

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

Case No. 82-1857-C

ROBERT V. BROWN and
SUE A. BROWN,
Engaged in Farming,
Debtors.

Chapter 7

Adversary Proceeding
No. 87-0109

DONALD F. NEIMAN, Trustee

Plaintiff

vs.

ANNABEL BROWN, CENTRAL
VETERINARY SERVICE, FARMERS
COOPERATIVE, DALLAS J. JANSSEN,
JUHL-SON ENTERPRISES, MASTER-
CARD/CITIZENS SAVINGS BANK,
THERMOGAS CO. OF MARSHALLTOWN,
a Division of Mapco Gas
Products, Inc., and VISA/
FIRST BANKCARD CENTER,
EUGENE MERCER d/b/a MERCER
LIVESTOCK SUPPLY

Defendants.

ORDER ON MOTION TO DISMISS

On December 9, 1987, the motion to dismiss filed by defendant VISA/First Bankcard Center (hereinafter "VISA") on November 9, 1987, and the resistance thereto filed by plaintiff trustee Donald F. Neiman (hereinafter "trustee") on December 9, 1987, came on for a hearing before this court in Des Moines, Iowa. August B. Landis appeared on behalf of trustee and Steven Kahler appeared on behalf of VISA.

On December 9, 1987, VISA filed an affidavit in support of its motion to dismiss and trustee filed a brief in support of his resistance to that motion. This court considers the matter fully submitted.

FACTUAL BACKGROUND

On December 27, 1982, debtors filed a joint petition for relief under Chapter 13 of the Bankruptcy Code, and on November 18, 1986, the proceedings were converted to Chapter 7. On June 8, 1987, trustee filed a complaint seeking to avoid alleged preferential transfers made by debtors to numerous defendants including VISA. VISA has its principal place of business in Omaha, Nebraska, and the alleged preference paid to VISA was \$1,708.26. On November 9, 1987, VISA filed a motion to dismiss and stated that pursuant to 28 U.S.C. section 1409(b), the adversary proceeding was improperly venued.

DISCUSSION

The issue in this case is whether VISA is entitled to an order pursuant to 28 U.S.C. section 1409(b) dismissing the adversary proceeding against it due to improperly laid venue.

The venue provisions for Title 11 bankruptcy proceedings are found in 28 U.S.C. section 1409. That section in pertinent part reads as follows:

§ 1409. Venue of proceedings arising under Title 11 or arising in or related to cases under Title 11.

(a) Except as otherwise provided in subsections (b) and (d) a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than \$1,000.00 or a consumer debt of less than \$5,000.00 only in the district court for the district in which the defendant resides.

28 U.S.C. §1409 (emphasis added.)

A close reading of 28 U.S.C. section 1409 reveals a clear distinction between proceedings "arising under title 11" and proceedings "arising in or related to" a case under Title 11. Compare 28 U.S.C. §1409(a) with 28 U.S.C. §1409(b), supra; In re Van Huffel Tube Corp., 71 B.R. 155, 156 (Bankr. N.D. Ohio 1987). A proceeding "arising under title 11" is any proceeding in which a claim is made based upon a provision of the Bankruptcy Code. National City Bank v. Coopers And Lybrand, 802 F.2d 990, 994 (8th Cir. 1986). Furthermore, it is a proceeding that would not occur but for a Bankruptcy Code provision. Van Huffel, 71 B.R. at 156. A preference action is clearly a proceeding "arising under title 11" because it could not occur but for a Bankruptcy Code provision. Id.

Pursuant to 28 U.S.C. section 1409(a), a proceeding that "arises under title 11" may be commenced in the district court where the case is pending. As noted above, a preference action clearly "arises under title 11." Furthermore, debtors' bankruptcy case, number 82-1857-C, is pending in this court. Therefore, trustee, pursuant to 28 U.S.C. section 1409(a), properly laid venue for this alleged preference proceeding in this court.

VISA contends the venue of this adversary proceeding is not proper in this court due to the venue exception found in 28 U.S.C. section 1409(b). That section provides that a trustee must commence a proceeding "arising in or related to" a title 11 case to recover a consumer debt of less than \$5,000 in the district court for the district where defendant resides. VISA argues that since this is a proceeding to recover a consumer debt of less than \$5,000 (debtor owed VISA \$1,708.26) and since VISA's principal place of business is Omaha, Nebraska, trustee must venue his proceeding against VISA in Nebraska. However, VISA's argument is not persuasive because the plain wording of the statute demonstrates that section 1409(b) does not apply to this case.

28 U.S.C. section 1409(b), by its express terms, does not apply to proceedings commenced by a trustee which "arise under title 11." Rather, section 1409(b) applies only to a proceeding "arising in or related to" a title 11 case. Compare 28 U.S.C. §1409(a) (governing proceedings "arising under title 11 or arising in or related to" a case under title 11) with 28 U.S.C. §1409(b) (governing only proceedings "arising in or related to" a case under title 11). As noted above, a preference action clearly "arises under title 11." Therefore, since the venue exception of 28 U.S.C. section 1409(b) is not applicable to a preference action, trustee, pursuant to section 1409 (a) has properly laid venue in this court for his adversary proceeding.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the court concludes proper venue for trustee's alleged preference adversary proceeding is in this court.

THEREFORE, IT IS ORDERED, that defendant VISA's motion to dismiss for improper venue is overruled.

DATED this 8th day of January, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE