

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:)	
)	
Pluma, Inc.,)	Case No. 99-11104C-11G
)	
Debtor.)	
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)	
Suntrust Bank, a Georgia)	
Banking Corporation, and)	
Centura Bank, a North)	
Carolina Corporation,)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 00-2078
)	
R. Duke Ferrell, Jr.,)	
Forrest H. Truitt, II,)	
G. Walker Box, Kemp D. Box,)	
C. Monroe Light, William)	
K. Mileski, R. Stephens)	
Pannill, J. Robert Philpott,)	
Jr., George G. Wade, and)	
Barry A. Bowles,)	
)	
Defendants.)	
)	

MEMORANDUM OPINION

This adversary proceeding came before the court on September 6, 2000, for hearing upon plaintiffs' motion to abstain and remand. William R. Rakes and James R. Langdon appeared on behalf of the plaintiffs and William C. Raper and Michael L. Robinson appeared on behalf of the defendants. Having considered the motion, the memoranda

submitted in support of and in opposition to the motion, the evidence submitted by the parties and the matters of record in this proceeding, the court makes the following findings of fact and conclusions of law pursuant to Rules 9014 and 7052 of the Federal Rules of Bankruptcy Procedure.

JURISDICTION

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984.

BACKGROUND

The following background facts are a matter of record and are not in dispute. Prior to its bankruptcy, Pluma, Inc. ("Pluma") was a publicly owned North Carolina corporation which operated as a vertically integrated manufacturer and distributor of fleece and jersey active wear. Pluma had manufacturing facilities and offices in Eden, North Carolina, and in Martinsville, Virginia. On May 14, 1999, Pluma filed for relief under Chapter 11 in this court. Initially, Pluma continued business operations while it attempted to develop a plan of reorganization and obtain exit financing. However, such efforts were unsuccessful and Pluma announced its intention to discontinue operations in early September of 1999. On September 24, 1999, Pluma

filed a plan of liquidation which, following some modifications, was confirmed on November 20, 1999. Liquidation of the Pluma assets currently is underway pursuant to the plan of liquidation.

The proceeding which is now before the court is a lawsuit which was filed in the State of Virginia in the Circuit Court of Henry County on March 2, 2000. The plaintiffs, Suntrust Bank and Centura Bank, allege that they participated in a syndicated loan program pursuant to which they loaned \$65,000,000.00 to Pluma. The defendants are ten individuals who were the directors of Pluma at the time of the loan. The plaintiffs' complaint contains state law claims for fraud, constructive fraud, negligent misrepresentation and unfair or deceptive acts or practices, and seeks actual damages of \$32,000,000.00 plus punitive and treble damages.

PROCEDURAL HISTORY

On April 3, 2000, defendants Box and Pannill removed this proceeding to the United States District Court for Western District of Virginia. Following the removal, the defendants filed a motion to transfer venue from the United States District Court for the Western District of Virginia to the United States Bankruptcy Court for the Middle District of North Carolina. Plaintiffs filed a motion in the United States District Court for the Western District of Virginia to dismiss this proceeding for lack of subject matter jurisdiction and for

remand to the state court or, in the alternative, for abstention and remand to the state court.

On July 25, 2000, the Honorable Norman K. Moon, United States District Judge for the Western District of Virginia, entered a memorandum opinion and order finding that the district court had jurisdiction over plaintiffs' claims and overruling the plaintiffs' motion to dismiss. Judge Moon declined to rule on plaintiffs' motion to abstain and remand and, instead, granted defendants' motion for change of venue, having concluded that the bankruptcy court in North Carolina was in the best position to deal with the plaintiffs' motion to abstain, which is the matter now before this court, together with plaintiffs' motion to remand to the state court in Virginia.

ANALYSIS

In arguing that abstention is mandatory, plaintiffs rely upon 28 U.S.C. § 1334(c)(2) which, in relevant part, 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 proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Under this provision, district courts and bankruptcy courts must abstain from hearing a proceeding when the moving party demonstrates that (1) its motion for abstention was timely; (2) the proceeding is based on state law issues; (3) the proceeding is "related to" a title 11 case but is not a core proceeding; (4) the proceeding otherwise could not have been commenced in the United States courts but for 28 U.S.C. § 1334; (5) there must be an action commenced in state court; and (6) the state action must be one which can be timely adjudicated in a state forum of appropriate jurisdiction. See In re Georgou, 157 B.R. 847, 850 (N.D. Ill. 1993); In re Leco Enters., Inc., 144 B.R. 244, 251 (S.D.N.Y. 1992).

The first five of the foregoing elements or requirements are conceded in this case, leaving at issue only the requirement that the state action be one which can be timely adjudicated in a state forum of appropriate jurisdiction. Also, there is no issue regarding the Circuit Court of Henry County being a "state forum of appropriate jurisdiction." Hence, the only question for determination by this court is whether this proceeding can be timely adjudicated in the Circuit Court of Henry County, Virginia. If so, this court must abstain and remand this proceeding to that court.

The timeliness element of 28 U.S.C. § 1334(c)(2) requires that the proceeding be one that "can be timely adjudicated" in state court.

The phrase "timely adjudicated" is not defined in 28 U.S.C. § 1334 nor in the Bankruptcy Code. Hence, development of the criteria to be used in determining timeliness under 28 U.S.C. § 1334(c)(2) has been left to the courts. According to Collier, most cases considering the issue have concluded that timeliness for purposes of 28 U.S.C. § 1334(c)(2) should be referenced against the needs of the bankruptcy case, rather than against an absolute time guideline. See 1 Collier on Bankruptcy ¶ 3.05[2] (15th ed. rev. 2000). The cases which have adopted this approach have focused on whether allowing an action to proceed in State court will have any unfavorable effect on the administration of a bankruptcy case. See In re World Solar Corp., 81 B.R. 603, 612 (Bankr. S.D. Cal. 1988); J.D. Marshall, Int'l, Inc. v. Redstart, Inc., 74 B.R. 651, 654 (N.D. Ill. 1987). Under this rationale, even though a related proceeding can be tried in state court in a relatively short time, that disposition may not constitute "timely adjudication" if that amount of delay would prejudice the bankruptcy case and the proceeding can be tried more quickly in the bankruptcy court.

The factors which have been considered in deciding "timeliness" in the context of 28 U.S.C. § 1334(c)(2) include the following: (1) the backlog of the state court and federal court calendars; (2) status of the proceeding in state court prior to being removed (i.e., the extent to which discovery has been completed); (3) status of the proceeding

in the bankruptcy court; (4) the complexity of the issues to be resolved; (5) whether the parties consent to the bankruptcy court entering judgment in the non-core case; (6) whether a jury demand has been made; and (7) whether the underlying bankruptcy case is a reorganization or a liquidation case. See In re Midgard Corp., 204 B.R. 764, 778-79 (10th Cir. B.A.P. 1997); In re Georgou, 157 B.R. 847, 851 (N.D. Ill. 1993).

Some of these factors such as the status of the state court calendar require the moving party to present evidence, which was done in the present case. Other factors, however, are evident from the record, such as whether a jury trial has been demanded, whether the parties have consented to the bankruptcy court entering judgment, and the nature and status of the underlying bankruptcy case. See In re Midgard Corp., 204 B.R. 764, 779 (B.A.P. 10th Cir. 1997).

If the motion for abstention is opposed, it is generally held that the burden of proving timely adjudication is on the party seeking abstention. See In re Arid Waterproofing, Inc., 175 B.R. 172, 180 (Bankr. E.D. Pa. 1994); In re Nationwide Roofing & Sheet Metal, Inc., 130 B.R. 768, 779 (Bankr. S.D. Ohio 1991); In re Ascher, 128 B.R. 639, 644 (Bankr. N.D. Ill. 1991). In the present case, this means that the plaintiffs have the burden of showing that this proceeding can be timely adjudicated in the Circuit Court of Henry County. For the

reasons hereinafter discussed, the court has concluded that the plaintiffs have carried this burden.

The backlog of a court's calendar must be considered because calendar backlog is a critical factor in determining how long it will take a court to dispose of a case. In the present case, the plaintiffs submitted an affidavit and statistical data concerning the status of the calendar in Henry County and how quickly this proceeding could be tried in that court. According to this evidence, a civil action in the Circuit Court of Henry County is usually tried within twelve months of commencement. Judge Moon found that "the Henry County Circuit Court can adjudicate this case within twelve months. . . ." Judge Moon is a former Virginia trial and appellate judge and is uniquely qualified to evaluate the evidence which was before him and project the amount of time that would be required for this proceeding to be tried in the Henry County Circuit Court. Twelve months, therefore, is accepted as the amount of time that likely would be required for the adjudication of this proceeding in the state court.

There are several factors which have a bearing on how long it likely would take for this case to be adjudicated if not remanded to state court. The first of these factors is that this proceeding is not a core proceeding and therefore is one in which the bankruptcy court cannot enter a final judgment. Additionally, there has been a demand

for a jury trial in this proceeding and the party demanding a jury trial does not consent to the jury trial being conducted in the bankruptcy court. As a result, the trial of this proceeding cannot be conducted in the bankruptcy court. The procedure that generally is followed in this district in such cases is that discovery and pre-trial motions are handled in the bankruptcy court and the case then is recalled to the district court for the jury trial. This means that the trial docket which must be considered is that of the district court here in the Middle District of North Carolina. Based upon the evidence in the record, this court's familiarity with the dockets of the bankruptcy court and the district court in this district, and taking into account that this proceeding must be regarded as complex litigation, this court is satisfied that the time required for the adjudication of this case in the federal courts in this district is no shorter than the twelve months projected for trial in the state court. In reaching this conclusion, the court has considered defendants' argument that the disposition time in federal court would be shorter because effective summary judgment relief is available in federal court but not in state court because, as a practical matter, summary judgment does not exist under Virginia law. The court is unconvinced by this argument because it is problematic and speculative as to whether all of the defendants would be able to obtain summary judgment if this

proceeding remained in this court. For example, the complaint may be read as alleging that some of the defendants were involved in meetings with representatives of the plaintiffs when the loan was being sought and that these defendants themselves made false and materially misleading statements to plaintiffs' representatives (as opposed to alleging that defendants should be held vicariously responsible for false representations made by others because of their status as directors at the time of the false representations). Further, at this point, there simply is no way for this court to have a meaningful, reliable idea of what the evidence will show in this proceeding. It is clear, however, that if any of the defendants were unsuccessful in obtaining summary judgment, there would have to be a jury trial in the district court.

There is nothing about the underlying Pluma bankruptcy case which leads to the conclusion that the adjudication of this case in state court should not be regarded as a "timely adjudication" for purposes of 28 U.S.C. § 1334(c)(2), given that the same amount of time likely would be required for the trial if the case were not remanded. A critical factor here is that the Pluma bankruptcy case involves a liquidation in which the primary concern is an orderly liquidation of assets and distribution of proceeds to creditors. Delay occasioned by related litigation therefore carries much less weight in the Pluma case

than in a case involving a reorganization in which such delay might thwart the entire reorganization effort. See In re World Solar Corp., 81 B.R. 603 (Bankr. S.D. Cal. 1988). Obviously, delay is to be avoided when possible, even in a liquidation case. However, in the present case, based upon the best estimates which can be made at this time, the delay occasioned by this proceeding likely will be no longer in the state court than in the federal court. Moreover, the bankruptcy court is not helpless in dealing with undue delay in a liquidation case. Section 502(c)(1) of the Bankruptcy Code permits the bankruptcy court to estimate for purposes of allowance any contingent or unliquidated claim, the fixing or liquidation of which would unduly delay the administration of the case. Estimation pursuant to this provision may be utilized to avoid having to await the resolution of an outside lawsuit to determine issues of liability or amount owed. See In re Ford, 967 F.2d 1047, 1053 (5th Cir. 1992). This provision will be available in the Pluma case in the event of undue delay whether this proceeding is in the state court or the district court.

The fact that the defendants are covered by Directors' and Officers' insurance which was purchased by Pluma prior to filing for bankruptcy relief has little, if any, bearing on the issue now before the court. Defendants point out that the committee of unsecured creditors' in the Pluma case has given notice of a possible claim

against the defendants which also may be covered under the Directors' and Officers' policy and that the present proceeding in which defendants' defense costs are being paid by the insurance carrier is reducing the amount of coverage which would be available if the committee successfully pursues a claim against the defendants. Defendants argue that a judgment in this proceeding in which the plaintiffs seek to recover compensatory damages of \$32,000,000.00 could wipe out the entire coverage and frustrate the efforts of the committee to collect any judgment which the committee might obtain. The likelihood of this scenario occurring has drastically declined, if not entirely evaporated, because counsel for the committee has now gone on record that the committee does not intend to pursue a claim against the defendants. However, even if the committee intended to pursue a claim, that fact would not be grounds for concluding that this proceeding cannot be timely adjudicated in state court. The existence of competing claims by the plaintiffs and the committee against the same insurance fund was support for a finding that this proceeding is subject to the "related to" jurisdiction created under 28 U.S.C. § 1334(a), but has no real bearing on whether this proceeding can be timely adjudicated in state court, particularly since there was no showing that a trial in state court was any more likely to cause prejudice to the committee or the Pluma bankruptcy estate than a trial

in federal court.

CONCLUSION

For the foregoing reasons, the court finds and concludes that this proceeding can be timely adjudicated in the Circuit Court of Henry County within the meaning of 28 U.S.C. § 1334(c)(2) and that mandatory abstention therefore is required pursuant to 28 U.S.C. § 1334(c)(2). Accordingly, an order will be entered contemporaneously with the filing of this memorandum opinion granting the motion for mandatory abstention and remanding this proceeding to the Circuit Court of Henry County. Since mandatory abstention is required under 28 U.S.C. § 1334(c)(2), the court need not consider plaintiffs' motion for permissive abstention under 28 U.S.C. § 1334(c)(1).

This 15th day of September, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

SEP 15 '00

U.S. Bankruptcy Court
Greensboro, NC

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Defendants.)
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ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) Plaintiffs' motion for mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2) is granted; and

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(2) Plaintiffs' motion for remand pursuant to 28 U.S.C. 1452(b) is granted and this proceeding is hereby remanded to Circuit Court of Henry County in the State of Virginia.

This 15th day of September, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge