SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: August 10, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: RONALD T. CHILDRESS	**CASE NO. 16-52067-KMS**
DEBTOR	**CHAPTER 11**
RONALD T. CHILDRESS	**PLAINTIFF**
V.	**ADV. NO. 17-06013-KMS**
THE COOPERATIVE FINANCE ASSOCIATION, INC.	**DEFENDANT**

ORDER DENYING MOTION TO DISMISS

Before the Court is the Motion to Dismiss Adversary Proceeding (Adv. Dkt. No. 5)[1] filed by The Cooperative Finance Association, Inc. ("Cooperative Finance"). The Court held a hearing on the motion on June 1, 2017. Adv. Dkt. No. 11. Having considered the arguments and record in this case, the Court finds that the motion to dismiss should be denied.

I. Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this Adversary Proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C.

[1] Unless stated otherwise, citations to the record are as follows: (1) citations to docket entries in the adversary proceeding, Adv. Proc. No. 17-06013-KMS, are cited as "Adv. Dkt. No. _____"; and (2) citations to docket entries in the main bankruptcy case, Case No. 16-52067-KMS, are cited as "Dkt. No. _____".

§157(b)(2)(F) and (H).

II. Findings of Fact[2]

On November 30, 2016, Ronald T. Childress filed a petition for Chapter 11 bankruptcy relief. Dkt. No. 1. On March 22, 2017, Cooperative Finance filed a proof of claim for a debt in the amount of $26,684.55 secured by "farm products, including crops and insurance." Claim No. 20-1 at 2. Cooperative Finance attached to its proof of claim the security agreement, a Uniform Commercial Code filing acknowledgement from the Mississippi secretary of state, and a consent judgment entered in the Circuit Court of George County, Mississippi. Cooperative Finance is a Kansas corporation with its principal place of business in Missouri.

On March 21, 2017, Childress filed an adversary complaint against Cooperative Finance seeking to recover, as a preferential transfer, $12,676.19 transferred to Cooperative Finance via garnishment and to avoid the judgment lien created by the consent judgment. Adv. Dkt. No. 1 at 3-4. On April 20, 2017, Cooperative Finance moved to dismiss the adversary proceeding for improper venue. Adv. Dkt. No. 5. Childress responded to the motion, and Cooperative Finance replied. Adv. Dkt. Nos. 8, 10. On June 1, 2017, the Court held a hearing on the motion and heard the parties' arguments; after the hearing, the Court gave the parties additional time to file amended briefs. Adv. Dkt. No. 11. Having received the amended briefs, the Court took the matter under advisement. Adv. Dkt. Nos. 12, 13.

III. Conclusions of Law

Cooperative Finance moved to dismiss the adversary proceeding under Federal Rule of

[2] Pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rules of Bankruptcy Procedure 9014(c) and 7052, the following constitutes the findings of fact and conclusions of law of the Court.

Civil Procedure 12(b)(3), applied by Federal Rule of Bankruptcy Procedure 7012(b). "[Federal] Rule [of Civil Procedure] 12(b)(3) states that a party may move to dismiss a case for 'improper venue.'" *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 577 (2013). Venue for adversary proceedings in bankruptcy is governed by 28 U.S.C. Section 1409. Relevant to this proceeding, Section 1409 provides:

> (a) Except as otherwise provided in subsections (b) . . ., a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.
>
> (b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover . . . a debt (excluding a consumer debt) against a noninsider of less than $12,850, only in the district court for the district in which the defendant resides.

28 U.S.C. § 1409(a)-(b) (2005). Subsection (b) is sometimes referred to as the "small-dollar home court venue exception." *See N1 Creditors' Trust v. Corwn Packaging Corp. (In re Nukote Int'l, Inc.)*, 457 B.R. 668, 668 (Bankr. M.D. Tenn. 2011).

Cooperative Finance argues that because the amount of money that Childress seeks to recover is less than $12,850 and because Cooperative Finance does not reside in Mississippi, this adversary proceeding must be dismissed for lack of venue. Childress argues that the small-dollar home court venue exception does not apply to preference actions.

Whether the venue exception applies to preference actions is an unsettled question of law. As explained in *Collier on Bankruptcy*:

> 28 U.S.C. § 1409(b) requires a trustee or debtor in possession to bring an action to recover property worth less th[a]n, or a money judgment less than, $1,300, a consumer debt of less than $19,240 or a nonconsumer debt of less than $12,850 against a non-insider, in the district where the defendant resides. The Bankruptcy Code defines "consumer debt" as a "debt incurred by an individual primarily for a personal, family, or household purpose."
>
> Because the language of Section 1409(b) limits its ambit to proceedings

> "arising in or related to such case," several courts have determined that the venue exception and limitation of section 1409(b) do not apply to preference actions because preference actions "arise under" title 11. Under this interpretation, because preference cases "arise under" title 11 they do not arise in and or not related to and thus they are specifically and exclusively addressed by section 1409(d). Thus the plaintiff in a preference action is not limited in venue choices by 1409(b).

5 *Collier on Bankruptcy* ¶ 547.17 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (internal footnotes omitted).

The Fifth Circuit has elaborated on the differences between "arising in" and "arising under", as used in the Bankruptcy Code, in the context of the difference between core and non-core proceedings. *See Wood v. Wood (In re Wood)*, 825 F.2d 90, 96-98 (5th Cir. 1987). These terms come from the federal bankruptcy jurisdictional statute which confers "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11" on the district courts. 28 U.S.C. § 1334(b) (2005). "Although the purpose of this language in section 1334(b) is to define conjunctively the scope of jurisdiction, each category has a distinguishable meaning." *In re Wood*, 825 F.2d at 96.

> Congress used the phrase "arising under title 11" to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11 . . . The meaning of "arising in" proceedings is less clear, but seems to be a reference to those "administrative" matters that arise only in bankruptcy cases. In other words, "arising in" proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.

Id. at 96-97 (internal footnotes omitted).

A number of courts, as cited by *Collier*, have found that a preference action arises under the Bankruptcy Code. *See, e.g., Ehrlich v. Am. Express Travel Related Servs. Co., Inc. (In re Guilmette)*, 202 B.R. 9, 12 (Bankr. N.D.N.Y. 1996); *Redmond v. Gulf City Body & Trailer Works, Inc. (In re Sunbridge Capital, Inc.)*, 454 B.R. 166, 169 (Bankr. D. Kan. 2011). "Although the

preference action would not exist outside of the bankruptcy, nonbankruptcy law does not control its outcome. Consequently, the action does not 'arise in' the bankruptcy case." *In re Guilmette*, 202 B.R. at 12. Further, "[e]very Court of Appeals which has examined the question has held that a matter invoking a 'substantive right created by federal bankruptcy law,' such as a preference recovery, is a matter 'arising under the Bankruptcy Code.'" *Moyer v. Bank of Am., N.A. (In re Rosenberger)*, 400 B.R. 569, 572-73 (Bankr. W.D. Mich. 2008) (quoting *Browning v. Levy*, 283 F.3d 761, 773 (6th Cir. 2002)). And based on this finding, these courts have declined to apply the home court venue exception.

Other courts, however, have disagreed. Notably, the Bankruptcy Appellate Panel of the Ninth Circuit held "that the terms 'arising under' and 'arising in' cannot be interpreted as mutually exclusive" as used in Section 1409. *Muskin, Inc. v. Strippit Inc. (In re Little Lake Indus., Inc.)*, 158 B.R. 478, 484 (B.A.P. 9th Cir. 1993). And a bankruptcy court in Tennessee, in ruling on the same question before the Court today, thoroughly examined the prior case law and legislative history to hold that preference "actions 'arise in' a case under Title 11" and that "[t]he small dollar venue exception in 28 U.S.C. § 1409(b) applies." *In re Nukote Int'l, Inc.*, 457 B.R. at 684. The *Nukote* court, in discussing the legislative history, quoted the Fifth Circuit saying "Legislative history indicates that the phrase 'arising under title 11, or arising in or related to cases under title 11' was meant, not to distinguish between different matters, but to identify collectively a broad range of matters subject to the bankruptcy jurisdiction of federal courts." *Id.* at 670 (quoting *In re Wood*, 825 F.2d at 92). But these cases are not binding on this Court. While *Little Lake* and its progeny have found the three categories of jurisdiction to be full of overlap, the Fifth Circuit has held that "each category has a distinguishable meaning." *In re Wood*, 825 F.2d at 96; *see also Stern v. Marshall*, 564 U.S. 462, 473 (2011) ("Congress has divided bankruptcy proceedings into three

categories: those that 'arise under title 11'; those that 'arise in' a Title 11 case; and those that are 'related to a case under title 11.'") (quoting 28 U.S.C. § 157(a) (2005)).

The Court, therefore, chooses to follow those courts that have held that preference actions arise under the Bankruptcy Code and are excluded from the small-dollar home court venue exception of Section 1409(b).[3] The Court has not undertaken its own examination of the legislative history, but to the extent that the legislative history is inconsistent with its decision, the Court finds the statute itself to be unambiguous, rendering any examination of the legislative history unnecessary and irrelevant. *See Hightower v. Tex. Hosp. Ass'n*, 65 F.3d 443, 448 (5th Cir. 1995) (citing *Toibb v. Radioff*, 501 U.S. 157, 162 (1991)) ("Only if the language is unclear do we turn to the legislative history."). And even if this result is not what Congress intended, "when a conflict exists between what Congress said and what Congress presumably intended, the language of the statute will control." *In re Richardson*, 217 B.R. 479, 489 (Bankr. M.D. La. 1998). The motion to dismiss is denied.

IT IS HEREBY ORDERED THAT the Motion to Dismiss Adversary Proceeding (Adv. Dkt. No. 5) is DENIED.

##END OF ORDER##

[3] *See Ross v. Buckles (In re Skyline Manor, Inc.)*, No. BK14-80934, 2015 WL 9274105, at *2-3 (Bankr. D. Neb. Dec. 18, 2015) (Court held in fraudulent transfer case that proceeding "arises under" Title 11 and that "§ 1409(b) does not apply." Court further stated that "decisions which read the term 'arising under' into § 1409(b) blur the line between statutory interpretation and statutory creation.").