take "any action on behalf of Liberty House, Inc. . . ." Pl.'s Mem. Supp. M. Abstain or Remand at 1. As shown, actions to obtain control of a debtor-in-possession "[go] to the very heart of the administration of the debtor's estate . . ." and, therefore, are core proceedings. SCK Corp., 54 B.R. at 169.

In fact, the nature of this case falls even further within the core of federal bankruptcy power because Bank of America and the lenders it represents are creditors of Liberty House, the debtor it seeks to control. In addition to listing matters concerning the administration of the estate as core proceedings, § 157's catch-all provision provides "other proceedings affecting the liquidation of the assets of the

estate or the adjustment of the debtor-creditor . . . relationship” constitute core proceedings. 28 U.S.C. § 157(O); see also Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (“the restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power . . .”). This case affects the debtor-creditor relationship because the agent of the creditors seeks to position itself as the sole director of the debtor, doubtlessly altering the nature of the debtor-creditor association.

The plaintiff mounts several defenses to the defendants’ claim that this action is a core proceeding. First, Bank of America argues that because the proceeding primarily involves state law contract and corporate governance claims it cannot constitute a core proceeding. Section 157(b)(3) expressly rejects this contention - “[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.” 28 U.S.C. § 157(b)(3). Indeed, “even in core proceedings” state law “is pervasive in most decisions which bankruptcy courts must make.” Official Comm. of Unsecured Creditors v. Provident Nat’l Bank (In re United Church of the Ministers of God), 74 B.R. 271, 278 (Bankr. E.D. Pa. 1987).

Second, Bank of America contends that this case could not “arise in” or “arise under” title 11 because the plaintiff has not invoked a substantive right provided by title 11. Pl.’s Supp. Mem. at 7. The plaintiff, however, does not point to and the court has not found any authority supporting the position that the plaintiff’s allegations dictate the nature of the action for purposes of determining whether the proceeding “invokes a substantive right provided by title 11.” See In re the Guild and Gallery Plus, Inc., 72

F.3d at 1178. Indeed, in Elsinore, 820 F.2d at 66, both parties agreed that the basis of the disagreement between the parties amounted to nothing more than differing interpretations of a collective bargaining agreement. Nevertheless, the court found that because the action was likely to affect the administration of the estate it amounted to a core proceeding. Id.⁴

In sum, Bank of America, as the lenders' representative, seeks to take control of the debtor-in-possession, Liberty House. Because this matter concerns the administration of the estate, will impact the debtor-creditor relationship, and, indeed, goes to the very heart of bankruptcy jurisdiction as it involves control of the debtor-in-possession, an entity that, at least initially, controls the corporate debtor's actions, this is a core proceeding.

II. Motion to Transfer

Upon motion and after a hearing, a court may transfer an adversary proceeding pursuant to 28 U.S.C. § 1412. 11 U.S.C. Bankr. Rule 7087; see also Raytech Corp. v. White, 54 F.3d 187, 189 (3d Cir. 1995) (transferring adversary proceeding arising in

⁴ Bank of America argues that this case "could not arise in the context of a bankruptcy case," see In re Guild and Gallery Plus, Inc., 72 F.3d at 1178, because there was no bankruptcy case pending when the plaintiff commenced this action. As explained, in the Third Circuit, a core proceeding is "one which invokes a substantive right provided by title 11 or which, by its nature, could arise only in the context of a bankruptcy case." Id. (emphasis supplied.) Having found that this case invokes federal bankruptcy rights, this court need not address whether or not the action could arise only in the context of a bankruptcy proceeding. See Elsinore, supra at 5-6 (holding that a corporation's attempt to prevent a union from striking, an action which could have arisen outside of a bankruptcy proceeding, constitutes a core proceeding).

bankruptcy case under § 1412).⁵ Section 1412 allows a district court to “transfer a case or proceeding under title 11 to a district court for another district, in the interests of justice or for the convenience of the parties.”

A presumption has developed that civil proceedings should be tried in the “home” court, namely, the court where the bankruptcy case itself is pending. See In re 1606 New Hampshire Ave. Assocs., 85 B.R. 298, 305 (Bankr. E.D. Pa. 1988); Colarusso v. Burger King Corp., 35 B.R. 365, 368 (Bankr. E.D. Pa. 1984); Stamm v. Rapco Foam, Inc., 21 B.R. 715, 724-25 (Bankr. W.D. Pa. 1982); see also, COLLIER ON BANKRUPTCY ¶ 4.04[1] (15th ed. 1997). “We are most reluctant to allow pieces to be severed from a case requiring litigation in several jurisdictions, rather than the desired goal of ‘centering’ administration of an entire case in one jurisdiction.” In re 1606 New Hampshire Ave. Assoc., 85 B.R. 298, 305. In light of Chapter 11's underlying principles, the court begins its analysis from the presumption that the instant proceeding should be tried in Hawaii.

Moreover, the two general considerations that § 1412 explicitly instructs the court to take into account, the convenience of the parties and the interests of justice, also favor transferring the action to Hawaii. The well-established factors to be considered in this type of determination are the following: (1) the proximity of creditors of every kind to the court; (2) the proximity of the debtor to the court; (3) the proximity of the

⁵ An adversary proceeding is a proceeding “to obtain an injunction or other equitable relief.” See 11 U.S.C. Bankr. R. 7001(7). It can be a core or a noncore proceeding. See e.g., In re Marin Oil, Inc., 689 F.2d 445 (3d Cir. 1982), cert. denied, 459 U.S. 1207 (1983).

witnesses necessary to the administration of the estate; (4) the location of the assets; (5) the economic administration of the estate; (6) the economic necessity for ancillary administration if liquidation should result. See In re Commonwealth Oil Refining Co., 596 F.2d 1239, 1247 (5th Cir.1979), cert. denied, 444 U.S. 1045 (1980); accord In re J&L Plumbing & Heating, Inc., 186 B.R. 388, 392 (Bankr. E.D. Pa. 1995); In re Midland Associates, 121 B.R. 459, 460-61 (Bankr. E.D. Pa. 1990); In re Boca Raton Sanctuary Associates, 105 B.R. 273, 274 (Bankr. E.D. Pa. 1989).

Liberty House, the debtor, although incorporated in Pennsylvania, is a Hawaiian based corporation, with 12 department stores and 25 resort shops in Hawaii and Guam. The debtor and most of its assets, therefore, are much closer to the Hawaiian venue. The parties have introduced scant evidence as to the proximity of the creditors to either venue. Bank of America, however, the administrative agent of the lenders, is a California-based national bank. Based on the evidence introduced, therefore, the creditors, as well as the debtor and its assets, are closer to Hawaii than Philadelphia. Furthermore, in light of the debtor's and creditor's proximity to Hawaii and the location of the assets and the proximity of the creditors to that venue the movants have overwhelmingly shown that the estate can be most economically administered in Hawaii.

Finally, the court must observe that it perceives no tactical advantage to either party from transferring this case to the District of Hawaii and none has been proffered by either party. The plaintiff, Bank of America, claims that the defendants are primarily

residents of Illinois and Massachusetts, and that many of the relevant documents are in Chicago. Presumably concerned for the convenience of the parties, Bank of America argues that this case should not be transferred to Hawaii. Despite its concern, Bank of America has not asked this court to transfer the case to Illinois or Massachusetts. Instead, the plaintiff attempts to try this action in Pennsylvania, a forum that is no more convenient to the defendants and has many less ties to the case than Hawaii. Indeed, the only significant tie to this situs is the fact that Liberty House is incorporated under Pennsylvania law. Furthermore, the defendants themselves urge a transfer to Hawaii. Finally, the bankruptcy proceedings, which will most likely require the attendance of many of the same witnesses and the introduction of many of similar documents, will continue in Hawaii regardless of where the instant action is tried. Thus, it would be extremely burdensome and inefficient to both the court and the parties to litigate these two actions on opposite ends of the United States. In sum, the presumption favoring the "home" court as well as the factors listed in 28 U.S.C § 1412 overwhelmingly favor granting the defendants' motion to transfer.

- (2) Disposition of Bank of America's motion to abstain or remand pursuant to 28 U.S.C. § 1334(c)(1) and 28 U.S.C. § 1452(b) is **DEFERRED**;
- (3) In the interests of justice and for the convenience of the parties, the defendants' motion to transfer is **GRANTED** and the Clerk is directed to transfer this action to the United States District Court for the District of Hawaii.

William H. Yohn, Jr., J.