

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of :  
ROSE WAY, INC., : Case No. 89-1273-C H  
Debtor. : Chapter 7  
- - - - - :  
DAVID C. ROSENBERGER and :  
DORIS ROSENBERGER, : Adv. No. 90-00093  
Plaintiff, :  
v. :  
MICHAEL C. FAVILLA, :  
JAMES D. STEARNS; :  
STEARNS & FAVILLA; :  
FREDRIKSON & BYRON, P.A., :  
WILLIAM I. KAMPF; GREYHOUND :  
FINANCIAL CORPORATION, :  
an Illinois Corporation; :  
CHRYSLER CREDIT CORPORATION; :  
a California Corporation; :  
ALLSTATE SALES AND LEASING :  
CORPORATION, an Minnesota :  
Corporation; EATON LEASING :  
CORPORATION, an Ohio Corpor- :  
ation; GENERAL ELECTRIC CREDIT :  
CORPORATION, an Illinois :  
Corporation; LARSEN, ALLEN, :  
WEISHAIR & CO., f/k/a SANDS, :  
RUST & CO., a Minnesota :  
Corporation; and DANIEL MUSOW, :  
Defendants. :

ORDER--APPLICATION TO REMOVE LITIGATION  
FROM U.S. DISTRICT COURT TO U.S. BANKRUPTCY COURT

On July 2, 1990, a hearing was held on the application of William I. Kampf, Fredrikson & Byron, James Stearns and Chrysler Credit Corporation to remove litigation from U.S. District Court to United States Bankruptcy Court. George T.

Qualley appeared on behalf of David C. Rosenberger and Doris Rosenberger ("Rosenbergers"); Henry Harmon appeared on behalf of Michael C. Favilla, James D. Stearns, Stearns & Favilla, Fredrikson & Byron and William I. Kampf; Jay Eaton appeared for General Electric Credit Corporation ("GECC"); Eric Turner appeared for Larsen, Allen, Weishair & Company f/k/a Sands, Rust & Company, and Daniel Musow; David W. Dunn appeared for Greyhound Financial Corporation ("Greyhound"); Mark Sherinian appeared for Chrysler Credit Corporation ("Chrysler").

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the arguments of counsel and briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

#### **FINDINGS OF FACT**

1. On June 8, 1989, Rose Way, Inc., and related entities Double-D, Inc. and Double-D Leasing, Inc. filed voluntary Chapter 11 petitions.

2. Prior to 1989, Rosenbergers owned all of the issued stock and outstanding capital common stock of Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc.

3. At the time of the filing, Michael C. Favilla was acting as President and Chief Executive Officer of Rose Way, Inc. and the related corporations. James Stearns was the Vice President of Rose Way, Inc.

4. On June 19, 1989, the Court entered an order authorizing the employment of William I. Kampf and the law firm of Fredrikson & Byron as counsel for Rose Way, Inc.

5. On July 6, 1989, the Court entered an order authorizing the employment of Sands, Rust & Company n/k/a Larson, Allen, Weishair & Company, which included Daniel Musow, as accountants for Rose Way, Inc.

6. On July 26, 1989, the U.S. Trustee appointed an Unsecured Creditors Committee for Rose Way, Inc.

7. Greyhound, Chrysler, Allstate Sales & Leasing Corporation, Eaton Leasing Corporation and GECC (collectively the "Finance Companies") are all companies which financed the purchase of tractors and trailers by Rose Way, Inc. During the course of the Rose Way Chapter 11 proceeding, all of the finance companies attempted to gain access to their collateral, the tractors and trailers, because Rose Way had defaulted upon its contracts with the finance companies. Rose Way resisted these efforts and eventually all of the finance companies entered into agreements with Rose Way, The Debtor-in-Possession, whereby Rose Way made interim payments to the finance companies as adequate protection payments. Rose Way was thereby able to retain possession of the tractors and trailers in an effort to keep the business operating so that a plan of reorganization could be filed. Upon notice and hearing these stipulations were approved and orders issued

granting the finance companies adequate protection. Notice was given to the Rosenbergers concerning these hearings.

8. On September 27, 1989, the U.S. Trustee filed a motion to examine post-petition payments made to David Rosenberger by Rose Way, Inc. in conjunction with his employment as a "consultant" to Rose Way, Inc. This motion prayed that Rose Way obtain approval for Mr. Rosenberger's employment, return estate money, and that any future payments to Mr. Rosenberger be upon application, notice and court approval. Various creditors and the Rose Way, Inc. Unsecured Creditors Committee joined in the U.S. Trustee's motion. The Court sustained the motion to examine post-petition payments and directed David Rosenberger to file an accounting with the Court.

9. On December 1, 1989, the Rose Way, Inc. Unsecured Creditors Committee filed a Conditional Motion for Appointment of Trustee asserting that David Rosenberger had taken certain action in an attempt to regain control of Rose Way, Inc. and that said activity was detrimental to the interest of the creditors. The U.S. Trustee joined in said motion and asserted further grounds for the appointment of a Chapter 11 Trustee. On December 21, 1989, the Court granted the Unsecured Creditors Committee's motion and ordered the appointment of a trustee to replace the Debtor-in-Possession.

10. On December 22, 1989, the Court entered an order

approving the U.S. Trustee's appointment of Sternco, Inc. as Trustee of Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. pursuant to 11 U.S.C. §1104, thereby removing the Debtor corporations as Debtors-in-Possession. William I. Kampf and the law firm of Fredrikson & Byron were appointed by the Court as attorneys for the Trustee.

11. Three petitioning creditors, Greyhound Financial Corp., FGL Commodities Services, Inc. and Signal Capital Corp. commenced in this Court on January 25, 1990, an involuntary petition against David Rosenberger under Chapter 7 of the Bankruptcy Code. On August 17, 1990, an order for relief was entered. Upon motion of David Rosenberger, this case was converted to Chapter 11 on August 28, 1990.

12. On March 1, 1990, Sternco, Inc. filed a joint disclosure statement and joint plan of reorganization for Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc.

13. On March 22, 1990, Sternco, Inc. withdrew the joint disclosure statement and joint plan of reorganization due to the decision of the Exchange National Bank of Chicago not to advance any further post-petition financing to Rose Way, Inc. or the related corporations.

14. In April of 1990, Sternco, Inc. made the decision to terminate the operations of Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. and to liquidate the remaining assets.

15. On May 22, 1990, the U.S. Trustee filed a motion to

convert the Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. Chapter 11 cases to Chapter 7 cases.

16. On July 2, 1990, the Court, upon notice and hearing, sustained the U.S. Trustee's motion to convert and entered an order converting the Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. Chapter 11 cases to Chapter 7 cases.

17. Upon conversion of the cases to Chapter 7 cases, the Court approved the appointment of a panel trustee for Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc., pursuant to 11 U.S.C. §701. The Chapter 7 Trustee retained different counsel. Sternco, Inc. was relieved as trustee and William I. Kampf and Fredrikson and Byron were relieved as counsel for the trustee. The accountants were also relieved as professional entities.

18. Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. are not ongoing entities as their business activities have been terminated and the Chapter 7 Trustee is in the process of liquidating the assets of these corporations.

19. Rosenbergers filed a complaint in the United States District Court for the Southern District of Iowa on April 30, 1990. The complaint named as defendants individuals and corporations that were involved in the Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. Chapter 11 bankruptcy cases.

20. An application to remove the case from the United

States District Court to the United States Bankruptcy Court for the Southern District of Iowa was filed on May 17, 1990.

21. The matter was referred to the U.S. Bankruptcy Court by Judge Harold D. Vietor on June 7, 1990.

22. On May 22, 1989, Rosenbergers filed an amended complaint. The amended complaint alleges conspiracy, common law fraud, violation of RICO, conspiracy to violate RICO, breach of contract, and negligence. Predominant in the allegations contained in the preliminary facts of the amended complaint are allegations regarding acts of Defendants after the filing of the Rose Way Chapter 11 petitions and in the context of the bankruptcy proceedings, specifically with reference to the stipulated adequate protection orders approved by the Court. Count IX of the amended complaint alleges negligent conduct on the part of Defendants Kampf and Fredrikson & Byron in the context of their representation of Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. during the course of the administration of these cases.

23. The Rosenbergers allege a conspiracy to seize control of the companies and fraudulently deprive the Rosenbergers of their ownership benefits and interests in the companies. They allege that conditions contained in the stipulation for adequate protection, which were approved by this Court, show a basis for this allegation.

24. The second and third counts allege a violation of

RICO and a conspiracy to violate RICO. These counts allege the operational facts of the allegations of conspiracy and common law fraud in support thereof.

25. On June 22, 1990, Rosenbergers filed a jury demand.

26. On June 27, 1990, Rosenbergers filed a motion for withdrawal of reference of case regarding their amended complaint in the United States District Court for the Southern District of Iowa. On August 6, 1990, the United States District Court, Southern District of Iowa, entered an order staying Rosenbergers' motion for withdrawal of reference of case to Bankruptcy Court, pending resolution by the United States Bankruptcy Court of the application to remove from U.S. District Court to U.S. Bankruptcy Court.

27. Rosenbergers filed a proof of claim in the Rose Way, Inc. case.

## **DISCUSSION**

### **I. Core Proceeding**

The bankruptcy court is given the authority to make the threshold determination of whether a proceeding is a core proceeding. 28 U.S.C. §157(b)(3) provides:

The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under Title 11. The determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state



law.

Two categories of proceedings are delineated in 28 U.S.C. §157: core proceedings which arise under Title 11 or arise in a case under Title 11, and non-core proceedings which are otherwise related to a case under Title 11. With core proceedings, bankruptcy courts are empowered to enter judgments and orders subject to traditional appellate review by a district court. U.S.C. §157(b)(1). With non-core "related" proceedings, bankruptcy judges may hear the matter, but the district court enters any final order or judgment after considering the bankruptcy judge's proposed findings and conclusions. 28 U.S.C. §157(c)(1).

A nonexclusive list of core proceedings is provided at 28 U.S.C. §157(b)(2)(A)-(O). Included in the list of core proceedings are:

(A) matters concerning the administration of the estate;

...

(M) orders approving the use or lease of property, including the use of cash collateral;

...

(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, except personal injury, tort or wrongful death claims.

Courts begin with the premise that core proceedings are to be given the broadest, constitutionally permissible definition. In re Arnold Print Works, Inc., 815 F.2d 165, 168 (1st Cir. 1987); In re Baker and Getty Financial Services, Inc., 88 B.R. 137, 138 (Bankr. N.D. Ohio 1988). When the post-petition acts complained of dominate heavily in terms of frequency, significance and effect compared to pre-petition acts, a proceeding brought to attach liability based on the totality of such acts will be considered a core matter. Matter of O'Sullivan's Fuel Oil Company, Inc., 88 B.R. 17, 20-21 (D. Conn. 1988). Claims alleging legal malpractice on the part of debtor's attorney bear heavily on the administration of the debtor's estate and are therefore core proceedings. In re SPI Communications & Marketing, Inc., 114 B.R. 14, 18 (N.D.N.Y. 1990). A dispute over the terms of a court-approved stipulation between the debtor and a creditor-lessor is a core matter. In re Gray Line of Boston, Inc., 62 B.R. 811, 813 (Bankr. D. Mass. 1986).

In the instant case, the causes of action contained in Rosenbergers' amended complaint have their source in the Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. bankruptcy cases. The allegations relating to Defendant Kampf and Fredrikson and Byron, P.A. arise out of their conduct in their official capacity as attorneys for Rose Way, Inc., Double-D, Inc. and Double-D Leasing, Inc. The allegations

concerning Larsen, Allen, Weishair & Co., f/k/a Sands, Rust & Co., and Daniel Musow arise out of their conduct as court-approved accountants for the estates. The allegations relating to the Finance Companies arise out of negotiations in the bankruptcy cases and the court-approved stipulations between the Finance Companies and Rose Way, Inc. As such, Rosenbergers' claims, including the RICO claims, arise predominantly in the context of the Rose Way Inc. and related bankruptcy cases. Therefore, the amended complaint is a core proceeding over which this Court has jurisdiction under 28 U.S.C. §157(b).

Having made the determination that the amended complaint is a core proceeding supra, the Court need not determine if it is a related proceeding.

## II. Withdrawal of Reference

Rosenbergers have resisted the transfer of this matter to U.S. Bankruptcy Court, and have moved the U.S. District Court to withdraw reference of this matter pursuant to 28 U.S.C. §157(d). U.S.C. §157(d) provides:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court, on timely motion of a party, shall withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both Title 11 and other laws of the United

States regulating organizations or  
activities affecting Interstate Commerce.

In the instant case, Rosenbergers contend that the overwhelming weight of authority holds that the bankruptcy courts do not have subject matter jurisdiction over RICO actions, citing In re Rubin Brothers Footwear, Inc., 73 B.R. 346 (S.D.N.Y. 1987). The U.S. District Court, in determining the motion for withdrawal of reference pursuant to 28 U.S.C. §157(d), is the proper court to evaluate Rosenbergers' contention and determine whether the proceedings should be withdrawn, in whole or in part. Therefore, the Court does not consider Rosenberger's assertion that bankruptcy courts do not have subject matter jurisdiction over RICO actions pursuant to 28 U.S.C. §157(d).

### III. Jury Demand and Bankruptcy Court Jurisdiction

For purposes of determining jurisdiction of the proceeding on Rosenbergers' amended complaint only, the Court considers the Rosenbergers' right to a trial by jury.

In Granfinanciera S.A. v. Nordberg, \_\_\_\_ U.S. \_\_\_\_, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), the U.S. Supreme Court held that a defendant in an action by a trustee to recover a fraudulent conveyance, where the defendant had not filed a proof of claim, was entitled to a jury trial under the Seventh Amendment. Granfinanciera, 109 S.Ct. at 2795-2802. At footnote 14, the Supreme Court indicates that a defendant that

files a proof of claim in the bankruptcy case subjects himself to the equitable powers of the bankruptcy court and thus is not entitled to a jury trial. Granfinanciera, 109 S.Ct. at 2799, n. 14; see In re Edwards, 104 B.R. 890, 898 (Bankr. E.D. Tenn. 1989). In United Missouri Bank of Kansas City, 901 F.2d 1449 (8th Cir. 1990), the Eighth Circuit Court held that a creditor which had not filed a claim in a bankruptcy case had a constitutional right to a jury trial in a preference suit, and the bankruptcy judge lacked the express or implicit statutory authority to conduct the jury trial in said preference action.

In the instant case, Rosenbergers have filed a proof of claim in the Rose Way, Inc. case. Thus, for purposes of this Court's determination of jurisdiction of the proceeding on Rosenbergers' amended complaint, the Court finds that Rosenbergers do not have a right to a jury trial. Therefore, Rosenbergers' demand for a jury trial does not affect this Court's jurisdiction of this proceeding.

#### **ORDER**

IT IS ACCORDINGLY ORDERED that this Court has jurisdiction of this proceeding as a core proceeding pursuant to 28 U.S.C. §157(b)(2). Further proceedings on Rosenbergers' amended complaint are stayed pending the District Court's resolution of the motion for withdrawal of reference of case to Bankruptcy Court.

Dated this 12th day of February, 1991.

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RUSSELL J. HILL  
U.S. BANKRUPTCY JUDGE