

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
CUTTY'S, INC., : Case No. 89-1097-C H
 : Chapter 11
 :
 Debtor. :
 _____ :
 CUTTY'S, INC., DEBTOR-IN- :
 POSSESSION, : Adv. No. 89-00116
 :
 Plaintiff, :
 :
 v. :
 :
 CREDITOR'S MULTI-SYSTEMS, INC., :
 :
 Defendant. :
 :
 - - - - -

REPORT AND RECOMMENDATION AGAINST ABSTENTION

Defendant's Motion for Abstention and Application for Stay Proceeding came on for hearing on December 19, 1989, the parties appearing by their attorneys of record: John H. Neiman, Neiman, Neiman, Stone & Spellman, P.C., for Plaintiff/Debtor; and David A. Morse, Garten & Wanek, Attorneys at Law, for Defendant. At the conclusion of said trial, the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(E) and (O). The Court, upon review of the pleadings, arguments of counsel, and briefs now enters its report and recommendation to the District Court pursuant to 28

U.S.C. §1334(c) and Fed.R.Bankr.P. 5011(b) and (c).

FINDINGS

1. Plaintiff filed a petition under 11 U.S.C. Chapter 11, on May 17, 1989. Plaintiff was continued in possession as debtor-in-possession and is presently acting in that capacity.

2. Defendant is a corporation with offices in Mobile, Alabama.

3. On August 9, 1989, Plaintiff filed a complaint in which Plaintiff alleged that Plaintiff referred delinquent contracts to Defendant for collection on a contingency basis; Defendant has been collecting said contracts in an unscrupulous and unprofessional manner; Defendant has refused to return installment and sales contracts to Plaintiff; Defendant has made settlement with people who have signed membership contracts without Plaintiff's approval; and Defendant has collected money and refused to pay said sums to Plaintiff. Plaintiff prays for money damages; an accounting; return of all contracts; an injunction prohibiting Defendant from making further collections on behalf of Plaintiff; and for the costs.

4. Plaintiff prays for damages of \$78,282.98, plus whatever sums are revealed by the accounting.

5. Defendant filed its motion for extension of time in which to file answer, motion for abstention, and application for stay on September 8, 1989.

6. On September 12, 1989, this Court granted Defendant an extension of time within which to file an answer. Said order was modified on September 29, 1989, to provide that Defendant should file an answer and jury demand, if any, on or before October 16, 1989.

7. On October 16, 1989, Defendant filed its answer, affirmative defenses, and jury demand. Defendant's answer and affirmative defenses puts into issue all the material allegations of the complaint and prays that the complaint be dismissed with costs to Plaintiff.

8. Defendant's affirmative defenses contain affirmative allegations that Defendant has returned all received documentation to Plaintiff; Defendant never received copies or originals of the installment sales contracts; Defendant has not attempted any collection activity since Defendant was directed to terminate such activities in October or November, 1988; Defendant has completely accounted for all monies collected by Defendant; Defendant stands ready to turn over to Plaintiff all monies received since Defendant's last accounting, which sums do not exceed \$1,100.00; and Defendant has never contracted directly with Plaintiff for its collection activities.

9. Defendant has not filed a claim in the case.

DISCUSSION

Defendant requests that this Court abstain from hearing

this proceeding. Defendant concedes that this is a core proceeding. Therefore, the mandatory abstention statute, 28 U.S.C. §1334(c)(2), is inapplicable. However, Defendant contends that this Court should exercise its discretionary power to abstain.

The statutory standard used to measure when and under what circumstances this Court should exercise its discretionary power to abstain is found in 28 U.S.C. §1334(c)(1), which provides:

Nothing in this section 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.

The Eighth Circuit articulated its standard for discretionary abstention in In re Titan Energy, 837 F.2d 325 (8th Cir. 1988). In Titan, the Eighth Circuit Court concluded that abstention is appropriate where: 1) the action requires a determination of state law issues and relates only peripherally and contingently to the debtor's estate; 2) the issues may be adjudicated in state court without fear that other creditors or the debtor will be irreparably harmed; 3) there is no reorganization to protect since the bankruptcy is a liquidation proceeding; 4) the action could not, absent bankruptcy court jurisdiction, be brought in federal court and

the issues it raises can be timely adjudicated in a state court action.

In the instant case, the underlying cause of action is breach of contract. The cause of action appears to have arisen before the Debtor petitioned the Bankruptcy Court for Chapter 11 relief. The Debtor, however, did not initiate the action until after the Chapter 11 petition was filed.

Debtor's complaint requests turnover of property of the estate in accordance with provisions of 11 U.S.C. §542. If Debtor is successful in said §542 turnover action, the assets will benefit Debtor's estate and its creditors. This is in direct contrast to Titan, where the action was brought by one non-debtor against another non-debtor and could have affected the debtor's estate only if certain contingencies occurred. Therefore, although Debtor's action does require a determination of state law contract issues, the action relates directly to the Debtor's estate. Abstention thus is not appropriate.

Abstention is also not appropriate because this Court has an interest in protecting Debtor's Chapter 11 reorganization.

In Titan, the case had converted from a Chapter 11 to a Chapter 7 proceeding. By contrast, Debtor's case is a Chapter 11 reorganization. Therefore, although the issues may be adjudicated in state court, this Court has an interest in hearing this action which could directly benefit Debtor's

estate and its creditors. Further, the Court has an interest in hearing this action to avoid the possibility that the state court proceeding would hinder the reorganization of Debtor's estate and slow Debtor's return to business. See Titan, 837 F.2d at 331.

Finally, abstention is not appropriate because this action could have been commenced in federal court absent bankruptcy jurisdiction pursuant to 28 U.S.C. §1332(a), Diversity of Citizenship Jurisdiction. Defendant does not dispute that the diversity requirement of §1332 is met. However, Defendant asserts that the amount in controversy is not enough to invoke federal diversity jurisdiction. According to §1332(a), the matter in controversy must exceed the sum of \$50,000.00, exclusive of interest and costs. In the instant case, Debtor/Plaintiff's complaint, as amended by a January 23, 1990 amendment to complaint obtained pursuant to leave of court under Fed.R.Bankr.P. 7015, demands judgment against Defendant in the sum of \$78,282.98, plus whatever sums are revealed by an accounting. Therefore, the amount in controversy exceeds the \$50,000.00 requirement, and this action could be commenced in federal court pursuant to 28 U.S.C. §1332.

In summary, applying the Titan standards, the Court finds that discretionary abstention is not appropriate in the instant case.

Defendant asserts that its demand for a jury trial filed October 16, 1989, is a strong factor which should encourage and necessitate abstention in this case. This Court finds that if Defendant has a right to a jury trial in this core proceeding, the Bankruptcy Court may conduct said jury trial. See Ben Cooper, Inc. v. Insurance Company of the State of Pennsylvania, et al (In re Ben Cooper, Inc., et al.), 896 F.2d 1394 (2nd Cir. 1990); Kroh Bros. Development Co., et al. v. United Missouri Bank of Kansas City, N.A. (In re Kroh Bros. Development Co., et al.), 108 B.R. 710 (Bankr. W.D. Mo. 1989). Therefore, Defendant's request for a jury trial does not necessitate discretionary abstention.

IT IS ACCORDINGLY the recommendation of this Court to the District Court, Southern District of Iowa, that Defendant's motion for abstention should be denied.

Further, pursuant to Fed.R.Bankr.P. 5011(c), the Court orders that any further proceedings in this adversary are stayed pending disposition of Defendant's motion for abstention in the District Court.

Dated this 11th day of April, 1990.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE