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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re:)	
)	
MICHAEL HAT,)	Case No. 04-32497-B-11
)	
Debtor(s).)	
)	
_____)	
)	
MICHAEL HAT,)	
)	
Plaintiff(s))	Adv. No. 06-2217-B
)	
vs.)	
)	
FARM CREDIT LEASING SERVICES)	Docket Control No. DNL-1
)	
CORP.,)	Date: November 7, 2006
)	
Defendant(s).)	Time: 9:30 a.m.
)	
_____)	

On or after the calendar set forth above, the court issued the following ruling. The official record of the ruling is appended to the minutes of the hearing.

Because the ruling constitutes a "reasoned explanation" of the court's decision under the E-Government Act of 2002 (the "Act"), a copy of the ruling is hereby posted on the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format, as required by the Act. However, this posting does not constitute the official record, which is always the ruling appended to the minutes of the hearing.

DISPOSITION AFTER ORAL ARGUMENT

This matter continued most recently from October 11, 2006 for the parties to file supplemental briefing. Both parties timely submitted briefs and replies. The matter came on for hearing on November 7,

1 2006, at 9:30 a.m. Appearances are noted on the record. The
2 following constitutes the court's findings of fact and conclusions of
3 law, pursuant to Federal Rule of Bankruptcy Procedure 7052.

4 Plaintiff's motion is granted and this adversary proceeding is
5 remanded to San Joaquin County Superior Court.

6 Plaintiff raises two arguments in support of this motion. He
7 argues (1) that this court lacks subject matter jurisdiction to hear
8 the adversary proceeding and (2) that equitable considerations favor
9 remand. The first argument fails but the court agrees with the
10 second.

11 (1) Subject Matter Jurisdiction. The District Court has
12 "original but not exclusive jurisdiction of all civil proceedings
13 arising under title 11 or arising in or related to cases under title
14 11." 28 U.S.C. § 1334(b) (West 2006). Pursuant to 28 U.S.C. § 157
15 and General Orders 182, 223, and 330 of the District Court for the
16 Eastern District of California, all such cases have been referred to
17 the bankruptcy judges of this District. Thus, this court holds
18 subject matter jurisdiction to the extent that this adversary
19 proceeding arises under, arises in, or is related to a case under
20 title 11.

21 Defendant argues that this matter arises under title 11 and
22 further argues that it is a core proceeding. Plaintiff disagrees,
23 arguing that this proceeding is non-core. The court requested
24 additional briefing on the issue of whether or not plaintiff waived
25 his right to assert non-core status by his failure to comply with the
26 requirements of Federal Rule of Bankruptcy Procedure 9027(e)(3). As
27 further set forth below, the court does find that defendant has waived
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1 the right to assert non-core status. That being said, such a finding
2 does not affect the issue of jurisdiction because this court has an
3 independent duty to determine its own jurisdiction. The court finds,
4 for purposes of the subject matter jurisdiction issue only, that this
5 matter is non-core and that this court lacks "arising under"
6 jurisdiction.

7 This adversary is clearly not one "arising in" a case under title
8 11. "'Arising in' proceedings are those that are not based on any
9 right expressly created by title 11, but nevertheless, would have no
10 existence outside of the bankruptcy." In re Harris Pine Mills, 44 F.3d
11 1431, 1435 (9th Cir. 1995) (citation omitted). Because this adversary
12 proceeding could exist independently outside of a bankruptcy
13 proceeding, it is not one "arising in" the bankruptcy. Id.

14 However, the court finds that this adversary proceeding is one
15 'related to' the underlying bankruptcy proceeding.

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17 The usual articulation of the test for determining
18 whether a civil proceeding is related to bankruptcy is
19 whether *the outcome of the proceeding could conceivably*
20 *have any effect on the estate being administered in*
21 *bankruptcy*. [citations omitted]. Thus, the proceeding
22 need not necessarily be against the debtor or against the
23 debtor's property. An action is related to bankruptcy if
24 the outcome could alter the debtor's rights, liabilities,
25 options, or freedom of action (either positively or
26 negatively) and which in any way impacts upon the
27 handling and administration of the bankrupt estate.

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2 Feitz v. Great Western Savings (In re Feitz), 852 F.2d 455, 457 (9th
3 Cir. 1988) (citations omitted) (emphasis in original). This standard
4 for jurisdiction is broad in scope. The defendant has set forth an
5 effect this adversary could conceivably have on the estate - that this
6 case could give rise to a claim for indemnity. "It remains to be seen
7 whether, and to what extent, [this] action will affect [debtor's]
8 estate. Yet, even a proceeding which portends a mere contingent or
9 tangential effect on a debtor's estate meets the broad jurisdictional
10 test articulated in Pacor." National Union Fire Ins. Co. Of
11 Pittsburgh, PA v. Titan Energy, Inc. (In re Titan Energy, Inc.), 837
12 F.2d 325, 330 (8th Cir. 1988). This is one such case and the court
13 finds it has 'related to' jurisdiction.

14 (2) Equitable Considerations. The court finds that equitable
15 considerations warrant remand of this matter to state court. "The
16 court to which such claim or cause of action is removed may remand
17 such claim or cause of action on any equitable ground." 28 U.S.C. §
18 1452(b) (West 2006). The court considers the same factors to
19 determine remand that are used to determine permissive abstention.
20 Western Helicopters Inc. v. Hiller Aviation, Inc., 97 B.R. 1, 5 (E.D.
21 Cal. 1988) ("When deciding to abstain or remand pursuant to 28 U.S.C.
22 §§ 1334(c) (1) or 1452(b), the court must weigh such considerations as:
23 judicial economy; comity and respect for state court decision-making
24 capabilities; the effect of remand upon the administration of the
25 related title 11 estate; the effect of bifurcating the claims and
26 parties to an action and the possibilities of inconsistent results;
27 the predominance of state law issues and non-debtor parties; and the
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1 prejudice to other parties to the action.").

2 After Hiller Aviation, the Ninth Circuit Court of Appeals decided
3 Christensen v Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912
4 F.2d 1162, 1166-67 (9th Cir. 1990). "[F]actors a court should consider
5 when deciding whether to abstain: (1) the effect or lack thereof on
6 the efficient administration of the estate if a Court recommends
7 abstention, (2) the extent to which state law issues predominate over
8 bankruptcy issues, (3) the difficulty or unsettled nature of the
9 applicable law, (4) the presence of a related proceeding commenced in
10 state court or other nonbankruptcy court, (5) the jurisdictional
11 basis, if any, other than 28 U.S.C. § 1334, (6) the degree of
12 relatedness or remoteness of the proceeding to the main bankruptcy
13 case, (7) the substance rather than form of an asserted "core"
14 proceeding, (8) the feasibility of severing state law claims from core
15 bankruptcy matters to allow judgments to be entered in state court
16 with enforcement left to the bankruptcy court, (9) the burden of [the
17 bankruptcy court's] docket, (10) the likelihood that the commencement
18 of the proceeding in bankruptcy court involves forum shopping by one
19 of the parties, (11) the existence of a right to a jury trial, and
20 (12) the presence in the proceeding of nondebtor parties." Id.

21 The court finds that the following Tucson Estates factors favor
22 remand: 1, 2, 5, 6, 9, 10, 11 and 12. Returning this matter to state
23 court will not adversely effect the administration of the estate.
24 Even though the court finds above a conceivable effect on the
25 bankruptcy estate such that subject matter jurisdiction is
26 established, that effect is ultimately contingent on plaintiff
27 prevailing in this matter. If and when the contingent effect
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1 materializes, it can be adequately addressed by this court. This
2 adversary proceeding exclusively involves matters of state law, and
3 this court's jurisdiction is non-exclusive under 28 U.S.C. 1334. This
4 department's ability to administer its weekly calendars will be
5 burdened by administration of this action. The court finds it likely
6 that defendant removed this action from state court in the hopes of
7 finding a sympathetic forum. The parties retain the right to a jury
8 trial in this matter. The deadline for making jury trial requests has
9 not yet run. See Fed. R. Bankr. P. 9015(a) and Fed. R. Civ. P. 38(b).
10 Finally, the action involves a nondebtor party, the defendant, and the
11 debtor whose control over the bankruptcy estate was terminated in
12 April, 2003 with the appointment of a chapter 11 trustee.

13 Factors 3, 4 and 8 favor retaining the case. The applicable law
14 is not difficult or unsettled. There is but one proceeding, this one,
15 which was removed from state court. There is no need to sever claims
16 as all involve only questions of state law.

17 Factor 7 is mixed. As noted above, the court finds that
18 plaintiff has waived his right to assert non-core status because he
19 failed to comply with the mandatory filing requirement in Federal Rule
20 of Bankruptcy Procedure 9027(e)(3). Claims that the failure is merely
21 the fault of counsel are unavailing. See Pioneer Investment Services
22 Company v. Brunswick Associates Limited Partnership, 507 U.S. 380,
23 396, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993) ("clients must be held
24 accountable for the acts and omissions of their attorneys."). Rule
25 9027(e)(3) requires the statement be filed "not later than 10 days
26 after the filing of the notice of removal." That provision has
27 existed unchanged since 1991. The court agrees that a case by case
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1 determination is appropriate and in this instance waiver is warranted.
2 "[T]he appropriate measure is to weigh the specific equities discussed
3 in Wetzel and Barge to determine if waiver is or is not appropriate on
4 a case by case basis." In re Application of Buran, __ B.R. __, 2006
5 WL 2615552, *2 (W.D. N.Y. Sept. 11, 2006). In so weighing the
6 equities, the court applies a balancing of factors such that the
7 longer the delay, the less prejudice must be shown to find waiver.
8 Conversely, the shorter the delay, the more prejudice must be shown to
9 find waiver. This case was removed from state court on May 19, 2006.
10 Plaintiff's first assertion of non-core status appears in his
11 opposition filed July 25, 2006; sixty-eight days after this case was
12 removed and fifty-eight days late. That is substantially longer than
13 Wetzel v. Lumbermens Mut. Cas. Co., 324 B.R. 333 (S.D. Ind.
14 2005) (filed on the 11th day) and Barge v. Western Southern Life Ins.
15 Co., 307 B.R. 541 (S.D. W. Va. 2004) (motion to remand within 30 days
16 of removal). The court acknowledges that it is less than the period
17 in Buran (four plus months) but that decision is not binding on this
18 court or dispositive in this case.

19 Furthermore, the finding of waiver is consistent with treatment
20 of other rights that must be affirmatively asserted by parties.

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22 Our precedents also demonstrate, however, that Article
23 III does not confer on litigants an absolute right to the
24 plenary consideration of every nature of claim by an
25 Article III court. See, e.g., *Thomas, supra*, at 583, 105
26 S.Ct., at 3334; *Crowell v. Benson, supra*. Moreover, as a
27 personal right, Article III's guarantee of an impartial
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1 and independent federal adjudication is subject to
2 waiver, just as are other personal constitutional rights
3 that dictate the procedures by which civil and criminal
4 matters must be tried. See, e.g., *Boykin v. Alabama*, 395
5 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (waiver of
6 criminal trial by guilty plea); *Duncan v. Louisiana*, 391
7 U.S. 145, 158, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968)
8 (waiver of right to trial by jury in criminal case); Fed.
9 Rule of Civ.Proc. 38(d) (waiver of right to trial by jury
10 in civil cases). Indeed, the relevance of concepts of
11 waiver to Article III challenges is demonstrated by our
12 decision in *Northern Pipeline*, in which the absence of
13 consent to an initial adjudication before a non-Article
14 III tribunal was relied on as a significant factor in
15 determining that Article III forbade such adjudication.
16 See, e.g., 458 U.S., at 80, n. 31, 102 S.Ct., at 2876, n.
17 31; *id.*, at 91, 102 S.Ct., at 2881-2882 (REHNQUIST, J.,
18 concurring in judgment); *id.*, at 95, 102 S.Ct., at 2884
19 (WHITE, J., dissenting). See also *Thomas, supra*, at 584,
20 591, 105 S.Ct., at 3334-3335, 3338. Cf. *Kimberly v. Arms*,
21 129 U.S. 512, 96 S.Ct. 355, 32 L.Ed. 764 (1889); *Heckers*
22 *v. Fowler*, 2 Wall. 123, 17 L.Ed. 759 (1864).

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24 Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 848-49,
25 106 S.Ct 3245, 3255-56 (1986). "The fact that Congress failed to
26 include any provision for explicit consent in the 1984 Act indicates
27 that consent implied from the parties' actions is sufficient." In re
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1 Daniels-Head & Associates, 819 F.2d 914, 918-9 (9th Cir. 1987) (Section
2 157(c) (2) does not require express consent). Based on the foregoing,
3 the court finds waiver and were this matter not being remanded,
4 plaintiff would have impliedly consented to entry of final orders by
5 this court.

6 Most of the Tucson Estates factors favor remand. Therefore, the
7 motion is granted, and this action is remanded to San Joaquin County
8 Superior Court.

9 The court will issue a minute order.

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