

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MAINE EMPLOYERS MUTUAL)
INSURANCE COMPANY,)
)
Plaintiff)
)
v.)
)
COMMERCIAL WELDING,)
INC., et al.,)
)
Defendants)

Civil No. 98-211-P-H

RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS FOR CHANGE OF VENUE AND PLAINTIFF’S MOTIONS TO REMAND AND TO ABSTAIN

Before the court are four motions stemming from the removal of the instant case from state court by defendants C. Cleve Whitener (“Whitener”) and Lauren Engineers and Constructors, Inc. (“Lauren”) on June 8, 1998. Notice of Removal (Docket No. 1). Upon one point, all agree — that this case should not remain in this court. Whitener and Lauren accompany their Notice of Removal with a motion to change venue to the United States District Court for the Northern District of Texas. Motion for Change of Venue, etc. (Docket No. 2). Defendants John Baer (“Baer”) and Yates Insurance Agency (“Yates”) move to change venue to the Northern District of Georgia, Atlanta Division. Defendants John Baer’s and Yates Insurance Agency’s Opposition to Defendants C. Cleve Whitener’s and Lauren Engineers & Constructors, Inc.’s Motion for Change of Venue to the

Northern District of Texas and Motion for Change of Venue to Northern District of Georgia, Atlanta Division, etc. (Docket No. 5). Finally, plaintiff Maine Employers Mutual Insurance Company (“MEMIC”) moves this court to abstain from hearing this case and to remand it to its court of origin — Maine Superior Court, Cumberland County. Plaintiff’s Motion for Abstention (Docket No. 9); Plaintiff’s Motion for Remand (Docket No. 8). For the reasons that follow, I recommend that MEMIC’s motions to abstain and to remand be granted, and that the motions of Whitener, Lauren, Baer and Yates to transfer venue be denied.

MEMIC commenced this case by filing a complaint dated January 2, 1998 in the Maine Superior Court (Cumberland County) against Commercial Welding, Inc. (“Welding”) and CWCO, Inc. (“CWCO”), as well as Whitener, Lauren, Baer and Yates. Complaint (Tab No. 1 to Binder of State Court Pleadings (“Binder”)). MEMIC, which had provided workers’ compensation insurance to both Welding and CWCO, complained in essence that the defendants had schemed to deprive it of more than \$1 million in insurance premiums by concealing the relationship of the two defendant companies. *See generally* Complaint; Plaintiff’s Objection to Motion for Change of Venue (“Plaintiff’s Objection”) (Docket No. 6) at 1-2.

By letter dated March 26, 1998 Welding notified the Superior Court that it had filed in the United States Bankruptcy Court, Northern District of Texas, Abilene Division, a voluntary bankruptcy petition under chapter 7 of the Bankruptcy Code.¹ Defendant’s Notice of Bankruptcy (Tab 4 to Binder). The case in the Maine Superior Court proceeded, with some of the defendants filing answers and Whitener and Lauren filing a motion to dismiss, until Whitener and Lauren

¹The bankruptcy proceeding has since been transferred to the U.S. Bankruptcy Court for the District of Maine. *See* Docket No. 21.

removed it to this court. Answer [of Yates and Baer] (Tab 7 to Binder); Motion of C. Cleve Whitener and Lauren Engineers & Constructors, Inc. to Dismiss for Lack of Personal Jurisdiction, Lack of Standing, and Violation of Automatic Stay (Tab 9(1A-1) to Binder); Answer, Affirmative Defenses and Counterclaim of CWCO, Inc. (Tab 12 to Binder).

Whitener and Lauren base their removal of the case to this court upon its relation to Welding's freshly filed bankruptcy petition, citing 28 U.S.C. § 1452(a), which provides in relevant part that "[a] party may remove any claim or cause of action in a civil action . . . 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." Section 1334(b), in turn, vests district courts with jurisdiction of cases "arising under title 11, or arising in or related to cases under title 11." Critically, however, section 1334 goes on to impose a barrier to the exercise of jurisdiction upon the alignment of certain predicate facts:

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.

28 U.S.C. § 1334(c)(2).

In challenging the removal, MEMIC argues first that the district court lacks jurisdiction — plain and simple — over a number of claims within this eleven-count case because they neither relate to nor arise in Welding's bankruptcy proceeding nor arise under title 11. Plaintiff's Reply to Defendants' Objection to Motion for Remand ("Plaintiff's Reply") (Docket No. 17) at 1-5. I agree. MEMIC's claims consist of the following: Count I, breach of contract claim against CWCO and

Welding; Count II, unjust enrichment claim against CWCO and Welding; Count III, intentional misrepresentation claim against all defendants; Count IV, negligent misrepresentation claim against all defendants; Count V, claim that Welding, Whitener and Lauren are liable for Welding and CWCO's debts based on "piercing the corporate veil" theory; Count VI, claim that Welding, Whitener and Lauren are liable for Welding and CWCO's debts based on agency; Count VII, claim that Welding, Whitener and Lauren are liable for CWCO's debts based on estoppel; Count VIII, claim that Whitener and Lauren are liable for Welding and CWCO's debts based on undercapitalization; Count IX, claim that Whitener is liable for rendering Welding insolvent in violation of the Maine Business Corporation Act, 13-A M.R.S.A. § 720; Count X, claim that Whitener, Lauren and Welding are liable for fraudulent transfer in violation of 14 M.R.S.A. § 3572 *et seq.*, the Uniform Fraudulent Transfer Act; and Count XI, claim for punitive damages against all defendants.

I first conclude that none of MEMIC's claims involve so-called "core" bankruptcy proceedings, in the sense that they neither "arise under" title 11 nor "arise in" a title 11 case. A claim "arises under" the bankruptcy code "if it states a cause of action created by title 11 or is a matter concerning the administration of the estate with no adverse third party involved." *Central Me. Restaurant Supply v. Omni Hotels Management Corp.*, 73 B.R. 1018, 1022 n.11 (D. Me. 1987) (citation omitted). *See also Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (B.A.P. 10th Cir. 1997) (proceeding "arises under" title 11 "if it asserts a cause of action created by the [Bankruptcy] Code"). None of MEMIC's claims arise under the bankruptcy code; instead, they all arise under Maine law. *See, e.g., Omni Hotels*, 73 B.R. at 1022 (case did not "arise under" title 11 but rather under Maine law). Nor do MEMIC's claims, which predate the filing of Welding's

bankruptcy, directly concern the administration of that bankruptcy estate. *See, e.g., Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 168 (1st Cir. 1987) (distinguishing “core” proceedings that concern administration of estate, such as suit by debtor to recover post-petition debt, from suit to recover pre-petition debt).

With respect to the second species of “core” proceeding, a claim that “arises in” a bankruptcy case, this court has observed that such claims include “‘administrative matters’ (*e.g.*, allowance and disallowance of claims, determining dischargeability of debt, or confirmation of plans); counterclaims by the estate against persons filing claims against the estate; or orders to turn over property of the estate.” *Omni Hotels*, 73 B.R. at 1022 n.11 (citations omitted). *See also Midgard*, 204 B.R. at 771 (proceedings “arising in” bankruptcy case “are those that could not exist outside of a bankruptcy case, but that are not causes of action created by the Bankruptcy Code”). None of MEMIC’s pre-petition claims arise within Welding’s Texas bankruptcy proceeding. For example, MEMIC is not party to a bankruptcy claims process or an adversary proceeding within the Welding bankruptcy action. *Compare, e.g., Texas v. Texaco, Inc. (In re Texaco, Inc.)*, 109 B.R. 609, 612 (S.D.N.Y. 1989). Nor is this a case in which the trustee for the Welding estate is engaged in a process of liquidating real estate or some other tangible asset that MEMIC also claims. *Compare, e.g., Sisters of Providence Health Sys., Inc. v. Summerfield Elm Manor (In re Summerfield Pine Manor)*, 219 B.R. 637, 638-39 (B.A.P. 1st Cir. 1998). Indeed, MEMIC has not filed a claim against the bankruptcy estate. Plaintiff’s Reply at 5. The fact that MEMIC might choose to do so does not transform its pre-petition state-court action into one that “arises in” the Welding bankruptcy case. *See, e.g., Bendor Corp. v. Conejo Enter., Inc. (In re Conejo Enter., Inc.)*, 174 B.R. 814, 821 (C.D. Cal. 1994) (“possibility that Bendor may file a proof of claim does not affect whether the

Bankruptcy Court ultimately has jurisdiction over the proceeding”), *vacated in part on other grounds*, 96 F.3d 346 (9th Cir. 1996).

For these reasons, Whitener’s and Lauren’s attempt to match MEMIC’s claims with several statutorily defined categories of “core” proceedings also fails. Whitener and Lauren suggest that MEMIC’s causes of action fall within the following classes of “core” proceedings enumerated in 28 U.S.C. § 157(b)(2):

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate . . . ;

- (E) orders to turn over property of the estate;

- (H) proceedings to determine, avoid, or recover fraudulent conveyances;

- (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

Objection of Defendants C. Cleve Whitener and Lauren Engineers and Constructors, Inc. to Plaintiff’s Motion for Abstention (“Whitener and Lauren Objection”) (Docket No. 13) at 2-4.

Whitener and Lauren overlook the critical fact that MEMIC’s claims are made outside of the confines of the bankruptcy proceeding. Subsections (A), (B), (E) and (H) concern classic proceedings within a title 11 case, none of which are at issue in MEMIC’s case. *See, e.g., Arnold*, 815 F.2d at 168 (debtor’s action to collect post-petition debt fell within literal wording of section 157(b)(2)(A), unlike suit to recover pre-petition debt). And, while subsection (O) is broadly worded, it too is most sensibly construed as relating to proceedings arising within the context of a bankruptcy case. *See, e.g., Burke v. Donington, Karcher, Salmond, Ronan & Rainone, P.A. (In re Donington, Karcher, Salmond, Ronan & Rainone, P.A.)*, 194 B.R. 750, 759 (D.N.J. 1996) (“subsection (O) does

not render a proceeding core merely because the resolution of the action results in more, or less, assets in the estate”) (citations and internal quotation marks omitted); *Sedlachek v. National Bank of Long Beach (In re Kold Kist Brands, Inc.)*, 158 B.R. 175, 179 (C.D. Cal. 1993) (subsections (A), (O) did not transform removed action into “core” proceeding).

It next remains to consider whether any of MEMIC’s claims could be said to be “related to” Welding’s bankruptcy proceeding. Claims are “related to” a bankruptcy case if “the outcome of that proceeding *could conceivably have any effect on the estate* being administered in bankruptcy.” *Philippe v. Shape, Inc.*, 103 B.R. 355, 356 (D. Me. 1989) (citation and internal quotation marks omitted) (emphasis in original). In *Shape*, this court discerned a sufficient nexus when a plaintiff sued two non-debtors whom the debtor had agreed unconditionally to indemnify. *Id.* at 358. Were the plaintiff to prevail, its victory necessarily would impact the debtor and its estate by virtue of the automatic indemnification agreement. *Id.* By contrast, this court found an insufficient nexus in a case in which there were contractual conditions precedent to the triggering of a provision under which the debtor would be obligated to indemnify the defendant. *Omni Hotels*, 73 B.R. at 1023-24.

Viewing the MEMIC claims through the lens of this test, it is immediately apparent that a number of those causes of action could have no possible impact on the Welding bankruptcy estate. These are the claims peppered throughout each count of the Complaint that are aimed at defendants other than Welding, with two exceptions that MEMIC concedes. Counts IX and X, MEMIC agrees, would be related to the Welding bankruptcy if the trustee in bankruptcy exercised its right to pursue similar claims on behalf of the estate. Plaintiff’s Reply at 4. As to the remaining claims against defendants other than Welding, however, the court has no jurisdiction. These claims neither arise under title 11, nor in the bankruptcy case, nor are they related to that case. The defendants identify

no basis for jurisdiction other than 28 U.S.C. § 1452(a).

Stripping out the myriad unrelated claims leaves Counts IX and X, and the following as against Welding only: Count I (breach of contract), Count II (unjust enrichment), Count III (intentional misrepresentation), Count IV (negligent misrepresentation), Count V (liability for CWCO's debts based on "piercing the veil"), Count VI (liability for CWCO's debts based on agency), Count VII (liability for CWCO's debts based on estoppel), and Count XI (punitive damages).

With respect to these, MEMIC argues (again, correctly) that this court must abstain from hearing them pursuant to the mandatory-abstention provision, 28 U.S.C. § 1334(c)(2). MEMIC meets each requisite of this test. First, its Motion for Abstention was timely filed on June 22, 1998, within two weeks of the filing of the Notice of Removal. *See, e.g., Midgard*, 204 B.R. at 776-77 (noting that "timely" undefined in section 1334(C)(2) but that filing within eight days timely). Second, MEMIC's causes of action against Welding all are based upon state law. Third, for the reasons discussed above, these causes of action are "related to" Welding's bankruptcy filing but do not arise under title 11 or arise in the Welding bankruptcy proceeding. Fourth, this action could not have been brought in the district court but for the bankruptcy nexus. Complete diversity between the plaintiff and the defendants is lacking², and the defendants identify no basis other than the bankruptcy filing for federal jurisdiction. Fifth, MEMIC's action was commenced in a state court of appropriate jurisdiction. Sixth and finally, MEMIC's action was in the process of being timely adjudicated by the state court when removed to this court. Other than the instant constellation of

²MEMIC asserts that one defendant, Welding, is organized under the laws of the State of Maine. Complaint ¶ 3; Plaintiff's Objection at 2-3. The defendants do not argue to the contrary. The plaintiff is a Maine insurance company.

motions, there has been no activity upon it in the federal court, and thus there is no apparent prejudice to any of the parties in removing it to the court having the greater familiarity with its substance.

Defendants Whitener and Lauren seek to deflect the force of section 1334(c)(2) by arguing that it is inapplicable to removed actions. Whitener and Lauren Objection at 2. The parties do not cite, nor can I find, any authority from the First Circuit or this court on this arcane point. However, the authority upon which Whitener and Lauren rely, *Fedders N. Am., Inc. v. Branded Prods., Inc. (In re Branded Prods., Inc.)*, 154 B.R. 936 (Bankr. W.D. Tex. 1993), reflects not only a minority view, *see, e.g., Midgard*, 204 B.R. at 773-74, but also an unpersuasive one. Section 1334(c)(2) presupposes the filing of a state-court action. The vehicle through which a federal court, in turn, likely would be placed in the position of weighing its jurisdiction over such an action would be removal. Thus, the *Branded Products* court's construction of section 1334(c)(2) renders it virtually useless. *See Williams v. Shell Oil Co.*, 169 B.R. 684, 692 (S.D. Cal. 1994).

In view of the court's lack of jurisdiction over many of MEMIC's claims and its necessity to abstain from hearing the remainder, remand pursuant to 28 U.S.C. § 1452(b) is appropriate. *See, e.g., Midgard*, 204 B.R. at 772-73, 775-76 (remand necessary as to claims with respect to which federal court lacks jurisdiction, appropriate with respect to claims as to which court must abstain); *Donington*, 194 B.R. at 759 (“[w]here abstention is appropriate, or required, remand will follow”) (citation and internal quotation marks omitted). Finally, without any basis upon which to predicate the exercise of federal jurisdiction, the motions of Whitener, Lauren, Baer and Yates for change of venue also must fall.

For the foregoing reasons, I recommend that MEMIC's motions to abstain and to remand be **GRANTED**, and that the motions of Whitener, Lauren, Baer and Yates to change venue be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of September, 1998.

*David M. Cohen
United States Magistrate Judge*