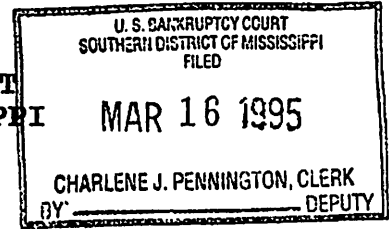


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION



IN RE: ROBERT WESLEY THOMAS, SR.

CASE NO. 94-03539WEE
CHAPTER 7

TRUSTMARK NATIONAL BANK

PLAINTIFF

VS.

ADVERSARY NO. 94-00260WEE

ROBERT W. THOMAS, SR.

DEFENDANT

AND

TRI COUNTY LIVESTOCK
INVESTMENT CORP.

GARNISHEE DEFENDANT

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court on the Motion to Remand filed by Trustmark National Bank, wherein Trustmark seeks an order remanding this action to the Circuit Court of the First Judicial District of Hinds County, Mississippi, from whence it was removed. After considering the evidence presented to the Court at a hearing of this matter, along with the arguments of counsel, and being otherwise advised in the premises, this Court holds that Trustmark's motion is well taken and should be granted.

In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In June of 1989, Trustmark commenced an action against the Debtor, Robert W. Thomas, Sr., in the Circuit Court of the First Judicial District of Hinds County, Mississippi. In August of 1990, a judgment was entered in favor of Trustmark for a principal amount of \$ 300,000. After various post-trial motions, the judgment became final in the early part of 1993.

In July of 1993, Trustmark as a judgment creditor, caused a writ of garnishment to be issued against Tri County Livestock Investment Corporation, Inc., the Defendant in this adversary proceeding. Tri County answered the writ of garnishment, Trustmark objected to Tri County's answer, and litigation regarding the writ of garnishment ensued. The garnishment action finally came on for hearing in July of 1994, but was not concluded at that time. The court adjourned the hearing to allow Trustmark time to file an additional pleading and for the parties to further prepare. The hearing was set to be reconvened on November 7, 1994.

The events of November 7 and 8 are hotly disputed by the parties, but they are not relevant to the issue of whether to remand this action. Nevertheless, the Court will summarize its understanding of the events in an effort to explain the positions taken by each party.

Tri County Livestock contends that an understanding was reached with Trustmark that the hearing would not go forward on November 7 because Robert W. Thomas, Sr. was going to file bankruptcy. Trustmark contends that no such agreement was ever reached. It is not clear to this Court what type of proceeding occurred on November 7 since the Court has before it no record of any proceeding in state court. It is clear that, whatever occurred, Tri County Livestock did not appear before the court. An unauthenticated copy of a judgment in favor of Trustmark against Tri County Livestock in the amount of \$ 105,147 signed by the state court judge on November 8, 1994¹ was presented to this Court at the hearing on the Motion to Remand. The judgment recites that it is *nunc pro tunc* to November 7, 1994 at 10:20 a.m. It appears that the judgment has never been entered by the circuit clerk in the case file.

On November 7, 1994, at 10:22 a.m., Robert W. Thomas, Sr. filed a petition for relief under Chapter 7 of the Bankruptcy Code. On November 8, 1994, Mr. Thomas removed the state court action to the United States District Court for the Southern District of Mississippi pursuant to 28 U.S.C. § 1452, and the case was subsequently transferred to this Court by order of the U.S. District Court and became the present adversary proceeding.

¹ While the Court is ruling only on Trustmark's *Motion to Remand*, it would direct the attention of the parties to Adams v. Sidney Schafer & Associates, Inc. (In re Adams), 809 F.2d 1187, 1189 (5th Cir. 1987).

Tri County also filed a *Motion to Set Aside Ruling, to Alter or Amend Ruling, or Judgment, to Set Aside Judgment, or in the Alternative for Other Relief* in this adversary proceeding, requesting this Court to set aside the state court judgment.

On November 22, 1994, Trustmark filed its *Motion to Remand*, which is presently before the Court. In support of its motion, Trustmark argues that the action is a non-core proceeding based on state law, and that this Court should abstain from hearing this action under the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2). Trustmark also argues that it holds a valid judgment against Tri County Livestock based on the state court judgment.

Trustmark's *Motion to Remand* was noticed for hearing for January 12, 1995.

On January 10, 1995, Tri County Livestock filed a motion for continuance of the hearing on the *Motion to Remand*, stating that it just became aware that an additional action involving Trustmark and Tri County had also been removed to the U.S. District Court pursuant to 28 U.S.C. § 1452. Upon hearing the motion to continue, the Court determined that the action to which Tri County Livestock referred was a fraudulent conveyance action commenced by Trustmark in state court seeking to recover the conveyance of stock in Tri County Livestock from Robert W. Thomas, Sr. to his son. Upon commencement of Mr. Thomas's bankruptcy, the case was removed to the U.S. District Court and referred to this Court based on the assertion that the Chapter 7 Trustee is the proper party in interest to maintain a fraudulent conveyance action. After

learning the nature of the fraudulent conveyance action, the Court denied Tri County Livestock's request for a continuance.

On the morning of the hearing on January 12, 1994, Tri County Livestock filed a *Motion for Leave of Court to File Amended Pleading*, seeking permission to file a cross-claim in this adversary proceeding against the Debtor in the main case, Robert W. Thomas, Sr. The Court observes that both Mr. Thomas and Tri County Livestock are represented by the same counsel.

The hearing on the Motion to Remand was conducted as noticed, and the parties were granted additional time to submit to the Court authorities in support of their positions.

CONCLUSIONS OF LAW

While there are pending at this time two motions in addition to the motion to remand, the Court will consider only the motion to remand.

Remand is governed by 28 U.S.C. § 1452, which provides as follows:

28 USC § 1452

§ 1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, 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. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

Trustmark asserts that this Court should remand this action based on 28 U.S.C. § 1334, which contains provisions relating to subject matter jurisdiction and permissive and mandatory abstention. Title 28 U.S.C. § 1334 provides in part as follows:

28 USC § 1334

§ 1334. Bankruptcy cases and proceedings.

....

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court 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.

(c)(1) Nothing 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 arising under title 11 or arising in or related to a case under title 11.

(2) 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 proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

The first inquiry the Court must make is whether it has subject matter jurisdiction over the action in question. In Wood

v. Wood (Matter of Wood), 825 F.2d 90, (5th Cir. 1987), the Fifth Circuit Court of Appeals stated:

For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between proceedings "arising under", "arising in a case under", or "related to a case under", title 11. These references operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least "related to" the bankruptcy. The Act does not define "related" matters. Courts have articulated various definitions of "related", but the definition of the Court of Appeals for the Third Circuit appears to have the most support: "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." We adopt it as our own.

Id. at 93 (footnote omitted).

The present adversary proceeding involves an action by Trustmark against Tri County Livestock Investment Corp, which is not in bankruptcy. Trustmark is attempting to have Tri County Livestock found liable under Mississippi law for amounts it may have owed Mr. Thomas after the writ of garnishment was served. Using the Wood definition of a "related" case, i.e., "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy," if Trustmark is successful in its action against Tri County Livestock, then Trustmark's action could "conceivably" affect the value of Trustmark's claim against the bankruptcy estate of Robert W. Thomas, Sr. Therefore, under the Wood case, this Court has subject matter jurisdiction of the present action.

The Court next turns to the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2). Mandatory abstention under § 1334(c)(2) may not be applied to core proceedings. However, upon timely motion of a party, where a case is a non-core related proceeding, where no grounds for federal jurisdiction exist absent § 1334, and where the action is commenced and can be timely adjudicated in a state forum the Court must abstain from hearing the action. See, 1 Collier On Bankruptcy, ¶ 3.01[3][b] (Lawrence P. King, et al. eds., 15th ed. 1994).

In the Wood case, the Fifth Circuit explained the meaning of the phrases "arising under" and "arising in" as follows:

[T]he phrases "arising under" and "arising in" are helpful indicators of the meaning of core proceedings. If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding; for example, an action by the trustee to avoid a preference. If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt. If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under § 157(c)(1) it is an "otherwise related" or non-core proceeding.

Wood v. Wood (Matter of Wood), 825 F.2d 90, 97 (5th Cir. 1987)

The present action by Trustmark against Tri County Livestock, as garnishee defendant, does not invoke a substantive right created by bankruptcy law and can exist outside of this

bankruptcy proceeding. Therefore, the present action is a non-core related proceeding.

Also, there exist no grounds for federal jurisdiction absent 28 U.S.C. § 1334. The action involves matters of purely state law, and there has been no indication that diversity jurisdiction exists. The action was commenced in state court against a defendant, which is not in bankruptcy. It was partially tried and was set for a conclusion of the trial at the time it was removed to this Court. There is no indication that it cannot be timely adjudicated in the state court from which it was removed.

For the foregoing reasons, this Court holds that this adversary proceeding will be remanded to the Circuit Court for the First Judicial District of Hinds County, Mississippi pursuant to 28 U.S.C. § 1334(c)(2).

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 16 day of March, 1995.


UNITED STATES BANKRUPTCY JUDGE

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

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED MAR 16 1995 BY CHARLENE J. PENNINGTON, CLERK DEPUTY
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IN RE: ROBERT WESLEY THOMAS, SR.

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TRUSTMARK NATIONAL BANK

PLAINTIFF

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ADVERSARY NO. 94-00260WEE

ROBERT W. THOMAS, SR.

DEFENDANT

AND

TRI COUNTY LIVESTOCK
INVESTMENT CORP.

GARNISHEE DEFENDANT

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the above styled adversary proceeding, being Circuit Cause No. 38,270, should be, and hereby is, remanded to the Circuit Court for the First Judicial District of Hinds County, Mississippi pursuant to 28 U.S.C. § 1334(c)(2).

SO ORDERED this the 16th day of March, 1995.



UNITED STATES BANKRUPTCY JUDGE