UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, Brendan Hampton Church, Debtor(s).	C/A No. 23-01436-HB Adv. Pro. No. 23-80047-HB
Dream Medical Group, LLC Joseph Agresti, Plaintiff(s), v. Church Enterprises, Inc. *et al.*,[1] Defendant(s).	Chapter 7 **ORDER DENYING MOTION TO ABSTAIN AND REMAND WITHOUT PREJUDICE**

THIS MATTER came before the Court for hearing on January 4, 2024, for consideration of the Motion to Remand and Abstain (the "Motion") filed by Scott D. MacLatchie and Frank B.B. Knowlton on behalf of Defendants Church Enterprises, Inc., Edwin N. "Chuck" Church, Jr., Kirsten G. Church, Jean P. Church, and Betsy J. Anderson (the "Nelson Mullins Defendants"), requesting the Court abstain from hearing this action pursuant to 28 U.S.C. § 1334(c)(1) (*i.e.*, discretionary abstention) and remand it to the State Court (defined below) pursuant to 28 U.S.C. § 1452(b) (*i.e.*, equitable remand).[2] Gregory J. English and Miranda Nelson filed a joinder in the Motion on behalf of Defendants Andrew Anderson, Becston, Inc., Ryan Bilton, Mark Cabrera, Gemini Ventures, LLC, James Randy Goff, Adaobi Gwacham, Michael Joseph Kelley, C.R. May, Nothing Wasted Foods, II, Inc., Chad Saxon, Jim Saxon, Tony Stewart, Benjamin Swanson, Michael Wagner, and Evan Williamson (the "Wyche Defendants").[3] Collectively, the Nelson Mullins Defendants and the Wyche Defendants are referred to herein as the "Moving Defendants."

[1] Pursuant to Fed. R. Civ. P. 10(a), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7010, the Court is naming only the first defendant in the caption rather than listing the numerous defendants in this action.
[2] ECF No. 20, filed Sept. 21, 2023.
[3] ECF No. 31, filed Oct. 11, 2023.

Christine E. Brimm filed Objections to the Motion on behalf of a large group of defendants listed on Exhibit A thereto (the "Brimm Defendants").[4] Joshua J. Hudson, Paul S. Landis, and Wilson F. Green filed a response on behalf of Plaintiffs Dream Medical Group, LLC ("DMG") and Joseph Agresti (collectively, the "Plaintiffs") asking the Court to deny the Motion.[5]

This matter is related to the bankruptcy case of Brendan Hampton Church ("Debtor"), pending in this Court.

PROCEDURAL BACKGROUND

The relevant facts are found on the Court's dockets in the bankruptcy case and this adversary proceeding. On March 2, 2022, Plaintiffs filed an Amended Complaint naming numerous parties (the "Defendants"), including the Moving Defendants and the Brimm Defendants, in the Court of Common Pleas, Thirteenth Judicial Circuit, Greenville County, South Carolina (the "State Court") (C.A. No.: 2022-CP-23-0576) (the "State Court Litigation").[6] The Amended Complaint alleges the following: Plaintiffs entered into an agreement with Old South Trading Co., LLC ("OST") and Debtor, its owner, in April of 2020—the beginning of the COVID-19 pandemic—whereby Debtor and OST would provide Plaintiffs with protective masks at a contract price of about $11.5M. In May of 2020, after failing to provide all masks timely, Debtor and OST entered into an agreement with Plaintiffs to refund them approximately $5.5M. Debtor and OST failed to refund the money to Plaintiffs, so Plaintiffs sought and obtained an arbitration award for approximately $5.5M against Debtor and OST. Instead of paying Plaintiffs the refund, Plaintiffs allege Debtor and OST used their money to fuel a "Ponzi scheme"[7] in which the

[4] ECF No. 32, filed Oct. 11, 2023; ECF No. 62, filed Nov. 28, 2023.
[5] ECF No. 33, filed Oct. 11, 2023.
[6] ECF No. 1, Ex. 1-A, pp. 8-20.
[7] A "Ponzi scheme" "takes its name from Charles Ponzi, who in the late 1920s was convicted for fraudulent schemes he conducted in Boston" and refers to "[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger

Defendants received exorbitant returns as investors. Plaintiffs assert that (1) a constructive trust should be placed over the returns, with such funds being returned to Plaintiffs; (2) the payments to Defendants were fraudulent conveyances under the Statute of Elizabeth (S.C. Code Ann. § 27-23-10); (3) Defendants were engaged in a civil conspiracy with Debtor and OST to defraud Plaintiffs; and (4) Defendants were unjustly enriched by receiving money that should have gone to Plaintiffs. Neither Debtor nor OST are defendants in the State Court Litigation.

On May 18, 2023, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code to begin the above bankruptcy case. On August 1, 2023, Debtor's case was converted to Chapter 7, and John K. Fort was appointed Chapter 7 Trustee (the "Trustee"). Many, but not all, of the Defendants have filed claims against Debtor's estate, as has Plaintiff DMG for $5,845,626.89. On August 15, 2023, Plaintiffs filed a timely Notice of Removal pursuant to 28 U.S.C. §§ 1452(a), 1334(a), 1334(b), and 1334(e), Fed. R. Bankr. P. 9027, and Local Rule 83.IX.01 (D.S.C.) to remove the State Court Litigation to this Court and initiate the above adversary proceeding. As of the date of the entry of this Order, OST has not filed a bankruptcy petition, and the Trustee has not yet taken any position in this proceeding nor pursued or abandoned any similar claims.

Plaintiffs set forth the basis for this Court assuming jurisdiction over the State Court Litigation in the Notice of Removal and their response to the Motion. Plaintiffs assert they are the largest non-priority unsecured creditors of the Debtor's estate, and thus resolution of their claim against the estate is core to estate administration. Further, resolution of Plaintiffs' claims against those Defendants whose aggregate returns were less than their principal investment is core to estate administration because any recovery on those claims would reduce Plaintiffs' claims against the

investments" usually "without any operation or revenue-producing activity other than the continual raising of new funds." *Ponzi Scheme*, BLACK'S LAW DICTIONARY (11th ed. 2019).

estate and increase those Defendants' claims against the estate. Likewise, resolution of Plaintiffs' claims against those Defendants whose aggregate returns exceeded their principal investment is core to estate administration because Plaintiffs assert the Trustee is likely to bring (core) turnover claims against such Defendants. Plaintiffs contend that even if their claims against Defendants were determined to be non-core, it would be more appropriate for this Court to resolve all claims by and against all Defendants—all of which arise from the actions of Debtor and OST—than to have piecemeal litigation with the possibility of inadequate or double recoveries. They assert that only this Court can resolve all claims on an "equitable" basis.

The Brimm Defendants support keeping the action in this Court. They argue that the Trustee has the sole authority to pursue the estate's fraudulent transfer claims until he has abandoned them, and thus Plaintiffs' fraudulent transfer claims and all other claims with a similar underlying focus are property of the estate. Accordingly, they conclude this Court has exclusive jurisdiction over such claims and this adversary proceeding. The Brimm Defendants note that little progress has been made in the State Court Litigation and assert the State Court may not have personal jurisdiction over, or may be an improper venue as to, many of the Defendants. They also contend that the outcome of this action will impact the validity and amount of the proofs of claim filed by Defendants and Plaintiff DMG in the underlying bankruptcy case, noting that they intend to file counterclaims against Plaintiffs if the Court does not grant their Motion to Dismiss.[8] Further, since the case was pending in this Court when the Brimm Defendants' former counsel was relieved, the Brimm Defendants hired a certified specialist in bankruptcy law, and remanding the case would likely require them to hire new counsel who would need to get up to speed on the case, resulting in further delay and increased expense.

[8] ECF No. 46, filed Nov. 2, 2023.

The Moving Defendants request the Court abstain from hearing this action and remand it to the State Court. In support of this request, the Moving Defendants contend that the factors for discretionary abstention and equitable remand weigh in their favor. Namely, Plaintiffs' claims may be litigated effectively in the State Court (as Plaintiffs implicitly acknowledge by initiating the lawsuit there) without disrupting estate administration. The State Court Litigation progressed for over a year prior to Debtor filing for bankruptcy, and Plaintiffs' claims involve difficult and unsettled issues of state law.

The Moving Defendants further argue there is only a tangential relationship between Plaintiffs' claims and Debtor's bankruptcy, as Defendants were not parties to the arbitration at issue and Plaintiffs' direct claims against Defendants are not related to the bankruptcy estate. Accordingly, they conclude the only potential basis for this Court's jurisdiction is 28 U.S.C. § 1334, and severance would be inappropriate. Moving Defendants assert Plaintiffs have removed this action to this Court simply because they have received unfavorable rulings from the State Court. Meanwhile, Moving Defendants assert their right to a jury trial is in jeopardy in this forum and it would prejudice them to force them—all non-debtors—to remain in this forum and continue to retain bankruptcy counsel in addition to their State Court counsel. Further, they argue the existence of numerous other lawsuits in state and federal courts across the country weighs in favor of abstention and remand.

CONCLUSIONS OF LAW

Under 28 U.S.C. § 1452, a party may remove any claim or cause of action in a civil case if the district court has jurisdiction of the claim or cause of action under 28 U.S.C. § 1334. Pursuant to 28 U.S.C. § 1334(b), the district courts have original but not exclusive jurisdiction of all civil proceedings arising under, or arising in, or related to cases under the Bankruptcy Code. The U.S.

District Court for the District of South Carolina has referred all cases under the Bankruptcy Code and all proceedings arising under, or arising in, or related to a case under the Bankruptcy Code to this Court pursuant to 28 U.S.C. § 157(a). Local Civil Rule 83.IX.01 (D.S.C.). "The party seeking removal bears the burden to establish federal subject matter jurisdiction." *Hughes v. Wells Fargo Bank, N.A.*, 617 F. App'x 261, 263 (4th Cir. 2015) (citing *Hoschar v. Appalachian Power Co.*, 739 F.3d 163, 169 (4th Cir. 2014)). "Removal must be strictly construed, and 'if federal jurisdiction is doubtful, a remand to state court is necessary.'" *Id.* (quoting *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004)); *see also* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."); Fed. R. Civ. P. 12(h)(3)[9] ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Bankruptcy courts have core and non-core jurisdiction. For a claim to be core such that the Court can enter a final order or judgment on it, it must be statutorily core *and* constitutionally core. *Fort v. Kibbey (In re Oaktree Med. Ctr., P.C.)*, 640 B.R. 649, 662 (Bankr. D.S.C. 2022). A non-exhaustive list of statutorily core proceedings is provided in 28 U.S.C. § 157, while a claim is constitutionally core if it "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* (quoting *Stern v. Marshall*, 564 U.S. 462, 499 (2011)). "A claim or proceeding *arises in* a bankruptcy case (and is thus a core proceeding) only when it would have no practical existence but for the bankruptcy, while a proceeding is *related to* a bankruptcy case if such proceeding may in any way affect the administration of the bankruptcy estate." *In re Palmetto Interstate Dev. II, Inc.*, 653 B.R. 230, 245 (Bankr. D.S.C. 2023) (emphasis in original) (citing *Meredith v. Wells Fargo Bank, N.A. (In re Meredith)*, No. 10-32366-KRH, 2014 WL 6845444, at

[9] Fed. R. Civ. P. 12(h) is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b).

*4 (Bankr. E.D. Va. Nov. 26, 2014)). "A proceeding that is related to a bankruptcy case is not a core proceeding. A bankruptcy court may hear such non-core proceedings and (in the absence of the consent of all parties to the proceeding) issue proposed findings of fact and conclusions of law for *de novo* review by the district court in accordance with 28 U.S.C. § 157(c)(1)." *Id.* (quoting *In re Meredith*, 2014 WL 6845444, at *4).

This Court has exclusive jurisdiction over all property, wherever located, of Debtor as of the commencement of his case, and of property of the estate. 28 U.S.C. § 1334(e)(1). The Bankruptcy Code defines property of the estate as including "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "Property of the estate includes all of the debtor's interest in any cause of action that has accrued prior to the bankruptcy petition." *Vinal v. Fed. Nat'l Mortg. Ass'n*, 131 F. Supp. 3d 529, 537 (E.D.N.C. 2015) (quoting *Miller v. Pac. Shore Funding*, 287 B.R. 47, 50 (D. Md. 2002)). Specifically, "all fraudulent transfer claims relating to a transfer made by the debtor, and the rights to recover damages or to avoid liens in connection with such claims, are property of the estate." *Angell v. Southco Distrib. Co. (In re Hatu)*, No. 21-00023-5-JNC, 2022 WL 1436051, at *10 (Bankr. E.D.N.C. May 5, 2022) (citation omitted); *see also Ivester v. Miller*, 398 B.R. 408, 430 (M.D.N.C. 2008) (summarizing Fourth Circuit precedent that only the trustee has standing to bring a fraudulent conveyance cause of action until such action has been abandoned).

28 U.S.C. § 1452(b) provides that the court to which a claim or cause of action has been removed "may remand such claim or cause of action on any equitable ground." Because bankruptcy jurisdiction—particularly "related to" jurisdiction—is broad, bankruptcy courts have "equally broad discretion to remand cases to the state courts where fairness and judicial efficiency will be better served by litigating the matters in state court than by sucking into the federal courts

large and complex actions lacking any specifically federal component merely because they tangentially affect a bankrupt estate." *Davis & Dingle Dentistry, P.A. v. E-Z Pay Servs., Inc. (In re E-Z Pay Servs., Inc.)*, No. 06–80166–DD, 2006 WL 3230602, at *2-*3 (Bankr. D.S.C. Nov. 2, 2006) (citation omitted). In determining whether to remand on equitable grounds, the Court should consider: (1) the effect on the efficient administration of the bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity; (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (6) the existence of the right to a jury trial; and (7) prejudice to the involuntarily removed parties. *Id.* at *3 (citation omitted).

28 U.S.C. § 1334(c)(1) provides that nothing in § 1334 "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." In deciding whether to exercise this discretionary abstention, the Court should consider the following instructive, non-binding factors: (1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden on the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence

of a right to a jury trial; and (12) the presence of non-debtor parties in the proceeding. *BGC Partners Inc. v. Avison Young (Canada) Inc.*, No. 2:15-cv-02057-DCN, 2015 WL 7458593, at *9 (D.S.C. Nov. 24, 2015) (citations omitted). "Generally, courts agree that abstention should be exercised only in a narrow sphere of cases and that abstention should be the exception, not the rule." *Foxwood Hills Prop. Owners Ass'n, Inc. v. 783-C, LLC (In re Foxwood Hills Prop. Owners Ass'n, Inc.)*, No. 20-80049-hb, 2021 WL 1812668, at *8 (Bankr. D.S.C. May 5, 2021) (quoting *In re Morgantown Excavators, Inc.*, No. 13-24, 2013 WL 4829165, at *3 (Bankr. N.D. W. Va. Sept. 9, 2013)). "A bankruptcy court has considerable discretion when deciding whether to abstain." *Id.* at *9 (quoting *In re McCurnin*, 590 B.R. 729, 744 (Bankr. E.D. Va. 2018)). "The moving party bears the burden of proving that discretionary abstention is warranted under the facts of the case." *Id.* (citing *Chicora Life Ctr., LC v. Charleston Cnty. (In re Chicora Life Ctr., LC)*, No. 16-80046-JW, slip op. at 5 (Bankr. D.S.C. Feb. 9, 2017)).

At the outset, the Court concludes that it has at least "related to" jurisdiction over the claims in this case, as their resolution may have a substantial impact on the claims allowance process. The Court also concludes that the overlapping factors for equitable remand and discretionary abstention favor retaining this case and denying the Motion. It appears the estate would be administered more efficiently if the Court retains jurisdiction over this matter rather than severing the state law claims, as it appears the claims in this action must be resolved before the claims allowance process and asset recovery process of the underlying bankruptcy may be completed. Although the causes of action are based on state law, this Court regularly applies the state laws at issue, and the issues presented do not appear to be highly complex or unsettled. Further, if this action continues, the applicable state law will likely be entwined with and augmented by applicable bankruptcy law.

The decision to remove the action to this Court does not appear to be an instance of forum shopping but rather an attempt to bring all parties and claims into one forum for efficient and equitable resolution. There also does not appear to be any prejudice to the involuntarily removed parties, and in fact many of them (the Brimm Defendants) seek to keep this action in bankruptcy court. If Defendants have a jury trial right, they may assert it at the appropriate time and, if warranted, applicable rules provide for a jury trial here (with consent) or in the U.S. District Court. This case includes many non-debtor parties, and the Court has no desire to exceed its jurisdiction over the subject matter or the parties. However, each party has an opportunity to challenge jurisdiction at the appropriate time. *See MDC Innovations, LLC v. Hall*, 726 F. App'x 168, 172 (4th Cir. 2018) (quoting *New Horizon of NY LLC v. Jacobs*, 231 F.3d 143, 150 (4th Cir. 2000)) ("Lack of subject matter jurisdiction may be raised at any time by the parties or by the court"); Fed. R. Civ. P. 12(h)(1) (describing circumstances in which defense of lack of personal jurisdiction, among others, is waived); *Goldsborough v. Marriott Int'l, Inc.*, No. 3:18-cv-02502-SAL, 2020 WL 13470961, at *3 (D.S.C. Nov. 10, 2020) (citing Fed. R. Civ. P. 12(h)(1)(B)) (stating that the plain text of Fed. R. Civ. P. 12(h)(1) provides "a party waives a defense of lack of personal jurisdiction when it omits the defense from its responsive pleading or Rule 12 motion."). The remaining relevant factors—that the State Court Litigation was pending pre-petition, the burden on the bankruptcy court's docket, and comity—do not outweigh the others. Weighing all these factors, it appears that the best course of action at this time is to retain the litigation in this Court, and to allow it to proceed alongside the underlying bankruptcy case, as many issues are comingled and neither justice nor comity would be promoted by granting the Motion.

While the general removal statute, 28 U.S.C. § 1447(c), provides "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made

within 30 days after the filing of the notice of removal under section 1446(a)," the Court may remand this case pursuant to 28 U.S.C. § 1452(b) at any time, as it contains no time limit. *See* 28 U.S.C. § 1452(b); 1 Collier on Bankruptcy ¶ 3.07[6] (2023) ("No time limit for filing a motion to remand is specified either in section 1452 or in Rule 9027; consequently, a motion to remand under section 1452 made outside of the 30-day period of section 1447(c) can still be timely."). 28 U.S.C. § 1334(c)(1) likewise contains no time limit for discretionary abstention. *See* 28 U.S.C. § 1334(c)(1); *see also Caperton v. A.T. Massey Coal Co., Inc.*, 270 B.R. 654 (S.D. W. Va. 2001) (motion to remand and abstain was initially denied without prejudice, then renewed and granted). Accordingly, the Moving Defendants may file a renewed motion to remand or renewed motion to abstain if further developments in the case make that appropriate.[10]

IT IS, THEREFORE, ORDERED the Motion to Remand and Abstain is denied without prejudice.

FILED BY THE COURT
02/06/2024

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Entered: 02/06/2024

Chief US Bankruptcy Judge
District of South Carolina

[10] For example, if the Trustee determines that any causes of action asserted herein that may belong to the estate are to be abandoned or not pursued by the Trustee.