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

IN RE: MICHAEL C. MURPHY & MARCIA A. MURPHY	CASE NO. 91-10280SEG
H.S. STANLEY, JR., AND TRUSTEE & M.C. MURPHY & CO., INC.	PLAINTIFFS
VS.	ADV. NO. 93-1003SEG
FIRST NATIONAL BANK OF SPARTA, JERALD BARTELL, JOHN F. CLENDENIN, WILLIAM C. NORTON, ALAN R. FARRIS, CONN, CLENDENIN, NORTON & FARRIS, CENTURY 21 GOLDEN KEY REALTY OF SPARTA RAE AUTRY, & ANN C. CONN, REPRESENTATIVE OF THE ESTATE OF MCMEEKIN CONN	DEFENDANTS

William S. Boyd, III P.O. Box 10 Gulfport, MS 39502	Attorney for H.S. Stanley, Trustee & M.C. Murphy & Co., Inc.
Cy Faneca & Nick B. Roberts, Jr. P.O. Drawer W Gulfport, Ms 39502-0680	Attorneys for First National Bank of Sparta & Jerald Bartell
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Attorneys for John F. Clendenin, William C. Norton, Alan R. Farris, Conn, Clendenin, Norton & Farris, & Ann C. Conn, Representative of the Estate of McMeekin Conn

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court on the *Amended Motion to Dismiss or, in the Alternative, to Transfer Venue* filed by Defendants John F. Clendenin; William C. Norton; Alan R. Farris; Conn, Clendenin & Norton (formerly Conn, Clendenin, Norton & Farris); and Ann C. Conn, Representative of the Estate of McMeekin Conn. The Movants assert that this Court lacks personal jurisdiction over the Movants and, therefore, this adversary proceeding should be dismissed as to them. Alternatively, the Movants assert that even if this Court does have personal jurisdiction, the venue of this action should be transferred to the Southern District of Illinois. After considering the motion and response thereto, the arguments of counsel and otherwise being fully advised in the premises, this Court holds that the motion is not well taken and should be denied. In so holding the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Michael C. Murphy and Marcia A. Murphy filed a joint petition for relief under Chapter 7 of the Bankruptcy Code in

December of 1991. In December of 1993, the Plaintiffs, H.S. Stanley, Jr., as Chapter 7 Trustee, and M.C. Murphy & Co., Inc. commenced this adversary proceeding against the Defendants. In their *Second Amended Complaint*, the Plaintiffs seek damages based on claims of legal malpractice, breach of contract and of the duty of good faith and fair dealing, civil conspiracy, continuing breach of fiduciary duty, conversion and willful violation of the automatic stay. The complaint also contains a claim for turnover of a car title and a partial objection to the proof of claim filed by the First National Bank of Sparta.

The Movants filed the present *Amended Motion to Dismiss or, in the Alternative, to Transfer Venue*, wherein they assert that this Court lacks personal jurisdiction over the Movants because they have no contacts with the State of Mississippi. The Movants further assert that requiring them to defend this case in Mississippi would be unfair, unreasonable and would offend traditional notions of fair play and substantial justice in violation of the Fourteenth and Fifth Amendments of the United States Constitution. In the alternative, the Movants request that the venue of this adversary proceeding be changed to the Southern District of Illinois.

In their response to the motion to dismiss, the Plaintiffs assert that since the Federal Rules of Bankruptcy Procedure provide for nationwide service of process, this Court has personal jurisdiction over the Movants. The Plaintiffs further assert that venue is proper in this Court and that the

movants have failed to meet their burden of showing that this adversary proceeding should be transferred to Illinois.

The Plaintiffs' claims arise out of a series of business transactions that took place when the Debtor, Michael C. Murphy, decided in 1989 to move from Sparta, Illinois to Alabama with his family. In conjunction with his decision to move to Alabama, Murphy decided to sell his real estate business, M.C. Murphy & Co., Inc., located in Sparta, Illinois. Murphy made some arrangements prior to moving to Alabama to sell his business to a gentleman with whom he worked at M.C Murphy & Co., Inc., Mr. Larry Bean. The sale by Murphy to Bean was not completed prior Murphy's move to Alabama. After Murphy moved to Alabama, the sale to Mr. Bean which he had anticipated did not occur. Instead, Murphy sold his business to Rae Autry, the owner of Century 21 Golden Key Realty of Sparta (Golden Key).

Murphy alleges that the sale to Golden Key was foisted upon him by the First National Bank of Sparta and was financially detrimental to himself and his family. But for the wrongful conduct of the Defendants, Murphy would not have sold the business to Golden Key nor would he have suffered the damages that he has experienced. In January of 1991, Murphy moved from Alabama to Gulfport, Mississippi. In December of 1991 the Murphys filed for chapter 7 protection.

The Defendants dispute many of the factual allegations contained in the complaint and deny liability for any damages suffered by the Murphys.

CONCLUSIONS OF LAW

This Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334[1]. The counts asserted against the Movants in the complaint involve claims of legal malpractice, continuing breach of fiduciary duty and civil conspiracy[2]. The claims asserted against the Movants are governed by state law[3] and constitute non-core related proceedings pursuant to 28 U.S.C. § 157. See Wood v. Wood (Matter of Wood), 825 F.2d 90, 93 (5th Cir. 1987).

I. Personal Jurisdiction

The Movants assert that this adversary proceeding should be dismissed as to the Movants because exercise of personal jurisdiction by this Court would be a violation of the due process guarantees of the Fourteenth and Fifth Amendments of the United States Constitution. The Movants claim that they have no minimum contacts with the State of Mississippi, that it would be unfair and

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[1] **28 USC § 1334**
§ 1334. Bankruptcy cases and proceedings.
(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

[2] Additional claims are asserted against nonmoving Defendants.

[3] The Court makes no conclusions at this time regarding choice of law issues.

unreasonable to require the Movants to defend this adversary proceeding in Mississippi and that exercise of personal jurisdiction over the Movants by this Court would offend traditional notions of fair play and substantial justice.

As an adversary proceeding[4], this case is governed by the Federal Rules of Bankruptcy Procedure[5]. Rule 7004(d) of the Federal Rules of Bankruptcy Procedure provides that "[t]he summons and complaint and all other process except a subpoena may be served anywhere in the United States." Rule 7004(d) differs from Rule 4(k) of the Federal Rules of Civil Procedure. Rule 4(k) limits a district court's exercise of personal jurisdiction to a defendant who either can be reached under a state long-arm statute; who is joined as a third party and may be served within 100 miles of where the summons is issued; who is subject to federal interpleader jurisdiction; or otherwise when authorized by federal statute.

In considering the constitutionality of a state court's exercise of personal jurisdiction over a defendant, the United States Supreme Court has on numerous occasions stated:

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant

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[4] Rule 7001 of the Federal Rules of Bankruptcy Procedure defines an adversary proceeding and includes within its definition "a proceeding (1) to recover money or property".

[5] Rule 1001 of the Federal Rules of Bankruptcy Procedure provides the "[t]he Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code."

> purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 85 L.Ed.2d 528, 105 S.Ct. 2174 (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L.Ed.2d 95, 66 S.Ct. 154, 161 A.L.R. 1057 (1945). Most recently we have reaffirmed the oft-quoted reasoning of Hanson v. Denckla, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958), that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Burger King, 471 U.S., at 475, 85 L.Ed.2d 528, 105 S.Ct. 2174.

Asahi Metal Industry Co. LTD., v. Superior Court of California, Solano County, 480 U.S. 102, 108-9, 94 L.Ed.2d 92, 107 S.Ct. 1026 (1987).

The same "minimum contacts with the forum state" analysis is used when a federal court seeks to exercise personal jurisdiction pursuant to a long-arm statute of the state where the district court is located. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 85 L.Ed.2d 528, 105 S.Ct. 2174 (1985).

However, when a federal court is attempting to exercise personal jurisdiction in an action based on a federal statute, it is the due process guarantees of the Fifth Amendment that come into play. See Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255, 1258 (5th Cir. 1994), Diamond Mortgage Corp. of Illinois v. Sugar, 913 F.2d 1233 (7th Cir. 1990), cert. denied, 498 U.S. 1089 (1991).

In Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255 (5th Cir. 1994), the Fifth Circuit Court of Appeals stated:

> [W]hen a federal court is attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States. Thus, while the Due Process Clause must be satisfied if a forum is to acquire personal jurisdiction over a defendant, sovereignty defines the scope of the due process test.
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> Here, the due process concerns of the Fifth Amendment are satisfied. Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States.

Id. at 1258 (citations and footnote omitted).

While the lawsuit in the Bush case involved a federal cause of action and a federal statute providing for nationwide service of process, the decision of the Seventh Circuit in Diamond Mortgage Corp. of Illinois v. Sugar, 913 F.2d 1233 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089 (1991) involved an adversary proceeding against out-of-state defendants based on state law claims of legal malpractice and breach of fiduciary duty. In ruling that application of Rule 7004 to acquire personal jurisdiction over the defendants did not violate the due process rights of the defendants, the court reasoned as follows:

> The Barron and Jaffe Attorneys, all residents of Michigan, contend that they have not established sufficient minimum contacts with Illinois to satisfy the Due Process Clause of the Constitution under these recent cases.
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> We believe, however, that the Barron and Jaffe Attorneys' contacts with the State of Illinois are, for our purposes, simply irrelevant. We have already established that district courts exercise original subject matter jurisdiction over non-core matters

> pursuant to 28 U.S.C.A. section 1334 (West Supp. 1990). Since section 1334 provides federal question jurisdiction, the sovereign exercising its authority over the Barron and Jaffe Attorneys is the United States, not the State of Illinois. Hence, whether there exist sufficient minimum contacts between the attorneys and the State of Illinois has no bearing upon whether the United Stats may exercise its power over the attorneys pursuant to its federal question jurisdiction. Certainly, the attorneys have sufficient contacts with the United States to be subject to the district court's *in personam* jurisdiction. And nationwide service or process has been established in these cases by Bankruptcy Rule 7004(d). We therefore conclude that the nationwide service of process provisions of Bankruptcy Rule 7004(d) do not violate the Barron and Jaffe Attorneys' due process rights in this case, and that the district court may exercise its *in personam* jurisdiction over these attorneys.

Id. at 1244 (citations omitted).

In the present case, each of the Movants are residents of the State of Illinois. As residents of the State of Illinois, the Movants certainly have minimum contacts with the United States of America. Rule 7004 of the Federal Rules of Bankruptcy Procedure provides for national service of process on the Movants. In light of the foregoing authority, this Court holds that the exercise of personal jurisdiction over the Movants in this adversary proceeding does not violate the due process rights of the Movants. Therefore, the motion to dismiss will be denied.

II. Transfer of Venue

In the alternative, the Movants argue that if the Court denies their motion to dismiss for lack of personal jurisdiction,

then the venue of this adversary proceeding should be transferred to the Southern District of Illinois. The movants base their request for change of venue on 28 U.S.C. § 1412[6] and Rule 7087[7] of the Federal Rules of Bankruptcy Procedure.

The United States District Court for the Southern District of Mississippi ruled in Searcy v. Knostman, 155 B.R. 699 (S.D. Miss. 1993) that a motion for change of venue in a non-core related proceeding is not governed by 28 U.S.C. § 1412, but instead by 28 U.S.C. § 1404(a). In so ruling, the court recognized that 28 U.S.C. § 1404 and § 1412 are similar, and that other jurisdictions have applied § 1412 to non-core related matters. This Court is bound by Searcy v. Knostman and, accordingly, will apply 28 U.S.C. § 1404(a) in considering the present motion for transfer of venue.

28 U.S.C. § 1404(a) provides as follows:

> **§ 1404. Change of venue.**
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In discussing the factors to be considered by a court when applying § 1404(a) the court in Searcy v. Knostman stated as follows:

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[6] **28 USC § 1412**
§ 1412. Change of venue.
A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

[7] **Rule 7087. Transfer of Adversary Proceeding.**
On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 USC § 1412, except as provided in Rule 7019(2).

> In deciding whether to transfer an action under § 1404(a) to another district or division, where it "might have been brought," the court must consider whether the interests of the convenience of the witnesses and parties, as well as the interest of justice are served thereby. The movant seeking transfer pursuant to § 1404(a) has the burden of establishing, by reference to particular circumstances and by a preponderance of the evidence, that the transferee forum is clearly more convenient and that transfer is proper. Davidson v. Exxon Corporation, 778 F.Supp. 909, 911 (E.D. La. 1991). . . . When considering a motion to transfer pursuant to § 1404(a), federal courts have considered a number of factors outside the three enumerated in the statute. Some of these factors are: location of counsel; the location of books and records; ease of access to proof; where the case can be tried expeditiously and inexpensively; the cost of obtaining attendance of witnesses and other trial expenses; the place of the alleged wrong, the possibility of delay and prejudice if transfer is granted; and the plaintiff's choice of forum. This last factor is very influential and should rarely be disturbed unless the balance is strongly in the defendant's favor.

Searcy v. Knostman, 155 B.R. at 707-8 (citations and footnote omitted).

In addition to determining that the convenience of the parties would be better served by transfer of the case, the court must find that transfer of the case would be in the interest of justice. Id. at 708. The avoidance of a multiplicity of litigation is a significant consideration in determining where the interest of justice is best served. Id.

In the present case, the Movants argue that both the convenience of the parties and the interest of justice dictate that this adversary proceeding be transferred to the Southern District

of Illinois. The Movants assert that all of the Defendants in this action and a great number of potential witnesses reside in Illinois; that access to necessary proof is more easily facilitated in Illinois; that virtually all non-party witnesses would be beyond subpoena power in Mississippi; that the expenses related to obtaining willing witnesses would be great if the case remains in Mississippi; that a judgment can be more easily enforced in Illinois; that a court in Illinois is better able to apply Illinois law (which the Movants contend is the proper choice of law); that the State of Illinois has a vital interest in the regulation of lawyers, real estate transactions and bankers within the state; and that the administration of the estate could be accomplished more easily if the case were transferred to Illinois.

In response, the Plaintiffs contend that the Movants have failed to show by a preponderance of the evidence that transfer of the case would better serve both the convenience of the parties and the interest of justice. As to the relative burden of the parties, the Plaintiffs point out that the Chapter 7 Trustee is pursuing this claim on behalf of a no asset estate. The defense of the Movants is being provided by an insurance carrier. The Plaintiffs contend that transfer of this case to Illinois would place a greater burden on the Plaintiffs than to require the Movants to defend this case in Mississippi.

The Plaintiffs also assert that since the First National Bank of Sparta, a nonmoving Defendant, has filed a proof of claim in the chapter 7 case, the claims against the bank in this

adversary proceeding are in the nature of a compulsory counterclaim to the bank's proof of claim and, as such, amount to a core proceeding. To transfer this adversary proceeding to Illinois would require duplication of litigation since all of the claims asserted in the *Second Amended Complaint* arise out of the same facts as those upon which the bank bases its proof of claim.

In considering the convenience of the parties, the Court recognizes that whether this adversary proceeding is tried in Mississippi or Illinois either the Plaintiffs or the Defendants will be greatly inconvenienced. Therefore, it is the relative convenience or inconvenience of the parties that must be weighed by reference to the totality of the circumstances.

Under Searcy v. Knostman, 155 B.R. 699 (S.D. Miss. 1993) the Court must consider the location of counsel, the location of books and records, ease of access to proof, where the case can be tried expeditiously and inexpensively, the cost of obtaining attendance of witnesses and other trial expenses, the place of the alleged wrong, the possibility of delay and prejudice if transfer is granted, and the plaintiffs choice of forum.

While it is true that all of the Defendants are residents of the estate of Illinois, the bankruptcy estate of the Murphys is pending in Mississippi before this Court. The Trustee brings this action upon the behalf of the creditors of the Murphy estate and is a resident of the State of Mississippi. The Movants have obtained local counsel in Mississippi.

In considering the location of books and records and the ease of access to proof, it appears that a substantial volume of books and records are located in Illinois. However, their presence in Illinois should not inconvenience the Movants, who are all located in Illinois. If anything, the location of documentary evidence in Illinois would be an inconvenience to the Plaintiffs, who nevertheless chose to bring this action in Mississippi.

The Court must also consider the cost of obtaining witnesses and the place of the alleged wrong. The Movants contend that a great number of witnesses are residents of the State of Illinois. Again, obtaining discovery from witnesses located in Illinois should not be an inconvenience to the Movants. The Movants also assert that the Illinois witnesses, if unwilling to testify, are beyond subpoena power. However, applicable rules of procedure provide for the use of depositions at trial where a witness is unavailable. The Plaintiffs assert that the Defendants' wrongful conduct occurred after the Murphys moved from Illinois to Alabama and continued after they moved from Alabama to Mississippi.

The possibility of delay if a transfer is granted must also be considered. As the Court has already observed, the Movants presently have local counsel in Mississippi. The Plaintiffs do not have counsel in Illinois. The attorney for the Plaintiffs has taken this case on a contingency fee arrangement since there are no estate assets with which to compensate an attorney. If this case were transferred to Illinois the Plaintiffs would be faced with trying to locate Illinois counsel who would take this case on a

contingency fee basis. Assuming the Plaintiffs were able to find new counsel, then new counsel would have to be educated on the facts and law upon which the Plaintiffs' claims are based. Additionally, this Court is presently familiar with this case, and transfer to another court would require another court to study and become familiar with the case. This Court believes that possibility of delay is greater if the case were transferred to Illinois than if it remains in Mississippi.

While this Court recognizes that defense of this adversary proceeding in Mississippi will be inconvenient for the Movants, this Court feels that when looking at the totality of the circumstances, the equities are in favor of this case remaining before this Court. The Plaintiffs have chosen this forum and that choice is to be afforded deference absent a showing that it is clearly outweighed by other factors. The Movants have failed to show that trial in Mississippi would cause them a greater inconvenience than the inconvenience placed in the Plaintiffs by requiring them to prosecute their claims in Illinois.

In addition to considering the convenience of the parties, the Court must consider the interest of justice. The First National Bank of Sparta has filed a proof of claim in the Murphys' chapter 7 case. The claims asserted against the bank in this adversary proceeding involve the same series of transactions upon which the bank's proof of claim is based. In Bank of Layfayette v. Baudoin (Matter of Baudoin), 981 F.2d 736, 740 (5th Cir. 1993) the Fifth Circuit Court of Appeals held that where the

Plaintiffs failed to assert in their bankruptcy a state law lender liability action against a bank that filed a proof of claim in their bankruptcy, their claims were barred by the doctrine of res judicata. In so holding, the court found that the lender liability claims involved the same nucleus of operative facts as the proof of claim and, as such, the lender liability claims were in the nature of a compulsory counterclaim to the proof of claim. The court also found that as a counterclaim to the bank's proof of claim, the matter constituted a core proceeding.

This Court believes that the interest of justice is best served by retaining this adversary proceeding in Mississippi. This action involves the same acts and events upon which the bank's proof of claim is based. The Plaintiffs have asserted an objection to the bank's proof of claim and have asserted a claim against the bank for violation of the automatic stay, both of which are based on the same facts as the claims against the Movants. If the case were transferred to Illinois, duplication of at least of part of this litigation would result. The outcome of this adversary proceeding directly impacts the administration of the underlying bankruptcy estate. Retention of this matter by this Court would ensure the most expeditious outcome of both this adversary proceeding and the bankruptcy estate of Michael C. Murphy and Marcia A. Murphy.

For the foregoing reasons, the *Amended Motion to Dismiss or, in the Alternative, to Transfer Venue* will be denied. A separate judgment consistent with this opinion will be entered in

accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 16th day of May, 1995.

UNITED STATES BANKRUPTCY JUDGE

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

IN RE: MICHAEL C. MURPHY & MARCIA A. MURPHY — CASE NO. 91-10280SEG

H.S. STANLEY, JR., AND TRUSTEE & M.C. MURPHY & CO., INC. — PLAINTIFFS

VS. — ADV. NO. 93-1003SEG

FIRST NATIONAL BANK OF SPARTA,
JERALD BARTELL,
JOHN F. CLENDENIN,
WILLIAM C. NORTON,
ALAN R. FARRIS,
CONN, CLENDENIN, NORTON & FARRIS,
CENTURY 21 GOLDEN KEY REALTY OF SPARTA
RAE AUTRY, &
ANN C. CONN, REPRESENTATIVE OF THE ESTATE OF MCMEEKIN CONN — DEFENDANTS

FINAL JUDGMENT

Consistent with this Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the *Amended Motion to Dismiss or, in the Alternative, to Transfer Venue* filed by Defendants John F. Clendenin; William C. Norton; Alan R. Farris; Conn, Clendenin & Norton (formerly Conn, Clendenin, Norton & Farris); and Ann C. Conn, Representative of the Estate of McMeekin Conn should be, and hereby is, denied.

SO ORDERED this the 16TH day of May, 1995.

UNITED STATES BANKRUPTCY JUDGE