Docket #0048 Date Filed: 4/29/2014

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APR 29 2014
U.S. BANKRUPTCY COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In re: RESIDENTIAL CAPITAL, LLC et al.	CASE NO: **12-12020 (MG)** ADV. CASE: 12-019363-mg Chapter 11
Jennifer L. Wilson Plaintiff, v. RESIDENTIAL CAPITAL, LLC; RESIDENTIAL FUNDING COMPANY, LLC; and Does 1 – 10 inclusively, Defendants.	MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW REFERENCE Concurrently filed: Motion to Withdraw Reference;

MEMORANDUM IN LAW IN SUPPORT OF MOTION TO WITHDRAW REFERENCE

As shown in this memorandum, grounds exist for the discretionary and mandatory withdrawal of the reference of this adversary proceeding ("Adversary Proceeding").

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PRELIMINARY STATEMENT

Plaintiff, Jennifer L. Wilson ("WILSON"), seeks monetary damages for breach of contract, violation of both New York and North Carolina State law, and by way of deceptive acts and practices on the part if the Debtor and/or agents thereof, perpetrated a fraud upon the state court depriving WILSON of, under color of law, her equity and property.

The claims asserted in the adversary proceeding are non-core. Accordingly, absent consent by all parties, the bankruptcy court may not enter final findings of fact or conclusions of law. If the actions proceed in the bankruptcy court, any proposed factual findings or conclusions of law made by that court will be reviewed, *de novo*, by this Court. Thus, the interests of judicial economy and expediency favor that the litigation bypass the bankruptcy court and proceed directly in this Court without further delay.

Additional factors weigh in favor of withdrawal of the reference of these adversary proceedings. Those include judicial economy, expediting the bankruptcy process, ensuring uniformity of bankruptcy administration, and satisfying the parties' jury demands. Moreover, the Court should withdraw the reference so that all related litigation may proceed in one forum before District Judge _____.

WILSON asserts in the alternative that if the reference is not withdrawn under the permissive withdrawal factors, the reference must be withdrawn as a matter of law because resolution of the issues in the adversary proceedings requires substantial and material consideration of the state law violations in perpetrating fraud upon the state court.

FACTUAL AND PROCEDURAL BACKGROUND

RFC by and through its agents made misrepresentations, breached contractual terms and conditions, violated state laws, and committed fraud on the state court.

On November 12, 2010 WILSON sought relief in the United States District Court Western District of North Carolina ("WDCNC"). Post overcoming a challenge to the jurisdiction of the Court the Court raised the question of proper Venue. WILSON voluntarily dismissed the case for lack of proper venue.

On May 16, 2011 WILSON refiled the Complaint initially filed in WDCNC in United States District Court North Carolina Middle District ("USDCNCMD").

The Bankruptcy petition filed by the Debtor RESIDENTIAL CAPITAL, LLC stayed the proceedings in USDCNCMD.

In an effort to have the claims fully litigated and determined upon the facts in the case, and before all claims became barred by way of the bankruptcy of the Debtor, on November 9, 2012 WILSON filed the Adversary Complaint now pending.

ARGUMENT

Pursuant to 28 U.S.C. § 157(a),[1] "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy

[1] Unless otherwise stated, all statutory references below are to title 28 of the United States Code.

judges for the district." *See Enron Power Mktg., Inc. v. Cal. Power Exch. Corp.* (In re Enron Corp.), No. 04 Civ. 8177(RCC), 2004 U.S. Dist. LEXIS 23868, at *5-6 (S.D.N.Y. Nov. 23, 2004).

Section 157(d) authorizes district courts to withdraw the reference from the bankruptcy court:

> [t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

Thus, the district court may (but is not required to) withdraw the reference "for cause shown." Alternatively, if resolution of the matter requires "substantial and material" consideration of certain non-bankruptcy law, the reference must be withdrawn. Both forms of withdrawal are applicable here.

I. **This Court Should Exercise Its Discretion To Withdraw The Reference Of The Adversary Proceeding.**

Although "cause" for permissive withdrawal of the reference under Section 157(d) is not defined in the statute, the Second Circuit has held that the district courts should consider several factors: (i) whether the claims involved are core or non-core; (ii) the most efficient use of judicial resources; (iii) expediting the bankruptcy process; (iv) uniformity of bankruptcy administration; (v) what will prevent forum shopping; and (vi) other related factors, including reducing confusion and a request for a jury trial. See *Orion Pictures Corp. v. Showtime Networks* (In re *Orion Pictures Corp.*), 4 F.3d 1095, 1101 (2d Cir. 1993), (and cases cited therein).

In *Complete Mgmt., Inc. v. Arthur Andersen, LLP* (In re *Complete Mgmt.*), No. 02 Civ. 1736 (NRB), 2002 U.S. Dist. LEXIS 18344, at *7-8 (S.D.N.Y. Sept. 27, 2002), this Court applied these factors to withdraw an adversary proceeding under facts similar to the facts presented here. In *Complete Mgmt.*, shareholders of Complete Management, Inc. ("CMI") filed a class action complaint against CMI in district court, alleging various federal securities violations. *Id.* at *2. Later, CMI filed a Chapter 11 petition in bankruptcy court. *Id.* After the petition was filed, CMI filed an adversary proceeding against Arthur Andersen. Upon motion by Arthur Anderson, the district court exercised its discretion to withdraw the adversary proceeding because CMI's claims were based on violations (tort) having no relation to bankruptcy law, Arthur Anderson was entitled to a jury trial, and the issues raised were more commonly resolved by district court. *See also Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld LLP*, 201 B.R. 635 (S.D.N.Y. 1996) (reference of adversary proceeding withdrawn where adversary proceeding involved pre-petition breach of contract and fiduciary duty claims arising out of the same transactions and events as in a securities case pending before the district court).

The first factor, whether an issue is core or non-core, is the most important factor for a district court to consider in deciding whether to withdraw a bankruptcy reference. *Orion Pictures*, 4 F.3d at 1101. *See Official Comm. Of Unsecured Creditors v. Union Transport Corp.* (In re FMI Forwarding Co., Inc.), No. 00 B 41815 (CB), 2005 WL 147298 (Jan. 24, 2005) (core/non-core determination central to analysis although not determinative). After the court makes a determination of coreness, the other factors should be weighed. *Id.*

II. **The Claims In The Adversary Proceeding Are Non-Core.**

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), the U.S. Supreme Court held that certain provisions of the Bankruptcy

Act of 1978, which permitted non-Article III bankruptcy courts to exercise jurisdiction over state-created private rights that arise independent of a bankruptcy case and which thereby allowed bankruptcy courts to adjudicate such claims to finality, were **unconstitutional**. Congress responded to the Marathon decision by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "Judicial Code"), 28 U.S.C. §§ 1334 and 157. Through the Judicial Code, Congress restructured the statutory grant of jurisdiction to bankruptcy courts, delineating between "core" bankruptcy proceedings and "non-core" proceedings.

The distinction between "core" and "non-core" proceedings has been summarized as follows:

> [a] proceeding is encompassed within the bankruptcy court's core . . . jurisdiction if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. By contrast, a proceeding is non-core if it exists independently under state law and is merely 'related to' the bankruptcy case because of a conceivable effect upon the debtor's estate. Only a district court, and not a bankruptcy court, may enter final judgment in a non-core, 'related to' proceeding.

Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship, Nos. 04 Civ. 708 (GEL), 04 Civ. 709 (GEL), 04 Civ. 710 (GEL), 2004 U.S. Dist. LEXIS 8168, at *5-6 (S.D.N.Y. May 7, 2004) (internal citations and quotations omitted). *See also Complete Mgmt., supra*, at *12 ("claims that involve disputes over rights that . . . have little or no relation to the Bankruptcy Code, do not arise under the federal bankruptcy law and would exist in the absence of a bankruptcy case are generally deemed non-core" (internal quotations omitted)). Core proceedings are "unique to or uniquely affected by the bankruptcy proceedings," or "directly affect a core bankruptcy function." *Luan Investment S.E. v. Franklin 145 Corp.* (In re Petrie

Retail), 304 F.3d 223, 229 (2d Cir. 2002). *See also Resolution Trust Corp. v. Best Prods. Co.* (In re *Best Prods. Co.*), 68 F.3d 26, 31 (2d Cir. 1995) ("A determination of whether a matter is 'core' depends on the nature of the proceeding.").

Congress has set forth, in Section 157(b)(2), a non-exhaustive list of the types of proceedings that can be core proceedings, including:

> (A) matters concerning the administration of the estate;
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan . . .;
>
> (C) counterclaims by the estate against persons filing claims against the estate;
>
> (D) orders in respect to obtaining credit;
>
> (E) orders to turn over property of the estate; (F) proceedings to determine, avoid, or recover preferences;
>
> (G) motions to terminate, annul, or modify the automatic stay;
>
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
>
> (I) determinations as to the dischargeability of particular debts;
>
> (J) objections to discharges;
>
> (K) determinations of the validity, extent, or priority of liens;
>
> (L) confirmations of plans;
>
> (M) orders approving the use or lease of property, including the use of cash collateral;
>
> (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
>
> (O) other proceedings affecting the liquidation of the assets of the estate or

the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

The misrepresentation claims and state common law claims alleged in the Adversary Proceeding do not fall within any of the categories listed above in Section 157(b)(2). Nor do the claims in the Adversary Proceeding involve rights that have any relation to the Bankruptcy Code (*see Complete Mgmt., supra*, at *12), and they are not "unique to or uniquely affected by the bankruptcy proceedings." *Petrie Retail*, 304 F.3d at 229. But for the existence of the bankruptcy case, the Adversary Proceeding would have been commenced as a civil action in the district court. The only connection between the Adversary Proceeding and the bankruptcy case is that the outcome of the Adversary Proceeding could potentially have an effect on the ultimate size of the pie from which creditors may partake. If WILSON prevails in the Adversary Proceeding against RFC there will be less estate assets available for distribution to similarly-classified creditors. The Adversary Proceeding does not in any way affect creditors' rights to extract from the RFC estate their pro rata share of that to which they are entitled. *See Best Prods. Co.*, 68 F.3d at 32 ("The only relationship the action had to the bankruptcy proceeding was that determination of the action would affect the ultimate size of the estate."). Therefore, the claims in the Adversary Proceeding are non-core. This weighs heavily in favor of withdrawing the reference.

III. **Withdrawal Of The Adversary Proceeding Promotes Judicial Economy.**

Judicial economy is best served by withdrawal of the reference because the bankruptcy judge has no power, absent consent of all parties, to issue a final decision on the non-core claims in the Adversary Proceeding. Instead, the bankruptcy court may only "submit proposed findings of fact and conclusions of law to the district court." Section 157(c)(1). The district court would have to review, de novo, the bankruptcy court's findings of fact and conclusions of law to

which any party interposes an objection. *Id.* Such secondary review duplicates judicial time and resources. See *Orion Pictures*, 4 F.3d at 1101 ("the fact that a bankruptcy court's determination on non-core matters is subject to *de novo* review by the district court could lead the latter to conclude that in a given case unnecessary costs could be avoided by a single proceeding in the district court").

Moreover, there are no claims in the Adversary Proceeding that present issues with which the bankruptcy court would be more familiar than the district court. To the contrary, the claims are matters with which Article III courts regularly contend, and this Court in particular is familiar with the claims (and facts) in the Adversary Proceeding, since they are similar claims (and facts) filed before the USDCNCMD Court in May 2011. *See Complete Mgmt.*, *supra*, at *12 n.5 (district court's familiarity with related issues in the non-bankruptcy securities litigation supported withdrawal of the reference); *Wechsler*, 201 B.R. at 640-42 (same).

Withdrawal of the reference in this instance also promotes judicial economy in that withdrawal is just the first in a series of steps that will eventually lead to all claims in the USDCNCMD Court, and the Adversary Complaint being joined in one District Court.

IV. Withdrawal Of The Adversary Proceeding Will Expedite The Bankruptcy Process And Lead To Uniformity Of Bankruptcy Administration.

For essentially the same reasons that withdrawal promotes judicial economy, withdrawal of the reference will expedite the administration of the bankruptcy estate by eliminating the distraction of litigation concerning non-core issues.

See *Complete Mgmt*, supra, at *12 (reference withdrawn in part because adversary proceeding would entail "extensive discovery, expert testimony, and a lengthy and complex trial requiring a jury"); cf. *Official Comm. Of Unsecured*

Creditors of Enron Corp. v. Lay (In re *Enron Corp.*), 295 B.R. 21, 26 (S.D.N.Y. 2003) (reference of adversary proceeding not withdrawn where it was related to other similar adversary proceedings already before the bankruptcy court and involved facts and issues the bankruptcy court was intimately familiar with). Further, withdrawal of the reference should promote uniformity because all the related litigation will be finally resolved before a single court, reducing the possibility of inconsistent positions and rulings.

V. **WILSON Is Entitled To And Has Demanded A Trial by Jury.**

WILSON is constitutionally entitled to a trial by jury, which WILSON has demanded along with the complaint. The Seventh Amendment provides: "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. Const. amend. VII. In *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), the U.S. Supreme Court interpreted the Seventh Amendment to include "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Id.* at 41 (emphasis in original) (internal quotation and citation omitted). Thus, the Court determined that entitlement to a jury trial depends upon whether the claims asserted are legal or equitable. Legal claims include claims for money damages on account of fraud or tort. *Id.* at 47-48. The Court went on to hold that, not only must the cause of action be legal, it must also concern private rights. *Id.* at 56. Examples of causes of action based on private rights include **state law causes of action for breach of contract** or warranty. *Id.*

The complaint in the Adversary Proceeding requests money damages for breach of contract, violations of state law, deceptive trade and practices, and misrepresentations. These are legal claims and concern WILSON's "private rights." Therefore, WILSON is entitled to a jury trial in the Adversary Proceeding.

Because WILSON does not consent to a jury trial before the bankruptcy court, and for the other reasons stated above, the reference of the Adversary Proceeding should be withdrawn. *See Official Comm. Of Unsecured Creditors v. Union Transport Corp.* (In re *FMI Forwarding Co., Inc.*), Nos. 00 B 41815 (CB), 01 Civ. 9462 (DAB), 01-02992 (CB), 2005 WL 1348956 (June 16, 2004) ("[C]onstitution prohibits bankruptcy courts from holding jury trials in non-core matters," *quoting Orion Pictures*, 4 F.3d at 1101); *Complete Mgmt., supra*, at *5 ("to allow bankruptcy courts to hold jury trials in non-core, related proceedings would violate the Reexamination Clause of the Seventh Amendment of the United States Constitution," *quoting Orion Pictures*, 4 F.3d at 1101).

VI. Alternatively, The Issues Set Forth In The Adversary Proceeding Mandate That The Reference Be Withdrawn.

Although cause exists for the Court to exercise its discretion and withdraw the reference of the Adversary Proceeding, WILSON also notes that the state claims in the Adversary Proceeding mandate withdrawal pursuant to Section 157(d).

Section 157(d) provides for mandatory withdrawal of the reference by the district court "on timely motion of a party . . . if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." In the Second Circuit, withdrawal is mandatory when resolution of the issues requires "substantial and material consideration" of certain nonbankruptcy statutes. In re *Ionosphere Clubs*, 922 F.2d 984, 995 (2d Cir. 1990). In *New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991), the Second Circuit held that withdrawal is required when issues are raised that would "require a bankruptcy court judge to engage in significant interpretation, as opposed to simple application, of federal [state] laws apart from the bankruptcy statutes." 932 F.2d at

1026. *See also The Singer Co. v. Groz-Beckert KG* (In re The Singer Co.), No. 01 Civ. 0165 (WHP), 2002 WL 243779, at *3 (S.D.N.Y. February 20, 2002) (mandatory withdrawal where claim raised a difficult patent law question).

However, when deciding under the mandatory withdrawal prong of Section 157(d) whether there will be a substantial and material consideration of non-bankruptcy federal law, the inquiry does not go so far as questioning whether the legal issues are unsettled or are of first impression.

> To satisfy the substantial-consideration test, the issues of nonbankruptcy law raised by the proceeding need not be unsettled or involve matters of "first impression." *McCrory Corp. v. 99 [cents] Only Stores* (In re *McCrory Corp.*), 160 B.R. 502, 505 (S.D.N.Y. 1993) (noting that what is at issue is "the degree to which the bankruptcy judge would have to consider the federal [nonbankruptcy] law" (emphasis added)). It is not clear that only a "simple application" of federal non-bankruptcy law is required of the Bankruptcy Court here.

Enron Power Mktg., supra, at *7-8.

The complaint in the Adversary Proceeding states breach of contract, violations of N.Y. trust law, N.C. state law, and deceptive acts and practices all resulting in the commission of fraud upon the state court. Without withdrawal, the bankruptcy court would have to issue findings of fact and conclusions of law concerning the defendants' compliance with breach of contract, state laws, and fraud upon the court. Accordingly, the court's analysis would require consideration of a number of N.Y. Trust law issues, including without limitation, whether the defendants: falsified N.Y. Trust law in perfecting the gift, and other information provided to WILSON in order to mislead the state court and secure through fraudulent means, under color of law, a favorable state court decision. While these issues may not involve questions of unsettled law or matters of first impression,

they will require the bankruptcy court to substantially consider the statutory elements of each alleged violation of the state laws.

CONCLUSION

For the foregoing reasons, this Court should enter an order withdrawing the reference of the Adversary Proceeding and grant such other and further relief as this Court deems just and proper.

Date: April 28, 2014

Respectfully submitted,



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PROOF OF SERVICE

I Jennifer Wilson hereby certify that on April 28, 2014, I served a copy of the foregoing by U.S. Postal Service and email addressed to defendants' counsel of record:

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This the 28th day of April, 2014.

By: Jennifer L. Wilson

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